THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2015

PAPER 3.02 – EU VAT OPTION

ADVANCED INTERNATIONAL TAXATION (THEMATIC)

Suggested solutions

Question 1

Part 1

The Sale of goods made from a shop on a vessel engaged in a passenger transport operation effected wholly within the community is determined by Article 37 Directive 2006/112 (the Principle VAT Directive or PVD). Article 37 (1) deems the place of supply to be the point of departure of the passenger transport operation. There will therefore be an obligation for the supplier of such goods to register and account for VAT to the Member State of departure for all sales made during each affected voyage. It should also be noted that recital 16 and Article 35 Reg 282/2011 clarifies that it is the journey of the means of transport that determines the section of a passenger transport operation effected within the community, and not the journey of the passengers within it.

In contrast to the sales made on intra-EU journeys, a voyage to Gibraltar is to a destination outside the EU. Sales of goods made to passengers on non-EU voyages are not liable to VAT in any Member State as the place of supply is not considered to be within the EU. Article 31 PVD deems the place where the goods are located at the time of supply to be the place of supply. In the case of a sale during a non-EU voyage this is likely to be on the high seas and therefore not within the EU.

Supplies of health and massage treatments to passengers are supplies of services to non-taxable persons. When performed on a voyage between EU places of departure and arrival the place of supply is determined by the basic rule in Article 45 which determines the place of supply to be the place where the supplier has established his business. The same treatment applies to the voyage between the EU and a non-EU destination. It follows that if the supplier is established within the EU; VAT will be due at the rate and in accordance with the registration threshold applicable to the Member State of registration. Conversely if the supplier is established outside the EU no VAT liability arises on either type of cruise.

Part 2

The leasing of trains falls under the general rule in Article 44 and is treated as where the customer belongs. The lessor, based in Germany, is making intra-EU supplies to a taxable person in France. The place of supply is France under Article 44 PVD, as modified by Article 20 Reg 282/2011. The lessor needs to establish the country in which the lessee is established by reference to commercial evidence and may accept a VAT identification number attributed by the Member State in which the lessee is established. They can check the number is valid by reference to the Europa website www.ec.europa.eu/taxation_customs/vies. There will also be a requirement for the lessor to include the value of the lease payments on a quarterly or monthly recapitulation statement, or EC Sales List, which requires the VAT Number and country of VAT registration of the lessee to be shown. There may also a requirement to make Intrastat returns if the value of dispatches of goods made by the lessor to customers in other EU Member States is above the threshold applicable in the supplier's Member State.

The lessee is receiving a supply of services in France and is required to account for the supply under the "reverse charge" provisions. The output tax on the supply will be based on the value of the supply at the French standard rate of tax (currently 20%), this output tax will be recoverable in full if the lessee is fully taxable. The lease payments are treated as an output and input on the lessee's VAT return. Depending on the rules regarding leased goods in France, there may be a requirement to include the payments made under the lease on an Intrastat return as an arrival.

Part 3

The first issue that the purchaser will need to consider concerns the acquisition of the aircraft in the Netherlands following its sale and delivery from France. This will require the value of the acquisition and any acquisition tax to be entered on the VAT return covering the earliest of the 15th day following the month in which the aircraft arrived or the date the supplier issues the invoice. In addition, because of the high value of the aircraft, it is likely that a "Supplementary declaration" will be required for Intrastat trade statistics purposes under the requirements of Regulation 638/2004. There are special rules for aircraft exceeding 2,000kg weight and vessels, which differ from the rules applicable to other goods in that they require reporting if there is a transfer of economic ownership rather than a physical movement between Member States. The value of the aircraft will include the consideration plus any costs of transport and insurance charged up to the point of delivery into the Netherlands.

The onward supply of the aircraft will be the charter or lease to the Dutch customer for which the place of supply will be the Netherlands providing the lessee is a taxable person belonging in the Netherlands.

The supply will fall under Article 148 (f) which allows for the exemption with credit, if certain conditions are met, regarding use of aircraft by airlines operating for reward chiefly on international routes. The meaning of the term “aircraft used by airlines operating for reward chiefly on international routes” has been the subject of the judgment of the ECJ in the case of A Oy (C-33/11) which was asked to consider the extent of the exemption in what is now Article 148 (e), (f) and (g) PVD. The ECJ found that in addition to the exemption covering direct supplies to such airlines, it could also be considered to cover supplies in the supply chain made by entities who were not themselves qualifying airlines but where the ultimate end user was so qualified. Because the domestic supply falls within the exemption in Article 148(f) it is also expected that the acquisition will be treated as exempt under Article 140 (a) which allows the exemption of acquisitions of goods where the supply by a taxable person would be exempt if made in the same Member State.

