THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

December 2023

MODULE 3.02 – EU VAT OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Finance Director
Green Supplies
Alesia

12 December 2023

Dear Sir or Madam

Thank you for your request for advice concerning your recycling of paper and plastic business.

Collection of wasted paper and plastic goods

It appears that the waste goods are acquired for no consideration and therefore there will be no Input Tax incurred on the acquisition of the goods. In order to count as consideration, the item given for a supply must be directly linked to the making of that supply. In addition, the collection of the wasted goods on a door-to-door basis by Green Supplies should not be considered a supply of services for consideration since the collection of the wasted goods is free of charge and there is no legal relationship between the Alesia's households and Green Supplies in regards to the collection of the waste paper and plastic.

According to the principles established in the CJEU Case C-288/19 QM, 'Consideration' means that there must be a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, and the remuneration received by the supplier of the service, constitutes value actually given in return for the service supplied to the recipient.

Donated and collected waste paper and plastic

Donated goods are collected in Alesia from community collection points and appear to be freely provided by the local authorities at collection points. There will be no recoverable VAT as no charge is made for obtaining these goods.

Hiring of trucks

About the purchase of hiring of means of transport services (trucks hiring) it is very important to determine whether the hiring will be of short-term or long-term nature. Short-term is defined in Article 56(3) as continuous possession or use throughout a period of not more than thirty days (in the case of vessels not more than ninety days).

It follows that the hire periods of 12 months will be considered long-term hiring of a means of transport for which the place of supply will be the place where the recipient of the services is established Art. 44 of PVD), i.e. Alesia. The local business will therefore charge Green Supplies with local VAT which will be fully recoverable as it relates to the taxable supplies of the company.

Processing and packaging

The activity of processing and packaging their own goods is not a supply and the recycled materials may be used as Green Supplies wish.

Sale of recycled materials to EU based factory

When recycled material is sold to the factory business located in another EU member state this will be an intra-community supply of goods on which VAT is not chargeable under certain conditions.

Therefore, to safeguard that the shipments to the factory established in another member state Green Supplies must obtain the customer's VAT number and hold two non- contradictory pieces of evidence that the goods have been transported out of Alesia. Green Supplies can check the number is valid by reference to the Europa website. In addition, Green Supplies will have to complete a recapitulative statement or EC Sales List, which requires the VAT Number and country of VAT registration of the factory to be shown. Failure to meet any of the above-mentioned conditions will result in Alesian VAT being due.

There may also a requirement to make Intrastat returns if the value of dispatches of goods made by Green Supplies to the factory established in the other EU Member State is above the threshold applicable in the supplier's Member State.

Sale of recycled plastic to a US business

The sale of recycled plastic to the US business is an export of goods. Article 146(1) a states that goods exported outside the EU can be exempt with credit.

To support this treatment, official or commercial evidence of the goods leaving the country must be held, supported by supplementary evidence to show that the export transaction has taken place.

Transportation of goods to customers

The transportation of the goods to the customers premises will be carried out by a local Alesia logistics company on behalf of Green Supplies. The place of supply of the transportation of goods to business customers, i.e., Green Supplies, 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 Alesia. The Alesian logistics company will charge domestic VAT on its invoice and Green Supplies will be able to claim it back under the provisions of Articles 167 and 168 of PVD. It worth noting that supplies relating to international transport are eligible for exemption under certain conditions.

Yours faithfully,
ADIT Candidate

Question 2

The Directors
Mondo Limited
Lambda, EU

Dear Sirs

Subject: VAT treatment of Mondo's transactions

As requested, I am hereby setting out in this letter my comments on the VAT treatment of the sales and procurement transactions carried out by Mondo Limited ('Mondo') as outlined in your question.

It is understood that Mondo is established for VAT purposes exclusively in Lambda, an EU member state, and does not have any fixed establishment in any other territory. It is also understood that Mondo is not registered for VAT purposes in any other country besides Lambda.

Nature of the supplies made by Mondo

At the outset, it is pertinent to point out that Mondo does not engage in supplies of tangible property (i.e. goods); rather, it is engaged in making supplies of services. Furthermore, taking into account that it supplies pre-recorded audio/visual media content on demand (such as audio books and educational video courses), it is considered that these supplies qualify as 'electronically supplied services' (ESS) as defined in Article 7 of Implementing Regulation 282/2011, namely "services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology." Indeed, the supply of digitised products generally is specifically mentioned in the said Article 7 as being a supply of ESS.

