THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

December 2021

MODULE 3.02 – EU VAT OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Group Taxation Director
Builders Limited
Estora

9 December 2021

Dear Sir,

VAT aspects of land related services in Europe

I am replying to your request for advice in respect of the VAT treatment of architectural, construction and letting services which you are supplying within the EU.

Hospital extension

The architectural design and construction services relate to a specific site and neither the status of the customer nor the type of the building are very relevant when determining the place of supply of the services (PoS). Design and construction services are included within the description of services connected with immovable property in article 47 PVD, for which the place of supply is determined by where the property is located.

The fact that the customer is established in the UK is not relevant in a case where land related services relate to a specific location, i.e. the hospital building which is located in Estora. Therefore, in this case the PoS is Estora, where the hospital is located.

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'. 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.

The hospital shall attribute input tax as far as possible to taxable activities, if any, (100% recoverable) and exempt medical care activities (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.

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.

Shopping mall development

It appears that the Estora's tax authorities decided that there was likely to be a loss of VAT through a fraud by the subcontractor, but if they could not prove that the person claiming the input tax was in some way connected or aware with that fraud, they could not deny the claim.

Therefore, since Builders paid the VAT in good faith to a VAT registered sub-contractor and the payment was supported by a valid VAT invoice, the relevant input VAT paid is recoverable by Builders.

Input tax would only be denied to a business who 'knew or ought to have known' that the supplier was fraudulent. This scenario was considered by the CJEU in Gábor Tóth (Case C-324/11) which determined that the cancellation of an operator's licence on its own was not relevant to the entitlement to tax deduction. If the invoice complied with article.226 of PVD, allowing the identification of the person who issued it and the nature of the services, it was prima facie evidence of entitlement to deduction.

Moreover, the CJEU held in Kittel (Case C-440/04) that the voiding of the contract does not prevent the existence of 'economic activity' and a supply, and the innocent business which was acting in good faith must be entitled to input tax. The tax authorities could only refuse the input tax deduction on the basis that:

- the business knew or ought to have known that the transaction was fraudulent;
- the goods or services described in the contract were not actually supplied.

However, according to the principles established in the Kittel case, the right to deduction will be lost, even on real purchases, where the business knew or ought to have known that the supplies related to a fraud. It will be for the national court to determine whether that is the case.

Office building in Boldonia

According to Article 44 PVD, a fixed establishment must be considered when the place of supply of services is dependent upon the place of belonging of the recipient of a supply. However, the intended letting services are subject to Article 47, not Article 44, and therefore the place of supply is where the property is located, irrespective of whether there is a fixed establishment in Boldonia.

However, Boldonia has taken advantage of the permission in Article 194 to require a customer to account for a reverse charge instead of requiring a foreign non-established supplier of 'non general rule services' (i.e. any services which are treated as supplied in Boldonia by virtue of Article 47, rather than Article 44) to register and account for output tax.

Therefore, it is essential to determine whether Builders is established in Boldonia to determine whether it is liable to register in Boldonia and account for output tax.

Article 11 of the Implementing Regulation 282/2011 states that "a fixed establishment shall be any establishment, other than the place of establishment of a business referred to in Article 10, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs."

Since Builders does not have any staff located in Boldonia and they appointed a real estate agent to manage the lettings on its behalf, it could be argued that Builders are supplying the letting services from its main business establishment, i.e. Estora, according to the provisions laid out in CJEU case ARO Lease, C-190/95.

Therefore, Builders is not liable to charge and collect Boldonian VAT related to the letting activity on the basis that it did not have a fixed establishment in Boldonia. In the absence of a fixed establishment, the VAT liability must be reverse-charged to the Boldonian business tenants under the "tax shift" allowed in Article 194 PVD, as the tenants are VAT registered in Boldonia.

The above treatment was confirmed by the CJEU in Titanium (Case C-931/19) which determined that where a property which is let in a Member State, where the owner of that property does not have his or her own staff to perform services relating to the letting does not constitute a fixed establishment. In addition, the CJEU ruled that the concept of fixed

establishment implies a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of given services.

Financial distress

According to the principles established under article 168, input tax must be incurred by Builders on a supply made to it to be recoverable by Builders. If the input tax was incurred by the bank, then it will not be recoverable by Builders although it settled the consultant's invoice. The key decisive factor will be the engagement letter with the consultant. If the engagement letter is solely with the bank, then Builders will not be able to recover the input tax paid on the professional advisor fees. On the other hand, if it is a joint instruction with both the bank and Builders there may be reasonable ground for input tax recovery.

