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Article 44 RVD as the main rule for intra-Community place of supply of services B2B: legal issues arising at its application. Is the implementation in Italy in line with article 44 RVD and the EU laws?

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Abbreviations

RVD	Recast VAT Directive 2006/112/EC
IVA Code	D.P.R. 633/1972 (Italian VAT Law)
IR	Council Implementing Regulation EU 282/2011
OECD	Organisation for Economic Cooperation and Development
Sixth Directive	Directive 77/388/EC of 17 May 1977
B2C	Supply of services business to consumer
B2B	Supply of services business to business
ECJ	European Court of Justice
F.E.	Fixed Establishment

1 Introduction

1.1 Background

The provisions relating to the place of supply of services seize a central role in the assessment of VAT liability for cross-border supplies of services¹ since they govern the question concerning the applicability of national tax legislation.² As the scope of the VAT system covers supplies of goods and services which a trader makes for consideration within the territory of a country in the course of his business, only a place of supply within the territory³ of that country allows the application of national VAT legislation.⁴

The doctrine of the determination of the place of supply is irrelevant in cases where transactions are subject to one and the same national tax jurisdiction. As soon as the jurisdiction of more than one national tax authority applies because, for instance, goods are moved to the territory of another Member State or services are supplied to a person who has his place of residence in another Member State, it cannot be unequivocally determined whether economic activity has taken place within or outside a particular national territory. Determination of the place of supply is crucial in answering the question whether and which VAT is to be levied.⁵

If each national tax jurisdiction were to refer to different criteria as the basis for determining the place of supply, not only double taxation, but also non-taxation could be expected to occur. It is precisely from that point of view that a uniform basis for determining the place of supply within the common market acquires particular importance.⁶

The rules contained in the RVD⁷ concerning the place of supply of services are intended, according to the 17th recital in the Preamble to the RVD, to delimit the powers of taxation of the individual Member States from one another so as to avoid conflicts of jurisdiction.⁸ The territoriality principle therefore inspires all the place of supply rules in the RVD.

1 AG Opinion in ECJ Case C-37/08 RCI para. 49

2 Haunold, P., *Mehrwertsteuer bei sonstigen Leistungen – Die Besteuerung grenzüberschreitender Dienstleistungen*, Vienna 1997, p. 121

³ territoriality principle

4 AG Opinion in ECJ Case C-37/08 RCI para. 49

5 Terra, B. and Kajus, J., *A guide to the European VAT Directives 2008 – Introduction to European VAT*, Volume 1, p. 497

6 Weiermayer, R., 'Der Leistungsort im Blicke der Rechtsprechung des EuGH', in: *EuGH-Rechtsprechung und Umsatzsteuerpraxis* (ed. Achatz, M. and Tumpel, M.), 2001, p. 125.

⁷ Directive 2006/112/EC

8 Case 168/84 Berkholz [1985] ECR 2251, paragraph 14; Case C-327/94 Dudda [1996] ECR I-4595, paragraph 20; Case C-167/95 Linthorst and Others [1997] ECR I-1195, paragraph 10; and Case C-452/03 RAL [2005] ECR I-3947, paragraph 23. In those cases, the Court stated, in connection with the provisions of Article 9 of the Sixth Directive concerning the place of supply, that the object of those provisions is to avoid, first, conflicts of jurisdiction which may result in double taxation, and, second, non-taxation.

Before the RVD entered into force on 1st January 2010, when the new place of supply rules became effective⁹, under the Sixth Directive¹⁰ the legislature in framing the rules on the place of supply, decided in favour of a hybrid approach. Article 9(1) of the Sixth Directive ruled that the place where services are supplied should, in principle, be the place of business of the person supplying them¹¹ (origin principle) However, in Article 9(2)¹², it made numerous mandatory exceptions, which considerably restricted the scope of Article 9(1) and allowed the principle of the place of business itself in the sense of place of establishment from the supplier side, which is the prevailing principle in the Sixth Directive, to become the exception. As refers to intra-Community supply of services, Art 9(2) shifted, for “intellectual services” specified in detail, the place of supply for tax purposes to the place of the receiving business establishment. In addition, special rules and schemes took into account the particular features of certain economic activities.

On the contrary, in the RVD, as explained in the 17th recital of the Preamble¹³, the place of supply of services is shifted to the Member State of the customer (destination principle) in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods. That provision is contained in art 44 RVD ruling the supply of services business to business. In the view of the legislature, the harmonization of the VAT system and the fiscal neutrality, reflecting in VAT the general principle of equal treatment,¹⁴ are best achieved in the B2B transactions through the application of the destination principle.

The place of supply is still fixed where the taxable person supplying the services has established his business (origin principle) according to art 45 RVD, for the supply of services to non-taxable persons. Exceptions are contained in articles 46/59b providing specific place of supply rules, mainly linked to the effective use criteria, prevailing on art 44 as *lex specialis derogat generali*. Special place of supply rules are also contained in Title XII RVD, “special schemes”.

The objective of the special VAT schemes¹⁵ is to adapt the applicable rules to the specific nature of the activities considered. For example, the services provided by travel agents most frequently consist of multiple services, in particular transport and accommodation, supplied partly outside and partly inside the territory of the Member State in which the undertaking has established its business or has a fixed establishment.

⁹ With the “VAT Package”, including Dir. 2008/9/EC, Dir. 2008/8/EC

¹⁰ Directive 77/388/EC of 17 May 1977

¹¹ AG Opinion in ECJ Case C-37/08 RCI para. 52

¹² of the Sixth Directive

¹³ Preamble to the RVD

¹⁴ ECJ C-484/06 Case Fiscale eenheid Koninklijke Ahold NV v. Staatsecretariats van Financien; ECJ C-488/07 Case Royal Bank of Scotland Group plc v. The Commissioners for Her Majesty’s Revenue and Customs

¹⁵ AG Opinion in ECJ Case C-37/08 RCI para. 96

The application of the normal rules on place of taxation, taxable amount and deduction of input tax would, by reason of the multiplicity of services and places in which they are provided, entail practical difficulties for those undertakings of such a nature as to obstruct their operations. In order to avoid that, for example Article 307 RVD provides *inter alia* that all transactions performed in respect of a journey are to be treated as a single service supplied to the traveller. It is to be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which he has provided the services.

Art 44 RVD presents many controversial aspects, due to the complexity of the wording that requires interpretation. Criticalities are present in the implementation of the rule at national level due to the wideness of the field of application. Such criticalities make difficult the correct localisation of the place of supply of services B2B with consequences on VAT allocation and liability.

Some clarifications are contained in the Council Regulation EU 282/2011, recasting Council Regulation EC 1777/2005 and laying down implementing measures of the RVD. Its articles touch upon nearly all areas of the EU VAT system. As set out in the Preamble¹⁶, the adoption of common provisions by way of a Regulation, should ensure a more internal market-compliant application of the VAT system in cases where divergences have arisen or may arise. In accordance with the principle of proportionality,¹⁷ the new Regulation does however not go beyond what is necessary to ensure uniformity.

Moreover, as the provisions of the Regulation aim at providing uniform responses to selective questions of interpretations, they are not conclusive for other cases and are to be applied restrictively. As the IR is based on powers attributed to the Council under the RVD to adopt implementing provisions, in case of conflict with rules of the RVD the IR should never override the RVD provisions, because it can't change their scope.¹⁸

Other clarifications are contained in the “decisions” of the VAT Committee, set up by art 398 RVD, whose role is not to give binding rules but to give guidance on the day-to-day practice of VAT.¹⁹

1.2 Purpose

The purpose of this research is to provide for an in-depth analysis of art 44 RVD and to determine the legal problems arising at its application, with particular reference to the concept of fixed establishment.

¹⁶ Preamble to EU Council Regulation 282/2011 paragraphs 2 and 4

¹⁷ Marie Lamensch, “New Implementing Regulation 282/2011 for the 2006 VAT Directive”, in EC Tax Review 2011-4 page 162

¹⁸ Walter de Wit, “The Fixed Establishment after the VAT Package”, in VAT in an EU and International Perspective, IBFD 2011, page 31

¹⁹ Terra Kajus, “A Guide to the European VAT Directives” Volume 1, IBFD page 1257

The questions to be answered are: which are the essential and problematic legal issues arising by the provision of art 44 RVD? And by the IR? Where, to whom and when the supply of services is provided?

In particular, a possible answer to the following questions will be given:

- a) Is art 11(1) IR compliant to art 44 RVD?
- b) Is art 11(1) IR compliant to art 171 RVD and 3(a) Dir. 2008/9?

And, to the questions:

- a) Is art 11(2) IR compliant to art 45 RVD?
- b) Is art 11(2) IR compliant to art 192 a RVD?

Then, which problematic issues derive from the implementation of art 44 RVD in Italy? A deep analysis is made on the compliance art 38 Bis 2 of the DPR 633/1972 (the Italian law implementing the RVD) to art 171 RVD, art 3(a) Directive 2008/9, art 44 RVD and 11(1)IR with respect to the right of refund and to the concept of fixed establishment.

1.3 Method and Material

The Method used in this research is both the legal and the jurisdictional method, based on Material deriving by European and national legal sources, European and national Case law, Historical doctrine, European Commission Guidelines, OECD Guidelines.

1.4 Delimitations

This research is not dealing with the supply of services business to consumer (B2C)²⁰. It is limited to the intra-EU supply of services. Exceptions to art 44²¹ and special schemes are not taken into consideration. The supply of services between head offices and their fixed establishments is not considered.²² At national level (Italy), only some problematic issues and the suspect unlawfulness of art 38 Bis 2 IVA Code are analysed, so it won't be explained in detail the whole implementation of art 44 RVD.

