

VALUE ADDED TRAVEL

Quarterly VAT news for the travel and events sectors

December 2018

Much has happened since the September edition of Value Added Travel, and it's by no means all Brexit related. In September, I reported on the Advocate General's opinion in two TOMS cases and the judgement in both has now been released. HMRC have announced a new policy on retained payments and unused services which could affect many. There is also news of developments on the EU front. The extent to which any EU changes, and indeed the recent judgements of the CJEU, affect us in the UK must depend on what happens with Brexit.

Previous editions are available [here](#).

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.

Cancellations

On 14 December, HMRC published [Revenue Brief 13/18](#) to announce a change of policy on the VAT treatment of retained payments and deposits. This states that HMRC's policy of allowing businesses to treat payments received as not subject to VAT when the service for which the payment was made is not used will change on 1 March 2019. HMRC will then expect VAT to be paid on all retained payments for unused services (and uncollected goods), regardless of whether the customer tells the supplier that he will not be using the service. They give the example of a hotel booking and state that the hotel cannot adjust the VAT on any payments already made if the customer cancels on or after 1 March.

Does this mean cancellation charges must now be included in TOMS? Well possibly, but it is possible to distinguish a holiday cancellation from the



circumstances described in HMRC's new policy. Furthermore, on the very same day as the Revenue Brief was published, HMRC released an updated version of the [TOMS Notice](#) which still states that cancellation fees should be excluded from the TOMS calculation. This issue will require clarification.

When is TOMS VAT payable?

The first of the European cases to be concluded this quarter is that of [Skarpa Travel](#) (C-422/17). This decision may require significant changes to the nature of TOMS accounting in the UK but whether it actually does so is really down to which of the Brexit outcomes we get.

The issue is the treatment within TOMS of deposits and payments on account. The UK version of TOMS allows payments on account to be ignored and for VAT to be paid wholly by reference to the date of departure. We now know that this is wrong as the Court concluded that a TOMS business must pay VAT on the receipt of deposits and other payments on account.

The value on which VAT should be paid (i.e. the margin deemed to be included within the payment on account) should be calculated by reference to the estimated margin to be achieved on the final supply. In other words, if, say, it is expected that the final margin to be made is 20%, then 20% of the on account payment will also be considered to be margin and VAT will be due on this 20% of the payment (assuming the supply contemplated is to be enjoyed in the EU).

Standalone services and TOMS

The second case is that of [Alpenchalets Resorts](#) (C-552/17). The decision here is that the supply of

accommodation on its own is capable of falling within TOMS: it does not need to be a part of a package to do so. This conclusion is consistent with the UK approach.

The Court also concluded that the margin is standard rated even if the service would otherwise attract a lower rate. This is also the UK rule.

The AG commented that a single service would be within TOMS only if it is accommodation or transport. Others such as car hire would therefore, on this basis, not fall within TOMS. However, the Court did not comment on this, limiting itself to the question of accommodation-only supplies.

The EU position

Much has happened in the last year. First, the Commission's study on the application of TOMS and on options for reform was published last December. This concluded that TOMS should be retained but needs reform. See [here](#) for a summary.

Then, in February, the Commission won its infringement action against Germany, confirming that wholesale supplies must be included in TOMS and that TOMS VAT must be calculated separately for each sale. Soon thereafter, it was announced that the Commission is taking similar action against Austria. It is understood that the Commission has been corresponding with other member states, including the UK, to understand their application of TOMS, no doubt with further infringement action waiting for any which refuse to fall into line with the CJEU's interpretation of the scheme.

In October, the travel Fiscalis meeting took place. The Commission and member states discussed last December's study and how reform might be pursued. I attended as a guest of the Commission. There were four main areas under discussion:

- The treatment of B2B supplies;
- The status of third country travel suppliers;
- The scope of TOMS; and
- The method of TOMS calculation

There was healthy discussion on each and it was clear an appetite existed for reform. It is understood that the Commission currently sees the third country question and the basis of the calculation as the priorities. It is clear that Brexit has created added incentive to consider the status of third country suppliers.

Whilst what happens with Brexit is key in understanding the effect of EU changes and case law in the UK, it is evident that how the Commission and member states interpret the effect of the current rules towards third

country travel businesses and how they might adapt the rules during a reform process will be very important.

Brexit

As you will be aware, the government has recently been advising business to prepare for a no-deal Brexit. [The Government's advice](#) for businesses in relation to TOMS if there is no deal was updated on 21 December and says the following:

"The Tour Operators' Margin Scheme is an EU VAT accounting scheme for businesses that buy and sell on certain travel services that take place in the EU. HMRC has been engaging with the travel industry and will continue to work with businesses to minimise any impact".

This is barely any different to the first version of the guidance issued in August. It seemed inadequate then but it beggars belief that this is still the full extent of official guidance less than three months before departure. Information on what the UK rules would be in a no-deal scenario, and also on possible obligations in other member states, is urgently needed.

Four main Brexit outcomes are regularly discussed: Mrs May's deal, a "managed no deal", Norway Plus and remain. Who knows what will happen but it is clear that each has its own VAT implications. TOMS would of course continue if remain wins the day and would also continue during the transitional phase in Mrs May's deal. It is possible it could continue in a Norway Plus model but would not in a no deal scenario.

If TOMS continues in the UK, even if only in the short term, it seems possible that significant changes would be required. Amongst the changes we might expect are the inclusion of wholesale supplies in TOMS and a change to a sale by sale basis of calculation, including the payment of VAT on deposits etc as per the Skarpa decision. Inclusion of wholesale supplies would mean significant changes for many and would also bring the end of the transport company mitigation scheme.

The meaning of agency

As reported in September, HMRC continue to contest the findings of the courts (notably in the Med Hotels case) on the meaning of disclosed agent for TOMS purposes. In November, the Tribunal heard HMRC's arguments in support of the referral of the issues involved to the CJEU (in the Hotels4U, Hotelconnect, Lowcost, Opodo and Alpha International cases). It had been expected that the decision on whether the issues should be referred would be released before Christmas but this did not happen.

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