THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

December 2022

MODULE 3.02 – EU VAT OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Mr Alexander Pappas
US

9 December 2022

Dear Sir,

VAT aspects of consultancy services in Europe

I am replying to your request for advice in respect of the VAT treatment of consultancy services which you are supplying within the EU.

Green Gaia's Business Establishment and VAT registration in Estoria

Green Gaia (GG) will be able to register for Estoria VAT if it makes or intends to make taxable supplies from its business establishment in Estoria. It is therefore essential to determine whether GG has a business establishment in Estoria, and whether that business establishment is the most closely concerned with the intended supplies.

Even though GG is incorporated in Estoria, the definition of 'where the business is established' according to art.10 Implementing Regulation is 'the place where the functions of the business' central administration are carried out'. This is further defined as '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'. A registered office alone is not sufficient to create a business establishment.

Therefore, the business establishment is the place where you have established your business and the main functions of the business' central administration are carried out. This will usually be the head office, headquarters or 'seat' from which the business is run.

Consequently, it seems clear that the business is established in Estoria, where essential day-to-day decisions concerning the general management of the business are taken and where the directors meet.

Therefore, GG has a requirement to register for VAT in Estoria, since the company has 'human and technical resources sufficient to make and receive taxable supplies', i.e. rented office and five employees in Estoria and it will be using its establishment for the provision of consultancy services.

Liability of Green Gaia's consultancy services

B2B consultancy services are a general rule service for VAT purposes and consequently the place of supply is where the recipient belongs (art.44 PVD). Even though the customers are government agencies and are therefore potentially not 'in business' for VAT purposes, it looks that they are all VAT registered. They will therefore be regarded as businesses for the purposes of the place of supply rules.

GG's consultancy supplies to domestic customers will be subject to Estoria VAT according to the provisions of article 44 PVD. GG will charge domestic output tax on its invoices and the transactions value should be reported on the company's VAT return.

GG's EU customers will therefore need to account for the supplies of consultancy services received from GG under the reverse charge mechanism (art.196 PVD).

GG shall support the above treatment by obtaining valid and sufficient evidence that its customers are taxable persons. Taxable persons for these purposes are customers who are

registered for VAT in another EU member state or can provide evidence of carrying on a business in another member state as per the provisions of Article 9 of PVD.

GG should validate and show the customer's EU VAT number (if appropriate) on the invoice. Its invoices will also need to include details of the legislative provisions under which the transactions are regarded as not VATable in Estoria and that the customer has an obligation to account for tax in its own member state under the reverse charge mechanism.

Furthermore, it will need to record such transactions on a recapitulative statement under art.264 PVD, recording the VAT registration numbers of the customers to whom it has supplied services without charging VAT.

US independent consultants' services

The administrative services provided by the US consultants to GG will be regarded as general rule B2B services. Under art.44, the place of supply of these services is Estoria, where GG is established. The supply is therefore subject to Estoria VAT and GG will therefore need to account for the supplies of consultancy services received from the US under the reverse charge mechanism (art.196 PVD).

Administrative services provided by our firm (accounting, filing statutory returns, preparing accounts for statutory and management purposes)

The administrative services provided by our firm to GG will be regarded as general rule B2B services. Under art.44, the place of supply of these services is Estoria, where GG is established. The supply is therefore subject to Estoria VAT and we should charge GG Estoria VAT.

Liability of training services

B2B educational services are a general rule business to business service unless the service constitutes the right of admission to an event (art.53).

Moreover, it is essential to consider whether the training aspect of a large consultancy project is likely either to be a part of the main supply, i.e. consultancy services to government agencies concerning their green transportation programmes. In such case the training services will not have a separate identity, and therefore they simply follow the treatment of the main consultancy service as it was analysed above.

According to the principles established in the leading CJEU Case C-349/96 Card Protection Plan Ltd, where two things are supplied together, they will be given their separate VAT liabilities if each is an independent aim of the purchaser. A supply which is not an independent aim but is ancillary or for the better enjoyment of the main supply will not have a separate liability but will take on the liability of the main supply.

In this case, it seems likely that some customers will be particularly attracted by the training offer, and it is not a clear-cut situation since only some customers will receive the training services for an extra training fee.

Therefore, if the training sessions will be treated as a separate distinct supply of services, according to Article 53 PVD, B2B supply of services in respect of admission to educational events, and of ancillary services related to the admission are deemed to be supplied where those events actually take place.

It is evident from article 32 of the Implementing Regulation 282/2011 that this requirement is met, as it says: "services in respect of admission to … educational… shall in particular apply to the right of admission to educational and scientific events such as conferences and seminars". Furthermore, according to the principles established in CJEU case Srf konsulterna AB, C-647/17, supplies in respect of admission to educational events, as described in Article 53 PVD, should be interpreted as meaning that it covers a service supplied solely to taxable persons

whose essential element consists of selling rights for individuals to be admitted to a professional "educational seminar" extending over one or several days.

