



Neutral Citation: [2023] UKFTT 51 (TC)

Case Number: TC08700

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2018/04667

VAT – tour operators’ margin scheme – treatment of cost of unsold inventory – treatment of inventory sold at a loss – can there be a negative margin – not overall - appeal dismissed

Heard on: 14 March 2022

Judgment date: 11 April 2022

Before

TRIBUNAL JUDGE AMANDA BROWN QC

Between

THE SQUA.RE LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mrs Ruth Corkin of Hillier Hopkins LLP

For the Respondents: Ms Olivia Donovan litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an appeal against two assessments raised by HM Revenue & Customs (**HMRC**) and the rejection of an error correction notice submitted by The Square Limited (**the Appellant**) in respect of calculations performed by the Appellant under the Tour Operators Margin Scheme (**the TOMS**) and in particular whether the TOMS operated in such a way as to permit a negative calculation resulting in repayment to the Appellant.

2. The Appellant provides serviced apartments predominantly in London to business and leisure travellers. The Appellant leases accommodation from the owners of the properties. These leases are often for an extended period (including annual leases) such that the Appellant is committed under the terms of the lease even where the accommodation cannot then be on supplied in some cases at all or at a profitable amount. The property owners are frequently (if not exclusively) private individuals who are not registered for VAT purposes.

3. The Appellant's supply to its customers includes the provision of online/telephone concierge service, cleaning etc. which, in the main it also buys in from third parties and on supplies as part of the package of services offered to its customers.

4. On 27 January 2017, the Appellant submitted an error correction notice in the sum of £272,894 for VAT considered to have been overpaid under the TOMS for the VAT prescribed accounting periods 03/16 – 09/16. The sum was calculated on the basis that the TOMS does not exclude the possibility of a negative margin, and, in that period, VAT had been overpaid when the full cost of bought in accommodation was taken into account.

5. Subsequent to the submission of the error correction notice the Appellant began accounting for VAT under the TOMS on the basis that a negative margin was permissible. The assessments raised by HMRC on 19 March 2018 accepted that the Appellant may make a zero margin on a supply within the TOMS but considered that a negative margin was not permitted by the scheme.

6. The dispute between the parties is a technical one only and concerns the interpretation of the statutory provisions implementing the TOMS into UK law. The Tribunal is asked to determine whether the statutory scheme permits VAT accounting on the basis of a negative margin i.e. where there is a cost of bought in services which is not covered by the cost of supplies made to the Appellant's customers. The parties were agreed that the Tribunal need not be concerned with the quantum of the assessments or the error correction notice.

THE LAW

7. Articles 306 – 310 Principal VAT Directive (**PVD**) requires Member States to apply a special VAT scheme to transactions carried out by travel agents who deal with customers in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities.

8. The terms of the required scheme provide that all supplies made by the travel agent of elements of a travel package bought in (to the extent that they are from suppliers within the EU) and supplied on (in an unaltered form) to and for the direct benefit of the traveller in respect of a journey shall be treated as a single taxable supply of services made by the travel agent to the traveller. That supply is treated as made where the travel agent carries on its business. The value or taxable amount of the supply is taken to be the margin achieved by the travel agent i.e. the difference between the total amount exclusive of VAT to be paid by the traveller and the actual cost to the travel agent of the supplies of goods or services bought in

from another taxable person. Any VAT incurred on buying in the goods or services is excluded from input tax credit.

9. The domestic implementation of the TOMS is authorised by section 53 Value Added Taxes Act 1994 (**VATA**) and found in Value Added Tax (Tour Operators') Order 1987 (SI1987/1806) (**TOMS Order**). All relevant provisions are contained in an annex to this judgment.

