



FACULTY OF LAW
University of Lund

Iljada Lutz

Value Added Tax treatment of vouchers – an uncertain land- scape

Master thesis
20 points

Supervisor
Christina Moëll

European Tax Law

Spring 2007

Contents

SUMMARY	1
ABBREVIATIONS	2
1 INTRODUCTION	3
1.1 Background	3
1.2 Presentation of the problem	4
1.3 Purpose	5
1.4 Delimitation	5
1.5 Method and material	5
1.6 Disposition	6
2 THE SCOPE OF VAT	7
2.1 Introduction	7
2.2 Transactions that fall outside the scope of VAT	8
2.3 Exempt transactions	9
3 WHAT DEFINES A VOUCHER?	10
3.1 General definition	10
3.1.1 <i>Definition of a singel purpose voucher (SPV)</i>	10
3.1.2 <i>Definition of a multi purpose voucher (MPV)</i>	11
3.1.3 <i>Definition of a free voucher</i>	11
3.1.3.1 Definition of a discount voucher	12
4 VAT TREATMENT OF VOUCHERS AS SUGGESTED BY THE COMMISSION	13
4.1 Single purpose voucher	13
4.1.1 <i>The taxable amount</i>	13
4.1.2 <i>The time of supply</i>	13
4.1.3 <i>The place of supply</i>	14
4.2 Multi purpose voucher	14
4.2.1 <i>The taxable amount</i>	14
4.2.2 <i>The time of supply</i>	14
4.2.3 <i>The place of supply</i>	15
4.3 Discount voucher	15
4.4 Unredeemed vouchers	15

5	BRIEF SUMMARY OF RESULTS ON THE CONSULTATION	16
6	ESTABLISHED PRINCIPLES BY THE ECJ	17
6.1	Taxable amount	17
6.2	Vouchers for free goods	21
6.3	Chargeability of VAT	22
7	SUMMARY OF PRINCIPLES ESTABLISHED BY THE ECJ	23
7.1	Vouchers that do not constitute consideration	23
7.2	Vouchers that do constitute consideration	23
8	LEGAL NATURE OF A VOUCHER	24
9	THE VAT- CHAIN	25
9.1	The domestic supply chain	25
9.2	Exempt intra-community supplies	26
10	CONCLUDING DISCUSSION	28
10.1	Voucher definition	28
10.2	Free vouchers	29
10.2.1	<i>Discount vouchers</i>	29
10.3	Singel Purpose Voucher (SPV)	30
10.4	Multi Purpose Voucher (MPV)	31
10.5	Unredeemed vouchers	31
	BIBLIOGRAPHY	33
	TABLE OF CASES	35

Summary

In November 2006, the Commission's Taxation and Customs Union Directorate-General published a consultation paper seeking views of the inconsistencies in the VAT treatment of vouchers between Member States. It explained that these inconsistencies may offer opportunities for tax avoidance or may raise situations of double, or non-taxation (for cross-border transactions). Currently there is no common interpretation to the VAT treatment of vouchers and the treatment of vouchers across the Member States differs widely. Some Member States treat the supply of a voucher as a supply of goods or services while others treat its purchase as a payment on account for future supplies. Other Member States do neither of the above and tax instead the supply of goods or services that occurs at the redemption of the voucher or treat them as a financial service. The objective of this thesis is to identify the main problems in the VAT treatment of vouchers.

This thesis concludes that the compatibility between some new forms of vouchers and classic means of payment is one of the most important issues. The main question is around the differentiation between a voucher and a "general means of payment". The primary challenge in regards to vouchers arises where vouchers attached to goods are redeemed in a Member State other than where the original sale occurred. The thesis argues that one set of rules for VAT – purposes are preferable and that the definition of some types of vouchers should possibly be reconsidered. The Commission concluded in its summary of results on the Consultation that in order to better harmonize the VAT treatment it is preferable to first harmonize the interpretation of the current rules. Even though that might aim to solve the inconsistencies in treatment of vouchers between Member States, it still leaves some unanswered questions of its practical application particularly in regards to cross-boarder transactions.

Abbreviations

EC	European Communities
ECJ	European Court of Justice
EU	European Union
FC	Final Customer
Ibid	Ibidem (Latin for “the same place”)
M	Manufacturer
MPV	Multi Purpose Voucher
SPV	Single Purpose Voucher
VAT	Value Added Tax
W	Wholesaler

1 Introduction

While shopping at your local grocery store you decide to try a different brand of cereal as an offer on the package catches your attention. If you buy two packages you will receive a coupon that entitles you to 25% off the admission to the Disneyworld Paris. Considering this being a great deal knowing that the admission is quite pricey, you gladly put two boxes of the cereal in your basket unaware of the complicated chain of events that will take place from a VAT point of view. Most people could care less, but from a tax point of view considering that VAT amounts depending on the VAT -rate results to quite a number of millions in revenue, this is a highly relevant issue. Let's say that the manufacturer of the cereal refunds Disneyworld 5% of each coupon used, how would this be treated for VAT purposes?

1.1 Background

In November 2006, the Commission's Taxation and Customs Union Directorate-General published a consultation paper seeking views of the inconsistencies in the VAT treatment of vouchers between Member States.¹ It explained that these inconsistencies may offer opportunities for tax avoidance or may raise situations of double, or non-taxation (for cross-border transactions). Even though a number of European Court of Justice Cases have provided useful guidance on the matter, the principles stated by the Court seem difficult to put in practise since the current rules are not adapted to the evolution of some vouchers. In order to come to a resolution of these issues, the Commission will consider possible legislative proposals for new rules. The consultation paper summarized that any legislative change should respect the following principles:

- The system must be able to cope with supplies in more than one country and with vouchers issued in one Member State and redeemed in other Member States.
- Tax neutrality should be ensured between different payment systems which deliver the same result in paying for goods and services; that is, the choice of payment instrument should not be a determining factor and the same tax charge would apply to a supply whether the customer uses cash, a voucher or any other form of consideration.
- Tax administrations must be able to enforce the system effectively without creating disproportionate burdens for business, that means simple and practical rules.
- The system reasonably be able to cope with future developments in the area under review.

¹ European Commission, Consultation Paper on modernising the Value Added Tax treatment of vouchers and other related issues.

The sole purpose of the consultation was to generate feedback on VAT problems in these areas as well as options for changing the provisions in the Sixth Vat Directive. This is not the first time that the Commission addresses VAT issues related to vouchers. Already in its Communication COM (2000) 348 final,² the Commission included as a future priority a review of the application of the Sixth VAT Directive to vouchers. In the Communication COM (2003) 614 final,³ the priority was reaffirmed. As new technology and business models continue to advance and give rise to new VAT issues, the Commission is of the view that it is now time to revise the legislation in this area.

1.2 Presentation of the problem

The ranges of problems have increased through the growing use of vouchers and in their multiplicity. The British retail consortium anticipates that vouchers that are currently redeemable only for goods or services may acquire a more general functionality as a means of payment.⁴ There is also a new trend of “gift card malls” through which retailers sell vouchers redeemable with other retailers, meaning that retailers now participate in the supply chain for vouchers not only as issuers/redeemers but also as intermediaries. Already at this time, some vouchers are impossible to differentiate from a general payment vehicle.

Currently there is no common interpretation to the VAT treatment of vouchers and the treatment of vouchers across the Member States differs widely. Some Member States treat the supply of a voucher as a supply of goods or services while others treat its purchase as a payment on account for future supplies. Other Member States do neither of the above and tax instead the supply of goods or services that occurs at the redemption of the voucher or treat them as a financial service. Furthermore, the recently more widespread use of vouchers in the travel and telecommunications industry has increased the number of problems, specifically in regards to issues linked to cross border trade. Other issues pertaining to the VAT treatment of vouchers is the correct assessment of the taxable amount, time of supply and place of supply.

² COM (2000) 348 final, Communication from the Commission to the Council and the European Parliament “A strategy to improve the operation of the VAT system within the context of the internal market”.

