

# Quarterly indirect tax update

July 2021

## Creation of fixed establishments: Letting of property in EU countries in which staff are not present

A recent judgement issued by the Court of Justice of the European Union (“CJEU”) stated that a business is required to have its own staff in order to create a fixed establishment for VAT purposes. The CJEU ruled that the concept of fixed establishment implies a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of given services.



### Background to the decision

In this case, a company established in Jersey (Titanium) owned properties in Austria, which were being let. Titanium did not have any staff located in Austria and they appointed a real estate agent to manage the lettings. Titanium retained all decision-making powers to enter into and terminate leases, to determine the conditions of any of the tenancy agreements and to carry out all maintenance work with regard to the property.

### Opinion of Titanium

Titanium took the position that it was not liable to pay Austrian VAT related to the letting activity on the basis that it did not have a fixed establishment in Austria. In the absence of a fixed establishment, the VAT liability is reverse-charged to the Austrian tenants.

### Opinion of the Austrian tax authorities

The Austrian tax authorities opined that a property which is being rented out would constitute a fixed establishment and referred the question to the CJEU as to whether the existence of human and technical resources would always be necessary for a fixed establishment to be created.

### CJEU ruling

The CJEU ruled that where a property which is let in a Member State, where the owner of that property does not have his or her own staff to perform services relating to the letting does not constitute a fixed establishment.

The CJEU referred to existing case law and states that the concept of fixed establishment implies a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of given services.

### Conclusion

The term “establishment” is not defined in Irish VAT law and therefore we welcome this case law and the additional guidance it brings in relation to the concept of establishment for VAT purposes. This should simplify the process of determining the place of supply of services for VAT purposes i.e. in which jurisdiction does the VAT arise. Given the complexities that arise here, specialist VAT advice should always be sought in this regard.

## VAT and Customs relief: Examination of returned goods relief

It has been over six months since the UK's official departure from the EU and businesses have had to adapt to many changes introduced by Brexit. Grappling with VAT and customs to ensure compliance is difficult, and given this increased cost, it is now more important than ever for businesses to be aware of any potential reliefs available.

Where goods are re-imported into the EU that have previously been exported from a location in the EU, VAT and Customs Duty relief may be available e.g. where the goods were originally exported from the EU to the UK and they are now being re-imported into Ireland. Generally, for the relief to apply, the goods must be re-imported within three years from the date of export.

The goods re-imported into the EU must also be in the same state as when they were exported from the EU. The goods cannot have been processed or treated when located outside the EU. However, the following are allowed:

- work necessary for repair or to keep the goods in good condition;
- handling or work carried out which only altered the appearance of the goods; and
- other work that was carried out that was later found to be unsuitable for the intended use of the goods.

If the value of the goods at exportation has increased as a result of any of the above services, duty will be chargeable on the re-importation. It is important to note that there is no relief from VAT where the entity importing the goods back into the EU differs from the original exporter that exported the goods out of the EU. However, the importing entity in this scenario may still avail of customs duty relief.

## Administrative essentials: Valid VAT invoices and commercial invoices

A VAT invoice is a document issued by an accountable person (i.e. a VAT registered trader), which sets out the details of a taxable supply and all related information as prescribed by VAT law. A VAT invoice must issue within fifteen days of the end of the month in which goods or services are supplied. The information given on a VAT invoice is the basis for establishing the VAT liability on the supply of goods or services and it also enables VAT registered customers to reclaim the VAT charged to them.

## Information required on a valid VAT invoice

Please note the following information is required for an invoice to be deemed valid:

- the date of issue of the invoice;
- invoice number;
- the full name, address and the registration number of the person who supplied the goods or services to which the invoice relates;
- the full name and address of the person to whom the goods or services were supplied;
- in the case of a reverse charge supply the VAT number of the person to whom the supply was made and an indication that a reverse charge applies;
- in the case of a supply of goods, other than a reverse charge supply, to a person registered for VAT in another Member State, the person's VAT number in that Member State and an indication that the invoice relates to an intra-Community supply of goods;
- the quantity and nature of the goods supplied or the extent and nature of the services rendered;
- the date on which the goods or services were supplied or, in the case of early payment prior to the completion of the supply, the date on which the payment on account was made, in so far as that date differs from the date of issue of the invoice;
- in respect of the goods or services supplied:
  - the unit price exclusive of VAT;
  - any discounts or price reductions not included in the unit price, and the consideration exclusive of VAT;
  - in respect of the goods or services supplied, other than reverse charge supplies:
    - a. the consideration exclusive of tax for each rate (including zero-rate) of VAT, the rate of VAT chargeable; and
    - b. the VAT payable.

