Opinion Statement FC 14/2014

on the VAT treatment of vouchers

Prepared by the CFE Fiscal Committee
Submitted to the European Commission and the EU Council
in September 2014
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We will be pleased to answer any questions you may have concerning CFE’s comments outlined below. For further information, please contact Mr. Piergiorgio Valente, Chairman of the CFE Fiscal Committee or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

Introduction:

On 10 May 2012, the European Commission published a legislative proposal for a Directive on the VAT treatment of vouchers, amending Directive 2006/112/EC (Common System of VAT)\(^1\), to harmonise the VAT treatment of vouchers and to overcome problems such as double or non-taxation, tax avoidance and barriers to business innovation resulting from mismatches in national laws. The European Parliament has been consulted and has delivered its opinion on 17 April 2013\(^2\).

Except for the comments at paragraph 15 below, directed at cross-border payments for accepting vouchers, this Opinion Statement does not consider discount vouchers of the type considered by the European Court in Case C-126/88 *Boots v Customs and Excise Comrs* [1990] ECR I-1235, ECJ. It is instead concerned with single purpose vouchers (“SPV”) and multi-purpose vouchers (“MPV”) that the consumer pays for.

1. The CFE welcomes the idea of introducing harmonised rules in relation to vouchers\(^3\). If well-drafted, such rules will reduce the current dangers of double taxation and non-taxation that result from the lack of harmonisation. However, we are concerned that the current proposal, if adopted, will not achieve these objectives, due to its complexity that will pose great difficulties especially for SMEs.

2. Another important preliminary observation is that the proposal does not clearly address the position where the voucher is issued by a person who is distinct from the person who actually supplies the goods and services. In this situation there is an additional payment between the supplier and the issuer of the voucher that also needs to be taken into account.

3. The CFE welcomes the Presidency’s Note regarding the VAT treatment of vouchers that was published on 26 August 2013. Partly for the reasons indicated in that paper, it does have reservations about the Commissions’ proposal particularly in so far as it relates to MPVs.

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1. COM(2012)206 final
3. The decision of the Court of Justice in Case C-40/09 *Astra Zeneca UK v HMRC* does raise issues of possible concern in so far as it suggests that there may be separate taxable supplies of vouchers since this might result in what is in effect double taxation.
a. **Single Purpose Vouchers**

4 In relation to SPVs, the CFE agrees with the consensus that they be taxed on issue. The main possible issue with the proposal is determining what should be regarded as a SPV or a MPV. In particular:

(i) As the Commission’s Proposal accepts, it may be necessary not only to determine the items that can be acquired with the voucher but also where the supply will take place. This means that any possible cross-border use of vouchers will prevent it from being a SPV, which may in practice severely limit the number of vouchers that can be regarded as SPVs. Indeed this may bring into question the merit of having special rules for SPVs.

(ii) Another possible issue is how specifically the goods or services need to be defined before a voucher should be regarded as a SPV. For example, should a voucher be regarded as being a SPV for this purpose if it can be used for potentially different goods and services whose VAT treatment is identical? The definition in the Commission’s Proposal suggests that a voucher is a SPV even though it can be used for different goods or services provided their VAT treatment is the same. However the reference to defined goods and services in the Explanatory Memorandum means that it is not entirely clear if this is intended. If, as we assume, it is intended that a voucher can be a SPV even though it can be used to acquire a number of different goods or services provided they are taxed on the same basis, it would be helpful if the Explanatory Memorandum could be amended to make it clearer that this is intended. If this is not intended, consideration will obviously need to be given to how specifically the nature of the supply needs to be identified before a voucher can be regarded as a SPV. If the approach taken by the Court of Justice in C-419/02 *BUPA Hospitals Ltd v H.M. Customs & Excise* [2006] ECR I-1685 is adopted, the goods and services will need to be very specifically defined.

b. **Multi-Purpose Vouchers**

5 The CFE considers that the Commissions’ proposal in relation to MPVs is more problematic. Under the proposal the consideration paid for the MPV is to be taxed on redemption. The CFE agrees with this aspect of the proposal.

