THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

December 2024

MODULE 3.02 – EU VAT OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Finance Director
Landcom
Merkia

12 December 2024

Dear Sir or Madam

Thank you for your request for advice concerning your landscape planning consultancy business.
Landscape planning consultancy business

It appears that the landscape planning consultancy business relate to a specific site and neither the status of the customer nor the type of the property are very relevant when determining the place of supply of the services (PoS).

Landscape planning services are included within the description of services connected with immovable property in article 47 PVD, for which the place of supply is determined by where the property is located.

Therefore, the place of supply will be determined as follows:

1) When the property will be located in Merkia, the place of supply will be Merkia. Landcom will be charging Merkian VAT irrespective of the status and the place of establishment of the customer.

2) When the property is located in another member state, the place of supply shifts to that member state. Landcom must assess whether VAT registration is required in that jurisdiction, particularly if the customer is a non-business entity.

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

3) When the property is located outside the EU, the place of supply will be the location of the property, meaning outside the EU. As a result, those supplies will be considered outside the scope of the EU VAT.

Landscape planning provided to Merkian clients – Property located in Arestia

As stated above, when the property is located outside the EU, the place of supply will be where the property is located, i.e., outside the EU. Hence, those supplies will be treated as outside the scope of the EU VAT despite the fact that the client is established in Merkia.

Future hotel development

Since the location of the actual land upon which the hotel may be constructed is unclear at the stage of designing the landscaping plans it could be argued that Landcom cannot link its services to a specific site.

Consequently, these services cannot be classified as land related services and the services fall within the basic rule and would be supplied in Merkia where the recipient of the services is established. The supply would therefore be subject to Merkian VAT and Landcom would account for any VAT on its invoice.

Recovery of Overcharged VAT – Sales of Landcom

The recovery of overcharged VAT (e.g., when an incorrect rate has been applied on an invoice, or when the place of supply is another member state) has long been a controversial point as the EU VAT Directive considers that VAT incorrectly invoiced is:

1) owed to the tax authorities; and
2) not deductible for the customer (i.e., the customer must seek remedy from the seller).

In addition, several Member States consider that refunding sellers for overcharged VAT constitutes "unjust enrichment." As a result, If a business has charged VAT in error, collected it from a customer and paid it to the

authorities, it can be surprisingly difficult to put that right even if everyone accepts that no VAT should have been charged.

Moreover, according to article 203 of the EU VAT Directive, VAT is payable by any person who enters the VAT on an invoice, even if there is no actual taxable transaction. However, this only applies where VAT has been invoiced incorrectly and there is a risk of loss of tax revenue because the recipient of the invoice could deduct such VAT.

In Société Comateb & Others case (C-192/95), the CJEU confirmed that unjust enrichment of a claimant was a valid reason for a government to refuse a tax repayment. However, this would only be right where the tax had been borne in its entirety by someone else. If, for example, the customer had agreed a gross price with the business and was indifferent to whether this included VAT or not, the tax would not have been 'passed on'.

In this respect, recent CJEU cases provide some clarity on the reclaim of overcharged VAT on business-to-consumer (B2C) transactions.

In P GmbH (C-378/21), an indoor playground operator charged customers the standard Austrian VAT rate of 20% instead of the reduced VAT rate of 13%, with the latter being the correct rate for supplies of this kind in Austria. The seller tried to reclaim the overcharged VAT but was denied by the Austrian tax authorities because the taxpayer did not correct the original invoices that had been issued to the private customers and because they argued that any refund to the taxpayer would result in an unjust enrichment of the taxpayer.

The CJEU held that 'unjust enrichment' applies where VAT has been invoiced incorrectly and there is a risk of loss of tax revenue because the recipient of the invoice could deduct such VAT. In the present case, since the customers were final consumers with no right to deduct VAT, there was no risk of loss of tax revenue, and thus the CJEU concluded that Article 203 of the VAT Directive was not applicable.

However, in B2B cases, where customers should in principle be able to recover VAT, an invoice correction might be required.

<u>Recovery of Overcharged VAT – Purchases of Landcom</u>

Landcom should first seek a remedy directly from the seller who overcharged the company by applying the standard VAT rate instead of the reduced rate on the invoice. Landcom should request the seller to correct the error by issuing a credit note, effectively cancelling the excess VAT that was charged.

In Genius Holding BV case (C-342/87), the CJEU held that the right to deduct could only be exercised in respect of tax which was actually due under a taxable transaction which was subject to VAT. There was no right to deduct input tax which was wrongly charged. This meant it was up to the business to find the supplier and ask for the overcharged VAT back, rather than up to the tax authority to pay the claim and find the supplier.

Nevertheless, customers should be able to recover VAT overcharged from the tax authorities if the seller cannot (i.e., due to insolvency) or is not willing to correct the invoice and reimburse the overcharged VAT amount to the customer.

In Schütte case (C-453/22), the CJEU ruled that the EU VAT Directive and the principles of VAT neutrality and effectiveness require that a customer has a direct right to claim from the tax authorities the reimbursement of improperly invoiced VAT paid to their sellers and paid by those sellers to the public purse in circumstances where the customer cannot claim that reimbursement from those sellers due to the limitation period provided for by national law. The CJEU also ruled that if the VAT is not reimbursed by the tax authority within a reasonable time, the loss suffered by the customer of having borne the improperly charged VAT must be compensated by the payment of default interest by the tax authority.