1.5 Outline

This research starts with the principles of tax allocation in chapter 2, then continues with the analysis of the text of art 44 RVD on the basis of the IR and on the ECJ Case law, deepening in particular the concept of fixed establishment (chapter 3), and finally describes the implementation in Italy of art 44 and 171 RVD in the art 38 Bis 2 of the Italian VAT code (chapter 4). Conclusions are contained in chapter 5.

²⁰ but only B2B supply of services

²¹ Art 44 RVD

²² The ECJ FCE Bank Case ECJ C-210/04 made it clear that such services fall outside the scope of VAT in head office-to branch supply inside a group within the same Member State; the case is much more controverted in relation to the possible implications of an international VAT group, but the topic is too complex to be discussed in this thesis

2 Principles of tax allocation

2.1 The legal principles of VAT

On the basis of art 113 TFEU, harmonisation of legislation ruling indirect taxes is necessary to avoid distortion of competition and ensure the functioning of the internal market. Art 113 demands the Council to adopt rules that can guarantee tax harmonisation.

Article 19 TEU rules that “the Court of Justice of the EU ... shall ensure that in the interpretation and application of the Treaties the law is observed”. This recognition of “the law” as source of the EU legal order has empowered the ECJ to apply legal unwritten principles when interpreting Community provisions.

These principles are simply created by the Court, as occurs in the national sphere, and they accordingly constitute principles specific to EU law, in the sense that they have their own autonomy²³ and are not borrowed from other legal systems. In VAT Cases ECJ has referred, *inter alia*, to the following principles: of elimination of distortion in competition, of equality, legality, fiscal neutrality, territoriality and destination.

Those principles do not have constitutional status like, instead, the unwritten general principles forming part of the fundamental EU rights, such as good faith, legal certainty, non-retroactivity, equal treatment, proportionality.

2.2 Fiscal neutrality principle

The principle of fiscal neutrality²⁴ was intended by the Community legislature to reflect, in matters relating to VAT, the general principle of equal treatment²⁵. However, while that latter principle, like the other general principles of Community law, has constitutional status, the principle of fiscal neutrality requires legislation to be drafted and enacted, which requires a measure of secondary Community law²⁶. From the *NCC Construction Danmark Case* emerges that, when implementing provisions, Member States must take into account the principle of equal treatment which binds those Member States. Because the principle of neutrality does not have constitutional status, that principle needs to be implemented and may be the subject of detailed rules in legislative measures. The principle of fiscal neutrality includes the principles of VAT uniformity and of elimination of distortion in competition.

²³ AG Tesouro in Case C-367/96 (Kefalas)

²⁴ ECJ Cases 289/86 (Happy Family) and 269/86 (Mol) for the first time cited ”principle of” fiscal neutrality

²⁵ see, to that effect, Case C-309/06 Marks & Spencer paragraph 49

²⁶ Case C-174/08 NCC Construction Danmark

2.2.1. Fiscal neutrality principle in the RVD

Art 1(2) RVD describes the neutrality principle in the meaning that VAT, as a general tax on consumption, should be exactly proportional to the price of the goods and services so that the tax does not influence prices and regardless of the producer.

2.2.2 Fiscal neutrality principle in the OECD Guidelines

The OECD Guidelines explain the meaning of fiscal neutrality as VAT, as a final tax on consumption, should be neutral for businesses.²⁷ In similar situations, businesses carrying out similar transactions should be subject to similar levels of taxation. With respect to the level of taxation, foreign businesses should not be disadvantaged nor advantaged compared to domestic businesses in the jurisdiction where the tax is due or paid.²⁸

2.2.3 Fiscal neutrality principle in doctrine

The doctrine^{29 30} makes a distinction among internal and external neutrality, the first related to the national aspect of levying a turnover tax, the second to the international aspects. Internal neutrality has three aspects: legal, competition and economic neutrality. Legal neutrality means that the equal is treated equally, the tax burden has to be equal for identical products; Competition neutrality in economic sense is a consequence of legal neutrality, because if VAT is legally neutral, competition will be not distorted. Competition neutrality has a legal meaning also: VAT as an indirect general tax on consumption is to be paid by businesses, but the tax must be borne by individuals. If a different tax burden is borne by identical products, the business that has to pay the highest tax cannot fully shift the tax to the consumer, if it wants to remain competitive, so the tax becomes not competition neutral. Economic neutrality means that VAT is neutral if it does not interfere with the optimal allocation of the means of production. Such interference may be caused by different tax rates. External neutrality means a neutral functioning of the tax frontiers: the tax on importation is not to exceed the internal tax on like domestic goods and services and the refund on exportation has to be the same amount that has been levied.

2.2.4 Fiscal neutrality principle in jurisprudence

Different aspects of neutrality have been enlightened by the ECJ Case law, that the doctrinal debate has subsequently developed.

a) Meaning principle of equal treatment

²⁷ OECD VAT/GST Guidelines February 2013 pag 16

²⁸ ibidem pag 16

²⁹ Terra Kajus, a Guide to the European VAT Directives IBFD 2011 pag 283/287

³⁰ M.E. Möller, "On the Value Added tax in Denmark and the Economic Community and the renaissance of Tax Neutrality", Bulletin of International Fiscal Documentation 10 (1967), pp. 431-450.

In *Zimmermann Case*³¹ the ECJ recalled two different meanings of neutrality: "on the one hand, (as) the deduction mechanism provided for under the (Sixth) Directive is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities, ...the common system of VAT seeks to ensure neutrality of taxation of all economic activities"³².

"On the other hand, the principle of fiscal neutrality means that supplies of goods or services which are similar, and which are accordingly in competition with each other, may not be treated differently for VAT purposes"³³.

b) Meaning legal neutrality

In *Rank Group Case*³⁴ the ECJ explains when the services or goods are similar, that is when their use is comparable and when the differences between them do not have significant impact on the decision of a customer to which service to chose.

c) Meaning competition neutrality

In *Kügler Case*³⁵ "the principle of fiscal neutrality precludes, *inter alia*, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned".

2.2.5 Impact of the Neutrality principle on the tax burden

Relief of the burden of tax ensures that all economic activities are taxed in a wholly neutral way; this principle must be observed by the Member States in order to avoid double taxation, and as a consequence used as a parameter to rule deductions, refunds, taxable amounts, invoicing. The principle of neutrality limits anti-abuse measures.

a) Double taxation

In *Cookies World Case*³⁶ "to tax a supply of services in another Member State when it has already lawfully been subject to VAT in the State of the supplier of the services gives rise to double taxation contrary to the principle of fiscal neutrality inherent in the common system of VAT".

b) Deductions –Refunds

³¹ ECJ judgment in C-174/11 *Zimmermann* paragraphs 47, 48

³² see *inter alia*, to that effect, Case C-174/08 *NCC Construction Danmark*, paragraph 27, and Case C-277/09 *RBS Deutschland Holdings*, paragraph 38

³³ see, *inter alia*, *Joined Cases C-453/02 and C-462/02 Linneweber and Akritidis* para 24, and *Joined Cases C-259/10 and C-260/10 Rank Group*, paragraph 32

³⁴ ECJ *Joined Cases C-259/10 and C-260/10 Rank Group*

³⁵ ECJ judgment C-141/00 *Kügler* par 30

³⁶ ECJ judgment C-155/01 *Cookies World* par 60

*Commission v. Spain Case*³⁷ underlined the importance of deductions for the neutrality of the tax burden. It is contrary to the principle of fiscal neutrality if the Member State of importation does not adopt the measures necessary to permit to deduct from VAT due on importation the amount of VAT paid in the Member State of exportation without the possibility of obtaining a refund of that tax, when the supply of similar goods is not subject to VAT in the Member State of importation.

In *NCC Construction Danmark, Case* “it should be noted that the principle of fiscal neutrality resulting from the provisions ..of the (Sixth) Directive implies that a taxable person may deduct all the VAT levied on goods and services acquired for the exercise of his taxable activities³⁸”

In *Ecotrade Case*³⁹ “the right to deduct laid down in the (Sixth) Directive forms an integral part of the VAT mechanism and in principle cannot be limited”.

In *Halifax Case*⁴⁰ “the right of deduction provided for in the (Sixth) Directive ...must be exercised immediately in respect of all the taxes charged on transactions relating to inputs”

c) Reverse charge

In *Ecotrade Case*⁴¹ “as far as concerns the obligations arising from the (Sixth) Directive, although it is true that that provision allows Member States to lay down the formalities relating to the exercise of the right to deduct in the case of the reverse charge procedure, a failure to comply with those formalities by the taxable person cannot deprive him of his right to deduct”.

d) Anti-abuse measures

In *Halifax Case*⁴², “the (Sixth) Directive must be interpreted as precluding any right of a taxable person to deduct input VAT where the transactions from which that right derives constitute an abusive practice. For it to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the (Sixth) Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must

³⁷ ECJ judgment C-119/89 *Commission v. Spain*

³⁸ see, to that effect, Case C-98/07 *Nordania Finans and BG Factoring* [2008] ECR I-1281, paragraph 19

³⁹ ECJ judgment in joined Cases C-95/07 and C-96/07, *Ecotrade*, para. 39

⁴⁰ ECJ judgment C-255/02 *Halifax* par 83

⁴¹ ECJ judgment in joined Cases C-95/07 and C-96/07, *Ecotrade*, paragraph 62

⁴² ECJ judgment C-255/02 *Halifax* paragraphs 85, 86

also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage.”

2.3 The destination principle

The destination principle is the legal unwritten principle underlying the rules on the place of supply of services B2B.⁴³ It fixes the place of supply as the place where the likely consumption of, and application of, income from the supply take place⁴⁴. As a consequence, all products and services bear the same tax burden when finally sold to the consumer. So, exports are exempt with refund of input taxes (that is free of VAT) and imports are taxed on the same basis and at the same rates as domestic supplies. Accordingly, the total tax paid in relation to a supply is determined by the rules applicable in the jurisdiction of its consumption and therefore all revenue accrues to the jurisdiction where the supply to the final consumer occurs⁴⁵. This principle places all firms competing in a given jurisdiction on an even footing.