10. For present purposes, the key provisions of the domestic scheme in summary, provide:

(1) that the TOMS shall apply to any supply of designated travel services made by a tour operators established in the UK (see regulations 2 and 3 TOMS Order);

(2) a "designated travel service" is defined as a supply of goods or services a) acquired by the tour operator for the purposes of his business, and b) supplied for the benefit of the traveller without material alteration (see regulation 3 TOMS Order);

(3) supplies are treated as made, at the election of the tour operator, either when the journey commences (or the accommodation is occupied) or when payment of at least 20% of the total package price is received' and the normal time of supply provisions in sections 4 and 5 VATA are disapplied (see regulation 4 TOMS Order);

(4) all elements of the package are treated as supplied at the same time (see regulation 4);

(5) provided that the tour operator is established in the UK the supply treated as made in the UK (see regulation 5 TOMS Order);

(6) the value of the supply shall be determined by reference to the difference between sums paid or payable to, and sums paid or payable by, the tour operator in respect of that service, calculated in the manner specified by HMRC in Notice 709/5 Tour Operators Margin Scheme for VAT (the relevant part of which has force of law) (see regulation 7 TOMS Order);

(7) recovery of input tax is precluded on supplies of goods or services bought in for onward supply pursuant to the TOMS (see Article 12 TOMS Order).

11. So far as relevant for this appeal, VAT Notice 709/5 provides:

1.2 The law

...

HMRC has certain powers, including powers to specify how to work out the value of supplies covered by the TOMS (see sections 5 and 8 to 13).

The whole of sections 8 – 13 have force of law. Other parts of this notice represent HMRC's interpretation of the law, but are not law in themselves.

...

2.6 How TOMS works

...

As a tour operator based in the UK, you only account for VAT on the difference between the amount you receive from your customer ... and the amount you pay your suppliers ...

...

4.3 VAT you can reclaim on purchases

You may reclaim (outside TOMS) UK VAT incurred on your overheads ... subject to normal rules ...

4.4 VAT you cannot reclaim

You cannot reclaim VAT on purchases that you make to resell as Margin Scheme supplies.

...

5. TOMS Calculations

5.1 The year end calculation

The year end calculation will:

- Work out the total margin achieved ...

...

5.11 How to account for VAT during the year

Once you have completed one of the year end calculations at section 8 and section 9 you'll have percentages enabling you to provisionally account for output tax and enter the net sales value on your VAT Returns for the next financial year ...

5.12 Accounting for VAT on each package instead

Precise figures are not usually known at the time your VAT Returns are due ... TOMS requires you to account for output tax on a provisional basis on your VAT Returns during the year, with a year-end calculation and any adjustment to be done during the next VAT Return period.

...

6 The year-end TOMS calculation, selling price and costs

6.1 How to work out the selling price of your TOMS supplies

The first step is to add up the selling price of your supplies with tax points ...

...

6.3 How to work out the purchase price of your Margin Scheme supplies

The first step is to add up the total VAT inclusive purchase price of the goods and services that you have bought in for resale as Margin Scheme Supplies. You must only include purchases that relate to the supplies that are included at step 1 of the year-end TOMS calculation see paragraph 6.1 for that financial year. ...

6.4 Indirect costs

Indirect costs are general business costs, which are not directly and specifically incurred in order to make Margin Scheme or in-house supplies. Only the direct costs [defined as those directly and specifically attributable to the provisions on in-house supplies] of making your supplies should be included in the calculations. ...

12. Sections 8 to 13 set out the precise steps to be taken when calculating the VAT due under the TOMS. They have force of law and are lengthy. Steps 2 – 9 of Section 9 provide for the calculation of the total of the VAT inclusive purchase prices of the Margin Scheme supplies and direct costs which are then, at step 10, deducted from the total selling price of all Margin Scheme supplies.

THE TOMS

13. The objective of the TOMS was to adapt the general VAT rules to address the practical difficulties otherwise arising in respect of the activities of travel agents which frequently involve multiple supplies in different jurisdictions (inside and outside the EU). However, the exceptional treatment arising under the scheme was to be applied only to the extent necessary to achieve its objective (see *HM Customs & Excise v Madgett and Baldwin (t/a Howden Court Hotels)* C-308/96 (**Madgett & Baldwin**) paragraph 34 and *First Choice Holidays v HM Customs & Excise* C-149/01 (**First Choice**) paragraph 22 – 25).

