THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2024

MODULE 3.02 – EU VAT OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Report on NatMet VAT issues

NatMet's activities consist entirely of services under Art 24 PVD and give rise to different VAT treatment and liabilities as follows:

Supplies made by NatMet

Meteorological services provided under a statutory obligation suggest that NatMet could be regarded as a body governed by public law, in which case NatMet will not be regarded as a taxable person and the activity could be regarded as not being an economic activity within the meaning of Art 13 PVD. If this were the case it would result in their being no obligation to charge VAT to users of the services provided under the statutory obligation.

Commercial services provided to business customers established in Bordonia and elsewhere in the EU will however be regarded as economic activities conducted by a taxable person where treatment as a non-taxable person would lead to significant distortions of competition Art 13(i) PVD. It is reasonable to conclude that weather information, training events and education to state school pupils are activities that other organisations would provide in Bordonia and that the competition test is met.

Specifically, the supply of weather information to radio stations and flying clubs would have a place of supply determined under Art 44 PVD which for non Bordonia established business customers would lead to a reverse charge supply and require entry of a recapitulative statement. NatMet would need to charge Bordonia VAT on supplies to local businesses.

In person training events and lectures will be regarded as having a place of supply determined under Art 53 PVD which is where the events actually take place. If in Bordonia, local VAT will be charged but if elsewhere, for example at an EU customer's location there may be a requirement for NatMet to register for VAT in that member state unless the provisions of the "liability shift" can apply and the business customer will account for VAT under the reverse charge.

Education provided to pupils of states schools in Bordonia will have a place of supply in Bordonia but is likely to be an exempt supply of education under Art 132(i) PVD if NatMet is regarded as a body governed by public law with the aim of education.

The supply of weather information to foreign military organisations without a permanent presence in Bordonia, depends on whether Bordonia and the respective military organisations are members of NATO. In circumstance where both are members of NATO the supplies can be treated as exempt under Art 151(c) PVD and no VAT will be chargeable.

In cases where one or both parties are not NATO members, as Art 58 PVD applies to electronic services and military organisations are not taxable persons the place of supply will be where the government of the military organisation belongs. If however Bordonia has implemented a "use and enjoyment" provision allowed for under Art 59a PVD, the place of supply may be Bordonia in which case local VAT will need to be charged.

Input tax

Total annual input tax of €4million is split between statutory activities incurring €1 million and the remainder relates to commercial activities and overheads. Because NatMet is not acting as a taxable person, due to being governed by public law, it is not necessarily able to recover the €1 million input tax due to Art 168 PVD only allowing the deductions relating to the taxed transactions of a taxable person. However, it will be able to recover the remainder of the input tax including that which may relate to the supplies of services to a NATO member by virtue of Art 169(b) PVD.

I trust that this report addresses all points to enable NatMet to comply with its EU VAT compliance obligations.

ADIT Candidate

Question 2

CFO
Thebair
Thebia

Request for VAT advice

Documentation required for removals and exports

As an air freight carrier for businesses in Thebia it is important that you provide your customers with accurate and timely evidence of removal and export of goods to enable them to claim relevant VAT relief (exemption) under Art 138 PVD. In the case of removals of goods from Thebia to locations in other EU member states the despatching Thebian business will require from you documentation such as a bill of lading, , an airfreight invoice, a signed CMR document or note or an invoice from the carrier of the goods that meets the conditions described in Art 45a paragraphs 1(a) and 3(a) ("List A") of the Implementing Regulation 282/2011. This will form one of the two pieces of non-contradictory evidence that the despatching business will need to possess in order to evidence the removal of the goods from Thebia. It will not be sufficient for your customer to rely on two items issued by you as each must come from two different parties independent of each other (paragraph 1a).

In the case of exports from Thebia to the USA the evidence that your business customers will require from you is largely the same as those which are required for intra EU movements. An authenticated airwaybill will be the most common document that would evidence that you have carried their goods to the USA, although they will also require other documentation from other parties before they treat their goods as exported and outside the scope of domestic VAT.

In both cases your customer needs to be in possession of your documentation within three months of the date of supply of the goods but the earlier you can provide it to them the better it will be.

In circumstances where you remove your own goods permanently to another member state using your own planes, the requirement is that you retain two non contradictory pieces of evidence one of which can be your own issued documentation but you will also require a document from another party which also shows that your goods have departed or arrived at their destination, for example a Customs entry or commercial document. To treat the despatch as an exempt transaction you will also need to complete a recapitulative statement showing details of the goods you have despatched.