Furthermore, supplies consisting of audio/visual content are generally not included in the list of supplies of goods and services to which the reduced VAT rates (or the exemption with deductibility of VAT) may be applied, as set out in Annex III PVD. Therefore, it is presumed that these supplies by Mondo taking place within a particular EU member state are generally subject to the standard rate of VAT applicable in that EU member state.

Sales transactions – B2C

It is understood that Mondo engages primarily in transactions with non-taxable persons, also referred to as business-to-consumer (B2C) transactions. In terms of Article 58 PVD, the place of supply of ESS to a non-taxable person shall be the place where that person is established, has his permanent address or usually resides.

Therefore, the applicable place of supply for VAT purposes is as follows:

a) B2C sales to customers established in Lambda are deemed to take place in Lambda and therefore subject to the standard rate of VAT applicable in Lambda.

b) B2C sales to customers established in another EU member state (not being Lambda) are deemed to take place in that other EU member state and therefore subject to the standard rate of VAT applicable in that other EU member state.

c) B2C sales to customers established in third countries outside the EU are deemed to take place outside the EU and therefore fall outside the scope of EU VAT. Therefore, no EU VAT is chargeable thereon. It may be pertinent to note that there could be VAT / GST / other indirect tax implications according to the rules applicable in the specific third countries in question where the customers are established. However, any such non-EU indirect tax obligations fall outside the scope of the EU VAT Directive and therefore are not considered further here.

As regards reporting and payment of VAT on the above transactions, B2C sales to customers established in Lambda would typically be reported in Mondo's respective periodical VAT return due to be filed in Lambda, and Lambda VAT charged thereon would generally be payable to the tax authorities in Lambda as part of the domestic Lambda VAT return filing and payment process.

With regard to B2C sales to customers established in another EU member state (not being Lambda), Lambda would be required to charge and collect VAT on its supplies at the rate applicable in the EU member state where its customers are established. It is assumed that the annual EUR10,000 threshold for supplies of telecommunications, broadcasting and electronic services (and distance sales of goods) within the EU to remain subject to VAT in the EU

member state where Mondo is established (i.e. Lambda) is significantly exceeded in the case at hand, and is therefore not applicable to Mondo.

Accordingly, Mondo has two broad options to account for VAT on B2C sales to customers established in another EU member state:

1) Register for VAT domestically in each of the seven (7) other EU member states wherein Mondo has B2C customers, and collect and remit VAT to the respective tax authorities as part of the local in-country VAT return filing and payment process. Clearly, this would entail significant administrative burdens and compliance costs for Mondo.

2) Alternatively, use the Union One Stop Shop (OSS) scheme. This would avoid the need for Mondo to register for VAT in each EU member state in which it supplies services to its customers. The Union OSS allows taxable persons to declare and pay VAT due in each of the seven (7) other EU member states wherein Mondo has B2C customers but wherein it is not established via the VAT web portal in Lambda, being Mondo's EU member state of identification.

In practice, once Mondo is registered for the Union OSS scheme in Lambda, it will electronically submit OSS VAT returns detailing the B2C supplies made to customers established in the other EU member states along with the VAT due at the applicable rate in each respective EU member state. The OSS VAT return is submitted quarterly and, along with the VAT paid, it is then transmitted by Lambda (being the member state of identification) to the corresponding member states of consumption via a secure communications network. It is pertinent to note that OSS VAT returns are additional (and do not replace) the local VAT return that Mondo is required to submit in Lambda under its domestic VAT compliance obligations in Lambda.

It is also pertinent to note that the OSS scheme is optional. However, when choosing to use the OSS scheme, Mondo must apply the scheme to all supplies falling under this scheme in all relevant EU member states. Mondo cannot, therefore, opt to use the OSS scheme just for supplies in some EU member states and not for supplies in other EU member states. Once opting into the scheme, it is applicable for all supplies to consumers in all EU member states.

<u>Sales transactions – B2B</u>

As regards the sales transactions that Mondo engages in with other taxable persons, also referred to as business-to-business (B2B) transactions, in terms of Article 44 PVD, the place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located.

As regards sales made by Mondo to other taxable persons established in Lambda, this would be deemed to be a domestic supply of services taking place in Lambda and therefore subject to the standard rate of VAT applicable in Lambda. These domestic B2B sales transactions would typically be reported in Mondo's respective periodical VAT return due to be filed in Lambda, and Lambda VAT charged thereon would generally be payable to the tax authorities in Lambda as part of the domestic Lambda VAT return filing and payment process.

