

VAT ALERT

SERVICES NOT USED BY THE END OF THEIR VALIDITY PERIOD – APPLICABLE VAT TREATMENT

JUNE 2016

► FROM AIRPORTS TO MOVIE THEATERS: VAT ON MULTIPLE-ENTRY CARDS

By a decision handed down on 15 April 2016,¹ the French Council of State (*Conseil d'Etat*), following the position of the Court of Justice of the European Union,² has ruled that non-refundable and unused multiple-entry movie theater cards and books of tickets are subject to VAT.

In addition to selling single tickets, the movie theater operator MK2 Vision offers its customers multiple-entry cards and books of tickets for which they pay the full price at the time of purchase. These cards and books have an expiry date after which any unused tickets will no longer be refundable.

According to the movie theater operator, the amount corresponding to the portion of the price of any tickets and entries not used by the expiry date should not be characterized as consideration for a service, but rather as compensation for the loss suffered by the company due to the customer's default. Accordingly, the sums paid in this respect should not be subject to VAT.

The Council of State considered that, even though the movie tickets and entries were not used, the movie theater operator placed the customers in a position to attend movies. The high court consequently concluded that the sums paid when the tickets and entries were purchased are subject to VAT, whether or not the tickets/entries were used during their validity period.

Like the CJEU in its Air France KLM decision, the Council of State has thus adopted a broad interpretation of the concept of "supply of services," according to which even if the customer did not actually benefit from the service rendered, the service is deemed to have been supplied so long as the customer was placed in a position to benefit from it.

Thus, the mere fact that the customer does not actually avail himself of the service, i.e. the projection of a movie, has no impact on the recognition of a supply of services.

Regarding the chargeability of the VAT, the CJEU and the Council of State reaffirm that "*in order for VAT to be chargeable before the supply is made, it is necessary and sufficient that all the relevant information concerning the chargeable event is already known and therefore, in particular, that, at the time the payment on account is made, the goods or services have been clearly identified.*"

¹ CE, 15 April 2016, no. 373591, *MK2 Vision*

² CJEU, 23 December 2015, Case C-250/14, C-289/14 – CE, 13 April 2013, no. 365172/365173 CE, 13 April 2016 Air France KLM



In the case at hand, all the elements of the movie-watching service are known at the time the tickets are purchased.

Consequently, the VAT is chargeable at the time the multiple-entry movie cards and books of tickets are purchased.

Although the CJEU's judgment on unused plane tickets is not exempt from criticism, the Council of State has, in the present decision, endorsed it.

This Council of State decision is the first example of the Air France case law being applied to other sectors of activity.

The subject could potentially extend to gift card suppliers or car rental companies as well as to businesses that receive indemnities in connection with commercial disputes.

The financial stakes can be high, particularly in B-to-C relations where the VAT (deemed to be included in the invoiced amount) directly impacts the company's margin (without any possibility of re-invoicing it).

These decisions must nonetheless be viewed in combination with the CJEU's *Eugénie-les-Bains* decision³ relating to deposits paid in the hotel sector.

The CJEU had considered that such sums should be regarded as lump-sum termination indemnities not subject to VAT where (i) the customer exercised the cancellation option available to him, (ii) those sums were retained by the hotelier and (iii) were paid as compensation for the loss suffered by the hotelier as a result of customer default.

CJEU, 18 July 2007, Case C-277/05, *Société thermale d'Eugénie-les-Bains*

OUR ASSISTANCE

In this context, and in view of securing the rights of the companies concerned, we recommend undertaking a legal and tax review of contractual provisions relating to "services/gift cards not used by the expiry date."

More generally, the lawyers at FIDAL with whom you usually work are available to address the implications of this decision in further detail.

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