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

Yours faithfully
ADIT Student

Question 2

The Board of Directors
Livro Limited
Astoria

12 December 2024

Dear Sirs / Madams

Thank you for your request for VAT advice concerning your textbook retail business.

Sale of textbooks via bookstore in Astoria

The sale of textbooks within the company's bookstore in Astoria refers to supplies of goods without transport. In terms of Article 31 PVD, where goods are not dispatched or transported, the place of supply shall be deemed to be the place where the goods are located at the time when the supply takes place, namely in Astoria, and therefore subject to Astoria VAT rules.

As a general rule, such supplies of goods would be taxable at the standard rate of VAT applicable in Astoria. However, in terms of Article 98 PVD, EU Member States are allowed to apply a reduced VAT rate or even an exemption with deductibility of the VAT paid at the preceding stage to specified supplies referred to in Annex III of the PVD, which includes the supply of books. Therefore, one would need to check the domestic VAT legislation of Astoria to ascertain whether the standard VAT rate or a reduced / zero VAT rate applies in Astoria to the sale of textbooks by Livro Limited via its physical bookstore in Astoria.

In any event, such supplies should in principle confer input VAT recovery rights for Livro Limited.

Sale of textbooks via online bookstore

The sale of textbooks by Livro Limited via its online bookstore whereby the said textbooks will be delivered from Astoria to retail customers established in other EU member states (namely Bodonia and Calla) constitute supplies of goods with transport. Furthermore, in terms of Article 14(4) PVD, 'intra-Community distance sales of goods' means supplies of goods dispatched or transported by or on behalf of the supplier, including where the supplier intervenes indirectly in the transport or dispatch of the goods, from a Member State other than that in which dispatch or transport of the goods to the customer ends, amongst others where the customer is a non-taxable person, as in the case at hand.

In terms of Article 32 PVD, where goods are dispatched or transported, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins (namely Astoria). However, by way of derogation from Article 32 PVD, Article 33(a) PVD provides that the place of supply of intra-Community distance sales of goods shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends.

However, Article 59c PVD provides that the rules governing intra-Community distance sales of goods shall not apply – unless the supplier chooses to opt otherwise – where:

a) The supplier (namely Livro Limited) is established only in one EU Member State for VAT purposes (namely Astoria), which is the case; and

b) The goods are dispatched or transported to Member State(s) – namely Bodonia and Calla – other than the Member State of establishment of the supplier (namely Astoria), which is indeed also the case; and

c) The total value of such supplies (plus any business-to-consumer (B2C) supplies of TBE services i.e. telecommunications, radio/television broadcasting electronically supplied services to non-taxable person in terms of Article 58 PVD) does not exceed EUR10,000 in the current or preceding calendar year. From the information provided, this condition is satisfied by Livro Limtied for the calendar year 2024 and, based on current projections, is also expected to be satisfied during calendar year 2025.

Therefore, it is expected that the rules governing intra-Community distance sales of goods shall not apply to Livro Limited during 2024 and 2025. Therefore, Article 32 PVD shall apply, whereby the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins (namely Astoria), and hence the supplies shall be subject to Astoria VAT rules.

Accordingly, the same VAT treatment as outlined for domestic supplies in section a) above shall apply i.e. such supplies of goods should generally be taxable at the standard rate of VAT applicable in Astoria, unless a reduced / zero VAT rate applies to the supply of books taking place in Astoria in terms of the domestic VAT legislation of Astoria.

Should Livro Limited choose to exercise the option available to it in terms of Article 59c(3) PVD for the rules governing intra-Community distance sales of goods to apply to it instead, then the place of supply of intra-Community distance sales of goods shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends, namely in Bodonia and in Calla respectively. This would mean that the supplies would instead become subject to the VAT rules of Bodonia / Calla and accordingly subject to the applicable standard / reduced / zero VAT rate applicable to the supply of books in terms of the applicable domestic VAT legislation of Bodonia / Calla.

In any event, again such supplies should in principle continue to confer full input VAT recovery rights for Livro Limited.

Courier services supplied to Livro Limited

The courier services provided by the supplier established in Bodonia to Livro Limited are supplies of services which are governed by the general business-to-business (B2B) place of supply of services rule set out in Article 44 PVD, which states that the place of supply of services to a taxable person acting as such shall be the place where that person has established his business.

It is understood that Livro Limited is established in Astoria and does not maintain any fixed establishment in any other country. Accordingly, the supply of courier services to Livro Limited shall be deemed to take place in Astoria.

Since the service provider is established in Bodonia (and not in Astoria), Article 196 PVD applies whereby the liability to account for and pay VAT in Astoria is shifted onto the business customer, namely Livro Limited, via the reverse charge mechanism.

We would typically expect such courier services to be subject to the standard VAT rate in Astoria. However, on the basis that these services are used for the purposes of taxed transactions of Livro Limited (namely the sales of textbooks via the online bookstore to customers established in Bodonia and Calla) then, by virtue of Article 168 PVD, Livro Limited shall be entitled to immediately deduct the self-charged VAT thereon. As a result, there should be no actual VAT payable in this respect by Livro Limited.

