

VALUE ADDED TRAVEL

Quarterly VAT news for the travel and events sectors

March 2019

Welcome to this latest edition of Value Added Travel, my newsletter for those operating in the travel and events sectors. If you would like to discuss any of the points covered, or indeed any other VAT issue, please do feel free to contact me. My contact detail is set out overleaf.

Previous editions are available [here](#).

Brexit

Let's start with Brexit. At the time of writing (28 March), MPs are part way through their attempt to find a Brexit outcome on which they can agree. Clearly, great uncertainty remains on what will happen and we do not know what the VAT position will be. I will issue an update once we know more.

At the moment, four main outcomes still seem possible: a no deal exit, Mrs May's deal, Brexit on "softer" terms (such as the inclusion of a customs union with the EU) and remain. Each has its own VAT outcome.

As far as travel VAT is concerned, we do know what would happen to some extent in each of the scenarios.

No deal – HMRC have legislated for a new UK version of TOMS which would apply if we leave with no deal. This would see the continuation of the current rules but the margin would only be taxable to the extent it is earned on services enjoyed in the UK. Please see the January 2019 edition of this newsletter [here](#) which looks at the position in detail, not just for those within TOMS but also for wholesalers and events agencies.

So the UK position is fairly clear. What remains very unclear is the position of UK travel suppliers in other member states. It is often overlooked that TOMS is a simplification which removes many of the complexities



which would otherwise exist. The basic rule for many types of travel and tourism service is that VAT is due in the member state in which the service is enjoyed. TOMS overrides this and ensures that the supplier only needs to pay VAT in his member state of establishment.

However, TOMS is an EU scheme and it is unclear where suppliers outside the EU stand in the context of the scheme. It is possible to interpret the EU Directive to mean that all suppliers are covered by TOMS but are not subject to VAT if established outside the EU. This interpretation would mean that UK suppliers would pay no EU VAT on travel to the EU27 (and would pay no UK VAT either under the new UK TOMS). However, it is also possible to see the EU rules as applicable only to suppliers located within the EU. In this case, UK tour operators and similar may need to pay VAT in each member state in which their services are enjoyed.

As far as I'm aware, no member state, nor the European Commission, has made any announcement on what they would expect. However, HMRC did comment on this in the explanatory memo accompanying the Statutory Instrument which introduced the no deal TOMS. First, in describing the simplification benefit of the current arrangements, this memo stated that:

"UK tour operators only have to register for VAT in the UK rather than in each member state where their travel services are enjoyed".

This implies that UK suppliers must register if the EU TOMS is not available to them. However, when addressing this issue specifically, the memo was rather more vague:

"It is possible that some member states will require UK based tour operators to register for VAT for supplies of travel services made in their country, although practices

vary. However, as the VAT on the margin in the UK will be zero rated there is no risk of them being taxed more than once on the supply”.

Remain – clearly, EU law would continue to apply. VAT would continue as it is now. The EU version of TOMS would still apply. It must be very likely, however, that the UK would adapt its implementation (or be forced to do so) to reflect CJEU judgements. We could expect this to mean the inclusion of wholesale supplies in TOMS, the adoption of new time of supply rules (the Skarpa decision – see the December edition here) and even the need to calculate TOMS VAT due on a sale by sale basis.

Mrs May’s deal – this would involve a transitional period during which EU law continues to apply. The EU TOMS would continue but there would again be a chance that changes required by the CJEU judgements would be introduced during the period, particularly if the period is extended.

What would happen at the end of the transition period would be determined by the nature of the agreement reached with the EU. In the absence of any agreement to the contrary, it is reasonable to think that the no deal arrangements might apply.

Customs union – one of the options discussed is to adopt the transitional period and to change the political declaration to include a customs union. The VAT position during the transition would be as described above. The position after that would once more be dependent on the agreement on the future trading relationship.

Cancellation income

In the December edition, I reported on a new HMRC policy in [Revenue Brief 13/18](#) on retained payments upon cancellation.

HMRC had announced that, from 1 March 2019, deposits and other payments retained in the event of cancellation could no longer be treated as not subject to VAT. Hotel cancellations were given as an example affected by this change.

I questioned whether it was HMRC’s intention to change the treatment of cancellation fees charged by those within TOMS. HMRC’s guidance for many years has stated that a tour operator’s cancellation charges should be excluded from TOMS (and thereby not be subject to VAT). On the same day as the publication of the Revenue Brief, HMRC published a new TOMS Public Notice which once more contained HMRC’s position that cancellation fees were not subject to VAT, fuelling

the feeling that HMRC continued to see tour operators’ cancellations as free of VAT.

However, we were disabused of this view in late February when HMRC issued a revised TOMS Notice which states that cancellation fees should be included as part of the TOMS selling price. It is now clear that HMRC expect cancellation fees paid to any business within TOMS to be subject to VAT. It should be noted though that the effect of this change would be very limited under the new UK no deal version of TOMS.

Nevertheless, there are reasons to question the HMRC position. HMRC have quoted two CJEU judgements in support of their position whilst ignoring other decisions which suggest that cancellations should still be free of VAT. Notably, the CJEU decided, in the Société thermal d’Eugénie les Bains case, that hotel cancellations were not subject to VAT. It is understood that HMRC believe that the decision in that case has been superseded by later judgements. There are good arguments, however, that the Société thermal decision is still valid and is the most relevant to the circumstances of those in TOMS.

There is a further objection to the HMRC position in the form of the TOMS time of supply rules. For most, the point at which TOMS VAT is paid is the date of departure. In a nutshell, therefore, if there is no departure, how can any VAT be due?

ABTA has made representations to HMRC on behalf of its Members on the issues involved.

The meaning of agency

I have included updates in previous editions on the progress of the agency cases.

The key decision on this issue was in 2014, in the case of Secret Hotels 2 (formerly and better known as Med Hotels). The Supreme Court concluded that Secret Hotels had acted as a disclosed agent and was therefore not required to pay VAT on the sale of accommodation. Five further cases have since been heard – the Hotels4U, Hotelconnect, Lowcost, Opodo and Alpha International cases all of which were won by the taxpayer.

But HMRC continued the fight and, in November last year, there was a hearing to decide (Brexist notwithstanding) if the issue should be referred to the CJEU. The Tribunal has just released its decision that no referral should be made. HMRC have the right to seek leave to appeal the decision. Any such request must be made by 7 May, so we must wait a little longer, at least, for a final position on these cases.

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