Part 4

The hire of cars to members of the public is the hiring of a means of transport to non-taxable persons and is a supply of services. Since 1 January 2013, Article 38 of Regulation 282/2011 (the Implementing Regulations) modifies Article 56 of PVD regarding determining the place of supply of hiring of means of transport. The place of supply of “short-term” hiring is the place where the means of transport is actually put at the disposal of the customer. In this case Madrid, Spain.

Short-term is defined in Article 56(3) as continuous possession or use throughout a period of not more than thirty days (in the case of vessels not more than ninety days). It follows that the hire periods of 7, 14 and 21 days will be considered short-term hires for which the place of supply will be Spain. Article 59(a) PVD allows Member States to consider the extent to which the use and enjoyment of specified services are made in order to prevent the non-taxation, double taxation or distortion of competition that may otherwise arise from the determination of the place of supply. To the extent that the cars are effectively used and enjoyed outside the EU, the place of supply may be considered to be outside the EU.

Short term hires that are extended because of force majeure do not require a change of VAT treatment providing the reason for the extension could not have been averted. However Article 39 does allow Member States to counter abusive practices involving consecutive contracts.

The 60 day hires will be covered by Article 56(2) and will be regarded as having a place of supply determined by the place where the customer is established, has his permanent address or usually resides, except to the extent that use and enjoyment of the service takes place outside the EU.

It follows that for a long-term hire to a non-taxable person belonging in say Italy, the place of supply will be Italy and may require the supplier to register and charge VAT in that Member State.

Question 2

Part 1: Legitimate expectation

Legitimate expectation is the term used to describe the doctrine under which a party (usually a business) can place reliance upon the position of an authority whether made through policy, statute or similar means, in which it may place confidence in understanding the treatment it may reasonably expect to apply to a transaction or course of action. It is not fundamentally an EU concept although it has been applied to EU tax and other matters through the judgments of national courts and the CJEU. One of the better known CJEU VAT cases concerning this point is Marks & Spencer (Case 62/00) in which it was held that national legislation retrospectively curtailing the period for exercise of a right of a taxpayer provided for in the 6th EU VAT Directive, was incompatible with the principle of legitimate expectation. The principle has also been established in Sudholz (C-17/01) where it was held that Article 3 of Decision 2000/186 was invalid due to the violation of this principle, in that it allowed for a change of tax treatment, to the detriment of the taxable person, retrospectively. In general terms, the principle of legal certainty precluded a Community measure from taking effect from a point in time before its publication.

Part 2: Abuse of rights

Abuse of rights is a term used to describe the circumstances in which a business gains a tax advantage as a result of the strict interpretation of a statute in circumstances in which the relief or exemptions are not regarded as intended to be given. The most widely reported European VAT case is in Halifax (C-255/02) in which a partly exempt bank attempted to gain full recovery of input tax on the construction of call centres through a series of transactions involving related companies within the Halifax group. The ECJ held that the application of community law cannot be extended to transactions that are not in the context of normal commercial operations, but solely for the purposes of gaining a tax advantage provided for in community law. It required the national courts to decide whether action constituting an abusive practice has taken place, and if so, allow for the redefining of transactions to establish the situation that would have prevailed in the absence of those transactions.

It is widely accepted that the “Halifax Test” requires two conditions to be met, namely;

1) Whether the scheme achieves a result contrary to the Principal VAT Directive; and
2) Whether the essential aim of the arrangements was to obtain that tax advantage.

Earlier EU cases concerning the development of the principle include Emsland-Starke (C-110/99) which concerned the recovery of European export refunds on foodstuffs which were exported and then immediately re-imported into Germany. More recently Weald Leasing (C-103/09) determined that the structuring of transactions designed to provide a lower VAT liability did not constitute an abusive practice even though additional entities had been unnecessarily introduced in to supply chain.

Another recent case in which the ECJ decided it didn’t need to make a Halifax type ruling concerned Paul Newey, trading under the business name Ocean Finance (C-653/11). In this case the appellant was making exempt supplies in the UK but minimised otherwise irrecoverable input tax, by routing cost components through non-EU companies. The ECJ held that contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purpose of identifying the supplier and recipient of a supply of services. The Court held that they may be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute an artificial arrangement set up with the sole aim of obtaining a tax advantage. The ECJ did not rule on the specific “Halifax” question referred by the UK UTT, but adopted an approach which concentrated on the economic reality of the transactions. The principle has therefore gained a presence in EU VAT jurisprudence although the extent of its application remains to be determined by the national courts.

