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German Tax and Legal News

German tax authorities disallow the application of TOMS to non-EU travel agents

Update: By letter of 12 December 2022, the German Ministry of Finance extended the non-objection deadline to 31 December 2023.
Source: Federal Ministry of Finance, letter of 12 December 2022.

Update: By circular dated March 29, 2021, the MOF announced that it will not object to the application of TOMS by non-EU travel agents until December 31, 2021.

The German Ministry of Finance announced not applying the special scheme for travel agents (TOMS) to non-EU travel agents as of 1 January 2021. This opinion could cease the competitive advantages that non-EU travel agents enjoy in Germany so far when buying in and re-selling travel services.

Background
The German Ministry of Finance recently announced that the special VAT scheme for travel agents (also known as Tour Operator Margin Scheme) as laid down in Section 25 of the German VAT Act and Articles 306 to 310 of the VAT Directive does not cover transactions by travel agents that have not established his business within the European Union or has a fixed establishment there (non-EU travel agents).

TOMS is a special scheme for businesses that buy in and re-sell travel, accommodation, and certain other services in their own name. It enables VAT to be accounted for on travel supplies without businesses having to register and account for VAT in every EU country in which the services and goods are enjoyed.

Consequences
It could be concluded from this opinion that the TOMS does not cover non-EU travel agents with the effect that they should apply the normal rules on place of supply, valuation, liability and input tax deduction. Accordingly, non-EU travel agents should either be required to register in Germany if they supply travel services there, or the reverse charge mechanism should apply requiring the German business recipient of the travel service to account for German VAT.

German tax authorities' opinion is in line with the VAT committee's position resulting from the 101st meeting of 20 October 2014 where the VAT committee by large majority agreed that travel services carried out by non-EU travel agents should not be covered by that special scheme. The purpose of this position is to avoid competitive advantages that travel agents established outside the EU would enjoy if the TOMS applies but no VAT is imposed considering the place of supply rule within this special scheme.

Whether or not this position is in line with German or European VAT law is an open issue. The European Court of Justice has not ruled on this subject so far. The VAT Directive as well as the German VAT law allows another interpretation - the non-taxation of travel services provided by non-EU travel agents. The law could be interpreted as applying to all travel agents buying in and re-selling travel services but only imposing VAT on travel agents if they have established their business in the EU or have a fixed establishment there. It follows from the wording of the law that does not distinguish between EU and non-EU travel agents and the place of supply rules within the special scheme. The member states in the EU seem to interpret the law differently as the study on the review of the VAT special scheme for travel agents and options for reform (Final Report, TAXUD/2016/AO-05) issued by the European Commission in 2017 show.

Who is affected by that opinion? Non-EU tour operators, non-EU destination management companies as well as German businesses receiving travel services from non-EU travel agents should evaluate their VAT position (VAT liability and input VAT deduction) if they are supplying or receiving travel packages or single travel services.

Travel agents acting as intermediaries are not affected by this position. They already fall

outside of the special scheme.

Source
BMF Schreiben vom 29.01.2021, III C 2 – S 7419/19/10002 :004
Umsatzsteuer; Besteuerung von Reiseleistungen von Unternehmen mit Sitz im Drittland

European Commission, Study on the review of the VAT Special Scheme for travel agents and options for reform, Final Report TAXUD/2016/AO-05

VAT Committee, Giudelines Resulting From Meetings Of The VAT Committee, up until 3 November 2020

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