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To all
clients

Circular
No. 25/2024

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Subject: Reform of tax penalties – caution in the case of excessive VAT on incoming invoices

With Legislative Decree No. 87 of 14 June 2024 (published in the Official Gazette of 28 June 2024), the changes concerning administrative tax penalties and criminal tax offences have now also been revised in the course of the ongoing tax reform. Although the legislative decree entered into force immediately, on 29 June 2024, the amendments to the administrative penalties, by virtue of a special rule in Art. 5 of the legislation, apply only to offences committed from 1 September 2024. By then the reform will hopefully also have been commented on in the specialist press, so that we will hopefully be able to inform you in good time.

The reform also contains, however, a clarification regarding the input VAT deduction, and it is advisable to observe this clarification immediately, especially since the practice hitherto tolerated by the tax authorities (which was more favourable for the taxpayer) is fully supported neither by national nor by European case law.

Specifically, this concerns all those cases in which a supplier of goods or services, by mistake or indeed out of misplaced caution, charges value added tax on transactions which would in fact be VAT-exempt, not subject to VAT or outside the scope of VAT, or applies too high a VAT rate.

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For example, it is common practice for renovation works on commercial buildings between businesses (where the reverse charge procedure does not apply) to be invoiced at the standard rate of 22% instead of applying the reduced VAT rate of 10% available in such cases.

Following Ruling No. 334298 of 5 January 1982, the tax authorities have hitherto as a rule granted the full input VAT deduction in such cases, even though the Court of Cassation most recently reached a different conclusion in its decision No. 32900 of 8 November 2022, namely that only the VAT actually due may be deducted as input VAT by the recipient of the invoice. And the European Court of Justice, too, has repeatedly expressed itself to this effect in the past.

And it is precisely this principle that is now confirmed by Art. 6 of Legislative Decree No. 87/2024: even where invoices are issued with excessive value added tax, the input VAT may be deducted, but only to the extent to which it is actually due according to „the nature and the characteristics“ of the transaction concerned. It follows that: if 22% VAT is charged instead of 10%, 12% is not deductible, and if a transaction outside the scope of VAT is mistakenly invoiced with VAT, the input VAT is not deductible at all.

It remains to be recalled that matters do not stop at the disallowance of the input VAT deduction: anyone who deducts VAT which is not due and which has been charged to him additionally faces an administrative penalty of between 250 Euro and 10.000 Euro.

One can only hope that the strict rule outlined above will not be applied to infringements in connection with the „reverse charge“, where, particularly in the construction sector and as a result of contradictory administrative instructions, it is in many cases impossible, even with the best will in the world, to determine whether invoices are to be issued with or without VAT.

But one principle may certainly no longer apply: when in doubt, charge VAT, or the higher VAT rate.

Yours sincerely

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