Question 3

Dear Colleague,

Thank you for your enquiry regarding the issue you have at hands. The services supplied by your client seem to have a composite nature, but I will try to address all the points you mentioned.

Part 1

It seems clear that the activity of the commercial French laboratory is not considered exempt in the sense of article 132 1 b) of the Principal VAT Directive. The commercial laboratory is not a body governed by public law nor does it have a similar nature.

A similar situation was already reviewed by the CJEU in the case LuP GmbH, where it was considered that such laboratories were not included in article 132 1 b). Furthermore, they do not respect the criteria of article 133, as this is not a non-profit entity.

As the European public hospitals may not be considered a taxable person in the sense of article 9 of the Principal VAT Directive, the French laboratory is applying the article 45 of the Principal VAT Directive.

Part 2

The supply of services to a client outside of the Community will be outside the scope of EU VAT, as the service will be considered as provided where the client has established its business, according to article 44 of the Principal VAT Directive.

Part 3

The French laboratory will have to fill out its VAT return with the output VAT charged, as well as recapitulative statements regarding the services provided, in the terms of articles 251 and 262 of the Principal VAT Directive, respectively.

Part 4

The supply of services will depend on the rules of articles 44 and 45 of the Principal VAT Directive.

European private hospital clients will usually have taxable and non-taxable supplies, the rules in article 43 of the Principal VAT Directive allow the supplier to treat the client as a taxable person in respect to all services rendered to him.

Therefore, according to article 44, the place of supply of such services should be the place where the clients have established their business. The French laboratory should not charge French VAT, with the exception of services provided to French hospitals.

Part 5

Supplies of services to non-taxable persons are considered as placed where the supplier has established his business, according to article 45 of the Principal VAT Directive. Therefore, both supplies will include French VAT.

I hope this answers your questions.

Kind regards

Tax Adviser

Question 5

Dear Mr Group Taxation Director,

I refer to Lion PTE Ltd's request for assistance regarding the VAT consequences of marketing its products in Europe through your Group's website.

As you may know, the rules regarding the place of supply of telecommunications, broadcasting and electronic services to non-taxable persons have changed with effect of 1 January 2015.

This change may have a great impact in your business as it has changed the VAT treatment of such supplies, when made by taxable persons established outside, as well as inside, of the EU.

The products Lion PTE Ltd proposes to market will be considered electronically supplied services, in the sense of article 58 of the Principal VAT Directive.

Annex II of the Principal VAT Directive establishes an indicative list of what is considered as electronically supplied services, namely:

a) Supply of games;
b) Supply of music;
c) Supply of software and updating thereof; and
d) Supply of distance teaching.

Before 1 January 2015, for taxable persons established outside the EU such as Lion PTE Ltd, the place of supply of such services to non-taxable persons in the EU, was where the taxable person was established. In this case this would mean that the supply of such services was not subject to VAT in the EU.

However from 1 January 2015, the place of supply of the same services is where the non-taxable persons receiving the services is established, has his permanent address or usually resides. This rule applies both to taxable persons established inside and outside of the Community.

This would mean that a VAT liability would arise in each of the Member States where non-taxable persons would buy from Lion PTE Ltd.

However, together with the modifications in the article 58 of the Principal VAT Directive, a special regime for telecommunications, broadcasting or electronic services supplied by taxable persons not established within the Community was also introduced(articles 358a to 369 of the Principal VAT Directive), in which the Mini One Stop Shop regime is included.

A similar regime exists for taxable persons established within the Community, but not in the Member State of consumption. This regime is slightly different from the one I will describe, however I will not focus on that, as you mentioned that Lion PTE Ltd does not have any establishments in European countries.

This new scheme will centralize and facilitate the communication between a taxable person supplying such services across the EU and the several Member States' tax administrations.

According to article 359, Member States shall permit a taxable person not established within the Community, that provides the abovementioned services to non-taxable persons established within the Community, to use this special scheme.

The choice of the Member State of identification is free and I am available to help you evaluate your options in this regard.

After choosing the Member State, the taxable person shall communicate to that Member State when it starts and ceases its taxable activity. The taxable person will receive an individual VAT identification number.

In terms of tax compliance, the Principal VAT Directive establishes that the taxable person shall submit by electronic means to the Member State of identification, a VAT return per calendar quarter (whether or not the services have been supplied), which includes, for each of the Member State of consumption in which the VAT is due, the total value of supplies of telecommunications, broadcasting and electronic services carried out during the tax period and the total amount per rate of the corresponding VAT.

As described, this new scheme represents a big improvement when compared to the eventual need to register for VAT purposes in several Member States. The communication between the taxable person and the company is centralized in one place and the allocation of tax between Member States is done in a second phase.

Please note that there are a few points that must be mentioned:

a) The VAT return must be done in euro, or in the national currency, in the case of Member States which have not adopted the euro;

b) The taxable person making use of this scheme may not deduct VAT incurred in any Member State. Any refund of VAT must be done in accordance with Directive 86/560/EEC, which establishes the arrangements for the refund of VAT to taxable persons not established in Community Territory;

c) The taxable person must keep records of the transactions covered by the special scheme, for a period of ten years from the end of the year during which the transaction was carried out.