As regards sales made by Mondo to other taxable persons established in EU member states other than Lambda, the place of supply in terms of Article 44 PVD would be the other EU member state where the business customer is established. Therefore, this supply would fall outside the scope of VAT in Lambda, and typically it would be an obligation of the business customer established in the other EU member state to self-account for VAT thereon in terms of the reverse charge mechanism as provided for in Article 196 PVD.

It is also pertinent to note that in terms of Article 262 PVD, Mondo would have an obligation to submit a recapitulative statement in Lambda in order to report such EU cross-border B2B supplies of services (other than services that are exempted from VAT in the Member State where the transaction is taxable) and for which the recipient is liable to pay the tax pursuant to Article 196 PVD. Since the types of supply made by Mondo generally do not qualify for VAT exemption, it is unlikely that the services would be exempted from VAT in the Member State where the transaction is taxable, and therefore a recapitulative statement filing requirement will generally apply to Mondo.

In this regard, it may be pertinent to note that in terms of Article 18 of Implementing Regulation 282/2011, unless it has information to the contrary, Mondo may regard a customer established within the EU as a taxable person where the customer has duly communicated its individual VAT identification number to Mondo, and Mondo obtains confirmation of the validity of that identification number and of the associated name and address, typically by running a check using the European Commission's online VIES VAT number validation database.

As regards those instances where a business customer established in another EU member state (not being Lambda) fails to provide its valid EU VAT identification number to Mondo as part of the online purchase process, then in terms

of Article 18 of Implementing Regulation 282/2011, unless it has information to the contrary, Mondo may regard a customer established within the EU as a non-taxable person when it can demonstrate that the customer has not communicated its individual VAT identification number to it. Therefore, in such instances, Mondo would be justified in instead applying the same treatment as that applicable to B2C sales made to customers established in another EU member state (not being Lambda) and therefore charging VAT at the standard rate of VAT applicable in the other EU member state, and reporting and paying the same via the OSS scheme (or alternatively the domestic in-country VAT registration route, if Lambda opts not to adopt the OSS scheme).

Procurement of advertising and marketing services

As regards the procurement by Mondo of advertising and marketing services from a marketing agency established in Gamma, a third country outside the EU, in terms Article 44 PVD the place of supply is where Mondo (being the business customer) is established, namely in Lambda. Therefore, this supply of services falls within the scope of Lambda VAT. In this regard, on the basis that the supplier is not established in Lambda, it would typically be the obligation of Mondo to self-account for VAT thereon within its domestic VAT return in Lambda in terms of the reverse charge mechanism as provided for in Article 196 PVD.

It is relevant to note that insofar as Mondo is engaged exclusively in the provision of supplies which are VAT taxable by their nature (namely the supplies of ESS consisting of audio/visual media content) and hence confer full input VAT recovery rights in terms of Article 168 PVD, then the VAT self-accounted for by Mondo upon its procurement of advertising and marketing services should in principle be immediately fully recoverable, hence resulting in a VAT neutral procurement transaction with no actual liability to pay VAT thereon.

I trust this is helpful, and would be most pleased to provide further assistance or clarifications as may be required.

Yours faithfully,
ADIT Candidate

PART B

Question 3

To: Finance Director, CEL
Subject: Promotional Activities
Date 13 December 2023

Dear Sir or Madam,

To determine the VAT treatment of a supply, it is necessary to examine its nature from a VAT standpoint.

The scenario provided is related to the granting of vouchers of a EUR10 to the customers who buy electric appliances at their retail stores. The customers, after receiving the voucher, could redeem it for obtaining goods from five specified suppliers who are participating in the scheme.

Handling of vouchers to customers

It appears that the vouchers were not separately charged to the customers and therefore, they were effectively provided 'free'. Even though economically customers are making a single payment for 'electric appliances now plus right to vouchers later', it is not possible to attribute any particular part of the payment for electric appliances to the supply of vouchers.

The basic rule for a chargeable transaction requires there to be consideration paid by the purchaser. If there is no consideration, there is no supply within art.2(1)(a).

However, when assets are given for free by a taxable person to its customers, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible, unless the exemption of gifts of small value applies (art. 16 of PVD).

Consequently, CEL will have to account for output tax on the gifts of goods (vouchers redeemable for goods) if the relevant input VAT was recovered (see below analysis), unless they meet the small gifts exception in Thebia.

Vouchers issued by the five suppliers - VAT treatment

A voucher must give details of the goods or services it represents or of the identity of the potential suppliers. There are two types of vouchers, the single-purpose and the multi-purpose voucher.