2.3.1 The destination principle in the RVD

Art 44 RVD applies the destination principle in the meaning that VAT due for the supply of services B2B shall be levied in the place where the taxable person to whom the services is provided, is established.

2.3.2 The destination principle in the OECD Guidelines

The destination principle according to the OECD Guidelines⁴⁶, means that internationally traded services and intangibles should be subject to VAT in the jurisdiction of consumption.

The “Main Rule” of the OECD Guidelines, in order to guarantee neutrality, is to allocate the taxing rights to the jurisdiction (country) in which the business customer is located. Therefore instead of the supplier, the business customer should be liable to account for VAT due through the ‘*reverse-charge*’ mechanism, where that is consistent with the national consumption tax system in the country of the customer.

Whereas the widest application of the Main Rule is recommended in order to achieve VAT neutrality in cross-border situations, different interpretation

⁴³ AG opinion, paragraph 51, ECJ Case C-37/08 RCI

⁴⁴ AG opinion, paragraph 51, ECJ Case C-37/08 RCI

⁴⁵ Ben Terra Place of supply of services

⁴⁶ OECD International VAT/GST Guidelines February 2013. The OECD published on February 2013 some Guidelines in order to avoid the problem of uncertainty and risk of double taxation and unintended non taxation that result from the inconsistencies in the application of VAT to international trade. The Guidelines do not impose legally binding VAT rules on countries or prescribe legislative approaches. Their design and consistent implementation is intended to serve as a basis for countries to frame their own laws and administrative practice, reduce impediments to international trade and improve the neutrality of VAT regimes worldwide while reducing opportunities for tax avoidance and create more certainty for businesses and tax authorities.

of the place of taxation rules and limited right of deduction of input-VAT (also in case of reciprocity requirements for refund of foreign VAT) may lead to a loss of neutrality.

2.3.3 The destination principle in jurisprudence

In *Heger Case*⁴⁷ the basic principle behind VAT, which is a tax on consumption, is that it should be charged at the place of consumption.

In *RCI Case*⁴⁸, under the destination principle the place of supply is fixed as the place where the likely consumption of and/or application of income from the supply takes place.

2.4 The origin principle

The origin principle taxes services and goods where they are produced or where the supplier resides, so VAT is levied in the various jurisdiction where the value is added, which means that export are taxed and import are exempt. Each jurisdiction levies the VAT on the value created within its own borders. Under an origin based regime, exporting jurisdictions would tax exports on the same basis and at the same rate as domestic supplies, while importing jurisdictions would give a credit against their own VAT for the hypothetical tax that would have been paid at the importing jurisdiction's own rate.⁴⁹

The disadvantage of the origin principle is represented by the fact that the tax burden on imported products and services and locally produced goods and services is not necessarily the same, if the country of origin applies a different tax rate from that of the importing country.

Tax paid on a supply would reflect, under this principle, the pattern of its origins⁵⁰ and the aggregate revenue would be distributed in that pattern. This would run counter to the core features of VAT: as a tax on consumption, the revenue should accrue to the jurisdiction where the final consumption takes place. The origin principle places consumers in different jurisdictions on an even footing.

2.4.1 The origin principle in jurisprudence

In *Heger Case*⁵¹ “the Sixth Directive put in place the basic rule, in respect of supply of services, that the place of supply and therefore the place of taxation is where the supplier is located. In so doing, the Community legislature created a degree of internal tension within the Sixth Directive,

⁴⁷ ECJ Case C-166/05 Heger AG Opinion paragraph 27

⁴⁸ ECJ Case C-37/08 RCI, AG Opinion paragraph 51

⁴⁹ Ben Terra Place of supply chapter 4

⁵⁰ OECD International VAT/GST Guidelines February 2013

⁵¹ ECJ Case C-166/05 Heger, AG Opinion paragraph 27

inasmuch as the place of supply rules for services are based on the origin principle rather than the destination principle.”⁵²

2.5 The territoriality principle

Under to the territoriality principle,⁵³ only transactions taking place on national territory are subject to tax. Foreign transactions are not subject to tax even if carried out by domestic firms. Domestic transactions are taxed regardless of whether the business carrying them out is domestic or foreign.

2.5.1 The territoriality principle in jurisprudence

In *RCI Case*⁵⁴, since “the scope of the VAT system covers supplies of goods and services which a trader makes for consideration within the territory of the country in the course of his business, only a place of supply within the territory of the country allows he application of national VAT legislation”.

⁵² ECJ Case C-166/05 Heger ,AG Opinion paragraph 27

⁵³ Ben Terra Place of Supply

⁵⁴ ECJ Case C-37/08 RCI AG Opinion para. 49

3 Legal issues

3.1 The main rule for supplies to taxable persons

Title V of the RVD contains the “Place of taxable transaction” rules, among which art 44, the “main rule” for B2B supply of services. It is the general rule, or default rule, that applies when no specific rule apply:

“The place of supply of services to a taxable person acting as such shall be the place where that person has established his business.”

This general rule with respect to the place of supply of services to taxable persons is determined on the basis of where the taxable person receiving the service is established. The supply of services requires the existence of a synallagmatic legal relationship, pursuant to which the contracting parties undertake mutually to render reciprocal performance, in the light of the fact that⁵⁵ only the supply of services effected for consideration is to be subject to VAT.

The main rule contains a hierarchy, theorised in the *Berkholz Case*⁵⁶ among the various place of supply to ensure the correct tax allocation:

“...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.”

Under this rule, it is not the contractual relationship with the place of establishment that determines the place of supply, but rather the establishment to which the service is supplied, according to an economic criterion.⁵⁷

The rule shifts the place of supply of services B2B to the country of the customer with the objective to achieve, to the greatest extent possible, taxation at the place where the actual consumption takes place, and in most cases the place of consumption is deemed to be where the customer has established his business but, if this choice does not lead to a *rational result*⁵⁸ for VAT purposes or creates conflicts with another Member State, it will be necessary to turn to another establishment to which services are provided.

⁵⁵ under Article 2(1a) *in joint provision* with art 24(1) of the RVD

⁵⁶ ECJ Case 168/84 *Berkholz*

⁵⁷ *Terra Wattel-European Tax Law*, Sixth edition, Wolters Kluwer Pag 194

⁵⁸ the proxy of “rational result” is theorised by ECJ in Case *Berkholz C-168/84*, in Case *DFDS C-280/95*, and in Case *C-452/03 RAL (Channel Islands)*

It is worth recalling that, in order to prevent VAT double taxation or non-taxation, art 59a RVD provides that, with regards to some services⁵⁹, Member States may consider the place of supply, if situated within their territory, as being situated outside the Community where the “*effective use and enjoyment*” of the services takes place outside the Community; and *vice-versa* if situated outside the Community, being situated within their territory where the “effective use and enjoyment” of the services takes place within their territory. But, such discretionary power of each Member State may result in a rather muddled allocation of the place of supply of services. In practice it is implemented mainly in the sense that Member States, for VAT taxation optimal allocation, treat the place of supply of services as being situated within their territory⁶⁰, if situated outside the Community.

The main problem in order to correctly assess the VAT liability in the supply of services is which establishment is most directly connected with receiving supplies. The place of business is the principal point at which to tax the supply of services, unless the conditions for taxing the services elsewhere are fulfilled. It must be seen as a *proxy* used to ensure taxation at the place of consumption.⁶¹

3.2 The concept of an Establishment

The place where the customer has established his business or has a fixed establishment is decisive in determining where services are or deemed to be rendered.⁶²

In order to understand where the taxable person has established his business, the supplier shall rely on the information received from his customer, which he will verify by normal commercial security measures⁶³, such as identity or payment checks.

The place of establishment of the business of a taxable person is identified, according to *Planzer Luxembourg Case*⁶⁴

“where the essential decisions concerning the general management of that company are adopted and where the functions of its central administration are carried out”.

In other words, the determination of a company’s place of business requires a series of factors to be taken into consideration, foremost of 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

⁵⁹ the place of supply of which is governed by articles 44, 45, 56 and 59 RVD

⁶⁰ Ben Terra, Julie Kajus – A Guide to the European VAT Directives, 1, IBFD 2011 p.670

⁶¹ Ben Terra-The VAT Package and anti-tax fraud measures, ETIL 2010

⁶² Ben Terra, Julie Kajus – A Guide to the European VAT Directives, 1, IBFD 2011 p.654

⁶³ Article 20 IR

⁶⁴ ECJ Case C-73/06 *Planzer Luxembourg Sàrl v. Bundeszentralamt für Steuern*

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.

ECJ has given prevalence to the reality of the place of establishment of the company rather than relying on the place of the statutory seat of a company as proposed by the AG.

Thus a fictitious presence, such as that of a "letter box" or "brass plate" company, cannot be described as a place of business for VAT purposes.⁶⁵ Article 10 IR is in line with ECJ decision:

"for the application of Articles 44 and 45, 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".

And:

"in order to determine the place, 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".

Finally:

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

If the taxable person receiving the services is established in more than one country, that supply shall be taxable in the country where the taxable person has established his business,⁶⁶ unless the supply is made to a fixed establishment of the customer located in another country, because in that case it will be taxed where "the fixed establishment receiving the service and using it for its own needs" is located. On a residual basis, the supply is deemed to be made where the taxable person has his permanent address or usual residence.⁶⁷

From the point of view of VAT liability, where a taxable person has established his place of business in his customer's Member State where the VAT is due, he must charge the VAT due on the services, even if he did not intervene in the supply⁶⁸.