Payment services supplied to Livro Limited

The payment services provided by the supplier established in Denares (non-EU) to Livro Limited are supplies of services which are governed by the general business-to-business (B2B) place of supply of services rule set out in Article 44 PVD, which states that the place of supply of services to a taxable person acting as such shall be the place where that person has established his business. Accordingly, the supply of payment services to Livro Limited shall be deemed to take place in Astoria.

In terms of Article 135(1)(d) PVD, transactions concerning payments are exempt from VAT. Since the payment services in question consist of the execution of orders for the transfer of a sum of money from one bank account to another, and entail a change in the legal and financial situation existing between the payor and the recipient, and between those parties and their respective banks, then based on CJEU case law (such as case C-2/95 SDC), the service in question should indeed qualify as a VAT exempt payment transaction. Accordingly, the supply in question should not trigger a VAT liability.

Proposed sale of e-books

The proposed extension of the current online bookshop to also enable automated online sales of downloadable electronic books (e-books) to retail customers established in the EU as from 2025 would result in Livro Limited being engaged in making electronically supplied services (ESS) to non-taxable persons. By virtue of Article 58 PVD, such supplies are deemed to take place where the customer is established, has his permanent address or usually resides, and therefore VAT would generally be due in each of the relevant EU Member States according to the country of establishment of the respective customers, and at the applicable rates to e-books prevailing in those EU Member States.

It is pertinent to note that the exception based on Article 59c PVD referred to in section b) above to treat the supplies as taking place in Astoria instead could in principle also apply. However, considering the low threshold of EUR10,000 and the fact that for 2025 the company is already projecting online physical textbook sales to other EU Member States amounting to EUR9,500, it is likely that the sale of e-books would result in the EUR10,000 threshold being breached as from 2025, with the result that Article 59c would cease to find application. This would mean that the

cross-border sales made by Livro Limited (not merely the proposed new e-books activity but also the existing physical textbook sales made to customers in Bodonia and Calla) would be subject to VAT at the applicable rate(s) in the relevant EU countries of destination of the physical textbooks (i.e. Bodonia and/or Calla) and as regards e-book sales, these would be subject to VAT at the applicable rate(s) in the relevant EU countries where the customers are established.

In this regard, from a VAT compliance perspective, it would typically be advisable for Livro Limited to avail of the Union OSS (One Stop Shop) scheme, which would allow it to maintain a single VAT registration in Astoria, and to fulfil its VAT reporting and payment obligations in other EU Member States via the submission of a single quarterly OSS return in Astoria.

It may be pertinent to note that the OSS scheme is voluntary. Therefore, if Livro Limited opts not to use the Union OSS, it would be obliged to register for VAT in all EU countries where it makes supplies to final customers, charging VAT at the applicable rate(s) in the relevant EU Member States, and submitting corresponding VAT returns in each of these EU Member States. This would likely result in a very significant VAT compliance burden, and therefore we would expect that it would be more opportune for Livro Limited to use the Union OSS scheme.

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

Yours faithfully
ADIT Student

PART B

Question 3

To: Finance Director, Acropolis
From: ADIT Student
Subject: EU Cross border supplies
Date: 13 December 2024

Dear Sir or Madam

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

Intra-EU B2B sales of goods

The VAT treatment applicable to intra-EU B2B sales of goods should in principle be relatively straight forward:

1) the seller zero-rates the sale (EU Dispatch); and
2) the customer self-assesses VAT on the purchase (EU Acquisition).

However, this mechanism has unfortunately been prone to fraud and tax authorities across the EU have in recent years focused on the application of the zero-rating on the seller's side, taking an increasingly strict approach.

It is worth noting that the rules for documenting EU cross-border movements of goods for supporting the zero-rate treatment by the seller have been harmonized as of 1 January 2020 based on the "Quick Fixes". In particular, the seller must ensure that the following conditions are met before treating the intra-EU sales of goods as zero-rated:

1) Goods were transported between two Member States and the acquirer qualified as a taxable person for VAT purposes;

2) The acquirer must be identified for VAT purposes in a Member State other than that in which the transport of the goods begins and has indicated this VAT identification number to the seller;

3) The seller verifies the VAT identification number of the acquirer; and

4) The seller must report the transaction in its recapitulative statement (also commonly referred to as EC Sales List).

Quick fixes - Harmonized documentation requirements

The EU Directive and Regulations now contain a list of documentary evidence allowing taxpayers to presume that the goods have been transported from one Member State to another to support the application of the zero VAT rate (i.e. VAT exemption) to the EU cross-border supply of goods.

In particular, the supplier has to provide at least two non-contradictory evidential documents that were prepared independently from one another.

Quick fixes - Mandatory VAT identification number verification for EU cross-border supplies

Based on the new rules, the importance of the VAT ID numbers of customers increases. Effectively, reporting an incorrect VAT ID number of your customer in the recapitulative statement prevents you from applying the zero VAT rate (i.e. VAT exemption).

Therefore, to mitigate these risks, we strongly recommend reassessing your current processes and strengthening the controls related to customer VAT identification number verification and data management.