Future hotel development

Since the location of the actual land upon which the hotel may be constructed is unclear at the stage of designing the architectural plans it could be argued that Builders cannot link its services to a specific site. Consequently, these services cannot be classified as land related services and the services fall within the basic rule and would be supplied in Estora where the recipient is established. The supply would therefore be subject to Estoran VAT and Builders would account for any VAT on its invoice.

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,
Omega Ltd,
Nordia

9 December 2021

Dear Finance Director,

Subject: Omega Ltd VAT – VAT treatment of activities

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

Sales of Drones to Nordian and EU Businesses

Omega currently makes supplies of goods to both domestic business customers and those in other member states. Supplies of goods to customers established in Nordia will be subject to Nordian VAT according to the provisions of article 32 PVD. Omega will charge domestic output tax on its invoices and the transactions value should be reported on the company's VAT return.

In addition, as per the description of the activities of Omega in Nordia, there is a supply of goods which are dispatched from one Member State to another. The intracommunity supply of goods will be treated as an exempt dispatch of the goods from Nordia, provided that the normal administrative conditions detailed in article 138 PVD for exempting an EU dispatch are met. Omega will not charge output tax in Nordia and the EU Businesses acquiring the goods will account for acquisition tax on the value of the goods supplied, article 40 PVD refers.

Article 138(1) states that supplies of goods to EU customers will be exempt with credit in Nordia provided the EU customer is a taxable person. The EU customer must provide a valid EU VAT number to Omega and Omega shall validate the VAT number provided through the Europa website.

In the case where the person acquiring the goods does not indicate his VAT identification number to the supplier or where the VAT identification number indicated has been issued by the Member State from which the goods are dispatched or transported, the conditions for applying the exemption of Article 138 will not be met and Omega shall have no other option but to charge Nordian VAT on its invoice.

The VAT invoice should show the customer's VAT identification number and the transaction value should be reported on the company's VAT return. Furthermore, Article 226(11) of PVD states that in the case of an exemption, reference should be made to the applicable provision of the Directive, or to the corresponding national provision, or any other reference indicating that the supply of goods is exempt. Hence, Omega's sales invoice must include narrative that the customer has an obligation to account for acquisition tax in its own member state.

The above treatment will be acceptable provided that the goods are removed from Nordia, and Omega must retain satisfactory evidence of the goods removal from Nordia, Article 45a IR refers. The acquisition tax will be calculated using the cost and freight charges of the goods and must be entered on the VAT return of the customers as both acquisition tax and input tax if it is to be recovered.

The total value of exempt intra-Community dispatches must be separately shown on Omega's VAT return.

The value of the sales should also be reported on the recapitulative statements as detailed in Article 262(a) and 263 of PVD, showing the value and VAT registration number of its customers in each member state. It worth noting that the exemption may be revoked retroactively when

the tax authorities establish non-compliance of Omega with its obligation to submit a recapitulative statement.

Finally, Intrastat returns (monthly or quarterly) will also need to be made if annual intra-community dispatches exceed the threshold applicable in Nordia. Intrastat returns must be made between 10 and 30 days from the end of the reference period, Reg 638/2004 refers.

Transportation of goods to customers

The transportation of the goods to the customers premises will be carried out by a local Nordian logistics company on behalf of Omega. The place of supply of the transportation of goods to business customers, i.e., Omega, is given by Article 44 and PoS is the place where the customer belongs. Therefore, the place of supply of the transport services will be Nordia, where Omega is established. The Nordian logistics company will charge domestic VAT on its invoice and Omega will be able to claim it back under the provisions of Articles 167 and 168 of PVD.

Professional training sessions: on-site face-to-face training seminars

Omega provides on-site professional training services to the businesses acquiring drones. 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, as the principal supply is the supply of training services to businesses, the place of supply will be the place where those activities actually take place and the admission to the professional training services will be subject to Nordian VAT, irrespective of where the customers are established.

In addition, as an exemption as an educational service, Article 132(1)(i) PVD, is to be considered, 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. However, according to the principles established in CJEU case MDDP Sp. z o.o., Akademia Biznesu, Sp. Komandytowa, C-319/12, that educational services are only exempt under PVD art.132(1)(i) if the supplier is a public body or an entity recognised as having a similar purpose. Furthermore, the CJEU ruled that a general exemption for all educational supplies, regardless of the nature and objects of the supplier, shall not permitted.

