VALUE ADDED TRAVEL

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Quarterly VAT news for the travel and events sectors

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Welcome to this June 2020 edition of Value Added Travel. The main subject this quarter is the European Commission's evaluation of TOMS and the prospect of reform of the scheme. This may appear to be of most interest to non-UK readers but, for the reasons given below, the process may also be very relevant to UK travel businesses.

Please do contact me (detail overleaf) if you would like to discuss anything contained in this newsletter.

Brexit

There has still been no announcement from HMRC on what the TOMS replacement rules will be. The current version of TOMS (based on EU law) will cease to apply in the UK at the end of the transitional period but we still do not know what the replacement regime will be. There would appear to be two main options: adoption of the new UK version of TOMS originally intended to apply in the event of a no deal Brexit in March last year – see my January 2019 newsletter available here for more detail - or the abolition of TOMS in this country and application of "normal" VAT.

What this latter approach would mean is not entirely clear but it could be expected that VAT would be due on the full value of UK services at the rate specified in the UK and that input tax could be offset against the output tax due.

I will let you know once any further information about this is available.

TOMS evaluation

The Commission's public consultation on the evaluation of the TOMS rules was launched at the end of May. The deadline for responses is 14 September 2020.

Please see, in particular, the December 2019 edition of this newsletter (available here) for more detail on the evaluation process.

The consultation is in the form of a questionnaire. A copy of the document can be seen here.

The consultation asks for views on the current rules under four headings:

- Effectiveness – has the scheme been successful in achieving its objectives (simplicity and a fair allocation of revenue)?
- Efficiency – this concerns the costs and benefits of the scheme
- Relevance – does the scheme still address the needs of business?
- Coherence – is the scheme consistent with the wider aims and principles of the EU VAT system?

The responses to the consultation will be influential in determining if reform of TOMS will be proposed and, if so, what the proposed changes will be.

Of course, the effect of any reform to the EU rules will be smaller in the UK than it might have been. However, it is clear from previous Commission publications and from the issues addressed in this consultation that the creation of a level playing field between EU and non-EU travel suppliers is one of the main points under consideration. In other words, how might the rules be framed to ensure that the VAT outcome is the same whether the supplier is established in the EU or in a third country?

I think it is fair to say that the current TOMS is a means to regulate the taxation of tour operators and similar established in the EU whilst the emphasis of a reformed

system is likely to be a fair basis for the taxation of travel services enjoyed within the EU, regardless of the identity and location of the supplier. This process provides an opportunity to influence how the sale of travel in the EU by non-EU suppliers will be taxed.

It is worth noting that the Commission's VAT Expert Group met in May to continue the deliberation on the VAT treatment of the sharing economy and the role of online platforms in the collection of VAT due. This does not concern travel specifically but rather the more general online provision of services. A level playing field is again an important concern. In addition, the OECD continues to consider the role (globally) of digital platforms in the collection of VAT.

The meaning of agency

A regular topic in these newsletters has been the ongoing saga of the litigation on the meaning of agency and the circumstances in which the use of TOMS is necessary.

To recap, the agency status adopted by Med Hotels was challenged by HMRC but in 2014 the Supreme Court concluded that HMRC's position was wrong: the effect of Med's contractual relationships and the wider commercial reality was that Med had sold accommodation as agent of the hotels it represented and that TOMS therefore did not apply.

A number of other travel businesses (Hotels4U, Hotelconnect, Lowcost, Alpha Rooms and Opodo) had similar disputes with HMRC stood behind the Med case. HMRC did not accept that each should be treated as an agent notwithstanding the strong precedent of the Supreme Court judgment. Each therefore had to take its own case at the Tribunal and each was successful in demonstrating that it had acted as agent. HMRC then tried to have the matter referred to the Court of Justice of the European Union ("CJEU"). The Tribunal refused to allow such a referral but gave HMRC leave to appeal that decision. The most recent, and it would seem, final development is that HMRC have decided not to pursue any appeal.

The litigation is therefore at an end and the strong precedent of the Supreme Court decision remains a key basis on which to determine whether a business is acting as agent or not.

The meaning of fixed establishment: the Dong Yang case

This is a recent decision of the CJEU on the meaning of fixed establishment in a case referred by Poland. As the place of supply of a service within TOMS is where the supplier is established or alternatively has a fixed establishment from which the service is provided, it is clear that the meaning of fixed establishment is an important concept for TOMS.

The Court was asked to consider if the mere existence of an EU subsidiary of a non-EU company should be considered to create a fixed establishment of the parent. The Court concluded that it should not: the existence or otherwise of a fixed establishment must be determined by commercial and economic reality and must not be based solely on the legal status of the entity in question.

This is not a surprising decision; indeed, it would have been amazing if the CJEU had decided that a non-EU parent must be seen to have a fixed establishment just because it has an EU subsidiary. It would also have been a large concern given the UK's new third country status.

The case also considered the responsibilities of the supplier to determine if the client has a fixed establishment. Poland had argued that the supplier should consider the contract between a parent and its subsidiary. The Court noted that such information is unlikely to be available to the supplier and in any event no such obligation exists but clearly the supplier should consider its own arrangements with the client.

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