³ COM (2003) 614 final, Communication from the Commission to the Council and the European Parliament and the European Economic and Social Committee “Review and update of VAT strategy priorities”

⁴ Response to the Consultations paper by British Retail Consortium Brussels

1.3 Purpose

The objective of this thesis is to identify the main problems in the VAT treatment of vouchers, which among other things includes the lack of a clear definition of a voucher. In order to accomplish this, I will present a summary of principles established by the ECJ by analysing some of the leading VAT cases that deal with vouchers and other promotional schemes. The further purpose is in the context of this to attempt to clarify the VAT treatment of vouchers.

1.4 Delimitation

The consultation paper also looks at some other closely related issues to the VAT treatment of vouchers such as business gifts and VAT issues that arise in relation to premium rate phone card services as a payment vehicle. This matter is linked to the issue, but for the purpose of this thesis, I have chosen to put the focus on vouchers concerning goods, since this concept alone deals with complex issues. It is not my ambition to give a comprehensive summary of the VAT system, for that reason I will only discuss cases and provisions of relevance to the subject matter.

1.5 Method and material

The starting point for this thesis has been the consultation paper along with the preliminary summary report of results presented by the Commission.⁵ In order to fully understand the practical use and function of all the various types of vouchers I have also examined the responses from various parts of EU and various sectors. In the process of writing this thesis, I have used the traditional method of legal research and analysis by studying relevant case law of the Court along with Directive 2006/112/EEC on the common system of value added tax, which has been my main source of primary law. Articles written by legal scholars and practitioners have also contributed to be a valuable source of insight and information.

On 28 November 2006, Directive 2006/112/EC on the common system of value added tax (the recast of the First and Sixth Vat Directives) was adopted entering into force 1 January 2007. In order to improve the drafting quality the Sixth Directive has undergone numerous changes. Even though

⁵ For the purpose of this thesis, I have used the same terms as in the consultations paper:

Issuer – the person materially issuing a voucher.

Intermediate – a person who does not issue a voucher but disposes of vouchers he acquires either to another intermediate or to a final business consumer or final consumer.

Refunder – the person that bears the economic consequences of the content of the voucher (it may be the same as the issuer).

Redeemer – the person that redeems the voucher but does not necessarily bear the economic consequences of the content of the voucher (it may be the same as the refunder).

Retailer – often is the same as redeemer.

the changes do not affect its substantive content, they do alter the format with the 53 Articles of the Sixth Directive divided into 414 new Articles.⁶ When referring to Articles in this thesis, I am always unless specifically noted referring to Articles of Directive 2006/112/EC. In order to clarify for the reader I will provide the new Article in brackets when referring to case law using the former Articles of the Sixth Vat Directive.

1.6 Disposition

By way of introduction, the subsequent chapter will present a general overview of the scope of VAT. For pedagogic purposes, it might be useful to read part 9.1 after the introduction since it gives an overview of how the VAT – chain functions. After the introduction, the text is divided into three main parts, beginning with an attempt to defining a voucher. The succeeding part treats the suggested VAT treatment by the Commission, which is followed by a review of relevant case law that ends with a summarization of principles established by the ECJ. The main difficulty in regards to cross-boarder transactions is emphasized in part 9.2 followed by a concluding discussion.

⁶ Terra, Kajus, *The Recast VAT Directive and The Integrated Text of the Sixth VAT Directive*, preface p. v.

2 The scope of VAT

2.1 Introduction

Value added tax (VAT) is a tax on final consumption of certain goods and services, in other words it is a tax on consumer expenditure. It is levied on the added value that results from each exchange. Every VAT-registered trader in the chain of supply from manufacturer through to retailer charges VAT on their sales and are entitled to deduct the amount paid for VAT on their purchases. The effect of offsetting purchases against sales is to impose the tax on the added value at each stage of the production. The legal character of a VAT can be described as a general indirect tax on consumption, which is not only a name but also provides the legal character of the tax.⁷ The definition of indirect taxes and their difference from direct taxes is therefore based on the assumption of that indirect taxes are fully shifted forward to the final consumer. According to Article 2 shall the following be subject to value added tax: the supply of goods and services effected for consideration within the territory of the country by a taxable person acting as such and the importation of goods by anyone. The Directive makes a distinction between the scope and the territorial application, referred to as the place of supply rules. The place of supply rules are probably the most complex part of the European VAT system, being particularly important for the allocation of tax revenues between the Member States.⁸ At the end of 2003, the European Commission launched a proposal to amend the place of supply rules in respect of services rendered to taxable persons.⁹ It proposed to amend the rules governing the place of supply of services to taxable persons, by generally making such services taxable in the Member State where the customer is established. Once implemented these changes should insure taxation at the place of consumption. As comparable considerations apply, the Commission did not deem it as logical to leave the rules on services to non-taxable persons unchanged. Therefore a year and a half later, the Commission incorporated rules relating to services rendered to non taxable persons into its Proposal.¹⁰

⁷ Terra, Kajus, Introduction to European VAT and other indirect taxes, p.384.

⁸ Swinkels, Joep, International VAT monitor, "Evolution of the EU Place-of-Supply Rules" March/April 2006, p.101.

⁹ Proposal for a Council Directive amending Directive 77/388/EEC as regards the place of supply of services, COM (2003) 822 final.

¹⁰ Amended proposal for a Council Directive amending Directive 77/388/EEC as regards the place of supply of services, COM (2005) 334 final.

2.2 Transactions that fall outside the scope of VAT

Article 2 of the Sixth Directive calls for the supplies of goods and services to be effected for consideration. One of the most important cases on the meaning of consideration is *Coöperatieve Aardappelenbewaarplaats*.¹¹ A cooperative operated a cold store for the benefit of its members who annually paid a storage charge. Between 1975 and 1976, the cooperative levied no charges on its members, and because of this, the authorities raised a VAT assessment on the basis that the members had received a benefit as a result of the failure to make a charge. The ECJ held that there was no consideration for the supply of the storage services, and made three main points: Initially, the meaning of consideration is to be determined by Community law and not by national law.¹² There must be a direct link between the services supplied and the consideration received. The consideration must be capable of being expressed in money. The taxable amount is the consideration actually received and not a value assessed according to objective criteria.¹³ Consequently, a provision of services for which no definite subjective consideration is received does not constitute a provision of services “against payment”.

Furthermore, there has to be a legal relationship in order to treat payments as consideration for a particular supply of goods and services. In *Tolsma*,¹⁴ a musician who played a barrel organ on the public highway invited passers-by to leave a donation in a tin. When he was assessed to output tax on his takings, he appealed since he believed that his takings were outside the scope of VAT. The ECJ held that firstly, there is no agreement between the parties, since the passers-by voluntarily make a donation, whose amount they determine as they wish. Secondly, there is no necessary link between the musical service and the payments, the passers-by do not request music to be played for them, as the payments are voluntary.¹⁵

In a recent decided case *Société thermale d’Eugénie-les-Bains*,¹⁶ the question referred to the court was whether a sum paid as deposit by a client to a hotelier is to be regarded as consideration for the supply of a reservation service (which is subject to VAT), or as fixed compensation for cancellation, which is not subject to VAT. Contrary to the Advocate General, the ECJ held that in situations where performance of the contract followed its normal course, the deposit was applied towards the price of the services supplied and was therefore subject to VAT. By contrast, the retention of the deposit at issue was triggered by the client’s exercise of the cancellation option made available to him and served to compensate the hotelier follow-

¹¹ Case C-154/80 (1981).

¹² Para. 9 of the judgment.

¹³ Para. 12 and 13 of the judgment.

¹⁴ Case C-16/93 (1994).

¹⁵ Para. 17 of the judgment.

¹⁶ Case C-277/05 (2007).

ing the cancellation, and not as remuneration for the supply of service. Where a client exercises the cancellation option and the hotelier retains that sum as a fixed cancellation charge paid as compensation for the loss suffered, this has no direct connection with the supply of any service for consideration and, as such, is not subject to tax.¹⁷ Therefore, neither the payment of the deposit, nor the retention of the deposit was covered by Article 2(1) of the Sixth Directive. (Article 2(1) (a) and (c)).

