NEW VAT TRAPS IN INTERNATIONAL AND OFFSHORE TAX PLANNING

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The Changes

Important and sweeping changes to the place of supply rules for value added tax purposes will come into force on January 1st 2010. There will be an enormous increase in the number reverse charges in respect of supplies received from abroad. Indeed, the reverse charge mechanism will in future become the rule rather than the exception. **They changes can have unexpected consequences in any transaction which has an international element, particularly in the context of offshore and international tax planning.** All existing strategies need to be reconsidered to ensure that they will not, as from 2010, have a value added tax "downside". These apply not just to strategies aimed at value added tax mitigation but to all strategies.

The new law is particularly obscure. The United Kingdom has attempted to implement the changes in Finance Act 2009, by prospective amendment of the Value Added Tax Act 1994. The relevant EC law is Council Directive 2008/08/EC ("Directive 2008/08") which is even more obscure. Directive 2008/08 amends the principal directive relating to value added tax, which is currently Council Directive of 28 November 2006 on the common system of value added tax (2006/112/EC) ("the 2006 Directive".

It would appear that Finance Act 2009 only imperfectly translates EC law into United Kingdom law.

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In this article, I shall discuss the old and new rules in outline and point out some traps and problem areas. This article is not an exhaustive account of the new law nor a substitute for proper professional advice on a case by case basis. I shall concentrate on the position where a person who "belongs" abroad (a "Person Abroad") makes a supply of which the recipient is a person who "belongs" in the United Kingdom.

The Current Law in Outline

Value Added Tax Act 1994 section 1 imposes a charge to value added tax "on the supply of goods or services *in the United Kingdom* (including anything treated as such a supply)". This is further explained by section 4 (Scope of VAT on taxable supplies), which again provides that "VAT shall be charged" only on "any supply of goods or services made in the United Kingdom".

In order to determine whether a supply made by a Person Abroad is a supply made in the United Kingdom, we must consider Value Added Tax Act 1994 section 7 (Place of supply) which provides, so far as is material:

> "(1) This section shall apply (subject to sections 14, 18 and 18B for determining, for the purposes of this Act, whether goods or services are supplied in the United Kingdom.
>
> ...
>
> (10) A supply of services shall be treated as made-
>
> (a) in the United Kingdom if the supplier belongs in the United Kingdom; and
>
> (b) in another country (and not in the United Kingdom) if the supplier belongs in that other country.
>
> (11) The Treasury may by order provide, in relation to goods or services generally or to particular goods or services specified in the order, for varying the rules for determining where a supply of goods or services is made."

(Sections 14, 18 and 18B and subsection (2) to (9) of section 7 apply only to supplies of goods.)

Where, therefore, does a person "belong"? Value Added Tax Act 1994 section 9 (Place where supplier or recipient of services belongs) provides, so far as material:

> "(1) Subsection (2) below shall apply for determining, in relation to any supply of services, whether the supplier belongs in one country or another ...
>
> (2) The supplier of services shall be treated as belonging in a country if-
>
> (a) he has there a business establishment or some other fixed establishment and no such establishment elsewhere; or
>
> (b) he has no such establishment (there or elsewhere) but his usual place of residence is there; or
>
> (c) he has such establishments both in that country and elsewhere and the establishment of his which is most directly concerned with the supply is there."

Thus, section 9(11) apart, the supply made by the Person Abroad would not be made in the United Kingdom and hence could not be a taxable supply. We must still consider section 9(11) and Treasury Orders made under that section. Orders and / or other derogations from the general rule have been made or enacted in respect of numerous matters, including:

- Accountant's services
- Ancillary transport services
- Advertising services
- Artistic services
- Banking services
- Broadcasting and digitised/electronic services
- Consultancy bureaux's services
- Consultants' services
- Copyright, patent, licence, trademark or similar right
- Cultural services
- Data processing
- Designated travel services
- Education
- Engineers' services
- Entertainment
- Exhibitions, conferences or meetings

