

VALUE ADDED TRAVEL

Quarterly VAT news for the travel
and events sectors

September 2018



Welcome to this second 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. 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

There's only really one place to start. My comments on VAT and Brexit in the [June edition](#) suggested, based on comments attributed to the Treasury, that the UK might remain in the EU VAT area and that, as a result, the VAT treatment of travel may remain much as it is. Well, much has changed over the summer!

I did say that any proposal that the UK should remain in the EU VAT area would be controversial and so it proved. The ERG MPs proposed an amendment to the Taxation (Cross Border Trade) Bill to the effect that the government should commit to the UK remaining outside the VAT area. That was accepted by the government and (very narrowly) passed by MPs. The terms of the amendment appear to apply particularly to trading in goods but even so this development must make it considerably less likely that we will remain in the EU VAT area for services as well as goods. The Bill has now received Royal Assent and so is law.

Every day that passes seems to make it more likely that the UK and EU will fail to reach agreement on the terms of withdrawal and that there will be no transitional period. That could mean significant change to certain areas of VAT in just six months, i.e. on 29 March 2019. One such area is travel VAT. As TOMS is an EU scheme, it could well be, in the absence of a transitional period, that TOMS ceases next March. There is absolutely no clarity on what would then happen, both

for UK suppliers (B2C and B2B) selling travel to the EU and those elsewhere selling UK travel. The government's technical notice "VAT for business if there's no Brexit deal" published on 23 August states simply that:

"The Tour Operators' Margin Scheme is an EU 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".

You may consider that that's not particularly helpful. HMRC has, however, said they will provide a view on what they think may happen in this area in the near future. I will issue an update on this should that happen.

If a withdrawal agreement is reached, however, and a transitional period implemented as anticipated, it is understood that TOMS will continue until 31 December 2020 (i.e. the scheduled end of the transition), at least giving a period to discuss what the replacement rules should be and giving some opportunity to amend systems and take whatever other steps are needed to comply with new requirements.

Developments with wholesale travel (and the TOMS method of calculation)

For wholesale suppliers, the rules could change for reasons unconnected to Brexit. To recap, in 2013 the CJEU held that wholesale supplies of travel must be included in TOMS and that TOMS VAT due must be calculated on a sale by sale basis (i.e. not by calculating the total margin in aggregate on all TOMS supplies made in a period, as we do in the UK). In the [June edition](#), I commented on the situation in Germany and Austria. Germany was taken to Court for its failure to

adopt the CJEU's decision, and lost, and the Commission is taking similar action against Austria.

Germany and Austria are by no means the only member states not to follow the decisions. The UK is another. It is understood that the Commission has now taken the first step in similar proceedings against other member states including Ireland, Sweden and Spain. Whether any other member state(s) will follow Germany and (perhaps) Austria to the CJEU will become clearer soon.

The position of the UK is not clear at this stage. It does seem clear, however, that the Commission is now serious about enforcing the CJEU judgements. The likelihood of this mattering if we leave the EU without a deal must be small but it could be significant if there is a transitional period.

Follow up to the study on TOMS and on reform options

The Commission's study on the application of the travel VAT rules and on options for reform was published in December 2017. See [here](#) for a summary. The Commission is holding a meeting under the Fiscalis programme to discuss the findings in late October. The Commission has asked me to attend.

This may be an important step on the path to change. Importantly for the UK, the scope of reform is not limited to EU based suppliers: an important aspect is the future position of non-EU suppliers including those in due course in the UK. It is also quite possible that the member states will discuss the position of UK suppliers upon Brexit under the *current* EU rules.

The meaning of agency

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 TOMS VAT. The Court established a procedure to be followed in establishing the status of travel suppliers based largely on the effect of the contracts. Five further cases have since been heard – the Hotels4U, Hotelconnect, Lowcost, Opodo and Alpha International cases. HMRC have lost all of them but fight on. In November, there will be a hearing to decide (Brexit notwithstanding) if the issue should be referred to the CJEU. The outcome will be important to many.

When is TOMS VAT payable?

I referred in June to a CJEU case, [Skarpa Travel](#) (C-422/17), concerning when TOMS VAT is payable. The Advocate General has just given his opinion.

The question is the treatment of deposits and other on-account payments. The AG concluded that VAT is due upon on the margin estimated to be included in each payment received. So, if, for example, the part payment was 20% of the total, 20% of the projected cost would be deducted to identify the margin included in that payment. The same procedure would be undertaken for each payment and the margin would be adjusted once final costs are known.

Should the Court follow the AG's opinion (and it usually does), this will represent another significant erosion of the simplification benefit of TOMS. Fortunately, in the UK, we have a specific TOMS time of supply rule (unlike the Directive) meaning that UK taxpayers will be unaffected by this case, unless the UK scheme is brought into line with the (anticipated) decision, but Brexit presumably makes this unlikely.

Standalone services and TOMS

In a second recent opinion, in the [Alpenchalets Resorts](#) case (C-552/17), the same AG considered whether accommodation supplied on its own can fall within TOMS. The AG thinks it can. There have been earlier cases on this, notably Van Ginkel and Star Coaches. There is a contradiction between those decisions but the AG preferred the Van Ginkel decision that accommodation on its own can fall within TOMS. This is in line with the UK approach. The AG also confirmed, again as already practiced in the UK, that the margin is standard rated even if the service would otherwise attract a lower rate.

There is one area, however, in which the opinion is at odds with the UK approach. The AG thought 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. That is a narrower application than is usually adopted in the UK. The AG is not the first to reach this conclusion but it is a useful reminder that the UK version of TOMS may be incorrect.

Making Tax Digital

In my updated [note](#) on Making Tax Digital ("MTD"), I set out a few ways in which TOMS accounting might be accommodated. I copied my notes to HMRC and asked if they had any comments. I have been promised a response shortly and will revise my note if appropriate. In addition, HMRC have just published a short [document](#) on getting ready for MTD which is a more user-friendly introduction to the subject than the detailed Public Notice.

David Bennett

Mobile
Email
Web

07795 684 958
david@elmanwallbennett.co.uk
www.elmanwallbennett.co.uk