THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2022

MODULE 3.02 – EU VAT OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Report to Omega Ltd

12 June 2022

Report on VAT aspects of your recycling business

Purchase of waste electrical goods

The purchase of goods has its place of supply where the goods are located at the time that the supply takes place, or where transportation is concerned, where the goods are located when the transport begins Arts 31 and 32 PVD**.** In all cases, except for domestic purchases, this is outside Bordonia and so the purchases are not subject to Bordonia VAT, but may be in the country where located**.** In the case of goods bought from Bordonian suppliers, Bordonian VAT will be chargeable and can be recovered by Omega as it will relate to onward taxable activities.

Since Omega are taking ownership of goods in other member states and are likely to be charged local VAT, it would be advisable for them to register in those member states where they purchase goods**.** The only exception to this would be if they can take possession of those goods and evidence their intention to remove them to Bordonia as despatches – in some member states it may be possible to obtain the goods zero rate providing that they can show that they are VAT registered in Bordonia, comply with transport requirements and hold evidence of removal.

When waste goods are brought into Bordonia from EU member states, this will be a movement of own goods which will be subject to acquisition tax in Bordonia - this too will be recoverable. Depending on the annual values of despatches from member states and arrivals in Bordonia there may also be Intrastat reporting requirements**.** Recapitulation statements will also be required to be submitted in the countries from which goods are removed to record the zero-rated movement of own goods.

Goods purchased from non-EU suppliers will be treated as imports Art 70 PVD and Customs duty and import VAT will be due based on the value of the goods, plus freight and incidental costs to bring them to Bordonia. Omega will also require an EORI number to enable them to make import declarations.

Processing in Bordonia

The activity of processing their own goods is not a supply and the recovered materials may be used as Omega wish.

Donated and collected waste goods

Donated goods are collected in Bordonia and appear to be freely provided by Charities and at collection points. There will be no recoverable VAT as no charge is made for obtaining these goods.

Sale of recovered materials

When recovered material is sold to other businesses in Bordonia this will be a domestic supply on which VAT is chargeable.

If recovered material is to be sold to a business customer outside Bordonia without Bordonia VAT being charged, shipments to customers in other member states will require Omega to obtain the customer's VAT number and hold two non- contradictory pieces of evidence that the goods have been transported out of Bordonia. They will also be required to complete a

recapitulative statement. Failure to meet any of these conditions will result in Bordonian VAT being due.

Sale of patented rights to USA group

The sale of rights is a supply of services. Where the customer belongs in the USA and appears to be a business, providing this can be evidenced the supply can be treated as outside the scope of VAT with recovery of any VAT previously incurred. There will be no liability to account for VAT on the monthly payments when received.

ADIT Student

Question 2

Finance Director
Boldon Group
Theta
12 June 2022

Dear Sir or Madam

Thank you for your request for advice concerning your quarrying, gravel and sand extraction business.

It may be helpful to explain that a right granted to you for the operation of a quarry and similar activities is treated as a supply connected with immovable property by Art 47 PVD. Further detail concerning the application of Art 47 is contained in Art 31a of the Implementing Regulations (IR 282/2011) which lists activities that are covered and those that are not covered by Art 47. Although quarrying is not referred to specifically in the Implementing Regulation, if it is performed under exclusive rights or licence granted by the owner of the site it will be treated as a supply connected with immovable property being made in the place where the land is located. The same treatment also applies for land under water i.e., the sea-bed. Art 31a paragraph 2 h) is relevant to this point.

Territorial scope

The territorial scope of EU VAT is referred to in Art 5 PVD and is defined for each member state within Art 355 of the Treaty for the Functioning of the EU (TFEU). Article 3 of the United Nations Convention on the Law of the Sea (UNCLOS) states that the breadth of the territorial sea of a coastal state must not exceed 12 nautical miles. It follows that if extraction of material is made wholly within an area within a member state the services will be treated as made in that member state and subject to VAT accordingly. However, if activity is undertaken in areas outside a member state's territorial limits VAT will not apply although the extracted material will be treated as an import if it is subsequently brought to a member state.

If you are considering importing extracted material, you will need to make a Customs entry at the port of arrival and will require an identifying EORI number. The value of the extracted material will need to be agreed with the tax authority of arrival as VAT at the domestic rate will be applicable and possibly Customs duty.

Specific arrangements

- The granting to you of a licence to extract gravel in Cresia will be regarded as a supply connected with immovable property for which Cresian VAT may be charged (subject to any option to tax that may exist in Cresia). This may require the quarry owner, established in a different member state, to register and charge Cresian VAT. It would be desirable for you to register for VAT in Cresia to enable you to recover any VAT charged.