- Financial services
- Gas and electricity distribution services
- Hire of goods other than means of transport
- Hire of means of transport
- Insurance
- Intermediaries' services
- Intra-Community transport of goods
- Land
- Legal services
- Obligation to refrain from pursuing business activity or right
- Provision of information
- Right to services
- Scientific services
- Sporting services
- Staff
- Telecommunications services
- Trading allowances in greenhouse gas emissions
- 33 Transport of goods or passengers
- Valuation of goods
- Work carried out on goods

For completeness, the Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121 paragraph 16 can (if certain conditions are satisfied) operate to deem a supply of services to be made where the recipient belongs, but only if the supply "consists of any services of a description specified in any of paragraphs 1 to 8" of Value Added Tax Act 1994 Schedule 5. I discuss paragraphs 1- 8 of Schedule 5 below in the context of reverse supplies.

There also exists the possibility of a "reverse charge" under Value Added Tax Act 1994 section 8 and Schedule 5. Section 8 (Reverse charge on supplies received from abroad) provides:

> "(1) Subject to subsection (3) below, where relevant services are-
>
> (a) supplied by a person who belongs in a country other than the United Kingdom,

and

(b) received by a person ("the recipient") who belongs in the United Kingdom for the purposes of any business carried on by him,

then all the same consequences shall follow under this Act (and particularly so much as charges VAT on a supply and entitles a taxable person to credit for input tax) as if the recipient had himself supplied the services in the United Kingdom in the course or furtherance of his business, and that supply were a taxable supply.

(2) In this section "relevant services" means services of any of the descriptions specified in Schedule 5, not being services within any of the descriptions specified in Schedule 9.

..."

If the supply fell within Value Added Tax Act 1994 Schedule 9, it would be an exempt supply and there would clearly be no question of a reverse charge.

Value Added Tax Act 1994 Schedule 5 (Services supplied where received) contains a list of various descriptions of supply. Paragraphs (1) - (8) are not problematic. They are:

1 Transfers and assignments of copyright, patents, licences, trademarks and similar rights.

2 Advertising services.

3 Services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services; data processing and provision of information (but excluding from this head any services relating to land)

4 Acceptance of any obligation to refrain from pursuing or exercising, in whole or part, any business activity or any such rights as are referred to in paragraph 1 above.1

5 Banking, financial and insurance services (including reinsurance, but not including the provision of safe deposit facilities

5A The provision of access to, and of transport or transmission through, natural gas and electricity distribution systems and the provision of other directly linked services.

6 The supply of staff

7 The letting on hire of goods other than means of transport

7A Telecommunications services [as defined]

7B Radio and television broadcasting services.

7C Electronically supplied services

8 The services rendered by one person to another in procuring for the other any of the services mentioned in paragraphs 1 to 7C above.

The interesting item is item 9:

> "9 Any services not of a description specified in paragraphs 1 to 7 and 8 above when supplied to a recipient who is registered under this Act."

Construing literally the extracts from section 8 and Schedule 5 which I have quoted above, one would no doubt reach the conclusion that they would be in point in the case of any person who was a registered person under the Value Added Tax Act 1994.

A "relevant service" would be supplied by the Person Abroad because it would be "supplied to a recipient who is registered under this Act" within the meaning of Schedule 5 paragraph 9. And it would be (a) supplied by a person who belongs in a country other than the United Kingdom, and (b) received by a person who belongs in the United Kingdom for the purposes of any business carried on by him, within the meaning of section 8(1). One might conclude that it was irrelevant where the service was in fact supplied because it was deemed to be supplied by the recipient *in the United Kingdom*. One might indeed find the result very odd indeed in that a person who made only exempt supplies or so few taxable supplies that he was not registered under the Value Added Tax Act 1994 would not suffer a reverse charge, yet one would regard the words as very clear.