14. The operation of the TOMS also ensures that revenue from VAT is allocated to the member state in which final consumption of the individual services such that the individual components of a travel package will effectively be taxed into final consumption where they take place (see *Van Ginkel Waddinxveen v Inspecteur der Omzetbelasting* C-163/91 (**Van Ginkel**) paragraph 24). The value-added service provided by the tour operator in putting the package together is taxed by reference to the place of business of the tour operator.

15. The application of the TOMS to “travel agents does not require the taxable person making the supplies to be recognised as either a travel agent or as a tour operator “in a normal sense” merely that they are providing services of a type provided by such businesses (see *Madgett & Baldwin* para).

16. There is no requirement that the travel agent combine multiple elements of a travel packaged in order to be required to account for VAT under the TOMS (see *Van Ginkel* paragraph 23).

17. At EU level, in order to fall within the scope of the TOMS the bought in travel service must be provided by a taxable person acting as such (see *Alpenchalets Resorts GmbH v Finanzamt Munchen Abteilung Koperschaften* C-552/17 paragraph 20). It is however, to be noted, that the UK provisions do not include such a restriction within the definition of a designated travel service. However, at an EU level taxable person includes anyone making supplies in the course of furtherance of a business whereas the UK definition is limited only to those registered or required to be registered for VAT. The UK requirement to include any bought in supplies received for the purposes of the business reasonably, but not precisely, reflects the EU requirement, and/or for the purposes of the present appeal is not considered material. It is also favourable to the Appellant in the circumstances of the appeal.

FACTUAL FINDINGS

18. The relevant facts were not in dispute.

(1) The Appellant is a tour operator as it provides accommodation of a type normally provided to travellers which it has bought in and on supplies.

(2) The Appellant purchased accommodation largely from non-VAT registered owners and so did not incur VAT on the bought in supplies.

(3) Bought in accommodation was often leased on 12 month or long leases rather than on a week by week or night by night basis.

19. In the period covered by the error correction notice and assessments the Appellant bought in accommodation which it could not on supply profitably (**Inventory Sold at a Loss**) and, in some cases, at all (**Unsold Inventory**).

PARTIES SUBMISSIONS

20. The Appellant contends that:

(1) the TOMS should provide a similar result to normal VAT accounting such that where the input cost exceeds the output achieved HMRC should be prepared to repay the VAT cost of the negative margin;

(2) there is nothing within the terms of the margin scheme itself which would preclude a negative margin scheme calculation, indeed the global nature of the calculation prescribed in Notice 709/5 would appear to accommodate such a result as it is impossible to determine the cost of each individual supply and thereby whether on a supply-by-supply basis there was a positive or negative margin;

(3) further support was to be derived from paragraph 6.3 of Notice 709/5 which required the inclusion of all costs “relating” to supplies made - as the cost of buying in the accommodation facilitated the ability to make any onward supplies the cost related to those supplies;

(4) by reference to the narration of Spanish implementation of the TOMS as set out by the Advocate General in *Commission v Spain* C189/11 it was clear that a negative margin was at least conceivable under the directive provisions as Spain had chosen to expressly preclude the taxable amount being negative.

21. In oral submission the Mrs Corkin also sought to draw support for a conclusion that a negative margin was permissible from the terms of “other margin schemes” but gave no specific references to such schemes.

22. HMRC’s case was that the TOMS provided the basis on which output tax on the tour operator service was calculated and, put simply, there is no basis for a calculation of negative output tax. A taxable person rendering conventional VAT returns may be in a repayment position because their input tax exceeds their output tax, but output tax is always a positive amount. As input tax recovery is precluded in respect of purchases falling within TOMS there was no basis for a tour operator to be in a repayment position vis a vis the TOMS supplies.