- The sale by Boldon of rights to extract gravel in Nordia will also be regarded as a supply related to immovable property if those rights are for an exclusive right to the site. Assuming an option to tax has been made by Bolden in Nordia, Nordian VAT should be charged to the purchaser in Theta. It follows that Boldon, if not already registered for VAT in Nordia may need to do so. However, if Nordia has adopted Art 194 PVD it may allow the VAT to be accounted for under the "tax shift" by the purchaser established in Theta assuming the purchaser is registered for Nordian VAT. In this situation, Nordia may allow the purchaser to recover the VAT it pays under the tax shift as input tax on a domestic VAT return under Art 171a, rather than under the EU VAT Refund Scheme.

- An alternative view could be that the business of gravel extraction has been sold in its entirety and should be treated under Art s19 and 24 PVD as being a totality of assets

resulting in no supply of goods having taken place. This possible alternative would be dependent on Nordia having adopted Arts 19 and 24 PVD.

- The extraction of aggregate and sand from a site partially within and partly outside Theta will result in the material obtained from the part of the site in Theta being moved within that territory and will not incur result in a taxable event. The material that originates outside Theta waters will be regarded as an import and should be dealt with as above.

I hope this is sufficient for your purposes but please contact me if you wish to discuss any aspect.

Yours faithfully
ADIT Student

PART B

Question 3

VAT issues relating to Fuel Cards – Falcon GmbH

Initial supply of fuel

The initial supply of fuel is the supply of goods from the fuel station operator to either the owner of the vehicle or Falcon, the issuer of the card upon whose guarantee the fuel station knows they will receive payment for the fuel provided. The determination of which of these applies is obviously dependent upon the contract between Falcon, the card issuer, and the card holder as well as Falcon and the fuel stations in the relevant EU member states.

A key requirement for there to be a supply of goods is that there has to be a transfer of the right to dispose of tangible property as owner, Art 14(1) PVD. An examination of the contracts and behaviours of the parties involved is required to determine whether Falcon has taken ownership of the fuel; and therefore whether they can supply it to others.

In the CJEU case of Vega International (C- 235/18), the court found on the facts of that case that the card issuer, Vega International, did not obtain title to the fuel and was therefore not entitled to either recover VAT or charge VAT on any onward supply of fuel.

Supply chain

The supply chain that was determined was one in which the fuel was supplied by fuel stations to the owners of the vehicles in whose tanks the fuel was provided. The owners would therefore have an entitlement to a deduction of VAT provided all conditions were met and they were VAT registered in the same member state as the fuel station business. Alternatively, if they were not VAT registered in the same member state they could, subject to meeting relevant conditions, seek an EU cross border refund from the tax authority that had received the VAT on the initial fuel sale. The supply chain analysis applied in Vega International follows a similar analysis by the CJEU in Auto Lease Holland BV (C- 185/01) which held that fuel cards provided in addition to vehicle leasing did not result in the provision of fuel between lessor and lessee.

Alternative interpretation

Depending on the wording of the contracts, the alternative interpretation that the CJEU favoured in Vega is that Falcon is making a supply of credit under Art 135 (b) PVD, the consideration for which is the 3% charge that is made to card holders. The consequence of this analysis is that the taxable supply of fuel is between the fuel stations and the card holder, the card holders have the entitlement to recover the VAT incurred providing it is used for economic activities and they hold a valid VAT invoice issued by the fuel stations. It follows that Falcon is not entitled to recover the VAT charged by the fuel stations or to charge VAT on the amounts recovered from the card holders.

Late payment charges

Since the supply of credit is made by Falcon it follows that late payment charges are also exempt from VAT as additional consideration for exempt supplies.

PART C

Question 4

Infringement proceedings

The EU Commission identifies possible infringements of EU law through its own enquiries and as a result of having concerns brought to its attention by citizens, businesses etc. A potential infringement occurs when the Commission believe that the national law of a member state has not correctly or fully implemented the EU Treaties.

The Commission will initially approach the member state(s) concern and seek to get amendment to the offending legislation. If the EU country concerned fails to communicate measures that fully transpose the provisions of directives, or doesn't rectify the suspected violation of EU law, the Commission may launch a formal infringement procedure.

The procedure follows a number of steps laid out in the EU treaties, each ending with a formal decision.

Procedures and Remedies

- The Commission sends a letter of formal notice requesting further information to the country concerned, which must send a detailed reply within a specified period, usually 2 months.