Professional training sessions: pre-recorded webinars

Omega also provides pre-recorded webinars to the businesses acquiring drones. Regarding the pre-recorded online training courses, as this supply does not involve human intervention during the webinar it is an electronically supplied service (ESS).

Therefore, supplies of pre-recorded webinars by Omega to business customers, will be treated as B2B electronically supplied services, as they are provided with “only minimal human involvement”, article 7 of the Implementing Regulation 282/2011 refers.

Services provided to EU businesses will be treated as supplied where the customer belongs, as per Article 44 of PVD. Consequently, Nordian VAT will be chargeable by Omega on the supplies of pre-recorded webinars to Nordian businesses. However, Nordian VAT will not be chargeable by Omega on the supplies of pre-recorded webinars to businesses established in

other EU member states and the customer should account for VAT under the reverse charge rules (Article 196 of PVD).

Omega 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.

Omega should validate and show the customer's EU VAT number (if appropriate) on the invoice and appropriately annotate the invoice to the fact that VAT will be accounted for by the customer under the Article 196 of PVD reverse charge rules. Finally, the value of the services should be included on Omega's domestic VAT return and should be reported on its recapitulative statement showing the value and VAT registration number of its customers in each member state.

Furthermore, in case where the customer buying the pre-recorded webinars is a non-taxable person (no valid EU VAT number or other sufficient evidence is provided) this is a supply of B2C electronically supplied services (Art 58 PVD) which will result in an obligation to account for VAT in each member state in which your customers are established, something that is likely to require multiple registrations.

Since from 1 July 2021, the VAT on any type of B2C services that are deemed to be supplied where the customer is located can be declared within the One-Stop Shop (articles 359 and 369b of the VAT Directive) which will allow you to submit a single return in Nordia incorporating the various VAT amounts due from each supply you have made to each customer. To enable you to determine which member state each of your non-business subscribers belongs in you should use the rules in Arts 24b(d) and 24f IR which enable you to refer to 2 non-contradictory pieces of information such as country in which credit/debit card is issued and IP address to determine the country and therefore the rate of VAT that you need to collect.

Therefore, by linking the VAT to the place where the customer is established, in the sense of "destination VAT", means that the place of supply will be where the webinars are effectively consumed.

Sales of software downloads

Sales of software downloads by Omega to business customers, will be treated as B2B electronically supplied services, as they are provided with "only minimal human involvement", article 7 of the Implementing Regulation 282/2011 refers.

Services provided to EU businesses will be treated as supplied where the customer belongs, as per Article 44 of PVD. Consequently, Nordian VAT will be chargeable by Omega on the supplies of software to Nordian businesses or the customer should account for VAT under the reverse charge rules (Article 196 of PVD) on the supplies of software to businesses established in other EU member states.

Omega shall undertake all administrative procedures analysed above in regards with the supplies of pre-recorded webinars (obtaining valid and sufficient evidence that its customers are taxable persons, appropriately annotate the invoice, recapitulative statement submissions etc.).

Imports from India

Omega produce these Drones from raw materials imported from India on which import VAT will be chargeable at import which is likely to be deductible as input tax because of its intended use for making onward taxable supplies of finished goods. The valuation for import VAT will include any Customs duty as well as freight and insurance that are incurred in importing the raw materials. Omega will require an EORI number to identify itself on Customs documentation and may benefit from VAT deferment if Nordia allows such deferments.

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

PART B

Question 3

From: Tax Consultant
To: Mark
RE: VAT treatment of B2C eCommerce sales

Background

I refer to your request to advise you on the VAT treatment applicable to the eCommerce sales you make via your website to private consumers established in Astrioca, Bestria and Chiora. As you may be aware, as of 1 July 2021, the EU VAT rules governing the cross-border sale of goods on a B2C basis have undergone a significant change with the coming into force of the so-called eCommerce VAT package, and therefore this Memorandum shall seek to provide you with an overview of the key changes that are relevant to your business.

Therefore, as requested, this Memorandum provides you with my comments on the VAT treatment of the sales you make in each of the three relevant countries, distinguishing where relevant between the VAT treatment applicable to sales made up to 30 June 2021, and sales made as from 1 July 2021.

