THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2023

MODULE 3.02 – EU VAT OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Finance Director
Elan BV
Bordonia

Dear Finance Director,

In response to your request for advice concerning VAT, I can provide the following information.

Elan is making supplies of animal boarding in Bordonia with clients belonging in both Bordonia and Astoria. To determine the place of supply it is important to consider whether the supplies are to non-taxable persons or taxable persons as determined by Articles 44 and 45 PVD. If clients are taxable persons, the place of supply will be made where the clients belong or have established their business. However, it seems more likely that the majority of clients will be non-taxable persons and that the supply will be treated as being made in Bordonia with Bordonian VAT being charged to residents of both Bordonia and Astoria. The same treatment will apply to non-EU resident animal owners.

It is arguable that an element of the supply could be regarded as the supply of services relating to immovable property due to the importance of the kennelling aspect of the services. However, Art 47 PVD and Art 31 of the Implementing Regulations do not contain any reference to animal boarding or stabling and it would be difficult to see animal boarding as being similar to hotel accommodation or similar services.

Veterinary services provided in Bordonia by a business established in the same member state would be subject to Bordonia VAT except possibly in the circumstances where the recipient is a non-EU resident.

Collecting any veterinary charge from customers and passing it to the veterinarian does not result in a supply by Elan as no charge is raised for this activity. It is possible that the provision of services in advance of payment may result in bad debts for the veterinarian.

Licensing fee paid to local government

A statutory fee paid to a local government is unlikely to be charged with VAT as the collection of statutory fees is not generally treated as an economic activity by a taxable person – Art 9 PVD.

Animal boarding for an inclusive fee

The VAT treatment of services of animal boarding and any veterinary care may give rise to difficulties if the suppliers of each element are established in different member states. However it appears that any required veterinary services will be supplied to Elan. This will result in a reverse charge supply under Art 45 PVD with Elan accounting for the VAT due in Bordonia. The veterinarian supplier will not need to charge VAT on the supply but will be required to include the supplies on a recapitulative statement made in Astoria.

Elan's charge to customers of €500 per animal could be seen as the consideration for a composite service. The predominant element under CPP principles is likely to be the boarding element particularly as it is possible in some cases that no veterinarian services are required. This combined supply would be subject to VAT in Bordonia when made to a non-taxable person. The veterinarian supplier established in Astoria will not need to register for VAT in Bordonia and Elan will not be considered an undisclosed agent as it is a principal contracting directly with its customers.

Yours faithfully,
ADIT Candidate

Question 2

Erasmus Spa – report on VAT treatment of estate agency supplies

Property advertising services

Erasmus provides estate agency supplies for properties in Thebia and other member states to individuals belonging in the same states. Under the basic rule contained in Art 45 PVD the place of supply is where Erasmus is established which is Thebia, however because the services are related to land Art 47 PVD determines that the place of supply shall be the location of the property. Erasmus will need to register for VAT in each of the countries in which it the properties which it advertises are located and will need to charge VAT on the supplies made.

Timeshare income

The services connected with timeshares has been considered in CJEU cases RCI Europe (C-37/08) and MacDonald Resorts Ltd (C-270/09) which held that the place of supply of the resale of timeshare membership, annual fees and exchange fees was the place where the property subject to the timeshare was located and not where the business selling the timeshare arrangement was established. Although the members of this scheme are all resident in Thebia, these cases introduce a practical problem in that the tax treatment of the sale of timeshare "points" can't be determined until the place at which those points will be consumed is known, this may of course be a long time after the original sale of timeshare points and in some cases may never occur.

Holiday lets

The letting as holiday lets of properties in Switzerland will be outside the scope of Thebia VAT because the place of supply is Switzerland, the place where the properties are located (Art 47), although a liability to register in Switzerland may arise. The letting of the properties in Thebia will be subject to Thebia VAT because the properties are located there (Art 47) as long as the Thebia tax authority excludes holiday lets from the exemption for "leasing or letting of immovable property" that exists under Art 135 (1)(l) member states have wide discretion to determine which activities should be treated within that exemption.

