VAT Digest

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Supply: Differences between goods & services

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Detailed Practical Guidance on:

- The concept of supply
- Classification of supplies
- Distinction between supplies of goods and services
- Place of supply

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Editorial team

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Territory of the United Kingdom for VAT purposes

The United Kingdom consists of Great Britain, Northern Ireland and the waters within 12 nautical miles of the coast-line. It does not include the Isle of Man or the Channel Islands, the position of which are as follows:

- Isle of Man – although outside the United Kingdom, it is treated as part of the United Kingdom for VAT purposes and VAT is chargeable under the law of Isle of Man which is largely similar to the United Kingdom VAT legislation.

- Channel Islands – they are outside both the United Kingdom and the EU for VAT purposes.

Abbreviations

ECJ	European Court of Justice
EU	European Union
The Directive	Council Directive 2006/112/EU of 28 November 2006 on the common system of VAT
HMRC	HM Revenue and Customs
VAT Act 1994	Value Added Tax Act 1994

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Editorial

Ruth Corkin

This is the third issue in the new series of VAT Digest which, over the coming months, will cover (hopefully in a logical sequence) the whole VAT system from start to finish. Issues 88 and 89 covered pre-registration and VAT registration itself (respectively) and this issue continues with the issues relating to supplies of goods and services.

It may seem blindingly obvious to many people that a supply has taken place, especially where money has changed hands. However, many people find that VAT is odd when it comes to the blindingly obvious! Not only is there the concept of non-monetary consideration, but there is the concept of something being neither a supply of goods nor services. Even when something looks like a supply of goods it can, in fact, be a supply of services and vice versa. Add into this confusing mixture who the supply is to and where the supply is being made and it is easy to see why even the most seasoned VAT advisers often come up with an 'it depends' answer!

All of these concepts are not only established in UK VAT law, but are also governed by EU law. In a significant number of instances, definitions and principles have also needed the various courts to decide on a more detailed and (often) common sense application of the law.

Recently, the place of supply of services has received an EU wide overhaul to provide a simplified method of determining where services have been supplied, but even this has areas where new rules are being phased in over a period of years (eg hire of means of transport, cultural, sporting, exhibitions and training services). Eighteen months after the introduction of the new basic rules (with the inevitable exceptions!) further clarification of the terms and definitions was issued by way of a pan EU Implementing Regulation on 1 July 2011.

Unfortunately for the UK, HMRC's National Advice Line believes that this implementing Regulation is still under consultation and I have known clients to be advised that 'it will be years before it comes into force in the UK!' This is despite the fact, that, on 1 July 2011, the Implementing Regulation had immediate legal effect in every member state, dispensing with the need for domestic legislation.

It is all too easy to fall foul of the issue of supply and overlooking the basis, could be costly in terms of tax and penalties. This VAT Digest is designed to help you make those essential decisions as to what supply is made, to whom, by whom, for how much and where it is made.

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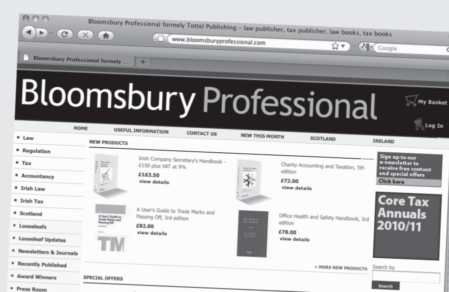

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1. Introduction

Section 4 of VAT Act 1994 which is aptly entitled '*scope of VAT on taxable supplies*' sets out the various conditions that must be satisfied for United Kingdom VAT to arise –

> *'VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.'*

Therefore, it is self-evident that, generally, for VAT to arise, five key elements need to be present:

- There must be a supply;
- The supply must be of goods or services;
- The supply must take place in the United Kingdom;
- The supply must be a taxable supply;
- The supply must be made by a taxable person in the course or furtherance of business.

This issue of *VAT Digest* considers the meaning of the VAT concept of '*supply*', its classification into supplies of goods and services (and, complicatedly enough, into supplies which are neither, as well as a new emerging court imposed fictional concept of a '*non-supply*') and examines the rules which dictate where supplies of goods and/or services are treated as taking place for the purposes of VAT. This digest does not consider the meaning of taxable supply or the concept of supplies made by a taxable person *'in the course or furtherance of any business'*; it may be that future issues of *VAT Digest* will separately examine these concepts in detail.

Readers will no doubt notice a recurring theme in this issue - various (ostensibly) absolute sets of rules are referred to here only for a list of exceptions to follow almost immediately. Perplexing as this might be, the author encourages the readers to remember the underlying principle central to the scheme of VAT - there is one absolute rule in VAT which has no exceptions and that is that every rule in VAT has at least one exception.

2. What is a supply?

Neither VAT Act 1994 nor other ancillary United Kingdom VAT legislation really defines the term '*supply*'. Instead it merely states (rather vaguely) that supply *'includes all forms of supply, but not anything done otherwise than for a consideration'.*[1] The United Kingdom VAT legislation further adds that *'anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services'.*[2]

The Directive (which forms the common framework for the EU scheme of VAT) restricts itself to defining '*supply*' by reference to goods and services. A supply of goods is defined in the Directive as '*the transfer of the right to dispose of tangible property as owner*'[3] and a supply of services is defined as '*any transaction which does not constitute a supply of goods*'.[4]

This provides an insight into the fundamental nature of the expression '*supply*' as it is used in the European scheme of VAT. First, this expression has a wide import and although prima facie it might seem that the requirement for there to be a consideration in order for the supply to be chargeable to VAT imposes a restriction on its meaning, it does not – a supply of goods or services is a supply, regardless of whether or not it is made for a consideration; lack of consideration merely (but crucially from the perspective of VAT) means that it does not come within the scope of the European VAT system. Secondly, the ostensibly wide scope of what constitutes a supply of services (ie '*anything done*' for a '*consideration*' which is not a supply of goods) means that it is intended that anything capable of being '*furnished or served*' (giving the word '*supply*' its ordinary literal meaning) which is not covered by the definition of a '*supply*' of goods should be within the scope of the definition of this term. The VAT net, as can be deduced, is cast far and wide. Critically, this also provides a clear indication that the European scheme of VAT recognises that supplies generally, for VAT purposes, consist of either goods or services, both of which have their own distinctive characteristics. It should follow therefore that these two classes of supply should be treated differently from a VAT perspective.

2.1 The 'transfer' concept and supplies

If we were to give the term *'transfer'* its literal meaning, we could observe that the European VAT system pre-supposes the passing of something from one person to another for a supply to occur. As '*supply*' requires a '*transfer*' to occur for a supply of goods to take place (and this requirement should logically be extended to services as well), this effectively means two things - (a) a supply must only be able to be made to the person who receives the supply (ie to whom the goods are '*transferred*' or the services are '*furnished or served*') and (b) there cannot be a supply of goods or services from a person to himself (unless in very specific statutorily prescribed circumstances).

The circumstances described in (a) and (b) above have important practical consequences in the world of European VAT. As readers will be aware, it is not entirely unusual for goods or services to be transferred or provided by the supplier to the recipient at the instruction of a third person (usually but not necessarily an associate of the recipient) who pays for the consideration and may also be, in many cases, the party which contracts with the supplier in relation to those goods/services. In such circumstances, it is often less than straightforward to determine who the actual recipient of the supply in question is for VAT purposes.

It is accepted that, although as a general rule the recipient of a supply will normally be the person who contracts for the supply and who pays for it,[5] it is not necessary that the recipient of a supply will be that person in every case. It is an established principle of VAT law that in order to determine who the recipient of a supply is, it is necessary to conclude from a thorough examination of facts as to who the '*prime beneficiary*' of the supply is.[6] This critical determination affects many other aspects of VAT, most notably the recoverability (or lack thereof) of VAT incurred by a person in connection with the said supply.

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Example 1

James is a VAT registered trader in consumer goods who wishes to obtain mortgage lending from a bank to fund his purchase of a shop from where he intends to carry on his trade. Under the terms of his mortgage application he is required to pay for any survey of the property carried out by a surveyor appointed by the bank to ensure that the security (being the shop) is acceptable risk for the bank. This fee is payable by James irrespective of whether or not his mortgage application is ultimately successful.

Although James pays for this survey being undertaken (and therefore incurs the VAT on such surveying fees), James cannot recover such VAT (ie he cannot claim input tax on this expense) as he is not the recipient of the supply (being supply of surveying services). Although he is undoubtedly a 'beneficiary' of the supply, it is arguably the bank which is the 'prime beneficiary' of the services provided by the surveyor as (a) the surveyor is contractually bound only to the bank and takes instructions only from it; (b) the reports of the survey are addressed to the bank and it is only the bank which can rely on this survey; and (c) the bank utilises this survey in making commercial decisions (as to the adequateness of the security, etc) for its own commercial benefit – it is incidental that James also 'benefits' from the obtaining of the mortgage but that is not a certainty in any event as the survey fees are payable irrespective of whether or not his mortgage application is successful.

It is a generally held view (including that of HMRC but not of some taxing authorities in other EU member states[7]) that the term '*supply*' implies a transaction involving at least two parties. Thus, unless in very specific statutorily prescribed circumstances, there can be no supply made by a person to himself. Therefore supplies within the same legal entity (say from the head office of a company to one of its branch offices or from one division of a company to another) cannot be a supply for the purposes of VAT.

There are certain specific statutorily prescribed circumstances[8] where this general rule may be displaced. For example where a '*reverse charge*' situation exists, the recipient of the supply of services is treated as both the supplier and the recipient of the said supply (**Note:** *this is not really a contradiction of the general rule outlined above but merely a fiction introduced for administrative purposes given that in situations where 'reverse charge' arises, the underlying transaction in question still involves at least two persons*). Another example is where there is a movement of goods within the same legal entity from one EU country to another – this is deemed to be a supply for VAT purposes although there is no transfer from one legal person to another in such circumstances.

Under a set of anti-avoidance rules introduced in the United Kingdom VAT legislation, the Treasury may, by order, provide that where certain goods are taken possession of or produced by a person in the course or furtherance of a business carried on by him and (a) are neither supplied to another person nor incorporated in other goods produced in the course or furtherance of that business; but (b) are used by him for the purposes of a business carried on by him, the goods are treated for VAT purposes as being both supplied to him for the purpose of that business and supplied by him in the course or furtherance of it. This principle applies equally to services.

Example 2

Raj owns a partly-exempt business, and uses his own employees to paint and renovate his office. The supply of such services by his employees (to his business) will be treated as a self-supply and VAT will be chargeable on the supply – given Raj's partly exempt status, full recovery of the VAT so charged (by himself) will not be recoverable.

The purpose behind this principle is self-evident – it seeks to prevent a partially exempt business from producing certain goods (or utilising its own services) for use in its business and recovering VAT where it otherwise would have been irrecoverable. These anti-avoidance rules apply in very specific circumstances and to specified goods and services and therefore it is not worth analysing these rules in any greater detail.