23. HMRC contended that as a special scheme the TOMS should be applied only to the extent necessary to achieve its aims and did not require or permit a refined meaning of output tax which was, as defined in section 24(2) VATA, the VAT due on a supply. Pursuant to the TOMS the nature, place, time and taxable amount of the supply was modified for the purposes of determining the charge to output tax. However, fundamentally, the TOMS provided the basis on which VAT was to be charged on the supply made by the Appellant and there is no scope for a negative charge to output tax.

DISCUSSION

Can there be a negative charge to output tax?

24. Article 1 PVD provides that the PVD establishes the common system of VAT which entails the application of a general tax on consumption proportional to the price of goods or services and that VAT is calculated on the price of the goods or services at the rate applicable after deduction of the VAT borne directly by the various cost components. VAT is charged by reference to the taxable amount of the supply which, under the general rule provided in Article 73 is everything which constitutes consideration obtained or to be obtained by the supplier in return for the goods or services from the customer or a third party.

25. Section 1 VATA introduces the charge to VAT on supplies of goods and services. Section 24(2) defines output tax is defined as the charge to VAT on supplies made by the taxable person.

26. These definitions make clear that the taxable amount and the associated charge to VAT (in the UK) are concerned with the supply made and not the VAT incurred on the various cost components.

27. It is clear from these provisions and a vast body of case law that inherent within the common scheme of VAT that it is intended to be neutral as far as a taxable person making only taxable supplies is concerned. The scheme provides that a taxable person only making taxable supplies should not bear the burden of VAT.

28. The neutrality is achieved through the offsetting of the VAT cost on purchases against the VAT charge on supplies (or outputs). Under normal VAT accounting the VAT charges on supplies is calculated by reference to the consideration received by the supplier from the customer. As there can realistically be no concept of negative consideration. On the contrary where a situation of “negative consideration” arises it will be necessary to determine if the payer is receiving a supply from the recipient of the payment (see *Mirror Group Plc v HM Customs and Excise* C-409/98 and *Cantor Fitzgerald International v HM Customs & Excise* C-108/99).

29. Article 306 PVD applies a special scheme for travel agents but maintains the distinction between taxable amount of the supply made by the taxable person and input tax credit. Article 308 defines how the taxable amount of the supply is to be calculated (by reference to the margin) and Article 310 excludes recovery of input tax. These provisions are reflected in the terms of Section 53 VATA, The TOMS Order and Notice 709/5.

30. The statutory effect of these provisions is to deem or treat a supply to me made in the UK by reference to the modified time of supply and by reference to a modified valuation. It is therefore the means by reference to which the output tax charge is calculated. It is accurate to observe that it does so in a manner which obviates the need for multi-jurisdictional input tax recovery, but it is not a means by reference to which input tax credit is formally given.

31. The Tribunal therefore determines that there is no basis inherent within the scheme or its purpose which would permit a calculation of a negative sum. There has been a supply (of a designated travel service) for a consideration (the price paid), and it is the taxable amount of that supply which is to be determined. A negative taxable amount is a conceptual impossibility. A negative margin arises as a consequence of a lack of profitability in the transaction, but VAT is a transaction tax and not a profit tax.

32. The TOMS is a scheme which preserve fiscal neutrality in a way which avoids multi-jurisdictional registration for tour operators/travel agents. But it does not provide for recovery of input tax. Repayments occur in the normal VAT accounting scheme where input tax exceeds output tax where input tax recovery is precluded there can be no basis that any charge to VAT on the direct cost components of a designated travel service can result in an entitlement to repayment.

33. That is perhaps particularly so in the present case. As noted at paragraph 17 above the UK implementation permits the inclusion of costs incurred which are non-VAT bearing i.e. because, as here, they are supplied by a non-registered provider of accommodation. In effect the UK TOMS is generous in that the output tax calculation in respect of the resupply of such services takes account of the input cost even though no VAT was borne. Under the ordinary scheme for VAT accounting VAT would be due on such supplies at the full price charged for the supply with no relievable input tax at all.

