

UK Indirect Tax Conference
VAT Issues For Travel
Businesses

Andy Beavers and Tom Walsh
14 November 2014



And next year....

- More of the same!

Agenda

- Agent vs Principal (*Secret Hotels 2*)
- Credit card fees (*NEC*)
- TOMS (*EC vs Spain et al*)
 - Implications
 - Next Steps
- Reverse charges
- TAFD's (*TUI & IberoTours*)

Agenda

- TAFD's (*TUI & IberoTours*)
- Agent vs Principal (*Secret Hotels 2*)
- TOMS (*EC vs Spain et al*)
 - Implications
 - Next Steps
- Credit Card Fees
- APD
- AOB

TAFD's (*IberoTours*)

- It is common practice for travel agents to fund discounts to the brochure price of holidays, but to make no adjustment to their VAT liability for the value of the discount provided.
- The question is whether a travel agent is entitled to a refund of VAT potentially over-accounted for in respect of agent-funded discounts.

HMRC's position:

- The *Elida Gibbs* principles do not apply where a **disclosed agent** as opposed to a principal in the supply chain grants a discount.
- If an adjustment to output VAT should be made, this should only be applied to discounts to the price of EU holidays (non-EU holidays are zero rated under TOMS).
- If an adjustment to output VAT should be made by the travel agent, it should be reduced in line with the margin made by the tour operator.
- TUI (heard May 2012) lost at FTT.

TAFD's (*IberoTours*)

IberoTours

- Received a positive Advocate General's opinion in July 2013.
- But this has been overturned by the full Court.
- In essence, a discount funded by the travel agent represents third party consideration contributed by the agent towards the cost of the travellers holiday. Consequently tax has been paid on the correct amount.
- *Elida Gibbs* can be distinguished because the grantor of the discount is not involved in making the supply of the holiday.
- What does this mean for UK TAFD claims?

Secret Hotels 2 aka “Med Hotels”

The issue

- Was Med:
 - (a) acting as principal and liable to UK VAT on its margin under the TOMS; or,
 - (b) the hotels’ agent, so that VAT was payable in the countries where the hotels were situated?
- Do you look at the whole package of facts of the case (FTT) or is the contract king (UTT)

HMRC’s focus on substance and economic reality:

- Med’s ability to keep money in event of cancellation or no-show.
- Med’s obligation to supply alternative accommodation or refund if hotel full/insolvent etc
- Advance payments to hotels
- Undisclosed profit margin
- Other features; compensation, complaints etc

***Secret Hotels 2* aka “Med Hotels”**

Court of Appeal found in favour of HMRC and identified 6 key factors that meant that the economic reality was more relevant than the contract.

Supreme Court found in favour of taxpayer and found:

- Contract governed by English law
- Contract clearly envisages an agency relationship (the test appears to be whether it would be recognised as such under English law).
- Provided contract is not a sham and/or actions of parties do not change the contract (under English law) then the contract defines the VAT answer.
- Other factors might be inconsistent with contract or create potential breaches of contract but do not alter the contract.
- Are the Lord's seeking to ensure legal certainty?

***Secret Hotels 2* aka “Med Hotels”**

Supreme Court Analysis of the 6 Factors

- Used own name in holding product out for sale and using local agents;
 - Irrelevant. Med needs to maintain brand and goodwill in market
- Dealt with product availability issues as its own problem;
 - Irrelevant. Med needs to protect its own goodwill.
- Dealt with complaints / compensation without reference to the hotel;
 - Possibly a breach of the contract – but that doesn’t change the contract.
- Used the services of hotel operators to deliver the advertised service.
 - Dismissed without comment.
- Did not deal with hotels in a manner consistent with agency and in a manner insufficient to fulfil tax obligations;
 - Inconsistent with contract – but that doesn’t change the contract.
- Treated monies received as its own money not as agent for hotel.
 - Possible inconsistency but that doesn’t change the contract.

Secret Hotels 2 aka “Med Hotels”

Where next?

For Secret Hotel 2....

- Nowhere. No avenue of appeal from Supreme Court.

For HMRC

- No clear policy announcement. But....
 - In theory it would be hard to find a materially “worse” fact pattern and further litigation looks hard.
 - However, that may not stop HMRC from trying! Differences do exist and HMRC are highlighting such differences as distinguishing factors to resist claim settlement.
 - Possible attempt to get a question referred to CJEU?

***Secret Hotels 2* aka “Med Hotels”**

Where next?

For Travel Agents

- Some uncertainty looks set to continue but in the meantime.....
- Assess strength of contracts!
- Resolve / settle retrospective disputes with HMRC (if possible).
- Secure agency business model going forward.
 - What factors beyond the contract can be influenced.
- Consider changes to existing principal models?

For the wider sector

- Some uncertainty looks set to continue but in the meantime.....
- Ensure clarity within the supply chain:
 - Who is acting in what capacity?
 - Who is responsible for the VAT at each stage?
 - Who is bearing the risk?