Therefore, the separate supply of training services to businesses is deemed to be supplied where those activities actually take place, i.e. the premises of the customers. Hence, GG's training services supplied to domestic customers will be subject to Estoria VAT. In addition, in respect with the training supplied to EU customers, the customer will account for VAT under the reverse charge mechanism instead of requiring GG to register and account for output tax, assuming that the respective member states have adopted Article 194.

Finally, it worth noting that it would be the country in which the place of supply of the training or education is situated that would decide on whether the participation fee is exempt from VAT (Article 132(1)(i)). However, it seems that the exemption will not be applicable since GG is not an organisation governed by public law.

GG's consultants travelling – Input VAT to be incurred

VAT will be incurred on:

- Hotel accommodation, which is supplied where the land is. Therefore, VAT will be payable in every member state in which GG's consultants will buy hotel accommodation.

- Short-term car hire, which is supplied where the car is made available. Therefore, VAT will be payable in every member state in which GG's consultants will hire a car.

- Car fuel, which will be a supply of goods wherever the fuel is bought.

Consequently, GG will be incurring VAT payments in multiple member states due to the travelling of its consultants.

Recovery of VAT incurred

Deduction of input tax is a fundamental principle of the VAT system and economic operators must be completely relieved of the cost of VAT incurred in relation to their taxable transactions in order to preserve the principle of proportionality within the VAT system. Article.168 gives the right of deduction in relation to input tax which is incurred on 'goods and services used for the purposes of the taxed transactions of a taxable person'.

Therefore, as a business established in Estoria, Green Gaia may be able to recover VAT incurred in the other EU member states for business purposes under the electronic refund system of Directive 2008/9/EC, subject to detailed rules set out in the Directive.

The claim is made by means of an electronic submission via the 'electronic portal' operated by the tax authorities of the Member State in which the claimant belongs, i.e., Estoria. The tax authorities of the member state of establishment carry out some basic checks, and then they transmit the claim to the Member State of refund. Finally, the input VAT incurred in Estoria for business purposes will be recoverable through the domestic VAT return of GG.

I trust the information above is sufficient to enable you to consider the VAT aspects of your abovementioned activities and please do not hesitate to contact me if you wish to discuss any aspect in greater detail.

Yours sincerely
ADIT Student

Question 2

Finance Director,
Blue Bridge Ltd,
Boldonia, EU

15 December 2018

Dear Finance Director,

Subject: Green Bridge Ltd – VAT treatment of activities

I am replying to your enquiry concerning the VAT treatment for the activities detailed in your letter. For ease of reference, I will respond in the order used in your letter.

Petrol Oil Refinery

Deduction of input tax is a fundamental principle of the VAT system and economic operators must be completely relieved of the cost of VAT incurred in relation to their taxable transactions in order to preserve the principle of proportionality within the VAT system. Article.168 gives the right of deduction in relation to input tax which is incurred on 'goods and services used for the purposes of the taxed transactions of a taxable person'.

It appears that BB recovered the input tax incurred on the basis of an intention to use the goods and services purchased to make taxable supplies of petrol oil after the completion of the refinery. However, BB made an exempt supply of land to the local authority in a compulsory purchase deal.

At first sight, it seems possible that the VAT authorities may require the input tax to be clawed back because the circumstances which justified the recovery have changed. According to the provisions of articles 184 and 185 of PVD, Estorian authorities may deny the reduction of input tax credit due to the fact that an input was initially intended for taxable use but is then put to exempt use, i.e. the sale of land.

In addition, the right to recover input tax on the acquisition of goods/services assumes that the expenditure incurred on obtaining them is a component of the cost of any taxable transactions that create the right to deduct associated input tax. Once a right of deduction had been exercised because the expenditures were for the purpose of investment work intended to be used in connection with taxable transactions, the authorities may not claim repayment merely because the taxpayer has been unable to use the goods or services for the intended purpose. In CJEU Case C-110/94 (INZO), the CJEU held that as long as the original intention to make taxable supplies was a genuine one, the business was a taxable person and entitled to input tax recovery. There was nothing to justify clawback.

The above treatment was also confirmed by the CJEU in Ghent Coal Terminal BV (Case C-37/97), which determined that where a taxable person had a genuine intention to use the goods and services for taxable purposes, and the intention had not really changed, i.e. the goods and services supplied to the business for the purpose of investment work intended to be used in connection with taxable transactions. Consequently, the right to deduct should be retained since the original intention had been frustrated by circumstances beyond the taxable person's control, i.e. by the actions of the local authority. An adjustment might be required under the capital goods scheme, but not under arts.184 and 185.