Does the margin scheme apply on a transaction by transaction basis?

34. It is significant to note that whilst the TOMS calculation is undertaken at a global level the TOMS is a special scheme which is required to be construed consistently with the objectives identified by the Court of Justice in *First Choice* (see paragraph 13 above) and, as a derogation it is required to be construed strictly.

35. The language of the TOMS Order is clear that it applies to a supply of a designated travel service (as defined). Pursuant to Article 3(3) the supply of multiple components of a travel package are treated as a single supply of services.

36. The ordinary time of supply rules contained in sections 4 and 5 VATA do not apply in the case of a designated travel service where, in contrast, the time of supply is, subject to the tour operator's election, either the commencement of the journey or receipt of 20% of the total due. In the case of an election to treat the time of supply as when the journey commences the time of supply is identified explicitly in connection with the provision of, in this case, the accommodation.

37. The place of supply provisions contained in regulation 5 are also specified by reference to the treatment of a designated travel service.

38. Where there is a supply of a designated travel service it is the value of that supply which is calculated by reference to the margin for that service (see Article 7).

39. The purpose of the TOMS would therefore appear to be predicated on the basis that the taxable amount of each transaction is to be determined. However, the detailed rules of the scheme provide for a global calculation undertaken on an annual basis. The extent to which an individual negative margin reduces the overall VAT payable calculated on a global basis is considered below.

Application to Inventory Sold at a Loss

40. The Appellant's case was prepared only on the basis that the costs in dispute related to Unsold Inventory. However, it became apparent that the Appellants considered some inventory had been sold but at a loss.

41. It was somewhat unclear what was meant by "at a loss". Where that loss arose, by way of example, because accommodation for 52 weeks had been bought in at a cost of £52,000 and 30 weeks had been sold at a value totalling £45,000 there is, on the face of it, a loss of £12,000. However, as that "loss" arises because of the 12 unsold weeks (assuming the purchase cost to be £1,000 per week the Tribunal considers that the analysis set out below regarding Unsold Inventory applies.

42. Where however, accommodation for 52 weeks had been bought in at a cost of £52,000 and 52 weeks had been sold to a total value of £45,000 such inventory has quite clearly been sold at a loss. The TOMS looks to value the supply made by the tour operator by reference to the margin achieved and is couched in terms of doing so by reference to an individual supply. There is no question in the context of this example that there is a supply which must be valued. The question is whether the value is £0 or whether it can be a negative sum.

43. As indicated above the Tribunal has concluded that there is no basis that the taxable amount of the supply of accommodation can ever be negative. HMRC accept that in this example the value of the supply would be £0, and the Tribunal agrees.

44. The Tribunal also understood HMRC to accept, by reference to the above example, that when undertaking the annual calculation under the TOMS the Appellant would be entitled to include the full £52,000 as a purchase cost thereby, and to that extent, permitting the use of a negative margin. HMRC however, contend that where the total calculation results in a negative

margin the annual sum due by way of output tax would be £0. By reference to an extension of the above example: if in addition to the transactions identified in paragraph 42 above accommodation costing £52,000 were bought in but supplied on for £65,000 the TOMS calculation would be $(45,000 + 65,000) - (52,000 + 52,000)$ and the margin would be £6,000 on which VAT would be due. The calculation would not be $(45,000 - 52,000)$ capped at nil + $(65,000 - 52,000)$ £13,000.

