



Will the issues pertaining to vouchers under the Recast VAT Directive be solved by the Voucher Proposal?

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List of abbreviations

Commission European Commission

ECJ European Court of Justice

ECR European Court Reports

EU European Union

Excl. Excluding

i.e. id est (that is)

Incl. Including

MPV Multi-Purpose Voucher

para. Paragraph

Proposal COM(2012)/206 final (Voucher Proposal)

RVD Recast VAT Directive (Directive 2006/112/EC on the common system of value added tax)

SPV Single Purpose Voucher

SWD Commission Staff Working Document SWD (2012) 127

VAT Value Added Tax

1. Introduction

1.1 Background

Vouchers are widely used within the EU. They provide the holder with a right to certain goods or services, or a discount on certain goods or services.¹ They are not always paid for and often used for promotion purposes in order to increase sales. Additionally the vouchers are more and more used in cross-border transactions.

Even though vouchers are commonly used in the territory of the EU, there are no common rules within the EU pertaining to the treatment of vouchers for VAT purposes. Each member state has its own interpretation and rules as to how to treat the sale or redemption of vouchers. Some countries are of the opinion that VAT is due at the issuance of the vouchers, other countries tax vouchers at their redemption. This leads to uncertainty for taxable persons in cross-border trade. As a consequence of the absence of clear common VAT rules with respect to vouchers, double- or non-taxation could occur in cross-border transactions when for instance a voucher is purchased in a country which taxes the issuance and redeemed in a country taxing the voucher on redemption. On the other hand, discrepancies at the time of taxation in various member states could also lead to non-taxation, which could be used for abusive purposes². The aforementioned issues are obviously undesirable effects.

The European Court of Justice (hereinafter the ‘ECJ’) was requested to clarify the treatment on several occasions. Despite the fact that there are several cases decided by the ECJ on the treatment of vouchers³, the treatment of vouchers is only partially clarified.⁴ The reason for this is that the cases covering the treatment of vouchers deal with specific issues and the outcome of the cases are not uniformly applied in all the member states, they only give limited guidance.⁵ Various issues regarding the treatment of vouchers remain.

In order to harmonise the VAT treatment of vouchers within the EU the Commission issued a Voucher Proposal⁶ (hereinafter the ‘Proposal’), which hopefully solves the current issues pertaining to vouchers.

¹ Shaw, S., ‘VAT in face value vouchers – The Lebara case’, Tax planning international, London, Vol. 14 (2012), no. 6, p. 2.

² COM(2012)/206 final, explanatory memorandum , p. 6.

³ Inter alia , Case C-288/94 *Argos Distributors Ltd v Commissioners of Customs & Excise* [1996] ECR I-05311; Case C-317/94 *Elida Gibbs v. Commissioners of Customs and Excise* [1996] ECHR I-05339 Case C-48/97 *Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise* [1999] ECR I-02323; Case C-40/09 *Astra Zeneca UK Ltd v Commissioners for Her Majesty’s Revenue and Customs* [2010] ECR I-07505.

⁴ A. Rodrigues & Mike Lambourne, ‘Towards clarification of the EU VAT treatment of vouchers’ , International VAT Monitor, July/August 2012, p. 237.

⁵ R. Cowley, ‘European Commission Review of VAT on Vouchers European Commission Review of VAT on Vouchers’, Irish Tax review, Vol. 25 (2012), no. 3, p. 97.

⁶ Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards the treatment of vouchers, COM(2012)/206 final .

1.2 Purpose

The purpose of this master thesis is to determine whether the issues pertaining to the current treatment of vouchers will be solved by the Proposal. The question to be researched is: will the uncertainties regarding the current treatment pertaining to vouchers be solved by the Proposal?

1.3 Delimitation

Not all types of vouchers will be discussed. The types of vouchers focused on in this thesis will be the vouchers as referred to under the Proposal, being single purpose vouchers (hereinafter ‘SPV’s’), multi-purpose vouchers (hereinafter ‘MPV’s’) and free discount vouchers.

This master thesis will not discuss the distinction between vouchers and means of payment⁷ and whether or not this is sufficiently reflected in the Proposal. This choice has been made due to the limitation in number of pages.

Moreover, the potential non redemption of voucher will not be given consideration.

1.4 Method

In order to determine the current issues pertaining to vouchers, case law and related advocate general’s opinions regarding vouchers, in conjunction with the Recast VAT Directive (hereinafter ‘RVD’) will be analysed.

The Proposal⁸ will be examined, as well as the related Staff Working Document of the Commission (hereinafter ‘SWD’) in order to determine how vouchers will be treated under the Proposal.⁹

With respect to both, the current treatment of vouchers as well as the treatment of vouchers under the Proposal, academic literature and academic articles will be consulted.

1.5 Structure

This master thesis will start with a very brief discussion about concepts in the EU VAT system relevant for this thesis. Subsequently the issues currently arising under the RVD will be discussed, this discussion will be narrowed to free discount vouchers and paid vouchers (SPV’s and MPV’s)¹⁰. Thereafter the Proposal will be discussed followed by how the Proposal treats SPV’s, MPV’s and free discount vouchers. The thesis will end with a conclusion.

⁷ A payment instrument falls outside the scope of the Proposal.

⁸ COM(2012)/206 final.

⁹ Commission Staff Working Document SWD (2012) 127.

¹⁰ These definitions are not used under the current RVD.

2. European VAT system in brief

The aim of the European VAT system is to tax expenditure for private consumption.¹¹ The final consumers (non-taxable persons), rather than taxable persons, will bear the burden of VAT.

‘At each stage of the production/distribution process VAT will be collected by the taxable person, on behalf of the tax authorities and account for it to them’ (output VAT)¹². The tax to be paid should be proportional to the price of the good or service, regardless the number of transactions involved in the production/distribution process prior to the final consumption. In this way VAT neutrality is ensured.¹³ Since the expenditure for private consumption is intended to be taxed, the taxable person can deduct the tax it paid on acquisitions (input VAT). Article 168 RVD indicates that the taxable person is only entitled to deduct input VAT pertaining to goods and services (input) which are used for taxed transactions (output). According to article 169(a) RVD this also applies to transactions taxed in another member state, in case these transactions would have qualified for VAT deduction had they taken place in the home country.¹⁴

Transactions do not only take place within the borders of one member state, often goods/services are provided cross-border. In case the supply is made to a taxable person in another member state (B2B¹⁵ transaction) VAT has, in principle, to be paid by the taxable person to whom the service was supplied, however the same amount can be deducted. This will be further discussed in paragraph 3.2.4 (place of taxable transactions).

3. Treatment of vouchers under the Recast VAT Directive

3.1 Vouchers are not defined

The RVD does not provide for a definition of vouchers. From case law it can be derived that vouchers offer a right to receive goods/services or a discount in the amount of the face value stated on the document. Vouchers appear in various forms (tangible or intangible, paid or free voucher etcetera), moreover the forms can differ between the various member states.¹⁶ Apart from that, the market pertaining to vouchers is constantly evolving. It is difficult to make a clear distinction between the various vouchers and to cover the various forms under one term.

¹¹ B. Terra, & J Kajus, Introduction to European VAT 2011, Volume 1, IBFD 2011, p. 274; Bijl, VAT: ‘Money off vouchers’ and cash back schemes’ - what are the problems and how can they be solved’, EC Tax review 2012-5, p. 262.

¹² Case C-317/94 *Elida Gibbs v. Commissioners of Customs and Excise* [1996] ECHR I-05339, para. 22.

¹³ Case 15/81 *Gaston Schul Douane Expeditie BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal* [1982] ECR 01409, para. 10.

¹⁴ Article 169(a) RVD requires that the transaction would be eligible for deduction had they occurred in the home member state, see: B. Terra & J. Kajus, Introduction to European VAT 2011, Volume 1, IBFD 2011, p. 999.

¹⁵ B2B means Business to Business.

¹⁶ M. van de Ven & A. Van Esdonk, ‘De BTW Behandeling van Vouchers’, MBB, no. 9, September 2012

As indicated in the introduction, this thesis will focus on MPV's, SPV's and free discount vouchers. Whereas the RVD does not provide for a definition of vouchers, the Proposal does provide for a definition of vouchers, however this chapter relates to the treatment of vouchers under the RVD. Even though neither the RVD nor case law provides for a definition, below will be indicated what this chapter considers to fall within the scope of the various types of vouchers to be discussed.

Free Discount Vouchers

When reference is made to free discount vouchers in this chapter, vouchers are not provided against consideration. These vouchers can for instance be distributed in the form of a leaflet, in a newspaper, provided at the purchase of certain goods and will entitle the holder to a discount once the voucher is redeemed at the supply of a good/service. This type of voucher can be split into two types.

1. Money-off voucher: the retailer provides the final consumer a discount, subsequently the retailer can reclaim the face value of the voucher from the manufacturer; and
2. Cash-back voucher: the final consumer is required to send the voucher to the manufacturer, who will reimburse the face value of the voucher directly to the consumer.

Free Vouchers

This type of vouchers is provided for free¹⁷ (not against consideration) and entitle the holder of the voucher to the supply of a (free) good or service as defined/in the amount stated on the voucher. Free vouchers are not topic of discussion in this master thesis, however reference is made to case law dealing with free vouchers which could be relevant for this thesis.

Paid Vouchers

These vouchers are issued against consideration and offer the final consumer the right to receive goods/services in the amount of the face value stated on the document, also often referred to as face value vouchers.

In case all information regarding the taxable status of the ultimate supply is known at the time of issuance of the voucher, the voucher qualifies for an SPV (considered as a prepayment).¹⁸

Should it not be possible to clearly identify the elements for the future supply at the time of issuance of the voucher, the voucher will be considered an MPV.

¹⁷ It can be argued whether or not this type of voucher is really provided for free, since it is quite likely that consumers indirectly pay for the voucher, however this discussion falls outside the scope of this thesis.

¹⁸ In this situation it should be possible to determine the VAT rate of the future supply, based on the kind of goods/service, whether it will be supplied to a taxable or non-taxable person and the place of supply.

3.2 The Recast VAT Directive: the issues arising

3.2.1 Issuance of a voucher: how to characterise?

With respect to vouchers two phases can be distinguished, the issuance of the voucher and the redemption of the voucher. Currently some countries tax the issuance of the voucher, other countries charge VAT at redemption. This situation is undesirable since it may result in double taxation or non-taxation and potential tax avoidance.