It was nevertheless stated in de Voil, at V3.231 (Services received from abroad):

> "VATA 1994 s 8 imposes a "reverse charge" which transfers the liability to account for and pay tax on "relevant services" from the person making the supply to the person (referred to as the "recipient") who receives them. ...
>
> ...
>
> **The "reverse charge" only applies where the place of supply of such services would be in the UK.** Where the place of supply is another country,

> such services are outside the scope of UK VAT and subject to tax, if any, only in that other country. Since the general rule for the place of supply of services is that they are supplied where the supplier belongs and the "reverse charge" only applies where the supplier belongs outside the UK, the application of the "reverse charge" is limited to those special cases where the general rule is overridden."

The authority cited by de Voil is "Notice 741 (March 2002) para 1.5". That was a misleading reference. The 2002 version of Notice 741 has been entirely replaced. The current version was last issued / updated to May 2008. It is a very long Notice indeed. The following extracts from it certainly support de Voil's view (emboldening added by RV):

> "13 Schedule 5, paragraphs 1 to 8 - Services that can be supplied or received in a customer's country
>
> The law which lists the services that can be made in a customer's country is in VATA 1994 Sch 5, paras 1 to 8.
>
> Remember, this section [sic] covers a list of services. **It does not determine where supplies of these services are made**.
>
> ...
>
> 13.2 Why are **para 9** and 10 **of Sch 5** not included in this section?
>
> This section only details services covered by section 12 and paragraph 16.10.
>
> **Paragraphs 9** and 10 **of Schedule 5 refer to services whose place of supply is determined to be the UK under other sections. Their function is simply to provide the mechanism for the reverse charge provisions and allow UK VAT registered customers to account for UK VAT on behalf of overseas suppliers in certain circumstances.** See paragraphs 16.11 and 16.12.
>
> ...
>
> 16 Reverse charge
>
> The law on the reverse charge is in VATA 1994 s 8.
>
> ...

16.7 Can the reverse charge apply to services supplied by UK suppliers?

The reverse charge does not apply to supplies of services where the supplier belongs in the UK. It only applies where services are supplied in the UK by suppliers belonging overseas.

Services which, under the place of supply rules, are supplied in another country are outside the scope of UK VAT. Such services can only be subject to tax in that country."

...

16.12 Extension to other services supplied in the UK

The reverse charge also applies to the following services when they are made in the UK:

- services relating to land and property. See section 6;
- services supplied where performed. See section 7;
- passenger transport. See section 9;
- freight transport services not covered by paragraph 16.11;
- services covered by the additional rules for hired goods, telecommunications services, radio and television broadcasting services. See section 14; and
- services covered by the additional rules for electronically supplied services. See section 15.

16.12.1 When does the extension to the reverse charge apply?

The extension to the reverse charge applies if you are UK VAT registered and **receive services listed in paragraph 16.12** which are supplied in the UK where:

- your supplier belongs outside the UK; and
- you receive the supply for business purposes."

There can be no doubt from the above that Her Majesty's Commissioners of Revenue and Customs agree that, for a reverse charge to operate under section 8 and Schedule 5 paragraph 9 the supply must be made in the United Kingdom

independently of and before one seeks to apply those provisions. So even if the Person Abroad makes a taxable supply, that supply will be made outside the United Kingdom and there will, under current law, be no reverse charge.

How is it that the construction Her Majesty's Commissioners of Revenue and Customs put on the relevant words can be so far from their ordinary and natural meaning? First, given that section 8 can have an effect only where the recipient of the supply in question belongs in the United Kingdom and the supply is received for the purpose of a business carried on by him, if Schedule 5 paragraph 9 were construed literally, it would make paragraphs 1 - 8 completely redundant! That is a strong indication that it is not to be so construed.

Second and more importantly, construing paragraph 9 according to its ordinary and natural meaning would involve United Kingdom law being flatly incompatible with EC law. The place of supply rules are laid down in the 2006 Directive. They are of central importance, as it is vital that each transaction is not taxed by more than one Member State and almost as vital that a transaction which is prima facie within the charge to Value Added Tax should be taxable in (at least) one Member State. While Article 56 authorises (and requires) the departures from the normal rules which are reflected in the Value Added Tax Act 1994 Schedule 5 paragraphs 1- 8 inclusive, there is nothing which would authorise paragraph 9, construed literally.

