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The Spanish VAT Interpretation of the Use and Enjoyment Rule

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Article 59ab of the VAT Directive (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax) was implemented into the Spanish domestic legislation through Article 70(2) of the Spanish VAT law (Law No. 37 of 28 December 1992 on value added tax). As is well known, this article contains a special place of supply rule applicable to only certain types of services and under very particular circumstances. This special provision is known as the "*use and enjoyment*" rule.

In this article, the author describes the interpretation that the Spanish tax authorities make of this rule, which has recently been the subject of some controversies.

1. **Scope of the Spanish VAT use and enjoyment rule**

The Spanish VAT use and enjoyment rule establishes that specific services are considered to be supplied within the Spanish VAT territory and, consequently, subject to Spanish VAT when, following the general place of supply rules (those included in Article 44 of the EU VAT Directive), these services are deemed to be located outside the EU territory (including the Canary Islands, Ceuta or Melilla), if their effective use or exploitation is carried out within the Spanish territory.

First, it is essential to note the specific types of services to which the rule applies under Spanish VAT law. When their recipient is a taxable person for VAT, the services concerned are the following:

– transfers of copyrights, patents, licenses, trademarks or commercial brands and other intellectual and industrial property rights;

– transfer of goodwill or rights;

– advertising services;

– services of consultants, auditors, engineers, lawyers, accountants or tax experts and other similar services;

– data processing and supply of information;

– translators, proof reading, editing and those provided by interpreters;

– insurance, reinsurance as well as financial services;

– provision of staff;

– film dubbing services;

– hiring of movable property, with the exception of means of transport and containers;

– access to gas, electricity, heating and refrigeration distribution networks;

– obligations to refrain from providing, wholly or partially, any of the services listed above;

– intermediation services on behalf of and for the account of others.

The rule also applies to the following services irrespective of whether the recipient is a taxable person for VAT or not:

– hiring of means of transport;

– telecommunications, radio and television broadcasting and electronically supplied services.

Whenever any of the services mentioned above are supplied, and if they are deemed to take place in a third country or territory by application of the ordinary place of supply rules, **the supplier must make an extra effort and ascertain whether the service supplied is somehow used, exploited, or enjoyed within the Spanish VAT territory as defined above**. In such an event, Spanish VAT must be charged. It is worth mentioning that the burden of proof lies on the taxable person.

2. **How to determine when a service is effectively used or enjoyed in Spain?**

Determining when a service is used in a particular territory is complex and subject to different interpretations.

The difficulty lies in that **the Spanish VAT law does not establish a uniform criterion** to be followed, so each situation must be analyzed individually. According to the Spanish tax administration, deviating from a case-by-case analysis is difficult.

To date, the criteria that could be used in Spain as guidance for applying this rule can only be drawn from answers that the Spanish Ministry of Finance (*Dirección General de Tributos*) has issued in relation to taxpayers' queries. However, these consultations are made for the specific cases raised to the Spanish tax administration. Therefore, although they could serve as a guide to some extent, these consultations are far from being a one-size-fits-all solution on which any taxable person may rely.

In this respect, the Spanish tax authorities' former criterion to apply the rule requires determining

the person who carried out the use or exploitation of the services in the Spanish VAT territory. In principle, the rule was only applicable in cases where the service recipient was the same person who actually used the service in that territory. According to this former criterion, the analysis should be made by following these steps:

– first, it was necessary to ascertain the person effectively using or exploiting the service in Spain. In principle, the use and enjoyment rule was only applicable in those cases where the recipient of the services was the same as the one effectively using the said service in the Spanish VAT territory;

– second, it was necessary to find the underlying transaction for which the service is rendered. The use and enjoyment rule was applicable only if such underlying transaction was subject to Spanish VAT;

– third, it was necessary to have a direct or a strong relationship between the service rendered and the underlying transaction.

Moreover, the Spanish tax authorities have considered possible a partial application of the use and enjoyment rule. This means that **if a particular service is partially effectively used in Spain, only this part of the service should be subject to Spanish VAT**. Taxable persons must have solid backup documentation confirming that only a part of the service supplied is subject to Spanish VAT.

As evident from the above, this was a complex process consisting of several phases, but it at least established a set of minimum criteria to be met. However, the **Spanish tax authorities´ criteria concerning this rule have been evolving in recent years towards a much broader application**. It can be said that a broader interpretation of this rule has become more evident since the CJEU´s judgment in *Athesia Druck* (C-1/08). This case is relevant enough as it was one of the first cases in which the application of this rule was accepted in the case of a supply of services with an intermediate recipient. While it is true that this is a relevant case, it is equally evident that it refers to a specific and concrete case of advertising services.

This current and broad interpretation of the use and enjoyment rule adds more complexities to the process. In the last rulings, the Spanish tax authorities no longer require a strong link between the service supplies and the underlying transaction for which the service is rendered. According to their recent criteria, **this connection can be direct or indirect**[1].

Moreover, the rule no longer applies only in cases where the services are effectively used in Spain by the direct recipient of the said services. The Spanish tax authorities have confirmed in several rulings, invoking the CJEU's judgment in *Athesia Druck*, that this rule also applies in cases where the services are effectively used or exploited in Spain by the initial or any other recipient. What is more important is that according to this new criterion, **the rule applies regardless of whether these recipients of the services carry out transactions subject to VAT in Spain or not**.

The author, therefore, observes a significant evolution of the Spanish tax administration towards an extensive application of this rule. This evolution has moved from a criterion in which a strong and direct relationship was required between the service provided and the underlying transaction by which it could be understood that the service was used in Spain to a much broader criterion in which the relationship no longer needs to be so direct. Additionally, it is no longer required that the

initial recipient of the service must be the one who had to use it in Spain. With the current criterion, the exploitation of the service can be carried out by any other recipient company being not necessary for the latter to carry out transactions subject to VAT in Spain.