Insurance broker commission

The income derived from acting as Insurance broker is likely to be exempt from VAT under Art 135 (1)(c) PVD, because the place of supply to persons belonging in the EU will be where the supplier is established under Art 45. The location of the building is not relevant to the Insurance exemption (unlike the place of supply of services related to Land). Any input tax incurred in making intermediary Insurance supplies is unlikely to be recoverable when made to EU residents, however it should be recoverable under Art 169 (c) when the recipient is located outside the EU.

Accountancy services

Thebian VAT will be recoverable by Erasmus where it directly relates to supplies made of holiday lets in Thebia if they are subject to VAT in Thebia. Any input VAT relating to the lets in Switzerland will be recoverable if the treatment of similar supplies in Thebia would be subject to VAT Art 169 (a) PVD.

PART B

Question 3

Domino is making supplies of electronic services within the meaning of Art 58 and Annex II PVD. Electronic services made to non-taxable persons are deemed to be supplied in the country in which the recipient of the services belongs, which are Bordonia and Thebia. Because Domino does not have an establishment within the EU they have options of i) registering for VAT in both Bordonia and Thebia and accounting for output and input tax on domestic returns, or ii) registering for the One Stop Shop (OSS) in a member state of their choosing as a non-Union established business) Arts 358a-369 PVD. It is unlikely that any customers are taxable persons but if they were the reverse charge would apply.

If the registration for OSS is made in either Bordonia or Thebia it will not be possible to account for sales to customers belonging in the member state of identification (either Bordonia or Thebia) as local sales will need to be recorded on a domestic return. It may therefore be simpler for Domino to register for OSS in a different member state and account for sales made to both countries through a single return. The calculation of VAT due on each supply needs to be made at the VAT rate applicable in the relevant member state and as pricing is in Euros there is no requirement to convert currency values. OSS returns need to be made quarterly and submitted within 30 days of the quarter end. Tax must be declared in Euros and records must be retained electronically and kept for 10 years. There is not a requirement to use a tax representative or agent established in the member state of identification.

The additional service of DNA testing and analysis offered through the on-line platform does not fall within the definition of TBE services due to Art 58, however since 1 July 2021 the OSS non-Union scheme includes all services supplied to non-taxable persons which take place in a Member State in accordance with the place of supply rules. As a consequence, the VAT on any additional charge for DNA testing will also need to be accounted for through the OSS (or included on a domestic VAT return if that option has been taken).

The local laboratory in Bordonia who provide testing services to Domino will be able to make a B2B supply without charging Bordonia VAT under Art 44 PVD because Domino is established in the USA and do not have a fixed establishment in the EU. The fact that Domino is registered for VAT in the EU does not preclude the supply from being treated as outside the scope of Bordonia VAT.

<u>Question 4</u>

To: Finance Director, Etna
From: ADIT candidate
Subject: Catering

Dear Sir/Madam,

Catering services provided by a supplier at a restaurant in Theta are treated for VAT purposes as having a place of supply where the service is physically carried out and are subject to Theta VAT – Art 55 PVD. Article 6 of the Implementing regulations define the meaning of restaurant and catering services.

However, restaurant and catering services provided on trains (ships and aircraft) are dealt with under Art 57 PVD which states that the place of supply of these during a passenger transport operation within the EU shall be the point of departure. It follows that for outbound rail journeys from the Theta capital that Theta VAT will need to be charged. However, on the return journey back to Theta there will be a VAT liability to the member states in which the journeys commence. This will require Etna to register for VAT in each of the member states from which relevant journeys begin and to consider its pricing structure to ensure that the VAT exclusive price allows sufficient profit. It may be necessary to have different prices depending on where the journey begins.

For restaurant services provided on direct trains leaving for journeys to Zurich, Switzerland – which is not part of the EU, where part of the journey is outside the EU the position is less clear. Article 36 of the Implementing Regulations (282/2011) states that where restaurant and catering services are provided outside a passenger transport operation between member states but in the territory of a Member state or third country, that supply shall be covered by Article 55 of PVD. Art 55 states that the place of supply shall be where the services are physically carried out. – in this case Theta VAT would be due on all catering services made while the meal is served on the train in a section of the journey in Theta territory.

However, some member states have decided to not apply VAT to catering services provided on the outward leg of an international journey to a third country such as Switzerland, this approach removes the practical difficulties of determining exactly in which territory a meal has been served. (Any supplies made on the return leg are likely to be subject to any VAT rules which apply in Switzerland and need to be determined in conjunction with the Swiss tax authority.