6 The proposal also envisages that VAT is to be charged by reference to “the nominal value” of the voucher. This is defined in proposed article 74a as everything that constitutes consideration “obtained by the issuer of the voucher”. This is clearly intended to be a sum which is greater than the payment made by the intermediate distributors for the vouchers. This is made clear by the fact that it is intended that the issuer should be able to recover input tax on the difference between the price at which the voucher is sold to the distributor and the nominal value of the voucher. However, it is unclear how the nominal value is intended to be calculated. If the first distributor sells the voucher to a second distributor, the first distributor is liable to account for VAT on the difference between the price that he paid for the voucher and the nominal value of the voucher. He is also given a right to recover input tax on the difference between the price at which he sells the voucher to the second distributor and the nominal value of the voucher. In both instances this is despite the fact that he makes no payment to the distributor. In this regard it is to be observed that the terms on which vouchers are issued can differ. So in some cases the distributor may pay for the vouchers at the time the distributors acquire them while in other cases payment may be made at a later date, for example when the distributor sells the voucher.
It will be apparent that the proposal is drafted on the assumption that a distributor should be regarded as making a supply to the person who he acquired the vouchers from. There may be some cases where factually it would be correct to view the distributor as rendering a promotional service to the issuer of the voucher or the person who the voucher was acquired from. However, as a matter of fact, it is difficult to see why this should always be regarded as being the position. For example some times a business may acquire vouchers to sell them at a discount as a way of promoting its own business rather than the business of the person who issued the vouchers. The proposal also does not make it clear how the system is intended to operate if a non-taxable person buys the vouchers. For example final consumers may buy the vouchers intending to use them and then change their mind and sell them to another distributor.

It will be apparent from the comments at paragraph 6 above that one of the central features of the proposal is a determination of the “nominal value” of an MPV. The CFE has considerable reservations about this aspect of the Commission’s proposal for the following reasons:

(i) when the voucher is sold by a distributor acting on his own account at a profit, rather than as an agent, the profit would not naturally be described as “obtained by the issuer of the voucher”; it has instead been obtained by the distributor, who is acting as principal. If the definition is always intended to include the profit made by distributors in the turnover of the issuer, even though the distributors are acting as principals, it is therefore defectively drafted. It is, in any event, questionable whether it is appropriate to always include the entire price paid by the final consumer in the taxable turnover of the issuer. For the reasons indicated at paragraph 7 above and because he is acting as a principal, there are also many cases where the difference between the price at which the voucher is sold by the issuer and the price at which it is sold to the final consumer would not naturally be described as consideration received by the issuer of the voucher, since he has no entitlement to the payment and the distributor is not acting as his agent;

(ii) the wording of the draft Directive and Explanatory Memorandum make it unclear how the notional value is to be calculated. In particular, it is not clear if it is intended to be a notional figure or is intended to be the amount that the final consumer pays for the voucher. The wording suggests that it is intended to be the amount actually paid by the final consumer, which is obviously the approach that is most consistent with the Directive. It is clearly crucial that this should be clarified;

(iii) if the nominal value is a purely notional figure, as the Presidency suggests may be the position, although it is certainly not clear from the wording of the Proposal, then it offends one of the basic principles of VAT, that the final consumer should just pay VAT on the consideration that has actually been provided for the supply. If it is a purely notional figure, the Presidency has also correctly observed that there may be very considerable difficulties in determining what should be a notional nominal value when the voucher can be exchanged for a number of different goods and services which are sold at different prices and no value has been put on the voucher. The same may be true even for vouchers which can only be exchanged for specific goods if there is no prevailing market price. Even though it is paid for, and is therefore not a discount voucher of the type considered in *Boots v Customs and Excise Comrs* [1990] ECR I-1235, one of the purposes of the vouchers may be to effectively encourage sales by offering the opportunity to acquire goods at a discounted price. In such circumstances it would not be appropriate to use the full market price as the nominal value. In this regard it is to be observed that the definition of a voucher in proposed article 30a does not require it to have a face value and a voucher may in effect be a discount voucher...
because it is sold for less than its face value, although it may not be strictly a discount voucher for the purposes of the Directive, because its terms do not give a right to a discount;