The New Law

Finance Act 2009

Finance Act 2009 has radically amended the Value Added Tax Act 1994, with effect from 1st January 2010. The two main changes affect (a) the place where a supply of services takes place and (b) the law relating to reverse charges.

Place of Supply of Services

In Value Added Tax Act 1994 section 7 all references to supplies of services will be deleted and there will be inserted a new section 7A (Place of supply of services) which provides:

> "(1) This section applies for determining, for the purposes of this Act, the country in which services are supplied.
>
> (2) 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.

(3) The place of supply of a right to services is the same as that in which the supply of the services would be treated as made if made by the supplier of the right to the recipient of the right (whether or not the right is exercised); and for this purpose a right to services includes any right, option or priority with respect to the supply of

services and an interest deriving from a right to services.

(4) For the purposes of this Act a person is a relevant business person in relation to a supply of services if the person—

(a) is a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC,

(b) is registered under this Act,

(c) is identified for the purposes of VAT in accordance with the law of a member State other than the United Kingdom or

(d) is registered under an Act of Tynwald for the purposes of any tax imposed by or under an Act of Tynwald which corresponds to value added tax, and the services are received by the person otherwise than wholly for private purposes.

(5) Subsection (2) has effect subject to Schedule 4A.

..."

Thus, if the person is a "relevant business person", and if he "belongs" in the United Kingdom, a supply made to him by a Person Abroad will be deemed to be made in the United Kingdom and thus in principle within the scope of United Kingdom value added tax, no matter where the Person Abroad in fact "belongs". If X is not a "relevant business person", then the supply made by the Person Abroad will be made outside the United Kingdom, as under present law: see the new section 7A(2)(b).

When does a relevant business person "belong" in the United Kingdom? Finance Act 2009 has substituted a new section 9 (Place where supplier or recipient of services belongs), which provides:

"(1) This section has effect for determining for the purposes of section 7A (or Schedule 4A) or section 8, in relation to any supply of

services, whether a person who is the supplier or recipient belongs in one country or another.

(2) A person who is a relevant business person is to be treated as belonging in the relevant country.

(3) In subsection (2) "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, and

(c) otherwise, the country in which the person's usual place of residence is.

(4) In subsection (3)(b) "relevant establishment" means whichever of the person's business establishment, or other fixed establishments, is most directly concerned with the supply.

[(5) deals with a person who is not a relevant business person]

(6) In this section "usual place of residence", in relation to a body corporate, means the place where it is legally constituted."

Let us assume that a person, X, of whom we are enquiring whether he is a relevant business person "belongs" in the United Kingdom.

X will be a "relevant business person" if (but not only if) he is registered under the Value Added Tax Act. If all the supplies he makes are taxable supplies or if the supply received by him from the Person Abroad is only the purposes of that part of his business (in EC-speak, "economic activity") which consists of making only taxable supplies, that should not result in any additional value added tax becoming payable, for while the value added tax on the supply will be payable by X (not the Person Abroad) yet he should be able to deduct it in full.

If X makes partly taxable supplies and party exempt supplies and makes taxable supplies of such value that he is registered under the Value Added Tax Act and if the supply to X by the Person Abroad is made at least in part in connection with exempt supplies made by X, then this *could* cause there to be a value added tax cost to X of receiving a supply from the Person Abroad. Whether it would do so would depend on whether:

(a) the supply in fact made by the Person Abroad was itself an exempt supply and

(b) whether the new reverse charge rules would convert the exempt supply into a taxable supply.

These points are discussed below.

What is the position if X is not registered under the Value Added Tax Act, whether because he makes only exempt supplies or supplies of an value insufficient to require him to be so registered? In that case, he will not be a "relevant business person" *by virtue of section 7A(4)(b)*. Let us assume for simplicity that X will not be a "relevant business person" by virtue of section 7A(4)(d), i.e. he is not "registered under an Act of Tynwald" - the legislature of the Isle of Man "for the purposes of any tax imposed by or under an Act of Tynwald which corresponds to value added tax".