2.2 'Consideration'

As mentioned earlier, a supply is generally outside the scope of VAT unless it is made for a consideration (**Note**: *The VAT legislation deems certain supplies where no consideration is actually paid as supplies for the purposes of VAT – these are commonly referred to as 'deemed supplies' and complex valuation rules apply to such deemed supplies*). Although the expression '*consideration*' is not defined in United Kingdom or European VAT legislation, the meaning of this expression has been examined very closely by the courts, as a result of which there exists a rich and varied body of case law in this area.

It is instructive to consider the definition of this expression in the Second Council Directive 1967/228/EU which defined '*consideration*' as meaning –

> *'everything received in return for the supply of goods or the provision of services, including incidental expenses (packing, transport, insurance, etc), that is to say not only the cash amounts charged but also, for example, the value of the goods received in exchange or, in the case of goods or services supplied by order of a public authority, the amount of the compensation received.'*

The principle set out in the definition above is now reflected in the Directive[9] where the definition of '*taxable amount*' (ie the amount by reference to which VAT is chargeable) is defined as -

> *'…everything which constitutes consideration obtained or to be obtained by the supplier in return for the supply from the customer or a third person...'*

The above definitions establish four key characteristics of a payment which is '*consideration*' – (i) it can be monetary (ie cash however it is paid whether by cheque, credit card, bank transfer or otherwise) or non-monetary (typically goods or services provided as payment in a '*barter*' transaction); (ii) it has to be linked (ie it must relate) to a supply; (iii) the payer can either be the person

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receiving the supply or any other person; and (iv) it need not have to have been received or made, it is sufficient if it is due to the supplier and therefore can be received in the future.

The fact that '*consideration*' can be non-monetary raises a major practical problem from the perspective of the operation of the VAT system. Where there is monetary consideration, there is no problem in calculating the VAT payable on the supply as the VAT will be calculated by reference to the cash amount payable as consideration. However, where the consideration is non-monetary, it is not possible to calculate the VAT payable unless the consideration is capable of being expressed in monetary terms. In light of these practical difficulties, it is an established principle of VAT law that for non-monetary consideration to constitute '*consideration*' for the purposes of VAT, it has to be capable of being expressed in monetary terms.

The European courts have established some key rules to determining the monetary equivalent of non-monetary consideration.[10] The general rule is that non-monetary consideration has the value of the alternative monetary payment that would normally have been given for the supply. By necessary implication, it means that to arrive at this payment it is important to determine (on a subjective basis) what the particular recipient would have paid the particular supplier for the particular supply had the payment been in money. This may be arrived at by looking at the contractual arrangements between the parties to the transaction or by looking at the price of the goods or services in question which the recipient would have had to pay had the non-monetary consideration not been given. Where it is not possible to apply this general rule, the alternative test is to determine what cost the supplier has incurred in procuring the goods which form the basis of the supply or, where the supply is of services, the amount the recipient is prepared to spend for that purpose.

Example 3

Company A sells clothing and other goods in store as well as by displaying and selling these products at parties held at the homes of various hostesses. This innovative marketing strategy (according to Company A) allows it to increase sales in a more informal non-seller/buyer context. The hostesses who hold such parties are entitled in return to a cash payment or they can obtain goods from Company A's catalogues at a reduced price. One such hostess, Pippa, who has the option of taking a cash payment of £500 chooses instead to purchase clothes from Company A's catalogues. She is able to buy clothes (which normally cost £1250) at a reduced price of £600.

In such a scenario, the value of the consideration for the supply of the clothes by Company A would be its usual price – ie £1250 broken down into monetary consideration of £650 plus non-monetary consideration of £600, being the subjective value of the services supplied by Pippa. This is irrespective of the fact that Pippa was really only entitled to £500 had she chosen to take the cash payment.

The requirement that there must be a link between supply and consideration sounds fairly straightforward at first instance. Evidently the number of cases of disagreement between the tax authorities across the member states and taxpayers (many of whom have litigated their way to the highest courts) tells a different story. The courts have concluded that the question of whether there is a link between supply and consideration (or absence thereof) is to be determined by reference to the agreement made by the parties concerned and by the true nature of the transaction in question.

This, therefore, means that for such a link to exist, first there must be some form of a legal relationship between the supplier and the recipient pursuant to which there is a reciprocal performance, namely the remuneration received by the supplier constituting the value actually given in return for the supply, and second the question of whether there is such a reciprocal performance (linking the supply to the consideration) is a question to be determined by reference to facts.

One case decided by the ECJ[11] gives an insight into this principle – a musician played music on the public highway and solicited and received money. It was argued by the tax authorities in the Netherlands that the musician made a supply of services (ie the playing of the music) in return for a consideration (being the money received from by-passers). It was held by the ECJ that this did not constitute a supply by the musician for two reasons:

> *'Firstly, there is no agreement between the parties, since the passers-by voluntarily make a donation, whose amount they determine as they wish. Secondly, there is no necessary link between the musical service and the payments to which it gives rise. The passers-by do not request music to be played for them; moreover, they pay sums which depend not on the musical service but on subjective motives which may bring feelings of sympathy into play. Indeed some persons place money, sometimes a considerable sum, in the musician's collecting tin without lingering, whereas others listen to the music for some time without making any donation at all.*
>
> *In addition…the fact that the musician plays in public with a view to collecting money and actually receives certain sums in so doing is of no relevance for the purpose of determining whether the activity in question constitutes a supply of services for consideration within the meaning of the Sixth Directive.'*

It is not possible to set out definitively a principle which encapsulates adequately a test which can be utilised to determine whether the required link between '*consideration*' and supply exists. However, set out below is a list of some payments which, although at first sight may appear to be consideration, have been established by case law to be payments which do not constitute 'consideration' for a supply for the purposes of VAT, on the basis that no sufficient link is seen to exist between the payment and the supply in question.

Fines

A fine or penalty is not consideration for a supply and is therefore seen as outside the scope of the VAT system. The most common example of this (which may have been encountered by readers) is parking fines.

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However, it should be noted that merely describing a payment as a fine or a penalty does not automatically exclude it from the VAT regime – for example a fine for delay in returning video rentals on time is merely further consideration for the underlying supply, ie the supply of video tapes.

Payments for breach of contract

It is logical to view restitutionary compensation payments for loss or damage suffered as a result of breach of contracts as not constituting consideration for the purposes of VAT. It should be noted however that this may not necessarily be the case in all circumstances.

HMRC notes that:

- There is no supply for VAT purposes of 'the right to terminate' or other such service where a contract originally contains a clause allowing the parties to terminate early in lieu of compensation for perceived losses arising from the termination.

- However, there will be supplies where no such right exists and agreements have separately to be reached properly to terminate the contracts. This is so, even if there is much talk of monetary '*compensation*' in these agreements.

Deposits

A security deposit (ie deposit retained whilst goods are let on hire) is not consideration for a supply. Even where the deposit is not refunded because the recipient of the goods in question has breached the terms of the contract (eg hire contract), the deposit amount does not constitute consideration for the original hire.

However, where the deposit is meant to be adjusted against the final consideration payable for a supply, this will constitute consideration for the purposes of VAT. Where the supply does not take place and the deposit is refunded, no supply will take place and therefore this deposit payment will not be regarded as consideration. An adjustment will be required where part supply takes place.

Donations and EU/Governmental grants

A payment made without any expectation of a reciprocal benefit is not consideration for the purposes of VAT. Similarly, where any goods or services are given away for no consideration, no supply can be said to have taken place.

Where a provider of services provides services free of cost but suggests that the recipient makes a token payment to be made to charity, provided this is not a condition precedent to the services being provided for free, such payment will not constitute consideration.

On the other hand, where in return for a payment, a person is required to market or promote the payer or his products; this will be treated as an advertising/sponsorship payment and will constitute consideration for a supply (being of advertising services).

The question of whether a grant from a governmental or EU authority constitutes consideration is more complicated and depends on whether a clear link can be established between the grant and the activities that the grantee is required to undertake in return for the grant. Where the governmental or EU authority derives a direct benefit, a supply can be said to take place and the grant may be seen as consideration for this supply. Furthermore, where the governmental or EU authority provides such a grant in return for the supply of services to a third party by the person receiving the grant, this may be seen as a supply for the purposes of VAT.

Tips and gratuities

Provided that such tips and gratuities are voluntary and are not expressed as condition for the underlying supply to be made (eg supply of food in a restaurant), this will not constitute consideration for such a supply.

It is not unusual for some restaurants to charge non-optional service fees – any such payment will constitute consideration for the purposes of VAT.

Rent free periods & reverse premiums

Where the rent-free periods are offered:

- in order for the tenant business to fit out the premises to its specifications (thereby not being able to use the premises fully during that time); or

- in order to reduce the actual rent to a market level while the lease still shows the higher level (giving the landlord more scope in setting rent for future tenants)

they are not consideration for supplies by the tenants.

However, where such rent-free periods directly relate to actions tenants are required to undertake for the landlords' benefit – usually carrying out building works that improve the properties, such rent-free periods will represent consideration for taxable supplies by tenants to their landlords.

Payments of reverse premium will also not constitute consideration for supplies provided they are no more than inducements to tenants to take leases and to observe the obligations in them. However, where such a payment is directly linked to benefits the tenant provides outside the normal lease term this will give rise to a taxable supply and the payment of such premium will constitute consideration for such supplies.

3. Classification of supplies

Although, as mentioned earlier, the system of United Kingdom VAT sidesteps from defining the term '*supply*' precisely, it does however classify this term into three neat categories. A '*supply*', for VAT purposes, is therefore either:

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- A supply of goods;
- A supply of services; or
- A supply that is treated as neither a supply of goods nor a supply of services.

The importance of this classification cannot be overstated, as this underpins the complex and elaborate system of VAT – the applicability of the correct rate of VAT to a supply, the determination of the time of supply and person from whom such VAT should be collected and in what manner, the place where a supply is said to take place for the purposes of VAT and the mechanism of VAT recovery (and its extent) are all determined on the basis of this classification.

