KPMG Meijburg & Co Tax & Legal

CJEU rules on VAT treatment of vouchers

On April 18, 2024 the Court of Justice of the European Union ("CJEU") rendered judgment in case C-68/23 (M-GbR vs Finanzamt O) concerning the VAT treatment of vouchers under the EU VAT rules applying since 2019. This is only the second CJEU case dealing with these new rules and therefore helps provide more clarity on how the rules should operate.

Broadly speaking, the applicable classification of a voucher can give rise to different VAT impacts for a number of reasons. First, it can affect whether the voucher is subject to VAT upon sale (or resale), or later upon redemption. This impacts not only the timing of when VAT needs to be accounted for, but also by whom. Secondly, the place where the voucher is sold may be different from where the voucher is later redeemed for goods or services, which may impact the place where VAT may need to be accounted for. Thirdly, the amount of VAT payable can depend on the qualification and the supplies for which a voucher is redeemed.

This judgment clarifies when a voucher qualifies as a single-purpose voucher ("SPV") – which is taxable upon each (re)sale – and discusses the VAT consequences of the resale of a multi-purpose voucher ("MPV") – which is taxable upon redemption. However, the judgment leaves some room for interpretation which may lead to differences in application between Member States and the need for further referrals to the CJEU in future. In the meantime, we recommend that all parties involved in the issue, resale or redemption of vouchers review the VAT treatment of their activities based on this ruling.

The case

M-GbR is a German reseller of so-called X-cards to end users. The X-Cards are issued by a UK company and can be used to load the user account in the X Shop. From that account, the user can purchase digital content (i.e. electronically supplied services). The X-card is country-locked meaning it is only allowed to be used by end users domiciled or habitually resident in one country (Germany in this case). M-GbR purchases the card from intermediary sellers located in countries other than the UK and Germany.

M-GbR took the position that the X-cards were MPVs and therefore did not charge VAT on the resale of the cards. M-GbR submitted two reasons for this qualification. First, it argued that the distribution of the X-card from the UK company to the resellers located outside Germany was within the scope of VAT in those other countries (and thus, the VAT treatment of the X-card was not clear in advance). Alternatively, it argued that the card was in practice also used by end users not living in Germany who had created a German user account in breach of the terms & conditions of the X shop (resulting in an uncertain place of supply for the services provided in exchange for the X-card).

The German tax authorities disagreed with M-GbR's arguments and took the position that the X-cards were SPVs, as they were only legitimately redeemable by German end users for services taxable in Germany. Accordingly, they argued that German VAT was due on the resale of the X-cards by M-GbR. Secondly, even if the X-cards did qualify as

MPVs, the tax authorities argued that M-GbR would still be liable for VAT on a distribution service performed independently from the resale of the voucher.

The case was brought before a German court which referred questions to the CJEU for a preliminary ruling.

First question: qualification as SPV?

Judgment
The CJEU ruled that to qualify as an SPV, two conditions must be fulfilled at the time of issue of the voucher:

(i) the place of supply of the goods or services for which the voucher can be redeemed must be known; and
(ii) the VAT payable (i.e. the tax base and the VAT rate) on those goods or services must be known.

The CJEU clarified that, as these conditions should be tested at the time of issue of the voucher, it is irrelevant for the classification of the voucher as an MPV or SPV whether the voucher is distributed via intermediaries established in other countries. Rather, only the VAT treatment of the goods and services for which the voucher can ultimately be redeemed should be taken into account for this classification.

In addition – with regard to the first condition – the use of the X-card by users in other countries in breach of the terms & conditions of the card should not be a factor in considering this question. Rather, only the intended or permitted use at the time of issue should be taken into account. As such, it is clear in the case of the X-card that the first condition is fulfilled, as the X-card can only be used in Germany and the digital services for which the X-card can be redeemed are generally taxable at the place of destination (i.e. the customer's place of residence).

The CJEU has left it to the referring court to establish whether all the services for which the X-card can be redeemed are taxable at the same VAT rate (and tax base). If that is the case, the X card qualifies as an SPV. Each transfer of an SPV by a taxable person (acting in its own name) is then a VAT taxable supply, as if the underlying supply for which the voucher can be redeemed is performed.

VAT treatment of resales of SPVs
This raises an interesting question, which is not explicitly answered in the CJEU judgment, in relation to the place of supply of those intermediary sales if a reseller in the chain is established outside the country where the final consumption will be taxed. The judgment could potentially be interpreted as meaning that these intermediary transfers of the X-card are also taxable in Germany given that the ultimate supply is in Germany, which, if correct, could result in intermediaries established outside Germany having to register and account for VAT on their supplies of SPVs. However, this was not explicitly stated in the CJEU judgment and arguably does not automatically follow from the CJEU's ruling. On the contrary, it could be interpreted that, while only the final sale is decisive for determining whether there is an MPV or SPV, the place of supply of each

intermediary supply must be analyzed in its own right. Under this analysis, those intermediary supplies of the digital services would therefore be taxable outside Germany if the B2B intermediary customer is established outside Germany, under the general B2B place of supply.