B2 Energy s.r.o. case (C-676/22)

The CJEU recently referred to the conditions for intra-EU cross-border sales of goods to be zero-rated in B2 Energy s.r.o. case (C-676/22). Under the applicable provisions at the time (which precede the "quick fixes" provisions, cross-border sales of goods could be zero-rated if the goods were transported between two Member States and the acquirer qualified as a taxpayer for VAT purposes.

In the case, a Czech taxpayer delivered oil to Poland, but the tax documents showed different recipients than those who actually received the goods.

The CJEU focused on whether the recipients qualified as taxpayers for VAT purposes. It held that the zero-rating can be denied if the seller has not shown that the goods were sold to a recipient qualifying as a taxable person for VAT purposes in the Member State of arrival of the goods if the factual evidence provided by the seller does not contain the information necessary to verify that the recipient had that status.

Intra-EU B2B chain supplies

EU cross-border chain transactions concern supply chains involving three parties (or more) and which entail the shipment of goods from one EU country to another. For instance, chain transactions can exist if the goods are purchased from third parties and subsequently supplied onwards. The primary challenge that arises is determining who has made the exempt dispatch, i.e., the person who makes the supply which crosses the border.

The “Quick Fixes” VAT rules introduce harmonized criteria for determining in which leg the cross-border supply takes place.

As a general rule, the dispatch or intra-EU transport shall be attributed to the supply made to the intermediary. However, as a derogation from the general rule, if the intermediary arranges for the goods to be transported and provides the supplier with a VAT registration number that is valid in the Member State where the goods are shipped from, the exempt intra-EU movement is treated as the supply made by the intermediary.

It is important to note that this derogation does not cover scenarios where the intermediary is located in another Member State and it is necessary to establish whether the Triangulation simplification can be used.

The triangulation simplification applies where businesses in three different EU Member States are involved in a chain sale of goods, but the goods are shipped between two Member States. Typically, the business in the middle of the transaction (“B”) would need to register for VAT in either the Member State of dispatch or the Member State of arrival of the goods. However, under triangulation simplification, this requirement is waived if certain conditions are met and the final business in the chain (“C”) becomes liable for the VAT under the reverse charge system, simplifying the process for the middle party, i.e., B.

In Euro Tyre case (C-230/09), the CJEU held that ‘when goods are the subject of two successive supplies between different taxable persons acting as such, but of a single intra-Community transport, the determination of the transaction to which that transport should be ascribed’ (i.e., the supply by E or the supplies by M and V) ‘must be conducted in the light of an overall assessment of all the circumstances of the case in order to establish which of those two supplies fulfils all the conditions relating to an intra-Community supply’.

The CJEU further ruled that ‘the intra-Community transport should be ascribed to the first supply [i.e., E’s supply, upholding the appeal], on condition that the right to dispose of the goods as owner has been transferred to the second person acquiring the goods in the Member State of destination of the intra-Community transport’.

In Luxury Trust Automobil case (C-247/21), the CJEU examined whether the triangulation simplification could be denied by the Member State of Party B if the invoice from Party B to Party C did not explicitly include a reference to “reverse charge.”

The case involved an Austrian business, Luxury Trust Automobil, which purchased goods (vehicles) from a UK supplier using its Austrian VAT identification number and subsequently sold these goods to a Czech taxable person. The goods were shipped directly from the UK to the Czech Republic. It is essential to note that the transaction took place before Brexit.

The CJEU ruled that issuing a correct invoice is a substantive condition for applying the triangulation simplification. As for the triangulation simplification, the invoice should specifically state “reverse charge” to ensure the end customer is aware of their tax obligations. The CJEU further ruled that a retroactive inclusion of the correct reference on the invoice does not mean that the simplified triangulation applies retroactively.

The above can change the VAT registration and reporting obligations for yourself and your customers. Hence, it is vital to ensure that the information included in your systems as well as supporting documents (e.g., invoices, waybills, etc.) are in line with the legal requirements to ensure the correct VAT treatment is applied and not subject to challenges by tax authorities.

I trust this provides the information you require.

Yours faithfully
ADIT Student

Question 4

Part 1

The principle of abuse of law or abuse of rights allows denial of a lawful right which a taxpayer has generated in an artificial way, if that right should not fairly have been given to the taxpayer because it is contrary to the intention of the law. The CJEU's judgment in Halifax (case C-255/02) is the leading case establishing that the principle of abuse of law is applicable to VAT.

In its judgment, the CJEU essentially established the principle that any artificial or fictitious scheme which results in the accrual of a VAT advantage when the essential aim of that scheme is to obtain the said VAT advantage, the grant of which would be contrary to the purpose of VAT law, shall be disregarded and looked through.

In Cussens (case C-251/16), the CJEU considered that with regard to the principles of legal certainty and the protection of legitimate expectations, a taxable person who has created the conditions for obtaining a right in a fraudulent or abusive manner cannot rely on those principles. If the conditions of abuse of law are met, a taxpayer is not entitled to rely on legal certainty or legitimate expectations to try to legitimise the abuse.

