

Indirect Taxes PG Boston

Steve McCrindle

VAT Partner (Haines Watts London & M25)

Tim Crosley

Tax Partner (Memery Crystal London)



Non-EU businesses doing business in the EU

- VAT pitfalls & challenges faced by non-EU businesses doing business in the EU
 - UK mainly with wider application & covering:
 - B2B supply of goods within the UK
 - B2C supply of delivered goods to customers in the EU
 - Business & Fixed Establishment
 - Land related services
 - Single v multiple supply of services
 - Reverse charge
 - To whom is the supply made?
-



B2B supply of goods within the UK

- US Inc. 1 agrees B2B contract with US Inc. 2 to supply goods
 - Goods physically move from UK subsidiary of US Inc. 1 to UK subsidiary of US Inc. 2
 - Goods movement all within the UK
 - Invoicing anticipated is:
 - UK subsidiary of US Inc. 1 to US Inc. 1
 - US Inc.1 to US Inc. 2
 - US Inc. 2 to UK subsidiary of US Inc. 2
 - Implications?
-



B2B supply of goods within the UK - continued

- Answer:
 - US Inc. 1 & US Inc. 2 caught in a UK domestic transaction chain & obliged to register for UK VAT
 - No VAT registration threshold – it could be a US\$100 transaction
 - Other EU Member States – may have introduced a simplification such that the US Inc's are not required to register for local VAT & instead, can make reclaims of VAT incurred direct from tax authorities (13th Directive Claim)
 - Do not need to have a Business or Fixed Establishment for a VAT registration obligation to impact
-



B2C supply of delivered goods to customers in the EU

- US Inc. supplies goods B2C to private consumers in the EU
 - US Inc. imports the goods into the UK
 - US Inc. distributes the goods to the customers throughout the EU

 - Implications?
-



B2C supply of delivered goods to customers in the EU - continued

- Answer:
 - As in previous example, there is no registration threshold for non-EU businesses, so US Inc. requires a UK VAT registration
 - Distance sales threshold exceeded in other EU Member States or goods subject to excise duty (e.g. alcohol)?
 - If so, US Inc. must register and account for VAT in EU Member State of delivery
 - Do not need to have a Business or Fixed Establishment for a VAT registration obligation to impact
-



Significance of “business establishment” and “fixed establishment” for supplies of services

Article 43 , Directive 2006/112/EC (EU legislation)

The place of supply of services shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied...

ss. 7A and 9 Value Added Tax Act 1994 (UK legislation)

A supply of services is to be treated as made (a) in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and (b) otherwise, in the country in which the supplier belongs.

A person who is a relevant business person is to be treated as belonging in the relevant country. The “relevant country” means (a) if the person has a business establishment, or some other fixed establishment, in a country (and none in any other country), that country, (b) 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 is...

“Relevant establishment” means whichever of the person’s business establishment, or other fixed establishment, is most directly concerned with the supply.



What is a Business Establishment

Business establishment is not defined in the VAT Directive, but the Implementing Regulation (EU) No 282/2011 states that:

Under Art. 10 - the place where the business of a taxable person is established shall be the place where the **functions of the business's central administration are carried out**.

Account shall be taken of the place where **essential decisions concerning the general management of the business are taken**, the place where the registered office of the business is located and the place where management meets.

Where these criteria do not allow the place of establishment of a business to be determined with certainty, the place where **essential decisions concerning the general management** of the business are taken shall take precedence.

Note: The mere presence of a postal address may not be taken to be the place of establishment of a business of a taxable person.

UK legislation

Guidance from the UK tax authorities tells us that the 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 that may also need to be taken into account include:

- 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.

The business establishment is viewed by the UK tax authorities as a single place which is usually the head office, headquarters, or "seat" of the business from which the business is run.