Lease payments to Bordonia bank

Aircraft leased from a bank may be treated as exempt supplies under Art 148(f) PVD providing they satisfy the requirement that they are operated for reward chiefly on international routes. The scope of this exemption was considered in the CJEU case of A Oy (C-33/11) in which the involvement in the supply chain of a business that was not the operator of the aircraft was considered. The CJEU held that providing the ultimate user of the aircraft met the requirement, a party in the supply chain, in this case a bank, could take advantage of the exemption. You will therefore not be charged VAT on the supply of leased aircraft from your bank.

Payments to non-executive director

The supply of services by a non-executive director, separately VAT registered in the same member state has recently been consider by the CJEU in the case of C 288/22 (TP v. Administration de l'enregistrement, des domaines et de la TVA). It was found that the director was undertaking economic activities but not independently as required by Art 9 PVD and was therefore not undertaking "taxable activities" in respect of their non-executive director work. It follows that no Thebian VAT would be expected to be charged on the services of the lawyer as director and therefore there will be no VAT to recover by Thebair.

I trust this response assists you to decide how to treat these transactions for VAT and please contact me if you wish to discuss anything further.

Yours faithfully
ADIT Candidate

PART B

Question 3

Murta

VAT report to the Board

Dear Board

I have been asked to provide you with a report on the VAT aspects of the purchase, subsequent use and refurbishment of Capital Towers, an office building situated in Bilcha, Floria.

It is important to initially state that as a domestic insurance and real estate organisation your supplies are for VAT purposes likely to be a combination of taxable and exempt supplies. Businesses of this type are only allowed to deduct a proportion of the VAT they incur as determined by Art 173 and 174 PVD. The VAT on their purchases, including buildings, is only partially recoverable and is dependent on the extent to which the business makes supplies with the right to deduction.

Because of your status as a partly exempt business, you will need to perform a calculation each year which will provisionally determine the proportion of your VAT on purchases that you are able to reclaim on your VAT return. There are additional rules for capital assets such as buildings (Art 187) which, dependent on the precise rules that exist in each member state, are treated as having a life of between 5 and 20 years over which time the proportion of VAT that can be recovered is reviewed each year and can vary until the end of the adjustment period or when the asset is sold, whichever occurs first.

Purchase of office building

In the specific case of Capital Towers which you purchased in 2019, your initial VAT recovery of the VAT incurred on its purchase would be in proportion to the building's use for taxable activities as your head office. Since your business makes taxable and exempt supplies (as above) it would be expected that the recoverable proportion applying to your whole business would be the recoverable percentage to be used for the VAT on the building in the first year in which you fully occupied it.

Letting of three floors

In subsequent years, you will have been required to consider the taxable use of the building and compare it with the recovery proportion used in the first year. If there is no difference no adjustment is required. However in 2021 when you started letting 3 of the 10 floors whilst retaining 7, it is important to consider how the proportion has changed. You state that you have charged VAT on the lease of the 3 floors and therefore this is fully taxable use of 30% of the building in that year.

The remainder of the building remains subject to the overall taxable proportion of your whole business and so it is likely that the overall use of the building for taxable purposes has increased when compared with the first year. The percentage difference between these 2 figures can be applied to the 5th or 20th or other relevant proportion of the total VAT on the purchase of the building and the difference is required to be claimed or repaid to the Florian tax authority through adjustment on the return.

Refurbishment

The refurbishment of the building that is planned to take place in 2025 will cost €5m and the VAT 187on this cost may itself become a Capital item within the meaning of Art 187 PVD. It is important to acknowledge that Art 187 refers to capital goods, an undefined term, which may differ between member states (see Art 189 PVD). It is therefore possible that in some member states a refurbishment will be within the term "capital goods" and not in others. Nevertheless, Murta is meeting the cost of a refurbishment to an area intended to be let under taxable supplies (floors 6-7) as well as floors 4 and 5 which they will continue to use for their partly exempt business. As previously, the proportion of the asset which is being used to make taxable supplies is increasing and the comparison with the first year will suggest an increase in the recoverable proportion on the 5th, 10th, 20th or other interval applicable in the member state.

The overall VAT requirements

The VAT requirements are to establish and record the amount of VAT incurred upon the purchase of the capital goods asset and to monitor the usage for taxable purposes annually so as to be able to make whatever adjustment is required as a result of increasing or declining use for taxable purpose throughout the life of the asset, I trust the above is helpful, but please contact me if you wish to discuss any aspect or require anything further.