2.3 Exempt transactions

Financial services are one of a number of transactions that fall within the scope of VAT but are treated as exempt according to Article 135 (1)(b) to (f). The reason why financial services should typically be exempt from VAT has been the absence of a readily identifiable mechanism for allowing the introduction of taxation. Since their implementation the provisions, which govern the treatment of financial services, have never been re-visited legislatively.¹⁸ The Commission is currently preparing draft legislation on the exemption of insurance and financial services from VAT to ensure that it reflects the world as it is today. There should be made a distinction between exempt supplies without the right to deduction and zero-rated supplies with the right to deduction that is a taxable supply but the rate of tax is nil. In the consultation paper pertaining to the VAT treatment of vouchers, the commission suggested that where vouchers function as general payment services, the provisions of Article 13B(d)3 (Article 135(1)(d)) should apply leading to VAT exemption as a financial service.

¹⁷ Para. 37 of the judgment.

¹⁸ European Commission, Consultation on modernising Value Added Tax obligations for financial services and insurances.

3 What defines a voucher?

3.1 General definition

All vouchers carry a right to receive certain goods or services, or to obtain a discount when acquiring those goods or services, or to receive a refund, at the time of redemption. That right might be shown as a value expressed in terms of monetary value or of a percentage (of reduction) or of units or quantity. Since vouchers take different form (a ticket, a card, an electronic message on a chip or other medium), the Commission suggests that for VAT purposes and according to their functionalities, it seems logical to divide them as either multi or single purpose vouchers. Discount vouchers should be a subcategory of free vouchers, which form another category. The concept of a voucher would in any case exclude them from categorization as a legal tender.¹⁹

3.1.1 Definition of a single purpose voucher (SPV)

The commission proposes that a SPV is limited to an identified good or service per voucher, redeemed by an individual redeemer (or refunder). An exception to this would be that an SPV issued for single or multiple goods or services, by one or more redeemers could remain to be regarded as an SPV on the condition that those goods or services are already identified at the time of supply and the vouchers sale revenues are already attributed to the redeemer or refunder as if it was already redeemed or refunded. An example of that kind of vouchers is an integrated bus-metro ticket where the actual consumption of a multiple ticket is not verified or verifiable. For practical reasons it suggested that a voucher ceases to be a SPV when the applicable VAT rates for the redeemable goods or services varies, or can not be known in advance.

Several of the responders to the consultation drew the attention to the fact that they had difficulty identifying many, if any vouchers transacted by their members that could be treated as an SPV. Multiple retailers, fashion retailers and grocery retailers all supply goods at different VAT rates. Even where a voucher can be used for a specific identifiable good (for example a book token) the increased internationalisation of retailing means that the redemption of that voucher for a book in different countries will lead supplies of books being taxed at different VAT rates. The SPV will not therefore

¹⁹ Consultation Paper on modernising the Value Added Tax treatment of vouchers and related issues, p. 4.

qualify to be treated as such and will by definition become a multi purpose voucher.²⁰

3.1.2 Definition of a multi purpose voucher (MPV)

The commission suggests that defining an MPV should be relatively straightforward if it were to cover, at least on its first appearance any voucher that would not fall under any other category. The general definition mentioned in paragraph 3.1.1 can be used as a definition of multi purpose vouchers, with the exclusion of vouchers already defined elsewhere. An MPV should not extend to systems whose objective is only to provide a form of payment for an open-ended range of goods and services. This means that an MPV should be considered as such until it ceases to be a voucher and becomes a more general means of payment under the terms of Article 135(1)(d) .

Since the use of vouchers and different technologies continue to evolve, the MPV's and the means of payment will converge and may become indistinguishable. The Tax Executives Institute states that this convergence directly affects whether the issuance of an MPV should be viewed as supply of right to receive goods or services. It is apparent that if the holder of the voucher can be reimbursed in money for value stored on a MPV, no supply of right to receive future goods or services can have arisen on the issue of the MPV. The British Bankers Association supports this reflection and suggests that the crucial difference between a voucher and a payment instrument lies in the fact that a voucher should not be categorized as a legal tender such as a debit/credit card and payment systems operated by mobile phone operators where credit can be used to purchase other services than airtime.

3.1.3 Definition of a free voucher

A free voucher is one that is issued without any charge, normally with the intention of promoting a product or a service. Examples of free vouchers are those that can be found in newspapers or simply given away by businesses to their customers. Following the results of the ECJ Case C-48/97 Kuwait Petroleum (see below) the relevant test to determine whether the voucher discount has been supplied free of charge should be whether or not the customer has the right to pay less if he does not want the vouchers being offered to him.

²⁰ Response by (among others) Giftex, The Voucher Association and British Retail Consortium Brussels.

3.1.3.1 Definition of a discount voucher

The Commission suggests that a discount voucher should be a subcategory of free vouchers. The discount can be expressed either as a percentage or as a fixed amount (with a face value). The nature of a discount voucher is that it represents a right to a discount from the refunder (directly or via a redeemer). For that reason, they should not be seen as carrying a money value in the strict sense since they generally cannot be redeemed for money independently from the product being promoted by the voucher. It is necessary to draw a distinction between a discount voucher that entails the customer to a discount off a product or a service and vouchers that are sold at a discount and the discount is simply the way intermediaries earn their margin.²¹

²¹ Consultation Paper on modernising the Value Added Tax treatment of vouchers and other related issues, p. 5.

4 VAT treatment of vouchers as suggested by the Commission

4.1 Single purpose voucher

4.1.1 The taxable amount

According to Article 73 the taxable amount should be in respect of goods or services everything, which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or at third party for such supplies. Thus, the taxable amount of an SPV is equal to consideration effectively paid by the customer to acquire the relevant voucher. This will be accurate when the voucher is issued and refunded by the same taxable person. In terms of taxable amount there may occur a different result if the redeemer is different from the refunder. In such case, the redeemer (and the refunder) will not act on the total consideration paid by the customer, but rather on the predetermined value of the voucher. The result being that the taxable amount is determined based on the refund effectively paid to the redeemer by the refunder.²²

4.1.2 The time of supply

According to Article 63, the tax becomes chargeable when the goods are delivered or the services are performed. However, where a payment is to be made on account before the goods are delivered, or the services are performed, the tax shall become chargeable on receipt of the payment and on the amount received (Article 65). This part of the provision refers to goods and services to be received when the quantity is not already known. Therefore, in order to apply this to vouchers it is necessary that the voucher is linked to a quantity or a unit of good, or a service already identified. As a result, VAT can be charged at the time of sale as a prepayment, such treatment should apply to all single purpose vouchers. The commission suggests treating a voucher that can be used in several Member States, in the same way as an MPV as it is impossible to identify when this prepaid voucher is issued and in which way it will be used by the recipient.²³

²² Ibid. p. 9

²³ Ibid. p. 9

4.1.3 The place of supply

The place of supply rules are decisive for whether and which VAT should be charged. As a general rule, Article 31 states that goods that are not dispatched or transported are treated as being supplied at the place where the goods are when the supply takes place. The general rule concerning the place of supply of services is according to Article 43 where the supplier has established his business or has a fixed establishment. To eliminate irregularity when services are supplied cross-border there are a large number of exceptions to this provision. It should be observed that the “importation” of services is not a taxable transaction under EC VAT law, which can result in elaborated schemes of allocating the place of supply of services.²⁴ (As mentioned above there has been launched a proposal to amend the current place of supply rules). The Commission acknowledges that if future development of SPV could allow them to be used cross-border, the essential anonymous nature of vouchers may raise issues that need attention. Otherwise, the SPV is according to present rules supplied where the voucher is sold.

4.2 Multi purpose voucher

4.2.1 The taxable amount

The Commission proposes that the sale of an MPV should be outside of the scope of VAT, and therefore it is not necessary to identify the taxable amount of the voucher itself. The taxable amount of the goods and services supplied against an MPV is equal to the value of the MPV effectively used to acquire those goods and services. The same principle applies as with SPV when the issuer/refunder of the voucher is not the same as the redeemer, then the taxable amount equals the consideration paid by the customer plus the money paid to the seller by the issuer/refunder (i.e. the amount deducted from the voucher).²⁵

4.2.2 The time of supply

The Commission suggests that the “payment on account” provided for in Article 65 should be applicable as far as is practical to MPVs. This implicates that, as contrary to SPVs the point in time when the tax becomes chargeable is when the final customer redeems the voucher. Nevertheless, in order to be applicable the wording of Article 65 requires that the goods and services to be received should be known at the time of sale, and the MPV vouchers do not fulfill that requirement.²⁶

²⁴ Terra, Kajus, A guide to the European VAT Directives, p. 570.