(iv) if the nominal value of an MPV is the sum that the end customer pays for the voucher, it will not be possible to determine the nominal value until the voucher is used. Particularly if there is a chain of distributors, the issuer of the voucher and any intermediate distributors may have difficulties in discovering the price at which the final distributor has sold the voucher. This is a point that was observed by the Presidency and also by the Court of Justice in C-520/10 Lebara Ltd v HMRC at para 30. The proposal would presumably require traders to impose obligations on distributors to report the price at which the voucher is sold, even though there would otherwise be no commercial reason why this obligation should be imposed. Unless special provision is made, a point developed below, if there is a long distribution chain, this information would also need to be passed down the chain sufficiently fast to enable the issuer and earlier distributors to properly account for the tax;

(v) the CFE also observes that there are instances where vouchers may be sold at a loss by a taxable person who acquires them from an issuer, for example on account of a change in market conditions or because the taxable person wants to use the vouchers on as a business promotion of his business and not the issuers. It is not entirely clear how it is intended that VAT should be accounted in such circumstances;

(vi) especially if the nominal amount is a notional figure unconnected with the amount paid by the final consumer, which can therefore generate rights to recover input tax that are unconnected to any payments made, and certainly any payments made by the issuer since he is making no payments to any one, there must be dangers that the proposal could encourage fraud or abuse.

As a minimum, further consideration therefore needs to be given to how to determine the nominal value of the voucher. If the nominal value is a purely notional figure unrelated to the price paid by the consumer, the proposal should be altered so it explains how it is to be calculated. However, the CFE is not attracted by this alternative because it contravenes one of the fundamental principles of VAT, that the charge should be by reference to the sum paid by the final consumer. The CFE also has concerns that this could encourage fraud and abuse. If alternatively it is to be determined by reference to the price paid by the final consumer, irrespective of whether the distributor is acting as agent for the issuer or as a principal, then the wording needs to be changed to make this clearer. However, while it is possible that it constitutes the best of the alternatives, this does cause administrative problems partly touched on above and below. Consideration also needs to be given as to what happens if the vouchers is sold at a loss or if there is a non-taxable person in the chain of supply, for example because a customer who initially bought the voucher for his own purposes decides to sell them, possibly at a loss, to a distributor.

Another related problem is how the time of supply rules are intended to apply particularly to distributors. No doubt it is currently intended that the normal rules should apply. However, how these rules apply in this context is not entirely clear or satisfactory. The Directive envisages the time of supply being determined by the time that the supply takes place, the date of payment and the date of invoice. One of the arguable lacunas of the Directive is that the provisions of the Directive do assume that the maximum taxable amount can be determined at the time of the supply or certainly within 15 days of it: see articles 63-66 and 222. The nature of the problems may vary depending on whether the nominal value is a notional figure or the price actually paid by the final consumer. In this regard the CFE observes that:
(i) the time of supply by the distributor is presumably intended to be when the voucher is sold by the distributor, although under the Commission’s proposal the supply being made by the distributor is not being made to the person buying the voucher but to the person who sold the voucher to the distributor (i.e. to the issuer of the voucher or to an earlier distributor in the chain);

(ii) the distributor will be receiving no cash payments from the person who he is making his supply to, i.e. the person who sold him the voucher. The only payments he will be receiving will be from the person he sells the voucher to, which is presumably intended to be regarded as third party consideration. If he sells on the voucher to another distributor the payment made to him will be less than the nominal value of the voucher. The difference between the nominal value of the voucher and the price at which the voucher is sold by the distributor will never in fact be paid to the distributor and therefore cannot generate a liability to account for VAT on account of its actual payment;

(iii) if the nominal value is a purely notional figure it will cause distributors financing problems. This is because they will presumably have to account for VAT by references to the difference between the price at which they bought the voucher and the nominal value of the voucher. This is despite the fact that they sell the voucher for an amount that is less than the nominal value. They may be able to subsequently recover the difference between the price at which they sell the voucher and the nominal value as input tax. However, it is to be observed that this will not be possible if the final consumer pays less than the nominal value for the voucher, which is grossly unfair. In any event, there will inevitably be delays in the right of recovery when there is a chain of distributors, because the first distributor in the chain will inevitably be rendering his supplies before the next distributor in the chain. He may therefore have to account for output tax at a time when he has no corresponding right to recover input tax, because that will only arise when his customer sells the voucher;

(iv) if the nominal value is the amount paid by the final consumer, there will presumably be multiple accounting and invoicing obligations, since the distributor will have to account for VAT when the voucher is sold to the next distributor, the charge being on the difference between the price paid for the voucher and the price at which it is sold. The amount charged will then need to be adjusted at least once when the voucher is sold to the final consumer, when the intermediate distributors will have to account for VAT on the difference between the price at which they sold the voucher and its nominal value, although there will be a matching right to recover input tax. Indeed this exercise would strictly need to be undertaken each time the voucher is sold.