Part 3: Fiscal Neutrality

Fiscal neutrality is a concept which has proved difficult to define as it is to a large extent aspirational and imprecise. That said, it refers to the overall approach to VAT which seeks to ensure that VAT is not a charge upon economic operators who are intended not to bear the burden of the tax, provided that their activities are subject to VAT. It is referred to by both the EU and the OECD in their guidelines regarding the application of VAT/GST and is widely regarded as consisting of two principles.

The first being that VAT is a tax on consumption and that the deduction of input tax is designed to relieve the burden of the tax, whilst taxing the final consumer – “the First Directive Principle”.

The second is that businesses should be treated similarly for tax purposes – "the Parity Principle".

The majority of case law surrounding the First Directive principle has been concerned with the deductibility of input tax in relation to business that make taxable supplies to consumers through a supply chain of several taxable persons, in contrast to where tax is incurred on exempt activities or in circumstances where the supplies have ultimately not been used by the claimant business. A further aspect of this principle is that the amount of tax borne by an ultimate consumer cannot be greater than the amount due on the consideration paid for the final supply to the consumer per Elida Gibbs (C317/94) which allowed a reduction in the value for VAT purposes for a manufacturer who made promotional payments to consumers of its products. The overall effect is that VAT should be fully deductible throughout a supply chain where the final supply is subject to tax. The effect of the First Directive principle is that the tax is completely neutral as regards its effect on a taxable person who makes only taxable supplies (other than the administrative costs of accounting for VAT, and subject to specific exclusions).
The second principle is concerned with trying to ensure a level playing field and it precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes, so that those goods or supplies must be subject to a uniform rate. This principle has been applied to:

- the concept of unjust enrichment, which at one time was unjustifiably applied to payment traders but not repayment traders selling the same product; Marks & Spencer plc (C-309/06);
- financial products, where essentially similar products were treated differently for tax purposes; JP Morgan Fleming Claverhouse (C-363/05);
- healthcare services, where it has been held that the tax treatment of such services could not be dependent on the legal persona of the taxpayer; Jennifer and Mervyn Gregg (C-216/97); and
- gaming machines, regulated under different gambling legislation. Rank Group plc (C-259/10).

The principle has also applied where car parking facilities are supplied by public bodies and private businesses in competition or potential competition with each other - Isle of Wight Council (C- 288/07).

Part 4: Direct Effect

Direct effect is the term used to describe the EU law concept that allows the provisions of Treaties, Directives and Regulations, in certain circumstances, to give rise to rights or obligations which individuals may enforce before the national courts.

Direct effect allows those articles of the Directives, which are i) unconditional and ii) sufficiently precise, to be relied upon as against any national provision which is incompatible with the Directive, or in the case of individual's rights are assertable against the state.

The first VAT case in which this point was considered was Becker (C- 8/81) which remains a leading case. Becker was concerned with a self-employed credit negotiator who invoked before her German national court an Article in the 6th VAT Directive which enabled the exempt treatment of the granting and negotiation of credit. Germany had not yet implemented the Article into national law. Becker wished to apply the exemption to the period of time from the end of the expiry period for implementation until the German law changed. The ECJ subsequently held that when a Member State has failed to implement a Directive correctly and not before the end of the period prescribed for implementation, that it had breached Article 189 of the EU Treaty which states that a Directive shall be binding upon each Member State. The court concluded that it would be incompatible in view of the binding Article to exclude the possibility of the obligations imposed being relied upon by persons affected. Consequently a Member State which has not adopted the measures required by a Directive in time may not plead, as against individuals, its own failure to perform the obligations that the Directive entails.

The adoption of national measures correctly implementing a Directive does not exhaust the effects of a Directive. It would be inconsistent with EU legal order to be able to rely on a Directive where it has been properly implemented, but not be able to do so where it has not been.

In a Spanish case, Marleasing SA (C-106/89), the ECJ held that "in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter".

Question 3

June 2015

Dear Colleague,

Please find below my comments to enable you to respond to the 5 questions concerning the correct VAT treatment of supplies made by French commercial laboratories:

1) The general rules regarding the place of supply of services are determined by Articles 44 and 45 PVD. These deal with supplies of services made to taxable and non-taxable persons respectively. These general rules are displaced by Articles 46 to 59, which lay down specific rules to determine the place of supply for a range of specified activities. E.g. supplies of transport, services relating to land, restaurant and catering services, etc. In order to decide the correct treatment under the place of supply provisions it is necessary to initially consider the status of the customer in terms of whether they are a taxable or non-taxable person within the meaning of Articles 9 to 13, PVD. Article 9 states that a taxable person is one who "independently, carries out in any place any economic activity". It is therefore necessary to determine who the client is as a first step in analysing the correct tax treatment.