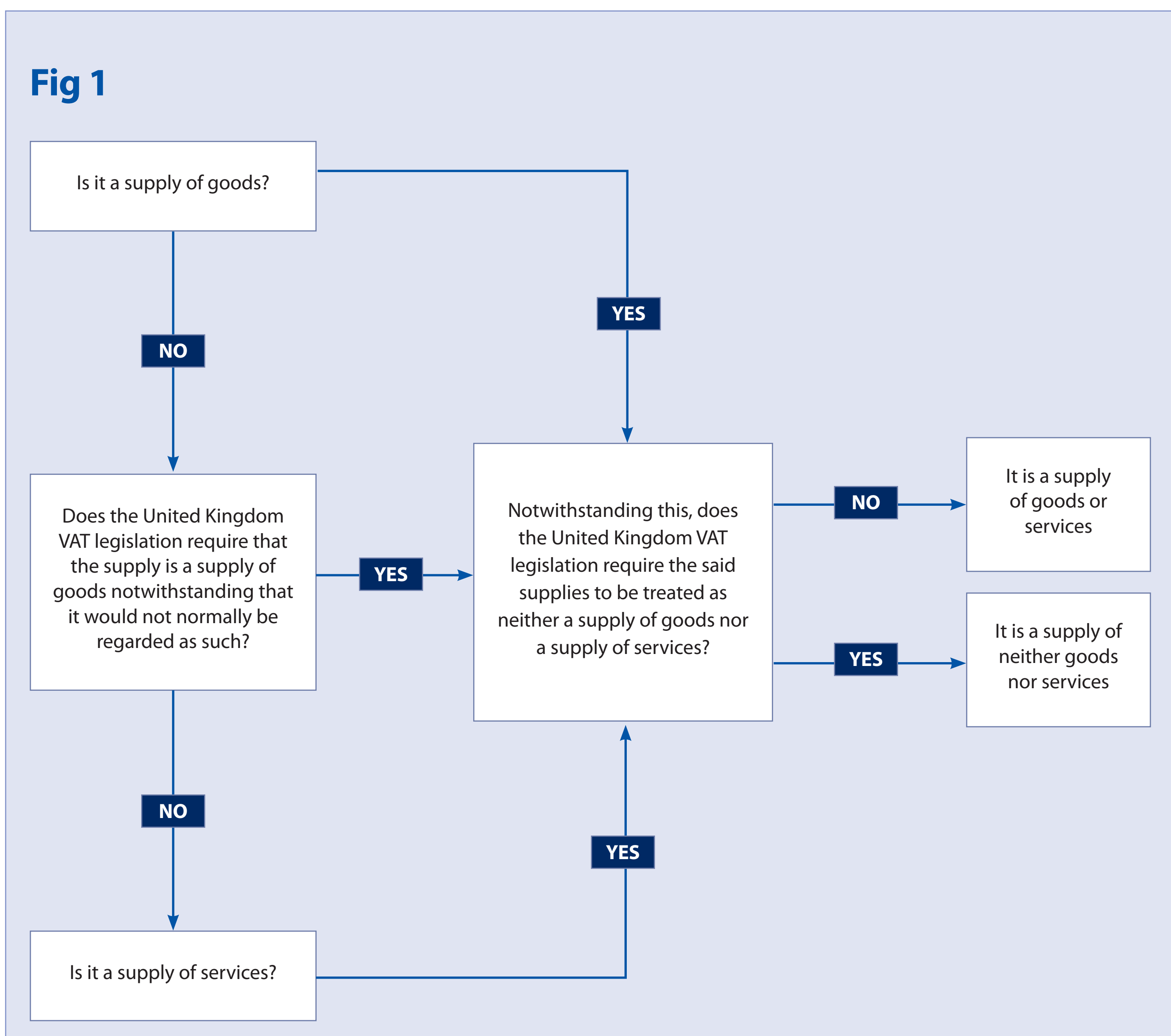
It is also pertinent to note that the application of United Kingdom VAT legislation operates consistently with the manner in which supplies are to be classified into the categories mentioned earlier. This manner of classification prescribed by the legislation is illustrated in the form of a flow chart in Fig 1.

4. Supply of goods

The United Kingdom VAT legislation makes an attempt at describing what is a supply of goods for the purposes of VAT. This description of a supply of goods for the purposes of VAT can be classified into the following broad categories.

4.1 Any transfer of the whole property in goods

Where there is a transfer of the right to dispose of the legal title to and/or the possession of, or control over, tangible property, there would be a supply of goods. This description is intentionally crafted in very broad terms. The key terms here are *'transfer'*, *'tangible'* property and *'whole property'*. *'Transfer'* taking its literal meaning pre-supposes the passing of something from one person to another. *'Tangible'* , taking its literal and substantive meaning here, means anything that can be touched and therefore includes



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both movable and immovable property.

The meaning of the term *'whole property'* on the other hand is somewhat more complex – it is generally understood as including all the rights derived from ownership of the property in question.

Therefore it appears that the transfer of both title to the goods and possession of, or control over, the goods would be a transfer of the whole property in goods.

4.2 The transfer of possession of goods

The question of whether simply the transfer of possession of goods but not legal title is a supply of goods or services is particularly complicated and somewhat perplexing. Under the United Kingdom VAT rules (as they are at present), where possession of goods is granted by one person to another but legal title continues to remain with the grantor, there cannot be supply of goods (but that could be a supply of services). However, United Kingdom VAT legislation provides that there is a supply of goods where the possession of the goods is transferred under an agreement for the sale of goods or where an agreement expressly contemplates that the legal title to the goods will also pass at some future time.

Therefore, under the United Kingdom VAT rules (as they are at present), supplies under hire purchase agreements or conditional sale contract would be supplies of goods rather than services provided, that (a) the title in the goods passes at the time determined by, or ascertainable from, the agreement and (b) the title passes no later than the time when the goods are fully paid for. It is pertinent to note here that if under a hire purchase or conditional sale contract, goods are repossessed for whatever reasons, this does not change the nature of the supply (ie the supply being one of goods).

In practice, there are many types of legal arrangements where the possession of goods is transferred to begin with and legal documentation envisages future transfer of title in certain circumstances. It is necessary in such circumstances to understand the substance of the commercial intentions and the wording of the legal documentation to determine whether a supply of goods can be said to take place there.

It is worth noting here that, following the decision of the ECJ in *Eon Aset Menidjment OOD v Direktor na Direktsia* '*Obzhalvane i upravelnie na izpalnenieto*' (C-118/11), the United Kingdom VAT rules described above may arguably be seen as being cast in narrower terms than what is envisaged by the Directive. The ECJ in that case concluded that where a finance lease *'provides either that the ownership...is to be transferred to the lessee on the expiry of that contract or that the lessee is to possess all the essential powers attaching to the ownership...and in particular, that substantially all the rewards and risks incidental to legal ownership...are transferred to the lessee and that the present value of the amount of the lease payments is practically identical to the market value of the property, the transaction must be treated as the acquisition of capital goods'*. Under current United Kingdom legislation as interpreted by HMRC, finance leases that do not provide for transfer of legal title of the goods are treated as supplies of services. In light of the judgment of the ECJ in the case referred to above, it is possible to argue that this United Kingdom treatment of finance leases (possessing the attributes referred to in the ECJ judgment) is inconsistent with the Directive and therefore some change in United Kingdom VAT legislation or HMRC treatment of such transactions may be forthcoming in the near future.

4.3 The grant, assignment or surrender of a major interest in land

The grant of a fee simple or a tenancy over land for a term certain exceeding 21 years (and in the case of Scotland interest of the owner, or the lessee's interest under a lease for a period of not less than 20 years) is a supply of goods.

4.4 Power, heat, refrigeration or other cooling, etc

The supply of any form of power, heat, refrigeration or other cooling, or ventilation and the supply of water are also treated as supplies of goods.

5. Supply of services

Unlike goods, which are tangible and therefore can be defined or described to an extent, defining services represents a legislator's nightmare. Define the supply of services too prescriptively and you may have various services falling outside of the definition and thereby escaping liability to VAT. Define it too broadly and you end up including things which you may not really intend to be treated as services and therefore subject to the VAT regime, with the resulting ambiguity for taxpayers and taxing authorities alike which the courts would then have to resolve. Unsurprisingly, United Kingdom legislation has taken the latter approach by defining services as *'anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services'.*[12]

So essentially, where anything is done for a consideration, provided it is not a supply of goods (or specified as neither supplies of goods nor services by VAT legislation), it is a supply of services for the purposes of VAT. This concept of '*anything done*' may seem to be excessively broad in that it is possible to view this as capturing all forms of functions carried out by a person within the definition of supply of services. That would be an erroneous view to take – for there to be a supply of services not only does something (anything) need to be done but it should be done for a consideration (the fundamental requirement for there to be a supply of any kind). It follows logically that where the carrying out of a function is independent of any payment made (ie consideration) and vice versa, no supply of services can be said to have taken place (except where otherwise expressly prescribed by the legislation).

5.1 The link between 'consideration' and services

In most day to day circumstances it will not be difficult to see a clear link between the two elements – the supplier and the recipient will both be aware that something (clearly identifiable by

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its very nature) was indeed done by the supplier in return for a payment by the recipient. However, in some circumstances it will not be readily apparent as to whether anything was done for a payment made – in particular it may be unclear whether a payment by one person was made for something done by the other person as a reciprocal gesture.

This link between the payment and '*anything done*' has to be established by reference to the true legal nature of the existing relationship between the parties, their intentions and whether there is a benefit obtained by someone in respect of which the payment is made. For example, in one case,[13] the state provided legal aid for applicants who could not afford to pay for legal representation. However, an applicant was required to make a contribution to the legal costs if his disposable income exceeded certain limits, and the Commission took the view that this contribution was consideration for a taxable supply. The ECJ held, however, that since the contribution was based on the ability of the applicant to pay, rather than the value of the service supplied, the link between the payment and the services was not established.

Contrast this with a case in which the taxpayer received a payment from the landlord of premises in return for entering into a lease of those premises, where it was held that the taxpayer made a supply of services in agreeing to accept the lease. However, in a subsequent case[14] it was held that the taxpayer does not make a supply simply by entering into a lease, even for a payment from the landlord, unless –

> *'the landlord, taking the view that the presence of an anchor tenant in the building containing the leased premises will attract other tenants, were to make a payment by way of consideration for the future tenant's undertaking to transfer its business to the building concerned. In those circumstances, the undertaking of such a tenant could be qualified, as the United Kingdom government in essence submits, as a taxable supply of advertising services.'*

The inferences that can be drawn from these cases are – (a) it is important to determine whether the payment is being made for anything to be done by any person; (b) whether that '*anything done*' by any person has sufficient link to the payment made; and (c) whether that '*anything done*' is or will be done in return for such a payment being made.

5.2 'United Kingdom legislation prescribed' supplies of services

In addition to this general definition of supply of services, the United Kingdom legislation specifically lists out the following supplies as supplies of services:

(1) The transfer of any undivided share of the property in goods

This relates to circumstances where title to goods is shared equally between persons (where such sharing of title is possible by law). If only a part share is sold, title to the goods does not pass to the new owner of the part share and this supply is therefore of services not goods. In contrast, if all the shares in goods are simultaneously sold to one person, there will be a supply of goods. The common example of an undivided share in property is a nomination in a race horse.

(2) The transfer of possession of goods

Where transfer of possession of goods occurs without a transfer of legal title (at the time of the transfer and none is intended in the future), for example in a hire, lease, rental or loan of goods scenario, a supply of services will be said to take place. Footnote: see 4.2 (particularly relating to the recent ECJ decision in *Eon Aset Menidjment OOD v Direktor na Direktsia* (C-118/11)).

(3) Work done on another person's goods

Any work done on another person's goods is a supply of service.