The CJEU provided clarification that where an abusive practice exists, the transactions must be redefined to re-establish the transactions that would have existed had the taxable person not implemented the transactions that constituted the abusive practice. That redefinition, however, must not go further than is necessary to ensure that the correct amount of VAT is charged and to prevent tax evasion. In considering whether the transactions in the case under consideration were implemented to obtain a tax advantage, the CJEU stated it is necessary for the objectives of the transactions to be taken into account. The CJEU considered that it is for the referring court to determine whether the constituent elements of an abusive practice are present. By way of guidance, the CJEU noted that the referring court should consider the very artificial nature of those transactions and the links of a legal, economic and/or personal nature between parties involved in the transaction. The transactions had no commercial substance and were entered into between connected parties essentially with a view to reducing the amount of VAT due.

Case C-419/14 WebMindLicenses concerned whether licensing agreements were abusive for VAT purposes. The CJEU confirmed that it was not abusive for a company established in one member state to enter into a licensing agreement with a company established in another member state to exploit the lower VAT rate in force in that second member state. Only if the arrangements were fictitious would they satisfy the Halifax principle and be considered abusive. The Court indicated that it was for the referring court to analyse all the facts placed before it to determine whether the arrangements were genuine or not. This would include examining whether the establishment of the licensee's place of business, or fixed establishment, was genuine. In particular, whether the licensee had an appropriate structure, premises, human and technical resources and equipment to engage in economic activity in its own name, on its own behalf, under its own responsibility and at its own risk. If an abusive practice is found to exist, the transactions involved must be re-defined so as to reestablish the situation that would have prevailed and VAT adjusted accordingly, even if VAT has been paid in another member state.

In case C-273/18 Kuršu Zeme, the CJEU reconfirmed the Halifax principle that an abusive practice can only be found to exist where the following two conditions are met:

1) The transactions have resulted in the accrual of a tax advantage that is contrary to the VAT Directive and national provisions; and

2) It is apparent from a number of objective factors that the essential aim of the transactions undertaken is solely to obtain that tax advantage.

In its judgment, the CJEU held that in this case the tax authority had not provided any evidence that the transactions were not genuine and that any VAT advantage had in fact been obtained, and as a result it could not deny the taxpayer the right of input tax recovery.

Part 2

If a taxable person has incurred input VAT that is attributable to taxed supplies or other transactions conferring input VAT recovery rights, then that person is in principle entitled (subject to the normal rules of input VAT recovery) to recover that input VAT.

However, a taxpayer who claims input tax on transactions in respect of which he 'knew or should have known' that they were 'connected with fraudulent evasion of VAT' is to be denied his entitlement to the right to claim that input tax. This principle was first established in the Court of Justice of the European Union (CJEU)'s judgment in Axel Kittel and Recolta Recycling, cases C-439/04 and C-440/04. Accordingly, this is commonly referred to as the 'Kittel' principle.

In its judgment, the CJEU held that traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing their right to recover input VAT.

It is acknowledged that preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the EU VAT Directive, and Community law cannot be relied on for abusive or fraudulent ends. In this regard, the CJEU held that taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the EU VAT Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods. This is because in such a situation the taxable person aids the perpetrators of the fraud and effectively becomes an accomplice.

Conversely, the CJEU found that where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, EU VAT law precludes a provision of national law under which the fact that the contract of sale is void - by reason of a civil law provision which renders that contract void as contrary to public policy - causes that taxable person to lose the right to deduct the input VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of value added tax or to other fraud. The CJEU held that the voiding of the contract does not prevent the existence of an economic activity and a supply for VAT purposes, and the “innocent” business must remain entitled to recover input VAT.

By contrast, where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, it is for the national court to refuse that taxable person’s entitlement to the right to deduct.

The Kittel principle may be broken down into three ‘limbs’, namely:

1) Was there fraudulent evasion of VAT?
2) Was the transaction connected with that fraudulent evasion of VAT?
3) Did the taxable person, when he entered into the transaction, know or should he have known that it was connected with fraudulent evasion of VAT?

More recently, the CJEU issued a judgment in case C-512/21, Aquila Part Prod Com also concerning the right of tax authorities in EU member states to question the input VAT deduction by purchasers in a situation where their suppliers (or previous suppliers in the supply chain) committed tax fraud - for instance, suppliers who participated in VAT carousel fraud).

In its judgment, the Court recalled its existing jurisprudence on the issue of the right to deduct VAT in the event of tax fraud, in particular that:

1) A taxable person may be denied the right to deduct provided that it is shown on the basis of objective circumstances that they knew or should have known that, by purchasing the goods or services giving rise to the right of deduction, they were participating in a transaction related to such fraud committed by the supplier or other entity involved in the supply chain; and

2) A tax authority that intends to refuse the right to deduct must prove the existence of VAT fraud and that the taxable person either committed this fraud themselves or at least knew or should have known that a given transaction was related to the fraud.

In addition, in its decision, the CJEU indicated the following:

1) It is sufficient to provide evidence that a taxable person knew or could have known about the fraud to claim the taxpayer's involvement in the fraud (and thus to justify the refusal of the right to deduct input VAT);

2) However, the mere fact that the entities participating in the supply chain knew each other is not sufficient evidence to prove the taxpayer's involvement in the fraud;

3) The tax authority may not require the taxpayer to carry out a comprehensive and thorough verification of the supplier, thus transferring to that taxpayer the obligation to carry out in-depth verification activities. In particular, tax authorities may not generally require a taxable person wishing to exercise the right to deduct VAT to ascertain, on the one hand, whether the issuer of the invoice relating to the goods or services for which exercise of that right is sought has the status of a taxable person, has the goods in question and is able to deliver them, and whether they comply with the obligation to declare and pay VAT, in order to ensure that there are no irregularities or fraud, and, on the other hand, that they have documents confirming this; and

4) The tax authority cannot restrict the taxpayer's right to deduct input VAT merely on the basis that they have failed to comply with their obligations under national or EU law relating to the safety of the food chain. In doing so, the Court acknowledged that failure to comply with those obligations may be one of the elements which the tax authority may consider to establish the existence of VAT fraud and the participation of that taxable person in that fraud.