<u>Dishonoured payments</u>

Where payment for a supply has been dishonoured there is a general rule that allows the supplier to make an adjustment to the taxable amount and any VAT due – this is covered by Art 90 PVD. Art 90 allows member states to determine the conditions that need to be met before any adjustment can be made. If all reasonable efforts have been made to identify the supplies for which payment has been dishonoured, it is expected any reduction shall be made on the return on which the EU VAT was initially declared. Where it is not possible to precisely determine which supply has been unpaid, I suggest that you apportion the dishonoured payments in the proportion that the value of supplies made in the territory of each member state is to the value of all sales made in all member states. If possible you should agree this approach with the relevant tax authorities in each member state in which supplies are made.

I trust this provides the information you require.

Yours faithfully,
ADIT Candidate

PART C

Question 5

The triangulation of goods refers to the situation in which a supplier in member state A sells goods to a business customer in member state B (the intermediary) but those goods are dispatched directly to the intermediary's customer in member state C. A simplification arrangement legislated in Art 141 PVD allows, subject to conditions being met for the intermediary to not account for acquisition tax in member state B on the supply from member state A

The conditions that need to be met include:

- The supplier in member state A issuing an invoice showing the VAT registration number of its customer in member state B and retaining evidence of removal to member state C.
- The supplier in member state A making a return on the recapulative statement indicating triangulation.
- The intermediary in member state B endorsing its invoice with the phrase identifying that triangulation is being applied and making a return on a recapitulative statement for the sale to member state C.
- The recipient in member state C must account for VAT on the goods in that country as a reverse charge.
- All 3 entities need to be registered for VAT in their respective member states.

The entity bearing the greatest risk is the intermediary in member state B because if any one of the tax authorities in three member states involved believes that the conditions have not been met, it is most likely that the relaxation allowing acquisition tax not to be accounted for in member state B will be denied. This will give the intermediary a liability to account for acquisition tax in member state B under the "fallback" provisions of Art 41 due to it allowing its VAT identification number to be used for the removal from member state A.

The risk is that the acquisition tax will not be recoverable as relating to an onward supply by the intermediary in member state B and will effectively be a hard charge on it. The fallback liability was confirmed by the CJEU in Cases C-539/08 Staatssecretaris van Financiën v X; CJEU Case C-536/08 Staatssecretaris van Financiën v Facet Trading BV [2010].

Question 6

"Economic activity" as referred to in Art 9 PVD is defined to include "Any activity of producers, businesses or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity." It can therefore be considered to encompass a broad range of activities which can be collectively considered to be within the scope of VAT when performed by a taxable person.

The principle effect of identifying economic activities as distinct from any activity, is to exclude from VAT those activities that are of a private or hobby nature even where they may be undertaken by a taxable person who is engaged in both types of activity. An example would be where a builder engaged in a trade constructing houses also, independent of his trade, sells some collectible stamps. The application of VAT would only apply to the building activities and not the stamp collecting unless it was performed with regularity and competed with others to make profit and itself became economic activity.

The categorisation of activities as "economic activity" can also act to limit the circumstances in which an individual or organisation may gain an entitlement to credit or refund of VAT incurred. For example, a charity or club may undertake activity for the benefit of others or mutual benefit which results in expenditure that includes VAT. It would naturally be desirable to obtain a refund of VAT but the entity is precluded from doing so except where the activity to which the expenditure relates falls within recognised "economic activity". "Economic activity" must exhibit such characteristics as frequency, intention to make a profit, competition with others undertaking similar tasks and what can be generally considered to be features of business enterprises. The passive holding of investments without any accompanied involvement in the management or running of the investment or asset. is not considered economic activity by the courts.

Relevant cases supporting the existence of economic activities include Rompelman, Ryanair, C&D Foods, and Marie Participations.

Relevant cases supporting the absence of economic activities include Polysar,Tolsma, Halifax, Welcome Trust, and Apple and Pear Development Council.

In each case marks will be awarded for alternative relevant cases.

