

Case Alert

Hotels4U.Com

Summary

The First-tier Tax Tribunal (FTT) has allowed Hotels4U.com's appeal in this case which related to whether the taxpayer was providing services to holidaymakers as an agent or as principal.

HMRC contended that Hotels4U was acting as a principal and that, as a consequence, the company's supplies were covered by the Tour Operators' Margin Scheme (TOMS).

Hotels4U argued that it was an agent providing services to its principal. As such, it contended that those services took place outside the UK and were not services falling within TOMS.

Following the Supreme Court's judgment in the case of Secret Hotels2, the FTT agreed with the taxpayer.

First-tier Tax Tribunal

The VAT Directive requires businesses providing designated travel services to travellers as principal to account for VAT using a special scheme known as the Tour Operators' Margin Scheme (or TOMS for short). However, the Directive specifically excludes supplies made by a business acting as an intermediary. The issue in this case, therefore was simple. On the evidence, was Hotels4U acting as a disclosed agent of the principal (the hotel) or was it acting as a principal.

The issue is not new to the courts. Indeed, the Supreme Court gave judgment in a similar case (SecretHotels2) in 2014 and Hotels4U argued that the facts of its case could not be materially distinguished from those in that case. In essence, as in the SecretHotels2 case, Hotels4U made arrangements with hoteliers outside the UK to 'acquire' rooms which it sold as agent of the hotel to the holidaymakers. HMRC considered that, in effect, Hotels4U bought the rooms and then resold them as principal to the holidaymakers. As such, this would have been a supply under TOMS and UK VAT would have been due on the margin it made.

The FTT considered that it was clear from the terms and conditions of the contracts that Hotels4U were not acting as a principal but as a disclosed agent of the hotelier. The fact that Hotels4U acquired the hotel beds in advance and then sold them on to the customer did not alter the fact that it acted as the hotelier's agent. The FTT allowed the appeal. It could not distinguish the facts from those in SecretHotels2 and it followed the dictum of Lord Neuberger in that case. Unless a contract between parties is a sham, what matters is what is agreed in the contract. Where the parties enter into an agreement which is intended to govern the relationships between them then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations.

Comment – this is a major victory for Hotels4U. (It had reclaimed over £15 million of VAT paid under TOMS). It will also be good news for other 'bed bank' businesses with similar claims. However, the FTT has only determined the matter by reference to UK law and has yet to decide whether to refer the matter to the Court of Justice. This issue – whether there is a difference between the EU concept of an 'intermediary' and the UK's concept of an 'agent' - will be dealt with at a separate hearing.

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