

## Indirect Tax | VAT

Alert 23 July 2024

### Preliminary questions referred to ECJ on VAT treatment customer loyalty scheme. What about the Dutch policy?

*On 20 June 2024, the Swedish Court referred preliminary questions ([Swedish referral](#)) to the European Court of Justice ("ECJ") regarding the interpretation of the provisions of the EU VAT Directive on vouchers in relation to customer loyalty schemes. Since the implementation of the Voucher Directive in 2019, a number of questions were anticipated regarding the treatment of discount vouchers and loyalty schemes. In this case, Lyko Operations AB offers a customer loyalty scheme, whereby customers obtain points redeemable for goods within the framework of the loyalty scheme. The ECJ is asked to determine if the points constitute a voucher and if so, how the taxable base in case of redemption should be determined. In this alert we provide you with an analysis of the Swedish referral and a refresher on the Dutch policy concerning customer loyalty schemes.*

#### Background

The EU VAT Directive provides the definitions and VAT treatment of transactions involving vouchers. A voucher is defined as an instrument that obligates the supplier to accept it as (partial) compensation for the supply of goods or services.

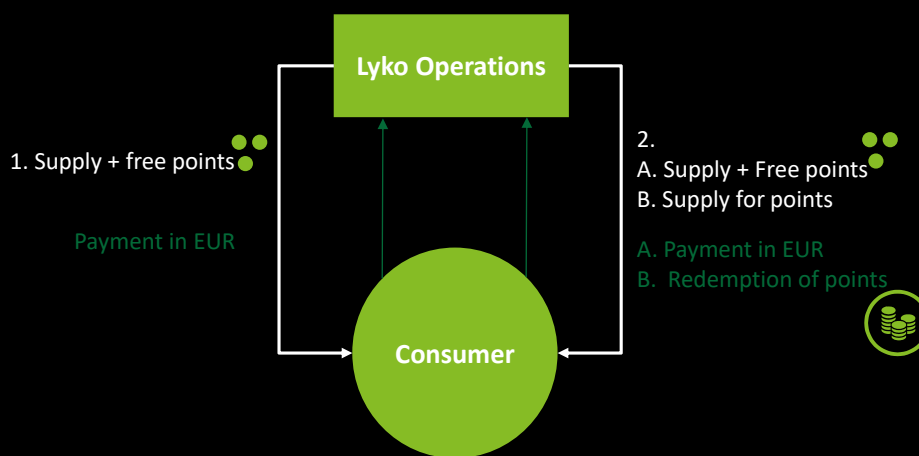
The VAT Directive further differentiates between vouchers of which the VAT treatment (place of supply and VAT due) is known at the time of issuance (single-purpose voucher or "SPV") and all other vouchers (multi-purpose voucher or "MPV"). For SPVs, any transfer of the voucher entitling the recipient of the voucher the right to a supply is considered the supply to which the SPV relates (i.e., taxable at the moment of issuance). In contrast, MPVs do not confer the

right to a specific good or service until they are redeemed and are VAT taxable at the moment of redemption.

### Facts of the case

The case revolves around Lyko Operations AB ("Lyko Operations") which requested a ruling from the Swedish Council for Tax Law ("Swedish Council") on the VAT treatment of their customer loyalty scheme.

Lyko Operations operates in the hair and beauty market, primarily supplying goods to consumers. Their customers can collect loyalty points by purchasing goods from Lyko Operations. These loyalty points can subsequently be redeemed for predetermined goods from the points shop of Lyko Operations, but only in conjunction with a new regular purchase. The VAT rates of the products in the points shop may vary.



The Swedish Council is of the opinion that the loyalty scheme does not constitute the issuance of a voucher to its customers, as no compensation is paid by the customer to obtain the points, and the points do not reflect or represent a monetary value (the points themselves cannot be used for partial payment). The Swedish tax authorities ("STA") agree with the ruling of the Swedish Council. According to the STA, a voucher should be proof that payment has been made for a future supply of goods or services and, therefore, always reflects a monetary value.

In contrast to the Swedish Council and the STA, Lyko Operations takes the view that the points are instruments that constitute a voucher, as Lyko Operations is obligated to accept the points as compensation for goods in their points shop. Lyko Operations argues that the fact that customers receive the points for free should be irrelevant in determining whether the instrument qualifies as a voucher. Since the VAT treatment cannot be determined at the moment of issuance of the points due to the varying VAT treatment of the goods in the points shop, Lyko Operations believes that the points constitute an MPV. Furthermore, because the points are issued for free and do not have a face value, the taxable base on redemption should be €0.

