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THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

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MODULE 3.02 – EU VAT OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Dear Sir or Madam

VAT aspects of your proposed EU business expansion

Thank you for your letter regarding your business expansion plans which will entail you opening new restaurants across the EU. I am pleased to advise you that the VAT treatment of each of your activities will be as follows:

Importation of goods

The importation of furniture and cutlery from outside the EU will normally require the payment of import VAT and possibly Customs duty at the port or airport of entry into Astoria. These will be calculated with reference to the purchase price of the imported goods with the addition of freight, insurance and any other incidental costs related to the transportation of the goods from the place of shipment to the point of entry into the EU. Import VAT will be chargeable at the same rate as would apply to similar goods supplied domestically and will be recoverable as it will relate to the deemed despatch of your own goods to Bordonia.

It is possible for importers of goods which are ultimately going to be sold to a taxable person in another member state to claim onward supply relief in the first state of entry into the EU (Art 143. 1 (d)) This means that VAT is not chargeable in Astoria on import but will become payable as acquisition tax when the goods are transported onwards to their final destination in Bordonia. It is a condition of the relief that a VAT registration number is in existence in Bordonia to account for the acquisition tax at the final destination and this number must be provided to the tax authorities in Astoria at the time of importation together with evidence of the intended transportation of the goods to Bordonia (Art. 143.2) Any acquisition VAT that is charged upon entry of the goods into Bordonia will be recoverable as input VAT as it relates to you making taxable supplies of catering.

Leasing catering equipment

Cross border equipment leasing between businesses is subject to VAT in the member state in which the customer (you) are established, under Art 44 PVD. This will mean that the Cederland supplier will not charge you VAT on lease payments but you will be required to account for VAT at the rate applicable in Bordonia under the reverse charge procedure. This requires you to calculate VAT at the appropriate rate based on the regular amounts paid to your supplier. You will be able to recover all VAT accounted for in this way because the leasing will relate to taxable supplies of catering which the restaurants will be providing to customers. You will need to supply your VAT number in Bordonia to the supplier and this should be shown on his invoice. The supplier will also need to submit a recapitulative statement to the tax authorities in Cederlands.

Fitting out works (labour only)

I understand that the fitting out works to be performed in Bordonia will be provided by contractors established in Astoria. It is possible that Bordonia will allow you as the recipient of services to account for VAT on the supply received from the contractors under the reverse charge procedure allowed by Art 194 PVD. This will save the contractors from registering for VAT in Bordonia. If the VAT shift is not available in Bordonia the contractors will be required to register for VAT as they will be making a land related services supply in the member state in which the building is located (Bordonia) and will need to charge you domestic VAT which you should be able to recover as input tax.

Fitted carpets

The supply of carpets including the service of carpet fitting is be undertaken by a supplier established in Estaria, an EU member state. The labour element of the supply will be subsumed

into a single supply of installed goods and the place of supply is where the installation takes place (Art 36). In this scenario, the supplier will need to bring the carpets into Bordonia but there is no acquisition tax as the transfer of own goods is ignored (see Art 17 (2) (b). The supplier will then need to charge domestic (Bordonia) VAT to you for the fitted carpet. The carpet fitting will require the supplier to register for VAT in Bordonia unless it is possible to use the simplification procedure for installed and assembled goods allowed under Art 36 PVD which has been adopted in some EU member states. This is for the prevention of double taxation and allows the recipient of the services to account for the supply under the reverse charge procedure.

Storage room conversion to domestic accommodation

The Estaria contractor performing conversion works on the storage rooms will be making supplies related to land in Bordonia and may be required to register there for VAT. However, Bordonia may have agreed to allow the customer to reverse charge the VAT on the services as provided under Art 194 PVD – this is an option derogated to each member state and may be conditional upon the supplier being registered for VAT in their own member state. This procedure, if allowed, would save the supplier from registering from VAT in Bordonia and place responsibility onto you to account for the VAT under the reverse charge procedure. In either event, there is likely to be an input tax restriction on the reverse charge or the domestic VAT charge because the VAT will be attributable to the leasing or letting of immovable property to the manager, an exempt activity under Art135 (l)., the input tax is likely to be restricted subject to any deminimis which may apply in Bordonia.