⁶⁵ see par. 62 of Planzer Luxembourg and by analogy par. 35 of Case C-341/04 Eurofood IFSC Ltd, and par. 68 of Case C-196/04 Cadbury Schweppes Overseas Ltd

⁶⁶ Art 21(1) IR

⁶⁷ Art 21 (3) IR

⁶⁸ art 53 IR

Regarding the location of a fixed establishment, suppliers shall examine the nature and use of the service provided⁶⁹ and where these elements do not allow for identification, check if the contract, the order form and VAT identification number of the customer identify the fixed establishment as the customer and whether the fixed establishment is the paying entity for the service⁷⁰. Where the location of the customer cannot be verified on the basis of these elements, or where the services are supplied under a contract covering one or more services used in an unidentifiable and non quantifiable manner, the supplier may consider that the supply occurs at the place where the customer has established his business (head office), without prejudice to the customer's obligations.

The aim of this provision is again to tax at the place closest to where consumption takes place, mostly from an economic perspective. But the above criteria lack clarity: it is unclear under which circumstances fixed establishments use services "for their own needs". The principle of equality is respected in the interpretation of "own needs" as "for own-end use"⁷¹, resale purposes and use for the provision of other supplies⁷², so not only limited to "end-use" of services.⁷³ Some commentaries argue that the "own need" criterion was introduced to remove unjustified VAT advantages in head office-branch configurations, like in *Zurich Insurance Co. Case*.⁷⁴

The circumstance that the fixed establishment will pay for the services is not really relevant, as according to the ECJ in *CPP (Card Protection Plan) Case*⁷⁵, a fixed establishment should not be treated as a taxable person by reason of the costs imputed to it in respect of the supplies of services that it receives.

Service providers and customers may disagree as to the use of the services, with consequent possible disputes. Putting such a heavy administrative burden on the service provider is not in line with the aim of the new place of supply rules of "minimising burdens of businesses"⁷⁶ aiming to guarantee the application of the principle of administrative simplicity that informs the RVD. But, in order to reduce the burden, the VAT Committee⁷⁷ clarified that "the supplier must obtain the necessary information from his customer

⁶⁹ Art 22 (1) IR

⁷⁰ Art 22(2) IR

⁷¹ the fixed establishment consumes the services itself

⁷² Gert Jan van Norden "The allocation of taxing rights to fixed establishments in European VAT legislation" –"VAT in an EU and international perspective", IBFD 2011 page 47

⁷³ Lejeune, Cortvriend, Accorsi, "Implementing Measures Relating to EU Place of Supply Rules: Are Business Issues Solved and is certainty provided?" IBFD may/june 2011 p 144

⁷⁴ For example, using a fixed establishment in a low VAT rate Member State as central procurement hub for the central purchase of services to be eventually used by all establishments of a taxable person making VAT exempt supplies. After purchasing the services, the central procurement hub would on-supply the services, outside the scope of VAT, to the other establishments. At a taxable person level a VAT saving would be achieved.: *HM Revenue & Customs v Zurich Insurance Co*, Court of Appeal, EWCA ci 218

⁷⁵ ECJ Case C-349/96 *CPP (Card Protection Plan)*

⁷⁶ Recital 4 of the Preamble to Council Directive 2008/8

⁷⁷ 88th meeting VAT Committee

and carry out a reasonable level of verification of that information via existing security procedures”.

The VAT Committee agrees that, unless there is evidence of “abuse of law” only the taxable person receiving the services shall be responsible for determining where the services are supplied. For the purposes of control, where the customer’s VAT identification number mentioned on the invoice is that attributed by the Member State of the fixed establishment, the presumption is that the services are provided to that fixed establishment unless there is proof of the contrary.

The burden of proof imposed on suppliers by the IR is much more onerous than it currently is in practice in many Member States, in particular as regards the obligation to verify the information provided by the customer⁷⁸. The IR does not mention “*good faith*” of the supplier in determining the status of the customer but, in order to avoid an excessive burden, it is possible for suppliers to rely on it, as it is a principle commonly adopted by ECJ in many Decisions, such as in *Teleos Case*⁷⁹.

3.2.1 Two different concepts of Fixed Establishment

The concept of “Fixed Establishment” was recently introduced in the EU VAT legislation: it was not present in the Second VAT Directive and appeared for the first time in the Sixth VAT Directive⁸⁰. The reason of the introduction of such concept is not explained in the Directives. The doctrinal interpretation⁸¹ hypothesised that the fixed establishment concept was introduced in order to provide equal VAT treatment for local taxable persons established in a Member State and the foreign taxable persons operating in the same Member State, in order to guarantee fiscal neutrality.

This equal tax treatment should not only be applied on the output side (the supply side of a fixed establishment) but should be also upheld on the input side (the receiving side of a fixed establishment). It means that the supply of services by fixed establishments located in a Member State should be taxed in the same manner as the supply of services by taxable persons resident in that Member State; as well, the supply of services to fixed establishments should be taxed in the same way as the supply of services to local taxable persons.

Despite the detailed legislative framework, it is not always easy to assess, in the economic reality, that directly impact on the VAT rules application⁸², the role played by a fixed establishment in the supply of services.

⁷⁸ Lejeune, Cortvriend, Accorsi, “Implementing Measures Relating to EU Place of Supply Rules: Are Business Issues Solved and is certainty provided?”, IBFD may/june 2011 p 147

⁷⁹ ECJ Case C-409/04, *Teleos* CJ judgment of 27 September 2007 in *Teleos PLC and others v. Commissioners of Customs and Excise*, Case C-409/04

⁸⁰ Artt 9(1), Art 9(2), and Art 26 Sixth VAT Directive

⁸¹ Van Norden, G.I., “Het concern in de BTW, Deventer, Kluwer, 2007, pp 121-122; Van Hilten, M.E. & Van Kesteren, H.W.M, *Omzetbelasting*, Deventer: Kluwer, 2010, pp 85-86

⁸² being VAT a tax on consumption

The RVD does not provide a detailed definition of the fixed establishment and before the IR, only the ECJ Case law has given guidelines, that have been incorporated in the IR. But, despite the effort of the IR to ensure uniform application of the rules relating to the place of taxable transactions, still a lack of clarity remains in the concept of fixed establishment that is not interpreted in the same way by all Member States, with practical impact for businesses.

Legal uncertainty leads to problems regarding not only the issues of place of supply of services and related VAT liability, but also deductions, refunds, reverse charge mechanism, intervention in the supply, administrative obligations.

The main rule of “fixed establishment” is art 11 IR. It contains two different definitions, from the receiving side⁸³ and from the supply side⁸⁴. It reflects the two different place of supply rules of art 44 and 45 RVD. Such duality is not present in the ECJ Case law, because the ECJ jurisprudence on “fixed establishments” was developed before the VAT reform of the place of supply rules. ECJ has always considered only the “supply side” fixed establishment.

Such duality raises immediately a question: can a fixed establishment that does not make taxable supplies, and therefore cannot be regarded as a fixed establishment under ECJ Case law, be considered anyway a fixed establishment, for the purposes of art 44 RVD, if it only is a “receiving fixed establishment”? The answer is relevant in order to assess the lawfulness of art 11(1) IR.

3.2.1.1 The “receiving side” fixed establishment

In this paragraph, through an analysis of art 11(1) IR that rules the “receiving side” fixed establishment, a possible answer to the following questions is given:

- a) Is art 11(1) IR compliant to art 44 RVD?
- b) Is art 11(1) IR compliant to art 171 RVD and 3(a) Dir. 2008/9?

a) Is art 11(1) IR compliant to art 44 RVD?

Art 11(1) IR rules:

“For the application of art. 44 RVD, “any establishment...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 the services supplied to it for its own needs”.

⁸³ Art 11(1) IR

⁸⁴ Art 11(2) IR

From a literal interpretation, the legal criterion to qualify a fixed establishment in the sense of art 11(1) IR is “the capability of receiving and using services for its own needs”.

From the wording of art 11(1) IR it could be inferred that also a representative office or a single person administrative office, that only have marketing or accounting functions, could be considered as fixed establishments for the purposes of art 44 RVD as they can have a sufficient degree of permanence and permanent presence, although not capable of supplying services. It means that the article broadened the concept of fixed establishment elaborated by the ECJ Case law so far.

In particular, it runs against the *Planzer Case*⁸⁵ that affirmed that “a fixed installation used by the undertaking only for preparatory or auxiliary activities, such as recruitment of staff or purchase of technical means ...does not constitute a fixed establishment”.

For sure, the fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment⁸⁶.

So, a VAT number, both for direct identification and through a tax representative, is not sufficient to constitute a fixed establishment. A VAT identification number is a rather formal instrument or necessity, which as such has little meaning in economic reality.⁸⁷

It seems according to some doctrine⁸⁸, that art 11(1) IR extends the scope of art 44 RVD, giving the main place of supply rule a much broader application, as art 44 RVD only refers to a generic concept of “fixed establishment” relevant for the sole scope of establishing where the place of supply is located, in the case of supply of services to a taxable person acting as such that has a “fixed establishment” to which the services are provided.

It seems that there is no legal reason that justifies the creation of a brand new concept of fixed establishment completely different from the concept of fixed establishment derived by the ECJ Cases and contained in art 45 RVD.

The “purchasing side” fixed establishment runs also contrary to the idea supposedly behind the concept of fixed establishment: to create equality and neutrality from a tax perspective between domestic businesses and businesses from other Member States operating within the Member State.⁸⁹

a) Conclusion: art 11(1) IR not compliant to art 44 RVD

⁸⁵ ECJ case C-73/06, *Planzer Luxembourg Sarl*

⁸⁶ Art 11(3) IR

⁸⁷ Jos Beerepoot, “About VAT registration and fixed or permanent establishments”, VAT in an EU and International Perspective, IBFD 2011 page 17

⁸⁸ Walter de Wit, “The fixed establishment after the VAT Package” in VAT in an EU and International Perspective, IBFD 2011 page 30

⁸⁹ Walter de Wit, “The fixed establishment after the VAT Package” in VAT in an EU and International Perspective, IBFD 2011 page 30

From the above, it could be inferred that the provision of art 11(1) IR is not compliant to art 44 RVD, because it broadens the scope of art 44 RVD giving the ultimate possibility to identify a “fixed installation” as a “fixed establishment” with consequent dramatic impact on the shift of tax liability.

b) Is art 11(1) IR compliant to art 171 RVD and 3(a) Dir. 2008/9?