Furthermore, according to the principles laid out in CJEU Case Sonaecom (C-42/19), when a taxable person is carrying out preparatory acts with the intention to pursue an economic activity the input tax incurred was recoverable, even though the finalisation of the intended taxable activity did not happen. However, the CJEU also ruled that actual use of goods and services must take precedence over original intention.

Consequently, since the input was initially intended for taxable use but is then put to an exempt use, i.e. the sale of land, an adjustment under the capital goods scheme may be required.

Digital Publication Project

To be deductible, input tax must be incurred 'by the taxable person' and must be properly charged. Problems can arise where a non-taxable person incurs expenditure on behalf of the business, employees or the owner of the business.

Therefore, the main concern here is that the expenditure appears to have been incurred by someone who will never make any taxable supplies. Consequently, the company cannot, on basic principles, claim the input tax because the supplies were not made to it but rather to its shareholder.

The following two possible actions should be considered in order to claim the input vat incurred on the preparatory expenditures:

1) It could be argued that there was no chain of supplies (suppliers to shareholder to company), but the shareholder has acted as the company's agent in incurring the expenditure and 'in reality' the input vat belongs to the company. However, that may not be accepted, particularly if the documentation shows the shareholder's name or if the company had not been incorporated at the time the expenditure was incurred.

2) A further possibility is for the owner herself to register for VAT and reclaim the VAT incurred. Although she never made any taxable supplies herself, and never intended to, she did carry out activities preliminary to trading.

The above is confirmed in the case of Rompelman & Rompelman (CJEU Case C-268/83), which established that preparing to carry on an economic activity is itself an economic activity, and the couple were taxable persons acting as such.

In addition, the case of Faxworld (CJEU Case C-137/02) established that an entity which exists only to carry on preliminary activities and then transfer them to another entity which will carry on the business is entitled to register for VAT and recover input tax.

Finally, the 'transfer of a totality of assets' by the VAT registered owner, which is normally described as 'the transfer of a business as a going concern' (TOGC), is not to be treated as a supply of goods nor as a supply of services, under articles19 and 29 of PVD.

Major Supplier's illegal actions

According to the PVD, 'a VAT system achieves the highest degree of simplicity and of neutrality 'when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution'.

The CJEU has consistently held that it would be wrong to exclude a transaction from the scope of VAT because of some minor legal problem with the way in which it was carried out, because that would effectively give illegal businesses (such as dealers in counterfeit goods) an advantage over lawful ones. If unlawful businesses compete in the same market as lawful ones, their transactions are subject to VAT in the same way. Otherwise, their exclusion would give a fiscal advantage to illegality and an incentive to create legal breaches in order to take dealings out of the scope of VAT.

According to the principles established by the court in the case of Goodwin & Unstead (Case C-3/97), which concerned the illegal sales of counterfeit perfume, the illegal sales were subject to VAT since Goodwin & Unstead competed with the genuine trade in perfumes, so it would create a fiscal distortion to remove it from the scope of the tax.

Therefore, only trading in goods which have no legitimate competitive market can be outside the scope of VAT by reason of illegality, i.e. the sale of illegal narcotics, because there is then no danger of distortion of competition.

BB's subsidiary – Credit facility to customers

It seems that the company makes two separate and distinctive supplies as follows:

- Supplies of goods - Company sells mobiles and accessories, which are taxable; and
- Supplies of financial services – Company charges interest, which is exempt.

The above is supported from the details given to us, which are stating that the interest is charged separately and specifically for the grant of credit. Additionally, if the consideration for the mobiles themselves is paid in full by the due date, the interest charge will be avoided by the customer.

In contrary, if payment was due on delivery, an interest charge did not constitute consideration for a supply of credit since no credit was given. Interest is typically calculated over a period of time (timing/accrual basis). Consequently, if the charge does not have that nature, it may not be interest.

According to the principles established in CJEU case Muys en De Winter's Bouw (C-281/91, the CJEU confirmed that a supplier who charged interest for late payment was in principle granting exempt credit within this provision, but if payment was only deferred until delivery of the goods, there was no 'credit' and the whole price was for the main supply.

Moreover, according to the provisions of CJEU case Card Protection Plan (C-349/96), all supplies should be given their natural and proper VAT treatments, but a supply which comprises a single service from an economic point of view should not be artificially split.

A service must be regarded as ancillary to a principal supply if it does not constitute for customers an aim in itself, but a means of better enjoying the principal supply.

It is therefore likely that the interest income will be treated as a separate exempt supply and it will not be regarded as an extra consideration for the taxable supplies of mobiles and accessories, due to the fact that the customers could avoid the charge in case they pay before the lapse of the due date.