   Despite the fact that the ultimate beneficiary of any testing may be an individual patient, it is most likely that the hospital in which those patients are cared for has the ability to commission any services regarding the patients. In the cases where the hospitals or veterinary practices receiving the supplies are taxable persons, the supply can be treated as made where the EU customer belongs and no VAT needs to charged or accounted for by your client. An exception to this would be where the customer belongs in France and/or provides a French VAT number, or where the hospital does not meet the requirements of the taxable person criteria in Articles 9 – 13. Examples would be where the hospital or vet is governed by a national, regional or local government or governed by public law, in which case Article 13(1) says it is not to be regarded as a taxable person and as a consequence the place of supply remains in France and French VAT should be charged on the supply. Article 18(1) and (2) of the Implementing Regs will assist the supplier in determining the status of the customer.

2) Following the approach detailed in the above paragraph, the place of supply of testing services made to USA hospitals will be outside the scope of EU VAT in the case of supplies to non-government hospitals because the customer would be regarded as a taxable person under the general rule in Article 44. In addition, Article 18(3) of the Implementing Regs allows a supplier of services to a customer established outside the EU to regard that customer as a taxable person if, in the absence of information to the contrary, he obtains from the customer a certificate issued for the purposes of Directive 86/560 by the customer's competent tax authority confirming that he is engaged in economic activities. Where the customer does not possess that certificate, the supplier needs to obtain proof that demonstrates that the customer is a taxable person and is required to carry out a reasonable level of verification of the information provided.

   In contrast, similar supplies to a hospital governed by public law would be regarded as being received by a non-taxable person where the place of supply is France under Article 45 and subject to French VAT. Arguably, the service being provided falls under the services of consultants listed within Article 59(c) PVD which covers supplies of services made to non-taxable persons outside the community. In such a case the place of supply would therefore be outside the EU and no French VAT would be due on supplies to these clients. The ECJ considered whether the activities of veterinary surgeons should fall within the terms of consultancy or similar services in Maatschap (Case C- 167/95) and considered that consultancy suggested activities of an advisory nature. If the testing services fell within this description, the place of supply would be outside the EU and no French VAT would be due. If not regarded as consultancy the place of supply would be determined as France under either Articles 45 or 54 and French VAT would be chargeable.

3) The value of supplies of services to business clients in other Member States under the "reverse charge" arrangements are required to be entered by the supplier on an EC Sales List or "recapitulative statement" showing the value and VAT number and Member State of registration for each customer receiving such supplies during the monthly or quarterly reporting period. There is no requirement to enter the value of such supplies to businesses in other EU Member States on the supplier's VAT return.

4) The value of services received are subject to reverse charge procedures for business customers which require the recipient to calculate the VAT due on the supply at the rates applicable in its Member State and to recover the tax calculated to the extent allowed by the applicable partial exemption method. The clients in EU private hospitals are likely to be using the testing services as part of the provision of exempt health care for patients. Medical healthcare is exempted from VAT under Article 132(1) (b) PVD.

5) Supplies made to private individuals resident in the UK are subject to French VAT under Article 45 PVD which states that the place of supply is where the supplier has established their business. However, where the private individual is resident outside the EU, as in the case of Jersey, no VAT is due where it can be successfully argued that the services are those of a consultant or similar within Article 59 (c) PVD because the place of supply is where the customer is established, has his permanent address or resides. In this case the supply would be outside the scope of French VAT.

I hope that the information detailed above allows you to provide appropriate advice.

Please do not hesitate to contact me should you wish to discuss these matters further.

Regards,

Student A

Question 4

Part 1

An application for refund of VAT incurred in the course of business in an EU Member State may be made by a business registered for VAT in another Member State under the provisions of Directive 2008/9. This procedure has applied since 1 January 2010 when it replaced the former "Eighth Directive refund system".

The requirements which need to be met include:

- The VAT must have been incurred in the course or furtherance of a business activity in the Member State of registration.
- Tax invoices need to be held to substantiate the amounts claimed.
- The claimant must not be registered or registerable for VAT in the Member State from which the refund is sought.
- The claimant shall not have a fixed establishment, seat of economic activity, place of business or other residence there.
- During the refund period the applicant must not have supplied any goods or services in the Member State of refund with the exception of i) transport and ancillary services, ii) supplies where VAT is payable by the recipient of the supply, or iii) supplies under the MOSS scheme from 1 January 2015.
- The claimant is required to provide evidence from his host tax authority that he is a taxable person in his host Member State.
- Any claim needs to be submitted electronically through the EU electronic portal designated for this procedure.
- The refund period shall not in normal cases be longer than 12 months nor shorter than 3 months.
- Claims must be made before 30 September of the calendar year following the refund period.
- Invoices above 1,000 Euros need to be scanned and submitted with the claim, other invoices should be retained pending possible verification.