Rules up to 30 June 2021

The distance sales rules applicable up to 30 June 2021 required a business to charge, collect and pay VAT on its intra-EU distance sales in the country from which the transport of the goods begins (i.e. Astrioca) until the annual taxable turnover of the business exceeds the applicable distance sales threshold set by the respective country where the customers are located. These thresholds differed across Member States and typically ranged between €35,000 up to around €100,000, depending on the Member State in question. Once the relevant threshold was exceeded, the business was obliged to register for VAT purposes in that country, to charge VAT at the applicable rate in that country, and to remit the VAT so collected to the relevant local tax authority.

New rules as from 1 July 2021

As of 1 July 2021, the individual Member State distance sales thresholds were abolished, and replaced by an EU-wide annual threshold of €10,000. Once this threshold is exceeded, an intra-Community distance sales of goods is deemed to take place in the Member State to which the goods are dispatched or transported.

Domestic sales in Astrioca

The domestic supply of goods to customers established in Astrioca is deemed to take place in Astrioca for VAT purposes. Astrioca VAT at the rate of 19% is chargeable on these supplies.

There has been no change to the VAT treatment of such domestic supplies of goods during 2021, and therefore the position obtaining up to 30 June 2021 is the same as that applicable as from 1 July 2021.

Cross-border sales to Bestria

The cross-border supply of goods dispatched to customers in Bestria constitute intra-Community distance sales. In this respect, intra-Community distance sales of goods refer to supplies of goods that are dispatched or transported from one EU Member State to another EU Member State by or on behalf of the supplier to a non-taxable person (i.e. B2C).

In view of the relatively low value of the annual turnover from sales of goods dispatched to customers in Bestria, the distance sales threshold of Bestria applicable up to 30 June 2021 will not have been exceeded, and therefore up to 30 June 2021, you were required to charge VAT

in Astrioca (at the applicable Astrioca VAT rate of 19%) on cross-border B2C sales of goods dispatched to Bestria.

Since your total intra-Community distance sales exceed the EU-wide annual threshold of €10,000, as of 1 July 2021 you will be required to charge, collect and remit Bestria VAT at the applicable rate of 20% (as opposed to Astrioca VAT at 19%) on cross-border B2C sales of goods dispatched to Bestria.

Cross-border sales to Chiora

The cross-border supply of goods dispatched to customers in Chiora also constitute intra-Community distance sales.

In view of the relatively low value of the annual turnover from sales of goods dispatched to customers in Chiora, the distance sales threshold of Chiora applicable up to 30 June 2021 will not have been exceeded, and therefore up to 30 June 2021, you were required to charge VAT in Astrioca (at the applicable rate of 19%) on cross-border B2C sales of goods dispatched to Chiora.

Since your total intra-Community distance sales exceed the EU-wide annual threshold of €10,000, as of 1 July 2021 you will be required to charge, collect and remit Chiora VAT at the applicable rate of 24% (as opposed to Astrioca VAT at 19%) on cross-border B2C sales of goods dispatched to Chiora.

VAT reporting and compliance considerations

Up to 30 June 2021, all B2C eCommerce sales you make are deemed to have taken place in Astrioca and therefore 19% VAT thereon is due. This VAT liability is reported in your domestic VAT return in Astrioca, and paid according to the domestic VAT payment rules applicable in Astrioca.

As of 1 July 2021, VAT will be due on your cross-border sales in each of the countries in which your respective customers are established. In order to mitigate the VAT compliance burden, you are eligible to elect to register for the One Stop Shop (OSS) mechanism, whereby you would be required to file a quarterly OSS return in Astrioca, in addition to your domestic VAT return. This will enable you to account for VAT due in Bestria and Chiora (at the applicable VAT rates of 20% and 24% respectively) by filing the OSS return, and therefore avoiding the need to register for VAT domestically in Bestria and Chiora.

Alternatively, you have the option to register for VAT domestically in Bestria and/or Chiora, in which case you would discharge your VAT reporting and payment obligations in those countries via the domestic VAT return filing and payment process. On the basis of my expectation that you do not incur any significant input VAT in Bestria and Chiora, I would expect that this alternative would not be opportune for you from a VAT compliance cost perspective, and that it should be more efficient to elect for the OSS instead.

Conclusion

As from 1 July 2021, it would appear to be opportune for you to register for the OSS. This will enable you to avoid foreign VAT registrations and should therefore mitigate the VAT compliance costs that would otherwise arise.