Supply of gift vouchers

The VAT treatment of gift vouchers changed in the EU on 1 January 2019 (see Arts. 30a and 30b) and requires the supplier (you) to determine whether they are 'single' purpose or 'multi-purpose' vouchers. A single purpose voucher will be one where, at the time of issue, both the liability to VAT and the place of supply of the underlying supply are known. I note that you intend to issue Euro denominated vouchers from your Astoria established company. The important question is whether these can be used at your restaurants in more than one member state – if that should be the case, the conditions for a single purpose voucher will not be met and they will fall to be classified as multi-purpose vouchers. This will mean that VAT will not be due on the issue of the vouchers but will be due at the time and place of redemption at the rate applicable in the relevant member state. If on the other hand the vouchers can only be used in one specified member state and in relation to goods or services where the VAT liability is known at the time of issue, VAT will be due at the time of issue in the relevant country.

Recommendations

1. Register for VAT in Bordonia at the earliest possible date to enable the early recovery of VAT and to be able to account for VAT under the reverse charge procedure.

2. Establish if Bordonia permits the recipient of supplies of installed and assembled goods and land related services to account for VAT themselves (saving non established suppliers from registering for VAT in Bordonia) particularly by businesses that are not established in that state.

3. Review the redemption arrangements for Gift vouchers to determine if any are solely for redemption against catering services provided in a single member state with VAT due at issue.

I trust that I have been able to address all of the points you have raised but please do not hesitate to contact me if you require anything further.

Yours faithfully

Question 2

I am pleased to provide the following note regarding the VAT treatment of supplies made by the Folgate group across the EU.

Membership charges

On the information provided it appears that the monthly charges are for membership of a camping club and are made by the Astoria established business. For the majority of customers this will be a B2C supply liable to VAT where the supplier is established under Art 45 PVD (Astoria). In the case of customers who say they are using club membership for their business, you should consider Art 18 of the Implementing Regulations IR 282/2011 which say that unless you have information to the contrary, you may regard a customer established within the community as a taxable person where you can demonstrate that the customer has communicated his individual VAT number to you. So as long has this has taken place and you have checked the number, name and address, you do not need to charge VAT on those supplies made to business customers as they will be liable for reverse charge in their own member state. You will however be required to enter details of such supplies on your recapitulative statements.

Ancillary supplies

The monthly newsletter and discount vouchers appear to be ancillary services to the predominant supply of club membership and on the principles established in *Card Protection Plan (CPP) C-349/96* are likely to be seen as a means of better enjoying the principal supply. Consequently this will be a single supply and no part of the consideration should be apportioned to these elements and the value of the supply will be the full monthly payments received. The electronically delivered newsletter may on its own be regarded as an electronically supplied service (where the place of supply is where the non-taxable customer belongs) which could suggest that it should be treated under the "Union" MOSS scheme for Telecoms, Broadcasting and electronic services covered by Art 369b PVD. However when provided along with the other elements of membership it is unlikely that the services would be seen as two separate supplies – one within the Union regime and the other subject to VAT under Art 45 PVD.

Supplies at campsites in each member state

Supplies of pitch hire at sites developed for use as camp sites are services connected with immovable property under Art 47 PVD and are taxable in the place where the property is located. Consequently VAT will be due at the rate applicable in each member state in which the camp sites are located. A similar treatment will apply to the supplies from campsite bars where the place of supply is where the services are physically carried out - Art 55 PVD. Since a separate company in the Member State concerned runs the campsites activities in each member state those companies will be liable for VAT on the above supplies as well as supplies made from shops and laundries on the sites.

Any vouchers accepted for discounts against sales through bars will be regarded as "self-funded" discount vouchers and will result in a reduction to the taxable value of supplies for which they are used under the principles established by the CJEU in *Boots Company (Case C -126/88)*. However where campsites are reimbursed for accepting vouchers in shops and laundries the payment from the parent also needs to be included as third party consideration in addition to the payments made by customers under Art 73 PVD.