Example 4

John, a carpenter, contracts with a customer (C) who provides him with raw material (wood, etc) to build a set of customised and bespoke furniture at the premises of for a consideration. John is supplying services.

(4) Non-business use of goods and services

Where, by or under the direction of a person carrying on a business, goods held or used for the purposes of the business are put to private or non-business use, whether or not for a consideration, that is a supply of services.

(5) Exchange units

The exchange of a reconditioned article for an unserviceable article of a similar kind by a person who regularly offers, in the course or furtherance of his business, to provide a reconditioning facility by that means. However, if the exchange is not part of the person's normal business practice or if the goods are exchanged for other goods at a discount, the transaction is a supply of goods on a part-exchange basis and not services.

6. Supplies of neither goods nor services

There are various transactions which the United Kingdom VAT legislation expressly requires to be treated neither as a supply of goods nor services. A list of some of the most commonly encountered transactions is set out below:

6.1 Transfer of a going concern

The supply by a person of the assets of his business to another person to whom he transfers his business (or part thereof) as a going concern (provided certain conditions are satisfied) is not treated as a supply of goods or a supply of services.

These conditions are summarised below:

- the assets of the business are to be used by the purchaser in

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carrying on the same kind of business as the transferor;

- where the seller is a taxable person, the transferor must be a taxable person already or become one as a result of the transfer;
- in respect of land which would be standard-rated if it were supplied, the transferor must notify HMRC of an option to tax in relation to the land by the relevant date; and must notify the transferor that his option has not been disapplied by the same date;
- where only part of the 'business' is being sold, it must be capable of separate operation; and
- there should be no '*immediately*' consecutive transfer of the assets.

This issue of the digest does not purport to analyse this concept of a transfer of going concern – it may be that a future edition of the digest will focus primarily on this area of VAT law.

Example 5

ABC Ltd sells all its assets (comprising together a newspaper publishing business) to EFG Ltd. Both ABC Ltd and EFG Ltd are registered for VAT in the United Kingdom and the assets being sold constitute a tangible business. This supply of assets should be treated as a supply of neither goods nor services and should not attract VAT (provided all the conditions of TOGC are met).

6.2 The assignment of rights under an HP or conditional sales agreement

The assignment of rights under an HP or conditional sales agreement, and the goods relating thereto, by the owner of a bank or other financial institution is neither a supply of goods nor services.

6.3 Repossessed goods

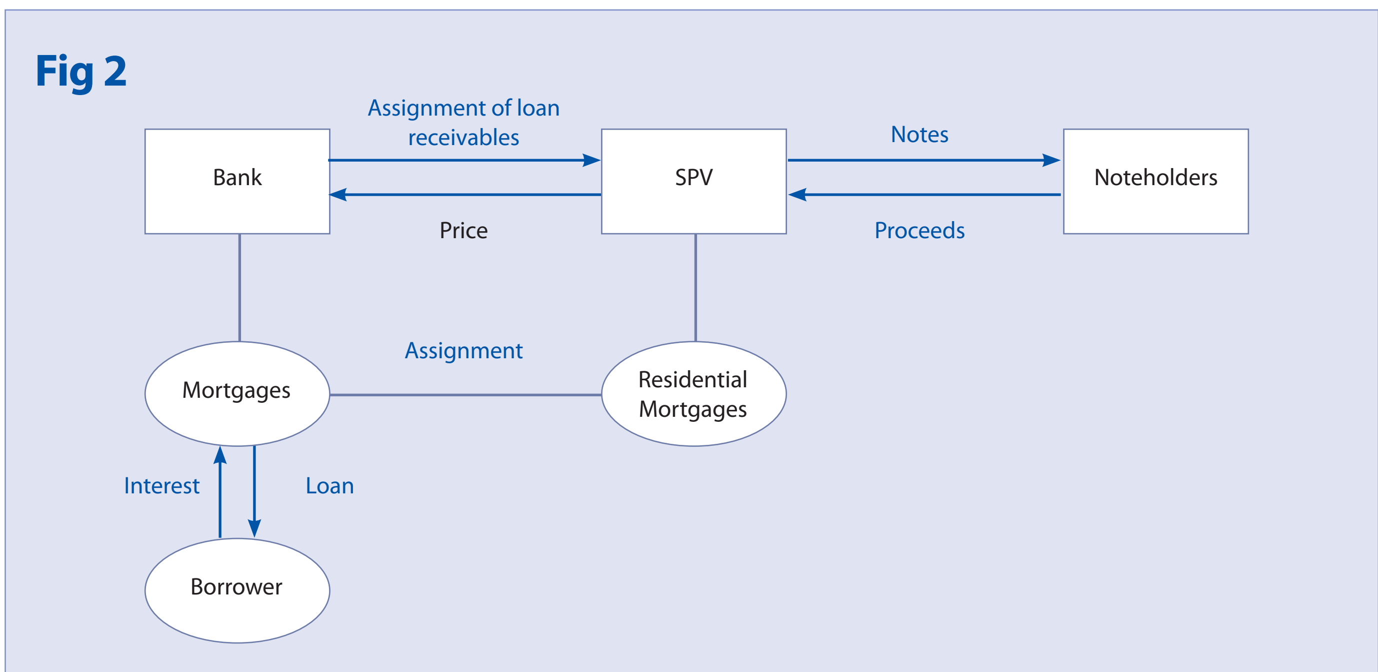
The sale of certain goods by a person, including a finance company, who has repossessed them under the terms of a finance agreement or by an insured in settlement of a claim under an insurance policy (provided certain conditions are met) does not constitute a supply of goods or services.

6.4 Supplies between group companies

Where a group of companies has registered as a VAT group, most supplies of goods or services by one member of a group to another are disregarded. However, it must be noted that certain statutorily prescribed supplies of goods and/or services are not disregarded in such circumstances. In addition, HMRC is empowered under the VAT legislation to direct that certain supplies made between two members of the same VAT group, which would otherwise be disregarded, are not disregarded.

7. The fiction of a non-supply – securitisations

Securitisation is a common tool used by large banks and other financial institutions to obtain working capital at favourable rates of interest. In a securitisation, a newly incorporated special purpose vehicle (SPV) issues loan notes to investors to fund the purchase of receivables (usually current and future revenue streams of the bank – ie debt receivables). The SPV uses the receipts from the receivables to pay interest and principal due on the securities and to pay any other costs and expenses it may



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have, in accordance with a specified priority order of payments.

The VAT treatment of securitisations has been the subject of two appeals in the past decade and the more recent of the two appeals has given rise to a new concept of '*non-supply*'.[15] This concept has been defined as those supplies which are *'in theory capable of constituting supplies' but 'belonging to the exceptional class of transactions which look prima facie like a supply, but which lose that character when viewed in their context.'*

The supplies being referred to here were the assignment of the assets by the bank in a securitisation transaction (of the kind described earlier). In addition the court observed that other such 'non-supplies' would include (a) the sale of currency to a foreign exchange dealer to obtain an exchange service; (b) the assignment of debts to a factor to obtain a factoring service; and (c) the assignment of property to a lender as security for a loan.

Closer examination of this new class of '*non-supply*' in the context of securitisations is not within the scope of this issue of the *digest*, however, this new class of '*non-supply*' has been briefly summarised here merely for completeness.

See fig 2, p11

8. Multiple supplies

Given that different VAT liability attaches to different goods and/or services, the supply of a bundle of identifiable goods and/or services gives rise to its own sets of problems (particularly where the different goods and/or services have different VAT liability). For example, it is not uncommon for an airline (not the low cost carriers of course), to provide food and beverages as a normal feature of its service as an air transportation service provider. It is clear that, if one were to be pedantic, for the consideration the passenger pays for his air ticket, he gets two services – one being air transportation (generally a zero-rated supply for the purposes of VAT) and another being a supply of meals and beverages (ie the in-flight catering provided by the airline). Should the consideration be apportioned between the in-flight catering service and air transportation service and VAT charged on the in-flight catering service (being subject to VAT at the standard rate in the United Kingdom)? Surely, a passenger does not fly in an airplane to primarily enjoy the meal (at least this author does not) and therefore the in-flight meal is not an aim in itself from the perspective of the recipient (or for that matter the supplier here) – it merely helps make the trip more enjoyable (or not as the case may be). Would the conclusion be any different if the passenger were to be flying in a low-cost carrier and had to purchase meals and/or beverages separately for a consideration?

As is becoming clear, there are no easy answers here – this is an area of VAT law which is littered with cases considering whether supplies of a bundle of goods and/or services constitute a single supply (with the result that there is only one VAT liability) or multiple supply (with the result that each supply within the bundle of supplies attracts VAT by reference to that supply in question).

A single supply (or composite supply as it is sometimes referred to) is where a supplier is deemed to make a single supply to the recipient, although the supply itself may consist of two or more identifiable elements (ie goods and/or services). A multiple supply is where a supplier is deemed to make several separate supplies to a recipient even though the supplies may be supplied as a bundle and usually at the same time. Often, where there is no difference in VAT liability of the goods and services comprising a bundle of supplies it will not matter whether a single supply or multiple supplies is/are deemed to be made. However, it will be important where each identifiable element would, if treated as a separate supply, carry a different VAT liability.

The leading case on this area in the United Kingdom is the decision of the House of Lords (and the ECJ) in *Card Protection Plan Limited v Commissioners of Customs & Excise*[16] which sets out some ground rules in determining whether a bundle of supplies constitutes a single supply or multiple supplies for the purposes of VAT. Although the ECJ stated in this case that '…*having regard to the diversity of commercial operations it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases*', it did give useful guidance (set out below) on what rule of thumb to apply in determining whether a bundle of supplies constitutes single or multiple supplies:

- When considering a transaction that consists of a number of components, regard must be given to all the circumstances in which that transaction takes place;
- Each supply of a service must normally be regarded as distinct and independent;
- A supply that comprises a single service from an economic point of view should not be artificially split – the essential features of the transaction must be ascertained to decide if the supply to a typical customer comprises several distinct principal services or a single service;
- There is a single supply in cases where one or more elements are to be regarded as ancillary services. An ancillary service is defined as something that does not constitute for customers an aim in itself but is a means of better enjoying the principal service supplied;
- The fact that a single price is charged is not decisive. If the circumstances indicate that customers intend to purchase two or more distinct services, a single price will not prevent these being treated as separate supplies with different liabilities applying, if appropriate, to those services.

It should be noted that although the ECJ decision referred to here only refers to a bundle of supplies comprising services, the criteria set out above apply equally to transactions comprising goods and/or services.

On the basis of the above principles, if we were to revisit the example of air transport and in-flight meal (referred to above), it would be right to conclude that where the passenger pays a single consideration for air transportation and gets in-flight meals as a normal feature of air transportation, the in-flight catering services should be viewed as ancillary to the main dominant supply being that of passenger transport – on that basis the supply should be zero-rated.