Article.168 gives the right of deduction in relation to input tax which is incurred on 'goods and services used for the purposes of the taxed transactions of a taxable person'. On the other hand, input vat which has been incurred in relation to a business exempt activity are not recoverable.

Consequently, a business that makes some taxable and some exempt supplies has to determine how much input tax it should be entitled to deduct, since only that which relates to the taxable side of the business could be recovered.

BB's subsidiary shall attribute input tax as far as possible to taxable activities, i.e. sales of mobiles and accessories (100% recoverable) and exempt financial activities, i.e. credit facility to customers (not recoverable).

The residual input tax is provisionally recovered using the 'Taxable over Taxable plus Exempt' proportion from the preceding year, and the proportion is generally carried out in accordance with articles.174 and 175. Member States may treat a business with an insignificant amount of exempt input tax (directly attributable and proportion of residual) as wholly taxable and entitled to full recovery.

The above treatment was confirmed by the CJEU in its case Régie Dauphinoise (C-306/94). The CJEU held that the earning of interest was a 'direct, necessary and permanent extension'

of the taxable activity, and it could not therefore be regarded as incidental. Hence, the interest income had to be included in ‘T over T plus E’.

After calculating the provisional recovery in each return period, the business must calculate the actual recovery for the year at the end of the year based on the actual ‘Taxable over Taxable plus Exempt’ figures and make an adjustment either recovering more or repaying some input tax.

I trust this is helpful and would be pleased to provide further assistance if required.

Yours faithfully,
ADIT Student

PART B

Question 3

Abuse of law

Abuse of law refers to a situation in which a person attains an unfair tax advantage as a result of the application of law in circumstances in which the tax advantage in question (such as relief or exemption) is not intended to be given. The leading CJEU VAT judgment in this respect is Halifax (case C-255/02), in which a partly exempt bank attempted to obtain full recovery of input tax on the construction of call centres through a series of artificial transactions involving related companies within the same corporate group.

The CJEU held that the application of EU law cannot be extended to transactions that are not undertaken within the context of normal commercial operations, but are solely for the purposes of attaining a tax advantage. It required the national courts to consider whether an abusive practice has taken place, and if so, to allow for the redefinition of the transactions to establish the situation that would have prevailed in the absence of those abusive transactions.

The concept of abuse of law as determined in Halifax case requires:

- Evidence that obtaining a tax advantage was the sole or main purpose of transaction(s) that were artificial and that had been undertaken solely for the purposes of obtaining that tax advantage; and

- Conferring such a tax advantage is contrary to the intention of the law.

Direct effect

Direct effect refers to the EU law concept that allows the provisions of EU law, in certain circumstances, to give rise to rights which individuals may enforce before national courts. More specifically, direct effect allows those articles of the EU VAT Directive which are: i) unconditional and ii) sufficiently precise to be relied upon as against any national provision which is incompatible with the Directive.

The leading CJEU judgment in relation to direct effect in VAT is Becker (case C-8/81). Becker concerned a self-employed credit negotiator who invoked before her national court in Germany an Article of the EU VAT Directive which enabled the VAT exempt treatment of the granting and negotiation of credit. Germany had not yet implemented the Article in question into domestic VAT law. Becker wished to apply the exemption during the period of time between the end of the expiry period for implementation of the Directive, until the German law was actually amended.

The Court held that when a Member State has failed to implement a Directive correctly or not before the end of the period prescribed for implementation, that Member State has breached Article 189 of the EU Treaty which provides that a Directive shall be binding upon each Member State. Furthermore, direct effect only applies vertically whereby a person seeks to enforce a right against the Member State which failed to implement a Directive on a timely and/or correct basis. A Member State which has not adopted the measures required by a Directive in time and/or correctly may not plead, as against individuals, its own failure to perform the obligations that the Directive entails. Likewise, direct effect does not apply horizontally as between individuals.

Effectiveness

The general principle of ‘effectiveness of rights’ requires that, where EU law confers certain rights upon a person, national law should not take those rights away. This also extends to the situation where conditions are imposed take make it possible, yet excessively difficult, to exercise those rights. Such conditions might include the imposition of an unreasonably tight

time-limit for making a claim, or requiring an unreasonable amount of documentation to support a claim which is based on a right conferred by EU law.

In Case 240/87 Deville, the French tax authorities had imposed procedural requirements for a claim that made it excessively difficult to recover national vehicle-related indirect taxes that had been held to have been wrongly collected in breach of EU law. The CJEU held that these procedural requirements violated the principle of effectiveness.

Equivalence

The principle of equivalence derives from the freedom of establishment, one of the fundamental freedoms enshrined in the EU Treaty. Businesses should be free to set themselves up in any Member State and should not be discriminated against by reason of their location. Where a foreign business makes a claim in a Member State, the principle of equivalence requires that the said Member State cannot make it any more difficult for the business to exercise its rights than for a domestic business making a similar claim.

