

# VALUE ADDED TRAVEL

## Quarterly VAT news for the travel and events sectors

June 2018

Welcome to this first edition of Value Added Travel, my newsletter for those operating in the travel and events sectors. I hope you find the information here to be useful.

My intention is to publish this newsletter each quarter.

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.

### Brexit

It will come as a surprise to no-one that there is no clarity yet on what Brexit will mean for VAT in general or for the travel sector specifically. However, it is interesting to note the comments of the European Scrutiny Select Committee in April that HM Treasury seems to prefer that the UK should remain in the EU VAT Area. For example, commenting on papers submitted to the Committee by the Treasury Minister, the Committee thought that:

*“it could be that the government’s long term objective is continued alignment with EU VAT legislation beyond the transition, to maintain the “freest and most frictionless trade possible””.*

Remaining in the EU VAT area would mean still being bound by EU rules (over which we would have little, if any, say) and by judgements of the Court of Justice of the European Union (“CJEU”) (against one of the government’s “red lines”). The EU VAT area is distinct from both the Customs Union and Single Market.

As a member of the VAT area, it seems reasonable to conclude that the VAT treatment of travel, including the TOMS rules, would remain largely as now. Of course,



any such proposal would be controversial and no doubt unacceptable to some. There will be many twists and turns on this still to come I’m sure.

It is also relevant that the Treasury Select Committee is looking at the VAT effects of Brexit (as part of its wider VAT Inquiry). Comments to the Committee closed on 31 May so hopefully more detail will be forthcoming soon.

### When is TOMS VAT payable?

A case (Skarpa Travel, C-422/17) heard at the CJEU on 7 June could affect the point at which TOMS VAT is paid and also greatly complicate the scheme.

This is a Polish case about the payment of VAT within TOMS on advance payments such as deposits. In the UK, most tour operators opt to pay VAT wholly by reference to the departure date but the arguments put to the CJEU claim that TOMS VAT should be paid every time a payment is received. For example, the European Commission submitted that VAT is due on each payment based on the actual margin at that point, i.e. the difference between the value of the advance payment and related costs actually incurred at that time.

It will be some time before we get the judgement. Its relevance to UK tour operators will depend on our participation in the EU VAT area.

### Update on the situation in Germany

As is well known, in 2013 the CJEU held that wholesale supplies must be included in TOMS and that TOMS payments must be calculated on a sale by sale (and not as we do in the UK, for example, on an aggregated annual basis). Germany, however, continued with its

practice of excluding B2B supplies from TOMS and did not require a sale by sale assessment. As a result, the European Commission took action against Germany and in February this year the CJEU, unsurprisingly, agreed with its own decisions of 2013 and judged Germany to have applied EU law incorrectly.

It is expected that Germany will soon announce changes to its rules to give effect to both aspects of the CJEU judgements. When the new rules will take effect, however, is uncertain. There may be a transitional period but, equally, I understand it is possible the new rules could be backdated to 1 January 2018. The need to calculate on a sale by sale basis would only affect businesses established in Germany but the change to the treatment of B2B supplies would be highly significant for many businesses, German and non-German.

Many tour operators and similar have been obliged to register in Germany to pay VAT under the reverse charge on German services purchased from a non-German supplier. The basis for this, in many cases, has been the exclusion of B2B supplies from TOMS under German law. That must change and it seems that the German tax authorities cannot enforce the payment of VAT by any non-German taxpayer on services which should be within TOMS. This gives a strong basis in many circumstances for taxpayers currently faced with such a demand to argue that the demand is incorrect. It may also be possible to seek a repayment of VAT paid previously under the German reverse charge.

A recently published decision of the German Federal Fiscal Court supports this view. The Court considered the situation of a German tour operator required to pay German reverse charge VAT on hotel accommodation acquired from an Austrian wholesaler. The Court concluded that the tour operator had the option to apply TOMS given the contradiction between the CJEU position and German domestic law. The tax authorities had imposed a liability on the tour operator based on the normal German non-application of TOMS for B2B supplies but the Court ruled that the authorities were wrong to do so: the taxpayer could rely on the interpretation of the CJEU. This applied even though the supplier, i.e. the Austrian wholesaler, did not apply TOMS.

Please note that the above is only relevant to the treatment of services which are capable of falling within TOMS. In particular, the German reverse charge still applies to the purchase of services from a non-German operator of the service itself (i.e. services supplied on

an in-house basis), for example a river cruise enjoyed in Germany but supplied by a non-German river cruise operator. It is clear, however, that the CJEU decisions mean, for many, the end of the need to pay German VAT and present an opportunity to recover VAT which the CJEU has, in effect, said should never have been paid.

It's not all good news though. Many B2B suppliers of German travel services have made successful claims for recovery of VAT on the purchase of German accommodation and other services. Presumably, from the effective date of the anticipated changes, such claims will no longer be permitted.

If you would like more information on this, please let me know. I can put you in touch with our German specialist consultant in our Tourism Tax & Law network if you would like advice specific to your circumstances.

### **Austria**

Austria has operated similar rules to those in Germany. Austria announced some time ago (in response to the 2013 judgements) that its rules would change but the changes have been postponed twice and would not have given full effect to the 2013 judgements (for example, it seemed likely that events would remain outside of TOMS). As a result, on 7 June the Commission announced that it has sent a reasoned opinion (part of the infringement procedure) to Austria for its alleged non-compliance. Austria has two months to agree to change its rules or the Commission may add Austria to the list of member states taken to court on these issues.

I can also introduce you to an Austrian specialist who would be happy to advise you.

### **Making Tax Digital**

In my note last month on Making Tax Digital, I referred to a number of uncertainties which I was hoping that HMRC would clarify. Despite writing to HMRC well over a month ago on these points, I have had no reply so I'm afraid there is no update I can give at this time.

### **VAT Forums**

We will be holding the next in our series of the VAT Forum in mid-July. The dates are still to be finalised but invites will be going out shortly. As before, we will be holding separate events for the leisure travel sector and the business travel/events sector.

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