This judgment is another decision in which the CJEU confirmed that the taxpayers' right to deduct input VAT may be questioned by the EU member states' tax authorities if these tax authorities prove, firstly, that tax fraud has been committed and, secondly, that the taxpayer knew or - if acting with due diligence - could have known about the existence of this fraud.

A key challenge in this regard is that the CJEU has not, to date, provided comprehensive guidance on the circumstances which the tax authorities should consider when examining the existence of taxpayers' due diligence, leaving this to the national courts. The CJEU indicates, at best, whether certain circumstances may independently determine the lack of due diligence or whether they may, in conjunction with other circumstances, be an indication of lack of due diligence (determination of which is left to the national courts).

Therefore, in practice, the tax authorities and national courts of the Member States are required to assess independently – while taking into account the general guidelines of the CJEU – whether, on the basis of the collected evidence, in their opinion a taxpayer acted with the requisite due diligence.

PART C

Question 5

The Tour Operators' Margin Scheme (TOMS) is a special EU VAT scheme for businesses that buy-in and re-sell "designated travel services" such as passenger transport, accommodation and certain other services as principals or undisclosed agents.

It enables VAT to be accounted for on travel supplies without businesses having to register and account for VAT in every EU Member State in which the services are enjoyed. Hence, it ensures that the tour operators operating in their own name will not be required deal with the need for multiple registrations in different countries.

The TOMS scheme is compulsory and although described in Articles 306 - 310 PVD as a Special Scheme for Travel Agents, its application extends to tour operators and other businesses established within the EU who make supplies of 'designated travel services' as an undisclosed agent to travelers.

The TOMS means that VAT should be applied only on the margins made from sales of designated travel services. That is to say, the difference between the total amount, inclusive of VAT, to be paid by the traveler and the actual cost to the travel agent of supplies of goods or services provided by other taxable persons, where those transactions are for the direct benefit of the traveler. Normally, the tour operator has to account for output vat on its margin by applying the prevailing vat rates of its member state of establishment. Hence, the Margin Scheme supplies are:

- standard-rated when enjoyed in the EU; and
- zero-rated when enjoyed outside the EU.

However, tour operators cannot recover input VAT in relation to travel services purchased from other businesses. Hence the tour operator cannot reclaim VAT on purchases that it makes to resell as Margin Scheme supplies, whether incurred in its place of establishment or in another EU member state.

The TOMS Scheme is applicable on both sales to travelers (B2C) and to other businesses (B2B).

CJEU Cases

My Travel Case (C-291/03)

The CJEU ruled that market value was the correct basis to use for a margin calculation. Hence, a travel agent or tour operator may not use the market value method at his own discretion. It was not a requirement that market value should be simpler to use than cost.

That method is applicable to in-house services whose market value may be established even if, in the same tax period, the value of certain in-house components of the package cannot be established as the taxable person does not sell similar services on a non-package basis.

Commission v. Germany case (C-380/16), Commission v. Kingdom of Spain case (C-189/11) , etc.

The CJEU ruled that held that the exclusion of supplies of travel services to business customers from the TOMS infringes Germany's obligations under the VAT Directive. Also, the fact that German legislation allows tour operators to use simplified methods to calculate the margin is also an infringement of EU law.

The CJEU decision acknowledged that there are particularly significant differences between the language versions of the directive, some using the term "traveler" and/or the term "customer", at times varying the use of those terms from one provision to another. CJEU considered that an approach consisting in applying the special scheme to any type of customer is the best way of achieving the aims of the scheme.

Star Coaches (C-220/11)

A transport company offering only passenger transport by coach to travel agencies does not fall within the scope of TOMS.

The CJEU decision acknowledged that a transport company which merely carries out the transport of persons by providing coach transport to travel agents and does not provide any other services such as accommodation, tour guiding or advice does not effect transactions falling within the special scheme for travel agents.

Alpenchalets Resorts (C-552/17)

The CJEU ruled that the mere provision by a travel agency of a holiday residence rented from other taxable persons or such provision of a holiday residence accompanied by additional benefits, irrespective of the extent of such additional benefits, each constitutes a single service under the special VAT scheme for travel agents. The supply of the accommodation together with the ancillary elements is a single service covered by TOMS.

The provision of services by travel agencies consisting of the provision of holiday accommodation are not subject to a reduced rate when are covered by TOMS.

C. sp. zo.o (C-108/22)

As per the above case the resale of accommodation services fall under the special scheme for travel agents.

The CJEU ruled that the Article 306 must be interpreted as meaning that the service provided by a taxable person, which consists in purchasing accommodation services from other taxable persons and reselling them to other economic operators, is covered by the special value added tax scheme applicable to travel agents, even though those services are not accompanied by ancillary services.