1) Single purpose voucher (SPV)

   - Place of supply, and
   - VAT due are known
   - Each transfer of the SPV is taxable

2) Multi-purpose Voucher (MPV)

   - VAT on redemption
   - No VAT if transferred

The vouchers provided to CEL by the five participating suppliers appear to be multi-purpose vouchers as defined in Art 30a PVD which simply says, "other than a single-purpose voucher", since the VAT due is not known upon the issuance of the vouchers.

The vouchers supplied to CEL are regarded as multi-purpose vouchers on the grounds that although they can be used only in Thebia, the VAT due is not known at the time of issue because the vouchers can be used for the purchase of a variety of goods from five different suppliers.

For MPVs (vouchers which are not SPVs) VAT shall be charged when the goods or services to which the voucher relates are supplied, and any prior transfer should not be subject to VAT. The practical effect of this is that the tax due on the eventual supply is not chargeable at the time the voucher is sold but is due in the member state and at the time of redemption. The actual handing over of the goods in return for the MPV as consideration will be subject to VAT on the face value of the voucher.

Hence, the supplier that redeems the voucher should issue a VAT invoice where required under the normal invoicing rules.

However, it is unlikely that CEL will be able to recover the input VAT charged by the specified suppliers, as the invoices showed supplies that were made to the customers, not to CEL. CEL had paid 'third party consideration' to the redeemers – it was part of what the redeemers had to account for output tax on, but because the supply was not made to CEL, CEL could not deduct any input tax.

The above has been considered in CJEU cases Loyalty Management Ltd (Case C-53/09) and Baxi Group Ltd (C-55/09), which held that the company was not entitled to deduct input tax on the goods, because those were supplied to the customers or to other businesses.

Marks will be awarded for alternative relevant cases.

Marketing company fees

The fees charged by the marketing company which can be identified as being in respect of a monitoring the loyalty scheme services will be subject to VAT. According to Article 44 PVD the place of supply is Thebia and the marketing company will need to issue a VAT invoice for its services.

In CJEU Case Baxi Group Ltd (C-55/09), it was held that Baxi was entitled to deduct the input tax on the promotional services, because they were supplied to it and to no-one else.

I trust this provides the information you require.

Yours faithfully
ADIT Candidate

Question 4

VAT Directive

The principal source of EU VAT legislation is the Principal VAT Directive (2006/112/EC). As a directive, this is a legal instrument that is binding with respect to the result to be achieved upon each Member State, but it leaves the choice of the form and methods of implementation to the national authorities. Therefore, contrary to regulations which have general (direct) application, the tendency is to consider in the first instance how the VAT Directive has been transposed into the applicable national legislation, rather than the Directive itself. This notwithstanding, ultimately it is the Directive that is decisive in resolving controversies, and in certain instances even in conferring rights directly to citizens (i.e. European taxpayers) via the doctrine of direct effect.

The Court of Justice of the European Union (CJEU) has pointed out that, according to its settled case law, the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally or indeed verbatim in express, specific legislation; a general legal context may be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner.

VAT Implementing Regulation

Binding implementing measures to ensure uniform application of the VAT Directive can be found in the VAT Implementing Regulation (Council Regulation (EU) No 282/2011). Those measures are directly applicable without transposition into national law. Indeed, as an EU legal instrument, a regulation is characterised by three key elements:

- its general application;
- its binding effect in its entirety; and
- its direct applicability.

Article 397 of the Principal VAT Directive provides that: “The Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive.” The implementing measures adopted by the Council under this procedure involve detailed technical questions of practical application. On 17 October 2005, the Council adopted Regulation (EC) No. 1777/2005 laying down implementing measures for the VAT Directive.

Subsequently, it was found necessary to recast Regulation (EC) No. 1777/2005 to reflect the structure and numbering of the VAT Directive, and to incorporate guidelines of the VAT Committee. Accordingly, on 15 March 2011 the Council adopted implementing Regulation (EU) No. 282/2011 laying down implementing measures for the VAT Directive, which has since been amended several times. The VAT Implementing Regulation is automatically incorporated into national law and therefore there is no domestic transposition thereof, unlike the VAT Directive.

Direct effect of VAT Directive

In its case law, the CJEU has developed both the concept of direct applicability of EU provisions which are sufficiently precise, clear and unconditional, and the concept of supremacy of EU law over domestic law. Based on these principles, a taxpayer may, in proceedings against a Member State, rely on a sufficiently precise, clear and unconditional provision of the Principal VAT Directive to override incompatible domestic provisions of that Member State which failed to implement the directive correctly and in time.