What is a Fixed Establishment

Fixed establishment is not defined in the VAT Directive, but the Implementing Regulation states that:

Under Art. 11 - a 'fixed establishment' shall be any establishment, **other than** the place of establishment of a business referred to in Article 10, characterised by a **sufficient degree of permanence and a suitable structure in terms of human and technical resources** to enable it to [receive and use/provide] the services.

UK legislation

The UK tax authorities take "fixed establishment" to mean an establishment:

- other than the business establishment;
- from which the activities of the organisation are carried out; and
- which has the **sufficient permanent presence of both the human and technical resources** necessary for making or receiving the supplies of services in question.

A business may have several fixed establishments, which may include a branch of a business or an agency.

If you have a temporary presence of human and technical resources, this does not create a fixed establishment in the UK. For example, an overseas television company sending staff and equipment to the UK to film for a week does not constitute a fixed establishment in the UK.

Where you have establishments in more than one country, you will need to decide which one is most directly connected with a supply.



Practical point 1 – multiple “establishments”

UK legislation states that (under s9(4) VATA 1994) the “relevant establishment” means whichever of the person’s business establishment, or other fixed establishments, is **most directly concerned** with the supply.

Examples (from the UK tax authorities):

1. A company whose business establishment is in France contracts with a UK bank to provide French-speaking staff for the bank's international desk in London. The French supplier also has a fixed establishment in the UK consisting of a UK branch, which provides French-speaking staff to other customers. The French establishment deals directly with the bank without any involvement by the UK branch. In these circumstances, the staff are supplied by the French business establishment.
2. A UK accountant supplies accountancy services to a UK incorporated company which has its business establishment abroad. The services are received in connection with the company's UK tax obligations. Here it is the UK fixed establishment (created by the registered office) which receives the supply.
3. A UK company seconds staff to a customer which has its business establishment in the UK and a fixed establishment in the US (created by a branch located in the US). The supplier is contracted by the UK establishment to provide staff to its US branch. The supplier invoices the UK establishment and is paid by them. The services are most directly used by the US branch and therefore the services are supplied to the US branch.

Zurich case

Where there is a business establishment where the head office is located, and also another fixed establishment in a different country, and services are supplied to the latter, the place of supply for VAT is likely to be the latter. For example, if in reality the services are **performed** in the UK for a UK recipient, it will be difficult for a charge to UK VAT not to arise, even if the relevant contract is **made** with a non-UK person. It was held that the supply of services did not take place at the head office by making a contract to supply them there, rather the place of supply of the services was at the place where services were **wholly, or virtually wholly performed** under the contract.



Practical point 2 - Agency

Article 44. The place of supply of services by an intermediary acting **in the name and on behalf of another** person... shall be the place where the underlying transaction is supplied in accordance with this Directive. *(Note, there are some specific exceptions not included here).*

UK legislation

The UK tax authorities' guidance tells us:

An overseas business contract with UK customers to provide services. It has no human or technical resources in the UK and therefore sets up a UK subsidiary **to act in its name** to provide those services. The overseas business has a fixed establishment in the UK created by the agency of the subsidiary.

An agency may also be a fixed establishment but a trader is not regarded as carrying on business through an agency if either:

- It acts merely as an intermediary in bringing together customer and provider and is not directly involved in the supply chain.
- It only supplies incidental services.

Relevant UK case-law stresses the need for permanent human and technical resources necessary for providing the services and lack of independence. The case law looks at the substance of the relationship rather than its legal form.



Land related services - general

Article 45 - The place of supply of services connected with immovable property, including the services of estate agents and experts, and services for the preparation and coordination of construction work, such as the services of architects and of firms providing on-site supervision, shall be the place where the property is located.

If the supply of a service is **related** to land or property, the place of supply is where the land is **situated**. This is not affected by where the customer or supplier belongs. There is no requirement for the presence of human or technical resources in determining the place of supply.