I trust the above responds to your requirements. I am available to help Lion PTE Ltd in implementing the abovementioned structure.

In case further information is necessary, don't hesitate to contact me.

Kind regards,

Tax adviser

Question 6

The place where a business is established or where a company has a fixed establishment assumes great importance namely in determining the place of supply of services.

As rule the place of supply of services will change according to whether it is a B2C or B2B supply.

According to article 44 of the Principal VAT Directive (2006/112/EC), in cases B2B services, the place of supply will be where the entity receiving the services has established its business. However, if services are provided to a fixed establishment located in a different Member State, the place of the supply will be where the fixed establishment is located.

On the other hand, in B2C services, article 45 establishes that the place of supply will be the place where the supplier has established his business. However, if the services are provided from a fixed establishment of the supplier located in a different Member State, then the place of supply will be the place where the fixed establishment is located.

The Implementing Regulation (282/2011/EU) helps us understand the concept of fixed establishment and how it complements the notion of where the business is established.

Article 10 of the Implementing Regulation defines the concept of where the business is established, mirroring the conclusion of the Court of Justice of the European Union (CJEU) in the Planzer Luxembourg case. It rules that the place where a business is established "shall be the place where the functions of the business's central administration are carried out".

This is usually the place where essential decisions concerning the general management of the company are taken, where the registered office is located or where the management meets. Once again making reference to the Planzer Luxembourg case, the Implementing Regulation clearly states that a mere presence of a postal address may not be taken to be the place of establishment.

In article 11 of the Implementing Regulation we find the definition of fixed establishment, which is "any establishment, other than the place of establishment of a business (...), characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs".

This means that the fixed establishment needs to have substance, as ruled several times by the CJEU. The CJEU has mentioned in several cases that a supplier does not have a fixed establishment if it does not have a suitable structure in terms of human and technical resources, for example in cases of machines installed in ships.

The Implementing Regulation also specifies that the mere fact of having a VAT registration shall not in itself be sufficient to consider that a taxable person has a fixed establishment, referring once more to the Planzer Luxembourg case.

Furthermore, according to the CJEU ruling in the Berkholz case, the fixed establishment will override the place of establishment of business only when it is necessary to avoid an irrational result or to solve a conflict between two Member States.

In this regard, and as a conclusion, it is worth to mention that the mere existence of a fixed establishment within the territory of a Member state where the tax is due will not mean that the taxable person will have to be regarded as established in that Member State. Article 192a of the

Principal VAT Directive, as well as article 53 of the Implementing Regulation are clear in determining that the fixed establishment will only be considered if it does intervene in the supply made.

Question 7

Part 1

The recharge of the IT costs associated with the introductions of a standardised accounting software by Strauss Trading to its branches in Belgium, Germany and Luxembourg will have different VAT treatments.

The Belgium branch is registered for VAT in Belgium as a single-entity registration. According to the CJEU ruling in the FCE Bank case, a recharge of costs between a head office and its branch will be disregarded for VAT purposes, as long as the branch is considered to not have any independent economic activity.

The German branch is part of a German VAT group. According to CJEU ruling in the Skandia case, the FCE Bank reasoning will not apply in the case where a branch is part of a VAT group in a Member State. It is considered that in this case the lack of independence of the branch is dissolved in the VAT group and the connection of the branch with the head office is not as strong. Therefore, and according to article 44 of the Principal VAT Directive, the place of the supply will be Germany. The German branch will account for acquisition VAT and will deduct the correspondent input VAT at the same time, in its VAT return for the tax period.

Finally, the Luxembourg branch did not make any taxable supplies. It plans on renting out office space, which according to article 135 1 l)of the Principal VAT Directive is an exempt activity.

If that is the case, and in case Luxembourg did not allow the option to tax established in article 137 1 d) of the Principal VAT Directive, the Luxembourg branch will have to account for acquisition VAT but will not be able to deduct the correspondent input VAT.

Part 2

Secondment of staff between the German branch and the Belgian branch will be treated as a general supply of services, in article 44 of the Principal VAT Directive. This means that the place of the supply will be Belgium.

The FCE Bank case does not apply, as these are not recharges between a head office and a branch.

The German branch will not account for any output VAT. The Belgium branch will account for acquisition VAT and deduct the corresponding input VAT at the same time.

The German branch will have to fill a recapitulative statement, in the terms of article 262 of the Principal VAT Directive, regarding the services provided.

Part 3

First, Strauss Denmark seems to carry out an economic activity in the sense of article 9 of the Principal VAT Directive. Even though according to Polysar case, the passive holding of shares is not considered economic activity, the active role in providing management and technical services is, according to Cibo Participations case.

The sale of shares is an exempt transaction in the terms of article 135 1 f) of the Principal VAT Directive.

The CJEU has decided in BLP Group case that input VAT incurred in the sales of shares would not be considered as overhead costs and would not be deductible.

However, the CJEU has decided in the Skatteverket v AB SKF case that the sales of shares could be considered as a transfer of going concern, in the sense of article 19 of the Principal VAT Directive. This seems to be the case of the sale of Muller A/S, as the sale was 100% of the shareholding. As Muller A/S makes only taxable supplies, the input VAT incurred can be considered as overhead costs and will be deductible, according to CJEU ruling in AB SKF case.