²⁵ Consultation Paper on modernising the Value Added Tax treatment of vouchers and related issues, p. 7.

²⁶ Ibid. p. 7.

4.2.3 The place of supply

When the sale of an MPV is treated as suggested above as outside of the scope, or as a mean of payment, VAT can only be applied at the time of its redemption and consequently the underlying supply of a MPV takes place where the voucher is effectively redeemed. The Commission acknowledges that for an essentially anonymous instrument such as a voucher, the correct application of taxation may raise some issues that require further attention.²⁷

4.3 Discount voucher

Typically, the difference between the taxable amount of the voucher and the taxable amount of the supply of the good or service is evident. A discount voucher will not have any taxable amount by itself, but affects the taxable amount of the related supply. Exceptions to this are discount vouchers that are refunded by a third party. In cross-boarder situations, the practical application may cause some problems. For example, when a discount voucher is issued in one Member State and the good is sold in another Member State and redeemed there, the refund is equal to the face value of the voucher but the taxable amount of the sale cannot be adjusted. This may distort the competition in terms of VAT between businesses established inside and outside of the Member States where the voucher is redeemed.²⁸

4.4 Unredeemed vouchers

Vouchers often have an expiry date after which they cannot be redeemed. The Commission proposes that if the consideration is refunded (which most likely not often would be the case) the sale transaction should be regarded as not effected and an adjustment of VAT should be made. If the consideration is not reimbursed, the consequences are different for SPV's and MPV's. Since the time of supply of an SPV is the time of the sale of the voucher, the supply is regarded as being already effected with the implication that the voucher will not be reimbursed does not change the situation. If an MPV is not taxed at the time of sale or before being used, the amount in the hands of the issuer is not regarded as consideration for a supply and consequently exceeding an expiry date applied to that amount will result in an enrichment of the issuer without any supply. Therefore, the Commission suggests some modification in one of the Articles under chargeable event and chargeability of VAT (Article 64) to create a chargeable event at the time of expiry date of a supply of money that gives right to use that money or to be reimbursed.²⁹

²⁷ Ibid. p. 8.

²⁸ Ibid. p. 10.

²⁹ Ibid. p. 11.

5 Brief summary of results on the consultation

In addition to the above listed comments in chapter 3, the most relevant issue among the responses was the compatibility between some new form of vouchers and classic means of payment. Some of the respondents thought that any proposal of legislation should aim for a single set of rules (namely that one proposed for MPVs). It is apparent from the responses that there is an imperative need for a clarification on the definition of the various kinds of vouchers. Many of the respondents expressed their concern regarding the challenge of the correct identification of the place of supply, therefore non-taxation of the initial sale of the voucher was sought after. Attention was also given to the relationship between vouchers and the proposed Directive on the place of supply rules.

Several of the responders were also of the meaning that a MPV should simply be defined as a financial service as means of payment. The Commission considers exploring this option further as this approach has the merit that it would simplify the VAT treatment of some vouchers. On the downside, since payment services generally are exempt, this would create an excessive burden for the distribution chain, because the pro-rata³⁰ or partial exemption implications. Several of the contributions considered that the main problem of inconsistent VAT treatment is due to a misunderstanding of the current rules. The suggestion was primarily to harmonize the interpretation of the current rules, before considering a legislative change.

All responses welcomed the initiative of the Commission since there is a common agreement on the existent need for clarification of the VAT treatment of vouchers.

³⁰ A pro-rata calculation determines the VAT deductible when a taxable person carries out a mixture of taxed and exempt activities.

6 Established principles by the ECJ

6.1 Taxable amount

According to Article 73, the taxable amount shall be everything, which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies. Article 79 (a) and (b) and Article 87 (a) and (b) provide that the taxable amount shall not include price discounts and rebates allowed to the customer and accounted for at the time of supply. The ECJ has sought to clarify how to calculate the taxable amount paid by the consumer in a number of cases. In some cases, vouchers have been held to constitute non-monetary consideration, while in others they have been held to be a plain mechanism for reducing the taxable amount. There should be made a distinction between coupons and cash-back offers that are not themselves issued for consideration, and vouchers such as book tokens, which are.³¹

In *Boots Company*³² a major retail company operated a sales promotion scheme where vouchers could be redeemed against the purchase of other goods. Some of these coupons appeared in magazines or leaflets, while others were printed on the back of products sold in the store so that the customer had to make a purchase in order to obtain the coupon. At times the costs of the promotion were born by the manufacturer of the goods concerned, at others entirely or partly by Boots itself. The parties were agreed upon that VAT was payable on the amount that Boots charged the manufacturers for the proportion of the price reductions to be financed by them. The argument therefore concerned only the price reductions granted upon presenting the coupons that were born by Boots. The case dealt with the question whether the coupons counted as consideration or whether they were just a mechanism for offering a discount.

Boots were of the view that when a customer buys goods with a coupon obtained upon an earlier purchase, VAT must be charged only on the sum of money actually paid by the purchaser. The Commissioners accepted that coupons printed in magazines did not count as consideration. On the other hand, they argued that coupons obtained by purchasing other products were consideration since the customer had to spend money in order to obtain such coupons. The ECJ held that there was no difference between the coupons and that both were ways of giving discount under Article 11(A)(3)(b) (Article 79 (a) and (b)).

³¹ Butler, Deborah, "Non-monetary consideration in the context of VAT" EC Tax Review, 2001-4 p. 234.

³² Case C-126/88 (1990) *Boots v Commissioners of Customs and Excise*.

The Advocate General Van Gerven described in his opinion how coupons in this context could be viewed from the legal point of view. For the retailer the coupons represent the obligation to grant a price reduction when they are surrendered upon subsequent purchases of goods specified on them. On the other hand, it must be assumed that a coupon no longer incorporates the right to a price reduction if the issuer in return for the obligation of the coupon obtains consideration value in monetary terms and thus not only the expectation of increased turnover.³³ The Advocate General acknowledged that the question remained that the customer did in fact have to spend money to acquire the coupon, and that the issuer/supplier did receive consideration in the form of increased turnover. "It is true that in those circumstances the customer spends money and that upon the sale of coupon-bearing goods the supplier receives a price." However, there is then a direct link between the full price and the goods then sold and at that moment, the full price should be included in the taxable amount. The coupon provides a right to a price reduction, just like a coupon distributed free of charge in a leaflet. The reduced price than actually received by the supplier constitutes the taxable amount. Because the coupon constitutes an obligation on the part of the supplier, it cannot be regarded as consideration, that is to say an advantage of the supplier capable of being expressed in money. It is therefore to be regarded as price discount or rebate within the meaning of Article 11(A)(3)(b).³⁴ (Article 79 (a) and (b)).

Argos³⁵ is a retailer, which lists its goods in a catalogue and sells them from its showrooms. Goods purchased can be paid for by means of vouchers issued and sold by Argos under its incentive scheme. Each voucher has a face value of different denomination. According to the conditions for use of the vouchers, they may be used at the value shown, for part or full payment for goods or services purchased in Argos showrooms but cannot be redeemed for cash. Argos sells its vouchers either at face value or at discount. The size of the discount depends on the order. The main buyers of the vouchers are companies, which distribute them to their staff or representatives by way of incentive, and financial services companies, which resell them to the public at or below face value. The last recipient of a voucher does not necessarily know who originally bought it or whether a discount from face value was granted.