The equivalence principle does have limitations, since it does not require individual Member States to provide the most favourable treatment to businesses that rely on EU rights, providing it does not single out EU derived claims for the most unfavourable treatment. These points were emphasised by the CJEU in Case C-88/99 Roquette Frères.

Legitimate expectations

Legitimate expectations refers to the principle whereby a person can place reliance upon the position of an authority – whether made through policy, statute or similar means – and therefore the person may place confidence in the VAT treatment it may reasonably expect to apply to a particular type of transaction. It is not originally an EU law concept, though it has been applied to EU VAT and other matters through the judgments of the CJEU and national courts.

One of the leading CJEU VAT cases concerning legitimate expectations is Marks & Spencer (Case C-62/00), in which it was held that national legislation retrospectively curtailing the period for exercise of a right of a taxpayer provided for in the EU VAT Directive was incompatible with the principle of legitimate expectations.

PART C

Question 4

Introduction

According to article 132(1)(m) of PVD, Member States shall exempt the supply of certain services closely linked to sport or physical education by nonprofit-making organisations to persons taking part in sport or physical education.

This exemption is restricted to not-for-profit organisations rather than commercial sports clubs. If the organisation qualifies, then anything it charges for sporting services (not goods) to persons taking part in sport (not spectators or other interested parties, but active participants) will be exempt, including the following:

- membership subscription;
- hire of facilities;
- tuition; and
- hire of equipment.

In particular, the following are considered to be supplies closely linked with and essential to sport or physical education:

playing, competing, refereeing, judging, coaching or training (but not attending as a spectator);
use of changing rooms, showers, playing equipment together with storage of equipment essential to the sporting activity and other facilities;
fees charged by nonprofit-making organisations for use of the playing facilities

Finally, to decide whether a body is non-profit making the following should be reviewed and assessed:

- the organisations' constitution; and
- its activities and its use of funds.

The above is necessary for determining whether the organisation was established with a purpose, intention or motive which exclude distribution of profit or surplus to those with a financial interest in it, i.e. its members.

Hence, a non-distribution clause in the constitution of an organisation does not, in itself, qualifying a body to be regarded as not-for-profit organisation.

CJEU Cases

Commission vs. Spain (C-124/96)

Spain granted exemption to sporting bodies whose entry fees did not exceed certain limits. Following the infringement proceedings that the Commission took, CJEU ruled that the exemption for services closely related to sport education cannot be limited to membership fees not exceeding a specified amount.

Stockholm Lindöpark AB (C-150/99)

Stockholm Lindöpark AB also dealt with the narrow scope of the exemption after a company which operated a golf club wanted to claim input tax by arguing that the practice of Sweden to operate a general exemption for the provision of facilities for playing sport was wider than permitted by the Directive. The CJEU held that no general VAT Exemption should be granted for a Membership of a golf club including a wide range of additional services.

Kennemer Golf (C-174/00)

In this case a dispute arose over whether a golf club qualifies as a 'not-for-profit' organisation, because it regularly made a surplus in its accounts. The CJEU ruled that in qualifying an organisation as a 'non-profit institution' for the purposes of the sports exemption, all the activities of that institution must be considered.

An institution can be classified as a 'not-for-profit institution' even if it systematically strives for surpluses which it then uses for its performance, i.e. using it for for the services it supplies and the improvement of the facilities of the club. Finally, the annual subscription fees of the members of a sport association can constitute the consideration for the services it supplies to its members.

Canterbury Hockey Club (C-253/07)

The CJEU ruled that the services provided to legal persons/associations are exempt, provided that those services are closely linked and essential to sport, that they are supplied by non-profit-making organisations and that their true beneficiaries are the persons taking part in sport.

Město Žamberk (C-18/12)

In this case, it appears that the taxable person did not want the exemption to apply as it wanted to deduct input tax on the cost of developing the sporting facilities. Consequently, the CJEU examined the borderline between "sport" and mere "recreation" since the Czech tax authorities claimed that the services provided by the municipal aquapark constitute exempt recreational services without the right to deduct VAT.

CJEU has ruled that sports activities which are neither practiced in an organized context nor on a regular basis and which do not have the purpose of participating in sports competitions, are regarded as the practice of sport within the meaning of art. 132(1)(m) PVD. Furthermore, the CJEU notes that access to the aquapark can be a service closely related to the practice of sport.

Bridport and West Dorset Golf Club (C-495/12)

In this case the CJEU has ruled that the supply of services to non-members of a golf club should not be excluded from VAT exemption within the meaning of art. 132(1)(m).

Commission v Netherlands (C-22/15)

The CJEU ruled that the Netherlands rules on exemption for sporting supplies did not comply with the PVD, sine it is both too narrow and too broad in regards with water sports.