Part 2

A UK VAT registered entertainer performing at an awards ceremony in Germany on behalf of a UK client would be expected to treat their supply as a Business to Business (B2B) supply for which the place of supply is where the customer belongs. In this case the supply would be made in the UK and UK VAT would be expected to be chargeable, Article 44 PVD refers. This treatment has only applied since 1 January 2011 and B2B entertainment and similar activities were previously subject to VAT at the place of performance between 1 January 2010 and 31 December 2010.

In the present case, since it is known that the UK entertainer is VAT registered, it is possible that the entertainer has failed to recognise the place of supply change that took place from 1 January 2011 with regard to entertainment activities, or has treated his supply as a B2C transaction under Article 54 for which the place of performance (Germany) determines the place of supply. In either case, I would recommend to the client that he may wish to suggest to the entertainer that he check whether he has correctly determined his VAT position.

Part 3

Attendees at the awards ceremony who are not registered for VAT in the UK could be variously considered as having paid for admission to an entertainment or similar event (Article 54) or alternatively to have received a supply of restaurant and catering services (Article 55) and/or services related to land (Article 47) or indeed a combination if these. In each case, the place of supply is Germany. I would advise my client that he should inform the unregistered hairdressers that no UK VAT is chargeable on the event unless the supply is treated as a TOMS supply (for which see below), but that they may be charged German VAT which would not be recoverable as they may not be eligible for a refund under Directive 2008/9.

Part 4

The Tour Operators' Margin Scheme (TOMS) is a special EU VAT scheme for businesses that buy-in and re-sell travel, 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.

The TOMS scheme is compulsory and although described in Article s 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 to travellers. Ostensibly the supplies by businesses providing conference and similar facilities without travel arrangements would not be expected to fall within the scheme. However, packages such as this, which include accommodation, fall within the TOMS scheme when made to non-business customers and business customers who use the supplies for their own consumption, which is arguably the case here. The fact that a travel agent supplied accommodation only was held in Beheersmaatschappij Van Ginkel Waddinxveen BV (C – 163/91) to not exclude the supplier from the special scheme provisions. The advice to this client is that under the current arrangements their supplies should be treated under the TOMS arrangements and no input tax should be reclaimed on the component elements. Instead the supplier must account for UK VAT on any margin achieved on the re-sale of the ‘package’.

The business should be advised that its supplies would be taken outside TOMS were it to have the attenders arrange their own accommodation and travel. This way the UK business would no longer be supplying services within the TOMS scheme and would be subject to the normal VAT rules requiring them to charge UK VAT as set out above.

Question 5

12 June 2015

Group Taxation Director
Lion PTE Limited
Singapore

Dear Sir,

VAT aspects of marketing web-based services in Europe

I am replying to your request for advice in respect of the VAT treatment of electronic services which you are considering marketing into the European market by means of a website.

Before addressing the VAT treatment of the specific products that you have listed, it may be helpful if I provide a summary of recent changes to the VAT treatment of certain electronic and other similar services made to customers in the EU.

Recent changes

The VAT treatment of supplies of broadcasting, telecommunications and electronic services to non-business customers in the EU changed on 1st January 2015 following the implementation of Regulation 1042/2013, amending Implementing Regulation 282/2011. The changes affect the application of Article 58 and Annex II of the Directive.

These measures changed the place of supply of broadcasting, telecommunications and electronic services, when made to non-taxable persons, from the place where the supplier belongs to the place where the consumer belongs.

The initial impact of these measures could result in suppliers of affected services having to register in each EU Member State in which they have customers in order to account for the VAT due and being subject to the different registration thresholds that exist for non-resident businesses in each Member State. However, the EU has implemented an arrangement which allows businesses to register for VAT in one Member State to account for VAT on sales made to non-business customers across all EU Member States, providing the supplier does not have a fixed establishment in any of the Member States of their customers. This optional arrangement is a simplification arrangement known as the “mini one stop shop” – or MOSS scheme.

Under the scheme, B2C supplies made in each Member State must be subject to the local rate of VAT applicable in the Member State of the customer. You will be provided with a single VAT registration number issued in the Member State in which you register for the MOSS scheme. The VAT due on all relevant supplies made to non-taxable customers must be accounted for through the MOSS scheme, which allows for one return and a single payment of tax each quarter which is subsequently divided up between the Member States in which customers belong. Returns and payments will need to be made electronically and within 20 days of each quarter end.