I trust that my comments are useful and address your queries on the VAT treatment of your B2C eCommerce operations.

Yours sincerely
Tax Consultant

PART C

Question 4

Background

In general legal terms, a branch (which may constitute a fixed establishment for VAT purposes) is not a separate entity distinct from its head office (typically, the primary place of establishment for VAT purposes). Rather, the two establishments (i.e. head office and branch) constitute a single legal person.

This was originally recognised by the CJEU in the FCE Bank case (C-210/04), in which the Court held that: "a fixed establishment, which is not a legal entity distinct from the company of which it forms part, established in another Member State and to which the company supplies services, should not be treated as a taxable person by reason of the costs imputed to it in respect of those supplies."

In essence, this means that an establishment of a company is not an entity separate from another establishment of that same company. Accordingly, a head office and its branch (assuming that both constitute a place of establishment from a VAT perspective) represent two establishments of one and the same entity, and therefore together constitute a single person. On this basis, it follows that services performed by one establishment for another establishment of the same entity – such as service transactions between a head office and a branch, or vice-versa – are typically not regarded as supplies of services for consideration falling within the scope of VAT. The rationale is that a branch typically cannot be a separate taxable person where it does not independently carry on an economic activity, i.e. it neither bears any economic risk arising from its activities, nor has independent capital. In such circumstances, therefore, there cannot be a legal relationship involving reciprocal performance between the supplier and the recipient, as is normally required in order for a supply to fall within the scope of VAT.

However, the landmark CJEU judgment in the Skandia America Corporation USA case (C-7/13) suggested that such disregarding of head office-branch transactions for VAT purposes (i.e. the principle established and confirmed in FCE Bank) may in certain instances not apply in a VAT Grouping context. In its judgment, the Court ruled on the VAT treatment of charges between a non-EU head office and its EU fixed establishment, which was part of a VAT Group in an EU Member State which adopted an 'establishment-only' system of VAT grouping.

In this context, the CJEU held that a VAT Group qualifies as a single taxable person for VAT purposes, and as such by becoming part of a VAT Group, the fixed establishment forms a different taxable person along with the other members of the VAT Group. According to the CJEU, therefore, the charges by a head office in the USA to its fixed establishment which was part of a Swedish VAT group fell within the scope of Swedish VAT, thereby departing from the FCE Bank principle. Indeed, this CJEU judgment had created quite a stir and debate (including consideration by the EU VAT Committee and VAT Expert Group) because it represented a departure from the general FCE Bank principle, and caused a degree of uncertainty on how to deal with charges between a head office and its fixed establishments in the EU.

More recently, the CJEU delivered its decision in the Danske Bank case (C-812/19). In this case, the CJEU essentially followed the reasoning applied in the earlier Skandia decision, confirming that, where an establishment of an entity located in a Member State joins a VAT group in that Member State, and the Member State considers only that establishment to be part of the VAT group, that establishment is to be regarded as forming part of a taxable person separate from any establishments located in other jurisdictions.

The facts of this case were that Danske Bank, a company with its head office in Denmark (i.e. principal establishment), operated in Sweden via a branch (fixed establishment). Danske Bank used a computer platform for all activities undertaken by all the company's establishments and, in the case of the Swedish branch, the costs of the use of the platform by the Swedish branch were charged to it by the principal establishment. Danske Bank formed part of a Danish VAT group. Like Sweden, Denmark operates an 'establishment-only' approach to VAT grouping,

such that it only considered the Danish principal establishment to form part of the Danish VAT group, and not any fixed establishments located outside Denmark.

The Swedish Tax Agency took the view that the VAT Group of which Danske Bank's principal establishment was a member, on the one hand, and the Swedish branch of that company, on the other, were to be regarded as being two separate taxable persons, and that therefore the services provided by Danske Bank's principal establishment, the costs of which are attributed to the Swedish branch, were to be regarded as supplies of services falling within the scope of VAT. This matter was disputed and was referred to the CJEU, which concluded that the principal establishment of a company, situated in a Member State and forming part of a VAT Group formed on the basis of Article 11, and the branch of that company, established in another Member State, must be regarded as separate taxable persons where that principal establishment provides that branch with services and imputes the costs thereof to the branch.