Supplies of advertising from Switzerland

Advertising supplied from outside the EU to the Astoria parent is subject to the reverse charge in Astoria based on the amount paid. There may be questions regarding whether each company is receiving supplies directly at their establishment in each member state, but the subsequent recharge along with other overheads should result in the cost being correctly allocated to entities in each member state (see below).

Movements of static caravans between sites

Seasonal movements of caravans between sites in different member states can be made without any requirement to account for VAT providing that details of all goods temporarily moved to other member states is kept in a temporary movement register kept by each of the owners of the caravans. (Art 17(2) (h) PVD). Providing the caravans are removed from the member state to which they are temporarily moved before the expiry of 2 years there will be no VAT chargeable. Caravans are means of transport as defined in Art 38 of the Implementing Regulations for the purposes of Art 56 PVD but as no charge is raised for the transfer, no taxable supply will be created for the use by a group company established in another member state. If this were to be a supply it would not also be a deemed supply of the transfer of own goods under Art 17(2) (g).

Overheads recharged from Folgate Astoria

The annual recharge from Folgate's Astoria business establishment to group companies in each member state are business to business supplies taxable in the customer's country subject to Art 44 PVD. Each company will need to account for VAT as a reverse charge supply.

The proposal to make at least one of the companies into a branch of Folgate Sarl will mean that the recharge will not be treated as a supply because both the parent and branch will be the same entity. The CJEU decision in *FCE Bank C-210/04* confirmed that a branch is not a taxable person distinct from the parent and therefore no supply and no reverse charge will be made.

I trust the above covers all the points relating to current and future supplies please do not hesitate to contact me if you require further assistance.

Regards

PART B

Question 3

Dear Finance Director

Thank you for your letter regarding the treatment of VAT incurred on purchases.

It may be helpful if I initially explain how VAT applies to not-for-profit organisations such as Bioflet whose activities consist of a mixture of conventional trading as well as funded activities such as research.

Economic activities

The most important issue is to determine which of the organisation's activities can be regarded as "economic activities" within the meaning of Art 9 PVD and related case law. In this context, economic activities refer to the independent activities of traders, producers and those who exploit tangible and intangible property for the purposes of obtaining income on a continuing basis. In general terms, activities which resemble buying and selling in an open market environment and which are commonly performed by many types of persons are likely to be regarded as "economic activities" within the meaning of the PVD.

When economic activities are performed independently by individuals or other legal entities the supplier is regarded as a taxable person whose activities come within the scope of VAT. In contrast, activities which are statutory, fund raising, charitable or do not have the characteristics of "business" are more likely to not be regarded as "economic activities" and those performing them will not attain the status of taxable persons in respect of those activities.

The sole fact that an organisation is fully or partially funded by grants does not in itself categorise activities as failing to meet the "economic activity" test, this point was stated by the CJEU in *Case C-263/15 Lajvér Meliorációs Nonprofit Kft. and Lajvér Csapadékvízrendezési Nonprofit Kft [2016]* where it was held that even charging a minimal fee for an activity is capable of bringing it within the category of an economic activity. Other relevant cases include *Gemeente Borsele v Staatssecretaris van Financiën (C-520/14)* in which the court considered whether a local municipality which heavily subsidised transport for school children at a loss was undertaking economic activities and could be regarded as a taxable person. The court found that the municipality was not engaged in economic activities because it only required parents to pay 3% of the transport cost and was not obtaining income on a continuing basis.

A similar point was also considered in the *Commission v Republic of Finland C-246/08* where legal aid provided by state law offices for a partial payment had not been subject to VAT, in contrast for the requirement for private advisers to charge VAT on similar services. The court rejected the Commission's position on the grounds that the part payments made for such a public activity was more a "fee" than a consideration in the strict sense.

In the specific circumstances of your organisation's activities, it is clear that the sales of plant and forestry products from a shop at the forestry estate are economic activities as they are made with frequency and over a significant period and clearly resemble similar sales made with a view to profit and in competition with others. However, the position is not so clear with the research work funded by grants and an industry levy, although the following questions may be helpful as they are indicative of economic activities. Is there a contractual requirement to engage in the activities? Is payment of the grant and levy conditional upon the organisation meeting some pre-determined objectives? Does the ultimate benefit of the research findings belong with your organisation or those paying grants etc.? What are the organisation's Articles of Association or similar which define its purpose?