The first and leading VAT case confirming the direct effect of the Principal VAT Directive is the Becker case (8/81). Ursula Becker was a self-employed credit negotiator. She invoked, before her national tax court in Germany, what is now Article 135(1)(b) of the Principal VAT Directive, which requires Member States to exempt from VAT, amongst others, “the granting and the negotiation of credit”. Germany was two years late in transposing this exemption into its national tax law. Becker wished to apply the exemption in the year between the expiry of the implementation period and the date on which the German implementing provisions came into force. The CJEU concluded that wherever the provisions of a Directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the Directive or in so far as the provisions define rights which individuals are able to assert against the state.

Direct effect applies vertically, meaning in relations between individuals and the state. This means that individuals can invoke a provision of EU law in relation to the state – albeit not the other way round i.e. Member States are obliged to implement the Directives, but the Directive may not be cited by a Member State against an individual. Horizontal direct effect (whereby an individual can invoke a provision of EU law in relation to another individual) also does not apply in the case of the Principal VAT Directive.

Role of the CJEU in VAT matters

The role of the CJEU as regards VAT matters relates primarily to two different scenarios:

1) On the one hand, questions in the field of VAT are addressed to the CJEU by national courts for a preliminary ruling;

2) On the other hand, VAT-related infringement procedures are launched by the European Commission against individual EU member states, which may eventually lead to a judgment of the CJEU.

Preliminary rulings

National courts and tribunals are required to apply EU law in order to decide the cases heard by them. If a national court or tribunal has doubts about the interpretation or validity of a provision of EU law which it has to apply in a particular case, it has the possibility or indeed - in certain circumstances - the obligation, of referring a question to the CJEU. This is referred to as the “preliminary ruling” request, a procedure laid down in Article 267 of the Treaty on the Functioning of the European Union.

When a preliminary ruling request is referred to the CJEU, the national court will suspend the national proceedings. A case will be opened in front of the CJEU and a judgment is eventually released by the CJEU, in which the CJEU will make set out how the EU VAT law provision in question is to be interpreted. The CJEU’s judgment is binding and is to be followed not only by the national court which made the reference but also by all other national courts within the EU, with a view to ensuring consistency in the interpretation and application of EU VAT law across the EU.

Infringement procedures

The European Commission acts as the “guardian” of EU law, since one of its responsibilities is to monitor and ensure that Member States comply properly with EU law. In this regard, the Commission may invoke the so-called infringement procedure whenever it has reason to believe that a particular EU member state is breaching a particular provision of EU law, such as EU VAT law.

The infringement procedure is a legal procedure that evolves through several steps, and which may culminate in the Commission bringing the case before the CJEU. If the eventual judgment of the CJEU declares that the Member State has indeed breached the relevant provision of EU VAT law, then the Member State will be obliged to change its internal rules or its administrative practice in order to comply with that CJEU judgment. This is another way by which the CJEU plays a role in ensuring that EU law, including EU VAT law, is interpreted and applied consistently and correctly across the EU.

PART C

Question 5

According to article 135(1)(a) of PVD, Member States shall exempt the supply of insurance and reinsurance services, including related services performed by insurance brokers and insurance agents.

Even though the exemption for insurance is brief and lacks a detailed definition, insurance transactions can be summarized as follows:

1) one party (the insurer) contracts to meet the loss, expense or liability on another party (the insured) in certain defined circumstances;

2) the insured pays consideration in the form of a premium.

In a reinsurance contract, one insurer passes some or all of the risks under insurance contracts to another insurer. In other words it insures its own liability to pay its own policyholders, in return for a premium.

Hence, 'related services performed by insurance brokers and insurance agents' must be related with either insurance or reinsurance services as described above. Typically, an insurance broker or agent:

- advises the insured on available contracts of insurance;
- helps with the completion of applications;
- may also help with the processing of claims;
- receives a commission from the insurer for arranging the insurance, or sometimes a fee from the insured.

CJEU Cases

JCM Beheer BV Case (C-124/07)

The CJEU ruled that activities of insurance brokers and insurance agents should be exempt. The terms used in defining what is exempt have an independent meaning in EU law and cannot be restricted by domestic legislation.

The exemption applies to the activity rather than the person undertaking it. As the sub-agent was doing the work that insurance agents and brokers do, even if for another broker rather than directly for the insurer or the insured, it was not prevented from enjoying the exemption.

Arthur Andersen case (C-472/03)

A firm of accountants contracted with an insurance company to carry out many of the 'back office' functions.