45. By reference to the terms of the scheme calculation provided for in Notice 709 which has force of law HMRC are, in the Tribunal's view, right to do so. In the event that the Tribunal's understanding of HMRC's position is incorrect the Tribunal determines that the annual calculation should be undertaken on the basis that individual negative margins are included and may reduce positive margins on other supplies subject to a net nil position for the purposes of calculating the annual adjustment and provisional margin for the following year. Whilst a negative margin is not envisaged under the provisions of the PVD at all, the scheme adopted by the UK does operate so as to provide some relief in respect of inventory supplied at a loss even where that inventory is non-VAT bearing.

Application to Unsold Inventory

46. The Appellant incurred the cost of buying in units of accommodation which it was never able to sell on. This cost represents a cost of doing business but on the basis that there has been no onward supply there is no supply which meets the definition of a designated travel service as regards that accommodation, in the language of both Article 308 PVD and Article 3 of the TOMS Order, the accommodation in question is not for the direct benefit of any traveller.

47. Further, as the cost of a bought in service only forms part of the mechanism by reference to which the value of the designated travel service is determined under TOMS where there is no on supply of the accommodation and no supply which needs to have a place time or taxable amount determined the TOMS is simply irrelevant.

48. By reference to the terms of the TOMS Order however, it is to be noted that Article 12 provides that input tax incurred by a tour operator for the re-supply of a designated travel services is excluded from credit under VATA. As such, it would appear that, by reference to the TOMS Order, any VAT borne on any bought in, but unsold inventory would not be excluded from recovery. The VAT on unsold inventory would be a general cost of doing business and, as such, recoverable in the normal way. This analysis is, of course, largely if not exclusively irrelevant to the Appellant as the bought in accommodation did not bear VAT and hence there would be no input tax to recover in any event.

49. The position on inclusion of the costs of Unsold Inventory is, however, less clear by reference to the global calculation prescribed in VAT Notice 709/5. Paragraph 6.1 and 6.3 of the Notice (which whilst not themselves having force of law effectively do so because the calculation provisions which rely on them do have force of law) provide for the inclusion of all costs which "relate to" a resupply of a bought in service.

50. In a situation in which the right to occupy accommodation is bought in on a basis which is different from that in which it is sold on and in circumstances in which there is Unsold Inventory, presents a more complex question of determining what costs should be included and which should be excluded by reference to the terms of the calculation. Using again, the above example where 52 weeks potential use of a unit of accommodation is bought in for £52,000 the Tribunal can see a persuasive argument that the cost of having the accommodation available for sale for one week is, in effect, that of buying it in for the whole year. Particularly where, for instance, the accommodation is only available on a 52 week lease it is somewhat difficult to see that anything but the whole cost is the cost that is "related to" the supply of the individual week (as articulated in paragraph 6.3 of Notice 709).

51. As noted in paragraph 46, Article 308 PVD and Article 3 TOMS Order require that the TOMS applies to any goods or services bought in for the direct benefit of the traveller. It is difficult to see that a 52-week lease of accommodation is bought in for the direct benefit of a traveller using only one of those weeks. However, at the other end of the scale if 51 weeks were sold, would it be reasonable to say that the cost of the one unsold week was not for the direct benefit of the travellers who collectively had occupied for the 51 weeks?

52. There is a further complication which might arise in valuing one week over another. The owner of the accommodation is likely to have let the accommodation to the Appellant for the security of a fixed amount for the year thereby avoiding both the risk associated with non-occupancy and the fluctuation in price over the year, together with the administration of finding occupants etc. Though not addressed in evidence it seems reasonably safe to assume that the Appellant agrees the lease value on the basis of an assessment that some weeks will command a higher rate than others and some will be unoccupied but by reference to a business sense that in the round they will be able to operate profitably.

53. By reference to the conditions on which the TOMS calculations are performed (as per the Notice) the Tribunal considers that whilst it might strictly be the case that the cost of any Unsold Inventory should be excluded from the margin calculation, practically, it would be cumbersome to operate and audit. A more traditional tour operator that block booked a flight would include the full cost of the flight irrespective of whether the plane was full at take-off rather than apportion the cost between seats taken and vacant. The Appellant's situation is not materially different.

