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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

in accordance with Article 395 of Council Directive 2006/112/EC

1. BACKGROUND

Pursuant to Article 395 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax¹ (the VAT Directive), the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance. As this procedure provides for derogation from the general principles of VAT, in accordance with the consistent rulings of the Court of Justice of the European Union (CJEU), any such derogation should be proportionate and limited in scope.

By letter registered with the Commission on 10 February 2020, Denmark requested an authorisation to apply a measure derogating from Article 308 of the VAT Directive. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 10 March 2020 of the request made by Denmark. By letter dated 11 March 2020, the Commission notified Denmark that it had all the information it considered necessary for appraisal of the request.

As a general rule, the taxable amount under the special scheme for travel agents, according to Article 308 of the VAT Directive, is the travel agent margin, that is to say, the difference between the total amount, exclusive of VAT, to be paid by the traveller and the actual cost to the travel agent of supplies of goods or services provided by other taxable persons, where those transactions are for the direct benefit of the traveller. The purpose of the derogation requested by Denmark is to lay down a rule determining the cost of passenger transport that has to be taken into account when calculating the travel agent's profit margin, in case there are parties in the chain of transactions that are closely linked. This cost will be the payment received by the last company in the chain that is not closely linked to the travel agent.

2. THE TRAVEL AGENT SCHEME

This special VAT scheme, set out in Articles 306 to 310 of the VAT Directive, was brought in due to the special nature of the industry. The services offered by travel agents usually consist of a package of services, in particular transport and accommodation obtained from third parties. These packages are then sold by travel agents, in their own name, to their customers. Those are circumstances where it is particularly difficult to apply the normal rules on the place of taxation, the taxable amount and deduction of input tax due to the complexity and location of the services provided.

Under Article 307 of the VAT Directive, all transactions performed by a travel agent in respect of a journey are regarded as a single service. The taxable amount is the profit margin realised by the travel agent on the supply of a travel package and hence the travel agent is not entitled to deduct input VAT. The place of taxation for the travel agent's

¹ OJ L 347, 11.12.2006, p. 1

supply is where he has established his business or has a fixed establishment from which he provides the single service or, failing this, the place where he has his permanent address or usually resides.

The special VAT scheme has two aims:

- (a) to simplify the application of EU VAT rules for these supplies, particularly so that a travel agent avoids having to register for VAT purposes in each of the Member States where the services acquired by the travel agent are performed;
- (b) to ensure that VAT revenue goes to the Member State in which final consumption of each individual component of the single supply takes place, with VAT revenue on services enjoyed in the course of the journey, such as hotels, restaurants or transport, going to the Member State in which the traveller receives the service and VAT on the travel agent's margin returning to the Member State where the travel agent is established.

3. THE REQUEST

Denmark requests, under Article 395 of the VAT Directive, that the Council, acting upon a proposal of the Commission, authorises it to apply a special measure derogating from Article 308 of the VAT Directive as regards the determination of the taxable amount to be applied under the travel agent special scheme when the parties intervening in transactions obtained by the travel agent are closely linked. In these cases, the cost of passenger transport that has to be taken into account when calculating the travel agent's profit margin is supposed not to be the payment to the taxable person which is closely linked, but the payment received by the last company in the chain of transactions that is not closely linked to the travel agent.

Denmark submits that the introduction of the derogating measure is necessary to fight fraud occurring in the travel agent sector. Several travel agencies have reduced their VAT payment by establishing subsidiaries that purchase airline tickets from airlines, after which they are sold to the travel agency for an artificially high price. This results in diminishing profits for the travel agency and, therefore, a smaller tax base. The subsidiary in return obtains unusually high profit margins. However, the purchase and sale of international airline tickets is zero rated passenger transport in Denmark. For this reason, the subsidiary has no VAT to declare or pay on these purchases and sales.

The Danish Tax Agency estimates that the VAT loss due to this practice has increased from DKK 3.5 million in 2014 to DKK 25.0 million in 2017. This loss will highly likely increase further over the coming years. Furthermore, this abusive practice gives a competitive advantage to those travel agencies which already use it, forcing other travel agencies to adopt the same abusive practice in order to remain competitive.

By establishing that the payment received by the last company in the chain of transactions that is not closely linked to the travel agent will be the cost used for the

calculation of the margin of the travel agent, Denmark would curb this abusive practice taking place in the travel agent sector.