It is not intended that this issue of the digest covers this area of VAT law in any further detail – it will suffice to note here that where transactions involving separately identifiable goods and/or services take place, it is necessary to determine whether the

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supply is a single or multiple supply in order to arrive at the correct VAT liability (and treatment) of the supply in question and this determination may not always be a straightforward one to make.

9. Place of supply

A supply of goods or services may be said to have taken place for the purposes of VAT. It may even be a taxable supply made by a taxable person in the course or furtherance of business, but no VAT can arise in the United Kingdom unless the supply in question takes place in the United Kingdom. For the purposes of VAT, the country where a supply is deemed to be made is called the '*place of supply*' and is the place where it is liable to VAT, if any is payable.

Given the fundamental difference in the nature and substance of goods and services, it follows that the rules for determining whether or not a supply takes place in the United Kingdom must be different for goods and services. It would also have to be consistent with the equivalent rules in other EU jurisdictions in order to ensure that VAT, where payable, is paid only in the correct country and to avoid the possibility of supplies being taxed more than once or not at all. For this reason the place of supply rules are one of those few areas of the European VAT system where there is a remarkable uniformity and harmony (save for a few exceptions) in the application of the fundamental principles enshrined in the VAT directives.

Given the tangible and corporeal nature of goods, the place of supply of goods is generally determined by reference to the location of the goods in question and its previous and subsequent movements. As it is not possible to determine the location of something as incorporeal and intangible as services, the place of supply of services is determined generally by reference to the location of the parties to the transaction in question. As with everything to do with VAT, there are exceptions to these general principles.

10. Place of supply of goods

The general rule to be applied in determining the place of supply of goods is that goods are to be treated as supplied in the United Kingdom if (a) they are in the United Kingdom; and (b) the supply does not involve their removal from the United Kingdom or otherwise as supplied outside the United Kingdom.

It is therefore clear that, as has been expressed earlier in this digest, the place of supply of goods is generally based on the physical location of the goods. It is also apparent from the general rule that where a supply of goods involves goods that are located in the United Kingdom and does not involve their removal from the United Kingdom, the place of supply of such goods is the United Kingdom and therefore within the scope of United Kingdom VAT. Where the goods are located outside the United Kingdom (and the goods do not enter the United Kingdom), the place of supply of the goods will be outside the United Kingdom and outside the scope of United Kingdom VAT.

It should be noted that the expressions '*removed*' and '*removal*' used in the legislation are not defined therein and should, as a consequence, be given their usual, everyday meaning; that is that the goods are physically moved from one location to another. It should also be noted that a '*removal*' for these purposes is not a removal of goods from the United Kingdom for the purposes of the VAT legislation if, in the course of their removal from a place in the United Kingdom to another place in the United Kingdom, the goods leave and re-enter the United Kingdom.

Where goods are '*removed*' from the United Kingdom, the general rule (outlined above) is to be ignored and replaced with one of the '*special rules*' outlined in the legislation.

10.1 Supplies of goods involving installation or assembly

Where the supply of goods involves their installation or assembly by the person making the supply (or his agent), the place of supply is where the installation or assembly of the goods take place.

The legislative provisions pertaining to place of supply of goods contain various expressions (such as '*removed*' and '*removal*' referred to earlier) including 'installation' and 'assembly' which are to be given their ordinary literal meaning as the legislation does not define these expressions. The special rule referred to here should be viewed in that context.

Two keys points of practical relevance need to be noted here – (a) although in the vast majority of the supplies of goods where '*installation*' and/or '*assembly*' is envisaged, complex machinery or electronics may well be involved, it is not necessary that this be so for this special rule to apply – some (any) element of installation and assembly is sufficient provided that the commercial arrangements require such installation and/or assembly to be made by the supplier (or his agent); and (b) although it is possible that an overseas supplier installing or assembling goods in the United Kingdom (on a '*one-off*' basis) may become liable to register for VAT in the United Kingdom (depending on the annual turn-over, etc), simplification arrangements exist for eligible EU traders whereby a VAT registration may not be required. A non-EU supplier can, exceptionally, treat the supply as taking place outside the United Kingdom (notwithstanding the installation or assembly of the goods in the United Kingdom by him or his agent) provided that the recipient of the goods acts as the importer on record of the goods and the consideration declared on importation documents includes the consideration payable for the installation and/or assembly of the goods.

10.2 Distance selling

Distance selling refers to those supplies where the supplier delivers the goods from one member state to another to a non-VAT registered customer (ie private individuals, charities and also persons or businesses exempt from a VAT registration).

The distance selling rules were originally introduced to prevent

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the obtaining of an undue trade competitiveness advantage by a business located in a low VAT rate member state which could sell mainly to private individuals (through say mail order) in a higher VAT rate member state and charge the low rate of VAT applicable in the member state where it is located by virtue of the general rule applying.

Under the distance selling rule, where a non-United Kingdom but EU supplier makes distance sales to customers located in the United Kingdom and (a) the value of supplies to United Kingdom customers exceeds the United Kingdom VAT registration threshold or the supplier has otherwise voluntarily registered for VAT in the United Kingdom; or (b) the supply involves goods that are subject to excise duty (in which case the threshold does not apply), then, notwithstanding the general rule, the place of supply of goods in such circumstances will be the United Kingdom. Consequently, the supplier of goods in such cases will become liable to register for United Kingdom VAT.

Equally, where a United Kingdom supplier makes distance sales to customers in another EU member state and where (a) the United Kingdom supplier exceeds the '*distance selling threshold*' in that other EU member state or has otherwise registered for VAT in that other EU member state; or (b) the goods are subject to excise duty in the other EU member state, the place of supply will be the other member state and not the United Kingdom.

The current distance selling threshold that (is set by) EU member states is set at a minimum of 35,000 Euros and a maximum of 100,000 Euros.

New means of transport (see further below) are excluded from distance selling arrangements.

10.3 Exports and imports & dispatches and acquisition

Where a supplier imports goods into the United Kingdom and subsequently makes a supply of goods to a United Kingdom customer, the place of supply of such goods is deemed to be the United Kingdom. In contrast, if the United Kingdom customer imports the goods (as the importer on record), the supply is treated as taking place outside the United Kingdom for the purposes of VAT.

Where a supply of goods involves the export of the goods from the United Kingdom to a place outside the EU without also involving their previous removal to the United Kingdom, the place of supply is treated as being the United Kingdom. **Note**: *This means that the supply of goods in such circumstances is prima facie subject to United Kingdom VAT although the supplier will be able to zero rate the sale provided that certain requirements in relation to export (eg obtaining evidence of the export) are met.*

The concepts of '*import*' and '*export*' apply only where goods enter or leave the EU. The terms '*acquisition*' and '*dispatch*' are used instead where supplies take place within the EU but between member states (referred to commonly as intra-EU supply of goods). Accordingly, it is not surprising to note that the above place of supply principles applying to exports and imports apply roughly similarly to dispatches and acquisitions.

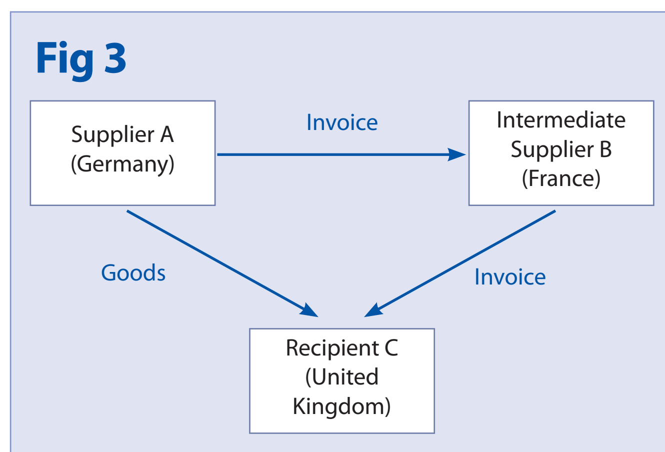
Where an intra-EU supply of goods takes place between VAT-registered persons, a supplier in one EU country need not charge VAT on the dispatch of goods to the recipient in another EU country (although the place of supply of such goods is the place from which the goods are dispatched. Instead the recipient of such goods will be required to account for any VAT due on acquisition of the said goods in that another EU country. This ensures that, at least where VAT registered persons are involved, VAT is due in the jurisdiction of consumption and not by reference to its jurisdiction of origin.

In contrast, where an intra-EU supply of goods takes place and the recipient is not a VAT registered person, VAT is normally charged and accounted for by the supplier in the EU country from which the goods are dispatched.

10.4 Chain supplies and triangulation

The application of the place of supply rules becomes particularly complicated where a series or chain of supplies take place and results in an intra-EU movement of goods.

Let us consider the following example (illustrated diagrammatically below)



In the example, there is a supply from A to B and then from B to C, although the goods are delivered directly to C by A (at the instructions of B). This chain of supplies involving three parties in different member states where goods, instead of passing through the chain, are delivered directly by the original supplier to the final recipient is often referred to as '*triangulation*'.

Applying the first principles of place of supply here, in the absence of any simplification procedure, there would be a dispatch from A to B and a corresponding acquisition by B in the United Kingdom followed by an onward domestic sale in the United Kingdom by B to C thereby requiring B to register for VAT in the United Kingdom (provided that the VAT registration thresholds are exceeded).

In such circumstances, provided that certain conditions are met and the intermediate supplier satisfies certain procedural requirements, a simplification procedure is available, whereby the supply from the original supplier (A in the example above) to the intermediate

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supplier (B in the example above) is ignored for VAT purposes (with the result that the intermediate supplier (B) will not be required to register for United Kingdom VAT merely by reference to the supply to the recipient (C)). The original supplier (A) is therefore able to zero rate the dispatch to (C) – (C) will be required to self-account for VAT on the acquisition of the goods from (B).

It is important to note that the simplified treatment described above is only available to triangulation scenarios – where two of the three parties are in one member state and the third in another, the simplified treatment described above cannot apply.

Let us consider the following example – an Austrian VAT registered person A supplies goods to another Austrian VAT registered person B who in turn supplies the said goods to C, a United Kingdom VAT registered person. The goods located in Austria are removed from Austria and delivered to C in the United Kingdom. It is important in such a scenario to ascertain which of the supplies (ie supplies from A to B and then from B to C) represents an intra-EU supply which attracts zero rating (on the basis of it being a dispatch – see 9.3 above). It is logical to treat the B to C supply as the intra-EU supply of goods as any other treatment (namely treating the A to B supply as the intra-EU supply of goods) would give rise to seemingly unintended consequences (one of which being that B in the above scenario will have a VAT registration obligation in the United Kingdom if the supplies were to exceed the VAT registration threshold).

A scenario (similar to what is described above) was considered by the ECJ in a recent case.[17] In this case the ECJ confirmed that where there are two successive supplies of goods (in a scenario such as one provided as an example above), only one of those supplies should be treated as an intra-EU supply of goods capable of being zero-rated in the member state of dispatch. The ECJ's view is that this is the only logical way to interpret the EU Sixth Directive, which results in VAT being due in the member state of consumption. What the ECJ did not identify however is which of the supplies in a series of supplies should be regarded as the intra-EU supplies – this leaves open a slight ambiguity where the chain of supplies takes more complicated forms than the simple scenario outlined above (where there can really be only one logical outcome).