In order for the supply of a voucher to be subject to VAT, according to article 2 RVD, four requirements have to be met. There should be:

1. a supply of goods or services;
2. for consideration;
3. within the territory of a member state¹⁹;
4. by a taxable person acting as such.

3.2.1.1 Supply of goods or services?

In the case *Astra Zeneca* the ECJ resolved that vouchers ‘confer a future right to goods or services to an, at that time, undefined object’²⁰. Since vouchers do not (immediately) transfer the right to dispose of tangible property²¹ as defined in article 14(1) RVD²², the transfer of the vouchers is considered to be a supply of services rather than a supply of goods.

Even though in aforementioned case the vouchers were provided by an employer to its employees the case can nevertheless be relevant for vouchers used in business transactions, which are subject of discussion in this master thesis. Similar to the vouchers in *Astra Zeneca*, paid- or discount vouchers do not provide for the right to dispose of tangible property. It can be concluded that the supply of paid and free discount vouchers is a supply of services rather than a supply of goods.

3.2.1.2 Consideration

Consideration assumes a ‘legal relationship’ between the provider of the goods/services and the recipient, pursuant to which there is a reciprocal performance.²³ Required is a direct link between the supply and the received consideration.²⁴ Whether this requirement is met should be determined on a case by case basis. When the consideration does not consist of money, it

¹⁹ In this thesis this requirement will be assumed to be met and will not be further discussed.

²⁰ Case C-40/09 *Astra Zeneca UK Ltd v Commissioners for Her Majesty’s Revenue and Customs* [2010] ECR I-07505, para. 25.

²¹ Case C-40/09 *Astra Zeneca UK Ltd v Commissioners for Her Majesty’s Revenue and Customs* [2010] ECR I-07505, para. 26.

²² The transfer of ownership does not refer to the legal transfer pursuant to national law, but includes ‘any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property’, Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, para. 7 and Case C-185/01 *Auto Lease Holland BV v Bundesamt für Finanzen* [2003] I-1317, para. 32.

²³ See inter alia Case C-16/93 *Tolsma* [1994] ECR I-743, para. 14; Case C-520/10 *Lebara Ltd v The Commissioners for Her Majesty’s Revenue & Customs* [2012] ECR 00000, para 27.

²⁴ See inter alia Case 154/80 *Staatssecretaris van Financiën v Cooperatieve Aardappelenbewaarplaats* [1981] ECR 445, para. 12; Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, para. 12; Case C-16/93 *Tolsma* [1994] ECR I-743, para. 14.

should be capable to be expressed in monetary terms.²⁵ Not every payment, however, falls within the scope of the term consideration; a deposit retained by an hotelier in case of ‘no show’ is not subject to VAT, since ‘there is no direct link between the supply of services and the consideration received’.²⁶

Vouchers can be paid for or provided for free. Generally speaking, pertaining to paid vouchers, there is a direct link between the service supplied and the consideration received. When a voucher is provided for free there is no consideration. Though it can be argued that in most cases free vouchers are not provided entirely for free. It is quite likely that the value of the voucher is included in the price of the good purchased, however this seems to be disregarded by the ECJ.

In *Kuwait Petroleum*²⁷, as part of a promotion scheme free vouchers²⁸ were provided by Kuwait Petroleum to consumers at the sale of petrol. Retailers participating had to pay Kuwait Petroleum an additional amount, plus VAT, for the purchase of petrol during the campaign. The vouchers could be exchanged for goods listed in a gift catalogue. Irrespective of if the customer accepted the voucher, the price of the petrol was the same. Consequently the ECJ considered that there was no link between the consideration and the goods provided. Article 73 RVD, which requires ‘consideration and a direct link’ did not apply. However, the supply should nevertheless be treated as a supply for consideration based on article 16 RVD (deemed supply), since the goods were provided for free and not of a small value. It follows from article 74 RVD that in such situation the taxable amount will be the purchase price of the goods or similar goods, alternatively the cost price. It could be argued that the outcome of this case leads to economical double taxation.²⁹ The goods could only be obtained by exchanging vouchers which were solely provided at the purchase of petrol. This could imply that the vouchers were not provided for free but the value of the good was calculated in the petrol price.³⁰ Following aforementioned reasoning, VAT on the good was paid at the time of purchase of petrol (assuming that the petrol price included the funding of the goods), as well as at redemption, since the supply is considered a deemed supply and VAT will be charged on the deemed supply. This view could be supported by the fact that the retailers paid an additional amount for the purchase of fuel during the promotion action, however since this is outside the scope of this thesis it will not be further discussed.

²⁵ See inter alia Case 154/80 *Staatssecretaris van Financiën v Cooperatieve Aardappelenbewaarplaats* [1981] ECR 445; Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365 Case C-288/94 *Argos Distributors Ltd v Commissioners of Customs & Excise* [1996] ECR I-05311, para. 17.

²⁶ Case C-277/05 *Société thermal d'Eugénie-Les-Bain v. Ministère de l'Economie, des Finances et de l'Industrie* [2007] ECR I-6415, para. 26.

²⁷ Case C-48/97 *Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise* [1999] ECR I-02323

²⁸ This type of vouchers are neither provided for consideration, nor provided at a discount.

²⁹ Vakstudie Nieuws 1999/27.15, Case C-48/97 *Kuwait Petroleum* annotation.

³⁰ This does not necessarily imply that at that time the price of petrol was higher than usual, a company could spread the price increase over a longer period to fund the promotion scheme.

3.2.1.3 Taxable Person

What is considered to be a taxable person can be found in article 9(1) RVD. Since this thesis focuses on the provision of vouchers by a trader to a consumer, the requirements for a taxable person will not be discussed and the trader will be considered to be a taxable person.

3.2.1.4 Conclusion

Considering the above it can be concluded that with respect to paid vouchers (provided that there is a direct link between the supplier and the consumer) all requirements for being a supply subject to VAT are met. The supply of paid vouchers falls, in principle, within the scope of VAT.

Free vouchers³¹, on the other hand, are not considered to be provided for consideration, thus, not all requirements pertaining to a taxable supply are met. Consequently the issuance of free vouchers is not subject to VAT.

3.2.2 Time of supply

The fact that a voucher is subject to VAT does not indicate at what moment VAT will be charged.

Article 63 RVD deals with the chargeability of VAT. It states:

‘VAT will become chargeable when goods or services are supplied’.

In some cases, however, the payment is done before the supply is made. A voucher can be purchased for a future supply of a good or service, in fact a prepayment is made. This could affect the time when VAT is chargeable.³²

Article 65 RVD states *‘when payments are made before the goods/services are supplied, VAT will become chargeable on receipt of the payment and on the amount received’.*

In *BUPA*³³ the ECJ ruled that, in order to qualify for a prepayment, ‘all relevant information regarding the chargeable event should be known, as well as the goods or services have to be clearly identified’.

If aforementioned requirements are met, VAT is chargeable at the moment the consideration for the future supply is received. The *BUPA* case did not deal with vouchers, however the judgment can be applied to vouchers.³⁴ In the case *Orfey Bulgaria* aforementioned approach was confirmed with respect to barter transactions.³⁵

³¹ As referred to in the Case C-48/97 *Kuwait Petroleum*.

³² Pertaining to free-vouchers there is obviously no pre-payment, thus the vouchers referred to in this section are paid-vouchers.

³³ Case C-419/02 *BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs & Excise* [2006] ECR I-01685, para. 48.

³⁴ M. van de Ven en A. Van Esdonk, *De btw-behandeling van vouchers*, MBB, nummer 9, September 2012.

³⁵ Case C-549/11 *Direktor na Direktsia ‘Obzhalvane i upravlenie na izpalnenieto’ – grad Burgas pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite v.Orfey Bulgaria EOOD*, [2012] ECR 00000, paras. 28 and 29.

Should a voucher be provided which can be redeemed for various undefined goods/services, it follows from *BUPA* that VAT will be charged when the voucher is redeemed.

Also in the *Lebara case*³⁶ the ECJ ruled that the vouchers should be taxed at issuance. Lebara, a UK company, sold telephone vouchers to distributors who resold the cards, in their own name, to intermediary operators or end users in various countries. The issue in this case was whether or not VAT was due at the sale of the vouchers in the UK. Lebara was of the opinion that no VAT was due in the UK when it provided the cards to distributors in other member states due to the reverse charge mechanism. The UK tax authorities, on the other hand, stated that two services were supplied: the provision of the vouchers to the distributors as well as the redemption once the end user used the card.

The ECJ stated that the voucher should be taxed at issuance, since the voucher could only provide for one type of service of which the nature and quantity was determined beforehand. However it considered the initial sale of the voucher and the resale as two separate transactions which should be taxed separately and did not assume a link between Lebara and the end user. The ECJ ruled that at the time of the payment made by the distributor the identity of the final consumer is not necessarily known and therefore does not create a direct link between Lebara and the final consumer.³⁷ The first transaction was the supply of service by the issuer to the distributor containing the right to use the telecommunication infrastructure in order to make international phone calls. The ECJ considered the definition of ‘telecommunication service’ in (now) article 24(2) RVD³⁸ broad enough to cover this service. The second supply was carried out by the distributor to the final consumer. The distributor resold the ‘telecommunication service’ in its own name. Both the service from Lebara to the distributor as well as the resale of the voucher to the final consumer had to be considered as a single supply, as a consequence they were both taxable transactions. However only the voucher itself was to be taxed at issuance, the underlying supply was not to be taxed when the voucher was redeemed.

It can be concluded that the outcome of the case (taxing at issuance) is in line with the *BUPA case*.

3.2.3 Taxable amount

Another issue pertaining to vouchers is determining the taxable amount. The taxable amount is the basis for calculating the tax due on a transaction.³⁹ It is relevant for both free discount vouchers and paid vouchers (SPV’s and MPV’s). Below will be discussed what the taxable amount is according to the RVD, subsequently reference will be made to case law pertaining to vouchers that dealt with the taxable amount.

³⁶ Case C-520/10 *Lebara Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2012] ECR 00000

³⁷ Case C-520/10 *Lebara Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2012] ECR 00000, para. 38 and 39.