On the one hand, in order to benefit from the exemption, the associations in question must not have any employees. The Netherlands thereby adds a condition that goes beyond what is permitted by Articles 132 and 133 PVD (too narrow) It seems that exemption in the Netherlands depended on the organisation only using volunteers rather than paid employees, which goes beyond the requirement of the Directive for "non-profit bodies".

On the other hand, the Netherlands extended the exemption for letting of berths and moorings beyond what is provided for in the Directive (too broad).

The CJEU ruled that no exemption should be granted for the rental of moorings and storage places for vessels to members of water sports associations.

London Borough of Ealing (C-633/15)

According to the CJEU, the granting of the exemption to bodies governed by public law for the provision of services closely related to the practice of sport or physical education may be made subject to the condition that this does not lead to a distortion of competition to the detriment of taxable commercial enterprises.

Golfclub Schloss Igling (C-488/18)

The CJEU ruled that VAT exemption for sports activities has no direct effect so that, although the legislation of a Member State which transposes this provision exempts from value added tax only a limited number of supplies of services closely linked to the practice of sport or physical education, said provision cannot be directly invoked before national courts, by a non-profit organization, in order to obtain exemption from other services closely linked to the practice of sport or the physical education that this body provides to people who practice these activities and that this legislation does not exempt.

Note: there are many cases that have considered the exemption of the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education, which could be quoted in answers to this question.

Summary

To qualify for exemption, the supplier of the services must be an eligible non-profit-making organization, and supply the services to individuals taking part in the sporting activity. Therefore, the true beneficiaries of the services supplied should be individuals that are taking part in sport and not spectators.

Question 5

Background

Article 11 of the EU VAT Implementing Regulation 282/2011 provides that a fixed establishment is 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".

The notion of fixed establishment is very important for EU VAT purposes, in particular due to its implications in terms of the place of supply rules for services.

Place of supply

In terms of the general place of supply rule for business-to-business (B2B) services laid down in Article 44 PVD, these services are taxable in the jurisdiction of the recipient's primary establishment.

However, this rule can be modified if the recipient has a fixed establishment in another jurisdiction that is different from that of its main establishment, and the service is actually received and used by this fixed establishment. In that case, the service is subject to the VAT rules applicable in the jurisdiction where that fixed establishment is located.

Subsidiary company

For an overseas subsidiary company to be considered to constitute a fixed establishment of the parent company, it would need to satisfy the definition of a fixed establishment as set out in Article 11 of the EU VAT Implementing Regulation 282/2011 and expounded by the CJEU in its case law on the subject of fixed establishment.

DFDS judgment

In this context, one of the earliest cases on fixed establishment was DFDS (case C-260/95.) This judgment was significant because the CJEU held that it was possible for a subsidiary to constitute a fixed establishment of its parent company if it was a 'mere auxiliary organ' of the parent company. In this case, therefore, the parent company was in a comparable situation to a head office with a branch.

Berlin Chemie CJEU judgment

Case C-333/20 (Berlin Chemie A. Menarini) considers precisely the question of whether a subsidiary company can constitute a fixed establishment of its parent company.

The facts of the case entailed a German company that marketed pharmaceutical products in Romania for the purposes of the regular supply of wholesale distributors of medicinal products. For this reason, the German company concluded a storage contract with a wholly owned subsidiary company established in Romania. Furthermore, the Romanian company undertook to actively promote the products of the German company in Romania through marketing and advertising activities, as well as to provide regulatory and representation services. These activities were conducted by the Romanian company in accordance with the strategies and budgets established and developed by the German company.

The Romanian company invoiced the services in question to its German parent company without charging Romanian VAT, on the basis that the place of supply of those services was in Germany in the accordance with the main general place of supply rule for B2B services.

The tax auditors in Romania disagreed with this position, and assessed the Romanian company to VAT on the basis that the company was not merely a service provider to the German parent company, but was also simultaneously its fixed establishment in Romania. The reasoning of

the tax auditors was based on the assumption that the German company had at its disposal all the human and technical resources belonging to its Romanian subsidiary.

The definition of fixed establishment, previously outlined, does not specify whether the requisite human and technical resources must belong exclusively to the company in question. In this regard, when considering whether a subsidiary company providing services to its parent company established in another Member State may constitute a fixed establishment of its parent company, the CJEU notes that the classification as a fixed establishment may not depend solely on the legal status of the entity concerned, but on the economic and commercial reality. In this case, the CJEU considered that the advertising and marketing services provided by the Romanian company to its German parent company were primarily intended to provide better information on the pharmaceutical products sold in Romania by the German company. The CJEU also emphasized that in order to have a fixed establishment, it is not necessarily required to have one's own human or technical resources; rather, what is decisive is the power to control and dispose of those human and technical resources as if they were one's own.