Yet could X be a "relevant person" by virtue of section 7A(4)(a) in that he is a "a taxable person within the meaning of Article 9 of" the 2006 Directive? (I consider later whether he could be a "relevant business person" by virtue of section 7A(4)c) as being "identified for the purposes of VAT".)

Article 9 of the 2006 Directive is contained in Title III Taxable Persons. It provides:

"1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

2. ..."

(Articles 10 -13 also deal with the concept of "taxable person".)

The phrase "taxable person" as used in the Directive is highly misleading. It does not mean (as it does in the Value Added Tax Act 1994) a person who is taxable! What is taxable is "the supply of [goods and services] for consideration by a taxable person acting as such": see Article 2.1. Thus, someone who makes no taxable supplies at all can still be a "taxable person", either because he makes no supply for a consideration or because he makes no supply within any Member State.

The width of the term "economic activity" is very great. Let us assume that X is carrying on an economic activity and is thus a "taxable person" with the meaning of article 9, **even though he is not registered (or liable to be registered) for United Kingdom value added tax purposes**.

This result is very surprising. For the width of the term "taxable person" in Article 9 of the Directive is so great that it is difficult to imagine any person falling within Value Added Tax Act section 7A(4)(b), (c) or (d) who would not already fall within (a). Given that the United Kingdom failed to implement the existing EC law in United Kingdom law, I have considered Council Directive 2008/08/EC to see if it has been properly implemented into United Kingdom law by Finance Act 2009. I have also considered that Directive in relation to the new reverse charge rules, which can apply if the recipient of the supply is a relevant business person. See below.

Value Added Tax Act 1994 section 7A(2) is, by virtue of 7A(5), subject to Schedule 4A. Schedule 4A is an entirely new schedule which is headed "Place of Supply of Services: Special Rules". It applies for the purposes, of inter alia, section 7A. It contains exceptions to the place of supply rules contained in section 7A.

Part 1 (General Exceptions) deals with:

1 Services relating to land

2 Passenger transport

3 Hiring of means of transport

4 Cultural, educational and entertainment services etc

5 Restaurant and catering services: general

6 EC on-board restaurant and catering services

7 Hiring of goods

8 Telecommunication and broadcasting services

Part 2 (Exceptions Relating to Supplies Made to Relevant Business Person) deals with:

9 Electronically-supplied services

Part 3 is headed "Exceptions Relating to Supplies Not Made to Relevant Business Person". It cannot therefore apply in a section 7A(2)(a) situation.
Part 3 deals with:

10 Intermediaries (more accurately, a supply (to a person who is not a relevant business person) consisting of 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, in which case the supply of making arrangements is treated as made in the same country as the supply to which it relates)

11 Transport of goods: general

12 Intra-Community transport of goods

13 Ancillary transport services

14 Valuation services etc

15 Electronic services

16 Other [defined] services provided to "a person ("the recipient") who—

"(a) is not a relevant business person, and

(b) belongs in a country which is not a member State (other than the Isle of Man)"

The New Reverse Charge Regime

Finance Act 2009 has also made prospective amendments to Value Added Tax Act section 8 (Reverse charge on supplies received from abroad). Subsections (1) and (2) of section 8 and Schedule 5, which contain the current reverse charge rules, are being entirely repealed. The new section 8(1) and (2) provides:

"(1) Where services are supplied by a person who belongs in a country other than the United Kingdom in circumstances in which this subsection applies, this Act has effect as if (instead of there being a supply of the services by that person)—

(a) there were a supply of the services by the recipient in the United Kingdom in the course or furtherance of a business carried on by the recipient and

(b) that supply were a taxable supply.

(2) Subsection (1) above applies if—

> (a) the recipient is a relevant business person who belongs in the United Kingdom, and
>
> (b) the place of supply of the services is inside the United Kingdom
>
> and, where the supply of the services is one to which any paragraph of Part 1 or 2 of Schedule 4A applies, the recipient is registered under this Act."