³⁸ at the time of the case article 9(2) of the Sixth Directive.

³⁹ J. Bijl, VAT: ‘Money off vouchers’ and cash back schemes’ - what are the problems and how can they be solved’, EC Tax review 2012-5, p. 262

Article 73 RVD states that:

‘the taxable amount shall include everything which constitutes consideration, obtained (...) by the supplier (...) from the customer or a third party, including subsidies directly linked to the price of the supply.’

In order to decide what the taxable amount will be it is relevant to determine the consideration. As discussed in paragraph 3.2.1.2, consideration assumes a direct link between the supply of the goods and the consideration obtained.

Discounts and rebates are excluded from the taxable amount⁴⁰ as well as price reductions for early payments.⁴¹ The actual amount received is relevant for the taxable amount, i.e. the subjective value, rather than ‘the value assessed by objective criteria’.⁴² Moreover, according to article 90 RVD, should the price be reduced after the supply takes place the taxable amount needs to be adjusted accordingly.⁴³

3.2.3.1 Case Law

The cases relating to vouchers and the taxable amount, relate (mostly) to free vouchers providing a discount, however the *Argos case* relates to paid vouchers which were provided at a discount.

The *Argos case*⁴⁴ dealt with paid vouchers provided at a discount. In casu a retailer, provided ‘face value vouchers’ to companies which subsequently provided the vouchers to employees and representatives. The vouchers sold were at a discount (less than the face value). The aforementioned vouchers could be used for full or partial payment of goods in an Argos showroom against their face value. It should be noted that the discount was not provided to the final consumer who redeemed the voucher but to the intermediary.

The dispute related the question what the taxable amount should be: whether the face value should be taken into account or the sum actually received (the face value less the discount paid at the original purchase of the voucher). The ECJ ruled that (now) article 73 RVD⁴⁵ has to be interpreted that the consideration should be the subjective value, i.e. the amount actually received.⁴⁶ It can be concluded the ECJ focussed on the distribution chain as a whole, by taking into account the discount provided at the initial purchase even though there did not seem to be a direct link between the discount and supply of the redemption good.

⁴⁰ Article 79 RVD.

⁴¹ Article 87 RVD.

⁴² Case 154/80 *Staatssecretaris van Financiën v Cooperatieve Aardappelenbewaarplaats* [1981] ECR 445, para. 13.

⁴³ In case of adjustment of the taxable amount, already deducted VAT in this respect will also be adjusted according to article 185 RVD.

⁴⁴ Case C-288/94 *Argos Distributors Ltd v Commissioners of Customs and Excise* [1996] ECR I-5311.

⁴⁵ at the time of the case article 11(A)(1)(a) of the Sixth Directive.

⁴⁶ Case C-288/94 *Argos Distributors Ltd v Commissioners of Customs and Excise* [1996] ECR I-5311, 16; see also inter alia Case 154/80 *Staatssecretaris van Financiën v Cooperatieve Aardappelenbewaarplaats* [1981].

The approach could be defended by the fact that according to article 73 RVD the taxable amount includes consideration from a third party. The voucher could be considered a direct link between the original purchase of the voucher and the supply of the redemption good to the final consumer.⁴⁷ Article 73 RVD states that the taxable amount should include 'everything obtained by the supplier in respect of the supply'. Considering article 73 RVD in connection with aforementioned direct link, the discount provided at the initial purchase should be taken into account when determining the taxable amount at the time of supply of the redemption good.⁴⁸

Though, in the *Bally case*⁴⁹ the ECJ ruled differently. In this case the consumer paid for the purchase with a credit card for which the credit company retained an amount as commission for the services rendered. Thus the supplier received a smaller amount than the customer paid. The ECJ was of the opinion that the taxable amount in this case was the amount paid by the customer (i.e. the amount received by the supplier plus the value of the service provided by the credit card company).

The different outcome of the cases could be explained by the fact that the credit company was potentially considered as an intermediary, acting in name of the supplier, whereas in the *Argos case* the distributor acted in his own name.⁵⁰ This would imply that the taxable amount should be determined based on the role of the distributor, whether or not he is acting in his own name.

In the case *Elida Gibbs*⁵¹ free vouchers were issued by the manufacturer rather than the retailer. The voucher provided the final consumer with a discount at the purchase of specified goods. He could redeem the voucher either at a retailer, who could subsequently request Elida Gibbs for reimbursement (money-off voucher), alternatively the manufacturer reimbursed the customer directly (cash back vouchers). According to *Elida Gibbs* the taxable amount of its initial supply should be reduced upon reimbursement, since the actual amount received was lowered by providing the reimbursement.

Article 90 RVD⁵² indicates that when the price is reduced after a supply takes place, the taxable amount should be adjusted accordingly. However, in casu neither did *Elida Gibbs* supply any goods to the final consumer, nor the final consumer paid a price to *Elida Gibbs*. The supply of goods to the final consumer was made by the retailer which received payment in return. There was no legal relationship between *Elida Gibbs* and the final consumer. *Elida Gibbs* made a supply to the wholesaler, the price paid by the wholesaler in this respect was

⁴⁷ B. Terra & J. Kajus, Commentary A Guide to the Recast VAT Directive, Chapter 7 (taxable amount), IBFD 2012.

⁴⁸ B. Terra & J. Kajus, Commentary A Guide to the Recast VAT Directive, Chapter 7 (taxable amount), IBFD 2012.

⁴⁹ Case C-18/92 *Chaussures Bally SA v. Belgian State, Minister for Finance* [1993] ECR I-2871.

⁵⁰ Commission Staff Working Document SWD (2012) 127, p. 23.

⁵¹ Case C-317/94 *Elida Gibbs v. Commissioners of Customs and Excise* [1996] ECHR I-05339.

⁵² At the time of the case 11(C)(1) of the Sixth Directive.

not reduced by the fact that Elida Gibbs reimbursed the final consumer. Bijl⁵³ is of the opinion that ‘price’ and ‘supply’ in article 90 RVD refers to the consideration paid/received for a transaction within a well-defined relationship between a supplier and its recipient. In case payments are made/received outside that relationship, the original taxable amount is not affected. An adjustment of a taxable amount ‘only applies to discounts with respect to parties involved in the initial supply’.⁵⁴ He indicated that in *Elida Gibbs* this is not the case: the final consumer did not pay any consideration to the manufacturer. Therefore he concluded that neither the taxable amount should be affected, nor the input VAT should be adjusted⁵⁵. This opinion is shared by A-G Fenelly in the *Elida Gibbs* case.⁵⁶

The ECJ came to a different conclusion. Pertaining to both money-off vouchers as well as cash-back vouchers, the taxable amount attributable to Elida Gibbs, in its capacity as taxable person, should in the ECJ’s view be the selling price charged by it, less the face value of the voucher.⁵⁷ Even though the Court realised that (now) article 90 RVD in principle assumes a contractual relationship between two contracting parties, the ECJ indicated that the provision in fact intends to ensure neutrality. Consequently, in case there is no contractual relationship, but parties are part of the same transaction chain and the first chain provides the final consumer a reduction, directly or indirectly, article 90 RVD should nevertheless be taken into account. Should this not be the case the tax authorities would receive more VAT than paid by the final consumer, at the cost of the taxable person.⁵⁸ This would infringe the principle of neutrality.⁵⁹ Aforementioned approach would, in ECJ’s view, not lead to disturbance of the VAT system since intermediary parties were not required to adjust the taxable amount.⁶⁰

Also in the cases *Commission v. Germany*⁶¹ and *Yorkshire*⁶² (free) money-off vouchers were issued. However where *Elida Gibbs* related to the taxable amount of the manufacturer, these cases concerned the taxable amount from the retailer’s perspective. The ECJ confirmed the approach used in *Elida Gibbs* and concluded that the value of the voucher should be included in the taxable amount. The taxable amount should consist of the ‘cash’ paid by the final consumer plus the amount of the voucher, reimbursed by the manufacturer, so that the taxable amount is not less than the retailer received.⁶³

⁵³ J. Bijl, VAT: ‘Money off vouchers’ and cash back schemes’ - what are the problems and how can they be solved’, EC Tax review 2012-5, p. 265.

⁵⁴ J. Bijl, VAT: ‘Money off vouchers’ and cash back schemes’ - what are the problems and how can they be solved’, EC Tax review 2012-5, p. 270.

⁵⁵ Adjustment referred to in article 185(1) RVD.

⁵⁶ Opinion A-G. Fenelly in Case C-317/94, *Elida Gibbs Ltd and Commissions of Customs and Excise* [1996] ECR I-5341, para. 20.

⁵⁷ Case C-317/94 *Elida Gibbs v. Commissioners of Customs and Excise* [1996] ECHR I-05339, para. 29

⁵⁸ Case C-317/94 *Elida Gibbs v. Commissioners of Customs and Excise* [1996] ECHR I-05339, para. 31

⁵⁹ Case C-317/94 *Elida Gibbs v. Commissioners of Customs and Excise* [1996] ECHR I-05339, para. 28

⁶⁰ Case C-317/94 *Elida Gibbs v. Commissioners of Customs and Excise* [1996] ECHR I-05339, para. 33

⁶¹ Case C-427/98 *Commission v Germany* [2002] ECR I-08315

⁶² Case C-398/99 *Yorkshire Co-operatives Ltd v Commissioners of Customs & Excise* [2003] ECR I-00427

⁶³ Case C-427/98 *Commission v Germany* [2002] ECR I-08315 para. 57; Case C-398/99 *Yorkshire Co-operatives Ltd v Commissioners of Customs & Excise* [2003] ECR I-00427, para. 19

The RVD does not provide for a clear provision how to treat a discount provided by a manufacturer to the ultimate customer. It seems that, in order to reach a ‘preferred’ outcome, the ECJ departed from literal interpretation of the RVD and looked at the principles of the VAT system, specifically the principle of neutrality.⁶⁴ The ECJ took into account the whole supply chain. It was of the opinion that whether the manufacturer pays the value of the voucher to the retailer or final consumer should not make any difference. It could be argued that, in order to observe the principle of legal certainty, when a provision is clear, it should be interpreted literally.⁶⁵ On the other hand, from an economic point of view the ECJ’s outcome might be preferable. The ECJ’s (artificial) approach led to taxation of the final consumer and an outcome in line with the principle of neutrality, the tax authorities did not receive more than paid by the final consumer.⁶⁶

Furthermore, in the previously discussed *Kuwait Petroleum case* the ECJ held that it follows from (now) article 79 RVD⁶⁷ rebates and price discounts ‘do not apply to reductions which cover the full cost of the supplied redemption goods’.⁶⁸

3.2.4 Place of taxable transactions

From the case *Astra Zeneca* it can be derived that the provision of a voucher should be considered as a supply of service. The vouchers discussed in this thesis are, in principle, initially provided to a taxable person. Article 44 RVD deals with the place of supply regarding services. It states that the place of supply (of services) to a taxable person shall be where that taxable person has established his business or where he has his fixed establishment.