54. Thus, whilst the Tribunal considers that were it the case that identified costs incurred in buying in goods and services which are not then the subject of an onward supply should be excluded from the TOMS calculations, costs associated with the block booking of accommodation of the type incurred by the Appellant are to be included. Where such costs exceed the value obtained by onward supply the negative margin forms part of the annual calculation. However, where the global calculation results in a negative margin the tax due for the year under the TOMS is £0 and there is no basis for a repayment to the Appellant.

Comparison to other margin schemes

55. The Appellant invited a comparison to "other margin schemes". The Tribunal has therefore considered the second-hand goods margin scheme and the global accounting scheme provided for in section 50A VATA. Pursuant to section 50A the Treasury may, by order, make provision for margin schemes. By such an order (VAT (Special Provisions) Order 1995) provision is made for a second-hand margin scheme and the global accounting scheme.

56. The second-hand goods margin scheme applies, where relevant, at the election of the taxable person selling the goods, on a transaction-by-transaction basis to determine the value on which VAT is due on the supply. It applies to any second-hand goods (including cars) which, when they are bought in, do not bear VAT. In accordance with the Court of Justice of the European Union, a margin scheme is a derogation from the general principles of the PVD and must be construed narrowly and in accordance with the underlying objective of the scheme. In the context of the second-hand goods margin scheme the objective is to avoid the double tax charge which would arise if goods that had been taxed once when they entered into consumption were to again be taxed on their full value and to avoid distortion of competition which might otherwise arise between taxable and non-taxable persons selling second hand goods. The margin is the difference between the total consideration received on the sale of the goods and everything paid for the vehicle there is no provision for a negative margin.

57. The global accounting scheme provides that a taxpayer operating the second-hand goods margin scheme in respect of low value goods (but also excluding motor vehicles, caravans,

aircraft, boats and horses whatever their value) may account for VAT on the total profit margin during a prescribed accounting period. Where the global accounting scheme is used the total profit margin is calculated by reference to the difference between the total selling price of all goods within the scheme sold in the prescribed accounting period and the total purchase price of all goods purchased in the prescribed accounting period. The global accounting scheme permits, for any prescribed accounting period, a negative margin to be carried forward to the next prescribed accounting period. In the period in which a negative margin arises no VAT will be due but there is never a situation in which VAT is repaid by reference to the negative margin. The negative margin provisions of the global accounting scheme effectively provide a means of precluding double taxation in respect of high-volume, low value trade in which purchases, and sales may not be aligned to prescribed accounting period and no more.

58. There is, in the Tribunal's view, no basis on which to read across the limited provision for accounting for a negative margin from the second-hand goods global accounting scheme to the TOMS. In this regard it is important to note is that the statutory objectives of the TOMS and the margin schemes applying to goods are different. As stated above the TOMS is designed to remove the challenges presented to a multi-jurisdictional business which might otherwise be required to register for VAT in all locations in which relevant travel goods and services are bought in and sold on. Of particular relevance for the purposes of this appeal is the marked contrast that under the TOMS it is implicit that the bought in supplies are likely to have been the subject of a taxable supply made to the tour operator rather than excluded from the scope of VAT and thus non-VAT bearing. There is no question of double taxation at consumption arising. It is correct to note that the basis on which the taxable amount of the supply is calculated also removes the requirement to claim input tax and, in accordance with the scheme of the PVD as a whole seeks to achieve fiscal neutrality (pursuant to which a taxable trader would expect to be relieved of the VAT paid on inputs). However, the purpose and effect of the schemes is intended to be different.

59. There is a similarity between the basis on which the global accounting scheme calculations are undertaken and the annual TOMS calculation as both seek to address the challenge of knowing on a transaction-by-transaction basis what the margin is. However, the need to carry forward a negative margin from one prescribed accounting period to another arises more as a consequence of the frequency of the calculation rather than being an inherent right to benefit from a negative margin. It is also significant that a perpetual negative margin would never result in repayment to the taxpayer.