The CJEU ruled that back-office services performed by an insurance broker/agent to an insurance undertaking are not VAT exempted.

Aspiro case (C-40/15)

A Polish company provided claims handling services in the name of and on behalf of an insurance company, although it had no legal relationship with the insured person. The CJEU ruled that claims settlement services provided by a third party are not VAT Exempted since the work of the supplier must include the essential aspects of the work of an insurance agent, such as the finding of prospective clients and introducing them to the insurer.

Q-GmbH (C 907/19)

The CJEU ruled that the exemption of those services is subject to two cumulative conditions:

1) those services must be 'related' to insurance transactions; and

2) they must be 'performed by insurance brokers and insurance agents'.

Question 6

The transfer of a business effectively results in the transfer of several assets, both tangible and intangible, which together constitute that business.

Transfer of tangible assets

As regards transfers of tangible assets, on the basis that both transferor and transferee entities are located in Bithania, the place of supply of the goods will be Bithania, and therefore Bithania VAT would be chargeable at the applicable rates to the asset in question.

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 Bithania, the place of supply of the services in question will be Bithania, and therefore Bithania VAT would be chargeable at the applicable rates to the supply of services in question.

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. Additionally, Article 29 PVD provides that the said Article 19 shall apply in like manner to the supply of services.

Furthermore, Member States may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortion of competition and tax evasion or avoidance by using Article 19.

Therefore, assuming that Bithania has implemented the provisions of 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 Bithania 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. Generally, the transferee must intend to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any.

On the other hand, if 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 Bithania, as outlined above.

Relevant CJEU case law

Zita Modes case (C-497/01)

CJEU has held that the TOGC provision should apply to 'any transfer of a business or an independent part of an undertaking, including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity. The transferee must however intend to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any.'

Faxworld case (C-137/02)

The CJEU ruled that the partnership had to be regarded as a taxable person on the basis of the future supplies to be made by the successor company. Input tax was deductible.

X BV case (C-651/11)

The CJEU held that the TOGC 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.

Schriever case (C-444/10)

The CJEU held that there must be an overall assessment of the facts in ascertaining the applicability of TOGC relief.

Mailat case (C-17/18)

The CJEU held that the the granting of the lease to operate the restaurant did not constitute a TOGC. The CJEU also said the fact that the lessee was not able to liquidate the business activity also indicated that this was not a TOGC.

Question 7

Introduction

The VAT exemption for education in article 132 of the Principal VAT Directive falls within the category of exemptions for certain activities in the public interest. This highlights that this type of VAT exemption is motivated by certain socio-economic goals, in particular to promote access to certain merit goods and services. A number of CJEU judgments are relevant as regards what should be considered as "education" that qualifies for VAT exemption.

Leading judgments

In Horizon College (case C-434/05), the CJEU noted that the transfer of knowledge and skills between a teacher and students is a particularly important element of an educational activity, although it is not by itself sufficient to qualify the provision of teachers to third-party establishments as an educational activity. In the words of the Court, educational activities consist of "a combination of elements which include, along with those relating to the teacher/student relationship, also those which make up the organizational framework of the establishment concerned". In interpreting the VAT exemption for education, one should therefore consider the whole framework of facilities, teaching materials, technical resources, educational policy and organizational infrastructure of the specific educational establishment in which teachers work.

In Haderer (case C-445/05), the CJEU considered the case of a freelance private teacher who provided pottery and ceramics classes and assistance to schoolwork in different education establishments, charging these host establishments for his services. The German tax authority had taken the view that the ceramic and pottery classes could not be qualified as education because, being intended purely for leisure, they did not involve the same types of demands as courses normally given in schools or universities. The CJEU ruled that for the purposes of VAT, the notion of school or university education should not be limited to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but also includes "other activities which are taught in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational".

In both Horizon College and Haderer cases, the CJEU stopped short of producing a comprehensive definition of what constitutes VAT exempt education. This notwithstanding, these judgments are helpful because they acknowledge the transfer of knowledge as a critical element of educational activity. These judgments also confirm that education is not defined by a formal curriculum or evaluation, and that leisure activities are excluded from the exemption. In essence, therefore, education services within the meaning of the VAT exemption are to be found where students pay for the transfer of knowledge.