The dispute concerned the calculation of VAT, which Argos as a taxable person must pay on its receipts from sales of goods paid for by means of vouchers. The Commissioners took the view that the face value of the voucher constituted the consideration for the supply of goods for fixing the taxable amount, regardless of whether the buyer was granted a discount. Argos considered that it did not receive the full face value of the vouchers, but only the difference between that figure and the discount granted to the first buyer of them. Thus, the taxable amount should be based on the discounted amounts at which it sold the vouchers to other traders. Contrary to

³³ Para. 13 of the Opinion.

³⁴ Para. 15 of the Opinion.

³⁵ Case C-288/94 (1996) Argos Distributors Ltd.

the Advocate General, the ECJ held that regard must be taken only to the transaction that is relevant in determining the actual money equivalent accruing to Argos when it takes a voucher in payment. This is the initial transaction comprising the sale of the voucher, at a discount or otherwise. The taxable amount constitutes the actual money received by Argos when it accepts vouchers as payment for its goods, namely the sum that is received upon the sale of the voucher less any discount allowed.³⁶

Elida Gibbs³⁷ a manufacturer of toiletries issued vouchers entitling customers to discounts on the purchase of its products. Elida Gibbs operated a money-off coupons scheme and a cash-back coupons scheme. The money-off coupons were distributed to the public, who handed them to retailers when purchasing the products in question. The retailers then claimed the face value of the coupons from Elida Gibbs. Under the cash-back coupon scheme, the consumer would cut out the coupon that was part of the packaging of some of Elida Gibbs products and send it to Elida Gibbs, who would refund the face value of the coupon. Elida Gibbs claimed a repayment of output tax, which it had previously accounted for arguing that the reimbursement constituted a retroactive discount of the face value of the coupons. The Commissioners rejected the claim and the case was referred to the ECJ.

Contrary to the Advocate General, the ECJ were of the view that both promotions had the effect of reducing the taxable amount. The ECJ considered that it would not be in conformity with the directive to calculate the VAT chargeable to the manufacturer as a taxable person, to exceed the sum finally received by him. Consequently, the taxable amount attributable to the manufacturer as a taxable person must be the amount corresponding to the price at which he sold the goods to the wholesalers or retailers, less the value of those coupons.³⁸ The Advocate General was of the opinion that Article 11(C)(1)³⁹ (Article 90 (1)) did not apply since the refund was not made by a party to the taxable transaction. The ECJ decided to the contrary and declared that the provision is an expression of the principle that the position of taxable persons must be neutral. In order to ensure the principle of neutrality, account should be taken of situations where a taxable person who, does not have a contractual relationship with the final customer, but is the first link in a chain of transactions which ends with the final consumer, grants the final consumer a reduction through retailers or by the direct repayment of the value of the coupons. Otherwise, the tax authorities would receive by way of VAT a sum greater than that actually paid by the final consumer, at the expense of the taxable person.⁴⁰

³⁶ Para. 20 of the Judgment.

³⁷ Case C-317/94 (1996) Elida Gibbs Ltd.

³⁸ Para. 29 of the Judgment.

³⁹ Article 11(C)(1) states that where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly.

⁴⁰ Para. 31 of the Judgment.

Yorkshire⁴¹ is a cooperative society, which carries on the business of retailer of food and non food goods. Yorkshire operated a coupon system that was corresponding to that in *Elida Gibbs*. Between 1974 and 1996, Yorkshire accepted price reduction coupons issued by various manufacturers. The products covered by the coupon in question were always put on sale at the normal retail price, with the result that a customer without a coupon was required to pay the normal sale price. Yorkshire included in its gross daily takings the sums received from manufacturers in exchange for price-reduction coupons collected from customers. Therefore, declaring for VAT purposes the normal retail price of the products sold without deducting the amount of the price-reduction coupons. The price at which Yorkshire bought the products from the various manufacturers did not take account of the coupons, and some products had even been purchased before the manufacturers issued such coupons.

Relaying on the judgment in *Elida Gibbs*, Yorkshire sought repayment of a part of the VAT paid between the years of 1974 to 1996. It claimed that only the amounts paid by its customers constituted the consideration for the supply of goods and that the amounts received from the manufacturers constituted refunds or reductions allowed by the latter on the initial purchase price. The sums were therefore not to be included in the taxable amount. The Commissioners rejected the request on the ground that Yorkshire had misinterpreted the judgment in *Elida Gibbs*. They took the view that the taxable amount for the supply of goods by Yorkshire consisted of the cash amounts paid by Yorkshire's customers plus the amounts paid by the manufacturers.

The ECJ referred to its judgment in *Commission v. Germany*⁴² that deals among other things with the determination of the taxable amount in the hands of manufacturers who issue coupons. In that case, the ECJ held that a manufacturer may be regarded as a third party as regards the transaction between the retailer who receives reimbursement of the value of the coupon and the final customer who used such a coupon. The ECJ pointed out as regards the supply made by the retailer receiving the reimbursement, the fact that a portion of the consideration received for that supply was not actually paid by the final customer himself, but was made available on the behalf of the final customer by a third part not connected with the transaction, is immaterial for the purposes of determining the taxable amount in the hands of that retailer.⁴³ The Court concluded in *Commission v. Germany* that the nominal amount of which a manufacturer reimburses to a retailer who have accepted them, the subjective consideration within the meaning of Article 11A(1)(a) (Article 73) received by the retailer comprises the whole of the price of the goods, which is paid in part by the final consumer and in part by the manufacturer. The sum represented by the nominal value of those coupons constitutes for the retailer an asset item realized on their reimbursement and they must be treated, to the extent of that value as a means of

⁴¹ Case C-398/99 (2003) *Yorkshire Co-operatives Ltd.*

⁴² Case C-427/98 (2002) *Commission v. Germany.*

⁴³ Para. 18 of the Judgment, Case C-398/99.

payment. Thus, the taxable amount in the hands of the retailer for the sale to the final consumer was the retail price, namely the price paid by the final consumer plus the amount reimbursed to the retailer by the manufacturer. The ECJ concluded that the interpretation reached in its judgment in *Commission v. Germany* is transposable to the Yorkshire case.

6.2 Vouchers for free goods

In *Kuwait Petroleum*,⁴⁴ an oil company distributed vouchers to customers who purchased 12 litres of petrol under a sales promotion scheme. The price of the fuel was the same whether or not the customer accepted the voucher. When customers had collected a certain number of such vouchers, they could be exchanged for goods marketed as free gifts. The case revolved around the question whether ‘free gifts’ supplied as part of this scheme come for VAT purposes within the consideration of the price paid when purchasing the petrol, or if not covered by article 5(6) (Article 16).

Article 16 provides that certain supplies of goods, even in the absence of consideration will be subject to VAT. However, applications for the giving of samples or the making of gifts of small value for the purposes of the taxable person’s business shall not be so treated.⁴⁵ The purpose of Article 16 is to prevent consumption of goods without the payment of VAT by taxable persons, who if they had purchased as consumers, would have paid VAT.⁴⁶ *Kuwait Petroleum* deducted input VAT on goods purchased for exchange with the vouchers. The Commissioners ruled that they were liable to account for output VAT on items supplied to customers on the ground that those goods were supplied “otherwise than for consideration”. *Kuwait Petroleum* appealed on the ground that the redemption goods were at the contrary supplied for consideration. That consideration was represented by an undefined part of the VAT-inclusive price paid by the consumer, which covered both the supply of fuel and the goods redeemed with the vouchers. Thus, *Kuwait Petroleum* had already paid the VAT due on the transaction.

The ECJ held that Article 11A(3)(b) (Article 79 (a) and (b)) did not apply since the terms “rebate” and “price discount” indicate a merely partial reduction of the total price agreed. Where, on the other hand, a 100% reduction in reality is that the goods are changing hands free of charge the disposal of goods free of charge falls within the scope of Article 5(6) (Article 16). In order for goods to be supplied for consideration within the meaning of Article 2, point 1, there has to be a legal relationship between the supplier and the purchaser entailing a reciprocal performance. Under the sales promotion scheme, the redemption goods were described as gifts. The retail price of the fuel was the same whether or not the purchaser accepted the vouchers. Therefore, *Kuwait Petroleum* cannot reasonably maintain that the price paid by the purchasers of fuel in fact contained a component represent-

⁴⁴ Case C-48/97 (1999) *Kuwait Petroleum (GB) Ltd.*

⁴⁵ See Article 16.