It is not clear that the Commission has given any consideration to these issues.

10 If the nominal value is the amount paid by the final consumer, as has been noted earlier, both the issuer and intermediate supplier also face the difficulties that they will only be able to fully quantify their liabilities if information is provided by the final vendor of the voucher in sufficient time to enable the other traders to discharge their obligations to duly provide tax invoices and to account to the tax authorities by reference to the price paid by the final consumer. If through no fault of their own, this information is not provided to other traders down the chain in time, it would be grossly unfair if they are penalised by the imposition of penalties or interest liabilities.

11 In the light of the foregoing, it is considered that there would be merit in having special timing rules for accounting for VAT on supplies by distributors of vouchers. If the nominal value is a notional figure, then each distributor should have an obligation to account for output tax at the moment of sale, however if they sell to someone other than the final consumer they should also
have an automatic right to recover input tax on the difference between the sale price and the nominal value of the voucher even though no supply may have been made by their purchaser at that stage. If the nominal value is the amount actually paid by final consumer, to simplify the position there should be no obligation to modify the VAT account until the voucher is used. The requirement to make the adjustments could also be made dependent on the receipt of an invoice from the person the voucher was sold to. Since the obligations to account for output tax should be matched by rights to recover input tax, framing the rights and obligations in this manner should not result in any material revenue risk. The issuer of the voucher will also be aware of its use and will no doubt request the issue of a revised invoice to enable it to recover input tax on the supplies rendered by the distributors.

The problems of the proposal, as described above, can be illustrated by the situation described in the picture below, showing the transactions as they could be envisaged in a normal distribution channel. The voucher in question may be issued at a nominal value of 100, or its nominal value can be missing completely, i.e. in a situation when the voucher would entitle its holder to spend two nights in a hotel of an ABC hotel chain in Berlin, London or Madrid, by the end of the year of the issue of the voucher. It is clear that at the time of their transactions the distributors will have very limited information to determine their VAT liabilities. For example, the transaction between Distributor 1 and Distributor 2 takes place in May, when it is not clear when the final transaction will actually take place and what will be the final taxable price paid by the client as the consumer of the service.

At the same time it is not really clear why the Distributor 1 should be taxed on 18 (the difference between the price paid for the voucher and its notional value, if known) when his profit (i.e. the added value which is received by it) is 2. This is even more difficult to justify in the transaction between Distributor 3 and Distributor 4, where Distributor 3 is in a loss making situation (either intentionally or unintentionally).

The situation may get even more complicated when the person providing the final supply is not identical with the person issuing the voucher.
The CFE considers that there is some force in the analysis of those Member States who view MPVs as a form of pre-payment or a money for money instrument. In the Explanatory Memorandum to the Commission’s Proposal, the Commission draws a distinction between a voucher and a pre-paid credit. But it is difficult to see much difference between the two as a matter of economic reality, if not law\(^4\). However, the CFE can also see that there may be instances where the intermediaries selling vouchers could be said to be making promotional supplies. The definition of a voucher is also sufficiently wide that it would probably extend to discount cards of the type considered in whose supply was considered to be taxable by the Court of Justice in Case C-461/12 *Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden / kantoor Den Haag*. The CFE can also see a case for taxing the sale of vouchers so as to enable VAT recovery and secure VAT neutrality. However, this does cause problems if the supply to the final consumer is exempt. However, if, for the reasons outlined in paragraph 11, an adjusting calculation is, in any event, necessary, there is presumably no reason why the liabilities in the chain should not be adjusted so that the supplies by the distributors should be treated as exempt supplies in cases where the supply to the final consumer is exempt or if the voucher is for some reason not utilised. Given the fact that most supplies are taxable, the CFE can therefore see a strong case for taxing the supplies by distributors in the first instance, but requiring or possibly permitting an adjustment if the supply to the final consumer is exempt or the voucher is not utilised. If the nominal value is a notional figure, an alternative approach might be to give issuers an option to exempt the supply chain in cases where the voucher is likely to be used for exempt supplies.