Should the supply be provided to a non-taxable person, the place of supply is, according to article 45 RVD, the place where the supplier has established his business.

Since the vouchers are usually initially provided to taxable persons, this thesis presumes that article 44 RVD is applicable, which implies that the issuance of a voucher will be taxed in the country where the supply is received.

There are various exceptions to the main rule which will not be discussed in this thesis. However what is relevant for this thesis is that in case of cross-border supply of services, the VAT should be paid in the member state where the service will be received, as stated in article 196 RVD (so called reverse charge).

However, cases pertaining to discount vouchers may also deal with the supply of goods. A good will often be sold through a chain of distributors to a final consumer (which uses a

⁶⁴ D. Butler, ‘*Elida Gibbs revisited: further thoughts on the extent to which vouchers can constitute consideration for VAT purposes*’, EC Tax Review, 2002-2

⁶⁵ J. Bijl, VAT: ‘*Money off vouchers’ and cash back schemes’ - what are the problems and how can they be solved*’, EC Tax review 2012-5, p. 266.

⁶⁶ D. Butler, ‘*Elida Gibbs revisited: further thoughts on the extent to which vouchers can constitute consideration for VAT purposes*’, EC Tax Review, 2002-2, p. 73

⁶⁷ Article 11(A)(3)(b) of the Sixth Directive.

⁶⁸ Case C-48/97 *Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise* [1999] ECR I-02323, para. 17

voucher to obtain a discount at redemption). It can be derived from the articles 40, 68 and 200 RVD that the taxable person acquiring the good should account for the VAT in his country. The intra-community supply of the good is covered by article 138 RVD. It states that the intra-community supply shall be VAT exempt.

3.3 Free discount vouchers

From above discussed case law it can be derived that difficulties with free discount vouchers arise when the discount voucher is provided by another party (which party ultimately reimburses the value of the voucher) than the one who is providing the supply of goods/services.⁶⁹

The ECJ ruled that the issuer of the voucher is entitled to deduct the reimbursement it made from the original sale relating to the voucher. Consequently the issuer's taxable amount is the selling price less the value of the voucher he reimbursed. In this way the taxable amount is equal to the amount paid by the final consumer.⁷⁰ Aforementioned reimbursement is considered as a third party payment to the party redeeming the voucher. This amount (excluding VAT) has to be added to the taxable amount stated on the invoice which the redeemer issues to the final consumer.⁷¹ According to the ECJ the other taxable persons in the supply chain are not required to adjust their input VAT.

3.3.1 Money-off/cash-back vouchers in cross-border situations

The *Elida Gibbs case* dealt with a supply within one country. As indicated, in order to reach the preferred outcome from an economic point of view, in line with the principle of neutrality, the ECJ departed from a literal interpretation. Applying the outcome of the case law is quite cumbersome and obviously it is preferable that the ECJ could come to the same outcome by following the RVD, rather than 'creating' a preferred outcome by departing from the RVD. Apart from that, should the outcome of the cases *Elida Gibbs* and *Commission v. Germany* be applied to cross-border situations, problems may arise.

In below diagram⁷² there is a local transaction between the manufacturer and wholesaler in the member state 1. Subsequently there is a supply from the wholesaler to a retailer in member state 2 (cross-border transaction). This supply to the retailer will be considered to be a supply to a taxable person in an intra-community transaction (cross-border transaction between two member-states). These supplies do not relate to the supply of the voucher. The voucher will be used by the final consumer in order to obtain a discount at the purchase of the good/service. In case the supply relates to services article 44 RVD applies, should the supply relate to goods article 40 RVD will apply. In case of an intra-community supply of services, as discussed in paragraph 3.2.4, no VAT will be charged on the supply, as a consequence the

⁶⁹ It seems that the Proposal only considers that money-off vouchers cause difficulties (see COM(2012)/206 final, explanatory memorandum, p. 5), further in this master thesis there will be indicated why also cash-back vouchers can cause problems.

⁷⁰ In order to ensure VAT neutrality.

⁷¹ COM(2012)/206 final, explanatory memorandum, p. 8-9.

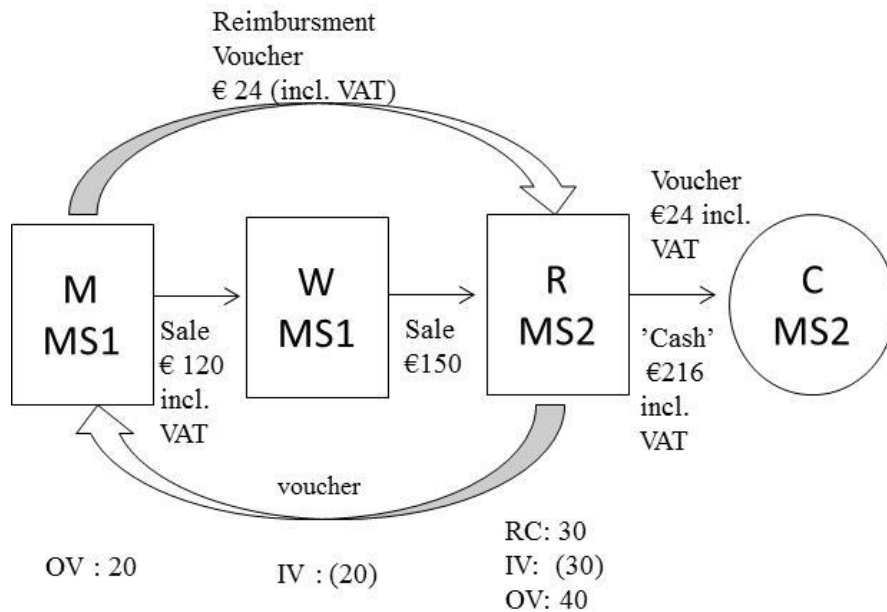
⁷² The diagram is an example of an money-off voucher, however the same applies to cash-back vouchers

wholesaler will not account for VAT on the supply, however VAT will be due in member state 2, which amount can be offset.⁷³

The consumer, located in member state 2, uses a money-off voucher with a nominal value of EUR 24, issued by the manufacturer located in member state 1, for a purchase in member state 2. Upon receipt of the voucher the retailer in member state 2 requests a refund of the voucher by the manufacturer in member state 1. Following *Elida Gibbs*, the manufacturer is entitled to deduct the face value of the voucher from its initial supply to the wholesaler. The initial supply in this case will be decreased by EUR 24. The initial supply was made for a total of EUR 120, deducting a face value of EUR 24, will lead to a total amount of EUR 96. This implies that the taxable amount would now be EUR 30 (considering a VAT rate of 20% EUR 16 VAT should have been charged). The manufacturer already paid EUR 20 VAT to the tax authorities, which means that he is eligible for a refund of EUR 4. As a consequence the tax authorities in member state 1 have to pay more than they receive. In fact the tax authorities in member state 1 partly fund the consumption in member state 2.⁷⁴ Moreover, the difference would have been bigger in case two different VAT rates would have applied. Should member state 1 apply a higher VAT rate than in member state 2, the tax authorities in member state 1 would have to refund based on a high VAT rate, whereas the tax authorities in member state 2 will receive VAT based on the lower VAT rate in that country.

⁷³ Articles 167 and 168 RVD

⁷⁴ J. Bijl, VAT: 'Money off vouchers' and cash back schemes' - what are the problems and how can they be solved, EC Tax review 2012-5, p. 269.



Reimbursement
 Voucher
 Refund: (4)

TA MS1: (4) TA MS2: 40

VAT rate : 20%
 RC = Reverse charge
 OV = Output VAT
 IV = Input VAT
 TA = Tax Authorities

It can be concluded that applying the outcome of case law to cross-border situations does not always lead to the correct result, since one member state partly funds the consumption in another member state.

3.3.2 Final consumer taxable person

As indicated, when a free discount voucher is used, according to case law, only at the level of the manufacturer an adjustment to the taxable amount has to be made. This could lead to problems when the final consumer is a taxable person.

In case the final consumer is a taxable person he will be entitled to deduct input VAT. However, the invoice which the final consumer will receive from the retailer will overstate the correct amount of reclaimable VAT⁷⁵ since at the initial supply the final consumer paid partly

⁷⁵ Commission Staff Working Document SWD (2012) 127, p. 17; see also ⁷⁵ B.J.M. Terra and E.T. Terra, 'The proposal in the EU VAT treatment of vouchers', World Journal of VAT/GST Law 2012, vol. 1 issue 1, p. 90.

with a voucher, including VAT which was subsequently reimbursement. This could potentially lead to over-deduction of input VAT and loss of VAT revenue.

The German and British governments, in the case *Commission v. Germany*, were of the opinion that the reduction in tax paid by the manufacturer should be followed by ‘a corresponding adjustment in the deduction of input VAT by the customer and intermediate transactions’.⁷⁶

The ECJ, however, in aforementioned case⁷⁷, ruled that corresponding adjustments of all parties in the chain are not necessary. Over-deduction can be avoided by applying article 185(1) RVD, which requires that, in case ‘changes occurred in factors which were used to determine the amount to be deducted’⁷⁸, the deduction the final consumer made in its capacity as taxable person will be adjusted after the VAT return is made. In practice it would be difficult to supervise whether this requirement is always complied with.⁷⁹

Conclusion

The treatment of free discount vouchers based on case law could lead to tax loss in case of intra-community trade or in case the final consumer is a taxable person.