Where the invoice is issued in a currency other than euro, the VAT should be shown in euro using the latest exchange rate issued by the European Central Bank on the date the invoice is issued.

## Information required to complete customs declaration: Commercial invoices for customs purposes

A commercial invoice is a customs document that is used to declare the importation of goods into ROI to Revenue. The commercial invoice is the basis for customs declarations and does not include any Irish VAT charged. The information required on a commercial invoice is as follows:

- consignor and consignee (e.g. contact details, name, address, phone number, EORI);
- ship from and ship to details;
- incoterms (agreed commercial terms e.g. DDP, DAP, Ex-Works etc);
- description of each item;
- quantity by line item;
- unit value by line item;
- total value by line item;
- country of origin for each item;
- tariff classification for each item;
- net and gross weight for each item;
- type of packaging;
- freight and insurance cost details; and
- export/import control status and authorisation number where available.

## Should all input VAT be repaid immediately if a planned real estate project is abandoned?

### Background to the decision

In a recent CJEU case, Skellefteå Industrihus (“the Company”), planned to construct a building to be used for offices which were intended to be leased. On this basis, the Company applied for, and was granted, the right to benefit from the optional tax liability scheme as from November 2012 allowing it to reclaim VAT incurred on development costs.

Through the early part of the construction phase of the project, the Company deducted approximately €95,000 of input VAT it had incurred on purchases relating to the construction of the building. Given the early part of the construction lifecycle in which these purchases were made, the purchases largely related to architectural services.

During development, one of the future tenants terminated its interest in leasing office space in the constructed building. Following a reassessment of costs, the Company deemed the project was no longer financially viable and abandoned the project in September 2013, thereby bringing the optional tax liability scheme to an end.

In December 2013, the Company repaid all VAT it had deducted while benefiting from the optional tax liability scheme, as was required under Swedish law.

### Opinion of the company

Despite this, in 2016, the Company reassessed its position and considered that the obligation to repay the input VAT deducted was not compatible with the EU VAT Directive and therefore submitted a request that the VAT deduction be reaccepted.

### Opinion of the Swedish tax authorities

This request was rejected by Swedish tax authorities, leading the Company to bring an action before the Swedish Administrative Court. The Administrative Court upheld the action on the ground that the applicable national legislation was not compatible with EU law and the amount of input VAT was repaid to the Company.

Following the dismissal of the appeal brought by Swedish tax authorities to the Swedish Administrative Court, the authorities appealed to the CJEU.

### Decision of the CJEU

The CJEU held that the requirement under Swedish law to repay all VAT deducted, with applicable interest, to the tax authorities where a taxpayer chooses during the construction phase not to tax a future lease is not compatible with EU law. While referring to past CJEU decisions, including the Irish case of Ryanair, the Court confirmed that the right of deduction, once it has arisen, is retained albeit the planned economic activity was not subsequently carried out and therefore not giving rise to taxable transaction. It further commented that:

‘Any other interpretation of the VAT Directive would be contrary to the principle that VAT should be neutral as regards the tax burden on a business.’

While the CJEU considered that the EU VAT Directive precludes national legislation requiring a taxpayer to immediately repay all that VAT, plus any applicable interest, in the circumstances above, it does not preclude national legislation which establishes an obligation to adjust the input VAT paid.

### Conclusion

This decision supports the long established VAT principle that it is the intention of a taxpayer at the time of making a deduction for input VAT which is key in its eligibility to make the deduction.

Across the EU there are various mechanisms for determining the VAT deductibility where there is a change of use of a property or a change in the resulting economic activity. Taxpayers should therefore be aware of what rules specially apply in each jurisdiction they maintain a VAT presence and hold sufficient records of its intention at any point in time.

## Contact

Should you have any queries in relation to the contents of this article or would like to discuss any indirect tax issue, please feel free to contact us.



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