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VAT**

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VAT UPDATE

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VAT TREATMENT OF VOUCHERS



“knowledge”

*Facts, information and skills
acquired through experience or
education; the theoretical or
practical understanding of a
subject.*

OXFORD DICTIONARY

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HARMONISATION OF THE VAT TREATMENT OF VOUCHERS: ANOTHER STEP IN ESTABLISHING THE INTERNAL MARKET

1.0 Introduction

Value added tax (VAT) lies at the heart of the internal market concept. Abolishing border controls, including fiscal controls, has always been at the forefront of the arguments for establishing the internal market¹, a feat achieved officially on 1 January 1993. As for VAT within the internal market, the Commission's original proposal was to have VAT charged in the Member State of origin, and abolishing tax remittance on inter-Member State supplies, a system which became known as the VAT definitive system.

However, getting Member States to agree, given the natural fight to protect vested interests, led to a transitional system that was meant to be in place for only four years, that is until 1996.

The concept of the transitional system was to have the functions that were previously performed by border controls, to be performed within the Member State where the taxable person was established. For persons working in VAT, this system will be familiar. This is because the VAT transitional system is still in place today, with no evidence that the VAT definitive system will ever be approved.

Further disagreements between Member States, the challenge of the EMU as well as the enlargement of the EU, have all been factors keeping the Commission busy in the meantime. Thus the only real development to VAT legislation comes either from the Court of Justice, on interpretation of specific articles of the VAT Directive², and of course from amendments to the VAT Directive itself, which arise from time to time on specific matters, in an attempt to deal with non-uniform practices of Member States; in an attempt to attain some level of harmonization of the functioning of the internal market; and unfortunately far away from fundamental and utilitarian legislative amendments required to really deal with the issues surrounding this VAT transitional system.

Well, we have a couple more amendments to the VAT Directive around the corner. The purpose of this article is to focus on one of them.

On the 10 May 2012, the EU Commission launched its Proposal to harmonise through legislation the VAT treatment of vouchers. In the absence of common rules, each Member State has been developing its own rules on how to treat transactions involving vouchers, resulting in either double or non-taxation, as discussed in the Proposal's impact assessment. When adopted, the Council Directive, that will amend the VAT Directive, will apply from 1 January 2015 but Member States are urged to have the legislation in place in their national laws by 1 January 2014.

2.0 Definition of Vouchers

The Proposal defines a voucher as an instrument in electronic or physical form that gives the holder the right to goods or services, or to receive a discount or rebate, in relation to a supply of goods or services, and where there is a corresponding obligation on the issuer to fulfill this right.

The Proposal also stipulates that payment services are not regarded as a voucher. This distinction is important so that certain financial products such as credit cards, are not captured under the Proposal's net.

Vouchers lead directly to the supply of goods and services and are issued to promote sales or to facilitate a purchase. Payment instruments facilitate the spending of a prepaid credit for the purchase of goods and services³.

Three types of vouchers thus are defined:

1. The Single-Purpose Voucher (SPV) that carries a right to receive a supply of goods and services where three things are known at the time of its issue:
 - a. the supplier's identity
 - b. the place of supply of the underlying transaction
 - c. the applicable VAT rate
2. The Multi-Purpose Voucher (MPV) that is any voucher, other than a discount voucher, which does not constitute a SPV. This is to say that at the time of issue, one or more of the three criteria defining the SPV are unknown at the time of issue. This could be for example a chain of hotels offering the holder of the voucher a one-night stay in any of its hotels in Europe. At the time of issue, the supplier's identity is unknown (as this will be the specific hotel that the holder of the voucher chooses), the place of supply is also unknown (as this will be the Member State in which the hotel is situated) and the applicable VAT rate is also unknown (as this will be the applicable VAT rate for accommodation in that Member State),
3. The Discount Voucher (DV) is a voucher carrying a right to receive a price discount or a rebate with regards to a supply of goods and services.