Although HMRC states that in identifying which of the supplies in a chain of supplies should be treated as an intra-EU supply, it will take into account the entire factual circumstances relating to the transaction and seek to avoid *'arriving at a position which requires one of the parties to register in the United Kingdom when the transactions could be accommodated within existing VAT registrations'*, it is pertinent to remember that VAT treatment is less than straightforward in such circumstances and scenarios such as the above example will therefore require careful consideration.

10.5 Intra-EU movement of own goods

The movement of goods within the same legal entity from one EU country to another is deemed to be a supply for the purposes of VAT and is therefore an exception to the basic concept of supply (involving a transfer from one legal person to another).

In the absence of any statutorily prescribed special rules as to the place of supply of such movement of goods, the normal rules for intra-EU movements of goods apply.

An example of such intra-EU movement of goods within a legal entity is the movement of consignment stock (such stock being goods moved from one EU country to another by a trader to create a stock in that other country from which supplies may be made periodically as required). In such cases there is a deemed supply of own goods the place of supply of which is the member state from which the goods are originally dispatched. The place of any subsequent supplies of the goods, once a buyer has been found, will usually be the member state in which the stock is located.

The United Kingdom VAT rules allow an overseas supplier holding consignment stock in the United Kingdom to appoint an agent registered for VAT in the United Kingdom to account for the acquisition VAT arising from the movement of stock to the United Kingdom (on behalf of the overseas supplier) and also to account for any VAT on on-sale of such stock. This is an alternative to United Kingdom VAT registration, which is available to the overseas supplier.

11. Place of supply of services

There are various *'place of supply'* rules applicable to different kinds of services to determine where they are deemed to be supplied for the purposes of VAT.

Where the place of supply of services is the United Kingdom, that supply is within the scope of United Kingdom VAT. Where the place of supply of services is in another EU member state, that supply is outside the scope of United Kingdom VAT but should be within the scope of the VAT rules of that other EU member state and liable to VAT in that country and no other. If the place of supply of a service is outside the EU, that supply is outside the scope of the European scheme of VAT altogether and is therefore not liable to VAT within the EU.

These rules may at first sight seem unnecessarily complicated and somewhat counter-intuitive in that they may seem to apply by establishing a general rule which applies only as refuge of last resort after the exceptions to this rule have been considered and discarded. This is intentional and will make logical sense if the underlying principle forming the basis of these rules is borne in mind – the general rule is the rule covering the majority of services provided by businesses; however for certain specified classes or kinds of services, EU member states have to deviate from the general rule to maintain fiscal competitiveness of their domestic supplier and to be able to do so, it is necessary to introduce these exceptions for such specific categories of services which will need be considered only where such specific categories of services are being supplied or received. The key determination therefore is whether the services in question fall within the specific category and where that is not the case, the special rules need not be considered further, as the general rule shall apply.

11.1 The general rule

The place of supply of services is:

(1) where the supply is to a *'relevant business person'*, where the recipient belongs; and

(2) where the supply is not to a '*relevant business person*', where the supplier belongs.

In order to understand the application of these rules, it is necessary to consider the meaning of the expressions '*relevant business person*' and '*where the recipient belongs*' (**Note:** *In this digest, references to 'business person' and 'non-business person' are sometimes used as an alternative to 'relevant business person' and a non-'relevant business person'.)*

11.2 *'Establishment', 'fixed place of establishment' & 'usual place of residence'*

A relevant business person is defined by the VAT Act 1994 as anyone who is either:

- a taxable person within the scope of Article 9 of the Directive;
- registered for VAT in the United Kingdom;
- registered for VAT in the Isle of Man;

provided that the services in question are received by the person otherwise than wholly for private purposes.

It should be noted that Article 9 of the Directive defines a taxable person in wide terms as meaning any person who independently carries out in any place any economic activity, whatever the purpose or results of that activity. It is not intended to discuss what the carrying on of an '*economic activity*' is for these purposes, as in most cases it will be apparent whether or not a person in question carries on an economic activity.

It might be interesting to note however that some recipients of a service may have non-business activities (such as charities) but notwithstanding their profit motive or non-business activities, these recipients will still be treated as a '*relevant business person*' if they are one, irrespective of what use they put the services to and provided that they do not receive the services for wholly private use.

A business, whether supplier or recipient of a service, belongs in the country:

- where the person has a business establishment, or some other fixed establishment; or
- where, if the person has a business establishment, or some other fixed establishment or establishments, in more than one country, the country in which the relevant establishment (ie the establishment most directly concerned with the supply) is; or
- otherwise, where the person's usual place of residence is located, if he has no business or other fixed establishment (the usual place of residence for a body corporate is where it is legally constituted).

The term '*business establishment*' or '*fixed establishment*' is not defined in United Kingdom or EU law. There is however a substantial body of case law[18] which sheds some light into how these terms should be interpreted in this context.

The ECJ has ruled that the term business establishment means the place where the essential decisions concerning the general management of a company are adopted and where the functions of its central administration are carried out. It is useful to consider what the ECJ had to say in this regard:

> *'Determination of a company's place of business requires a series of factors to be taken into consideration, foremost amongst which are its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account.'*

HMRC holds the view that '*business establishment*' means the principal place of business of a supplier, being a single place which is usually the head office, headquarters, or '*seat*' of the business from which the business is run. HMRC also accepts that where a business has a headquarters in one country and other premises located in different countries, the headquarters is the *business establishment* for the purposes of the place of supply rules, and the premises in other countries are '*other fixed establishments*'.

Various United Kingdom VAT tribunals have consistently found that where there are no permanent premises from which a business is carried on, there is no business establishment.[19]

The term *fixed establishment* is interpreted by HMRC to mean '*an establishment, other than the business establishment, from which the activities of the organisation are carried out and which has the permanent presence of both the human and technical resources necessary for making or receiving the supplies of services in question (and it is not appropriate to deem the supplies in question to have been provided at or from the place where the supplier has established their business).*' It should be noted that a VAT registration in itself is not sufficient to create a '*fixed establishment*'.

When a business has establishments in different countries, the place of belonging under United Kingdom law is determined by reference to the establishment most directly concerned with the supply. There is no definite test to be applied to determine the establishment '*most directly*' connected with the supply in question and therefore, this is a determination which will have to be made on facts considering the various factors pertinent to making this determination. Case law has pointed out some of the key factors to be taken into account in arriving at this determination and such factors have been neatly summarised by HMRC in one of the VAT manuals (and this is reproduced below):

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- how are the particular services provided?
- what is the significance of the activities carried out at each establishment in contributing to the services provided?
- where are the necessary human and technical resources (for example database, technical equipment, office equipment, telephones, and so on) for actually providing the services permanently based?
- which establishment appears on the relevant contracts, correspondence and invoices?
- where are the directors or other personnel who entered into the contract permanently based?
- where are decisions taken and controls exercised over the performance of the contracts?
- does reference to the preferred establishment lead to a more appropriate or rational result for tax purposes?

Practical Tips

To determine where a business (whether supplier or recipient of a service) belongs:

- First take into account the economic substance and reality as opposed to the contractual provisions or descriptions of the supply by the parties.
- Determine where the businesses' headquarters or main set up is – this is the primary point of reference.
- If the business has multiple establishments and if the primary reference to the headquarters of the business produces an inappropriate or irrational result for tax purposes or creates conflict with another member state, the establishment most directly concerned with the supply is the correct reference.
- Other establishments may only need be considered if they are of a certain minimum size and both the human and technical resources necessary for the provision of the particular services are permanently present.

The usual place of residence of a corporate body is straightforward to determine – VAT Act requires that this be the place where the corporate body is legally constituted. HMRC interprets this as meaning the country in which its registered office is located and this interpretation has been confirmed by the VAT tribunal in various cases.[20]

The usual place of residence of a private individual is not prescribed by VAT Act and therefore this is open to some interpretation. The logical interpretation of this would be to assume that the usual place of residence of a private individual would be where that person usually lives considering (in the order of importance) his personal and occupational ties. HMRC provides a slightly narrower interpretation of this expression and states that, in its view, the usual place of residence of a private individual will be the one country where the individual spends most of his time for the period in question and it is likely to be the country where the individual has set up his home, lives with his family and is in full time employment.

11.3 Application of the general rule

Where the supplier and the recipient of a supply (of services) are both located in the United Kingdom, and the services are of the kind to which the general rule applies (ie there are no exceptions applying to the general rule), irrespective of whether the supply is B2B (ie from a supplier to a recipient who is a '*relevant business person*' or B2C (ie from a supplier to a recipient who is not a 'relevant business person'), the place of supply is often fairly straightforward to determine. In such circumstances, the common location of the supplier and the recipient ensures that the place of supply of the services remains the United Kingdom. Where this is the case, depending upon the nature of the services, the supplier is required to account for VAT on this supply.

Example 6

B2B services

An accountancy firm in the United Kingdom provides tax and accountancy services to a United Kingdom company.

Under the general rule, the place of supply is where the recipient of the supply is located. The accountancy firm is required to account for VAT on this supply.

B2C services

A law firm in the United Kingdom provides legal services to an individual whose usual place of residence is the United Kingdom.

Under the general rule, the place of supply is where the supplier of the supply is located. The law firm is required to account for VAT on this supply.

B2B supplies

Determining the place of supply of services becomes relatively complicated where the services are supplied internationally (ie where the supplier and the recipient are located in different countries) and/or where the nature of the services being supplied are such that no exceptions apply to the general rule (ie the general rule is not replaced by the '*special rules*').

As discussed earlier, the general rule is that the place of supply of services provided to a '*relevant business person*' is where the recipient is located. Therefore where services (other than specified services to which special rules apply) are supplied to a 'relevant business person', the place of supply is where the recipient belongs. It follows therefore that where a business recipient of

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such services is located outside the United Kingdom, United Kingdom VAT would not be relevant even if the supplier is located in the United Kingdom. It equally follows that where a business recipient of such services is located in the United Kingdom, VAT would be payable in the United Kingdom.

In circumstances (as ones described above) where the recipient is located in the United Kingdom but the supplier is located overseas and VAT liability arises in the United Kingdom by virtue of the application of the general rule (as it relates to business recipients), it is the recipient (rather than the supplier) who is required to account for this VAT under what is referred to as the *'reverse charge'* procedure.

This is an administrative simplification measure provided for by the European and United Kingdom legislation which, in such cases, reverses the normal requirement of the VAT system which imposes the obligation on the supplier of services to account for any VAT payable to the tax authorities for any VAT due on its supplies.

In the absence of a '*reverse charge*' mechanism, suppliers with no connection to the United Kingdom (or for that matter any other member state of the EU) would be required to register in the United Kingdom (and any other member state of the EU) even though their only connection to the United Kingdom (or any other member state) is the location of the recipient of their services.