Motor car driving schools

The case of A & G Fahrschul-Akademie (C-449/17) relates specifically to a private driving school and is one of the leading cases on the notion of education for VAT exemption purposes. In this case, the Advocate-General (AG) contended that the term "school or university education" refers to the systems of general education existing in all Member States that are accessible to everyone and cover a very broad range of subjects. These systems, usually divided into stages, aim at providing the public with the knowledge and skills that "allow them to operate successfully in modern society in both the private and professional spheres". A feature of these general education systems is that they are tightly and comprehensively regulated by the Member States' laws, which defines the structure of the school system and the way in which schools operate, the curriculum, teachers' qualifications and the rules on obtaining certificates.

On this basis, the VAT exemption for education should not apply to services which do not fall within the scope of the general education systems of individual Member States and which are provided by bodies which do not form part of those systems, such as private driving schools. Therefore, the CJEU denied the exemption to the motor car driving school.

Swimming lessons

The same approach was adopted by the CJEU in more recent decisions. In HA (case C-47/19), the CJEU ruled that surfing and sailing classes provided by private schools as part of sports activities and physical education organized by schools and universities should not benefit from the VAT exemption in article 132(1)(i) given their "specialized" and "occasional" nature.

In Dubrovin & Tröger (case C-373/19), the CJEU denied the exemption to swimming lessons for children provided by a private school given that such lessons remain a "specialized tuition provided occasionally", notwithstanding the undoubted importance and general interest in teaching the skill of swimming.

Recognition status of provider

As stated in the question, education and vocational training are exempt on the condition they are provided by bodies governed by public law having such as their aim or by other organisations recognized by the Member State concerned as having similar objects.

Accordingly, the exemption of article 132(1)(i) extends beyond bodies governed by public law with an educational aim, and also applies to other organizations "recognized" by Member States as having a similar object. The CJEU's case law in this respect provides that:

- Recognition rules are the competence of Member States and must respect the fundamental principles of EU law, in particular the principle of neutrality;

- Recognition does not demand a case-by-case assessment, and may result from the national legal and administrative framework; and

- When assessing the applicability of exemptions, national courts may consider the entire legal framework and market context under which these entities act.

In MDDP (case C-319/12), the CJEU considered the case of a private academy providing courses related to business management in Poland, where national law established a VAT exemption for all "educational services" without subjecting private entities to any kind of recognition. The CJEU recalled that under Article 132(1)(i), educational services are exempt from VAT only when provided by bodies governed by public law or by any other bodies "recognised by the Member State concerned as having similar objects". Thus Article 132(1)(i) "does not permit Member States to grant the supply of the educational services exemption to all private organisations providing such services, by including also those whose objects are not similar to those of bodies governed by public law".

Therefore, this VAT exemption cannot be applied without some sort of recognition under the rules of the Member State in question, albeit such rules should be in line with EU law principles.

Vocational training

Article 44 of the VAT Implementing regulation specifically clarifies that, for the purposes of the VAT exemption under consideration, vocational training or retraining services shall include instruction relating directly to a trade or profession as well as any instruction aimed at acquiring or updating knowledge for vocational purposes. It also provides that the duration of a vocational training or retraining course shall be irrelevant for this purpose.

Supplies closely related to education

The Brockenhurst College case (C-699/15) considered whether restaurant and theatre services to paying third parties through an educational establishment as part of training may be treated as such. The college provided restaurant services and theatre services to third parties through trainees, in the course of their practical training, in return for payment. The CJEU noted that the term "closely related" relates to the supply of services which are closely linked to "children's or young people's education, school or university education, vocational training or retraining". Thus, a supply of services can be regarded as "closely related" to those latter services only where they are actually supplied as services ancillary to the education provided by the relevant establishment, which constitutes the principal supply. The CJEU concluded that the activities carried out in this case, consisting in students of a higher education establishment supplying, for consideration and as part of their education, restaurant and entertainment services to third parties, may be regarded as supplies "closely related" to the principal supply of education and accordingly be exempt from VAT, provided that those services are essential to the students' education and that their basic purpose is not to obtain additional income for that establishment by carrying out transactions in direct competition with those of commercial enterprises liable for VAT.

Conclusion

It is reasonable to assume that facilitating the access to general education systems was the original intent of the European legislator in setting the exemption of article 132(1)(i), given that these systems provide everyone with the skills necessary for living in contemporary society.

In limiting the exemption to general education systems, the CJEU brings greater certainty to the interpretation of article 132(1)(i) and focuses it where the public interest is clearest, albeit with an emphasis on the formal elements of the exemption and the national procedures through educational organisations are recognised.

Question 8

Introduction

If a taxable person which is eligible to recover input VAT purchases a capital asset, the input VAT is typically recovered upfront based on the expected business use at the time the capital purchase is made. In terms of the VAT Capital Goods Scheme (CGS), however, adjustments may need to be made to ensure that the amount of input VAT deducted correctly reflects the use of the capital good over its deemed useful life.

