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Analysis — Tartaruga: locating the risk for IPT purposes

Insight and analysis

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Speed read: Insurance premium tax has become an increasingly important tax for the UK exchequer. In Tartaruga, the First-tier Tribunal has considered the extent to which insurance contracts related to risks situated outside the UK and were therefore outside the scope of UK IPT. The decision provides important insight into how an establishment is identified under the regime and, in particular, the distinction between temporary or permanent establishments.

Insurance premium tax (IPT) was first introduced in October 1994. At that stage, the rate of IPT was 2.5%. Since then it has become an increasingly important tax for the UK exchequer, and it is currently charged at a rate of 12% with a higher rate of 20%. Further changes to the regime are likely following the consultation that launched last year and concluded in February, which looked at the treatment of administration fees and how to collect the tax.

What has stayed constant is that there is an exemption from IPT for premiums paid on risks situated outside the UK. While this sounds simple, it has proven difficult in practice, especially when any premium covers a number of different risks or risks covering different establishments located internationally. Taxpayers are faced with a number of different tax authorities seeking to charge IPT in such cases. Following the CJEU case of *Kvaerner v Staatssecretaris van Financien* [2001] STC 1007, the principle is that one has to look at and allocate part of the premium to the place (the establishment) where the activity whose risk is covered by the contract is exercised, or in the case of a building, where the building is situated. An establishment can include a subsidiary or place of business. For international insurers and their policyholders, however, this only goes so far. The recent First-tier Tribunal (FTT) decision in *Tartaruga Insurance Ltd v HMRC* [2021] UKFTT 7 (TC) does now shed some light on the rules.

The facts in *Tartaruga* are relatively complex, in that the insurance contract concerned was part of a number of contracts between a contractor group carrying out operations in the North Sea and its customers in the oil and gas industry. The main part of the business was laying and connecting undersea pipelines. The contractor had operations in London and Aberdeen, which were responsible for the technical analysis and design of the pipelines; however, much of the work was carried out on very large ships which remained on site for some months and formed the epicentre of the operations offshore. The way in which the contracts with oil and gas customers worked was that under a particular contract, the contractor would have to bear part of the cost of any damage to the pipeline (or in some cases, personal injury liability). It insured that risk with its captive insurance company, Tartaruga, and it is those insurance contracts which were the subject of the IPT dispute. In coming to a view on whether IPT was chargeable, the FTT first had to decide whether the risk was attributable to the contract with the oil company or whether it should look through the contract and look at the underlying event that triggered the pay-out. The conclusion reached was that, contrary to the suggestion made by HMRC (and differing from that reached in a previous case), it was necessary to look at the event. This seems sensible but the distinction is a fine one.

Having decided that one looks through to the event, it was necessary to determine where the risk is situated. The taxpayer argued that the offshore pipelines were fixed and should be treated as a building for these purposes. This relied on a statement made in HMRC's *Notice IPT1*. This was accepted by the FTT. However, this did not cover the entirety of the risk, which covered more than just damage to the installed pipeline. It was therefore necessary to look at where the contractor had establishments to which the premium was attributable. In looking at this issue, the FTT looked at what an establishment was, and whether it was possible to draw any analogy from the corporation tax or VAT rules, as well as the OECD Model Treaty wording. It did take some support from these and concluded that an establishment had to have a degree of permanence and this meant that it had to be in place for more than 12 months. It was clear that the contractor had some such establishments in the UK. The taxpayer argued that the relevant establishments also included the ships from which the pipelines were laid. In this, it was successful. The ships in many cases were similar to a factory: they had a degree of permanence and were the place from which the project was managed. Part of the premium could therefore be apportioned to risk related to an establishment situated outside the UK and was outside the scope of UK IPT. This again seems a logical conclusion.

Where does that leave an insurance company in trying to determine whether the premium is exempt? The insured will be equally concerned that any conclusion reached by the insurer is correct as, ultimately, it is likely to bear the cost of the IPT. The case obviously has an application to offshore projects and installations, and many will be looking at the distinction between temporary or permanent establishments. Outside this world, the decision is comforting in that it indicates that IPT should be chargeable by reference to risks relating to long-term establishments and that in the world of increasingly mobile workplaces, inadvertent IPT charges are less likely to be triggered. What does of course remain to be seen is whether the decision is appealed and whether other authorities across the globe adopt the same approach.