If the contractual and conditional requirements of funding result in the benefits of research passing to the funders there is a strong suggestion that you are engaged in economic activities and are making supplies to those paying grants and levies. In contrast if none of those features are present and work performed is unconditional and without expectation of obtaining income

on a continuing basis it is more likely that you will not be regarded as conducting economic activities.

Consequences of economic and non-economic activities

Overall this may be a finely balanced decision the consequences of which may require you to treat the income as the proceeds of economic activity and therefore within the scope of VAT, subject to any exemptions that may apply. Alternatively, if not seen as economic activity and therefore not within the scope of VAT, while no output tax will be due there will be no entitlement to recover input tax on expenses which are made to support the research part of the organisation. This is likely to lead to an additional cost in performing research and is an aspect that you will need to factor into budgeting and future income requirements.

It is possible for an organisation such as yours to be a taxable person with some economic activities and other activities which do not meet the required tests. Although the organisation will be required to register for VAT, the consequences mean that VAT only applies to economic activities and certain VAT on costs may become an irrecoverable cost component of the non-business activity. The accurate analysis of VAT incurred is therefore critical if errors are to be avoided and it will be preferable to establish the agreement of the tax authority before claiming any VAT. Any attribution of input tax to economic/non-economic activities will take precedence over apportionment between taxable and exempt business activities in the case of partial exemption.

VAT incurred on the covered walkway

The specific issue concerning the VAT incurred on the construction of a covered walkway leading to the estate shop is similar to the position considered by the CJEU in *Sveda UAB C-126/14.* In this case the CJEU determined that a taxable person had a right to deduct input VAT paid for goods in relation to a pathway through a forest for the purpose of planned economic activity related to tourism, even though it could be used by the public free of charge as it enabled taxed transactions to be carried out providing that a direct and immediate link is established between expenses and an output transaction giving rise to a right to deduct. In the circumstances described it appears that taxable sales by the shop would justify the right to deduct and you have an entitlement to recover the related VAT as input tax. This is despite the fact that the expenses were funded by a grant since VAT law does not require the recipient of a supply to be the payer as a condition to input tax recovery.

I trust this is helpful and please do not hesitate to contact me if your require anything further.

Yours faithfully

PART C

Question 4

Articles 19 (and 29 in respect of services) PVD provide member states with the option to deal with situations in which the assets of an existing business are transferred from a VAT registered entity to a new owner, so as to be treated as "no supply" and therefore no VAT is required to be accounted for by the vendor.

The primary purpose of the "non-supply" treatment is to preclude a possible closing business from having the responsibility of charging and accounting for a potentially significant amount of VAT on one of its final business transactions thus preventing the opportunity for tax loss. In addition, the arrangements are an administrative simplification which allows what may be assets with differing VAT liabilities to be sold as if a single nil rate applied.

Referrals to the CJEU have been made on the grounds of questioning what was the totality of assets and in cases in which part of the assets were transferred, whether they were sufficient to enable the transfer to be treated as a "no supply". More recently the court has been asked to consider whether the transferee has acquired ownership of assets and not merely possession.

In the leading case of *Zita Modes Sarl C-497/01* the court held that the business transferred must be capable of carrying on an independent economic activity, rather than being the simple transfer of assets, such as the sale of stock; and that the buyer does not need to pursue the same type of business as the seller prior to the transfer, but must intend to continue the business transferred rather than liquidating the assets.

The case of *Staatssecretaris van Financien v X BV [2013] EUECJ C-651/11* was concerned with the position where 30% of the shares in a company were disposed of by a taxpayer at practically the same time as other shareholders disposed of their shares to the same purchaser. The court held that the disposal by the appellant did not constitute the totality of assets or services within the meaning of the predecessor legislation (6th Directive) and that the transfer of an independent business had not taken place.