4. THE COMMISSION'S VIEW

When the Commission receives requests in accordance with Article 395 of the VAT Directive, these are examined with a view to ensure that the basic conditions for granting a derogation are fulfilled, i.e. whether the proposed specific measure simplifies procedures for taxable persons and/or the tax administration or whether the proposal prevents certain types of tax evasion or avoidance. In this context, the Commission has always taken a restrictive, cautious approach to ensure that derogations do not undermine the operation of the general VAT system, are limited in scope, necessary and proportionate.

Any derogation from the rules laid down for the travel agent scheme can, therefore, not be more than a last resort and an emergency measure and must offer guarantees as to the necessity and exceptional nature of the derogation granted.

It follows from the request that the measure aims to tackle the abusive practice of reduction of a margin which serves as a tax base for the transactions covered by the special scheme for travel agents. This reduction is caused by the fact that the supply of international airline tickets is zero rated in Denmark and thus no VAT is declared or paid on those supplies. In other words, such supplies would not be covered by the special scheme for travel agents in Denmark. The Commission services do not agree with the assessment that such supplies would not be covered by the special scheme for travel agents and, therefore, could benefit from the exemption applicable to the passenger transport.

The CJEU in case *Madgett and Baldwin*², stated that the underlying reasons for the special scheme for travel agents and tour operators are equally valid where the trader is not a travel agent or tour operator within the normal meaning of those terms, but effects identical transactions in the context of another activity, such as that of hotelier. To interpret Article 26 of the Sixth VAT Directive (now Articles 306 to 310 of the VAT Directive) as applying solely to traders who are travel agents or tour operators within the normal meaning of those terms would mean that identical services would come under different provisions depending on the formal classification of the trader.

Furthermore, the CJEU in case *Alpenchalets Resorts*³, ruled that the mere supply by a travel agent of holiday accommodation rented from other taxable persons, or such a supply of a holiday residence combined with the supply of additional ancillary services,

² Judgment of 22 October 1998, C-94/97, *Madgett and Baldwin*, EU:C:1998:496

³ Judgment of 19 December 2018, C-522/17, *Alpenchalets Resorts*, EU:C:2018:1032

regardless of the importance of those ancillary services, each amounts to a single service covered by the special scheme for travel agents.

It should be noted that the CJEU in cases *Commission v Spain*⁴ and *Commission v Germany*⁵, stated that the special scheme applies not only to services directly supplied to the traveller but also to services supplied to any customer, including thus business-to-business transactions.

Therefore, the mere supply of airline tickets by a travel agent or tour operator is covered by the special scheme for travel agents. When such a transaction is carried out by a taxable person other than a travel agent or tour operator, as is the case with a subsidiary of the travel agent, it will also be covered by the special scheme for travel agents. The fact that the customer is not the traveller does not preclude the application of the special scheme.

The CJEU also stated in case *Alpenchalets Resorts*, that transactions made by a travel agent in respect of a journey are regarded, for the purpose of their tax treatment, as a single service supplied by the travel agent to the traveller. It follows that, since the supply of holiday accommodation is covered by the special scheme for travel agents, its tax treatment is not subject to the rules applicable to the supply of holiday accommodation, but that treatment is determined by the special scheme established by the VAT Directive for single services supplied by travel agents.

Therefore, the supply of airline tickets by the subsidiary, as it is already covered by the travel agents scheme, cannot be regarded as zero rated passenger transport. That supply will be taxed under that scheme, which implies the application of the standard rate and the determination of the taxable amount according to Article 308 of the VAT Directive.

Taking into account the above, the Commission has come to the conclusion that a derogation allowing for the taxable amount under the travel agent scheme, to be calculated by the travel agent having to base his cost on the payment received by the last company in the chain of transactions that is not closely linked to the travel agency, is not considered an appropriate solution to tackle abusive practices occurring in this sector.

Denmark should instead ensure that the provisions of the travel agent scheme are also applied to transactions carried out by subsidiaries acting as intermediaries.

More generally, the Commission would like to note that it is currently evaluating the application and implementation of the special scheme for travel agents in Member

⁴ Judgment of 26 September 2013, C-189/11 et al., *Commission v Spain*, EU:C:2013:587

⁵ Judgment of 8 February 2018, C-380/16, *Commission v Germany*, EU:C:2018:76

States⁶. An online public consultation will have provided an opportunity for Member State authorities, businesses and the wider public to contribute to this evaluation.

5. CONCLUSION

On the basis of the above-mentioned elements, the Commission objects to the request made by Denmark.

⁶ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11883-Evaluation-of-the-special-VAT-scheme-for-travel-agents>