Yours faithfully
ADIT Candidate

Question 4

Purchases and sales of used cars are subject to the same VAT treatment as new cars and are liable to VAT on their full value when sold by a taxable person. However, special arrangements exist for second-hand goods which allow them to have VAT accounted for on the margin between their purchase and selling price, rather than the full selling price. Art 313 PVD requires all member states to apply margin scheme availability to taxable dealers in second-hand goods (including cars), works of art, collector's items and antiques.

The cars eligible to be included in the scheme are those which have been purchased within the EU from a non-taxable person or a taxable person who has (largely) been making exempt supplies and therefore unable to recover VAT on the purchase of such goods, or who themselves have sold the goods using the margin scheme - Art 314 PVD. The margin is calculated as the difference between the selling price and the purchase price where both include the full consideration received and given for each transaction (Art 315 PVD).

Where cars are purchased from private individuals being non-taxable persons located in any member state the purchase price shall be the total amount paid to the individual for each car. When sold to customers located in the same and neighbouring member states the VAT due will be calculated on the margin and (unlike removal of other goods) there will be no exemption available if the car is removed to the neighbouring member state.

Member states may upon application to the VAT committee introduce a simplified scheme which allows for each tax period, the margin to be calculated on the difference or "global margin" between the value of all goods sold under the scheme less the value of all eligible goods purchased in the period, Art 318 PVD. This simplification dispenses with the requirement for the margin to be calculated on each item or car.

The seller is required to keep detailed records of the purchase and selling prices of each car bought and sold and must not enter the VAT charged on any sales invoice. However, they must issue an invoice to customers displaying the words "margin scheme – second hand goods".

Purchases of cars from a neighbouring member state and the removal of cars do not require the completion of Intrastat returns or recapitulative statements as they are not being treated as exempt supplies.

PART C

Question 5

The supplies made by Vesuvius to non-taxable persons are treated as made in Athena and will be subject to Athenian VAT as they are made [where performed or] where Vesuvius is established (Art 45 PVD). Supplies made to visitors to Athena will also have a place of supply in Athena if the recipients are non-taxable individuals. The only exception to this is the room hire which is a supply associated with immovable property and will be treated as made where the room is located, which is Athena – it is irrelevant who the recipient of the supply is or where they belong.

Engagement of staff on a payroll is not regarded as the supply of a service between employee and employer, however where agency staff are hired from an agency established in another member state it will be a B2B supply accountable by Vesuvius under the reverse charge procedure. Vesuvius will be able to recover the input tax on the reverse charge as employment relates entirely to taxable supplies The value of the supply will be the amount calculated under the method used by Vesuvius and the tax point will be the date on which each payment is made to the overseas agency. If made in a foreign currency the amount will need to be converted to Euro before the reverse charge can be accurately calculated.

The use of a car awarded as a staff incentive could be seen as a taxable supply between the employer and the employee or agency staff member although there is no obvious consideration other than the employment contract, which would need to be seen as non-monetary consideration. Dependent on the law applicable in Athena, if there is a block on input tax recovery on the purchase or leasing of cars (for example, because there is deemed to be private use of the cars) there may not be a taxable supply between the employer and staff member.

Question 6

EU VAT legislation features several anti-avoidance measures which aim to prevent businesses gaining a tax advantage contrary to the intention of the Principal VAT Directive and supporting VAT legislation.

The most frequently encountered measure is to restrict the recovery of incurred VAT to taxable activities and prevent recovery involving arrangements designed to recover VAT in circumstances where exempt or out of scope supplies are being made. The Halifax case C-255/02 established the principal that where a tax advantage was being sought as a main purpose of a series of transactions, the law should deny the right of recovery where it would constitute an abuse of that right. Other CJEU cases that have addressed the same issue include Huddersfield University, C-251/16: Cussens and Others and C-273/18 Kuršu Zeme.

A line of case law also exists to deny the recovery of VAT where Missing Trader fraud is present in a supply chain. The CJEU case of C-440/04 Kittel v Belgium established that where a business in a supply chain knew or should have known that another business in that supply chain was engaged in fraud the right to deduct can be denied to that knowing business. Similar findings have been made in C-440/04 Recolta Recycling and in contrast, C-354/03 Optigen.

Other anti-avoidance legislation exists to deny the “disaggregation” of activities between associated businesses which seek to avoid VAT registration, Art 11 PVD states that member states may, after consulting the advisory committee, regard activities between bodies connected by financial, organisational and economic ties as supplies made by a single taxable person.

