

## CJEU Judgment on the Tour Operators Margin Scheme (TOMS) TOMS to apply to travel services sold to any customer



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### **TOMS to apply to travel services sold to any customer**

The special VAT scheme for travel agents (including tour operators) (“TOMS”) applies when a travel agent buys in and re-sells travel, hotel and holiday and other related services to travellers without material alterations. In other words, the special scheme applies to the operations of travel agents, where the agent deals with the customer in his own name and uses the supplies and services of other persons in the provision of travel facilities. However, the scheme does not apply to a travel agent who acts only as an intermediary and merely makes a repayment of expenses to another person in the name and for the account of the traveller.

Under the TOMS, all transactions performed by a travel agent for the benefit of the traveller in connection with a journey, are treated as a single supply of services supplied by him to the traveller. Such supply is deemed to take place where the travel agent is established and therefore subject to VAT in that country, due on the agent’s margin (provided that the underlying services are enjoyed within the EU). The objective of the special scheme is twofold: to simplify matters for travel agents who would otherwise have to deduct or reclaim input VAT in different Member States and to ensure that each service is taxed where it is provided.

On 26 September 2013, the CJEU delivered its judgment in *European Commission v. Kingdom of Spain (C-189/11)* which relates to the special scheme for travel agents, particularly the extension of the scheme to sales of travel services to any type of customer.

#### **European Commission v. Kingdom of Spain (C-189/11)**

In this case the Commission decided to bring an action against the Kingdom of Spain for authorising the application of the scheme to sales of travel services to any type of customer (‘the customer-based approach’). The Commission considered that the intention of EU legislature was to restrict the applicability of the TOMS to services provided to travellers, which may also be legal persons, in so far as they are the final consumers of the travel services.

In its judgment, the CJEU found against the Commission and took the view that the customer-based approach must be followed because it is the most conducive to achieving the two objectives of the scheme by permitting travel agents to benefit from simplified rules regardless of the type of customer to whom they provide their services and in that way, encouraging a fair distribution of revenue between the Member States. The fact that when the special

scheme for travel agents was adopted in 1977, the majority of those agents sold their services directly to the final consumer does not imply that the legislature intended to limit the special scheme solely to sales of that kind. Moreover, it also held that by following the customer-based approach, there is no risk that the special scheme will be applied by travel agents when acting as intermediaries because of the express terms contained in the second paragraph of Article 306(1) of the VAT Directive which excludes such a possibility in any event.

Furthermore, the CJEU also concluded that retail travel agents who sell to the public travel services organised by wholesale agents may not be excluded from the special scheme because such exclusion is not provided for under the VAT Directive.

### **Impact on Malta's rules**

In terms of guidelines that were issued by the Malta VAT Department on the subject, "travellers" are defined as private physical persons as well as taxable persons acting in the course of their economic activity. However, the scheme is not considered to apply where the customer is a tour operator or another travel agent. As such, since in terms of Maltese VAT legislation and guidelines, the special scheme does not extend to sales to any customer, the local authorities may be constrained to effect legislative changes to extend the scope of the special scheme, such that it is brought in line with what the CJEU has decided in *European Commission v. Kingdom of Spain*.

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