3.0 Timing of the Supply

The Proposal clarifies that the supply of the voucher which carries a right to receive goods or services and the subsequent supply of these goods or services may not be segregated and should be regarded as a single transaction, which must be treated in the same way had the goods or services not been supplied through the use of the voucher. Under this sense, SPVs are subject to VAT at the time of issue, given that all the information relating to the underlying transaction is already known.

In the case of MPVs, this cannot apply until the facts are known relating to supplier, place of supply and VAT rate, and thus the VAT for MPVs under the Proposal, is due at the time of redemption of the voucher, ie at the time of supply of the goods or services. This is in line with principles laid down in the ECJ case, Bupa Hospitals⁴, where advanced payments for goods referred to in general terms in a list which was subject to alteration at any time by agreement between the customer and the supplier, and with the right of the buyer to recover the unused balance of the prepayment at any time, do not qualify as a prepayment that gives rise to a VAT liability on the part of the supplier.

Immediately there is the problem of what happens in the case of SPVs where the voucher is lost or never redeemed. There is no mechanism in place as the Proposal currently stands for the issuer of the voucher to claim back the output VAT which was payable on issue. It can be argued that if the voucher does not have an expiry date, then the supply could still occur and thus the VAT applies.

In most cases however, expiry dates are in place. The issue here is the single transaction concept of the Proposal whereby the payment for the voucher, which holds the underlying right to goods or services,

equates to the purchase of those goods or services. In fact if the voucher is never redeemed, it is dubious if a supply ever took place for VAT purposes. This concept also appears to contrast with the philosophy laid down in the French ECJ case, *Eugénie-les-Bains*⁵ whereby the forfeiture of a hotel customer of his deposit for cancelling his reservation, was not considered as a prepayment for any supply made by the hotelier, and thus not subject to VAT.

There is also the matter of a supplier of SPVs not being on a level playing field with the supplier of MPVs, where these are different taxable persons in the same market, due to the timing difference of the VAT obligation. One approach would be to amend the Proposal to state that the time of supply of any goods or services supplied through a voucher, whether SPV or MPV, should be the date of redemption.

This is the case in Cyprus.

The issue of the voucher, and receipt of payment, is considered an exchange of monies and not subject to VAT. This is probably not a correct justification given that in the case of an SPV, there may be little difference legally between purchasing the voucher itself, or prepaying for a supply of goods or services, where a voucher does not exist. The voucher does carry an underlying right to goods or services and it is this right that the buyer is purchasing, and not the voucher itself.

Nevertheless, an approach to have all vouchers taxed on redemption may be a better simplification of the rules, which is one of the Commission's targets. In such a case, there is no need to have separate definitions for SPVs and MPVs.

4.0 Rules for Distribution of MPVs in a Chain of Supply

The taxable amount in the case of vouchers is their nominal amount, which is defined as *'everything which constitutes consideration, including the VAT amount, obtained, or to be obtained by the issuer of the voucher'*.

Vouchers often pass through a chain of distributors. In the case of SPVs, the VAT is paid up front. In the case of MPVs, where there are distributors in the chain of supply between the issuer of the voucher and the customer, no VAT tax point arises at the point of issuing the voucher to the distributor. Thus the Proposal stipulates that the distribution itself is to be considered a separate service. Where the distributor purchases the MPV voucher below its face value, the value of this deemed distribution service is the difference between the nominal value of the voucher and the purchase price paid, less the amount of VAT related to the supplied distribution service⁶.

This means that the value of the deemed distribution supply will always be VAT-inclusive meaning the reverse charge principal cannot apply. As such, for cross-border supplies, either the issuer or the distributor will require multiple VAT registrations in order to either pay the output VAT in the country where it is payable or claim the input VAT if the VAT charged is of another Member State. Multiple registrations should not be the result of a proposal aimed at simplifying the VAT treatment on a specific matter.