Under Sch. 4A, s1 VATA 1994 (UK legislation)

A supply of services ...[such as those listed below] is to be treated as made in the country in which the land in connection with which the supply is made is situated. These services include:

- (a) The grant, assignment or surrender of any interest in or right over land;
- (b) The grant, assignment or surrender of a personal right to call for or be granted any interest in or right over land,
- (c) The grant, assignment or surrender of a licence to occupy land or any other contractual right exercisable over or in relation to land...
- (d) The provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation ...
- (e) Any works of construction, demolition, conversion, reconstruction, alteration, enlargement, repair or maintenance of a building or civil engineering work, and
- (f) Services such as are supplied by estate agents, auctioneers, architects, surveyors, engineers and others involved in matters relating to land.



What is a land related service? (UK guidance)

‘Land’ includes all forms of land and property; growing crops, buildings, walls, fences, civil engineering works or other structures fixed permanently to the land or seabed. It also covers plant, machinery or equipment which is an installation or edifice in its own right, for example, a refinery or fixed oil/gas production platform. Machinery installed in buildings other than as a fixture is normally not regarded as ‘land’ but as ‘goods’.

The UK tax authorities provide further examples of land-related services:

- the provision of a site for a stand at an exhibition where the exhibitor obtains the right to a defined area of the exhibition hall
- the supply of plant or machinery, together with an operator, for work on a construction site
- services connected with oil/gas/mineral exploration or exploitation relating to specific sites of land or the seabed
- the surveying (such as seismic, geological or geomagnetic) of land or seabed, including associated data processing services to collate the required information
- legal services such as conveyancing or dealing with applications for planning permission
- packages of property management services which may include rent collection, arranging repairs and the maintenance of financial accounts
- the supply of warehouse space

This place of supply rule applies only to services which relate directly to a specific site(s) of land or property. It does not apply if a supply of services has only an **indirect connection** with land, or if the land-related service is only an **incidental component** of a more comprehensive supply of services.



Grey areas in land related services

The UK tax authorities have stated that for a service to be land related it must have a **sufficiently direct connection** with a specific piece of land. This is also consistent with the VAT Committee guidelines (see next slide).

The following have been designated by the UK tax authorities to be “incidental” to land and therefore not land related services:

- Repair and maintenance of free standing machinery;
- The hiring out of civil engineering plant on its own;
- The secondment of staff to a building site, which is a supply of staff;
- The legal administration of a deceased person’s estate which happens to include property. These are lawyers’ services advice or information relating to land prices or property markets because they do not relate to specific sites;
- Provision of a recording studio where technicians are included as part of the supply. These are engineering services;
- Services of an accountant in simply calculating a tax return from figures provided by a client, even where those figures relate to rental income;
- Advice or information relating to land or property markets;
- Insurance of property;
- Feasibility studies assessing the potential of particular business or business potential in a particular geographic area;
- Design of a corporate style of an hotel chain.

What about the following:

- Advice on the value of investment properties situated in all 27 EU Member States;
 - Advice provided to a US business regarding the decorative state of a building in the UK;
 - Advice provided to a Russian landlord on the ability to raise rental return on properties in the UK, France or Germany.
-



Land Related Services – recent developments

The VAT Committee has discussed the scope of ‘land related services’ as regards the place of supply of services.

This article shall apply from 1 January 2017, however, the UK has already implemented most (if not all) of this in guidance.

Supply of services connected with immovable property

Article 31a

1. Services connected with immovable property, as referred to in Article 47 of Directive 2006/112/EC, shall include only those services that have a sufficiently direct connection with that property. Services shall be regarded as having a **sufficiently direct connection** with immovable property in the following cases:

(a) where they are **derived from an immovable property** and that property makes up a **constituent element** of the service and is **central to, and essential for**, the services supplied;

(b) where they are provided to, or directed towards, an immovable property, having as their **object the legal or physical alteration** of that property.