The CFE accepts that it is possible that the broad methodology suggested by the Commission may in fact be the most attractive. Obviously, as an alternative, when they are acting as principals, each distributor could just account for VAT on their margins, ie by reference to the price that they sell the vouchers for rather than the nominal value of the voucher. From an administration perspective this has the benefit of avoiding the need to make any adjustments, which is an unfortunate consequence of the Commissions’ proposal if VAT is to be calculated by reference to the actual amount paid the final consumer. However, traders may consider it unattractive to have to disclose the margins they have made to their customers. They may be slightly happier to be providing this information to their supplier, although there could also be sensitivities in this context, and may prefer the Commission’s proposal for that reason. The Commission’s proposal also possibly makes it slightly easier to have an adjustment procedure in cases where the voucher is used to acquire exempt services. If the proposal along the lines suggested by the Commission is to be implemented, for the reasons outlined above, the CFE considers that:

(i) further consideration needs to be given to how the nominal value of a voucher is to be determined;

(ii) there is a strong case for having special rules for determining the time of supply;

\(^4\) There has also been a recent reference to the Court of Justice on the issue of whether virtual currency should be exempt in Case C-264/14, *Skatteverket v David Hedqvist*. There may in practice be little difference between virtual currency and a voucher.
(iii) if adjusting calculations are necessary on the sale to the final consumer, the distribution services should be reclassified as being exempt if the supply to the final consumer is exempt or if the voucher is not utilised. Alternatively the issuer should be given an option to exempt the distribution supplies.

In this regard the CFE observes that there are other transactions which have similarities to vouchers but do not fall within the proposal. An example would be bit coins, which probably would not be described as an “instrument carrying a right to receive a supply of goods or services” and another example is the pre-paid credit card referred to by the Commission.

c. Cross-border discount vouchers

15 The Proposal also proposes to alter the treatment of payments by the issuer of a voucher to traders who agrees to reduce the prices that they would otherwise charge for their supplies because the customer provides a voucher. At present such payments are treated as third party consideration for the supply to the customer and a reduction in the consideration received by the issuer of the voucher for the supplies that they make to the distributor who purchases their goods and services in the first instance. The Proposal proposes that the payment should instead be regarded as consideration for a redemption service to the issuer by the trader selling the goods or services to the customer in exchange for the voucher. The Presidency correctly notes that the proposal has an impact on where VAT is accounted when there are cross-border transactions. This issue is not addressed in the Explanatory Memorandum to the Commission’s Proposal. The CFE observes that:

(i) in the cross-border context, for the reasons explained in the Presidency’s Statement, the proposal is likely to reduce the tax that is paid in the country where the consumer is resident. This is because the payment will cease to give rise to a liability to account for tax in the country where the final consumer receives the supply, even though it is in reality additional consideration or for the supply being made to the final consumer. The status quo is for that reason probably more consistent with the destination principle;

(ii) it will also cause problems when the vouchers can be used in a number of member states or in member states and third countries (an issue for example for UK retailers with shops in the Channel Islands) because the issuer will be unable to agree to make one fixed payment to anyone accepting the voucher. This is because the VAT consequences for the issuer of making a fixed payment may differ depending on where the person receiving the payment is established. If the person is established in the same State, the payment will presumably be treated as a VAT-inclusive payment for the supply. However, this will not be the position with a cross-border supply if the issuer is subject to a reverse charge.

Although the CFE is in favour of other changes, on this specific issue, for these reasons the CFE considers that the current rules are to be preferred to the Commission’s proposal on this issue. However, the CFE has no objections to codifying the current rules so as to minimise the possibility of any disputes.

The CFE also strongly believes that any proposed solutions should take proper account of expected supply chains and how transactions are normally commercially evidenced and should not be structured in a manner that imposes significant administrative burdens and new obligations to provide information between businesses when commercially this is not otherwise required. This is particularly true if it requires the disclosure of otherwise sensitive business
information (such as profit margins and information of business counterparties etc.). The proposed rules should also be sufficiently flexible that they can accommodate future developments in what is an evolving commercial environment.