As EU VAT law is not clear on this, the Swedish Supreme Court referred the following preliminary questions to the ECJ (paraphrased):

- 1) Can points in a customer loyalty scheme as applied in this case constitute a voucher for VAT purposes?
- 2) If so, how should the taxable amount be determined when the points are redeemed?

### Dutch policy on customer loyalty schemes

Since a variation of types of vouchers, discount vouchers and coupons can be distinguished based on the Dutch policy, we summarized the VAT consequences of each different type based on that policy below, before commenting on the potential impact of this case for the Dutch practice.

Description	VAT consequences per Dutch policy
<b>Stamps (Zegels)</b>	
<ul style="list-style-type: none"> <li>▪ Provided free of charge</li> <li>▪ Redeemable for cash</li> </ul>	The retailer is allowed to reduce its VAT due in a tax period by the redeemed stamps or, if the stamps are purchased by the reseller, upon issuance. The reduction of the VAT due is applied in proportion to the standard and reduced rate as applied by the reseller.
<ul style="list-style-type: none"> <li>▪ Provided for consideration</li> <li>▪ Redeemable for cash</li> </ul>	The benefit/discount received by the consumers (difference between the amount paid for stamps and amount received upon redemption), follows the same mechanism as stamps provided free of charge.
<b>Coupons (Waardebonnen)</b>	
<ul style="list-style-type: none"> <li>▪ Provided at the same time as a regular purchase</li> <li>▪ Provided free of charge or for remuneration</li> <li>▪ Redeemable as partial payment</li> </ul>	<p>VAT is due on redemption, whereby the taxable amount is derived from the amount paid on redemption and any amount paid for the coupons.</p> <p>If used as full payment, the rules for “free vouchers” apply (see below), i.e., the coupon is not treated as a ‘Waardebon’.</p>
<b>Discount voucher (Kortingsbonnen)</b>	
<ul style="list-style-type: none"> <li>▪ Not provided at the same time as a purchase</li> <li>▪ Provided free of charge or for remuneration</li> <li>▪ Redeemable as partial payment <b>or</b> to be shown to get a discount</li> </ul>	<p>If the discount voucher is supplied against remuneration, this is a taxable service, subject to the standard Dutch VAT rate.</p> <p>The discount given reduces the taxable amount of the supplies (either at the level of the reseller or the organizer).</p> <p>A discount voucher can consist in both discount vouchers that are redeemed (handed over/used) once as well as discount vouchers that can be used multiple times (e.g., the coupon is not redeemed, but shown to get the discount). The discount can either be a fixed amount or a percentage.</p>

## Free vouchers

<ul style="list-style-type: none"><li>▪ Provided at the same time as a purchase (if it does not qualify as a Coupon) or separately</li><li>▪ Provided free of charge</li><li>▪ Redeemable as partial or full payment</li></ul>	<p>The voucher may either be an MPV or an SPV. The latter only in exceptional cases, as generally the VAT due is not known at the moment of issuance.</p> <p>The following options apply upon redemption of an MPV, subject to the type of service/product acquired:</p> <ul style="list-style-type: none"><li>▪ Services. No VAT is due for the service (no deemed supply). No (additional) VAT recovery limitation applies, provided that the costs of the services can be considered general costs.</li><li>▪ Products that qualify as samples or low-value gifts (worth less than EUR 15). No VAT is due and no (additional) VAT recovery limitation.</li><li>▪ Products that do not qualify as samples and exceed the threshold for low value gifts. The supply qualifies as a deemed supply and the taxable amount is the purchase price or cost price.</li></ul>
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### *Dutch policy on Coupons vs Free vouchers*

Based on the policy, “instruments” that by itself do not qualify as a voucher, may do so taken together. The illustrative example of a savings card for a free cup of coffee is given (“buy 10, get the 11<sup>th</sup> for free”). As the stamps are provided free of charge and can be used as full payment, the stamps do not qualify as Coupons. Based on the policy, each stamp (received when buying a cup of coffee) does not fulfil the voucher definition, though the complete card (with 10 stamps) does. When provided free of charge, the VAT implication of free of charge vouchers are prescribed.

## Considerations and implications of the outcome for the Dutch Practice

### *Considerations on the taxable base for free vouchers in the Dutch policy*

Please note that the Dutch policy does not elaborate on the consequences when a Free voucher is partially used as payment. In our view, it follows from the law that, in such cases, the taxable base is limited to the amount actually paid on redemption. This may, however, result in considerably different outcomes for VAT.

