Place of supply of services – HMRC Notice 741A

Indirect Tax

01 September 2015

Proposed changes to Notice 741A for the better?

HMRC published draft changes to Notice 741A but, as a result of comments received, have delayed publication of a change notice and have asked for further input.

We commented on several issues arising from the proposed changes, including:

- the structure of future guidance;
- the need to use terms that are understood by smaller businesses; and
- the ‘use and enjoyment’ rule.

We outline some of the comments below.

Notice structure

A common problem in preparing guidance is the breadth of the subject matter covered. The rules on the place of supply of services is a massive topic. For example, all cross-border transactions are affected by the rules but most taxpayers, their customers and advisers will deal with only a specific type of transaction that is affected only by a small part of the rules.

An engineering contractor doing work overseas may only need to know whether his supplies are services that fall within the business-to-business (B2B) general rule or are services relating to land.

The guidance often follows the structure of the legislation.

Although this may appear logical, the result is guidance better suited to sequential reading, that is like a book, rather than operating as a work of reference that can be dipped into for the answer to specific questions. Therefore, we suggested that guidance would be more useful and user friendly if the more specific and specialist areas (such as those dealing with land-related services) were covered only briefly in the main notice on a topic, with a reference being made to a more specific HMRC notice dealing with the detailed rules. There are examples of where this has already been done with good effect: for transport there is a reference to Notice 744.

Services supplied where performed

These may include ancillary services. But, when deciding what is ancillary, it is critical to remember that it includes only those that are directly related or subsidiary to the main service. Lectures may be treated as supplied where the attendees are where they are one-off lectures, but this may not be the case where the lectures are part of a course that has a mix of distance learning and actual attendance. In this latter scenario, the lecture may be treated as supplied where the course provider is based. This should be drawn out in the guidance.

The definition of catering has been examined by the CJEU and is different from the rather extended definition in UK law dealing with zero-rating of food. It may be best to define the term ‘catering’ for the purposes of this rule.

B2C services supplied to customers outside the EU

This heading provides a perfect description of how a VAT specialist would describe this rule. However, bearing in mind that even very small businesses may need to find and read the rule, we questioned whether this is the best description. Care should be taken to ensure that terms such as ‘business to consumers’ are properly explained.

Use and enjoyment

At present the use and enjoyment rules apply to a very small number of transactions, including some cross-border leasing transactions. However, there are plans to extend the rules. The current notice provides several examples where HMRC claim that the rules apply. However, as commented on by Professor Ben Terra and Julie Kajus in their IBFD work on the VAT directives, none of the EU member

states has identified what criteria need to exist for the rules to apply.

We do not think the examples suggested by HMRC are helpful because they provide nothing to illustrate how the rules are being applied. Specifically, there does not yet appear to have been any attempt to identify what is to be regarded as ‘use’ and what is to be regarded as ‘enjoyment’. It is an issue that we believe will need to be dealt with when parliament extends the application of the rules but in the meantime it is also necessary to deal with the issue in the guidance.
We will be seeking the views of members when there is further consultation on any proposed changes, but in the meantime we would like the views of members on how they would define the terms ‘use’ and ‘enjoyment’.