- If the Commission concludes that the country is failing to fulfil its obligations under EU law, it may send a reasoned opinion: a formal request to comply with EU law. It explains why the Commission considers that the country is breaching EU law. It also requests that the country inform the Commission of the measures taken, within a specified period, usually 2 months.

- If the country still doesn't comply, the Commission may decide to refer the matter to the Court of Justice. Most cases are settled before being referred to the court.

- If an EU country fails to communicate measures that implement the provisions of a directive in time, the Commission may ask the court to impose penalties.

- If the court finds that a country has breached EU law, the national authorities must take action to comply with the Court judgment.

If, despite the court's judgment, the country still doesn't rectify the situation, the Commission may refer the country back to the court.

When referring an EU country to the court for the second time, the Commission proposes that the court impose financial penalties, which can be either a lump sum and/or a daily payment. These penalties are calculated, taking into account:

- the importance of the rules breached and the impact of the infringement on general and particular interests;

- the period the EU law has not been applied; and

- the country's ability to pay, ensuring that the fines have a deterrent effect.

The amount proposed by the Commission can be changed by the court in its ruling.

Outcomes

The Commission also publish the outcomes of their decisions so that business and others can see which member states and subjects have been subject to enquiries.

Notable cases that have related to infringement proceedings include Commission v France (C- 94/09) in which multiple supplies were being incorrectly broken down into their component parts rather than being taxed according to their overall essential character. Also, Commission v United Kingdom (C-276/19) which was concerned with the extension of the zero rating for commodity trading and (C-479/13) which concerned the application of a reduced rate to electronically supplied books. [Other relevant case will attract the marks available.]

Question 5

Introduction

The basic position regarding seeking to recover VAT incorrectly charged is for the recipient of the supply to approach the supplier and seek a revised invoice and credit note to put the supply back on the correct basis. However, it may not always be possible or find the supplier willing to make an adjustment particularly if it requires repayment of part of the consideration previously received. With specific reference to cross border refunds, Art.4 PVD Dir 2008/9 specifically states that a Member State is not required to refund VAT that should not have been charged by the supplier. The business who has paid too much VAT in this circumstance has to go back to the supplier for a refund.

Reemtsma

The CJEU Case (C-35/05) Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze [2008] is a leading case concerning refunds in which an Italian company provided advertising services to a German customer and charged Italian VAT in error. The customer applied for a refund from the Italian authorities which was refused because the VAT should not have been charged in the first place – it should have been a reverse charge in Germany. The CJEU agreed with the Italian authorities that they were entitled to refuse such a claim. It was for the business, who had overpaid VAT to the supplier, to take action against the supplier for recovery of the amount paid in error. Only the supplier could recover the overpayment from the authorities.

Danfoss A/S & Anor –v- Skatteministeriet CJEU Case (C-94/10) also dealt with the ability of a tax authority to resist making repayment of tax incorrectly charged to a party other than the taxpayer who paid the tax or duty to the government in circumstances in which that party can seek civil redress from the person that incorrectly charged the tax. However, the CJEU held that a tax authority can't refuse the claim where to do so would make it impossible or excessively difficult for the taxpayer to seek repayment.

In addition to Reemtsma and Danfoss, there have been several cases in which the CJEU has considered inequivalent periods of chargeability and recovery between the tax authority and the taxpayer, as well as circumstances in which the supplier has incorrectly issued a tax invoice for an exempt supply but has been denied the ability to correct the error, despite the authority prohibiting the recovery by the recipient. In these cases, the principles of equivalence and fiscal neutrality have been used to challenge the treatment applied by the tax authorities, with differing outcomes. An example is CJEU Rusedespred OOD Case (C-138/12) and CJEU Case C-95/07 and C-96/07 Ecotrade SpA v Agenzia Entrate Ufficio Genova 3 [2008] in which an Italian company incurred expenditure on which it should have accounted for a reverse charge, matched by a 100% deduction for input tax on the same VAT return, but which it thought was exempt altogether. The liability on its return was therefore correct, but the output tax and input tax figures were both too small. The Italian legislation provided a four-year period for the authorities to check and assess a business' liability to output tax, but imposed a two-year time limit on business' claims for input tax. The authorities therefore assessed for the output tax due under the reverse charge, but refused to allow the company to offset the input tax.

The CJEU considered the principles of 'effectiveness of rights" and 'equivalence'. and held that the Directive does not preclude national legislation which lays down a limitation period for the exercise of the right to deduct VAT, provided that the principles of equivalence and effectiveness were respected. These principles were not infringed merely because the tax authority had a longer period in which to recover unpaid VAT than the period granted to taxable persons for the exercise of their right to deduct. A limitation period was desirable because an indefinite time to claim infringed the principle of legal certainty. The Italian rules did not make it excessively difficult or practically impossible to claim, even though the authorities had longer in which to make an assessment.