3.4 Paid vouchers

3.4.1 SPV's and MPV's

From case law in combination with article 65 RVD, it can be concluded that when ‘all relevant information regarding the chargeable event is known, as well as the goods or services can be clearly identified beforehand’,⁸⁰ VAT is chargeable at the moment the consideration for the future supply is received. This applies to SPV's.

In case aforementioned requirements are not fulfilled, the general rule of article 63 RVD will apply, being VAT will be charged at the time the good/service is supplied. Which is applicable to MPV's.

The question remains what the taxable amount will be, since vouchers are often sold at a price lower than their nominal value.⁸¹ The ECJ did not explicitly deal with the taxable amount with respect to SPV's (pre-payments) or MPV's. However selling vouchers at a price below the nominal value could be seen as providing a discount which was dealt with in the *Argos case*⁸² as discussed above.

⁷⁶ Case C-427/98 *Commission v Germany* [2002] ECR I-08315, para 61.

⁷⁷ Case C-427/98 *Commission v Germany* [2002] ECR I-08315, para. 66.

⁷⁸ Article 185(1) RVD: ‘Adjustments shall, in particular be made where, after the VAT return is made some changes occurs in the factors used to determine the amount to be deducted, for example where purchases are cancelled or price reductions are obtained’.

⁷⁹ Vakstudie Nieuws, 2002/54.22, annotation at Case C-427/98 *Commission v Germany*.

⁸⁰ Case C-419/02 *BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs & Excise* [2006] ECR I-01685, para. 48.

⁸¹ See also Case C-520/10 *Lebara Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2012] ECR 00000, para. 14.

⁸² Case C-288/94 *Argos Distributors Ltd v Commissioners of Customs & Excise* [1996] ECR I-05311.

Further to the discussed case law, with respect to an SPV the taxable amount should be the amount actually received by the issuer. Since the SPV is to be taxed at issuance the price paid by the final consumer is irrelevant.

MPV's are taxed at redemption of the voucher and the vouchers are usually provided via a chain of distributors, so the *Bally case*⁸³ could also be relevant.

The taxable amount seems to be depended on the role of the distributor. In case the distributor acts in his own name the taxable amount will be the amount actually received by the issuer.

Does the distributor act in name of the issuer, the taxable amount will be the full price paid by the recipient of the good/service.

When the taxable amount will be the amount actually received, it can lead to implications with respect to MPV's. The difference in price for which the issuer sold the voucher and the final consumer paid for the voucher (due to the distributor's margin), means that there is a mismatch between the output VAT by the issuer and the input VAT paid by the final consumer. This causes a problem if the final consumer is a taxable person with the right to deduct.⁸⁴

Apart from the aforementioned issues it should be observed that various member states have their own rules and interpretations regarding vouchers. One country can qualify the voucher as an SPV so that it will be taxed at tax at issuance, whereas another country may consider the same voucher to be an MPV⁸⁵, which implies that VAT will be due at redemption. This may cause undesired double taxation or non-taxation.

4. Voucher Proposal

4.1 Introduction

On 10 May 2012 the European Commission launched a Proposal for a council directive regarding vouchers.⁸⁶ This Proposal should apply from 1 January 2015 and intends to amend the RVD pertaining to the treatment of vouchers. The European Parliament approved the Proposal upon first reading (subject to minor amendments) on 17 April 2013.⁸⁷ At the time of writing this thesis the Proposal has not yet been adopted.

As indicated, the RVD does not provide for clear rules as to how to treat vouchers, which could lead to double taxation, non-taxation and tax avoidance related therewith. The Proposal intends to provide for clear rules, as well as to distinguish vouchers from payment services.⁸⁸

⁸³ Case C-18/92 *Chaussures Bally SA v. Belgian State, Minister for Finance* [1993] ECR I-2871.

⁸⁴ COM(2012)/206 final, p. 7.

⁸⁵ For example the Netherlands makes a distinction between SPV's and MPV's.

⁸⁶ COM(2012)/206 final.

⁸⁷ Information derived from: ww.europarl.europa.eu, accessed on 27 May 2013.

⁸⁸ Payment services will not be discussed in this thesis.

The main areas which the Proposal intends to clarify are: what is a voucher, time of taxation, rules regarding distribution and discount vouchers.

4.2 Definition of vouchers

Article 30a(1) of the Proposal states that vouchers ‘carry a right to receive a supply or discount of goods or services’. The redemption of a voucher should not be seen as payment, but as the exercise of a right connected to the voucher, which was obtained at the purchase/receipt of the voucher and should be fulfilled by the issuer/redeemer.⁸⁹

Moreover, the Proposal makes a distinction between vouchers providing a right to a good or service and vouchers which provide a price reduction⁹⁰. The first mentioned category can be divided into single purpose vouchers (SPV) and multi-purpose vouchers (MPV), the other category is referred to as discount vouchers.

4.2.1 SPV

According to the Proposal an SPV is a voucher which carries a right to receive a supply of goods or services and the information regarding the supplier’s identity, where the supply takes place and the applicable VAT rate, is available at the time issuance of the voucher⁹¹.

4.2.2 MPV

The Proposal defines MPV’s as a rest category, i.e. ‘any voucher, other than a discount or rebate voucher which does not constitute a single-purpose voucher’⁹². With respect to MPV’s not all aforementioned information regarding the future supply of goods/services is available at the time of purchase. Moreover MPV’s can be redeemed for different types of goods and services, which could be subject to various VAT rates/regimes.⁹³ Hence the time of taxation of SPV’s and MPV’s is different.

4.2.3 Discount vouchers

In order for discount vouchers to fall within the scope of the Proposal, they should be one-off and linked to a specific supply.⁹⁴ According to article 30a(1) of the Proposal a discount voucher is considered to be ‘a right to receive a price discount’. From article 30a(1) of the Proposal in conjunction with article 25(1)(e) of the Proposal it can be derived that the discount vouchers covered by the Proposal are discount vouchers issued free of charge.⁹⁵ Pursuant to the SWD reference should be made to the case *Kuwait Petroleum* when determining whether the voucher is issued free of charge. Decisive is whether a customer has the right to pay less should he not wish to receive the voucher.⁹⁶ The problem the Proposal

⁸⁹ As opposed to a pure payment instrument.

⁹⁰ COM(2012)/206 final, explanatory memorandum, p. 3.

⁹¹ Article 30a(1) of the Proposal.

⁹² Article 30a(1) of the Proposal.

⁹³ For example a gift card which can be used to purchase various goods, as a consequence the VAT rate cannot be determined in advance since to some goods apply a lower VAT rate.

⁹⁴ COM(2012)/206 final, explanatory memorandum, p. 3.

⁹⁵ See also Commission Staff Working Document SWD (2012) 127, p. 33.

⁹⁶ Commission Staff Working Document SWD (2012) 127, p. 33.

intends to solve is when the free discount voucher will be reimbursed by the issuer rather than the redeemer.

4.2.4 Conclusion

The three aforementioned vouchers are covered by the Proposal. This implies that not all vouchers are covered. For instance paid vouchers provided at a discount as referred to in the *Argos case*, or the free vouchers subject of discussion in the *Kuwait Petroleum case* are not covered by the Proposal. The Commission is of the opinion that these types of vouchers do not require any legislative follow up.⁹⁷ In this thesis these types of vouchers will not be further discussed.

4.3 Treatment of vouchers under the Proposal

4.3.1 SPV's

Pursuant to article 65 of the Proposal VAT on SPV's is chargeable at the time of purchase of the voucher. This approach seems to be in line with the *BUPA case* and *Lebara case*. However, where the ECJ in the *BUPA case* required that 'the future delivery or future performance, must be known' in order to qualify for a prepayment⁹⁸, the Proposal additionally requires that the suppliers identity should be known at the time of issue.⁹⁹ Terra and Terra are of the opinion this causes an unnecessary complication and could result in different treatment between member states.¹⁰⁰ The supply of the voucher and the future supply of goods/services related to that voucher are treated as one single transaction for VAT purposes¹⁰¹, so in case of an SPV the voucher is only taxed when the voucher is supplied by the issuer and not at redemption, i.e. when the underlying supply of goods/services is provided. However, it seems that, when the voucher is purchased and subsequently resold, the subsequent supply will also be considered a prepayment of the underlying supply.¹⁰² This could be derived from preamble (12) of the Proposal¹⁰³.

In order to prevent different taxation in the various member states, which could lead to potential double- or non-taxation, the Proposal suggests adding a new paragraph to article 66 of the RVD. The current article 66 RVD allows member states to tax later than the supply is

⁹⁷ Commission Staff Working Document SWD (2012) 127, p.15 and 18.

⁹⁸ Case C-419/02 *BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs & Excise* [2006] ECR I-01685, para. 48.

⁹⁹ Article 30a(1) of the Proposal.

¹⁰⁰ B.J.M. Terra and E.T. Terra, 'The proposal in the EU VAT treatment of vouchers', *World Journal of VAT/GST Law* 2012, vol. 1 issue 1, p. 84.

¹⁰¹ Article 20b of the Proposal.

¹⁰² Wolf, R., 'Vouchers: een btw-fenomeen an sich', *Ntfr Beschouwingen* 2012/28, paragraph 5.

¹⁰³ Preamble (12) of the Proposal. 'Where payment is made on account before supply is made, VAT is however due on the amount received. It should be clarified that this also covers payments made for vouchers carrying a right to a supply of goods or services where the place and level of taxation of which are known (single-purpose vouchers). For other vouchers (multipurpose vouchers), VAT should only become chargeable upon redemption of the voucher.'

made. The new paragraph will state that derogation of article 65 of the Proposal is not permitted in case of payments against the issuance of vouchers.¹⁰⁴

The rules with regard to taxing SPV's seem at first sight straightforward and in line with case law. However, could a voucher actually qualify for an SPV? Taking as an example a telecommunication prepaid card which can only be used for telephone calls: even though the telecommunication service will be provided by one provider, the prepaid card can often be used to call 'paid service numbers' or VAT exempt numbers.¹⁰⁵ This implies that the place of supply and VAT rate cannot necessarily be determined in advance, which entails that such prepaid card cannot qualify as an SPV.¹⁰⁶ Apart from that, if the voucher is sold to a distributor the voucher could end up with a consumer in another member state. If this consumer is a taxable person the place of supply will be that member state.¹⁰⁷

Nevertheless, in *Lebara* the ECJ confirmed the existence of the SPV regarding a telecommunication voucher. However, whether or not the voucher could qualify as an SPV was not subject of dispute in that case.