Let us assume that X, the actual recipient of the services, is "a relevant business person who belongs in the United Kingdom" so that the condition in the new section 8(2)(a) is satisfied. Unless some exception to section 7A applies, the place of a non-exempt supply of services would on that basis prima facie be inside the United Kingdom, so that condition in the new section 8(2)(b) would be satisfied.
One needs to go on further and ask whether "the supply of the services is one to which any paragraph of Part 1 or 2 of Schedule 4A applies". If it does, then section 8 would bite *only* if X were registered under the Value Added Tax Act 1994 so that, for example, a trader which made wholly exempt supplies would fall without the reverse charge. If "the supply of the services is" *not* "one to which any paragraph of Part 1 or 2 of Schedule 4A applies", then it does not matter whether X is registered or not.

If section 8 did not apply, that could in theory still leave the Person Abroad potentially liable (in an appropriate case) for value added tax on the supply, assuming it to be made within the United Kingdom. However, if it had no presence or assets within the EU, that liability might be difficult to enforce.

What if a Person Abroad makes a supply to a relevant business person who belongs inside the United Kingdom and that supply is an *exempt* supply? Value Added Tax Act 1994 section 8(4A), inserted by Finance Act 2009, provides:

> "(4A) Subsection (1) does not apply to services of any of the descriptions specified in Schedule 9."

It is Schedule 9 which lists supplies which are exempt supplies.

The effect of the new section 8(4A) appears at first blush to make redundant section 8(1)(b), which deems the deemed supply to be a taxable supply. For section 8A applies only to a supply which is a taxable supply. However, there are situations, no doubt exceptional ones, where the inclusion of both provisions in the section makes sense. In determining whether a supply is an exempt supply it is sometimes necessary to take into account the identity and characteristics of the person making it. The effect of the new section 8A is, in my view, that one takes into account in the first instance the identity and characteristics of the person *in fact* making the supply.

If the supply made by him is, on that basis, an exempt supply, then the section does not apply at all. If the supply made by him is a taxable supply, then the deemed supply made by the recipient is always a taxable supply, even if, had the supply in fact been made by the recipient, it would have been an exempt supply.

EC Law

I shall now consider some relevant parts of EC law, to determine whether Finance Act 2009 is in conformity with it. I shall especially concentrate on the question whether the general rule is that the place of a supply of services made by a person who belongs outside the United Kingdom to a person who belongs in the United Kingdom and who carries on a business but who is not liable to be registered for value added tax in the United Kingdom is inside or outside the United Kingdom.

The principal directive relating to value added tax is currently the Council Directive of 28 November 2006 on the common system of value added tax (2006/112/EC) to which I shall refer as "the 2006 Directive". The new place of supply rules are introduced by Council Directive 2008/08/EC of 12 February 2008 amending the 2006 Directive as regards the place of supply of services, to which I shall refer as "Directive 2008/08".

EC law is so often so badly drafted, even worse than United Kingdom legislation, that the European Court of Justice has to have resort to what it calls a "purposive" rule of construction. This means that greater violence can often be done to the wording of the legislation in construing it in order to reach a conclusion that the Court thinks was intended (or, rather, would have been intended, had the draughtsman given the matter due consideration) than would be the case with United Kingdom legislation, even in the current judicial climate. A corollary of this is that it is legitimate to resort to the recitals introducing a piece of legislation and explaining its purpose in order to construe it. Lawyers educated in England should remember that the Golden Rule (of statutory construction) stops at Calais.

Recital (3) of Directive 2008/08 states:

> "(3) For all supplies of services the place of taxation should, in principle, be the place where the actual consumption takes place. If the general rule for the place of supply of services were to be altered in this way, certain exceptions to this general rule would still be necessary for both administrative and policy reasons."

Amazing at is may seem, effect is NOT given to this principle by Directive 2008/08. Instead, the Directive looks at other factors, such as where the maker or the recipient of the supply has established his business or has a fixed establishment or is resident. It is only in exceptions to the general rule that the place of actual consumption is relevant!