⁴⁶ Para. 12 of the Opinion.

ing the value of the vouchers or of the redemption goods. The sale of fuel and the exchange of goods for vouchers are two separate transactions. Consequently, the application by an oil company of goods that are not small in value in exchange for vouchers must be treated as a supply for consideration within the meaning of Article 5(6).⁴⁷ (Article 16).

6.3 Chargeability of VAT

As described above the chargeable event and the chargeability of the VAT are regulated in Article 63 and 65. The following case deals with whether some particular transactions aimed at avoiding VAT can be disregarded, at least from a fiscal perspective. In BUPA hospitals⁴⁸ (the case was heard with two other cases, Halifax and Huddersfield University) the question was whether a payment that, at the time it is made, does not provide for any specific goods or services to be supplied, can still be considered as a pre-payment under Article 10(2) (Article 65). BUPA Hospitals carried on the business of running a large number of private hospitals. Following the announcement of forthcoming legislation, BUPA decided to use pre-payment arrangements in order to benefit from a more favourable VAT system by concluding contracts with other companies within the same group for the future supply of drugs and prostheses.

The ECJ held that the second subparagraph of Article 10(2) (Article 65) constitutes derogation from the rule laid down in the first subparagraph of that provision, (Article 63) and as such, must be interpreted strictly.⁴⁹ For that derogation to be available, it was necessary for all the information concerning the future supply of goods or services to be known already and, therefore, in particular, it was necessary for the goods or services to be precisely identified at the time when the payment on account was made. It must also be borne in mind that it is the supplies of goods or services, which are subject to VAT, rather than payments made by way of consideration for such supplies. Therefore, even more so, payments on account of supplies of goods or services that have not yet been clearly identified cannot be subjected to VAT.⁵⁰ Thus, such pre-payments do not fall within the scope of the second subparagraph of Article 10(2) (Article 63).

⁴⁷ Para. 32 of the Judgment.

⁴⁸ Case C-419/02 (2006) BUPA Hospitals Ltd.

⁴⁹ Para. 45 of the Judgment.

⁵⁰ Para. 50 of the Judgment.

7 Summary of principles established by the ECJ

7.1 Vouchers that do not constitute consideration

Coupons that are issued free of charge do not constitute consideration. As seen above in *Boots*, the coupon that Boots had funded itself constituted an obligation on the part of the supplier, and could not be regarded as consideration. It is therefore to be regarded as price discount or rebate within the meaning of Article 79 (a) and (b). The taxable amount is reduced by the discount. It should be noted that it only makes sense to refer to a discount when a supply is made for consideration. In *Kuwait Petroleum*, the ECJ held that there was no consideration and therefore no discount. It held that the supplies were taxable under Article 16.⁵¹

7.2 Vouchers that do constitute consideration

Consideration is the means by which the price is paid. The classic example of a voucher that constitutes consideration is the book token. Such vouchers entail two distinct transactions: the sale of the voucher and the redemption of the voucher. In cases where the voucher is sold for its redemption value, the original sale is not a taxable supply. At the time of redemption, the voucher is treated the same as had the customer paid in cash. The situation becomes more complicated in cases where the vouchers are sold for less than their face value.⁵² The main point in *Argos* (see above) was the taxable amount, should the voucher be valued at face value or at the price, which Argos had received for it? The ECJ held that the taxable amount constituted the actual money received by Argos, namely the sum that is received upon the sale of the voucher less any discount allowed.

⁵¹ Butler, Deborah, "Non-monetary consideration in the context of VAT" EC Tax Review. 2001-4. p. 240.

⁵² Ibid.

8 Legal nature of a voucher

The ECJ stated in *Argos* that the voucher “by its nature, is no more than a document evidencing the obligation assumed by *Argos* to accept the voucher, instead of money, at its face value”.⁵³ In *Boots*, the ECJ described what the coupon represented in the relations between *Boots* and its customers from the legal point of view. The ECJ held that the coupon is constitutive of the bearer’s right to a price reduction equal to the amount indicated on the coupon. In *Commission v. Germany*, the ECJ stated that the coupons substantiated the retailer’s right to receive from the manufacturer a reimbursement in the amount of the reduction granted to the final consumer. It follows that the sum represented by the face value of those vouchers constitutes for the retailer an asset item realised on their reimbursement and that they must be treated, to the extent of that value, as a means of payment.⁵⁴

In English contract law, the promise contained in a voucher amounts to a promise by the issuer of the voucher that it would be accepted in full or partial discharge of the consideration for goods or services. The CIOT⁵⁵ is of the view that it therefore appears that a voucher does not necessarily represent a actual right to receive goods or services, but consist of something akin to a VAT exempt negotiable instrument within Article 135 (1)(b) to (f). The supplier will usually have the right to refuse to supply, but having agreed to it, is obliged to accept the voucher in full or part payment.

Since the rights attaching to vouchers are framed by reference to the agreement between the parties concerned, vouchers can take a very wide variety of forms and contain varied rights. All this add to the difficulty in defining vouchers.

⁵³ Case C-288/94 (1996) *Argos Distributors Ltd.* Para. 19 of the Judgment.

⁵⁴ Case C- 427/98 (2002) *Commission v. Germany*, Para. 58 of the Judgment.

⁵⁵ Response by the Chartered Institute of Taxation on the Consultation Paper, p. 4.

9 The VAT- chain

9.1 The domestic supply chain

In *Elida Gibbs*, the ECJ concentrated on the entire supply chain between the manufacturer and the final customer instead of the single transaction between the retailer and the final consumer. The ECJ held that the basic principle of the VAT system is that it is intended to tax only the final customer. It would therefore not be in conformity with the directive for the taxable amount used to calculate the VAT chargeable to the manufacturer as a taxable person, to exceed the sum finally received by him.⁵⁶

Dr. Deborah Butler illustrates how the General Advocate demonstrated an example of a simplified VAT chain in *Commission v Germany*. This chain is based on sales from a manufacturer (M) to a wholesaler (W) who sells to a retailer (R) who in turn sells to a final customer (FC). The chain operates as follows:

1. M sells goods to W at 100 plus 10 VAT. He passes on the 10 to the authorities as output tax.
2. W sells the goods on to R at 200 plus 20 VAT. He deducts the 10 that he has paid by way of input tax from his 20-output tax and passes on 10 to the authorities.
3. R sells the goods on to FC at 300 plus 30 VAT. He deducts the 20 that he has paid by way of input tax from his 30-output tax and passes on 10 to the authorities.⁵⁷

The authorities have then received 30 by way of VAT. This is corresponding to 10 percent of the 300 exclusive of VAT paid by the final customer. There is a need to make a distinction between a cash-back voucher and a money-off voucher. If M issues a cash-back voucher worth 11 inclusive of VAT, the FC sends the voucher directly to M who then pays 11 to FC. This 11 breaks down into 10 in relation to the price exclusive of VAT and 1 in relation to the VAT, which M claims back from the authorities. The authorities have received 29 by way of VAT, which is 10 percent of the revised VAT exclusive purchase price of 290. The position of W and R are not affected.

If M instead issues a money-off voucher to the FC, the position is somewhat more complicated. FC presents the voucher to R when purchasing the goods. R then sells the goods to FC for 319, which can be broken down to 290 selling price and 29 VAT. R then claims a refund of 11 from M, who claims a refund of 1 from the authorities. The position of W is not affected. Butler is of the opinion that W's position (as in *Elida Gibbs*) is departing from the text of Article 90(1) and (2). In all cases involving cash-back cou-

⁵⁶ Para. 28 of the Judgment.