The CJEU's decision in this case essentially reflects its decision in Skandia, albeit dealing with a slightly different fact pattern since in Skandia, the head office was established outside the EU, and the branch was in an EU Member State and formed part of a VAT group in that Member State. The CJEU's deliberations in Danske Bank again included a review of the relationship between a head office and branch for VAT purposes (as set out in the FCE Bank case) in a VAT Grouping context.

According to the Court, in case of a supply between a head office and its branch, in order to determine whether such a supply falls within the scope of VAT, it is fundamental to determine whether there is a legal relationship between the provider of the service and the recipient of such service, further to which there is reciprocal performance. In the specific case of a head office and its branch, which form a single taxable person, based on the FCE Bank principle, the Court acknowledged that this legal relationship typically doesn't exist and therefore the reciprocal performance between the two typically constitutes a non-taxable internal flow of funds. In the case at hand, however, the CJEU found that the Swedish branch and the Danish VAT group of which the principal establishment forms part should be regarded as two separate taxable persons. This essentially means that services provided by the principal establishment that forms part of the Danish VAT group to the Swedish branch should not be disregarded as non-taxable internal flows - and may therefore be subject to VAT.

In these circumstances, the CJEU therefore upheld that the principle set out in Skandia case (according to which services supplied by a principal establishment in a non-EU Member State to its branch established in a Member State constitute taxable transactions when the branch is a member of a VAT Group), is also applicable to the reverse case where the head office is a member of a VAT Group in another EU Member State. Therefore, Danske Bank's head office in Denmark and its Swedish branch cannot be regarded as a single taxable person and consequently, the services provided by Danske Bank to its own Swedish branch were subject to Swedish VAT.

Question 5

Background

The transfer of a business effectively results in the transfer of a number of assets which together constitute that business. Such business assets may be tangible assets such as equipment and inventory, the transfer of which would constitute a supply of goods for VAT purposes, as well as intangible assets such as intellectual property, the transfer of which would constitute a supply of services for VAT purposes.

Transfer of tangible assets

As regards transfers of tangible assets, on the basis that both transferor and transferee entities are located in the same EU Member State (i.e. Fuselia) and assuming that such assets will remain located within the territory of Fuselia pursuant to the transfer, the place of supply of the goods will be Fuselia, and therefore Fuselia VAT would be chargeable thereon according to the rules applicable to the asset in question, i.e. typically the standard VAT rate in Fuselia, albeit a reduced rate, zero rate or VAT exemption may possibly also apply.

Transfer of intangible assets

As regards transfers of intangible assets, the general B2B place of supply of services rule provides that the place of supply is where the customer is established. Therefore, since the transferee is established in Fuselia, the place of supply of the services in question will be Fuselia, and therefore Fuselia VAT would be chargeable thereon according to the rules applicable to the supply of services in question, i.e. typically the standard VAT rate in Fuselia, albeit a reduced rate, zero rate or VAT exemption may potentially also apply.

Transfer of a business as a whole

Article 19 PVD provides that, in the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor. Furthermore, Member States may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortion of competition.

They may also adopt any measures needed to prevent tax evasion or avoidance through the use of Article 19. Furthermore, Article 29 PVD provides that the said Article 19 shall apply in like manner to the supply of services.

Therefore, assuming that Fuselia has implemented provisions transposing Articles 19 and 29 PVD, the transfer of the totality of a business' assets on a going concern basis would – as long as the relevant criteria in Fuselia for the application of this so-called transfer of a going concern (TOGC) relief are met – be treated as neither a supply of goods nor a supply of services, and hence would fall outside the scope of VAT. In such circumstances, no VAT would be chargeable on the transfer of the business.

Conversely, if the provisions transposing Articles 19 and 29 PVD do not find application to the transfer of the business in question (perhaps because the applicable criteria are not fulfilled), then the transfer of the business assets would be subject to VAT according to the normal VAT rules applicable in Fuselia, as outlined above.

Relevant CJEU case law

The CJEU has, to some degree, considered this TOGC relief provision in its case law. In particular, the CJEU has held that the TOGC provision is an independent concept of EU law with its own autonomous meaning. Therefore, any domestic measures taken by EU Member States to restrict its application should be limited strictly to the second sentence of Article 19 PVD i.e. to prevent distortions of competition, tax evasion or tax avoidance. The Advocate

General Opinion (AGO) in the Zita Modes case (C-497/01) also pointed out that this provision protects the tax administration in cases in which the vendor does not pay the VAT otherwise due on the business transfer, for example due to insolvency.