The recent case of *Mailat - Apcom Select C- 17/18* ruled that the leasing of immovable property along with other assets and consumables to a company which carried on a restaurant business under the same name could not be treated as falling within an Art 19 because the transferee was not in ownership of the assets under the (exempt) lease.

Although not referred to the CJEU for a ruling on Art 19 in the case of *AB SKF C-29/08* the court expressed the view that a sale of shares could be viewed as the disposal of the "totality of assets" and may be seen as falling within Art 19. This judgment has blurred the distinction between non-economic or exempt sales of shares and introduced the possibility that in certain circumstances they may have been viewed as non-supplies with the resulting beneficial input tax treatment.

Where Art 19 applies it is important to note that the successor is treated as if they had recovered (or not) input tax on the assets acquired, this can have significant effects on subsequent disposals e.g. Capital goods adjustments, etc.

Question 5

The phrase “use and enjoyment” is a term undefined in EU law but most commonly used in the context of determining the place of supply of services and can be applied by each individual member state to a defined range of activities under the derogated powers provided for in Art 59a PVD. Those defined activities include the general place of supply provisions for B2B and B2C supplies at Arts 44 and 45 PVD, hire of means of transport Art 56, supplies of telecommunications, broadcasting and electronic services to non-taxable persons Art 58 and supplies made to non-taxable persons outside the community Art 59.

Article 59a is intended to counter the possibility of double taxation, non-taxation or distortion of competition that may arise from the application of other place of supply of services rules which may lead to a distorted outcome if only based on where the supplier and customer belong. For example, the use of a telecommunications service between a supplier and a B2C customer based in the same member state, who frequently travels to say Australia, where the telecom service is used would on basic principles be subject to domestic VAT despite the fact that the “use and enjoyment” of the service is made several thousand miles away from the EU. The rule generally applies where either services are consumed within the EU but would otherwise escape VAT, or they would be subject to EU VAT when consumed outside the EU. Use and enjoyment does not apply where services are subject to VAT in one member state but used in another.

The term is taken to determine the place where the service is consumed for example where a car is hired within the EU by a non-taxable person who then uses it outside the EU, the general rule in Art 45 would require the supplier to charge VAT, however the use of the car outside that territory constitutes “use and enjoyment” outside the EU and VAT should not be charged. The enjoyment aspects is generally considered to be where the benefit of the service is taken, which in most cases will lead to the same outcome as under “use”.

Effective use and enjoyment takes place where a recipient actually consumes services irrespective of the contractual arrangements, payment or beneficial interest. Some member states have used the power to make their member state the place of supply if there is some connection to it, even though the consumer is outside the EU – this is known as “negative use” and examples include Spain has done this on Phone cards supplied B2B mainly to Andorra but only usable in Spain, and Belgium on transport which takes place in Belgium but is B2B with a non-EU customer. These countries run the risk of creating double taxation. In contrast positive use and enjoyment rules seek to avoid double taxation.

Cases in which the term has been considered include *RAL (Channel Islands) Ltd C-452/03* which was concerned with the place of supply of slot gaming machines located in the EU when provided by an entity established outside the EU. Also *Athesia Druck Srl C-1/08* which was concerned with the place where advertising services were supplied in circumstances in which the customer was established outside the EU but the use of the advertising services took place within the EU in the same member state as the supplier. Another case concerned *Ocean Finance t/a Paul Newey C-653/11)* which although primarily concerned with whether steps were taken with the sole aim of obtaining a tax advantage, also considered the place of supply where services were received by a UK business from a supplier outside the EU and subsequently used to make exempt supplies of finance.

In each case the actual place at which the services were “used” was determined to be the correct place of supply despite indications to the contrary, including in contracts, which would have applied if the “use and enjoyment” provisions had not applied.

The rule can’t result in the place of supply being changed from one EU member state to another – only between EU and non-EU places and in cases where a supply is partly used between each the possibility of apportionment exists.