In its judgment, the CJEU excluded the possibility that the same human and technical resources that were allegedly at the disposal of the German company could also be the same human and technical resources through which the Romanian company provided the services. That would result in a contradictory outcome, namely a supplier making supplies of services to itself. This finding led the CJEU to conclude that the German company does not have a fixed establishment in Romania, since it lacks a structure to enable it to receive services and use them for the purpose of selling and supplying products. The Court also found that the Romanian company was not directly involved in the sale and supply of the German company's products in Romania since it did not, for example, enter into any agreements with third parties on behalf of the German company.

Other relevant case law

In Welmory (case C-605/12), the CJEU suggested that personnel and technical resources of another entity could be sufficient for a fixed establishment to exist, and that the resources did not necessarily need to belong to the company in order to create a fixed establishment of that company.

In its decision in Dong Yang (case C-547/18), the CJEU did not rule out the possibility that a subsidiary can create an FE for VAT purposes for a parent company established in another country.

Conclusion

The Berlin Chemie judgment clarifies some questions on fixed establishment that were outstanding following recent judgments of the CJEU, such as Titanium (case C-931/19), which one might have possibly interpreted as requiring that a fixed establishment is to have its own human resources. Berlin Chemie confirms that it is actually not a requirement for a taxable person to own the human or technical resources itself – it would be sufficient to have the right to dispose of those human and technical resources in the same way as if they were its own (sometimes referred to as 'comparable control').

Ultimately, the decision does not conclusively define the specific circumstances in which a subsidiary becomes a fixed establishment of its parent company, such as what type of access by the parent to the resources of the subsidiary is required to convert an independent subsidiary into a fixed establishment of its parent. Therefore, one might expect further future litigation on this significant yet delicate matter.

Question 6

Background

Agency is a fiduciary relationship which exists between two parties whereby one of the parties (referred to as the principal) agrees that the other party (referred to as the agent) may act on its behalf, including when entering into contracts with third parties.

Disclosed versus undisclosed agents

VAT legislation recognises two broad types of agency / intermediary relationships, whereby a principal may be either disclosed or undisclosed. Indeed, where a taxable person acts as agent or intermediary, they may:

- 'Act in their own name' – in this case, the intermediary's name appears on the invoices. This is often referred to as an "undisclosed agent" (albeit it is really the principal whose name is not disclosed to the final customer). In this case, the undisclosed agent is usually treated as buying and selling the subject matter of the transaction as principal in terms of Article 28 PVD; or

- 'Act in the name and on behalf of another person' – in this case, the principal's name appears on the invoices. This is often referred to as a disclosed agent (albeit it is really the principal whose name is disclosed to the final customer). A disclosed agent is not involved in the primary underlying transaction between the principal supplier and the customer, but merely supplies a service to one or other party to the primary underlying transaction.

Therefore, an undisclosed agent is someone who holds himself out as a principal, even though he is in fact acting on behalf of an undisclosed principal. An undisclosed agent is sometimes referred to as a "commissionaire". Conversely, a disclosed agent is someone who discloses to his customers the fact that he is acting on behalf of a principal, who is named. In this situation, the agent typically earns a commission on his sales.

VAT treatment of undisclosed agents

Article 28 PVD provides that where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself. VAT legislation therefore deems there to be a simultaneous supply to, and by, the undisclosed agent i.e. two simultaneous back-to-back supplies.

Although Article 28 PVD refers only to supplies of services, and not goods, this treatment is typically also extended to supplies of goods involving an undisclosed agent. In this regard, Article 14 PVD provides that a "supply of goods" shall mean the transfer of the right to dispose of tangible property as owner, and that the transfer of goods pursuant to a contract under which commission is payable on purchase or sale (amongst others) shall be regarded as a supply of goods. Despite the reference to a contract under which commission is payable in Article 14 PVD, this provision is typically interpreted as extending the undisclosed agent VAT treatment applicable to services in terms of Article 28 also to goods.

The effect of this is to deem the existence of two successive supplies of goods where, strictly speaking, potentially only one transfer of legal ownership takes place, since the undisclosed agent typically does not take legal ownership of the goods and, from a VAT perspective, ordinarily does not acquire the right to dispose of the goods as owner.

In practice, this means that the principal issues an invoice (and/or any other applicable fiscal documentation) for the supply of goods or services in question to the undisclosed agent. In turn, the undisclosed agent would issue an invoice (and/or any other applicable fiscal documentation) to the customer for the goods or services deemed to have been supplied by him. The agent's implied commission effectively arises from the difference between the value of the consideration for the goods or services supplied charged by the undisclosed agent to the

customer and the value of the consideration for the goods or services supplied charged by the principal to the undisclosed agent.