TOMS Infraction

- 8 member states infringed for their operation of the TOMS rules.
- ECJ followed the opinion of the advocate general and found that:
 - wholesale supplies should be included within TOMS (UK currently excludes wholesalers from TOMS).
 - TOMS should be calculated on a transaction by transaction basis (UK currently stipulates that a periodic(annual) calculation must be performed).
 - no VAT invoice can be raised (in line with UK position).

TOMS Infraction

Reaction

- HMRC BB 05/14
- Acknowledges implications of decision:
 - Wholesale supplies in TOMS
 - TOMS accounting on a transaction level.
- But, no immediate changes to the operation of TOMS in UK citing:
 - Possible TOMS reform
 - The disruption that would be caused by changing TOMS twice.
- Review in 12 months but the decision will have direct effect in the meantime.
- Timetable for TOMS reform.....(and what might the Commission do in the meantime).

TOMS Infraction

Latest

- 2003 Italian compromise text ditched
- Commission heading ‘back to the drawing board’ but with limited appetite to revisit
- HMRC self-imposed timescale for review due to expire in the next few months
- So...anomalies on interpretation of TOMS rules continue to exist...
- ...as does the benefit afforded to tour operators established outside the EU compared with EU counterparts

Credit card fees

- Way Ahead Group (WAG) decision released.
- WAG provided tickets (as agent), postage & packing and a payment processing fee.
- HMRC argued that WAG provided a single (standard rated) supply of ticket booking and/or acted for the promoter in levying the charges (essentially T-Mobile and Denplan arguments).
- FTT found:
 - There is a supply of Payment Processing by WAG as principal to the Customer;
 - This is not a supply of ticket booking services or part of a complex supply to do so, remotely or otherwise;
 - It is a supply by WAG as principal and not as the Promoter's agent;
 - WAG's supply for the Booking Fee falls within Group 5 Schedule 9 VATA;
 - WAG makes exempt supplies of Payment Processing services."
- Follows NEC and DPAS in supporting position of travel agent claims.

Credit card fees

- Bookit decision also released.
- Bookit, an Odeon subsidiary, charged a credit card handling fee to customers making advance ticket purchases. Three key questions were addressed
- Do the card handling fees fall within scope of exemption?
 - Probably yes (per Bookit 1). But enough uncertainty (due to Nordea) to refer to ECJ. Exact questions still to be determined.
- Do the card handling services amount to debt collection?
 - No. Treating a supply to the debtor as debt collection would be contrary to the purposes of the law.
- Is the arrangement (using a subsidiary to collect the fee) abusive?
 - No. A business can be tax efficient provided contracts (and VAT analysis) match underlying commercial and economic reality.

Credit card fees

- Summary of latest position for travel agents.
- UK Courts have consistently found that a card handling service can be eligible for exemption. (Bookit, NEC, Way Ahead). CJEU arguable concluded the same in AXA Denplan.
- Bookit referral to CJEU should clarify the liability of such services.
- UK Courts have consistently rejected a debt collection (AXA Denplan) analysis where the charge is made to a customer.
- Where charge is made in isolation to the main supply (i.e by a separate entity) the composite supply argument (T-Mobile) has been rejected (Bookit).
- Outlook is therefore positive for travel agents claims – but it could be some time before final resolution.

Air Passenger Duty

Background

- The UK has one of the highest rates of APD in the world
- HMRC have 5 officers collecting >£3bn of UK APD per annum.
- APD compliance obligations demand assurance and a risk premium.
- Increased profile due to recent rate increases and high profile lobbying.
- HMRC's approach has increased in rigor - more disputes/assessments.
- Penalties regime

Air Passenger Duty

Wider implications

- Highly politicised:
 - pressure on inbound/outbound tourism;
 - contribution of the aviation sector to the UK economy;
 - devolution;
 - emerging non-UK hubs
 - airport capacity



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited (“DTTL”), a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.co.uk/about for a detailed description of the legal structure of DTTL and its member firms.

Deloitte LLP is the United Kingdom member firm of DTTL.

This publication has been written in general terms and therefore cannot be relied on to cover specific situations; application of the principles set out will depend upon the particular circumstances involved and we recommend that you obtain professional advice before acting or refraining from acting on any of the contents of this publication. Deloitte LLP would be pleased to advise readers on how to apply the principles set out in this publication to their specific circumstances. Deloitte LLP accepts no duty of care or liability for any loss occasioned to any person acting or refraining from action as a result of any material in this publication.

© 2014 Deloitte LLP. All rights reserved.

Deloitte LLP is a limited liability partnership registered in England and Wales with registered number OC303675 and its registered office at 2 New Street Square, London EC4A 3BZ, United Kingdom. Tel: +44 (0) 20 7936 3000 Fax: +44 (0) 20 7583 1198.