Value shifting in favour of untaxed supplies at the expense of taxable supplies has been encountered where exempt services are supplied together with other supplies, for example insurance with goods or other services. Measures that address these arrangements have been based on resisting the possibility of fragmenting a composite supply into parts which have different liabilities such as Card Protection Plan C-349/96 and C-41/04 Levob Verzekeringen BV.

Other alternative credible and relevant examples will be awarded full marks.

Question 7

Fiscal neutrality

Fiscal neutrality is a principle which refers to the overall approach to VAT which seeks to ensure that VAT is not a charge upon economic operators who are intended not to bear the burden of the tax, provided that their activities are subject to VAT.

It is referred to by both the EU and the OECD in their guidelines regarding the application of VAT/GST and is widely regarded as consisting of two principles.

The first principle is that VAT is a tax on consumption and that the deduction of input tax is designed to relieve the burden of the tax, whilst taxing the final consumer – "the First Directive Principle".

The second principle is that businesses should be treated similarly for tax purposes – "the Parity Principle".

The majority of case law surrounding the First Directive principle has been concerned with the deductibility of input tax in relation to business that make taxable supplies to consumers through a supply chain of several taxable persons, in contrast to where tax is incurred on exempt activities or in circumstances where the supplies have ultimately not been used by the claimant business. A further aspect of this principle is that the amount of tax borne by an ultimate consumer cannot be greater than the amount due on the consideration paid for the final supply to the consumer per Elida Gibbs (C-317/94) which allowed a reduction in the value for VAT purposes for a manufacturer who made promotional payments to consumers of its products.

The overall effect is that VAT should be fully deductible throughout a supply chain where the final supply is subject to tax. The effect of the First Directive principle is that the tax is completely neutral as regards its effect on a taxable person who makes only taxable supplies (other than the administrative costs of accounting for VAT, and subject to specific exclusions).

The second principle is concerned with trying to ensure a level playing field and it precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes, so that those goods or supplies must be subject to a uniform rate.

This principle has been applied to:

- the concept of unjust enrichment, which at one time was unjustifiably applied to payment traders but not repayment traders selling the same product: Marks & Spencer plc (C-309/06);
- financial products, where essentially similar products were treated differently for tax purposes: JP Morgan Fleming Claverhouse (C-363/05);
- healthcare services, where it has been held that the tax treatment of such services could not be dependent on the legal persona of the taxpayer; Jennifer and Mervyn Gregg (C-216/97);
- gaming machines, regulated under different gambling legislation. Rank Group plc (C-259/10); and
- where car parking facilities are supplied by public bodies and private businesses in competition or potential competition with each other - Isle of Wight Council (C- 288/07).

Legitimate expectation

Legitimate expectation is the principle under which a party (usually a business) can place reliance upon the position of an authority whether made through policy, statute or similar means, in which it may place confidence in understanding the treatment it may reasonably expect to apply to a transaction or course of action. It is not fundamentally an EU concept although it has been applied to EU tax and other matters through the judgments of national courts and the CJEU.

One of the better known CJEU VAT cases concerning this point is Marks & Spencer (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 6th EU VAT Directive, was incompatible with the principle of legitimate expectation. The principle has also been established in Sudholz (C-17/01) where it was held that Article 3 of Decision 2000/186 was invalid due to the violation of this principle, in that it allowed for a change of tax treatment, to the detriment of the taxable person, retrospectively. In general terms, the principle of legal certainty precludes a community measure from taking effect from a point in time before its publication.

Question 8

As a business established outside the EU, Alpin will be able to recover the VAT incurred by its employees when visiting Holsta under the “13th Directive” Dir 86/560, providing that all of the expenditure is for the purposes of Alpin’s business and not personal expenses of the employees.

The following conditions also need to be met:

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

You should note that an EU country may:

- Set time limits within which claims must be made.
- Refuse to refund VAT in this way if the claimant’s country/territory does not grant reciprocal refund rights for VAT or similar to businesses based in that EU country.
- Impose restrictions on the type of expenditure qualifying for refunds.
- Insist that the claimant appoint a tax representative.
- May not offer refunds on more favourable terms than apply to EU established persons.

The VAT that can be claimed by Alpin is €15,000 - €3,000) = €12,000 x 20/120 = €2,000.

The €3,000 incurred on entertainment is unlikely to be refundable because of Art 176 PVD.