VAT treatment of disclosed agents

For VAT purposes, the actual supply of the goods or services takes place directly between the principal and the customer, thereby bypassing the disclosed agent. The principal therefore raises the invoice (and/or any other applicable fiscal documentation) to the customer in respect of the supply of the goods or services in question.

Separately, the agent will invoice the principal for his commission, representing a separate supply of intermediation services made for consideration to the principal.

Conclusion

Careful consideration should be given when determining the VAT treatment of agents / intermediaries, in particular to ascertain whether a disclosed or undisclosed agency arrangement applies. In this regard, the terms of the contractual agreement between the agent and its principal should be considered, and this should align with the commercial reality of the transactions between them. Agency arrangements are becoming even more important for VAT purposes in recent years, with an increasingly large number of persons operating online through various platforms which need to consider whether they are operating as, or through, a disclosed or undisclosed agent. The question as to whether the agent is disclosed or undisclosed could also impact the application of the place of supply rules, and hence where the supplies are deemed to take place for VAT purposes.

Question 7

Background

It is a fundamental principle of EU VAT that VAT is chargeable on a supply of goods or services when certain conditions are satisfied, including in particular when the supply of goods or services is made by a "taxable person acting as such" in terms of Article 2(1) PVD. It follows that activities carried out by a person who is not acting in the capacity of a taxable person should generally fall outside the scope of VAT.

VAT treatment of employees

In terms of Article 9 PVD, 'taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. With specific regard to the VAT treatment of employment arrangements, Article 10 PVD specifies that the condition in Article 9 that the economic activity be conducted 'independently' shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability. Therefore, as a general rule, the remuneration (wages/salaries) arising from employment is not considered to represent consideration for services rendered within the context of an independent economic activity, and hence generally falls outside the scope of the charge to VAT.

VAT treatment of supply / secondment of employees

Secondment generally refers to an arrangement whereby an employee is assigned by an employer to work for another entity. Applying general VAT principles, to the extent that a supply of services for consideration is being made, then that would typically fall within the scope of VAT. More specifically, insofar as:

- the supply / secondment of employees is made for an identifiable consideration;
- there is a direct link between the supply / secondment of employees and the consideration; and
- the remuneration received by the provider of the service constitutes the value actually given in return for the service supplied to the recipient;

then in principle there is a supply of services for consideration that falls within the scope of VAT.

Case C-94/19

Case C-94/19 specifically concerned the secondment of an employee as company director, although the principles established in this case should apply equally to the secondment of regular employees who are not company directors. In its judgement in case C-94/19, the CJEU confirmed that the lending or secondment of employees by a parent company to its subsidiary, even if carried out in return for the mere reimbursement of the related costs, generally constitutes a supply of services for consideration falling within the scope of VAT. This supply is therefore in principle subject to VAT in the relevant country according to the general place of supply of services rule.

The facts of the case entailed the secondment of an employee by one company, Avir, to a subsidiary, San Domenico Vetraria, to act as a company director of the latter. Avir invoiced San Domenico Vetraria for amounts corresponding to the costs incurred for the seconded employee. San Domencia Vetraria applied VAT to the amount reimbursed and then exercised its right to deduct that VAT. The tax authorities took the view that those reimbursements fell outside the scope of VAT since they did not concern supplies of services between the parent and its subsidiary, and denied San Domenico Vetraria's input tax claim. This was based on provisions of domestic Italian VAT legislation which provided that, in the case of the secondment of staff by one company to another, where the sum reimbursed corresponds to the amount of costs incurred for the seconded staff, the secondment falls outside the scope of VAT. However, the Italian Court expressed doubt as to whether the secondment of staff should fall outside the

scope of VAT and referred the matter to the CJEU, asking whether national legislation under which the lending or secondment of staff by a parent company in respect of which the subsidiary merely reimburses the related costs is regarded as falling outside the scope of VAT is contrary to the VAT Directive, and to the principle of fiscal neutrality.

The CJEU found that the secondment was carried out on the basis of a legal relationship of a contractual nature between Avir and San Domenico Vetraria, in the context of which there was reciprocal performance, namely the secondment of a director from Avir to San Domenico Vetraria, on the one hand, and the payment by San Domenico Vetraria to Avir of the amounts invoiced to it, on the other. It furthermore maintained that if it were to be established (which it held was for the referring national court to ascertain) that the payment by San Domenico Vetraria of the amounts invoiced to it by its parent company was a condition for the latter to second the director, and that the subsidiary paid those amounts in return for the secondment, it would have to be held that there is a direct link between the two. In this event, the CJEU held that the transaction should be regarded as having been carried out for consideration and subject to VAT, maintaining that the actual amount of the consideration - in particular the fact that it is equal to, greater or less than, the costs which the taxable person incurred in providing his service - is irrelevant.