An example:

- Voucher received free of charge, useable as partial or full payment for products.
- Redeemed for product with retail price of EUR 30 (incl. 21% Dutch VAT).
- Redeemed for product with cost price of EUR 20 (excl. 21% Dutch VAT).
- In case of additional payment on redemption, this payment is EUR 5.

If it meets the criteria as	VAT consequences
<b>Coupons (Waardebonnen)</b>	
<ul style="list-style-type: none"> <li>▪ Provided free of charge</li> <li>▪ Redeemed as partial payment</li> </ul>	Taxable amount: EUR 4.13 (VAT: EUR 0.87)
<b>Discount voucher (Kortingsbonnen)</b>	
<ul style="list-style-type: none"> <li>▪ Redeemed as partial payment</li> </ul>	Taxable amount: EUR 4.13 (VAT: EUR 0.87) (EUR 5 incl. VAT = EUR 30 retail – EUR 25 discount)
<b>Free vouchers</b>	
<ul style="list-style-type: none"> <li>▪ Redeemed as full payment</li> </ul>	Taxable amount: EUR 20 (VAT: EUR 4.20). (Technically a deemed supply, effectively a correction of the input VAT)
<ul style="list-style-type: none"> <li>▪ Redeemed as partial payment</li> </ul>	Taxable amount: EUR 4.13 (VAT: EUR 0.87)

This example illustrates that, based on the Dutch policy, Free vouchers used as full payment may result in a higher tax liability. This is a result of the interpretation that the use of a redemption of a voucher as full payment results in a deemed supply.

Both Dutch and EU VAT law have specific rules to determine the taxable amount for activities. The general rule is that the taxable amount is based on the remuneration stipulated. Two of the exceptions to this general rule are (i) for MPVs the taxable amount is based on the amount paid for the MPV, or (if not known) the face value of the voucher, and (ii) for deemed supplies of goods (including free of charge supplies) the purchase price or cost price. It is not apparent from the Dutch and EU VAT law in which order these exceptions should be applied: for a free MPV without a face value is the taxable amount equal zero or should it be considered a deemed supply. Dutch VAT policy points to the latter, though Lyko Operations argues the first.

More generally, when the policy was updated in respect of the new vouchers rules per 2019 it has been argued by the Dutch association of tax advisors that Free vouchers do not qualify as vouchers at all. The Dutch Ministry of Finance did **not agree**. It follows from the questions raised in the Lyko Operations case, that the Dutch interpretation is not an “acte clair”.

In our view, most of the loyalty schemes mentioned above may result in a VAT neutral outcome, as the VAT due is derived from the remuneration received by the retailer. This is, however, not the case where Free vouchers are used for products that do not qualify as low-value gifts. The deemed supply triggers an additional VAT liability without any income. Although this outcome appears consistent with ECJ case law (ECJ 27-04-1999, [C-48/97](#) (Kuwait Petroleum) for supplies of goods), it should be recognized that this case law is from before the current voucher rules. The current rules specify (i) that the voucher is the consideration for the supply (i.e., it is not a supply for free), and (ii) the specific taxable amount to be applied for this consideration (which effectively may be zero).

## Implications of the outcome for the Dutch Practice

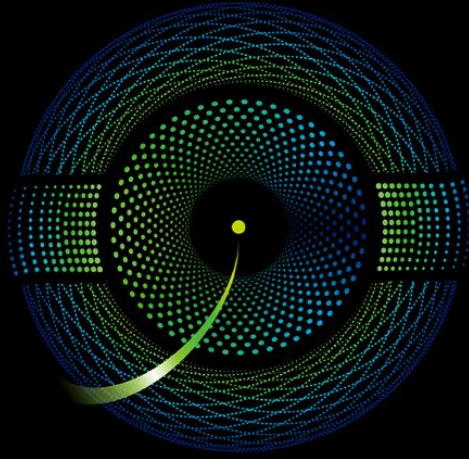
Based on the facts in the case referred to the ECJ, from a Dutch VAT perspective the points may qualify as Free vouchers qualifying as an MPV. The STA uses in the referred case a comparison to a “coffee stamp card” to conclude that it is not a voucher as the points do not have a separate value. The same example is used in the Dutch policy, though with a different conclusion. Also, the argument of Lyko Operations that the points qualify as MPVs and, therefore, the taxable amount is zero, is not in line with the Dutch policy. As this case illustrates view different from the view in Dutch policy, it could be very relevant for Dutch practice.

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