In the X BV case (C-651/11), the CJEU summarised the case law as set out in Zita Modes, where the CJEU had held that TOGC relief applied if a set of cumulative conditions arose. The no-supply TOGC treatment covers the transfer of goods and services which together constitute an undertaking or part thereof that is capable of carrying on an independent economic activity. This rule does not cover the mere transfer of assets on a standalone basis, such as the transfer of an inventory of goods. In the latter case, the normal VAT rules applicable to supplies of goods (or services) would apply, as described above. Furthermore, the transferee must intend to continue to operate the business, and not to liquidate the activity. All of the elements transferred must together allow an independent economic activity to be carried out.

In the Schriever case (C-444/10), the CJEU emphasised that there must be an overall assessment of the facts in ascertaining the applicability of TOGC relief. In the Mailat case (C-17/18), the CJEU held that the lease of a restaurant business does not fall within the scope of the concept of the transfer of a totality of assets.

Question 6

Meaning of reverse charge

The general rule concerning the liability to VAT is set out in Article 193 PVD, in terms of which the person liable to pay the VAT due on a transaction to the tax authorities is the supplier. The reverse charge mechanism represents an exception to this general rule, whereby the liability to account for / pay VAT is shifted onto another person rather than the supplier, specifically the customer. In practical terms, this means that the supplier would not charge VAT on the invoice for the supply, with the VAT being paid and/or accounted for by the customer instead. On this basis, I do agree that the reverse charge is indeed a simplification measure, because it is intended to reduce the need for in-country VAT registrations for non-established suppliers, hence mitigating VAT compliance burdens.

Mandatory reverse charge

In certain instances, the PVD envisages a mandatory application of the reverse charge mechanism. For example, specifically as regards supplies of gas through a natural gas system, electricity and heat or cooling energy through heating and cooling networks, Article 195 PVD provides VAT shall be payable by any person who is identified for VAT purposes in the Member State in which the tax is due and to whom the goods in question are supplied, if the supplies are carried out by a taxable person not established within that Member State.

Similarly, as regards services subject to the general B2B place of supply of services rule (as set out in Article 44 PVD), Article 196 PVD specifies that VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the said services are supplied, if the services are supplied by a taxable person not established within the territory of the Member State.

Another instance where a mandatory reverse charge mechanism applies where a person makes a taxable intra-EU acquisition of goods. In this case, the customer is the person liable to pay the tax in terms of the reverse charge mechanism. The corresponding intra-EU supply would typically be zero-rated, and the obligation to account for / pay the VAT falls on the customer.

Optional reverse charge

In addition to those instances where it is mandatory that the customer pays the VAT due on a transaction, there are also instances where EU countries may optionally choose to designate the customer as the person liable for payment.

For example. Article 194 PVD provides that where a taxable supply of goods or services is carried out by a taxable person who is not established in the Member State in which the VAT is due, Member States may provide that the person liable for payment of VAT is the person to whom the goods or services are supplied. Furthermore, Member States shall lay down the conditions for the implementation of the reverse charge mechanism in these circumstances.

Intervention of fixed establishment

For the purpose of the reverse charge rules, even if a taxable person has a fixed establishment in a particular EU country, he shall not be regarded as established there if that fixed establishment does not intervene in a taxable supply of goods or services the taxable person makes in that EU country (Article 192a PVD).

Triangulation

Triangulation is itself a simplification mechanism that is effectively an extension of the reverse charge concept. A triangular transaction is one in which a business established in EU country A supplies goods to a customer in a second EU country (B), but the goods are shipped directly to the customer from a third EU country (C). In a triangular transaction, it is the ultimate

customer who is the person liable to pay VAT, provided that the customer is a taxable person or a non-taxable legal person registered for VAT in the EU country where the final supply takes place (i.e. country C). Article 197 PVD refers.

Reverse charge VAT reporting

When the reverse charge is applied, the customer typically reports both their purchase (input VAT) and the supplier's sale (output VAT) in their own VAT return.

In this manner, insofar as the customer enjoys full input VAT recovery rights, these two entries would cancel each other within the same return, resulting in no actual VAT cash payment liability for the customer. Conversely, if the customer is not eligible to recover input VAT in respect of the relevant transaction (whether wholly or in part), the input VAT reported is restricted accordingly, resulting in the customer being liable to pay the relevant VAT due.

From the perspective of the tax authorities in the country of the customer, they can see the transaction being reported in the applicable boxes for cross-border supplies of goods or services within the customers' domestic VAT return.