Here, the application of a one-stop shop may be a solution, although this will require further agreements between Member States, which, as history shows, is in itself a challenge.

5.0 Commissionaire

In the case of an undisclosed agent/commissionaire (a taxable person acting in his own name but on behalf of another), a problem arises in cases of MPVs given that the commissionaire would be deemed to have received and supplied the vouchers himself, resulting in a need to adjust the taxable amount at all stages of the distribution chain, with no additional VAT being generated. To avoid such administrative costs, the Proposal removes the application of the commissionaire principal where a taxable person takes part in a chain for the supply of MPVs.

6.0 Discount Vouchers

A discount voucher (DV) or a rebate is in essence a reduction in price and not directly related to the supply itself.

Where the issuer of the DV is also the redeemer, then the DV is simply accounted for as a discount and no VAT implications arise. This treatment was confirmed in the ECJ case of Argos⁷.

Where the issuer and the redeemer are two different taxable persons, the Proposal places a deemed redemption service on retailers (redeemer) who accept and redeem cash-back coupons issued by a third party (issuer) to promote sales of their [issuers'] products or services, and from whom the discount offered by the coupons are reclaimed. In this case the retailer will invoice the third party issuer for the redemption service (being the DV value), VAT inclusive.

If the DV is sold (e.g. a €10 voucher is sold for €5), the sale of the voucher is in itself a separate supply of a service, being the right to a discount, and is chargeable to VAT at the standard rate, regardless of the VAT rate attached to the underlying supply of goods or services of the DV.

7.0 Conclusion

Given the uncoordinated different treatments of vouchers for VAT purposes by Member States, a proposal for harmonisation is a step in the right direction.

The Proposal currently being discussed still has complications and will need to be adapted before being passed as a Council Directive. The increased administration burdens on businesses to comply with the requirements of the proposal, including the need for multiple VAT registrations in the cases of cross-border MPVs, together with the potential distortion of a level playing field between SPV and MPV issuers given the difference in the time of supply, and the ambiguity over the right and the mechanism to reclaim output VAT where SPVs are lost or not redeemed, are some of the main problems attached to the Proposal.

Harmonising the VAT treatment of vouchers is not an easy task, but then agreeing on any form of harmonisation never was. However each spasmodic effort to harmonise seems to contribute to an increase in the administrative burden of businesses in order to comply with VAT regulations.

This not only makes it more difficult for businesses to function in times of an economic crisis, but also makes the EU less competitive as a whole, which goes against the purpose of its foundation. We will await the next version of the Proposal following comments from all Member States and interested parties. We will no doubt be discussing this topic again in around 12 months from now.

FOOTNOTES

1. To this effect emphasis is given to Article 14(2) of the EC Treaty, as amended, which reads: “The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.”
2. EU VAT Directive: Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347 (2006).
3. Reference is made in the Proposal to the Payment Services Directive, Directive 2007/64/EC.
4. ECJ, 21 Feb 2006, Case C-419/02, BUPA Hospitals Ltd and Goldsborough Developments Ltd v. the Commissioners of Customs and Excise.
5. ECJ, 18 Jul 2007, Case C-277/05, Société thermale d’Eugénie-Les-Bains v. Ministère de l’Economie, des Finances et de l’Industrie.
6. For examples on SPVs and MPVs including where a chain of suppliers exist, the Commission issued on the 10 September 2012, a note containing a series of examples to illustrate the Commission proposal on the VAT treatment of vouchers (Interinstitutional File 2012/0102 CNS, document 13499/12 ANNEX <http://register.consilium.europa.eu/pdf/en/12/st13/st13499.en12.pdf>).
7. ECJ, 24 Oct 1996, Case C-288/94, Argos Distributors Ltd v. Commissioners of Customs and Excise.

NOTE

The above is issued as guidance only and should not be solely relied upon to structure business transactions without expert advice.

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