There is the suspect that art 11(1) IR is not compliant with art 3 Directive 2008/9, which deals with refunds of VAT to non-established businesses. Art 3(a) rules that taxable persons can obtain refunds of VAT paid in other Member States in which they are not established, provided they did not supply services (or goods) deemed to have been supplied in the Member State of refund⁹⁰. Member State of refund means the Member State in which the VAT was charged to the taxable person not established, in respect of goods or services supplied to him by other taxable persons in that Member State or in respect of the importation of goods into that Member State⁹¹.

The right of refund can be claimed only if the taxable person has not, in the Member State of refund, during the period of refund, the seat of his economic activity or a fixed establishment from which business transactions were effected or, if no such seat or fixed establishment existed, his domicile or normal place of residence; and, during the refund period, he has not supplied any goods or services deemed to have been supplied in the Member State of refund, with the exception of the supply of some exempt services⁹² and the supply of good and services to a taxable person that is liable for VAT under the reverse charge mechanism. The consequence and scope of the two exclusions is that, in these cases, the supplier should be regarded as a taxable person who is not established in that Member State⁹³.

Therefore, the right of refund is excluded if the fixed establishment of the supplier “from which transactions are effected”⁹⁴ is in the same Member State of the customer.

But, the presence of a mere receiving fixed establishment of the supplier, can be relevant for the purposes of eliminating the right of refund?

From the wording of art 3(a)⁹⁵ it is clear that only the “fixed establishment from which business transactions are effected” is relevant in order to impede the right to claim refund by taxable persons that purchase (goods or) services subject to VAT in a Member State but who are established in another Member State.

⁹⁰ with the exception of transport services and services falling under the reverse charge pursuant arttt. 194/197 and 199 RVD

⁹¹ art 170 RVD

⁹² exempt services ruled in Artt. 144, 146, 148, 149, 151, 153, 159, 160 RVD

⁹³ Ben Terra, “The VAT Package and anti-fraud measures” ETIL 2010

⁹⁴ “supply side fixed establishment”

⁹⁵ Art 3(a) Directive 2008/9

The content of the art 3(a) Directive 2008/9 is referred to in art 171 RVD, so it can be inferred that the art 11(1) IR is not compliant in its wording to art 3 (a) Directive 2008/9 and to art 171 RVD.

In order to verify the compliance of art 11(1) IR to art 171 RVD and art 3(a) Directive 2008/9, it is also necessary to rely on the ECJ Case law.

In the joint Cases *Daimler and Widex*⁹⁶, the ECJ stated:

“for the purposes of exclusion of a right to refund, taxable transactions must actually be carried out by the fixed establishment in the State where the application for refund is made and a mere ability to carry out such transactions does not suffice”.⁹⁷

“A right to refund of the input VAT paid must be granted, without it being necessary to examine, moreover, whether the undertakings in question do actually each have a ‘fixed establishment’ within the meaning of the provisions to be interpreted, since the two conditions forming the criterion of a ‘fixed establishment from which business transactions are effected’ are cumulative.”⁹⁸

The ECJ refers to its judgment in the *Case Commission v. Italy*⁹⁹

“it must, however, be borne in mind that, in its judgment in *Case Commission v Italy* ...the Court held that the expression ‘fixed establishment from which business transactions are effected’ in Article 1 of the Eighth Directive¹⁰⁰ and, now, in Article 3(a) of Directive 2008/9, must be interpreted as regarding a non-resident taxable person as a person who does not have a fixed establishment carrying out taxable transactions in general. The existence of active transactions in the Member State concerned therefore constitutes the determining factor for exclusion of recourse to the Eighth Directive. Similarly, the Court has held that the term ‘transactions’ used in the phrase ‘from which business transactions are effected’ can affect only output transactions.”

As a consequence,

“the actual carrying out of taxable transactions in the Member State of refund is thus the common requirement for there to be exclusion of a right to refund, whether or not the applicant taxable person has a fixed establishment in that State.”

The ECJ in *Daimler and Widex Case* explained that the scope of the Directive 2008/9 is:

⁹⁶ ECJ joint Cases C-318/11 and 319/11 *Daimler and Widex*

⁹⁷ paragraph 37 ECJ joint Cases C-318/11 and 319/11 *Daimler and Widex*

⁹⁸ Paragraph 39 Case ECJ joint Cases C-318/11 and 319/11 *Daimler and Widex*

⁹⁹ ECJ Case C-244/08 *Commission v. Italy* [2009] ECR I-130, para. 31 and 32

¹⁰⁰ Eighth Council Directive 79/1072/EEC, 6 /12/1979 replaced by Directive 2008/9/EC

“to enable taxable persons to obtain refund of the input VAT where, in the absence of active taxable transactions in the Member State of refund, they could not deduct that input VAT paid from output VAT due.”

Infact, from *Planzer Case*¹⁰¹

“the right of a taxable person established in a Member State to obtain refund of VAT paid in another Member State, in the manner governed by the Eight Directive, is the counterpart of such a person’s right, established by the VAT directive, to deduct input VAT in his own Member State”.

And, from *Debouche Case*¹⁰² and the *Monte Paschi Siena Case*¹⁰³ the refund is subject to a “double test”: VAT is refundable in so far as deductible in the Member State of refund and insofar as the right to deduction exists in the Member State of establishment.

In order to evaluate the lawfulness of art 11(1) IR, it must be borne in mind that it is an implementing provision. It is contained in the Implementing Regulation, that is a source of law that can be issued by the EU Council on the basis of the powers attributed to the same Council by the RVD.

As the Commission notes in its accompanying document to the Green Paper on the future of VAT¹⁰⁴

“in the VAT Directive, which establishes the common system of VAT, the Council has reserved for itself the power to adopt implementing measures (Implementing Regulations). By its very nature, this procedure is limited in scope and may not be used to amend the VAT Directive...”

The principle is confirmed by the ECJ in the *Söhl & Söhlke Case*¹⁰⁵:

“lastly, it follows from the case law of the Court that the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation or to the implementing legislation adopted by the Council...”

¹⁰¹ ECJ Case C-73/06, Case Planzer Luxembourg. Sarl

¹⁰² ECJ Case C- 302/93 Debouche

¹⁰³ ECJ Case C- 136/99 Monte Paschi Siena

¹⁰⁴ Commission Staff Working Document, 1 December 2010, SEC (2010) 1445 final, Accompanying document to the Green Paper on the future of VAT, “Towards a simpler, more robust VAT and efficient VAT system”, (COM(2010)695 final)

¹⁰⁵ ECJ C-48/98 - Söhl & Söhlke Case

In addition, it should be noted¹⁰⁶ that the IR was adopted by the Council using other decision-making processes than the ones applied to the RVD¹⁰⁷. Therefore, the IR has a legal lower status than the RVD. So, in case in contrast the IR should not prevail on the RVD. And, the ECJ Decisions have a higher legislative power than the Implementing Regulation.

b) Conclusion: art 11(1) IR not compliant to art 3(a) directive 2008/9 and not compliant to art 171 RVD

The concept of “receiving fixed establishment” cannot be invoked for the exclusion of the right to claim refund.

So, in relation to art 3(a) Directive 2008/9 and 171 RVD, art 11(1) IR seems not compliant.

3.2.1.2 A particular “receiving” fixed establishment: “global contracts”

A particular case involving supplies made to taxable persons is that of services supplied under a global contract. Where global contracts are in place, the services are acquired by the customer for use not only in a single jurisdiction but also in a number of other jurisdictions where he is located.

In the Guidelines of the 88th VAT Committee,

“A global contract is a business agreement which may cover all the services supplied to a taxable person. For services supplied under such a global contract, which are to be used in several places, ... these services shall also, as a starting point, be taxable at the place where the customer has established his business. Where services covered by such a contract are actually intended for the use of a fixed establishment and that fixed establishment bears the cost of those services, they shall however be taxable at the place where that fixed establishment is located”¹⁰⁸.

Services may, as a general rule, only be taxed in one place. Where services supplied to a taxable person under a global contract are to be used in several places, the supply should, in principle, be taxed where the taxable person has established his business.

That should apply even if it is the fixed establishment to be in charge of the global contract. To tax services received under such a contract at the place

¹⁰⁶ Walter de Wit, “The fixed establishment after the VAT Package” in VAT in an EU and International Perspective, IBFD 2011 page 32

¹⁰⁷ the Council Implementing Regulation has been adopted without consultation of the European Parliament and EcoSoc, based on art 113 TFEU

¹⁰⁸ An example would be a third party service provider who is bound by contract to grant all the establishments held by the taxable customer access to a data base. Another example may be an accountancy company which is under contract to provide its services to all the establishments which the taxable customer has. The contract could be made with the main establishment, or indeed one of the fixed establishments may instead be in charge of the contract.

of business regardless of who is in charge of the contract, seems consistent with the proxy chosen by the legislator.