(emphasis added)



Single v Multiple Supply of services

- Events and Conferences
 - US Inc. organises conference in an EU Member State
 - Attendees are in business but not established in any way in the EU
 - If supplied separately the EU VAT implications of the following example services is:
 - admission fee to attend the event/conference – likely subject to VAT
 - raw stand rental – VAT exempt or subject to VAT (dependent on VAT liability applied by EU Member State of conference)
 - advertising/sponsorship services – outside the scope of EU VAT



Single v Multiple Supply of services - continued

- electricity - likely subject to VAT
 - telephone - outside the scope of EU VAT
 - cleaning – likely subject to VAT
 - security – likely subject to VAT
 - listing in catalogues – outside the scope of EU VAT
-
- What if a package of these services is supplied?
 - Historically it may have been seen as a supply of land/land related service (so falls within the VAT regime in which the conference/event is located)
 - Change of focus, so now possible that the supply will be a ‘General Rule’ service and wholly outside the scope of EU VAT
-



Single v Multiple Supply of services - continued

- However, member states have implemented attaching rules differently:
 - **UK** – where a package of a stand and accompanying services is provided, the entire service will be ‘General Rule’ and outside the scope of UK VAT
 - **Germany** - where a package of a stand and at least three additional services, the entire service will be ‘General Rule’ and outside the scope of German VAT
 - For a package of a stand and less than three additional services, each element of the package will need to be considered and the attaching German VAT liability determined
 - **Netherlands** – it appears that the Dutch tax authorities view even raw stand rental as a service, which is not a supply of land/land related service and will be outside the scope of Dutch VAT



Single v Multiple Supply of services – continued

- Conferences with travel, transfers, accommodation, etc. – another can of worms – maybe next time, or even another life!



Reverse Charge

- B2B services supplied from outside the EU to EU businesses
 - Usually applies to supplies that would be subject to VAT if made between two businesses in the same EU Member State
 - EU businesses have to treat such services as supplied to and by themselves – hence, the reverse charge
 - They account for VAT as output tax on the value of the supply received, and
-



Reverse Charge - continued

- They recover that VAT as input tax to the extent they are entitled to do so, and
- On the same VAT return
- Not all EU businesses are entitled to recover the VAT they incur, either in whole or in part
 - Example sectors: Some Property, Financial Services, Health, Welfare, Care, Gaming, Education, not for profits, government organisations, etc.
- Implications?



Reverse Charge - continued

- Answer:
 - Services supplied ostensibly VAT free by a non-EU business to an EU business customer could lead to irrecoverable VAT in the hands of the customer
 - Non-EU suppliers of such services need to be aware of this additional cost of their service delivery
 - Does not normally apply to Branch to Branch supplies, but may if the recipient Branch is a member of a VAT group registration in certain EU Member States
 - Affects EU Member States that have VAT grouping provisions and apply 'establishment only' grouping provisions
 - Does not impact UK VAT groups, as the UK operates 'whole body' VAT grouping provisions, i.e. the UK would consider that the HQ and all of its branches had joined the UK VAT group
-



To whom is the supply made?

- Lease between landlord and lessee
 - Landlord issues invoice for rent to lessee
 - Lessee's business dissolved, all assets and employees moved to connected business
 - Connected business pays rent
 - Landlord accepts connected business is paying rent
 - No formal assignment of lease
 - Implication, i.e. who is entitled to recover VAT on rent?
-



Disclaimer

Disclaimer:

The Haines Watts Group consists of all firms in which Haines Watts Limited is a partner, member or shareholder, or with whom they have signed a participation agreement, or firms controlled by such firms. Generally, "HW", "Haines Watts" and "Haines Watts Group" refer to the network of member organisations, each of which is a separate and independent legal entity. Member organisations are not members of one legal partnership and are only liable for their own acts and omissions, and not those of each other.

This presentation is designed for the general information of readers. The information represents Haines Watts Group's (and where applicable, Memery Crystal LLP's) present understanding of current and proposed legislation and HM Revenue and Customs practice. Whilst every effort has been made to ensure accuracy, information contained in this briefing may not be comprehensive and recipients should not act upon it without seeking professional advice from their usual adviser.

In addition, this presentation is for GGI internal use only and intended solely and exclusively for GGI members.