Adjustment period

Article 187 of the Principal VAT Directive provides that in the case of capital goods, adjustment shall be spread over five (5) years including that in which the goods were acquired or manufactured. EU member states may, however, choose to base the adjustment on a period of five (5) full years starting from the time at which the goods are first used instead.

Furthermore, in the case of immovable property acquired as capital goods (e.g. buildings), the adjustment period may be extended up to twenty (20) years.

Annual adjustments

In terms of the CGS, the annual adjustment shall be made only in respect of one-fifth of the VAT charged on the capital goods, or, if the adjustment period has been extended, in respect of the corresponding fraction thereof. This adjustment shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired, manufactured or, where applicable, used for the first time.

Annual adjustments are triggered where, for example, an entity carries on mixed supplies (e.g. both VAT taxable and VAT exempt without credit supplies) and its input VAT recovery ratio (calculated using the standard turnover pro rata) varies on an annual basis.

Example

A financial services business buys computer equipment for €100,000 + €25,000 VAT. This computer equipment constitutes a capital asset that is used for both taxable and VAT exempt supplies. In the year in which the computer is purchased and put to use in the business, the taxable use percentage calculated in accordance with Articles 173-175 PVD is 10%.

In the following four years, the taxable use percentage is 15%, 20%, 5% and 2%.

In the first year, the business will initially recover €25,000 x 10% = €2,500.

The adjustment will be based on the spreading of the €25,000 VAT element over the adjustment period of 5 years – namely €5,000 per annum – of which 10% has been recovered in year 1. So the subsequent adjustments will be:

- year 2: recover an additional (15% – 10%) x €5,000 = €250
- year 3: recover an additional (20% – 10%) x €5,000 = €500
- year 4: repay to the tax authorities (10% – 5%) x €5,000 = €250
- year 5: repay to the tax authorities (10% – 2%) x €5,000 = €400

After year 5, the ‘tax life’ of the computer equipment for VAT purposes has been exhausted, and no further adjustment is required. Overall, the company will have recovered €2,600 net, which reflects the average taxable use over the 5 year period of reference.

One-time adjustments

One-time adjustments are triggered when, for example, an entity which originally carried on supplies conferring input VAT recovery rights (e.g. VAT taxable supplies) switches its activity to one entailing supplies which do not confer input VAT recover rights (e.g. VAT exempt without credit supplies). Such adjustments would typically be accounted for in full during the VAT period in which the event triggering the adjustment occurs.

Article 188 of the Principal VAT Directive considers the VAT adjustment required where the capital goods item is disposed of before the life has ended. In this regard, Article 188 provides that if supplied during the adjustment period, capital goods shall be treated as if they had been applied to an economic activity of the taxable person up until expiry of the adjustment period.

The economic activity shall be presumed to be fully taxed in cases where the supply of the capital goods is taxed, whereas the economic activity shall be presumed to be fully exempt in cases where the supply of the capital goods is exempt.

The adjustment provided for in Article 188 shall be made only once in respect of all the time covered by the adjustment period that remains to run. However, where the supply of capital goods is exempt, EU member states may waive the requirement for adjustment in so far as the purchaser is a taxable person using the capital goods in question solely for transactions in respect of which VAT is deductible.

Other provisions on capital goods

Article 189 of the Principal VAT Directive provides that EU member states may:

1) define the concept of capital goods;
2) specify the amount of the VAT which is to be taken into consideration for adjustment;
3) adopt any measures needed to ensure that adjustment does not give rise to any unjustified advantage;
4) permit administrative simplifications.

These rules permit significant flexibility to EU member states in the way in which they apply the CGS, resulting in variations across the schemes applied by different EU member states.

Article 190 of the Principal VAT Directive provides that adjustments should also be applied to certain purchases of services which have the nature of capital goods. For example, a business may purchase a building (goods) or may instead contract someone to build a building (services) – from a fiscal neutrality perspective, the resulting asset should be treated the same way for VAT purposes.

Conclusion

The CGS is a measure that primarily seeks to avoid VAT abuse and unjust enrichment to persons acquiring capital goods. The CGS helpfully acknowledges and confirms the general principle that, in the case of businesses enjoying input VAT recovery rights, an immediate deduction of input VAT incurred is typically allowed. In the event of changes in circumstances, there is either a claw back of part of the initial deduction, or an additional deduction, in order to equitably reflect the actual taxable use of the asset.