To argue that this proxy should apply in all cases would however run counter to the objective to have services taxed at the place of actual consumption. It may for example be that services covered by a global contract, or part of them, are actually intended for the use of a specific fixed establishment.¹⁰⁹ In such a situation, it would be reasonable that, instead of taxing those services at the place of business, they are taxed at the place of each establishment that bears the cost of the services received.¹¹⁰

What is relevant is that a service may not, upon its supply, be divided in two or more. If the access granted includes the place of business, it would stand to reason to tax the service at the place of business, even if other establishments are also granted access¹¹¹. Otherwise, it would be necessary to identify which is the fixed establishment to be seen as the main user and tax the service where that establishment is located, which would be a very delicate and cumbersome exercise.

Where the customer's fixed establishment to which the service is provided cannot be determined or where services covered by Article 44 are supplied to a taxable person under a contract covering one or more services used in an unidentifiable and non-quantifiable manner, the supplier may legitimately consider that the services have been supplied at the place where the customer has established his business.¹¹²

3.2.1.3 The “supply side” fixed establishment

In this paragraph, through an analysis of art 11(2) IR, a possible answer to the following questions will be given:

- a) Is art 11(2) IR compliant to art 45 RVD?
- b) Is art 11(2) IR compliant to art 192a RVD?

a) Is art 11(2) IR compliant to art 45 RVD?

Art 45 RVD, as the main rule for the place of supply of services to non - taxable persons states:

¹⁰⁹ An example could be a global contract between a large company and a supplier of accountancy services, where each service supplied under that contract is clearly identifiable in relation to the fixed establishment concerned or is directly invoiced to it and that fixed establishment bears directly the cost of the accountancy services received as a result of the contract. In such a situation, it would be reasonable that, instead of taxing those services at the place of business, they are taxed at the place of each establishment which bears the cost of the services received. The same reasoning might apply if the seat makes a minimal use of the services, which are instead mostly devoted to the needs of a fixed establishment.

¹¹⁰ Terra Kajus, A Guide to the European VAT Directives, IBFD 2013 chapter 5

¹¹¹ If the global contract covers a single service.

¹¹² Art 22 (1) IR

“The place of supply of services to a non- taxable person shall be the place where the supplier has established his business”.

In case where the customer is established in more than one country, it rules:

“however, if those services are provided from a fixed establishment of the supplier 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 supplier has his permanent address or usually resides”.

Art 45 RVD contains the concept of the “supply side” fixed establishment.

Art 11(2) IR rules the criteria to identify the “supply side” fixed establishment:

“for the application of articles 45 and 192a RVD” a fixed establishment is “any establishment...characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplies”.¹¹³

The proxy of art 11(2) IR is a “sufficient degree of permanence” and the mere “capability” to perform services.

A different interpretation of fixed establishment is given by the ECJ in the *ARO Lease Case*¹¹⁴.

According to the ECJ, it is decisive whether or not the establishment is capable of providing the services in an “independent manner”, after concluding its own contracts and taking its own management decisions. But, it is not sufficient that the fixed establishment intervenes in the supply of a service performed by the main establishment located in another State.

Under *ARO Lease*, what qualifies a fixed establishment (proxy) is the fact that it “actually performs the whole service” in an independent manner.¹¹⁵

a) Conclusion: art 11(2) IR not compliant to art 45 RVD

As the scope of art 45 RVD seems to be, from the *Aro Lease* proxy, that only when the fixed establishment provides the whole service the place of supply shifts to the Member State of the fixed establishment, and as both the ECJ Case law and the RVD have higher legal value than the IR, it may be

¹¹³ Art 11(2) IR

¹¹⁴ ECJ, C-190/95 *Aro Lease BV Case* point 19

¹¹⁵ Walter de Wit, ”The fixed establishment after the VAT Package” in VAT in an EU and International Perspective, IBFD 2011 page 28

inferred that art 11(2) is not compliant to art 45 RVD insofar it only requests “a sufficient degree of permanence...to enable it to provide the services”.

b) Is art 11(2) IR compliant to art 192a RVD?

Art 192a RVD determines under which circumstances VAT is levied from the fixed establishment when both the main place of business of the supplier and its fixed establishment are involved in the provision of services, and the place of supply is located in the Member State of the recipient of the service; such rule has direct impact on the supply of services of art 45 RVD and indirect impact on the supply of services of art 44 RVD.

Art 192a states that:

“..A taxable person who has a fixed establishment within the territory of the Member State where the tax is due shall be regarded as a taxable person who is not established within that Member State when the following conditions are met:

- a) he makes a taxable supply of goods or of services within the territory of that Member State;
- b) an establishment which the supplier has within the territory of that Member State does not intervene in that supply”

The meaning of “intervention” is clarified in art 53(2) IR, according to which a fixed establishment shall not be considered as intervening:

“unless the technical and human resources of that fixed establishment are used by him for transactions inherent in the fulfilment of the taxable supply of those goods or services made within that Member State, before or during this fulfilment”; ”however, mere administrative support tasks such as accounting, invoicing and debt collection are not considered as intervention in the supply of services”.

Therefore, a fiscal representative¹¹⁶ can never be regarded as intervening in a transaction, and also, as its presence is only legally justified if the foreign supplier is not established in the Member State of the customer, it can never be considered as a fixed establishment.

In order to correctly assess the VAT liability, art 192a in conjunction with art 53(2) IR has substantial relevance.

Infact, for the supply of services referred to in art 44 RVD, the standard rule is the reverse charge on VAT self-assessed and self-accounted by the taxable person (acting as such) receiving the supply of services¹¹⁷ with the exclusion of exempt services or zero-rated services to which the reverse charge is not applicable.

¹¹⁶ Art 204 RVD

¹¹⁷ Preamble Directive 2008/8/EC and article 196 RVD

But, if the fixed establishment of the supplier is located in the Member State of the customer, the reverse charge can only be applicable if the fixed establishment does not intervene, according to art 192a RVD. In this case, there is no “force of attraction” and the supplier is regarded as not established.

If, on the contrary, the fixed establishment intervenes in the supply, he is regarded as established and the normal invoice system shall apply and the supplier is liable to VAT through his fixed establishment.

The same principle applies for the services in art 45 RVD: if the supplier in a Member State has a fixed establishment in the Member State of the customer non- taxable person where it performs the service, local VAT becomes chargeable in the Member State of the recipient by the fixed establishment performing the service based on art 192 a RVD.

Active involvement in the provision of services is necessary to qualify as a fixed establishment under art 192 a RVD, but it is not necessary that the fixed establishment performs the whole service.¹¹⁸

In this aspect, art 192a RVD clearly breaks with the *Aro Lease*¹¹⁹ proxy¹²⁰. It does not, however, break with the requirement of the *Planzer*¹²¹ proxy.¹²²

A further clarification of the concept of intervention is given by art 53(1)IR, according to which the fixed establishment of a supplier of goods and/or services:

“shall be taken into consideration only when it is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to make the supply of goods or services in which it intervenes”.

And, from art 56 IR, the “intervention” is fulfilled, and the fixed establishment is regarded as intervening in the supply,

“where the technical or human resources of a fixed establishment ...are used ...for the fulfilment of the taxable supply of goods or services, whether before or during this fulfilment, or where it is envisaged that these resources may be used subsequently by the supplier without constituting a separate supply of goods or services..”

¹¹⁸ Walter de Wit, “The fixed establishment after the VAT Package” in VAT in an EU and International Perspective, IBFD 2011 page 28

¹¹⁹ ECJ C-190/95 *Aro Lease BV*, point 19

¹²⁰ what qualifies a fixed establishment (proxy) is the fact that it actually performs the whole service

¹²¹ ECJ C- 73/06 *Planzer Luxembourg*

¹²² a fixed installation that only performs auxiliary services is not a fixed establishment

It means that, while it is not necessary that the fixed establishment actually performs the entire service to fall within the scope of art 192a RVD, it must be capable, however, of performing the entire service (or supplying the same goods) that is supplied by the main establishment of the supplier. If the fixed establishment is only capable of providing part of the services, it cannot become liable for VAT under art 192 a RVD.¹²³

b) Conclusion: art 11(2) IR not compliant to art 192 a RVD

The proxy of art 11(2) IR is the minimum requirement of a “sufficient degree of permanence” in order to become a fixed establishment (conform to *Planzer Case*);

The proxy of art 45 RVD is “provision of the whole service” to become a fixed establishment in order to shift the place of supply (*ARO Lease Case*);

The proxy of art 192a RVD is “active involvement” in the supply of services, to become a fixed establishment, but is not necessary that it actually performs the whole service (contrary to *ARO Lease*; conform to *Planzer Case*);

The proxy of art 53(1) IR is “capability to performing the entire service”.

Therefore, as from above results that art 192 a RVD can only be invoked when the fixed establishment itself is capable of providing the entire service, not only a part of it, it seems that art 11(2) IR is not compliant.

3.3 Taxable person-Dual capacity

For the purpose of the application of the place of supply of services rules, if the place of supply depends on whether the customer is a taxable or non taxable person, the status of the customer shall be determined on the basis of articles 9 to 13 and article 43 of the RVD¹²⁴.

Different rules for taxable and non-taxable persons, could create problems when a person is acting both in the capacity of a taxable person and a non-taxable person, as for example charities.¹²⁵ Therefore, art 43 RVD provides that, for the purpose of applying the rules concerning the place of supply of services, a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services must be deemed to be a taxable person in respect of all services rendered to him and also that a non-taxable legal person who is identified for VAT purposes must be deemed to be a taxable person.

But, as emerges from the *TRR Case*¹²⁶, further clarification is necessary in order to avoid with certainty¹²⁷ that all services received by a taxable person

¹²³ Walter de Wit, “The fixed establishment after the VAT Package” in VAT in an EU and International Perspective, IBFD 2011 page 29

¹²⁴ Art 17 (1) IR

¹²⁵ Ben Terra, Julie Kajus – A Guide to the European VAT Directives, 1, IBFD 2011 p.665

¹²⁶ ECJ Case C-291/07 *Kollektivavtalsstiftelsen TRR Trygghetsrådet v. Skatteverket*

¹²⁷ see Point (4) Preamble to Directive 2008/08/EC

would have been treated in the same way, for taxable purposes, even in cases when they were not received as a taxable person, but as a private individual¹²⁸.