Recital 4 of Directive 2008/08 states:

> "(4) For supplies of services to taxable persons, the general rule with respect to the place of supply of services should be based on the place where the recipient is established, rather than where the supplier is established. For the purposes of rules determining the place of supply of services and to minimise burdens on business, taxable persons who also have non-taxable activities should be treated as taxable for all services rendered to them. Similarly, non-taxable legal persons who are identified for VAT purposes should be regarded as taxable persons. These provisions, in accordance with normal rules, should not extend to supplies of services received by a taxable person for his own personal use or that of his staff."

Given that Directive 2008/08 is a directive amending the 2006 Directive and supplemental to it, one would expect it to be construed in accordance with the 2006 Directive. The phrase "taxable person" is defined, by article 9 of the 2006 Directive so as to mean, in effect, any person who carries on an "economic activity". Yet if it is being used in that sense in recital (4), the second and fourth sentences are enigmatic. The second sentence would not be needed if a taxable person were simply one carrying on an economic activity. Hence, this is an indication that "taxable person" means, in at least some places in Directive 2008/08, a person who is actually liable to tax. (I consider below the important third sentence, concerning "legal persons who are identified for VAT purposes".)

The new article 3 of the 2006 Directive inserted by Directive 2008/08 is:

> "For the purpose of applying the rules concerning the place of supply of services:
>
> "1. a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him.
>
> 2. a non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person."

Paragraph 1 suggests that were it not for that paragraph a person would not be a taxable person unless he carried out activities or transactions which are "considered to be taxable supplies of goods or services in accordance with Article 2(1)" of the 2006 Directive" i.e. he makes supplies which are taxable. The word "also" suggests that if he makes taxable supplies, then he is also to be regarded as a taxable person in respect of non-taxable (i.e. exempt) supplies he makes.

This is truly appalling drafting. Some would say "Normal for the EC". Fortunately, these difficulties considering the meaning of "taxable person" in Directive 2008/08 are, in my view, probably rendered academic by the new provisions introduced by that Directive relating to persons who are "identified" for value added tax purposes. While the concept is already known under existing law, its scope is being expanded. Directive 2008/08 will add subparagraphs (d) and (e) to Article 214 of the 2006 Directive, which will provide:

> "1. Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number:
>
> (a) every taxable person, with the exception of those referred to in Article 9(2), who within their respective territory carries out supplies of goods or services in respect of which VAT is deductible, other than supplies of goods or services in respect of which VAT is payable solely by the customer or the person for whom the goods or services are intended, in accordance with Articles 194 to 197 and Article 199;
>
> (b) every taxable person, or non-taxable legal person, who makes intra-Community acquisitions of goods subject to VAT pursuant to Article 2(1)(b) and every taxable person, or non-taxable legal person, who exercises the option under Article 3(3) of making their intra-Community acquisitions subject to VAT;
>
> (c) every taxable person who, within their respective territory, makes intra-Community acquisitions of goods for the purposes of transactions which relate to the activities referred to in the second subparagraph of Article 9(1) and which are carried out outside that territory.
>
> (d) every taxable person who within their respective territory receives services for which he is liable to pay VAT pursuant to Article 196;
>
> (e) every taxable person, established within their respective territory, who supplies services within the territory of another Member State for which VAT is payable solely by the recipient pursuant to Article 196."

Who is a "taxable person who within [his] territory receives services for which he is liable to pay VAT pursuant to Article 196"? The new Article 196 will provide:

> "VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44

are supplied, if the services are supplied by a taxable person not established within the territory of the Member State."

The paper-chase takes us to the new Article 44, as inserted by Directive 2008/08, which provides:

> "Article 44 - The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides."

Now Article 44 refers only to services supplied to a taxable person and not to a "non-taxable" person, so that the reference in Article 196 to "non-taxable legal person" would appear to be redundant. However, the new Article 43 will provide:

> "For the purpose of applying the rules concerning the place of supply of services:
>
> 1. a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him;
>
> 2. a non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person."

