VAT: The meaning of use and enjoyment

Indirect Tax

01 November 2016

CIOT has engaged with HMRC on the meaning of the term ‘use and enjoyment’ for VAT purposes

Background

The government has adopted legislation that will change the place of supply of repair services provided to insurers with effect from 1 October 2016 (The Value Added Tax (Place of Supply of Services: Exceptions Relating to Supplies Made to Relevant Business Person) Order 2016).

HMRC have since published Revenue and Customs Brief 15/2016 setting out their policy in regard to what is use and enjoyment and have amended VATPOSS15000 of their manuals and VAT Notice 741A accordingly.

The legislation alters the place of supply of services that comprise repairs where they relate to an insurance claim and are made to someone other than the insured person if the service is effectively used and enjoyed –

- Within the UK where the service would otherwise be regarded as supplied **outside the EU**;
- Outside the UK where the service would otherwise be regarded as supplied **within the UK**.

Our comments to HMRC

We provided HMRC with comments on how we thought that the term ‘use and enjoyment’ should be interpreted.

We recalled that the legislation has its origins in the Sixth VAT Directive and was and still is intended to ensure that there is neither double taxation because a country outside the UK taxes a service that would also be taxed in the UK, nor no taxation because neither the country outside the UK nor the UK taxes the service (unless of course there is a specific relief in the country where the supply takes place).

The need for definition

We also noted that, so far as we are aware, no country has defined the terms ‘use’ and ‘enjoyment’ other than by providing examples. While we accept that in most cases it will be obvious that both take place either in the UK or outside the UK, there will be some exceptions and in those cases it is necessary to understand both terms. This is particularly so since it is possible that the rule may be extended to other services such as advertising.

In this regard, we noted that Professor Ben Terra and Julie Kajus in their work on the VAT Directives comment on the lack of definition. We also considered the commentary on the Swiss and Australian systems equivalent to VAT. These say that in both countries if work was done on goods in those countries, the work would be regarded as subject to tax there. In Australia there is an exception for goods immediately exported.

Thus, it would appear that in both countries a rule similar to the original Art 9(2)(c) of the Sixth VAT Directive would apply to tax work on goods in those countries. This may well also be the case in other third countries.

Our analysis

It is our view that the terms ‘use’ and ‘enjoyment’ must have separate meanings and that it is not a phrase where both terms must be interpreted as a whole.

Having regard to the purpose of the legislation (see article 59a of the Principal VAT Directive) it is clear that if work was physically undertaken and taxed in another country under their rules, and was also regarded as supplied in the UK under UK rules, the aim of defeating double taxation would not be achieved. The reverse could also apply.

We suggested that the term ‘use’ is intended to refer to physical or actual use, for example if a car is repaired in Switzerland, the repair service is ‘used’ there. We note in this regard that Australian guidance looks at who receives the repair and contemplates that the actual user may not be the taxpayer but someone else such as an employee. This seems logical.

The term ‘enjoyment’ is less clear, but arguably refers to where the benefits are actually received; so an insurer receives the benefits of a repair service within the UK if their receipt discharges an obligation under a UK policy.

Looking forward

We think it unlikely that there will be many disputes in regard to insurance claims. The intention of the legislation was that arrangements, which routed repairs undertaken in the UK via third countries, would be prevented and these will no doubt be effectively dealt with by the legislation because physical use will be in the UK as will enjoyment.

In regard to repairs outside the UK, HMRC’s guidance comments:

> ‘You should read this if you provide repair services to an insurer (or their agent) or an insurer (or agent) that is obliged to repair goods belonging to the insured party.’

We doubt that many third country repairers will be affected by these measures, although if they are they will probably be unaware of this provision so are likely to simply follow their local rules in any event.

However, in our view a proper understanding of what is meant by ‘use and enjoyment’ is important as those terms could impact on the implementation of the new rules. We would therefore welcome further comments from members on the subject.