Commission v Spain irrelevant

60. The Appellant placed some considerable reliance on the existence of an express provision precluding the application of a negative margin under Spanish domestic law. The Tribunal rejects the reliance on a provision which, by reference to the scheme as analysed, provides confirmation that a negative margin is impermissible.

DISPOSITION

61. For the reasons stated the Tribunal determines that the scheme of the TOMS does not provide for the benefit of a negative margin at all. However, under the terms of the UK implementation of the TOMS only a global calculation is undertaken. Pursuant to that global calculation it is permissible to include a negative margin calculated in respect of discrete supplies of designated travel services; however, there is no basis on which to permit an overall negative margin.

62. In principle the basis on which the error correction notice was submitted and the returns subject to assessment were calculated were flawed and the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**AMANDA BROWN QC
TRIBUNAL JUDGE**

RELEASE DATE: 11th APRIL 2022

VALUE ADDED TAX (TOUR OPERATORS) ORDER 1987 (SI1987/1806)

1 Citation and Commencement

This Order may be cited as the Value Added Tax (Tour Operators) Order 1987 and shall come into force on 1st April 1988.

2 Supplies to which this Order applies

This Order shall apply to any supply of goods or services by a tour operator where the supply is for the benefit of travellers.

3 Meaning of “designated travel service”

(1) Subject to paragraphs (2) ... and (4) of this article, a “designated travel service” is a supply of goods or services—

- (a) acquired for the purposes of his business; and*
- (b) supplied for the benefit of a traveller without material alteration or further processing.*

by a tour operator who has a business establishment, or some other fixed establishment, in the United Kingdom.

(2) The supply of one or more designated travel services, as part of a single transaction, shall be treated as a single supply of services.

(3) ...

4 Time of supply

(1) Sections 4 and 5 of the Value Added Tax Act 1983¹ shall not apply to any supply comprising in whole or in part a designated travel service.

(2) Subject to paragraphs (3) and (4) of this article, all supplies comprising in whole or in part a designated travel service shall, at the election of the tour operator making the supplies, be treated as taking place either—

- (a) when the traveller commences a journey or occupies any accommodation supplied, whichever is the earlier; or*
- (b) when any payment is received by the tour operator in respect of that supply which, when aggregated with any earlier such payment, exceeds 20 per cent of the total consideration, to the extent covered by that and any earlier such payment, save in so far as any earlier such payment has already been treated as determining the time of part of that supply.*

(3) Save as the Commissioners of Customs and Excise may otherwise allow, all supplies comprising in whole or in part a designated travel service made by the same tour operator shall, subject to paragraph (4) of this article, be treated as taking place at the time determined under one only of the methods specified in paragraph (2) of this article.

(4) Where—

(a) a tour operator uses the method specified in paragraph (2)(b) to determine the time of a supply; and

(b) payment is not received in respect of all or part of the supply.

notwithstanding paragraph (3), the time of any part of that supply, which has not already been determined under paragraph (2)(b), shall be determined in accordance with paragraph (2)(a).

(5) A designated travel service shall be treated for the purposes of the [Value Added Tax Act 1994](#) as supplied in the United Kingdom regardless of the place where it is to be enjoyed.

5 Place of supply

(1)

(2) A designated travel service shall be treated for the purposes of this Act as supplied in the ...

member State in which the tour operator has established his business or, if the supply was made from a fixed establishment, in the member State in which the fixed establishment is situated.”

7 Value of a designated travel service

... the value of a designated travel service shall be determined by reference to the difference between sums paid or payable to and sums paid or payable by the tour operator in respect of that service, calculated in such manner as the Commissioners of Customs and Excise shall specify.

12 Disallowance of input tax

... input tax on goods or services acquired by a tour operator for re-supply as a designated travel service shall be excluded from credit under sections 14 and 15 of the Value Added Tax Act 1983.