⁵⁷ Butler, Deborah, "Elida Gibbs revisited" *EC Tax Review*, 2002-2, p. 72.

pons, and in those cases involving money-off coupons where the trader who received the coupon did not buy the goods directly from the manufacturer, there is no adjustment to the price at which the manufacturer sold the goods. From the point of view of M's contract with W, W has paid M 100, yet M is seeking to be treated for VAT purposes as if W had only paid him 90. The price as between M and W was not reduced after the supply took place within the meaning of Article 90(1) and (2). A literal interpretation of Article 90(1) and (2) requires a distinction to be drawn between transactions where there is a contract between the manufacturer and the party who redeems the voucher, and cases where there is no such contract.⁵⁸ As seen above The Court did recognize this in *Elida Gibbs*, and reconfirmed this position in *Commission v Germany* as an expression of the wider principle of neutrality.

9.2 Exempt intra-community supplies

Intra-community supplies⁵⁹ of goods are exempt from VAT in the Member State of dispatch when they are made to a taxable person in another Member State who will account for the VAT on arrival. Additional VAT challenges arise for businesses offering discounts, rebates or vouchers in connection with cross-border supply chain transactions. If a manufacturer performs Intra-community supplies (or exports), the discounts will not include a VAT element capable of giving rise to an adjustment of the VAT due because no VAT is triggered in exempt transactions.⁶⁰ This may be inconsistent with the principles set in *Elida Gibbs* when the recipient of the discount is an end customer, which pays the full amount that includes VAT. The following VAT-chain illustrates a discount given from a manufacturer (M) to wholesaler (W) in another country who sells to a retailer (R) who in turn sells to a final customer (FC):

1. M carries out a cross-boarder VAT exempt supply of goods from country A to W in country B for 100.
2. W sells the goods to R at 200 plus 20 VAT.
3. M pays or refunds R a rebate/voucher of 11, R reduces his input VAT by 1.
4. R sells the goods on to FC 300 plus 30 VAT.

W and R have paid 49 VAT in total (W: 20, R: 30 outbound VAT – 20 input VAT – 1 input VAT in connection to the rebate/voucher). The FC has paid 30 VAT, since M is taxable in country A and thereby not allowed to recover the 1 unit of VAT and it is not W who reduces his sales, the VAT revenue of country B increases by 1. This creates a mismatch between the VAT collected in the supply chain and the amount of VAT paid by the end customer.

⁵⁸ *Ibid.* p. 73.

⁵⁹ The supply of goods by a VAT-registered trader in one EU Member State to a VAT-registered trader in another EU Member State, with some exceptions, is referred to as an intra-community supply.

⁶⁰ Para. 64 of the Judgment, *Commission v. Germany*.

HP⁶¹ illustrated in its comments to the consultation paper different examples where the principle of neutrality is at stake. The solution to the example above according to HP should be that the discount given in B2B (business-to-business) situations should be regarded as out of scope of VAT. As the vouchers and rebates would be not taxable in cross-border situations, no involved part is able to correct its VAT liability or refund.⁶² The Tax Executives Institute⁶³ also addresses this situation in its response to the consultation. In their view, the VAT-chain illustrated above violates not only the neutrality principle, but also the proportionality principle.

If the discount was given to an end customer who is a none taxable person (B2C cases) instead of the retailer, using the same VAT-chain as above the result would also be a violation of the principle of VAT neutrality. Applying the guidelines in *Elida Gibbs*, the tax base of the supply between R and C is not affected by the discount paid by M, since it is not R that is receiving the discount, but C. Since M is not able to recover the 1 VAT incurred in country B, and there are no other means to readjust the input VAT as C is not a taxable person, the principle of neutrality is not followed. A possible solution to this according to HP and TEI would be to adopt an amendment to the 8th and 13th Directives⁶⁴ permitting M to recover a “refund” of excess VAT from the Member State where the discount is applied.⁶⁵

⁶¹ HP is a multinational company, VAT registered in all EU countries who sells IT related equipment and IT solution services.

⁶² HP comments to the Consultation paper p. 4.

⁶³ Tax Executives Institute (TEI) is an organization with 53 chapters in North America, Europe and Asia.

⁶⁴ The 8th Directive concerns taxable persons established not in the territory of the country, but in another Member State. The Directive prescribes arrangements for the refund of VAT to taxable persons. The 13th Directive concerns the treatment of taxable persons not established in the territory of the Community.

⁶⁵ Response by the Tax Executives Institute on the Consultation paper, p. 13.

10 Concluding discussion

To sum up the general principles of VAT: At first, in order to constitute a taxable supply of goods or services it must be effected for a consideration. It is established that Community law rather than national law determine what constitutes consideration for a supply. There has to be a direct link between the supply and the consideration received. The consideration must be capable of being expressed in money and the basis of the assessment is the consideration actually received.⁶⁶ In the Summary Report⁶⁷ the compatibility between some new forms of vouchers and classic means of payment was considered one of the most relevant issues. All contributors underlined that the neutrality between systems having the same functionalities is fundamental. Several contributors considered that the problem of the different application of the VAT rules is principally due to a misunderstanding of the rules, rather than a real obsolescence of the rules themselves. Some of the responders believed that a payment for an SPV or an MPV should never be regarded as a payment on account for the goods against which the vouchers may eventually be redeemed, since the sufficient linkage does not exist.⁶⁸

10.1 Voucher definition

In general, the responders agreed with the general definition and main definition of a voucher as set out in the Consultation Paper. The main concern in opposition to this definition was that it is a bit too broad. There is a possibility that the definition proposed also will catch things that are currently regarded as prepayments or even contractual rights (ex. “bundles” of additional services). The British Bankers’ Association underlined the conflict between a voucher and a payment instrument. The crucial difference between a voucher and a payment instrument lies in the fact that that a voucher, whatever form it takes, should not be categorised as legal tender. Whereas a medium loaded with legal tender takes it outside the categorisation as a voucher and into the scope of Article 135 (1) (d) as a general means of payment. The suggested treatment is that any definition of a voucher, be it SPV or MPV should contain this distinction. Several of the responders mentioned this issue. Sony offers for example an e-wallet that is currently structured as an electronic voucher which gives the customer an entitlement to purchase electronic services (games, music, films etc) held out for sale by Sony, but possibly also sold for the account of other third parties. The consumer deposits funds into this e-wallet via a credit or debit card. Sony does not deem this e-wallet to constitute a general payment means, since its payment application is limited to the purchase of different

⁶⁶ Case C-154/80 (1981) *Coöperatieve Aardappelenbewaarplaats*.

⁶⁷ TAXUD/2131/07 rev 1 – EN “Summary report on the replies received in response the public consultation on modernising the value added tax treatment of vouchers and other related issues”.

⁶⁸ Comments of the Voucher Association and Book Tokens Limited.

types of electronic service. In their opinion, this structure falls within the definition of an MPV.⁶⁹

I think this is a good example of the evolution of voucher type systems into payment systems. The need for clarification in this domain is obvious and necessary in order to create a consistent VAT-treatment. The main question is around the differentiation between a voucher and a “general means of payment”. According to the Commission, an MPV should not extend to systems whose objective is only to provide a form of payment for an open-ended range of goods and services. As seen above in Sony’s interpretation of their e-wallet, a suggestion could be to define the concept of “open-ended” further and more precise.

10.2 Free vouchers

None of the responders objected to the test proposed by the Commission following Kuwait Petroleum in order to define whether the voucher discount has been supplied free of charge or purchased for consideration.

10.2.1 Discount vouchers

In the Summary Report,⁷⁰ it was acknowledged that there is a need for a further clarification about the meaning and the variety of discount vouchers. For example by adding a further category like “Pure discount vouchers” in order to make a distinction between free discount vouchers and discount vouchers which are not free even if they include a discount. Many of the responders exclaimed their concern of the VAT-treatment where a third party supplier funds the discount voucher. The rules should ensure that a VAT adjustment should be allowed where there is no payment by the third party supplier.

The primary challenge in regards to discount vouchers arises where discount vouchers attached to goods are redeemed in a Member State other than where the original sale occurred. For purely domestic chain transactions, Elida Gibbs stated, “VAT to be collected by the Tax Authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him”. The taxable amount was defined as being “equal to the selling price charged by the manufacturer, less the amount indicated on the voucher and refunded”, As seen in the domestic supply chain (9.1) above these principles are satisfied, but not where a manufacturer makes a VAT-exempt intra-community supply (9.2). In order to satisfy the principles set by the Commission for considering the pos-

⁶⁹ Response by Sony on the Consultation paper p. 5.