The reader may, if his head is not already spinning, have noticed a small problem of circularity with these provisions. A person will be required to be identified for value added tax purposes by Article 215.1(d) only if value added tax is payable by him, by virtue of Article 196, in respect of a supply in fact made to him by a supplier established abroad, and falling within Article 44. Yet value added tax will be payable by him only if he is identified for value added tax purposes! In my view, the European Court of Justice would probably deal with this as it deals with similar defects found in EU legislation. Rather than construing the provisions as redundant, it would hold that a person was liable to be identified if, *on the basis that he were so identified*, value added tax would be payable by him by under section 196.

The new Article 196 will provide:

> "VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44 are supplied, if the services are supplied by a taxable person not established within the territory of the Member State."

There are two further problems with this Article. It would appear that "taxable person" where it first appears does not bear its normal meaning of, in effect a person carrying on an economic activity but rather a person carrying on an economic activity who is liable to account for value added tax in respect of supplies made in the course thereof. Does it bear the same meaning in the phrase "a taxable person not established within the territory of the Member State"? I suspect not. Of course, the use of the very same expression in two quite different senses in the same sentence of a United Kingdom statute is virtually unheard of. But then we are dealing with EC legislation.

The second question is what is meant by a "non-taxable *legal* person identified for VAT purposes". All persons recognised by the law are legal persons. Yet the expression could be used, especially where the simple word "person" has just been used, to mean a person which was not a natural person, i.e. an individual, but an artificial person recognised *only* by the law, such as a body corporate. However, it seems most unlikely that EU value added tax legislation should put individual traders in a different position than, say, corporate traders. That would indeed involve the very distortion of competition which value added tax is meant to avoid.

Some Conclusions

What is the upshot of all this?

While the position is not as clear as it ought to be, my own views are as follows. If a service is provided by, say, a person which has established its business in the Channel Islands to a taxable person (in the basic EC sense of a person carrying on an economic activity) acting as such who has established his business in the United Kingdom and who has no fixed establishment elsewhere, and that supply is a taxable supply made for a consideration, then the place of supply of that service will normally be in the United Kingdom.

Moreover, the reverse charge rules will normally apply to cause it to be deemed to be made by the recipient. It is irrelevant whether the person to whom the supply is made is registered for value added tax e.g. because it makes only exempt supplies, **unless** the supplies fall within the new Schedule 4A Parts 1 or 2.

A more difficult question is whether the supply deemed to be made by the recipient is definitively taxable, or whether it is simply taken into account in determining whether the recipient needs to be registered for value added tax. This question will often be academic.

A further question is whether, if a supply is made by a person which has established its business e.g. in the Channel Islands to a person who is a taxable person who has established his business in the United Kingdom and who has no fixed establishment elsewhere but who is not acting as a taxable person in receiving the supply, because he is receiving it for his own non-business purposes, and that supply is a taxable supply made for a consideration, the place of supply of that service will normally be in the United Kingdom. A reading merely of the amended Value Added Tax Act 1994 section 7A(4) would supply the answer "yes".

However, this is in my view inconsistent with EC law. The new Article 43 of the 2006 Directive lays down a place of supply rule whether the services are supplied to a taxable person acting as such, whereas the new Article 44 lays down a place of supply rule whether the services are supplied to a non-taxable person. There is a gap in the wording where the services are suppiled to a taxable person NOT acting as such. In that context, Recital (4) to Directive 2008/08 in my view supplies the answer. It is concerned with "supplies of services to taxable persons" and ends "These provisions, in accordance with normal rules, should not extend to supplies of services received by a taxable person for his own personal use or that of his staff." Thus, the supply of a service to a taxable person not acting as such would in my view fall within article 44.

A person carrying on a business in the United Kingdom who pays a Person Abroad to do something - anything - even refraining from doing something - but which does not involve a supply of goods must always consider whether he is subject to a reverse supply. He will normally be unless the supply is an exempt supply or comes within an exception in Schedule 4A. However, that will be of no consequence in terms of his value added tax liability (as opposed to his reporting requirements) if the supply is received purely for the purposes of the whole or part of his business which consist of making only taxable supplies or is received for his non-business purposes.