Furthermore, as noted before, vouchers are often sold at a price lower than their nominal value.¹⁰⁸ The Proposal does not clearly state what the taxable amount will be: the nominal value or the price actually paid at the purchase. Therefore, as indicated previously, general rules and case law should be consulted, based on which the consideration actually received should qualify for the taxable amount.¹⁰⁹

In case the voucher is sold at a price lower than the value of the voucher and taxable amount is the amount actually received, the tax authorities would receive less than it should have based on the value of the voucher. This issue could potentially be solved in case the distributor charges the face value of the SPV on a subsequent sale. As stated above, the subsequent sale will also be considered as a prepayment and taxed as such. When the distributor charges the face value, VAT will be paid on this amount, after deduction of input VAT. The amount the tax authorities lost at the first sale, will be covered by this subsequent sale (the distributor pays VAT on the value of the voucher (output VAT) and deducts the input VAT it pays at the purchase of the voucher, which was sold below the face value). Full taxation of the voucher will so be ensured.

Alternatively, a 'distribution service' similar to deemed distribution service with respect to an

¹⁰⁴ COM(2012)/206 final, explanatory memorandum, p. 13.

¹⁰⁵ F. Idsenga, 'Uw beltegoed is zojuist opgewaardeerd', *Weekblad fiscaal recht.*, Deventer, Vol. 135 (2006), no. 6683 ; p. 949.

¹⁰⁶ R. Hoefnagels, 'BTW en prepaid telefonie – modern beleid voor een dito sector', *Forfaitair* 2013/232, p. ??.

¹⁰⁷ Article 44 RVD in conjunction with article 196 RVD.

¹⁰⁸ See also Case C-520/10 *Lebara Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2012] ECR 00000, para. 14.

¹⁰⁹ Case C-288/94 *Argos Distributors Ltd v Commissioners of Customs & Excise* [1996] ECR I-05311; Case C-317/94 *Elida Gibbs v. Commissioners of Customs and Excise* [1996] ECHR I-05339, ; Case C-126/88 *The Boots Company plc v The Commissioners of Customs and Excise* [1990] ECR I-01235; Case C-398/99 *Yorkshire Co-operatives Ltd v Commissioners of Customs & Excise* [2003] ECR I-00427; Case C-427/98 *Commission v Germany* [2002] ECR I-08315.

MPV (see below) could be provided, VAT has to be charged on that deemed service, which service amounts to the difference between the value of the voucher and the price paid by the distributor, so that taxation of the nominal value will be ensured.

4.3.2 MPV's

Pertaining to taxing MPV's the general rule of article 63 RVD¹¹⁰ applies, which implies that MPV's are taxed at redemption. VAT will be charged based on the underlying goods/services supplied. In order to guarantee that the MPV will only be taxed once, article 30b of the Proposal states that the supply of the voucher and the subsequent supply of goods/services should be considered as a single transaction and should be treated as if the goods/services were supplied without the use of a voucher. The subsequent sale of an MPV is not subject to VAT.¹¹¹ However, according to the Proposal, the margin for distribution of an MPV will be taxed. The margin received should be seen as consideration for a distribution service.¹¹²

VAT on MPV at redemption

The first amount to be taxed is the MPV itself (at redemption, pursuant to article 63 RVD). Article 74a of the Proposal states that the taxable amount is the nominal value of the MPV. A definition of what is considered the nominal value can be found in the Proposal. The reason for introduction of the definition of 'nominal value' is to ensure that the value of the MPV is constant, i.e. that it has the same value at the start and end of the distribution chain.¹¹³ In case a different price is paid by the final consumer than the price for which the issuer sold the voucher, a mismatch would occur between the output VAT and input VAT. The nominal value '*includes everything which constitutes consideration, including the VAT amount, obtained or to be obtained by the issuer of the voucher*', so can be read in article 74a(2) of the Proposal. Which implies that the nominal value includes both the amount paid for the voucher by the distributor as well as the value of deemed distribution services (as discussed below). In way this full taxation of the face value is ensured.

However, in case of partial redemption, the taxable amount will be the '*nominal value which corresponds to the partial redemption of the MPV, less the amount of VAT related to the goods or services redeemed*'¹¹⁴. The VAT amount will be known at the end of the distribution chain, at redemption, since only at that time the applicable VAT rate of the supplied good/service is known. The taxable person obliged to pay VAT with respect to the MPV is always the redeemer.¹¹⁵ He is presupposed to having carried out the taxable supply.¹¹⁶ This implies that the reverse charge cannot be applied.¹¹⁷

MPV's are not always redeemed by the taxable person who issued the MPV, in such situation

¹¹⁰ As mentioned in the previous paragraph for SPV's the Proposal made an amendment in order to tax them at issuance.

¹¹¹ COM(2012)/206 final, explanatory memorandum, p. 12.

¹¹² COM(2012)/206 final, explanatory memorandum, p. 14.

¹¹³ COM(2012)/206 final, explanatory memorandum, p. 13.

¹¹⁴ Article 74a of the Proposal.

¹¹⁵ Preamble (16) of the Proposal.

¹¹⁶ Paragraph added by the Proposal to article 193 RVD.

¹¹⁷ B. Terra and E Terra, '*The proposal in the EU VAT treatment of vouchers*', World Journal of VAT/GST Law 2012, vol. 1 issue 1, p. 92.

the redeemer will be reimbursed by the issuer. The reimbursement falls outside the scope of VAT.¹¹⁸

When the issuer redeems the MPV, article 168 RVD entitles him to deduct the VAT due or paid regarding the issue of the MPV.

As mentioned before, the MPV can be redeemed by a third party. According to article 169 of the Proposal the issuer retains the right to deduct in case MPV's are redeemed by a person other than the issuer of the voucher¹¹⁹, otherwise he would not have been entitled to deduct in such situation.

VAT on Distribution Service

Apart from taxing the MPV at redemption, it follows from article 25(d) of the Proposal that the margin for the distribution is to be taxed. This service is taxed each time when the MPV is supplied. The taxable amount for the deemed distribution service is the '*positive difference between the nominal value and the actual price paid for purchasing the voucher, less the VAT related to the supplies distribution service*'¹²⁰. The Commission is of the opinion that the intermediaries promote the distribution. The sale of the MPV, to distributors and onward, is not taxed, by taxing the distribution services the input taxes of the distributors can be deducted and will not be absorbed as hidden tax.¹²¹

The way of taxation, as suggested by the Proposal is reflected in below diagram. In this diagram the issuer sells a voucher with a nominal value of EUR 100 for an amount of EUR 70. This implies a deemed distribution service in the amount of EUR 30 including VAT (100-70). Assuming a VAT rate of 20%, Distributor 1 has to pay EUR 5 to the tax authorities, which amount can be deducted by the issuer as input VAT. Subsequently Distributor 1 sells the voucher for an amount of EUR 76. Considering a nominal value of EUR 100, Distributor 2 supplies a deemed distribution service for EUR 24, including VAT. Since the distribution service is considered a taxable service, distributors may deduct VAT on their expenses.¹²² Distributor 2 will have to pay EUR 4 VAT to the tax authorities, which amount can be deducted by Distributor 2. Subsequently Distributor 2 sells the voucher to Distributor 3 for an amount of EUR 88, which implies that a deemed distribution service was provided in the amount of EUR 12 (including VAT), over which EUR 2 output VAT has to be accounted for. Distributor 3 sells the voucher to the consumer. Last mentioned party will redeem the voucher at the issuer. The issuer/redeemer has to charge VAT and pay EUR 20 VAT to the tax authorities.

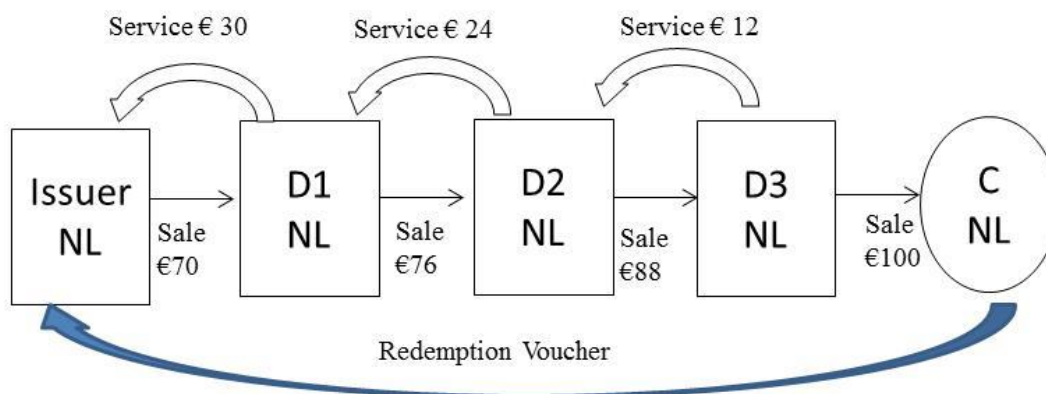
¹¹⁸ COM(2012)/206 final, explanatory memorandum, p. 14.

¹¹⁹ The Proposal does not clearly defines 'redeemer'.

¹²⁰ Article 74b of the Proposal.

¹²¹ Commission Staff Working Document SWD (2012) 127, p. 24.

¹²² Article 25(d), article 28, Article 74a and Article 74b of the Proposal; see also A. Rodrigues & M. Lambourne, '*Towards clarification of the EU VAT treatment of vouchers*', International VAT Monitor, July/August 2012, p. 239.



OV : 20	OV: 5	OV: 4	OV : 2
IV : (5)	IV : (4)	IV: (2)	
15	1	2	2

Nominal Value Voucher: €100
 VAT rate :20%
 Sales are incl. VAT
 Services are incl. VAT
 OV = Output VAT
 IV = Input VAT

From above diagram it can be concluded that in domestic situations the suggested approach of MPV's works well. The voucher itself is only taxed at redemption and not at the various stages. However, due to the introduction of the taxed 'deemed distribution service' also the margin the distributors will receive will be taxed. Since this service will be taxed separately from the voucher the nominal value of the voucher will not be affected, as a consequence a mismatch of the value of the voucher at the beginning and end of the distribution chain is avoided¹²³. Moreover, since the service is taxed distributors can deduct their input tax so that the distributors will not add it to the commission they charge, as a consequence 'hidden tax' will (hopefully) be avoided.