⁷⁰ TAXUD/2131/07 rev 1 – EN “Summary report on the replies received in response the public consultation on modernising the value added tax treatment of vouchers and other related issues”.

sible legislative measures (1.1), I think that the solution presented by some of the responders⁷¹ that the discount given in B2B (business-to-business) situations should be regarded as out of scope of VAT is the most uncomplicated way of maintaining the neutrality principle. As for a discount/rebate given to an end customer who is a none taxable person (B2C cases) the suggested solution could although more complicated, be to adopt an amendment to the 8th and 13th Directives⁷² permitting M to recover a “refund” of excess VAT from the Member State where the discount is applied as suggested above. This would undeniable give an increased administrative burden for the parties involved nevertheless, there is me knowingly really no system that effectively and justly can solve such issues without creating an excess burden. For example, in Argos seen above, Argos was both the issuer and redeemer who sold vouchers at a discount. In order to establish the taxable amount, Argos had to keep track of each voucher sold at a discount to identify the initial purchaser and the discount allowed to establish the consideration received. If the issuer of such a voucher is not the same as the supplier of the goods or services rendered the practical administrative question remains unanswered.

10.3 Singel Purpose Voucher (SPV)

Several of the responders had difficulty in identifying vouchers supplied as an SPV, but the main objection by the majority of the responders was that SPVs should be treated as prepayment on account with VAT charged at the time of sale.

When considering the first principle set by the Commission “The system must be able to cope with supplies in more than one country and with vouchers issued in one Member State and redeemed in other Member States” and the fact that the Commission suggests that a voucher ceases to be an SPV when the applicable VAT rates for the redeemable goods or services varies or cannot be known in advance, I do not see the point in two different sets of rules. According to the judgment in BUPA above, it is necessary for the goods or services to be precisely identified at the time when the payment on account is made. This means that a SPV would be restricted to supplies in a single Member State at a single rate of VAT. In my opinion, such a prepayment as with the SPV means that in reality the voucher is nothing more than a receipt for the goods or services purchased (for example a bus ticket or a concert ticket). Therefore, it could be argued that the definition of a SPV should be reconsidered; maybe it should not be categorized as a “voucher” at all, but simply as a payment in advance to avoid confusion.

⁷¹ See part 9.2.

⁷² The 8th Directive concerns taxable persons established not in the territory of the country, but in another Member State. The Directive prescribes arrangements for the refund of VAT to taxable persons. The 13th Directive concerns the treatment of taxable persons not established in the territory of the Community.

10.4 Multi Purpose Voucher (MPV)

It is clear from the Consultation Paper that the sale of an MPV should be considered outside the scope of VAT with VAT becoming due when the voucher is redeemed for particular goods or services. This means that the place of supply of an MPV becomes irrelevant since the underlying supply of a MPV takes place where the voucher is effectively redeemed. The main concern in regards to MPVs that was expressed by the responders was the conflict between a voucher and a payment instrument as seen above.

In the Summary Report,⁷³ it was concluded that in order to better harmonize the VAT treatment it is preferable to first harmonize the interpretation of the current rules and only when the interpretation cannot be of any help, a legislative change should be envisaged. It was also emphasized that the definitions of vouchers are not developed or comprehensive enough to fully clarify the situation. If the Commission considers a legislative change I believe that one set of rules are preferable. It is apparent from the responses that even the responders mixed up the different categories of vouchers. As I expressed above it could be argued that the SPV should not be classified as a voucher at all, but as a payment in advance. Whereas the free and discount voucher, as well as the MPV has a typical function of a voucher as described above in part 8. The result would be that all vouchers that would not fall into the free or discount category would be looked upon as a MPV and treated as such. This would eliminate some of the need for complex set of definitions for each voucher type. In the process of writing this thesis, I cannot disregard the possibility that several of the responders mentioned, that the problem of the different application of the VAT rules is mainly due to a misunderstanding rather than a real obsolescence of the rules themselves. This does however not solve some of the unanswered questions of its practical application particularly in regards to cross-boarder transactions. There remains several unclear questions in regards to the VAT treatment of vouchers, but the most important subject matter is that all Member States treat vouchers the same way.

10.5 Unredeemed vouchers

The majority of the responders opposed to creating a taxable event at the time of the expiry date of the voucher. One respondent⁷⁴ expressed that with a MPV the customer has not purchased a specific right as was considered in BUPA. Therefore, with an MPV, there can be no supply, and hence no VAT is due, until the voucher is redeemed in part or full.

⁷³ TAXUD/2131/07 rev 1 – EN “Summary report on the replies received in response the public consultation on modernising the value added tax treatment of vouchers and other related issues”.

⁷⁴ The Business Europe Position Paper in response to the Consultation.

The judgement in Case C-277/05 (see above), came after the summary report was published. In that Case, the ECJ held that the sums paid in advance might only be regarded as consideration for the supply of a reservation service subject to VAT, in case there is a direct link between the service rendered and the consideration received. In the case at hand, those conditions were not met, the obligation for Société thermale to make a reservation arises from the contract for accommodation itself and not from the payment of a deposit by the client. Therefore, in the view of the ECJ, there is no direct connection between a service and the deposit received. Considering this decision, it is most likely that unredeemed vouchers should remain untaxed.

Bibliography

Literature

Terra Ben and Kajus Julie, *A guide to the European VAT Directives, Introduction to European VAT and other indirect taxes 2005*, Volume 1, Boek Werk Studio's, Netherlands, 2005.

Terra Ben and Kajus Julie, *A guide to the European VAT Directives, Integrated Text of the Sixth VAT Directive 2005*, Volume 4, Boek Werk Studio's, Netherlands, 2005.

Terra Ben and Kajus Julie, *A guide to the European VAT Directives, The Recast VAT Directive and The Integrated Text of the Sixth VAT Directive 2007*, Volume 4, IBFD, 2007.

Articles

Butler Deborah, "Non-monetary consideration in the context of VAT: the status of the judgment in *Empire Stores v Commissioners of Customs and Excise* in the light of later judgments", *EC Tax Review*, 2001-4.

Butler Deborah, "Elida Gibbs revisited: Further thoughts on the extent to which vouchers can constitute consideration for VAT purposes", *EC Tax Review*, 2002-2.

Swinkels Joep, "Evolution of the EU Place-of-Supply Rules", *International VAT monitor*, March/April 2006.

Official Documents

COM (2000) 348 final, Communication from the Commission to the Council and the European Parliament, "A strategy to improve the operation of the VAT system within the context of the internal market".

COM (2003) 614 final, Communication from the Commission to the Council and the European Parliament and the European Economic and Social Committee "Review and update of VAT strategy priorities".

European Commission, Directorate General, "Consultation Paper on modernising the Value Added Tax treatment of vouchers and related issues".

European Commission, Directorate General, "Summary of Results, Public Consultation on Modernising the Value Added Tax Treatment of Vouchers and related issues".

Proposal for a Council Directive amending Directive 77/388/EEC as regards the place of supply of services, COM (2003) 822 final.

Amended proposal for a Council Directive amending Directive 77/388/EEC as regards the place of supply of services, COM (2005) 334 final.

Table of Cases

Case C-154/80	Coöperatieve Aardappelenbewaarplaats (1981) ECR 0445.
Case C-126/88	Boots (1990) ECR I-1235.
Case C-16/93	Tolsma (1994) ECR I-0743.
Case C-288/94	Argos (1996) ECR I-05311.
Case C-317/94	Elida Gibbs (1996) ECR I-05339.
Case C-48/97	Kuwait Petroleum (1999) ECR I-2323.
Case C-427/98	Commission v. Germany (2002) ECR I-08315.
Case C-398/99	Yorkshire (2003) ECR I-0427.
Case C-419/02	BUPA (2006) ECR 00000.
Case C-277/05	Société thermale (2007) ECR I-06451.
Opinion of Mr Advocate General Van Gerven Case C-126/88 ECR I-01235.	
Opinion of Mr Advocate General Fennelly Case C-48/97 ECR I-02323.	