Question 7

The term “use and enjoyment” is relevant to determining the place of supply of services and exists to ensure that neither double or non-taxation exists when certain services are provided by EU or non-EU established businesses. It is provided for by Art 59a PVD which gives member states discretion to implement “use and enjoyment” provisions in relation to activities for which the place of supply is determined under Art 44,45,56, 58 and 59.

The approach to the use and enjoyment options can be described as positive or negative use and enjoyment. Positive being the case where a host supplier supplies to a non-EU customer with the place of supply being where the services are used. Conversely negative use and enjoyment rules apply where a host supplier supplies services to a non-EU taxable person with the place of supply being treated, by the application of the rule, as the host country.

A simple example of the application of the “use and enjoyment” provision can be illustrated where a supplier of car hire in a member state supplies a vehicle to a private individual who intends to use the car outside the EU. Under normal rules the supplier would charge VAT in the member state of hire, but as the use of the vehicle is intended to take place outside the EU, the place of supply will also be outside the EU – if the tax authority in the relevant member state has enacted the provision in respect of Art 56 Hiring of means of transport. It is important to note that the override cannot change the place of supply between member states, only between member state and non-EU or conversely non-EU to a specific member state.

Notable CJEU cases that have considered this point include:

- Case C-653/11 HMRC v Paul Newey t/a Ocean Finance also considered the place where advertising services were used and enjoyed in circumstances in which a finance company initially established in a member state changed to one based outside the EU so as to purchase advertising services for UK TV advertising from a UK supplier without VAT being charged. The VAT would have otherwise have been irrecoverable due to the exempt activities. The CJEU determined that the real “use and enjoyment” of the advertising was in the UK and VAT was chargeable. This largely removed the advantage the business was seeking.
- C-593/19 SK Telecom C-593/19 [2021] also considered the point in relation to telecommunications where a non-EU supplier charged customers for use of their services when roaming in Austria – who had implemented a use and enjoyment law for telecoms. The CJEU decided that the “use and enjoyment” override applies and Austrian VAT should be accounted for.
- Case C- 1/08 Athesia Druck Srl considered a case in which an EU supplier of advertising services to a non-EU business resulted in advertising material being distributed to individuals in the supplier’s member state. The CJEU found that since the use and enjoyment of the advertising was within the EU to supply was subject to VAT.

Question 8

A non-EU visitor to the EU can enjoy some reliefs that are not available to an EU resident. These are generally aimed at promoting business with non-EU customers such as tourists and business visitors.

A common relief for a non-EU visitor to receive is the ability to purchase VAT free goods under Art 146 (1)(b) PVD where the goods are transported by or on behalf of the customer. This relief can include electronic goods, jewellery and other expensive items but is not extended to motor vehicles for private use and items for pleasure craft and private aircraft. The supplier is required to retain evidence of the removal of the goods from the EU.

When the goods are to be carried in a travellers personal luggage, the relief is conditional upon the goods being removed from the EU by the end of the third month following the month in which the supply took place. Member states may also set a minimum goods value before being eligible for VAT free supply (Art 147 PVD).

For the purposes of relief under Art 147 it is a requirement that the permanent address or habitual residence of the traveller is not within the EU. The permanent address or habitual residence means the place entered as such in a passport, identity card or other document accepted by the member state of supply.

This definition differs from the more common definition used to determine the place of supply for electronic services etc at Art 13 of Implementing Regulation 282/2011 which says that the place where a natural person “usually resides” shall be the place where they usually live as a result of personal and occupational ties. The regulation also covers the possibility that ties are in different places and that no occupational ties may exist – in such cases the place of personal ties shall be used.

A non-EU visitor can also benefit from VAT free (exempt) services applied to goods which have been imported into the member state for the purpose of the work that is performed. This may take the form of repair, restoration or improvement to moveable property which can include motor vehicles, yachts, electrical goods, watches etc. The supplier can exempt the supply (with credit) and it is conditional upon evidence being held that the goods are subsequently removed from the EU.

An EU supplier exempting this type of supply is advised to retain an amount equivalent to the VAT that would otherwise be chargeable, which can be refunded when satisfactory proof of export has been provided. This provides a security against the possibility that the goods remain in the EU or are not exported within specified time limits. Proof of export may consist of a sales invoice stamped by the last Customs border before the goods left the EU or a specified form specific to the visitor export arrangements.