Two key points should be particularly noted here (a) generally the reverse charge mechanism only arises where the recipient of the supply of services is a '*relevant business person*' receiving the services not wholly for private purposes; and (b) the effect of the reverse charge is that a taxable supply is deemed to be made by the recipient of the service in the United Kingdom in the course of furtherance of business.

Example 7

An Indian call centre company provides telephone support services to a United Kingdom bank. General rule applies to telephone support services and therefore the place of supply is the United Kingdom where the bank is located. The reverse charge will therefore apply here and the bank will be required to account for VAT on the service received and may claim this as input tax, subject to the normal rules on recovery.

Accounting for VAT using the reverse charge procedure is not complicated in accounting terms (although it is not uncommon for businesses to overlook this). Instead of being charged VAT by the supplier, a United Kingdom business customer who receives any of the relevant services credits his VAT account with the necessary amount of output tax as if he had supplied the services himself and at the same time debits his account with the amount of input tax to which he is entitled under the normal rules. The practical effect of this is that there will be no net tax payable on the transaction except by businesses which are not entitled to full deduction of input tax, such as those which are partly exempt.

Where the supplier of services is located in the United Kingdom and services (to which the general rule applies) are provided to a business recipient, the supplier is required under directly applicable EU legislation to determine the location of the recipient, based on the information provided by the customer. This information is usually the VAT registration or identification number of the recipient which will point out the location of the recipient.

The supplier is also required to ascertain the business status of the recipient in such cases. In most cases the business status of the recipient will be ascertained on the basis of the VAT registration or identification number of the recipient (in the country where it is located) provided to the supplier by the recipient. The supplier should be satisfied that it is indeed the customer's VAT number and should check with the VAT, Excise and Customs Duties Advice Line where there are doubts. It is also possible to verify the validity of a VAT number issued by any member state by entering the number to be validated in the VIES VAT number validation system available online on the European Commission website. However, where the customer is in business but outside the EU or is not VAT registered in another EU member state, alternative evidence of their business status should be obtained. Where no such evidence is provided, the supply should be seen as being provided to a non-relevant business person and therefore the general B2C rule should apply.

Example 8

A United Kingdom law firm provides legal services to a Luxembourg company. General rule applies to legal services and therefore the place of supply is Luxembourg provided the United Kingdom law firm is satisfied that the Luxembourg company is a 'relevant business person'. The United Kingdom law firm obtains the Luxembourg VAT registration number of the Luxembourg company, this should be acceptable evidence (unless something to the contrary).

The United Kingdom law firm will also be required to make a reference in the VAT invoice (issued to the Luxembourg company) to the appropriate provision of the Directive or corresponding provision of VAT Act 1994 or otherwise state in the invoice that the supply is one where the customer is liable to pay the VAT under the reverse charge procedure.

B2C supplies

As discussed earlier, the general rule is that the place of supply of services provided to a non- '*relevant business person*' is where the supplier belongs.

Example 9

A United Kingdom law firm provides legal services to a Luxembourg individual who is not a 'relevant business person'. General rule applies to legal services. Under the B2C general rule, the place of supply is the United Kingdom (as the supply is not to a 'relevant business person'). The United Kingdom law firm will therefore be required to account for United Kingdom VAT on this supply.

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11.4 Derogation to the general rule - special rules

Derogations to the general rule – land

A supply of services relating to land is deemed to be made where the land is situated – this is not affected by the business status of the recipient (although the business status of the recipient may mean that he may have to apply the reverse charge procedure where an overseas supplier supplies services relating to land). The VAT Act prescribes that the following services are to be treated as being related to land:

- the grant, assignment or surrender of any interest in or right over land;
- the grant, assignment or surrender of a personal right to call for or be granted any interest in or right over land;
- the grant, assignment or surrender of a licence to occupy land or any contractual right exercisable over or in relation to land (including the provision of holiday accommodation, seasonal pitches for caravans and facilities at caravan parks for persons for whom such pitches are provided and pitches for tents and camping facilities);
- the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purpose of a supply of catering;
- any works of construction, demolition, conversion, reconstruction, alteration, enlargement, repair or maintenance of a building or civil engineering work; and
- services such as are supplied by estate agents, auctioneers, architects, surveyors, engineers and others involved in matters relating to land.

The expression '*land*' has a wide meaning and includes any structures and natural objects attached to the land, so long as they remain attached – this expression therefore covers real estate of all description (ie buildings, land) and also civil engineering works, walls, fences or other structures fixed permanently to the land or sea bed. Plant, machinery or equipment which is an installation or edifice in its own right is included within the meaning of this term. Fixed North Sea oil rigs are regarded as land and are within the United Kingdom if within the twelve nautical miles territorial waters limit.

It can therefore be deduced from the above that where services (of the kind outlined above) are situated in the United Kingdom, the place of supply will be the United Kingdom, irrespective of where the supplier and the recipient is located and the business status (or lack thereof) of the recipient. Supplies of services relating to land located outside the United Kingdom is outside the scope of United Kingdom VAT system.

As the United Kingdom VAT legislation expressly treats *'services such as are supplied by estate agents, auctioneers, architects, surveyors, engineers and others involved in matters relating to land'* as services relating to land, it is possible that some ambiguity may arise as to which of the two rules (ie the general rule or the special rule for land) should be applied where services of such description are provided.

It should not be assumed that the services of the above description would automatically fall within the special rule. It has been established by the ECJ that for services of the above description to be treated as being related to land (and hence for the special rule to apply), the land or property in question must be the central and essential element of the services provided.[21] HMRC accepts that the special rule does not apply *'where such services are only indirectly related to land, or where the land-related service is only an incidental component of a more comprehensive service.'*

It is instructive to consider two cases which illustrate the subtle distinction between services relating to land and services, which although having a connection with land, are nevertheless treated as not being services to which the special rule described above applies.

In one case, the tribunal had to consider whether legal services supplied by a solicitor to a business person (located outside the United Kingdom) who took legal action to secure title to a flat located in the United Kingdom were subject to the special or the general rule. If the special rule applied, the place of supply of the legal services in question would be a supply taking place in the United Kingdom (on the basis that the land, ie flat, was in the United Kingdom). However, if the general rule applied, the place of supply of the legal services would be outside the scope of United Kingdom VAT on the basis that the recipient of the services was located outside the United Kingdom. The tribunal concluded by applying the principle established by the ECJ (referred to above) that the property (ie the flat) was a central and essential element here and therefore the place of supply of the legal services was the United Kingdom (on the basis of the special rule applying).

In another case, the tribunal had to consider whether the legal services provided by a solicitor (S) in the United Kingdom in connection with the administration of a deceased person's estate which included United Kingdom property would be a supply to which the special rule applied. In this case, the deceased person had lived in Australia and the executors were also located there. The connection with land was the house which was located in the United Kingdom – a different solicitor (S2) in the United Kingdom had been appointed to deal with the conveyancing in respect of this property. The tribunal again applied the ECJ established principle (outlined above) and concluded that although the service provided by S2 was a supply of legal services relating to land, the legal services provided by (S) was a supply of legal services (where the land or the property was not the central and essential element). On that basis (a) the supply by S2 was held to be taking place in the United Kingdom (under the special rule) and therefore subject to VAT there; and (b) the supply by S2 was held to be taking place outside the United Kingdom and hence outside the scope of United Kingdom VAT.

It is evident from the above two cases that services of the kind provided by estate agents, auctioneers, architects, surveyors, engineers and others in so far as they relate to matters pertaining to land require a factual analysis in order to determine whether the general or the special rule should apply in locating the place of supply of such services.

As it is not possible to go through the case law in greater detail here, a list of services (accepted by HMRC as generally relating to land) and services (accepted by HMRC as not generally relating to land) are set out below:

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Services relating to land

- services of estate agents, auctioneers, architects, surveyors, engineers and similar professional people relating to land, buildings or civil engineering works and management, conveyance, survey or valuation of property by a solicitor or surveyor;
- seismic surveying and associated data processing services on land;
- services of a loss adjuster in assessing validity of an insurance claim relating to damage to land or buildings;
- legal services such as conveyancing and dealing with applications for planning permission;
- lease or hire of exhibition stand space, where the specific stand space is reserved by an individual exhibitor;
- but if a supply of exhibition stand space is made with the specific location of the stand allocated on arrival this would fall to be taxed where the exhibition takes place;
- property management, including rent collection and arranging for routine maintenance;
- interior designing for a particular hotel;
- leases of buildings for less than 21 years (which is a supply of a service);
- provision of hotel or holiday accommodation;
- options to purchase land;
- provision of car parking; and
- provision of space in a warehouse (whether in a designated area or not).

Services not relating to land

- advice or information relating to land or property markets;
- insurance of property;
- the hiring out of a civil engineering plant on its own;
- feasibility studies assessing the potential of particular businesses;or business potential in a particular geographic area;
- design of a corporate style for an hotel chain;
- services of an accountant in simply calculating a tax return from figures provided by a client when those figures relate to rental income;
- provision of a recording studio where technicians are included as part of the supply. These are engineering services;
- repair and maintenance of free-standing machinery.

11.5 Derogations to the general rule - passenger transport

The place of supply of transportation of passengers (and their accompanying luggage or motor vehicle) is the country in which the transportation takes place. A pleasure cruise is regarded as transportation of passengers.

Where more than one country is involved (as would be the case in international air travel), regard must be given to the proportion of distances covered in each country. It should be noted that where such transportation takes place partly outside the United Kingdom but in the course of a journey between two points within the country (whether or not as a part of a longer journey involving travel to or from another country), the place of supply of such passenger transportation services would be the United Kingdom unless the means of transport used stops or lands (except in an emergency or involuntarily) in another country in the course of a journey between the two points.

11.6 Derogations to the general rule – transportation of goods

The place of supply of transportation of goods to business recipients falls under the general rule and therefore will take place where the recipient is located.

HMRC allows for an administrative derogation to the general rule in circumstances where freight services are provided to business recipients in circumstances where such services are *'used and enjoyed'* outside the United Kingdom – (eg the freight transport takes place wholly outside the United Kingdom). In such circumstances, as a temporary administrative measure, the place of supply is treated as being outside the United Kingdom – HMRC has stated that it is considering a permanent legislative provision in this regard. It should be noted that in circumstances where the reverse situation occurs, no charge to United Kingdom VAT will be imposed by application of what is essentially HMRC's unilateral measure.

The above principle also applies to '*ancillary*' transport services such as services of loading, unloading, handling and similar activities such as stowing, opening for inspection, cargo security services, preparing and amending bills of lading, airway bills and certificates of shipment, packing necessary for transportation, and storage.