Question 6

The right for businesses to claim VAT relief on bad debts is secured in Article 90 of the EU PVD.

Bad Debts meaning

Output VAT is due by the supplier to the authorities when he sends an invoice to its customer

In case the invoice remains unpaid due to bankruptcy or failure of the customer, this is considered being a bad debt. Since the supplier paid the output VAT to the authorities but not reimbursed by the customer, the supplier may ask the output VAT back from the authorities to avoid a VAT leakage.

Relevant law

Article 90 stipulates that in cases of cancellation, refusal, or total or partial non-payment, the amount on which VAT is chargeable should be reduced accordingly. However, the conditions for this reduction are determined by each Member State.

Furthermore, in cases of total or partial non-payment, Member States can choose to deviate from this requirement to reduce the amount of VAT due.

Although Member States have the right to set the conditions for businesses to claim VAT bad debt relief in their jurisdiction, the CJEU has confirmed that this is not an unrestricted right. However, where Member States have introduced rules which implement art.90, they are required to follow them logically and consistently.

In essence, the CJEU considers the conditions set by Member States cannot be so difficult to make it virtually impossible for taxpayers to claim bad debt relief and they must respect general EU principles, such as fiscal neutrality and proportionality.

Further considerations

Despite the various positive CJEU decisions confirming taxpayers' rights to bad debt relief, claiming the relief still involves the need of meeting various conditions which vary significantly across EU Member States.

Businesses should accordingly consider their procedures to help ensure they meet the specific conditions (e.g., timing, documentation, etc.) established by the relevant Member State in which the claim is being made.

Relevant CJEU case law

Goldsmiths case (C-330/95)

CJEU has held that If a refund of VAT is possible in the event of full or partial non-payment of the consideration, it is not permitted to exclude this refund if the non-paid consideration is a consideration in kind, while a refund is made in the case of a consideration in money.

Di Maura Case (C-246/16)

The CJEU held that the VAT Directive does not allow Member States to impose a disproportionate restriction on the possibility of claiming bad debt relief.

Member States can demand that the taxpayer takes reasonable measures to counter any uncertainties regarding payment. However the requirement that insolvency proceedings must have been concluded before a claim can be made is disproportionate and contrary to the principle of fiscal neutrality.

A-PACK CZ sro case (C-127/18)

The CJEU held that Article 90 of the VAT Directive must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that a taxable person cannot correct the value added tax (VAT) taxable amount, in the case of total or partial non-payment, by its debtor, of a sum due in respect of a transaction subject to that tax, if the debtor is no longer a taxable person for the purposes of VAT. Hence the recovery of VAT on bad debt if debtor is no longer VAT registered should not be denied.

SCT case (C-146/19)

The CJEU held that in the absence of tax evasion or abuse, a Member State cannot deny a claim to bad debt relief simply because the claimant has not filed a claim in bankruptcy proceedings when it is clear that payment for the supplies made will not be received.

ELVOSPOL case (C-398/20)

The CJEU held that the Article 90 of PVD must be interpreted as precluding a national provision which makes adjustment of the amount of value added tax subject to the condition that the partially or totally unpaid claim must not have arisen during the six-month period preceding the declaration of insolvency of the debtor company, where it is not ruled out under that condition that such a claim may ultimately be definitively irrecoverable.

Hence, the condition that debt did not arise during the 6 months preceding the declaration of bankruptcy is invalid.

Question 7

Where a private investor sells shares, VAT in respect of costs incurred in connection with the sale of shares is clearly not recoverable, since the VAT is not incurred by a taxable person acting as such. The same would apply in the case of a pure holding company which passively holds shares in other companies without carrying out any economic activity, hence being a non-taxable legal person.

When an active holding company sells shares in a subsidiary, or equally an active investor which is recognised as a taxable person sells shares, the question arises of whether the share sale is:

- a non-economic activity for VAT purposes; or
- a VAT exempt economic activity; or
- an economic activity conferring input VAT recovery rights.

For VAT purposes, a transaction consisting of a sale of shares is typically treated as either a non-economic activity, or as an economic activity consisting of a supply of services which is typically exempt from VAT as a transaction in shares and other securities in terms of Article 135(1)(f) PVD. On this basis, VAT incurred on costs with a direct and immediate link to the sale of such shares cannot be recovered.

In BLP (case C-4/94), a company incurred costs in respect of a sale of shares which was a VAT exempt supply. The CJEU considered that the costs relating to sale of those shares were directly linked to the exempt supply of those shares, and therefore could not be deductible costs, and this notwithstanding that the amounts generated from the sale of those shares was used for the purpose of its downstream business activities which generally conferred an input VAT recovery right in terms of Articles 168-169 PVD.

This matter was again raised in front of the CJEU in AB SKF (case C-29/08), where again costs were incurred in respect of a sale of shares which was VAT exempt. The judgment in this case reiterated that VAT is not deductible where there is a direct and immediate link between the costs incurred and the sale of the shares. However, this judgment acknowledged that where it is shown that there is a direct and immediate link between the costs incurred and the taxable economic activity of the seller, there could be an entitlement to deductibility.