Clarification is contained in Art. 44 RVD that, referring to “taxable person acting as such” narrows the scope of application of the provision by linking services received by the customer with his activities as a taxable person. “Acting as such” means¹²⁹, according to the IR, purchasing the services for the purposes of his economic activities and not for private use. But, when the services are intended both for private and business use, the supply shall be covered exclusively by art. 44 RVD provided there is no abusive practice.¹³⁰

As a consequence, service provider must verify the purposes for which the customer will actually use the services. Unless he has information to the contrary, the supplier may consider that the services are for the customer’s business use if, for that transaction, the customer has communicated his individual VAT identification number. In order to prevent their being burdened with a disproportionate onus of proof, suppliers should be able to assume that their customers have the status of “taxable persons acting as such” if they have received a valid VAT identification number from customers established in another Member State.

According to the VAT Committee¹³¹, if the necessary verifications are taken by the supplier, he is presumed to have been acting in good faith and is released from any further liability in the case of incorrect assessment of the status of the customer, provided no evidence of abuse of law exist. Under such circumstances, the customer may, in accordance with article 205 RVD, be held liable for payment of the VAT due in place of the supplier.

The assessment of the purpose to which each service will be put, will take place exclusively at the moment of the supply. Any subsequent changes to the use of the service received shall be without consequences for the place of taxation of that purchase, provided no evidence of abuse of law exists¹³².

If the two parties are established in the same Member State¹³³, the ordinary invoice method shall apply and VAT shall be payable by the supplier.

¹²⁸ for example for own personal use or that of his staff

¹²⁹ art 19 (1) IR

¹³⁰ Art 19 (3) IR

¹³¹ 86th meeting of the VAT Committee

¹³² Art 25 IR

¹³³ according to articles 2(1c), 193 RVD and 203 RVD

4 Implementation in Italy

4.1 Implementation into national law of art 44 RVD - Compliance

The implementation of the EU Directive 2008/8/EU¹³⁴ ruling the “place of supply” and the related articles of the RVD, by the Legislative Decree n. 18/2010¹³⁵ that amended the Italian IVA Code¹³⁶, are in force in Italy from the 1st January 2010.

The Italian implementation, generally in line with the RVD, is based basically on the territoriality principle¹³⁷ and, referring to the supply of services B2B¹³⁸ on the destination principle (main rule for B2B); referring to the supply of services B2C¹³⁹ on the origin principle (main rule for B2C); referring to special services¹⁴⁰ to non taxable persons, on the destination principle (first absolute derogation to the main rule B2C); referring to special services¹⁴¹ B2B and B2C it varies (second absolute derogation for B2B and B2C); referring to special services¹⁴² B2C on the destination principle (first relative derogation to the B2C main rule); referring to services supplied to extra-Community non taxable persons¹⁴³ it varies (second relative derogation to the main B2C rule).

Therefore, in the Italian VAT Code the main principle for the intra-Community supply of service is the destination principle with two groups of derogations: the first absolute (both for B2B and B2C) and the second relative (for B2C).

The main rule for services B2B in Italy is art 7-ter(1a) of the IVA Code:

”The place of supply of services shall be deemed to be in Italy when the services are supplied to taxable persons established in the territory of Italy”.

Art 7 (1d) IVA Code contains the definition of taxable person established in the Italian territory:

“taxable person established in the territory of Italy” "means a taxable person resident or domiciled in Italy who does not have established his domicile abroad, or a fixed establishment in the territory of Italy of

¹³⁴ part of the so-called VAT Package

¹³⁵ Legislative Decree n. 18/2010 of 22 January 2010 (VAT –IVA Code)

¹³⁶ DPR 633/1972 (IVA Code)

¹³⁷ art. 7 IVA Code

¹³⁸ art 7 ter(1a) IVA Code

¹³⁹ art 7-ter(1b) IVA Code

¹⁴⁰ art 7-quater – IVA Code

¹⁴¹ art 7-quinquies for cultural, artistic, sport, scientific, educational and similar services

¹⁴² art 7-sexies IVA CODE

¹⁴³ art 7-septies IVA Code

a taxable person domiciled and resident abroad, limitedly to transactions made or received by the fixed establishment. For persons other than natural persons domicile shall be deemed to be at the place where the registered office is and residence at the place of the real seat”.

Establishment is intended as “place of business”¹⁴⁴.

Art 7-Ter (2) IVA Code broadens the concept of taxable person relevant for the application of the place of supply of services rules, including new categories: special non-business entities¹⁴⁵, also acting in their institutional role; non-business entities previously identified for VAT for other purposes.

Art 3 IVA Code contains a very detailed list of “services”¹⁴⁶, that are to be considered in the place of supply of services rule.

Conclusion:

From the above analysis, Art 7-Ter (1a) is compliant to art 44 RVD.

4.2 Other Italian VAT Rules - Compliance to RVD

Art 6 IVA Code introduces important changes concerning the moment of chargeable event for intra-Community supplies of services. Italy has implemented the EU Directive in a different way from the other Member States. Infact, in art 6 the chargeable event occurs at the moment of the payment of the service, instead the other Member States have all adopted the rule of art 63 RVD “the chargeable event occurs and VAT shall become chargeable when the services are made/performed”, deemed to be made¹⁴⁷ or on receipt of the prepayment¹⁴⁸, with regard to services deemed to be supplied where the customer is established and which are subject to the *reverse charge* under art 196 RVD.

Conclusion:

Art 6 is not compliant to art 63 RVD. This discrepancy will cause practical problems in terms of EU control of information based on Intrastat models.

Art 17(1) IVA Code rules that if the supplier is a taxable person established in Italy, and the customer also, only the supplier is liable to VAT. If the supplier has a fixed establishment in Italy, the liability to VAT is shifted on the fixed establishment.

¹⁴⁴ see Agenzia delle Entrate Circolare Ministeriale 37/2011

¹⁴⁵ listed in art. 4 (4) IVA Code

¹⁴⁶ listed as an example in Circolare Ministeriale n. 58/E of 31 december 2009

¹⁴⁷ art 64(1) RVD in case of supplies of services which give rise to successive statements of account or payments are regarded as having been completed at the time when the periods to which the statements or payments pertain expire;

¹⁴⁸ art 65 RVD when a payment on account is made before a supply the VAT becomes chargeable on the receipt of the payment, unless the payment is a deposit which may be forfeited.

Art 17(2) IVA Code states that in the case of supply of services by a taxable person non established, to a taxable person established, liable to VAT is the receiver, through the reverse charge (self invoice).

Art 17(3) IVA Code provides that in the case of supply of services by a taxable person non established to a EU taxable person non established, liable to VAT is the non established taxable supplier through an ordinary invoice, directly (if identified ex art 35 ter DPR) or through a fiscal representative resident in Italy.

Conclusion:

Art 17 IVA Code is compliant to Art 196 RVD.

Art 21(6) IVA Code rules that the supply of services by an Italian taxable person to a non-established taxable person is out of the scope of VAT. But the Italian supplier must issue an invoice without VAT.

Conclusion:

Art 21(6) IVA Code is compliant to Art 226 (11) RVD.

4.3 Right of Refund and Fixed Establishments

In this paragraph an answer will be given on the compliance of the Italian refund rules to the European legislative framework.

a) Is art 38 Bis 2(1) IVA Code compliant to art 171 RVD, art 3(a) Directive 2008/9 EC, art 45 RVD and art 11(2) IR?

Article 38 Bis 2 IVA Code rules the right to claim refund for non-established taxable persons of the VAT paid in Italy for the purchases of services and goods, or imports¹⁴⁹, when deduction would be granted if the purchases were made among established taxable persons.

Article 38 bis 2 (par. 1 and 3) rules that refund is allowed if the non-resident applicant, during the refund period:

- (1) has carried out deductible transactions¹⁵⁰,
- 2) was a VAT taxpayer in its Member State of establishment;
- (3) did not have a fixed establishment in Italy;
- (4) did not carry out active transactions in Italy with the exception of transactions subjected to the reverse charge mechanism;
- (5) carried out transactions that entitle VAT deduction in the EU State of establishment. In the case that the taxpayers carry out both exempt and taxable transactions, the VAT refund is allowed proportionally to the amount of the transactions subject to deduction (pro-rata), as applied by the Member State of establishment.

¹⁴⁹ according to articles 19, 19-bis1 e 19-bis2 VAT Code

¹⁵⁰ according to articles 19, 19-bis1 e 19-bis2 VAT Code

Therefore, a taxable person non established in Italy can only claim a refund for VAT paid in Italy; instead, a taxable person established in Italy through a fixed establishment can not claim refund regardless of who made the purchase of goods or services in Italy (fixed establishment or parent company).

It is now necessary to clarify the concept of "fixed establishment"¹⁵¹.

According to the *Corte di Cassazione* in *Case 8488/2010*¹⁵², the concept of "fixed establishment" requires the existence of an objective element, a productive stable organization in Italy, and a subjective element, the existence in Italy of a business entity entitled permanently to conclude contracts on behalf of the company.

Under the older Case law of the *Corte di Cassazione n. 10925/2002*¹⁵³, a fixed establishment in Italy of a foreign company¹⁵⁴, requires the use of human and technical resources not being sufficient, for example, the presence of productive entities in the area where the supply is made.

So, the Cassazione is in line with *Aro Lease*¹⁵⁵ and with *Lease Plan*¹⁵⁶.

But, all the above Decisions only refer to the "supply side" fixed establishment, as ruled by art 45 RVD and by art 11(2) IR. Those concepts are valid when a fixed establishment is active part of the supply of services.