However, considering that MPV's are taxed at redemption, issuers could have a preference to qualify vouchers as an MPV over an SPV, since no output VAT has to be charged at issuance, though the input VAT can already be deducted.¹²⁴ Using an MPV could create cash flow advantages.¹²⁵

¹²³ Commission Staff Working Document SWD (2012) 127, p. 35.

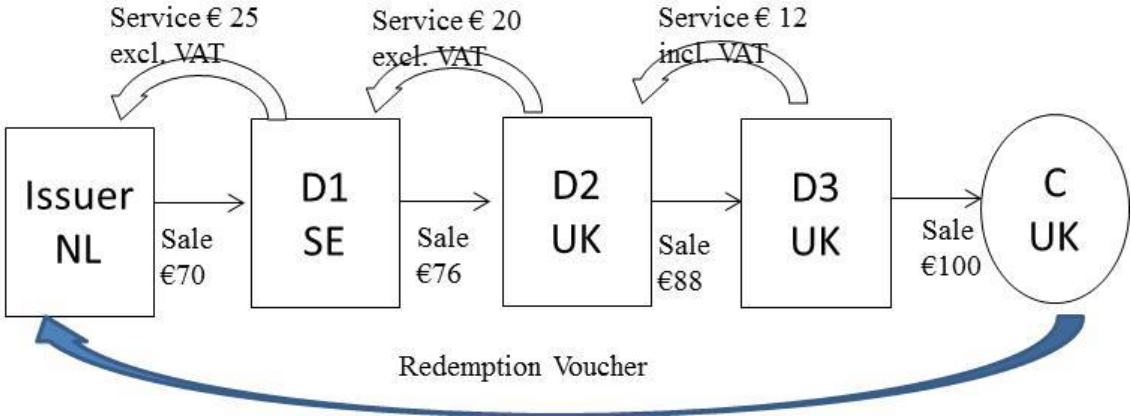
¹²⁴ Article 167 RVD.

¹²⁵ Cowley, R., 17. 'European Commission review of VAT on vouchers', Irish tax review. - Dublin. - Vol. 25 (2012), no. 3., p. 99.

5.3.2.1 Cross-border border situation and MPV's

As mentioned, the consideration for the distribution service is the difference between the nominal value and the price paid by the distributor, which is supposed to include VAT. In case of an intra-community transaction the VAT, in principle, has to be paid in the country of supply. This entails that the VAT is dependent on the country of supply.¹²⁶ It is therefore necessary to determine the taxable amount (the amount excluding VAT) since an invoice excluding VAT should be issued.

Below diagram reflects the use of an MPV in a cross-border situation, the VAT rates are in this case assumed to be the same in all member states, being 20% (due to the fact that in case of intra-community supply of services to a taxable person VAT should be charged in the country of supply, the amount of the service stated is excluding VAT).



OV : 20			OV : 2
RC : 5	RC: 4	IV: (2)	
IV : (5)	IV : (4)		
20	0	(2)	2

Nominal Value Voucher: €100
 VAT rate in all MS: 20%
 On sales no VAT is charged
 OV = Output VAT
 RC = Reverse Charge
 IV = Input VAT
 At redemption VAT is charged

It can be observed that the Proposal does not ensure VAT neutrality in case of intra-community supply.

¹²⁶ With respect to MPV's this applied only to the distribution service and not at the redemption service, since, as indicated, VAT at redemption always has to be paid by the redeemed.

4.3.3 Discount Vouchers

Pursuant to case law the reimbursement by the issuer to the redeemer is considered a third party payment. It follows from the explanatory memorandum that under the Proposal aforementioned consideration is no longer seen as a third party payment.¹²⁷ The Proposal considers the supply of the service/good partially paid for with the voucher as two supplies. The first supply is a supply by the retailer to the final consumer, the second supply is a supply by the retailer to the manufacturer. Article 25(e)¹²⁸ of the Proposal, assumes the reimbursement by the issuer as a consideration (including VAT) for supplying a redemption service by the redeemer,¹²⁹ thus in fact a deemed promotion service is created. According to article 169(d) of the Proposal the manufacturer will be entitled to deduct the VAT on the redemption service (creating input), ‘in so far the supplied goods/services give rise to deduction’,¹³⁰ rather than adjusting the tax base of the initial sale by the issuer¹³¹. As a consequence the issuer of the voucher is no longer required to adjust the taxable amount of the initial supply. The taxable amount for the redemption service, provided by the retailer to the manufacturer, will be the ‘*price reduction granted to the customer and reimbursed by the issuer, less the amount of VAT related to the supplied redemption service*’¹³². The taxable amount at the supply of goods/services will be the price actually paid by the final consumer.¹³³ The face value of the discount voucher will be reflected in the above discussed deemed promotion service.

Please refer to the diagram below.

¹²⁷ COM(2012)/206 final, explanatory memorandum , p. 9

¹²⁸ Article 25(e) Proposal: a supply of services may consist of: ‘the redemption of a free discount voucher, where the taxable person supplying the goods or services to which the voucher relates receives consideration from the issuer’

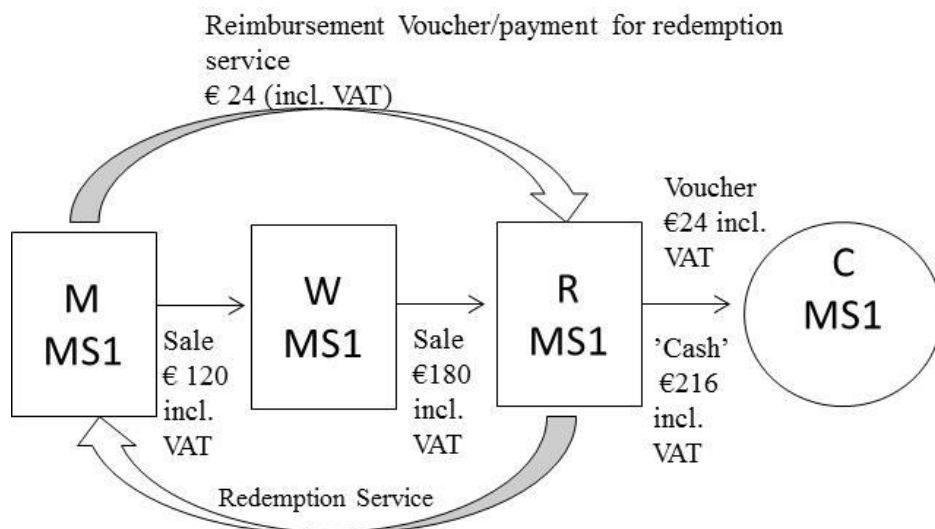
¹²⁹ COM(2012)/206 final, explanatory memorandum, p. 9

¹³⁰ Article 169(d) Proposal. The Explanatory Memorandum refers specifically to MPVs and redemption services. The article itself states: ‘transaction relation to the payment of consideration by the issuer of a voucher to the taxable person supplying the goods or services to which the voucher relates in so far the supplied goods or services give rise to deduction’. It therefore seems that it also relates to redemption service provided with respect to discount vouchers’.

¹³¹ As a consequence the pro-rata of the manufacturer would be affected should the manufacturer also apply exempt supplies

¹³² Article 74(c) Proposal

¹³³ COM(2012)/206 final, explanatory memorandum , p. 9



OV : 20 IV : (20) IV: (30)
 OV: 30 OV: 40

Redemption Redemption
 Service Service
 Input: (4) OV 4

TA (total) : 36

VAT rate : 20%
 Face Value Voucher: € 24 (incl. VAT)
 OV = Output VAT
 IV = Input VAT
 TA = Tax Authorities

Under the Proposal the issue which currently exists pertaining to discount vouchers is solved domestically.

By the proposed rules the ECJ does no longer have to use a questionable interpretation of the RVD as used in inter alia *Elida Gibbs*. The issuer will receive a reimbursement of VAT paid upon reimbursing a discount voucher used by a final consumer. However, the taxable amount of the issuer will not be adjusted, so in case the issuer also supplies exempt supplies, it will affect his pro rata.¹³⁴

Furthermore, as indicated in paragraph 3.3.2, pursuant to *Elida Gibbs* only at the level of the manufacturer an adjustment has to be made in the taxable amount and not at other parts in the distribution chain. In case the final consumer is a taxable person (who can deduct input VAT)

¹³⁴ J. Bijl, VAT: 'Money off vouchers' and cash back schemes - what are the problems and how can they be solved', EC Tax review 2012-5, p. 271.

he would receive an invoice which would overstate the correct amount of reclaimable VAT. The ECJ was, however, of the opinion that this issue is solved by the rules provided for in the RVD, being article 185(1) RVD¹³⁵. Yet, it is not always easy to supervise whether always is complied with this rule. The rules regarding free discount vouchers under the Proposal solve this issue. The invoice issued to the final consumer will no longer overstate the correct reclaimable VAT, since the reimbursement of the voucher will be separated from the supply by the retailer to the final consumer.

However, the problems are only solved with respect to money-off vouchers. Article 25(e) of the Proposal assumes a service from a taxable person, in its capacity as redeemer, to a final consumer. Such a situation applies to money-off vouchers, in case of cash-back vouchers no taxable person as redeemer is involved and thus it would not be able to perform a redemption service as described in the Proposal. It seems that pertaining to cash-back vouchers the current rules remain to apply.