Types of supplies

Before considering which of these arrangements may be most suitable, it is worth considering whether your proposed supplies are within these arrangements and if so which of the Telecoms, Broadcasting or Electronic Services (TBES) terms apply.

1) Downloadable games – these would be considered to be electronically supplied services (ESS) within the meaning of Article 7 of the Implementing Regs which states that ESS “shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology”. They are also included as an example of an ESS in Annex 1 to the Implementing Regulations 282/2011. It follows that the place of supply would be where the B2C customer belongs.

2) Ringtones for mobile telephones – these supplies are specifically included as an example of an ESS in Annex 1 to the Implementing Regulations 282/2011. B2C supplies will therefore be taxable where the customer belongs.

3) Anti-virus software – this would also be the supply of an electronically supplied service referred to under Article 7, which in the case of a supply to a B2C consumer would be taxable in the place where the customer belongs. If supplied to a business customer, B2B, the place of supply would also be where the customer belongs, the EU business customer would be subject to the reverse charge arrangements.

4) Training packages with printed materials and a telephone support service – As this supply involves human intervention during the webinar and the telephone support it is not an ESS. Instead the normal VAT rules apply. This is arguably a mixed supply of goods and services which should initially be considered under the principles established in Card Protection Plan (C 349/96). In the Card Protection Plan case the ECJ considered whether transactions consisting of Insurance and a credit card registration service (sold for a single price) should be regarded as two supplies, or whether one of those supplies should be regarded as a principal supply to which the other is ancillary so that it receives the VAT treatment of the principal supply. It could be argued that the printed course material and support service are a means to better enjoy the electronic training webinars and the consideration for the whole package should be accounted for as a supply made from Singapore not subject to VAT in the EU.

The important test considering whether one service is ancillary to another was considered in the ECJ case of Madgett and Baldwin (C-308/96 and C-94/97) which found that a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied.

Administrative aspects

For each ESS supply that you account for, under the MOSS scheme or otherwise, you will be required to consider the application of Articles 24a, 24b (a), (b) and (c) to determine the location of your customer. If the location is not determined by these Articles, as here, you will be required to collect and keep two pieces of evidence of where each person normally lives, Article 24f lists the types of evidence that may be collected as:

- The billing address of the customer;
- The IP address of the device used by the customer or any method of geolocation;
- Bank details such as location of bank account used or billing address held by the bank;
- Mobile Country Code (MCC) on the SIM card used by the customer;
- Location of the customers fixed land line; and
- Other commercially relevant information.

For practical purposes you may find the 1st, 3rd and 6th items most practical to determine, providing the items are non-contradictory they shall be used to determine where the customer is established and consequently what VAT rate to apply to the supply. The presumptions made on the basis of the non-contradictory evidence may be rebutted by a tax authority where there are indications of misuse or abuse Article 24d (2).

Article 18(2) of the Implementing Regs states that, irrespective of information to the contrary, the supplier of ESS may regard a customer established within the EU as a non-taxable person when he can demonstrate that the customer has not communicated his individual VAT identification number to the supplier.

In the event that you decide to commence the marketing and sales of any of these products into the EU market, I need to advise you that in addition to the obligation to register in each Member State, or to apply to adopt the MOSS scheme, you may need to consider the means by which you recover VAT incurred in any of the Member State in which you operate or conduct business activities. Unfortunately the MOSS scheme does not allow for recovery of input tax, and you will be required to submit any refund claim under the 13th Directive refund procedures detailed in Dir. 86/560. This procedure may entail lengthier delays in recovering VAT incurred than would be the case in a conventional national registration "offset" arrangements. If you register for VAT in each Member State, you will be able to recover VAT incurred in that Member State on the local VAT return.

A similar issue exists with regard to the correction of submitted VAT returns, in that any corrections will need to be advised for each return rather than being “rolled over” into the next subsequent return. Ultimately you may find that separate registration in each Member State is in the longer term a more suitable option.

One final point concerns how the EU tax authorities that may choose to audit your MOSS returns. A list of Member States that are in agreement that the tax authority of the Member State of MOSS registration will conduct audits and make initial approaches to the registrant has been published by the European Commission. In addition, the agreement extends to communication with registrants by e-mail and to provide a standard audit file. Whilst not legally binding this agreement has been formed amongst the majority of EU Member States. You will also be required to keep records for 10 years from the end of the year of each transaction and submit tax payments in Euro or the designated currency of any Member State that is not in the Eurozone.