However, the Directive did preclude a practice whereby tax returns were reassessed and VAT recovered which penalised an innocent misunderstanding of accounting obligations by denying the right to deduct in the case of a reverse charge procedure. The imposition of the reverse charge without allowing the necessarily linked deduction of input tax did make it practically impossible to exercise a right. The CJEU found that Member States should take the necessary measures to ensure that taxable persons comply with their obligations relating to declaration and payment, and may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion. However, they should not go further than necessary to attain those objectives.

Also, CJEU Cases C-78/02 to C-80/02 Elliniko Dimosio (Greek State) v Karageorgou & Others [2004] which suggest that member states that rely upon Art 203 for the receipt of VAT from those who enter it on invoices should find a mechanism to provide for the refund of amounts incorrectly charged.

Supplier insolvency

Case law shows that the remedies available to the party seeking refund are more limited in circumstances in which the supplier, who has collected the incorrectly charged tax, has subsequently become insolvent or has in another way ceased to exist. It is common in such circumstances for the entity who has paid the incorrectly charged tax to seek refund from the tax authority to whom it has, or should have been, passed. However such claims are conditional upon :

- The customer bearing the economic burden of the improper tax charge; and
- It would be excessively difficult or impossible in practice for him to have made a claim against his supplier (that his claim was rendered ineffective).

There is currently a referral to the CJEU in the case of HUMDA Case (C-397/21) in which the referring Hungarian court has asked for guidance on the correct interpretation of the national law which precludes the recovery of incorrectly paid VAT where it was invoiced in error and following the issuer having gone into liquidation. The questions asked relate to the principles of effectiveness and fiscal neutrality.

Question 6

An EU established business supplying goods to a business customer in another member state is required to meet several conditions if the zero rating of the supply is to be allowed by the tax authority in the supplier's member state.

The legislation applicable to intra-EU movements of goods is Art 138 PVD and Art 45a of the Implementing Regulation 282/2011. These conditions were revised to take effect from 1 January 2020 as part of the EU "quick fixes" to harmonise and make procedures uniform across all member states.

The conditions are as follows:

- The supplier needs to obtain, and preferably display on a tax invoice issued to the recipient of the supply, the customer's valid VAT registration number in their member state of establishment. (Strictly the Directive does not require the VAT number to be stated on the invoice, it only has to be 'indicated' to the supplier. Best practice however would be to include it on the invoice).

- The supplier must remove the goods from its member state normally within 3 months of the date of the supply.

- The supplier is required to hold two non-contradictory pieces of evidence of transportation to enable it to be presumed that the goods have moved outside the member state of despatch. These need to be from two different independent sources and are categorised under lists A and B. Either both items must come from list A or one each from list A and B

- If the acquirer is responsible for the transport, they must provide the vendor with a written statement that they have transported the goods by the 10th of the month following the month following the date of supply.

- The transaction must be entered on the supplier's EC Sales List to be completed in accordance with Art 264 PVD.

If any of the requirements are not met the goods will be subject to VAT in the member state of the supplier.

Question 7

Memo to Sveka business regarding sales in other member states

Dear Sirs

The sale and delivery of goods to non-business customers belonging in other member states is determined by Art 14(4) PVD, Art 33 PVD and Art 5 a) of the Implementing Regulation 282/2011. A revised treatment took effect from 1 July 2021 which no longer requires registration in each member state in which customers belong.

These require a business established in a member state (or outside the EU) to account for VAT on goods supplied to non-taxable customers at the rate applicable in the customer's member state. If sales made to non-business customers in other EU countries do not exceed 10,000 Euros per year the supplier may continue to charge the VAT rate applicable in their own country.

A supplier making supplies above this value has the option to registering in each member state in which customers belong or may register for the One Stop Shop (OSS) enabling them to make a return in their local member state declaring the VAT applicable on sales made throughout the EU.

Returns for the OSS must be made electronically to the member state of identification no later than 20 days after the end of the quarterly return period,. Returns must be accompanied by a single payment of the total VAT due in Euros. The supplier is required to retain records of all supplies made, the VAT applicable and any adjustments made for 10 years. The records must be capable of being provided electronically to the tax authorities in both the member state of identification (host member state) and any of the member states to which goods have been dispatched.

Member states may require a taxable person liable under these arrangements to appoint a Fiscal representative. In the absence of the customer's member state requiring a fiscal representative there is no engagement required with the tax authority unless the sales are selected for audit or a failure to make payment of VAT due occurs.