Conclusion

The reverse charge mechanism is indeed a simplification measure in the sense that it eliminates or reduces the obligation for sellers established outside the country to VAT register in that country in which the supply is deemed to take place for VAT purposes. If the supplier incurs any local VAT on costs related to the service or goods supplied under the Reverse Charge, they may be eligible to recover them through a cross-border VAT reclaim.

Question 7

The supply of entertainment events in Bithania is clearly being supplied by BC Organisation Ltd ('BCO') which sold tickets for each performance to individuals. However, Events Ltd ('Events') organised the events on behalf of BCO for an agreed fixed event management fee and as a result it incurred some costs and VAT, including some accommodation and restaurant input tax in Bithania.

Input tax recovery

Art.168 gives the basic entitlement to input tax credit for taxable persons registered in a Member State, but it is dependent on the business having 'taxed transactions' in that Member State. If that is the case, the business must register and claim input tax on a domestic VAT return. However, VAT on Events supplies of management services is accounted by BCO, the recipient of the services, i.e. reverse charge supplies.

It is a fundamental principle of VAT that businesses should be completely relieved of the cost of the VAT paid on their business purchases of goods and services. Therefore, the VAT incurred by Events in Bithania on accommodation and restaurant services purchases should be repaid to you. At present, it cannot be claimed on Event's domestic Andonia VAT return along with domestic input VAT, so it must be claimed via a separate electronic refund system.

Electronic cross border refund

An application for refund of VAT incurred in the course of business in an EU Member State may be made by a business registered for VAT in another Member State under the provisions 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., Andonia. 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, i.e., Bithania.

The requirements which need to be met include:

- The VAT must have been incurred in the course or furtherance of a business activity in the Member State of registration. Events incurred the input VAT in the course of its events organisation activities.

- Tax invoices from the hotels and restaurants need to be held to substantiate the amounts claimed.

- The claimant must not be registered or required to be register for VAT in the Member State from which the refund is sought and the claimant shall not have a fixed establishment, seat of economic activity, place of business or other residence there. Events staff will be in Bithania temporarily for the organisation of BCO's events and this is not sufficient to create a fixed establishment there.

- During the refund period the applicant must not have supplied any goods or services in the Member State of refund 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 from 1 January 2015. Provision of services to business customers, for instance BCO, which account for VAT under the reverse charge procedure are not regarded as services supplied by Events in Bithania for this purpose.

- The claimant is required to provide evidence from his host tax authority that he is a taxable person in his host Member State.

- Any claim needs to be submitted electronically through the EU electronic portal designated for this procedure.

- The refund period shall not in normal cases be longer than 12 months nor shorter than 3 months.

- Claims must be made before 30 September of the calendar year following the refund period.

- Invoices above €1,000 need to be scanned and submitted with the claim, other invoices should be retained pending possible verification.

In my view Events will meet all these requirements and therefore its claims will be valid.

Actress invoice

Regarding the evaluation of the correctness of actress' invoice you must consider the place of supply of the entertaining services. If the entertaining services are deemed to be supplied in Andonia, the actress' invoice will need to be revised as in that case the services will be subject to Andonian VAT.

According to Article 53 of the PVD, which is limited to B2B transactions, the place of supply of services in respect of admission to cultural and entertainment events, and of ancillary services related to the admission, supplied to a taxable person, shall be the place where those events actually take place. However, those place of supply rules would apply for events if the recipient of the services has to pay for "admission", something that does not apply in the case of Events Ltd.

Therefore, an Andonia VAT registered entertainer performing at events in Bithania on behalf of an Andonian client, i.e. Events, would be expected to treat their supply as a Business to Business (B2B) supply for which the place of supply is where the customer belongs, Article 44 PVD refers.

In this case the supply would be made in Andonia, where Events belongs, and Andonia VAT would be expected to be chargeable.

In the case at hand, since it is known that the Andonian entertainer is VAT registered, it is possible that the entertainer has failed to recognise the appropriate place of supply rule with regard to entertainment activities, or has treated her supply as a B2C transaction under Article 54 for which the place of performance (Bithania) determines the place of supply.

In either case, I would recommend to the client that he may wish to suggest to the entertainer that she check whether she has correctly determined her VAT position and to amend her invoice accordingly. The resulting Andonia VAT charge would be claimed on Event's domestic Andonia VAT return.