I trust the information above is sufficient to enable you to consider the VAT options that are available and please do not hesitate to contact me in the event that you wish to discuss any aspect in greater detail.

Yours sincerely,

A Student
Tax Expert

Question 6

Fixed Establishment

Articles 44 and 45 PVD require that a fixed establishment is considered when the place of supply of services is dependent upon the place of belonging of the recipient or supplier of a supply. EU VAT law provides that an economic operator may have a business establishment and any number of fixed establishments, which could possibly be in several different countries. In many cases the business establishment and fixed establishment will be in the same location and no difficulty arises. However, in circumstances in which a taxable person has a business establishment in one Member State and fixed establishments in several other Member States it is important to determine whether a location has a sufficient degree of permanence and human and technical resources to allow it to receive and use services for its economic activities.

In circumstances in which two or more places may be considered to be the place of supply, the matter is determined by the location of the fixed establishment that is most directly concerned with the supply in question.

Articles 10 and 11 of the Implementing Regulation 282/2011 apply from 1.7.11 and describe the requirements to be considered when determining the existence of a fixed establishment for the application of Articles 44 and 45 PVD. In particular Article 11 states that "a fixed establishment shall be any establishment, other than the place of establishment of a business referred to in Article 10, 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." Article 11(3) states "The fact of having a VAT number shall not in itself be sufficient to consider that a taxable person has a fixed establishment."

Amongst the earliest ECJ cases to consider fixed establishment was *Berkholz*, C-168/84, which was concerned with a German trader who installed gaming machines on ferries operating between Germany and Denmark, and contended that services from such machines were provided from a fixed establishment located on the ships. The ECJ ruled that an operation such as this may only be regarded as a fixed establishment if the establishment entails the permanent presence of both the human and technical resources for the provision of those services.

In *Faaborg-Gelting Linien*, C-231/94, a business established in Denmark provided meals on ferries operating between Denmark and Germany, which the German authorities assessed as supplies of goods. The ECJ held that the meals were supplies of services deemed to be carried out at the place where the supplier established his business. The Court observed that, applying Berkholz, the place where the supplier had established his business was the "primary point of reference", and that regard was only to be had to another establishment from which the services were supplied if the reference to the place where the supplier had established his business did not "lead to a rational result for tax purposes" or if it created a "conflict with another Member State".

In the case of *ARO Lease*, C-190/95, the ECJ held that for cars leased from a business in the Netherlands to business customers in Belgium, the place of supply could not be deemed to be from an establishment other than the main place of business unless that establishment had a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of the services. Accordingly the leasing company could not supply the cars from a fixed establishment in another Member State if it did not have an office or any premises on which to store the cars.

In RAL (Channel Islands) Ltd (C- 452/03) the Court considered whether the takings from gaming machines, located in the UK but operated by a company established in the Channel Islands, should be considered to have a place of supply at the place of establishment of the supplier, or a fixed establishment at which they were located. In this case the ECJ held that the supplies were "entertainment or similar services" made from a fixed establishment in the UK.

A further case, Welmory Sp z.o.o (C– 605/12), considered whether a Cypriot entity which uses the human and physical resources of another entity based in Poland (Welmory) should be considered to have a fixed establishment in Poland despite having a headquarters in Cyprus contracted to receive those services. In this case, the Cypriot company organised online auctions of goods on behalf of Welmory and received services including advertising and data processing from the Polish company. The Polish tax authority adopted the view that Welmory should charge VAT on what they regarded as domestic

supplies to the Cypriot company because they had a fixed establishment in Poland through the use of Welmory's infrastructure. Welmory had treated its supplies as being made in Cyprus where its customer was established.

The ECJ decided that the Cypriot company could have a fixed establishment in Poland if it uses Welmory's infrastructure:

- With a "sufficient degree of permanence"; and
- The infrastructure constitutes necessary human and technical resources to enable the Cypriot company to receive Welmory's services and to use them in its business.

The ECJ decision left it to the national court to apply an interpretation of the Directive and Regulations although it confirmed the continuing application of the case law applied to the interpretation of the earlier 6th VAT Directive (Article 9, Dir. 77/388).

A supplier seeking to determine a customer's fixed establishment to which a service is provided shall examine the nature and use of the service provided (Article 22 Reg 282/2010) and shall pay particular attention to whether the contract, order form and VAT number attributed to the Member State of the customer actually identifies the fixed establishment as the customer of the service and whether the fixed establishment is the entity paying for the service. Where the customer's fixed establishment to which the service is provided cannot be determined, or where the contract covers several services used in an unidentifiable and non-quantifiable manner, the supplier may legitimately consider the services have been supplied at the place where the customer has established his business (Article 10).