According to the above, **a weak nexus between the service and the underlying transaction would be enough for this complex rule to apply**. This much broader approach raises several problems explained below.

3. Some controversial aspects of the Spanish VAT use and enjoyment provision

It must be pointed out that **Article 59 of the VAT Directive is a measure to prevent double taxation or non-taxation of a specific service supply[2]**. In this way, it could be said that its application should not be generalized but applied in those cases where it is foreseen that a service in question will not be taxed for VAT or, on the contrary, will be double-taxed. It is true that, according to the CJEU´s judgment in *SK Telecom* (C-593/19), this should be assessed only from an EU perspective without being necessary to take into account the tax regime to which those services are subject in the third country concerned.

However, it is no less accurate that, in *SK Telecom* (C-593/19), the CJEU stated that the situation might be different in those cases where an international agreement is concluded with that third country. The CJEU did not refer to a specific agreement, but one can only think of VAT reciprocity agreements.

The first of our concerns is that **if the service in question is taxed in the country of destination, even if it is a third country (provided that there is some kind of agreement with that country), it seems inappropriate to apply the use and enjoyment rule** since it would be in some way breaching its purpose which is to avoid double taxation or non-taxation.

Another problem we see concerning the extensive application of the rule is that according to the Spanish tax authorities, the service can be used in Spain by its initial or final recipient. The author believes that this could create some problems as regards the ordinary and logical functioning of the VAT.

In this respect, the CJEU´s judgment in *Design Concept* (C-438/01) establishes that the rules governing the place of supply must be applied to each individual transaction. Any further operations following the initial operation should be analyzed separately with their own place of supply rules. This will not apply in cases of fictitious transactions where the initial recipient is not the actual recipient but a company somehow artificially placed as an intermediary to avoid paying VAT. However, this is part of another discussion and has nothing to do with the use and enjoyment rule.

Moreover, in *Design Concept* (C-438/01), **the CJEU mentions that the use and enjoyment rule depends solely on the place where the supplier and the recipient of the service in question are established**. **This rule no longer requires an account to be taken of transactions carried out after the first supply of services** (see, in particular, paragraphs 26 and 28 of the judgment).

The above seems to follow the logical functioning of the VAT, which stipulates that each transaction must be analyzed independently.

In the author's opinion, the problem is created because the Spanish tax administration is extending a criterion that the CJEU pointed out for a particular case (i.e., *Athesia Druck*, C-1/08) to all cases implying different services without distinction. It is worth noting that CJEU´s reasonings **and answers depend on the facts of the questions raised, for which a broad and general interpretation of a particular case may be misleading.**

In the case of advertising services in *Athesia Druck* (C-1/08), the CJEU found a clear link between an advertising service and commercial sales to the customers to whom the advertising is disseminated.

However, this reply refers to this specific case of advertising services. One may, therefore, conclude that without a link to commercial exploitation in a particular country, or any other clear indication of commercial exploitation by the recipient of the service in said country, a service cannot be considered to be effectively used or enjoyed in that country.

Applying a broad interpretation without any clear guidance to a technically complex and controversial rule as it is the use and enjoyment may create a situation of uncertainty which, in the author's opinion, should be avoided.

Since we must point out that we are talking about taxable persons from third countries, the situation can be highly complicated in some cases, which, depending on reciprocity agreements (which are only a few in the case of Spain), can end up in situations of irrecoverable VAT.

On another note, if the Spanish tax administration finally admits that the recipient of the service is going to effectively use it in Spain by exploiting it in some way in the Spanish VAT territory and, because of this reason, Spanish VAT is obliged to be charged by the supplier, **there are sufficient grounds to consider that the VAT should be recoverable**.

4. Conclusions

Determining when the service recipient actually uses or exploits the service in a given territory is a complex task.

If this task is made more complicated by an overly broad interpretation of the term "*use and enjoy*", the situation can become more problematic. It is therefore essential to establish some guidelines as to when this rule should apply.

When establishing these guidelines, it should not be forgotten that this is a rule to avoid double taxation or non-taxation. Therefore, in those cases where the service will be taxed at the destination country, including third countries with which there is a VAT reciprocity agreement, the rule should not apply.

At the same time, the application of such a rule should be restricted to cases where it is the initial recipient of the service who actually exploits or uses it and not any other operator further down in the chain. This element, apart from being extremely difficult to prove, does not seem to fit easily into the general functioning of the VAT.

Finally, if it is accepted that the service recipient exploits it somehow, it is also admitted that that

person is carrying out some economic activities. Therefore, if the supplier must charge VAT by applying the use and enjoyment rule, that VAT should also be recoverable.

[1] Among others, ruling V0931-22 (29.04.2022); V0904-22 (28.04.2022); V0912-22 (28.04.2022); V0883-22 (26.04.2022); V0094-22 (21.01.2022) etc.

[2] Subsection 10 of the EU VAT Directive: "Prevention of double taxation or non-taxation".

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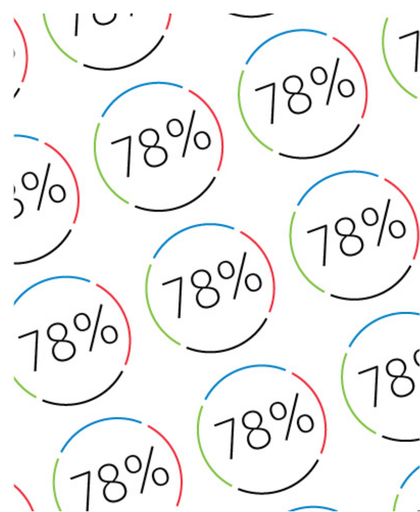

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