The place of supply of transportation of goods to non-business recipients is the country in which the transportation takes place, in proportion to the distances covered (where more than one country is involved) – the calculation mechanics to determine the extent to which the place of supply in the United Kingdom is the same as the one in respect of passenger transport described earlier. This rule does not apply in relation to intra-community transport of goods (ie where transport of goods takes place from one EU country to another) where the place of supply is the country in which the transportation begins.

The place of supply of '*ancillary*' transport services to a non-business recipient is the country where such services are actually performed.

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11.7 Derogations to the general rule – cultural, artistic, sporting, scientific, entertainment and educational services; valuation of goods; carrying out work on goods

The place of supply of services relating to valuation of goods and the carrying out of work on goods is determined under the general rule where the recipient is a business.

The place of supply of such services provided to a non-business recipient is the place where the services are physically performed. It should be noted that where the services involve the assembly of goods, this rule does not apply where the goods are or will become part of immovable property.

The place of supply of services in respect of admission to cultural, artistic, sporting, scientific, entertainment and educational services or similar events (and services ancillary thereto) to business recipients is where the event in question actually takes place.

The question as to whether something paid is for admission or for some other services will turn on facts. It will generally be clear from the nature of the services provided as to whether the consideration paid is a charge for admission. For example, where a business buys tickets to a sporting match in order to entertain clients then it is clearly buying the admission to an event. It will not matter whether this is in the form of seats within a stand or a hospitality box. The main purpose of either is to enter the stadium to observe the event. Similarly, where a business customer pays to enter an art exhibition this would again be a payment for admission to an event.

However where, for example, a person pays a third party to host and organise a conference for the benefit of that person (and his employees) and the third party supplier arranges a venue, speakers and refreshments, the provider is really providing event management services rather than merely charging admission to the event being arranged. In such cases, the place of supply of such services will be determined on the basis of the general rule. If the person decided to sell tickets to other businesses to attend this event that would of course be an admission charge to which the special rule will apply.

The place of supply of services relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities and ancillary services relating thereto (including services of the organisers of such activities) will be where the activities concerned take place.

11.8 Derogations to the general rule – hire of means of transport

The place of supply of hire of a '*means of transport*' depends on whether it is a '*short-term*' hire or a '*long-term*' hire.

A '*short-term*' hire of a means of transport is one where the vehicle is hired for the continuous possession or use of not more than 30 days, or 90 days for vessels. Any hire beyond this period is a long-term hire.

The duration of the continuous possession or use is largely a matter of fact. The starting point for determining the length of the hire should be the hire contract. When two or more contracts for the hiring of the same means of transport follow each other with an interruption of 2 days or less, the first term of the contract needs to be taken into account in deciding whether the second term is seen as short-term or long-term. If the two contracts together exceed 30 days (or 90 for vessels) then the second and subsequent consecutive contracts are treated as long-term hires. The original contract (if a short-term hire) is not reassessed retrospectively, providing that there is no evidence of abuse of law.

When a short-term hire contract is extended causing it to exceed the 30 (or 90) day period then the place of supply is retrospectively reassessed unless the clearly established circumstances show that events were outside of the control of the parties involved (force majeure).

Where a second short-term hire takes place between the same parties but relates to a different means of transport, or has significantly different terms, then these contracts will need to be examined separately, providing that there is no evidence of abuse of law.

'*Means of transport*' means transport **i**ncluding any vehicle, whether or not motorised, and any other equipment or devices designed to transport goods or persons from one place to another, which might be pulled or drawn or pushed by vehicles and which are normally designed and capable of being used for the transport of goods and persons.

This includes:

Motorised and non-motorised land vehicles such as cars, motorcycles, bicycles, tricycles and caravans (unless fixed to the soil);

- Motorised and non-motorised vessels;
- Motorised and non-motorised aircraft;
- Vehicles specifically designed for the transport of sick or injured persons;
- Agricultural tractors and other agricultural vehicles;
- Non-combat military vehicles and vehicles for surveillance or civil defence purposes;
- Mechanically or electronically propelled invalid carriages;
- Trailers, semi-trailers and railway wagons.

The place of supply of a short-term hire of a means of transport is where the means of transport is actually put at the disposal of the person by whom it is hired. However, this special rule is subject to further derogations – where the place of supply would otherwise be the United Kingdom but the effective use and enjoyment of the means of transport would be in a third country (ie country which is not a member state), the supply is to be treated as taking place in that country to the extent that it is so used and enjoyed

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and this principle applies equally in the reverse.

The special rule relating to short-term hire of a means of transport does not, currently, apply to long-term hire of a means of transport to which the general rule applies. However, from 1 January 2013, the place of supply of a long-term hire of a means of transport to a person who is not a relevant business person is in the country where the recipient belongs. However, where the long-term hire of a pleasure boat is put at the disposal of the recipient at the supplier's business establishment or some other fixed establishment of the supplier, it is treated as supplied in the country where the boat is actually put at the disposal of the recipient. This rule is subject to certain *'use and enjoyment'* restrictions which apply on the same basis as outlined earlier.

11.9 Derogations to the general rule – telecommunications and electronically supplied services

The supply of telecommunication services (ie services relating to the transmission, emission or reception of signals, writing, images, sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception and the provision of access to global information networks) is subject to the general rule but with a *'use and enjoyment'* derogation – on the same basis as outlined earlier. This principle applies in the same manner to the supply of radio and television broadcasting services.

The supply of electronical supplier services (eg website supply, web-hosting and maintenance of software and equipment, the supply of software (including updates to such software), the supply of images, text and information, the making available of databases, the supply of music, films and games, the supply of political cultural, artistic, sporting, scientific, educational or entertainment broadcasts (including broadcasts of events and the supply of distance learning and teaching) is subject to the general rule except for two derogations/modifications – where the recipient is a relevant business person, the use and enjoy derogation applies in the same manner as described earlier. Where the electronically supplied services are provided by a person who belongs in a third country to someone who is not a relevant business person and who belongs in a member state, the place of supply is deemed to be where the recipient belongs.

11.10 Derogations to the general rule – intermediary services

The place of supply of intermediary services (ie the making of arrangements for a supply by or to another person or of any other activity intended to facilitate the making of such a supply) to a non-business person is where the supply is made. Where the place of supply of an intermediary service is the United Kingdom but the place of supply of the service being arranged is outside the EU, the intermediary's supply in the United Kingdom may be zero-rated for VAT purposes (to the extent they are not exempt supplies in any event).

11.11 Derogations to the general rule – intangible services

Where certain services prescribed by the legislation are supplied to a non-business recipient located outside the EU, the general rule does not apply. Instead, a special rule applies which provides for the place of supply to be the place where the non-business recipient belongs. This effectively means that where this special rule applies, the place of supply will always be outside of the scope of EU VAT. The services to which this special rule relates are as below:

- transfers and assignments of copyright, patents, licences, trademarks and similar rights (as is apparent here, these relate to services of intellectual property);
- the acceptance of any obligation to refrain from pursuing or exercising (in whole or in part) any business activity or any rights;
- advertising services (this includes all services involved in publicising another person's name or products with a view to increasing their sales. It includes advertising services in different media such as radio and television broadcasting or in publications or on advertising hoardings.);
- services of consultants, engineers, consultancy bureaux, lawyers, accountants, and similar services, data processing and provision of information, other than any services relating to land;
- banking, financial and insurance services (including reinsurance), other than the provision of safe deposit facilities;
- services involving the use of natural gas and electricity systems and heat and cooling networks;
- the supply of staff ;
- the letting on hire of goods other than means of transport;
- telecommunication services;
- radio and television broadcasting services;
- electronically supplied services.

Example 10

An accountancy firm located in the United Kingdom provides personal tax filing advice to an Indian resident (who is not a relevant business person). The place of supply of such B2C services is where the recipient is located and therefore the said services are outside the scope of VAT.

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Endnotes

1 S 5(2)(a) of the VAT Act.

2 S 5(2)(b) of the VAT Act.

3 Art 14 of the Directive.

4 Art 24 of the Directive.

5 *C&E Comrs v Redrow Group plc* [1999] STC 161.

6 *WHA Ltd and another v C&E Comrs* [2003] STC 648.

7 See *FCE Bank v Ministero dell'Economia e delle Finanze, Agenzia della Entrate* (Case C-210/04).

8 S 5(5)(7) of the VAT Act.

9 Art 73.

10 *Naturally Yours Cosmetics Ltd v C&E Commrs (No 2)* (C-230/87) and *Empire Stores Ltd v C&E Commrs* (C-33/93).

11 *RJ Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (C-16/93).

12 S 5(2)(b) of the VAT Act.

13 *Commission of the European Communities v Republic of Finland* (Case C-246/08).

14 *C&E Commrs v Mirror Group Plc* (C-409/98).

15 *MBNA Europe Bank Ltd (MBNA)* – tribunal decision 19413 and High Court judgment [2006] EWHC 2326 (Ch) and *Capital One Bank (Europe) Ltd (COBE)* –tribunal decision 19238.

16 [2001] STC 174.

17 *EMAG Handel Eder OHG* (C-245/04).

18 *Planzer Luxembourg Sarl* (C-73/06), *Gunter Berkholz v Finanzamt Hamburg-Mitte-Altstadt* (168/84) and *Commissioners of Customs and Excise v DFDS A/S* (C-260/95).

19 *Singer & Friedlander Ltd* (LON/87/159), [1989] VATTR 27, (VTD 3274) & *Andrew Marks T/A Marks Cameron Davies & Co* (LON/ 95/1773) (VTD 15541).

20 One being *Chantrey Vellacott* (LON/91/1718X).

21 *Rudi Heger* (C-166/05).

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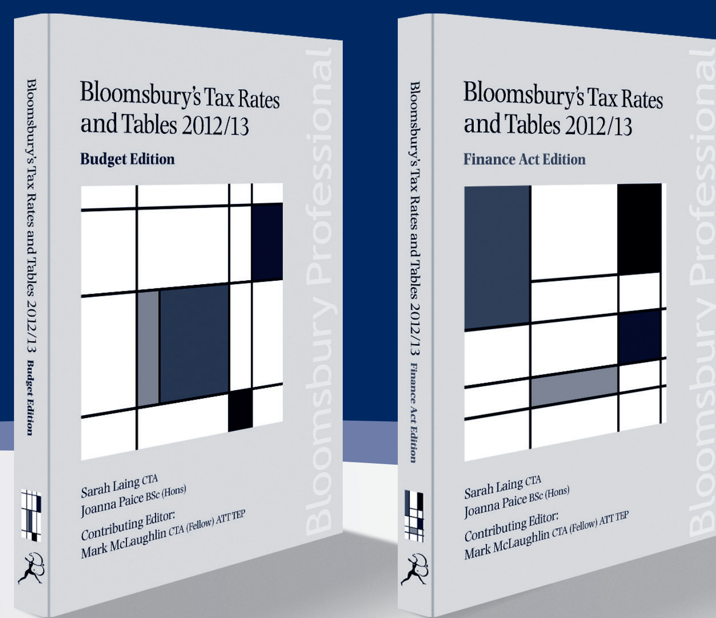

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