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UK Indirect Tax Conference 2015

VAT issues for travel businesses

Andy Beavers
Charlie McMillan
Emma Murphy

11 November 2015



Agenda

- Questions from the floor...
- TOMS infraction/reform (*EC vs Spain et al*)
 - Implications
 - Latest and Next Steps
- Agent vs Principal (*Secret Hotels 2*)
- Credit Card Fees
- Vouchers
- APD
- Indian Flight Ticket Tax
- AOB

Questions from the floor...

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Update on Air France APD Tribunal case

- Hearing in April 2015 – still no news on the decision date
- Typically 3 – 6 months (but can take longer) so should be due any day

Correcting low value VAT errors

- VAT return error correction and appropriateness of notifying HMRC in the context of the penalty regime (prompted versus unprompted)

What are HMRC asking travel businesses about?

- Non-industry officers still visiting travel businesses
- TOMS calculation reviews appear to have a light touch (possibly as a result of the above!)
- Credit card charges
- Self-billing arrangements increasingly under scrutiny

Questions from the floor continued...

Iceland

- Changes to Icelandic VAT for foreign travel agents and tour operators effective from January 2016
- Foreign travel agents and tour operators must register for VAT in Iceland as of 1 January 2016. By way of example, applicable to foreign travel agencies that buy accommodation services, food, etc. in Iceland and resell to their customers

The following goods and services will be subject to VAT at 11%:

- Passenger transportation other than public transport on scheduled routes, including the supply of equipment supplied by the tour organiser
- Admittance to tourist attractions and leisure
- Resident and non-resident travel agencies supplying services which are utilised in Iceland
- Admittance to baths and spas (not swimming pools)
- Rental of hotel rooms and accommodation in guest houses are already subject to 11% VAT

TOMS infraction/reform

TOMS infraction/reform

- 8 member states infringed for their operation of the TOMS rules.

Commission v Spain (2013)

- 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/reform

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, if businesses chose to implement it
- Timetable for TOMS reform ... (and what might the Commission do in the meantime)

TOMS infraction/reform

Latest

- 2003 Italian compromise text ditched
- Commission heading 'back to the drawing board' and this does not appear to be near the top of the agenda.
- Consideration is being given to undertaking a TOMS study across the EU – which should help to frame potential solutions.
- The VAT Committee's answer to the application of TOMS to non-EU businesses was issued in April, suggesting that TOMS does not apply to these businesses – but:
 - This opinion is not binding and therefore does not have to be followed
 - Whilst it states that the position is supported by a large proportion of Member States, it may have been 'agreed' by silence!!

TOMS infraction/reform

- Infraction proceeding letters were sent to a couple of Member States, but this does not necessarily mean wider proceedings will be taken against other Member States.
- HMRC self-imposed timescale for review expired almost a year ago (January 2015) ... although there was an informal message to the industry that no action would be taken unless required (i.e. following EU intervention)
- Whilst in theory there may be a risk of challenge under 'state aid' for the UK's transport company options, this is hard to predict and would need to involve a complaint being made.
- 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

Agent versus principal

Secret Hotels 2 aka 'Med Hotels'

A quick reminder

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'

Where next?

For Secret Hotels 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?

Credit card fees

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 (#2) decision also released with the following questions referred to the CJEU:

With regard to the exemption from VAT, what are the relevant principles to be applied in determining whether or not a "debit and credit card handling service" (such as the service that is supplied in this case) has "the effect of transferring funds and entail[s] changes in the legal and financial situation"?

As a matter of principle, what factors distinguish (a) a service which consists in the provision of financial information without which a payment would not be made but which do not fall within the exemption, from (b) a data handling service which functionally has the effect of transferring funds and which the Court of Justice has identified as therefore being capable of falling within the exemption (such as in SDC at paragraph 66)?

In particular, and in the context of debit and credit card handling services: Does the exemption apply to such services which result in a transfer of funds but which do not include the task of making a debit to one account and a corresponding credit to another account?

Does entitlement to the exemption depend on whether the service provider itself obtains authorisation codes directly from the cardholder's bank, or alternatively obtains those codes via its merchant acquirer bank?

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 arguably 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

Vouchers

Sch 10A UK VATA 1994

- Face value voucher (FVV) means a token, stamp or voucher (physical or electronic) that represents a right to receive goods or services to the value of the amount stated on it.
- The issue of a FVV, or any subsequent supply of it, is a supply of services
- There are 3 categories of FVV:
 - Credit vouchers
 - Retailer vouchers
 - Other vouchers

Credit vouchers

- FVV issued by person who is not the redeemer
- Issuer undertakes to reimburse (in full or in part) the person from whom the goods/services are obtained
- Consideration for supply of credit voucher is disregarded except to the extent that it exceeds the face value
- However, if the redeemer of the voucher fails to account for VAT due on the supply of goods/services made by them in return for the voucher then the Issuer is liable to account for VAT on the consideration they received.

Retailer vouchers

- FVV issued by person who is also the Redeemer or who undertakes to reimburse any other persons who may redeem the voucher
- Consideration for supply of retailer voucher is disregarded except to the extent that it exceeds the face value
- However, if the redeemer is someone other than the issuer and they fail to account for VAT due on the supply of goods/services made by them in return for the voucher then the Issuer is liable to account for VAT on the consideration they received.
- Any supply of a retailer voucher subsequent to the issue of it is chargeable to tax at the rate applicable to the underlying supply of goods/services

EC proposals on vouchers

- Introduces the concept of single purpose and multi-purpose vouchers (SPVs and MPVs)
- Introduces 2 new categories of service under Art 25(1):
 - a) Distribution of MPVs by a taxable person
 - b) Redemption services of free discount vouchers where the redeemer receives consideration from the issuer
- ‘Discount Voucher’ defined as a voucher carrying a right to receive a price discount or rebate with regard to the supply of goods or services.
- We await further guidance from the EU (and local tax authorities) but in the meantime the current legislation stands.

Air Passenger Duty

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

Indian Flight Ticket Tax

Indian Flight Ticket Tax

- Indian Government is proposing to introduce a new Aviation Policy
- Under the new Policy, certain concessions on direct and indirect taxes have been proposed for the civil aviation industry
- The draft National Civil Aviation Policy 2015 ('Policy') was released on 30 October 2015 for stakeholder's feedback/comments
- A Regional Connectivity Fund will be funded by a levy of 2% on all domestic and international tickets from 1 January 2016



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