Question 6

Deemed supplies can create a liability to account for VAT despite the absence of consideration. In general terms, EU VAT law deems supplies:

1. In situations where there is a requirement to prevent the final customer benefiting from goods or services which have not borne VAT;

2. To simplify tax accounting and administration; and

3. To combat fraud.

The most commonly encountered examples of deemed supplies are:

Assets on hand at deregistration from VAT

When a VAT registered entity deregisters with assets on hand, which have previously benefited from VAT recovery, they are deemed to have been supplied at their open market value immediately before the deregistration. Art 18(c) PVD refers (appears to be derogation “may”).

Goods forming part of a business’s assets disposed of so as to no longer form part of the assets

Art16 PVD provides that goods which were part of a business’s assets shall be treated as a supply of goods if they are put to a private use, disposed of free of charge or applied to a purpose other than that pertaining to the business, providing that VAT was wholly or partly deductible. There are exceptions for small value goods such as samples.

Transfer of own goods to another member state

Art 17 PVD treats the transfer of goods forming part of a business’s assets when moved between member states as being a supply of goods for consideration. The practical application means that a domestic VAT liability is only created where the transfer is not an exempt intra-community supply under Art 138 for example because there is no person acquiring the goods in the destination member state.

Temporary use of goods for non-business use

Art 26 PVD treats the use (as opposed to the “application. for use” at Art 16 above) of goods forming part of the assets of a business for private or non-business use as a supply of services for consideration, providing the VAT on those goods was wholly or partly deductible.

Self-supply of services when unable to fully recover VAT

Art 27 allows members states to introduce legislation which treats as a supply of services for consideration the self-s supply of a service, where if supplied by another taxable person, the VAT would not be wholly deductible. Such measures can only be introduced for the prevention of distortion of competition and after consulting the VAT committee.

Undisclosed agent treated as principal

Art 28 PVD deems a taxable person as the recipient and supplier of a supply of services where they act in their own name (undisclosed agent) despite the possibility that any contract is solely between the principal and the end-user of those services.

Note: marks will be awarded where alternative provisions are described.

Taxable amount in each case

The taxable amount for deemed supplies under Art 16, 17 and 18 shall be the purchase price of the goods or similar goods, or in the absence of a purchase price the cost price at the time

when the disposal or transfer takes place (Arts 74 and 76). In the case of deemed services under Art 26 the taxable amount shall be the full cost to the taxpayer of providing those services (Art 75). In the case of Art 27 (self-supply of services when unable to fully recover) the taxable amount is the open market value of the service supplied.

Question 7

Dear Sirs

Recovery of EU VAT

I am pleased to provide advice regarding the recovery of EU VAT incurred in relation to your activities in the EU.

As you are not established in the EU it will be possible for you to recover at least some of the VAT incurred since June 2017 on purchases of packaging from Astoria under the 13th Directive. The conditions that need to be met in order to make a successful claim are as follows:

- The VAT must have been incurred in the course or furtherance of a business activity.
- Tax invoices need to be held to substantiate the amounts claimed.
- You shall not have a fixed establishment, seat of economic activity, place of business or other residence in any EU country.
- During the refund period you must not have supplied any goods or services in Astoria with the exception of i) transport and ancillary services, ii) supplies where VAT is payable by the recipient of the supply, or iii) supplies under the MOSS scheme.
- You will be required to provide evidence from the Malaysian tax authority that you are a taxable person in Malaysia.
- Any claim needs to be submitted in accordance with the requirements of the Astoria tax authority (electronic or paper).
- The refund period shall not in normal cases be longer than 12 months nor shorter than 3 months.

You should note that any EU country may:

- Refuse to refund VAT in this way if the claimant's country/territory does not grant reciprocal refund rights for VAT or similar to businesses based in that EU country.
- Impose restrictions on the type of expenditure qualifying for refunds.
- Insist that the claimant appoint a tax representative.

Possible out of time claim

Unfortunately you may now be out of time to recover all of the VAT incurred since 2017 as each EU country has a time limit within which claims should be made. Most EU countries require claims to be made within six months of the end of the calendar year. I suggest you contact the Astoria tax authority or consult the European Commission website to find out the deadline date by which this needs to be submitted.

I trust you find this helpful and please do not hesitate to contact me if you require anything further.

Yours sincerely