While not explicitly clear from the CJEU judgment, the better argument seems to be that a B2B intermediary supply of an SPV should continue to be analyzed based on the place of supply rules applying to that B2B supply. In the case of B2B electronically supplied services, this will generally mean that VAT is due in the place where the recipient is established, with VAT arising on a reverse charge basis if the supplier and customer are established in different EU Member States. However, for other types of supplies (e.g. restaurants, hotels, travel, admission to events or supplies of a good), the place of supply of the intermediary sale may indeed be the country of actual use, so that the intermediary resellers may be required to register in that country to remit the VAT due. This outcome would be different if the reseller is not acting in its own name in the transfer of the voucher. However, this requires a careful analysis of the terms and conditions under which the reseller is acting.

It is possible that this question could come before the CJEU again in future if different views are taken by EU Member States and taxpayers on this question. Therefore it may not be the last we hear on this topic.

The second question: distribution services when transferring MPVs

Judgment
The CJEU also discussed a second question should the referring court conclude that the X-card is an MPV: under what conditions should the payment received for an (intermediary) transfer of an MPV (which in itself is not a VAT taxable supply) be regarded as consideration for an independent service, such as a distribution or marketing service?

The second part of the CJEU judgment is less clear. The CJEU firstly ruled that all facts and circumstances of the specific case should be taken into account to determine whether or not there is an independent service. However, it did not rule out the possibility that the resale of an MPV could be subject to VAT provided it is classified as a distinct supply of services to the person who ultimately supplies the goods or services in return for redemption of the MPV. The judgment therefore seems to imply that the recipient of such service must be the redeemer of the voucher and that the entire resale price of the voucher could be considered the taxable amount. The CJEU based this latter conclusion on Article 73a of the EU VAT Directive.

The CJEU stated that this approach ensures that VAT is charged on any profit margin earned through the resale of the voucher and referred to earlier comments by Advocate-General Ćapeta in her Opinion in case C-637/20, DSAB Destination Stockholm AB. Ms. Ćapeta argued in that Opinion that VAT on any 'profit margin' must be accounted for by the *issuer* of the voucher (e.g. if the value of the services redeemed by the customer was less than the price paid for the voucher). However, this point was

not made or explored further by the CJEU in the DSAB Destination Stockholm case and it is not clear how the CJEU in M-GbR would expect it to apply to the current fact pattern.

Further guidance is desirable
Notwithstanding the CJEU's comments, it is not clear that Article 73a of the EU VAT Directive should apply to the taxable amount of any independent service provided by resellers of MPVs, since that Article only relates to the VAT taxable amount of the supplies itself for which an MPV is redeemed. It would seem more appropriate to only apply VAT on the profit margin of the reseller (rather than the full sales price), and only if it is apparent from the arrangements made by that reseller that this margin is actually a consideration for a promotion or distribution service. Furthermore, it is not clear that the recipient of this distinct service would always be the redeemer of the voucher as presumably it could also be the immediately preceding reseller or the issuer of the voucher. The principle of taxing any profit margin made by the issuer of an MPV also requires further elaboration to confirm if it should apply more widely. Therefore, it should be anticipated that the CJEU ruling could lead to different outcomes in practice and this may lead to further CJEU referrals concerning the resale of MPVs in the near future.

It is also noteworthy that the European Commission – as confirmed at the VAT Expert Group meeting on October 26, 2023 – is preparing an assessment report on the operation of the new rules on vouchers, which were introduced in 2019. This may provide further guidance on how the rules currently apply across the EU and whether the stated objective of harmonizing the rules on vouchers across the EU has been met.

Recommendations

Although certain aspects of the CJEU's judgment are not entirely clear, we believe that all parties involved in the distribution chain of vouchers should take action by reviewing the qualifications of the vouchers they issue, sell, distribute and/or accept, and their role in the distribution chain. The VAT consequences thereof should be considered based on this qualification.

If the voucher is an SPV, it should be determined where VAT is due on the resale of the voucher (in its own name). If the voucher is an MPV, all circumstances of the resale – including all arrangements made with other parties in the distribution chain – should be considered to determine if any independent service is provided and, if so, what the VAT taxable amount of that service is.

Your KPMG Meijburg & Co VAT advisor can assist you with such a review, to help you determine the VAT consequences of your role in the distribution chain and, whether it can be modified to better reflect your preferred VAT treatment.

KPMG Meijburg & Co
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