



ITALIAN COMPANY LAW

TEMPORARY ASSOCIATION OF ENTERPRISES IN ITALY

ASSOCIAZIONE TEMPORANEA DI IMPRESE IN ITALY

by

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The temporary association of enterprises in Italy (Associazione Temporanea di Imprese - ATI) is expressly ruled by Italian legal system through the Legge n. 406/1991, in application of the EEC Directive n° 89/444. Its discipline has developed with the contractual practice in the field of co-operation between companies for the building of public works. The ATI discipline is applied only for contract sector.

Through an ATI agreement even small companies have the possibility to take part, in a jointly form, in the building of great works or, anyway, in those economic deals that are burdensome or complicated under technical, organizational or financial profile that, in consideration of the relevant risks, can be built only by companies of great dimensions. The ATI permits to a group of companies to jointly participate to a tender avoiding the costs of constitution of a common company or of a consorzio (consortium), because by this kind of association each company maintains its own legal personality. The ATI is a securer grant for the contracting party of duly and integral execution of the work.

By this way the associated companies can formulate a bid, to the contracting party, which is presented by only one of them: the company presenting the bid undertakes



Milan, 3 December 2010

the role of group leader and takes care of relations between the contracting party and other companies of the ATI.

By the presentation of the bid the associated companies of the ATI assume the joint liability towards the public administration (contracting party). After the presentation of the bid by an ATI it cannot alter composition of the companies taking part of it. A company taking part of an ATI set up for the presentation of a bid for a tender cannot take part to another ATI offering bid for the same tender.

Under Legge n. 109/1994 the temporary association of enterprises ATI can participate to a selection for allotment of public works provided that the associated companies had previously entrusted a collective special proxy to one of them before the presentation of the bid and provided that, both the leader group and the other companies, possess all required titles provided under the tender regulation.

An ATI can present a bid for a tender before its constitution provided that the bid is signed by all companies that then shall constitute an ATI.

A temporary association of enterprises ATI can be constituted by a notarized certificate of incorporation or by a private contract.

Under taxation profile, the constitution of an ATI doesn't establish a new entity subject to taxation; unless the ATI could be assimilate, in that case, as a de facto company. In fact, if the object of a tender is a work that cannot be fractionated in separate parts, that can be performed autonomously by each of the associated company, it comes to exist an associated entity running as a de facto company (Risoluzione Ministeriale [R.M.] n. 9/782/1983).

The company's members of an ATI are subject to taxation only for the amount of income under their participation shares.

The following transactions are taxable under the VAT regime: between the ATI and the contracting party, between other ITA companies and the leader group, between each



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individual company of an ATI and the contracting party; in such a case the ATI is not considered as VAT subject (R.M. prot. 384989/1981).

In case the works performed are not divisible, or the companies of the ATI perform in unitary way, the ATI is considered subject to VAT (R.M. prot. 363406/1986).

The ATI is usually classified in two species: horizontal and vertical. The horizontal one exists in case of co-operation of some companies, doing the same activity, which decide to associate in order to share the works and get the required titles to take part to the tender. The vertical one happens when a company assumes the role of group leader gathering other companies doing secondary activities.

All companies taking part of a horizontal ATI are liable towards the contracting party of the duly execution of the work and the partition of it among them is not relevant towards thirds parties (Sentence of Consiglio di Stato sez. V, 4 novembre 1999, n. 1805). The partition of shares of the partnership among companies of a horizontal ATI is free; in fact, case law deems that no law provides a limit on participation share (Consiglio Giustizia Amministrativa della Regione Sicilia 13 ottobre, n. 618). Under art. 95, comma 2, DPR n. 554/1999 the titles concerning economic, financing, technical and organizational aspects, demanded by the tender, of any single company taking part of an ATI have to be possessed up to 40% by the leader group and the remaining part have to be possessed up to 10% by each one other company of the ATI.

In the case of a vertical ATI the leader group is liable of the complete execution of the work towards the contracting party, while, the other companies are liable for their own share of work (Sentence of Consiglio di Stato, sez. V, 4 novembre 1999, n. 1805).

Mixed ATI are possible too. In such a case the ATI gathers inside a single organizational structure the features proper of the horizontal ATI, for the execution of works of the main class, with those of the vertical ATI for the execution of the secondary works.