This definition also applies to the situation described in art 192a RVD, thus also becoming relevant for art 44 RVD, as when the supplier has a fixed establishment in the Member State of the recipient of the service, the fixed establishment "intervening" in the supply becomes liable for VAT.

The exclusion from the right of refund for taxable persons ruled by art 38 Bis 2 is based only on the fact that at the time of the purchase of the service they had a "fixed establishment" on the territory of the Member State, but such wording is too vague and generic and needs interpretation.

As clarified in *Daimler and Widex*¹⁵⁷, the scope of the Directives¹⁵⁸, is:

"to enable taxable persons to obtain refund of the input VAT where, in the absence of active taxable transactions in the Member State of refund, they could not deduct input VAT paid from output VAT due".

From *Planzer*¹⁵⁹, refund of VAT paid in another Member State is the

¹⁵¹ according to Italian Tax law

¹⁵² Suprema Corte di Cassazione *Case 9 april 2010, n. 8488*

¹⁵³ Suprema Corte di Cassazione 25 July 2002, Case n. 10925

¹⁵⁴ referring to the art 9 par 1 of the Sixth Directive,

¹⁵⁵ ECJ Case C-190/05 "*Aro Lease Bv*

¹⁵⁶ ECJ Case C-390/96 *Lease Plan Luxembourg S.A*

¹⁵⁷ ECJ joint Cases C-318/11 e C-319/11 *Daimler and Widex*

¹⁵⁸ art 3 Directive 2008/9 and 171 RVD

¹⁵⁹ ECJ Case C-73/06, *Planzer Luxembourg. Sarl* paragraph 35

counterpart of a taxable person's right to deduct input VAT in his own Member State.

In the *Commission v. Italy Case*¹⁶⁰, ECJ clarifies that the basic element to exclude the right of refund is the presence of operation effectively carried out by the fixed establishment.

As a consequence, in *Daimler and Widex*,:

“for the purposes of exclusion of a right to refund, taxable transactions must actually be carried out by the fixed establishment in the State where the application for refund is made and a mere ability to carry out such transactions does not suffice”.

Interpreting art 38 Bis 2 from the Case law of the Corte di Cassazione and from ECJ Case law, the meaning of fixed establishment that it contains, seen in “active” sense, although the article does not provide expressly that the fixed establishment¹⁶¹, should be “active”, permanent and capable of providing services¹⁶², seems compliant to the scope of art 171 RVD, art 3 Directive 2008/9, art 11(2) IR and art 45 RVD.

a) Conclusion: compliant

From the above, it seems that art 38 Bis 2 IVA Code is compliant with art. 171 RVD, art 3 Dir 2008/9, art 45 RVD, art 11(2)IR

b) Is art art 38 Bis 2(1) IVA Code compliant to the scope of art. 44 RVD and 11(1) RVD?

Another problem arises from art 38 Bis 2 (1) IVA Code: is the presence in the Member State of a mere “receiving fixed establishment”¹⁶³ sufficient to eliminate the right of refund¹⁶⁴?

As the provision is not clear in its wording, also a receiving fixed establishment¹⁶⁵ could be in theory an obstacle to claim refund.

Article 38 Bis 2 does not clarify if the fixed establishment should be interpreted in “active” sense or also in “passive” sense¹⁶⁶, as it only refers to a “fixed establishment”.

But, interpreting in the meaning of “receiving fixed establishment”, would run against the abovementioned Case law and also against the scope of art. 171 RVD, art 3 Dir 2008/9, art 11(2) IR art 45 RVD.

¹⁶⁰ ECJ Case C-244/08 *Commission v. Italy*

¹⁶¹ According to art 3 of the Directive 2008/9 and of artt. 19 , 19 bis1, 19 bis2 VAT Code

¹⁶² as ruled by art 45 RVD, 11(2) IR and 192a RVD

¹⁶³ as ruled by art 11(1) IR

¹⁶⁴ provided by art 38 Bis 2 IVA Code.

¹⁶⁵ Art 11(1) IR

¹⁶⁶ as ruled by art 11(1)IR

The latest Decisions of the Corte di Cassazione are not useful to resolve this question, as they even seem to be contrary to the scope of the European rules.

In the *Decision n. 12633/2012*¹⁶⁷ and *n. 21380/2012*¹⁶⁸ the Cassazione affirmed that the identification of VAT is enough for the presumption of the existence of a fixed establishment. So referring to the art 11(3) IR, the Supreme Court affirmed that the same article is not relevant for the burden of the proof that remains completely on the foreign taxable person requesting the refund.

From the national implementing rules¹⁶⁹, established in Italy is in general “the taxable person that has in Italy a fixed establishment”, without considering the criterion of “active transactions”. So it seems that, from a literal interpretation, in any case of presence of fixed establishment the refund is excluded.

But the consequences of including also a “receiving fixed establishment” for the purposes of excluding the right of refund would run counter the fiscal neutrality.¹⁷⁰

b) Conclusion: not Compliant

As the wording is not clear, art 38 Bis 2 can be easily misinterpreted, also in the light of the abovementioned latest Decisions of the Corte di Cassazione and the implementing national rules.

But, from its wording and from the main part of the jurisprudential interpretation, it seems to be not compliant to the scope of art 44 RVD and 11(1) IR, in the sense that it shouldn't be interpreted as including “receiving fixed establishments”, although the most recent Jurisprudence is not clear on this aspect.

A doctrinal debate is currently held in Italy on this topic as, if not resolved, it seems an obstacle to correct B2B relations with foreign companies.

¹⁶⁷ Corte di Cassazione, Decision 20/7/2012 n. 12633

¹⁶⁸ Corte di Cassazione, Decision 30/11/2012, n. 21380

¹⁶⁹ Agenzia delle Entrate in the CM 108/E/2011

¹⁷⁰ The presence of a simple representative office would be enough to exclude the right of refund of a provider non-established.

5 Conclusion

This Thesis was aimed at clarifying the meaning of article 44 RVD in order to determine which legal issues arise at its implementation, both at European and at national level.

Art 44 RVD, as the main rule for B2B intra-Community supply of services, has a fundamental impact on the assessment of VAT liability among business operators as it defines on whom, where and when the liability arises.

Uncertainties on its application may have dramatic consequences in terms of litigation among privates and public sanctions.

Therefore, an analysis of the wording of art 44 RVD has been held, with the support of European Jurisprudence, Doctrine and Implementing Regulation.

As to the question “on whom” the VAT liability arises, an explanation of the concept of “dual capacity” of taxable persons was given.

As to “when”, the chargeability of the supply and the chargeable event have been explained in relation to the Italian implementing rule of art 6 IVA Code.

As refers to “where”, that is the main question to answer in order to identify the “place of supply” for VAT purposes, an analysis has been made on the impact of the principles of destination, origin, territoriality on art 44 RVD.

Then, as to “where” the supply of services is provided, an analysis of the concept of establishment as “place of business” and “fixed establishment” was given.

As refers to “fixed establishment” an analysis was made of art 11 of the Implementing Regulation, in relation to art 44 and art 45 RVD, in order to evaluate if the double definition of “supply side” and “receiving side” fixed establishment given by art 11 IR is compliant to the scope of the RVD, from a legal and jurisdictional perspective.

Then, an explanation of the particular “receiving fixed establishment” that is represented by the Global Contracts was given.

In relation to the “receiving side” fixed establishment, it has been analysed the compliance of art 11(1) IR to art 171 RVD art 3(a) Directive 2008/9, the main rule for the right of refund, and to the scope of art 44 RVD.

As a conclusion, it has been inferred that at 11(1) IR is not compliant to art 44 RVD as it broadens excessively its meaning, and to art 171 RVD art 3(a)

Directive 2008/9 as art 171 only considers the “supply side” for refund purposes.

In relation to the “supply side” fixed establishment a question has been raised on the compliance of art 11(2) IR to art 45 RVD and to art 192a RVD. As an answer, quite hazardous, it has been inferred that, from the interpretation given by the ECJ Case law on the Sixth Directive referring to the “supply side” fixed establishment, the scope and the applicability of art 45 RVD is narrower than the one of art 11(2) IR and 192a RVD, so it results in non-compliance in both cases.

From the “supply side” fixed establishment, the controversial concept of “intervention in the supply” of art 192a RVD was examined, underlying that although conceived for the purposes of art 45 RVD, it has also impact on art 44 RVD as it hinders the customer to reverse charge.

As refers to the Implementation in Italy, an evaluation of the IVA Code has been given, analysing the compliance of the main national rule and other VAT national provisions with art 44 RVD, art 45 RVD, art 192a RVD, art 196 RVD and art 63 RVD.

As refers to the “fixed establishment” the compliance of art 38 Bis 2 (1) IVA Code with art 171 RVD, art 3(a) Directive 2008/9 EC, has been analysed, with reference both to the “supply side” and to the “receiving side”. In particular, on the receiving side, it has been analysed the compliance of art 38 Bis 2(1) IVA Code with art 44 RVD as implemented by the art 11(1) IR. The conclusion is “not compliant,” although the latest national Case law of the Corte di Cassazione is not clear and leaves margin of doubt in relation to the possibility of including the “receiving fixed establishment” in the scope of art 38 Bis 2(1) IVA.

But, as from the previous conclusion, art 11(1) IR results not compliant to art 171 RVD and to art 3(a) Directive 2008/9, from the one side and to art 44 RVD from the other side as it broadens its scope, it derives that art 11(1) IR should be not compliant with art 38 Bis 2 (1) as well, as the last is the implementing provision of art 171 RVD.

The result of this research is the clear need that the Italian legislator takes some urgent measures in order to modify the content of art 38 Bis 2 and consequently to avoid problems of tax allocation and liability and litigations due to the uncertainty of the right to claim refunds.

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6.3 Italian Jurisprudence

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6.4 Other Jurisprudence

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