Accordingly, where it is possible to associate them with other taxable activities of the business – although the share sale itself is VAT exempt – establishing such a link beyond the immediate VAT exempt share sale transaction could generate a right of deduction. This would be the case if the costs in question were not actually cost components of the sale (i.e. they were not built into the price of the shares) but were instead overhead costs of the whole of the holding company's economic activity. In practice, it could be argued that typically is quite unlikely that the costs of selling a subsidiary would be 'built into the price' in the same way as, say, the costs of raw materials are built into the price of a manufactured good. Again, it would be for the national court to determine whether the input VAT on these costs is deductible on this basis.

This concept was reiterated in X BV (case C-651/11): "since the disposal of shares at issue in the main proceedings must be categorised as an exempt transaction… a right to deduct will exist only if the cost of the services supplied to X in relation to that disposal is part of the general costs relating to its overall economic activity, without being incorporated in the sale price of those shares." In determining if an entitlement to input VAT recovery exists in respect of the sale of shares, it must first be established if a particular cost incurred has a direct and immediate link with the sale. A case-by-case evaluation of the individual costs incurred in the context of the transfer of shares must take place to determine whether such a direct and immediate link with the sale of shares exists.

In C&D Foods (case C-502/17), the CJEU acknowledged that the reason a share sale is undertaken can be a relevant factor in determining whether a sale of shares is an economic activity or not. The Court held that in order for a share disposal transaction to come within the scope of VAT, the direct and exclusive reason for that transaction must, in principle, be the taxable economic activity of the parent company in question, or that transaction must constitute the direct, permanent and necessary extension of that activity. That is the case where that transaction is carried out with a view to allocating the proceeds of that sale directly to the taxable economic activity of the parent company in question or to the economic activity carried out by the group of which it is the parent company.

In the present case, it was apparent that the objective of the disposal of shares in question was to use the proceeds of that sale to settle debts owed. Accordingly, such a sale could not be deemed to be either a transaction for which the direct and exclusive reason is the taxable economic activity of C&D Foods, or a transaction constituting the direct, permanent and necessary extension of the taxable economic activity of that company. In those circumstances, that sale could not constitute a transaction consisting in obtaining income on a continuing basis from activities which go beyond the compass of the simple sale of shares and, accordingly, it did not come within the scope of VAT. On this basis, the VAT relating to the costs in question was not recoverable.

It may be relevant to note that where a VAT exempt sale of shares is made to a non-EU counterparty, costs which have a direct and immediate link with that sale of the shares and would be deductible on the basis of Article 169(c) PVD, which provides that a taxable person shall be entitled to deduct VAT incurred in so far as the goods and services are used for the purposes of transactions which are exempt pursuant to points (a) to (f) of Article 135(1), where the customer is established outside the Community or where those transactions relate directly to goods to be exported out of the Community.

Question 8

Part 1

Article 62 PVD defines the 'chargeable event' as the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled. More specifically, Article 63 PVD provides that the chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied. In this regard, goods are typically deemed to have been supplied when they are delivered to the purchaser, and services are typically deemed to have been supplied when they have been completed.

Conversely, Article 62 PVD provides that VAT shall become 'chargeable' when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.

Part 2

Continuous supplies are supplies of goods and services which are provided over a relatively extended period of time and are typically paid for at regular intervals. An example of a continuous supply of services is long-term rental of property, where rental payments may be due say on a monthly basis.

In this regard, Article 64 PVD provides that such continuous supplies of goods or services which give rise to successive statements of account or successive payments, shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate. For example, if the property rental service is invoiced / paid for on a monthly basis, the supply shall be deemed to have been made at the end of the relative month.

Continuous intra-Community supplies of goods over a period of more than one calendar month shall be regarded as being completed on expiry of each calendar month until such time as the supply comes to an end. As regards cross-border supplies of services for which VAT is payable by the customer pursuant to Article 196, which are supplied continuously over a period of more than one year and which do not give rise to statements of account or payments during that period, shall be regarded as being completed on expiry of each calendar year until such time as the supply of services comes to an end.

Part 3

Article 65 PVD stipulates that where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received.

This is a significant rule which triggers a charge to VAT whenever a payment of consideration for the supply is received by the supplier before the delivery of the goods or services (i.e. an advance payment). The tax point is triggered to the extent of the amount received. This means that where there is more than one advance payment (e.g. payment in instalments), there can be multiple tax points i.e. dates when VAT becomes chargeable.

Part 4

Whereas Articles 63-65 PVD are mandatory ("shall") rules, Article 66 PVD is an optional ("may") provision that allows Member States flexibility in the implementation of variations to the basic mandatory rules. In this regard, it would appear Member States are given a fairly wide discretion to fix the chargeable event differently since Article 66 allows Member States to derogate from Articles 63-65 PVD by providing that VAT is to become chargeable, in respect of certain transactions (i.e. specified types of supply) or certain categories of taxable person (e.g. qualifying small undertakings), at one of the following times:

a) No later than the time the invoice is issued;
b) No later than the time the payment is received; or
c) Where an invoice is not issued, or is issued late, within a specified time no later than on expiry of the time limit for issue of invoices imposed by Member States pursuant to Article 222 PVD (or where no such time-limit has been imposed by the Member State, within a specified period from the date of the chargeable event).