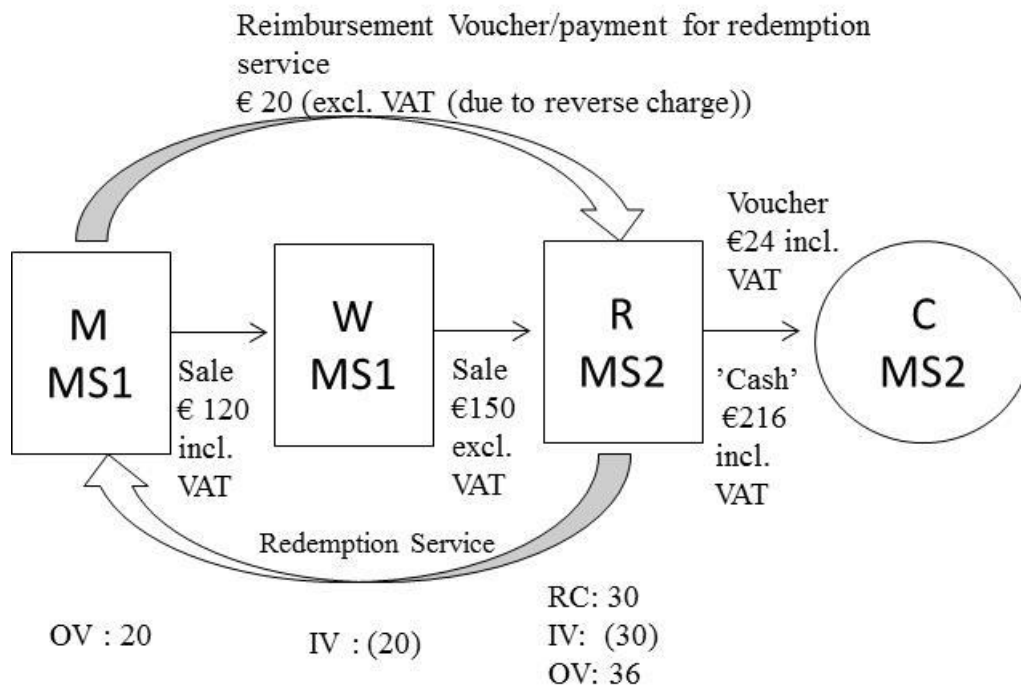
It is interesting that two similar discount systems will be treated differently under the Proposal.

Moreover, in case of a cross-border situation, a problem remains to occur.¹³⁶

Other than under the current rules member state 1 does not fund the consumption in member state 2, so at first sight it seems there are no issues. However, a service provided to taxable person in another member state means that the place of supply is considered where the recipient of the service is located, thus in member state 1. Under the reverse charge mechanism the manufacturer located in member state 1 is liable to account for VAT on the redemption service provided by the retailer in member state 2, though he can deduct the same amount. Kindly refer to the below diagram.

¹³⁵ Article 185(1) RVD requires that, in case changes occurred in factors which were used to determine the amount to be deducted, the deduction the final consumer made in its capacity as taxable person will be adjusted after the VAT return is made.¹³⁶ J. Bijl, VAT: *'Money off vouchers' and cash back schemes - what are the problems and how can they be solved'*, EC Tax review 2012-5, p. 271.

¹³⁶ J. Bijl, VAT: *'Money off vouchers' and cash back schemes - what are the problems and how can they be solved'*, EC Tax review 2012-5, p. 271.



Redemption Service
RC : 4
IV: (4)

TA MS1: 20 TA MS2 : 36

VAT rate : 20%
Face Value Voucher: € 24 (incl. VAT)
RC = Reverse charge
OV = Output VAT
IV = Input VAT
TA = Tax Authorities

In this case the manufacturer received initially EUR 100 (amount excluding VAT), but because of the subsequent redemption it paid EUR 20, as a consequence the total amount received is EUR 80. With a VAT rate of 20% he should be liable to pay VAT in the amount of EUR 16, rather than the EUR 20 already paid. Which means that he should have been entitled to a refund in the amount of EUR 4.¹³⁷ However he did not receive a refund, since in this situation the Proposal does not allow such a refund, as the adjustment is made based on input deduction rather than a tax base adjustment.

¹³⁷ J. Bijl, VAT: 'Money off vouchers' and cash back schemes - what are the problems and how can they be solved', EC Tax review 2012-5, p. 271.

This outcome is not in line with *Elida Gibbs* pursuant to which the amount on which basis the tax authorities collect VAT cannot exceed the amount received by the manufacturer. The tax authorities received in this situation EUR 20, whereas they should have received EUR 16.

As a result, under the Proposal it seems more advantageous for manufacturers to issue cash-back voucher than money-off vouchers, since the current rules remain to apply to the first mentioned type of vouchers.

5. Conclusion

This thesis intended to explore the current issues pertaining to vouchers and whether these uncertainties will be solved by the Proposal.

Based on article 65 RVD and case law it can be concluded that when at the purchase of a voucher ‘all relevant information regarding the chargeable event is known and goods or services are clearly identified’, the voucher should be taxed at issuance. The requirements following from the above referred *BUPA* judgment are currently not reflected in the RVD.

The Proposal provides for a definition of SPV’s and indicates which requirements should be met in order to qualify for a voucher to be taxed at issuance. It is clear at what time the SPV should be taxed.

What remains unclear is what should be considered the taxable amount in case a voucher is supplied by the issuer below the nominal value. If, according to case law, the actual amount received will be the taxable amount, the tax authorities will lose VAT revenue. A possible solution would be that the distributor charges the value of the SPV, so that full taxation of the value of the voucher is ensured. Alternatively, by charging VAT on a ‘distribution service’ similar to deemed distribution service with respect to an MPV, in an amount equal to the difference between the value of the voucher and the price paid, taxation of the full value could also be ensured.

With respect to vouchers often not all information regarding the future chargeable event is known at the time of supply. For an example, a hotel gift voucher, to be used in various member states, is issued and distributed via a chain of distributors. Based on current rules and case law this voucher does not qualify for a prepayment, since the applicable VAT rate is not known at the time of issuance. However, the current RVD does not provide for clear rules as to how to treat such voucher. From article 63 RVD it can be derived that such vouchers should be taxed at redemption. However, since the distributors (usually) account for a margin while distributing, the price of the voucher increases so that the price charged by the issuer differs from the price paid by the final consumer. This will cause a mismatch in the output VAT of the issuer and the input VAT mentioned on the invoice of the final consumer (which causes a problem if the final consumer is a taxable person who can deduct input VAT).

The Proposal provides for a definition of the MPV and indicates how this type of voucher should be treated. The suggested approach seems to work well in domestic situations. The

Proposal specifies what the taxable amount should be for both the principal supply as well as the distribution service. Since the principal supply and distribution service are taxed separately the nominal value of the voucher will not be affected so that no mismatch will occur in the value at the start and end of the distribution chain.

In cross-border situations, on the other hand, problems will arise. Firstly, the consideration for the distribution service is supposed to include VAT. In case of an intra-community transaction between taxable persons the VAT, in principle, has to be paid in the country where the service is received, which requires an invoice excluding VAT to be issued, so that the VAT can be accounted for in the country of receipt. The fact that the consideration already includes VAT may complicate calculations in case of different VAT rates. Secondly, due the reverse charge tax neutrality is not always ensured in cross-border distributions of MPV's.

Since SPV's are required to account for VAT upfront and MPV's will be taxed at redemption, it could well be that issuers try to design vouchers in such a way that they qualify for MPV's to generate cash-flow advantages. Apart from that, even though the Proposal provides for a definition of SPV's and MPV's, member states could classify the same type vouchers differently. Obviously last mentioned issue is not a flaw in the Proposal itself.

The last type of voucher discussed in this thesis is the free discount voucher pursuant to which the consumer receives a discount upon redemption of the voucher. The vouchers are regularly issued by a manufacturer while the retailer provides the discount and requests the manufacturer for reimbursement. Another possibility would be that the final consumer receives the discount after purchase of the good or service directly from the manufacturer. Pursuant to the RVD it seems that the taxable amount can only be adjusted in case discounts are granted to parties who were involved in the same original supply. Between the manufacturer reimbursing the voucher and the retailer/final consumer there is no direct link. Nevertheless, it follows from case law, that the manufacturer should receive a refund of the VAT paid at the initial supply. In reaching the outcome the ECJ departed from the literal interpretation from the RVD in order to ensure fiscal neutrality. According to the ECJ the tax authorities should not receive more VAT than paid by the final consumer at the cost of the taxable person. The ECJ would have come to a different interpretation should it have interpreted the provisions literally.

Moreover, using money-off/cash-back voucher in cross-border transactions does not always lead to the preferred outcome. When the manufacturer supplies to a wholesaler in another member state for onward supply, no issues occur, the reverse charge mechanism does not have any 'negative' impact on the outcome. However when the wholesaler would supply to a retailer in another member state for onward supply in that member state, the first member state will end up funding the consumption in the second member state. Due to intra-community supply the wholesaler will not account for output VAT. The VAT will be charged and refunded in the other member state. At reimbursement of the voucher, the manufacturer reimburses a VAT inclusive amount to the retailer/consumer. According to case law this leads to a reduction of the manufacturer's tax base, he will be entitled to a refund. Since output VAT was not paid, the tax authorities in the first member state will have a negative result.

The Proposal does no longer consider the payment by the issuer to the redeemer as a third party payment. Instead it separates the payments of the supply partially paid for by a voucher. One supply will be to the final consumer, the other supply will be a 'deemed promotion service' by the retailer to the manufacturer on which VAT has to be paid. As a consequence the manufacturer can deduct the VAT due on this service. This approach leads, in domestic situations, to the same outcome as under *Elida Gibbs* without a 'questionable' interpretation of the law. However, since the taxable amount of the issuer will not be adjusted, in case the issuer also supplies exempt supplies, his pro rata will be affected.

Furthermore, under the Proposal, the invoice to the final consumer will no longer over-state the correct reclaimable VAT.

In a cross-border situation the new proposed rules do not lead to an outcome in line with *Elida Gibbs*. Due to reverse charge the manufacturer has to account for VAT on the service, which he also can deduct. As a consequence the end result is nil, due to the fact that under the Proposal the adjustment is made based on input deduction, whereas according to current case law he would have received a refund, since the tax base would have been adjusted.

Moreover the proposed rules only cover money-off vouchers, rather than cash-back vouchers. At first sight it seems interesting that similar type of vouchers will be treated differently, however considering the effect the Proposal may have on cross-border situations, it would be beneficial for a manufacturer to opt for cash-back vouchers rather than money-off vouchers.

It can be concluded that part of the issues are solved by the Proposal, however unfortunately various issues remain, especially with respect to cross-border trade. Keeping in mind that one of the main goals of the EU is to facilitate smooth cross-border trade, these issues will hopefully be resolved before the Proposal comes into force.

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