When a supply is made to a taxable person under Article 44 of the PVD, Article 21 of the Implementing Regs allows for the exceptional circumstances in which the customer has neither an establishment nor fixed establishment and determines the place of supply by reference to the recipient's permanent address or usual residence. A similar provision applies in Article 45 in cases in which a supplier of B2C services has neither a business nor fixed establishments, the fall-back position being the place of permanent address or residence of the supplier.

Question 7

Part 1

The recharges of accountancy software IT costs made by the head office of Strauss Trading in the USA to each of the branches of Strauss Trading in Europe would not generally be viewed as a supply under the principle established by the ECJ in FCE Bank (Case C- 210/04). This is because a branch and its "head office" are parts of the same legal entity, and consequently it is not possible to have supplies between them. The FCE Bank case supports the view that the Belgian branch single registration does not need to account for VAT on any supplies to it from the US head office under the "reverse charge" arrangements because it is not a "taxable person", within the meaning of Article 9 PVD, carrying out an economic activity independently of its own head office.

However, the position is different where the branch is a member of a VAT Group because the group is regarded as a taxable person independent of the US head office from which the recharge or supply was made. This scenario was considered by the ECJ in Skandia America Corp. (Case C- 7/13) which determined that Article 9 PVD should be interpreted to view the branch, together with the other entities within the VAT group, as a taxable person distinct from the US head office. One of the consequences of the decision is to treat transactions between the head office in a third country and a branch of the same entity when registered as part of a VAT group as supplies within the scope of VAT. The same analysis would apply to the German branch which is in a VAT group with representative member Swann GmbH and which would be expected to account for VAT under the reverse charge arrangements on the value of supplies made to it, in this case $15m. The VAT calculated on the $15m recharge would be recoverable to the extent allowed by the partial exemption method for the VAT group. Because the branch makes both taxable and exempt supplies it would be expected that the German VAT group, will incur some irrecoverable VAT.

Irrespective of whether or not the Luxembourg branch is registered for VAT at the time the recharge is made, it may be able to rely on the FCE Bank case and not consider the recharge from head office to Luxembourg branch as a supply of services within the scope of VAT.

Part 2

The VAT treatment of supplies of staff from the German to the Belgian branch of Strauss Trading, Inc., each of which are separately registered for VAT in their respective Member States, would normally be expected to follow the principles in the ECJ judgment in FCE Bank (Case C-210/10) and be regarded as transactions outside the scope of VAT. It would be expected that transactions between branches of the same entity would be treated in the same way as transactions between a branch and its head office on the grounds that branches are not capable of acting independently as separate taxable persons.

However, in this case, the German branch is a member of the Swann GmbH VAT group and as such is a taxable person under the terms of Article 11 PVD which allows Member States to permit entities closely bound by financial, economic and organisational links to be treated as a single taxable person. In view of the ECJ judgment in Scandia America Corp. (Case C- 7/13) it is reasonable to expect that a recharge from the VAT group represented by Swann GmbH, to the separately registered Belgian branch, would be viewed as a taxable supply subject to the reverse charge in Belgium and to the same conditions that exist for supplies of services made between unrelated taxable persons established in different Member States. These requirements would include a potential restriction of input tax by the Belgian branch on the reverse charge supply made to it by the VAT group in which the German branch is a member.

Part 3

The sale of shares is generally treated as an exempt supply in accordance with Article 135 (1) (f) PVD and input tax directly attributable to the sale is not normally recoverable in accordance with the ECJ judgment in BLP Group plc (Case C4/94).

However, in the case of AB SKF (Case C-29/08) the ECJ decided that the sale of shares in a subsidiary by a holding company that played an active role in the management of the subsidiary and provided taxable services to it, was an economic activity. It also decided that a sale of shares could be similar to the "transfer of a totality of assets" under what is now Article 19 PVD and that the costs of selling the subsidiary could be treated as overheads of the seller's business as a whole, or of the business part being sold, in those Member States that chose to apply the provisions in Article 19.

The ECJ also decided that it was necessary to determine whether the costs incurred were incorporated into the price of the shares sold or whether they were cost components of other taxable activities of the taxable person that was the selling group.

In this case there has only been a three month period between the holding company registering for VAT and the disposal of the shares in Muller A/S which suggests that only limited taxable supplies are likely to have been made to this subsidiary before the sale of shares. It is also not clear whether Strauss Denmark is engaged in taxable activities besides the services it provides to the two subsidiaries. On balance, it appears more likely to be directly attributable to the exempt share sale rather than having a direct and immediate link with the overall economic activities of the parent and will be not be recoverable input tax.