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# **The EU VAT Treatment of Vouchers in the Context of Promotional Activities**

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## PREFACE

Years ago I decided, unsuspecting and underestimating everything, to start this research. From the start of my career in VAT, I was interested in the VAT treatment of vouchers. It was the topic of one of my first publications, in 2003. The tension between a business' right to deduct VAT incurred on business costs (promotional activities) and the fact that these promotional activities often lead to private consumption, which needs to be taxed, deserved proper research. Adding the voucher dimension made it even more challenging.

VAT is not the only thing that I find interesting, and not the most relevant thing in my life. During my research, other relevant things happened: I met my wife, we got married, I changed jobs, we had three daughters, etc.). This meant that I spent more time on this research than average. As a consequence, the rules I was trying to capture and describe changed substantially during the period of my research. In 2012, the EU legislator proposed rules for the EU VAT treatment of voucher transactions. This meant substantial parts of the research had to be rewritten. The EU VAT rules that finally came into force in 2019 were different from the originally proposed rules, which meant more adjustments. And of course the Court of Justice of the European Union also ruled several cases on the topic. If anything, I learnt that you shouldn't take too long finishing your research.

I have experienced my research as a journey. This book is a travel guide that could help travellers negotiate parts of the ever-changing landscape that is EU VAT. A landscape that is sometimes covered in thick mist. A landscape resembling a marshland, constantly changing: sometimes paths disappear, to be replaced by new, clearer routes but also by paths that are only described but not actually tested yet. I've tried to find the most sensible routes to some destinations, explaining in this travel guide why I prefer certain routes to others and where possible alternative routes could lead. I hope that this guide has lifted some of the fog and allows travellers to navigate parts of the VAT landscape more confidently.

I would like to take this opportunity to thank the people that have contributed to the realisation of this research.

I would like to thank Mariken van Hilten, René van der Paardt, Peter Essers and Kenneth Vyncke for agreeing to be part of the PhD committee. I appreciate the honest feedback they provided and their time and effort.

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enthusiastic and supportive, and by the time we both started believing that the actual end could actually be in sight, he proved invaluable in his support, comments and enthusiastic sparring sessions. Gert-Jan was appointed as my sponsor somewhat later, because the rules regarding the PhD-process were changed during the period of my research. Gert-Jan proved to be not only very discerning in an extremely positive way, but also of great help guiding me through the last crucial practical stages of the process. Both Herman and Gert-Jan focussed on improving the end result as much as possible, and their input was invaluable.

I also owe gratitude to my current employer, EY, as well as my previous employer. They believed in the added value of this process and allowed me more latitude than I could have hoped for. It would have not been possible to finish this research without their support.

I owe my friends and family a special thank you. The time spent on this research was time not spent on them. I'm sure that I cannot make this up to them, but I promise I will do my best.

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This manuscript was finalised on 1 March 2019. Legislation, regulations and case law published after that date have not been included.

Laren, May 2019.

Jeroen Bijl

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## CHAPTER 1

# Introduction

Vouchers are used for many different purposes, and vouchers have many shapes and forms. Vouchers can have a 'face value' printed on them, allowing the holder of that voucher to use it as consideration (payment) for goods or services to be provided by businesses that have agreed to accept these vouchers. Vouchers can also allow the holder a certain discount to a (future) purchase, or a refund of part of the purchase price of a product. Vouchers can be issued when purchasing goods or services, for no additional charge. Vouchers can be sold. Voucher can be printed in newspapers or on-line. Some vouchers are sold by one business and will allow the holder a discount at a different business. Outside the 'realms of business promotion', vouchers are also used as, for example, school vouchers, travel vouchers and meal vouchers. What all of these vouchers have in common is that they represent the entitlement of the holder to something.

From a VAT perspective, taxing 'the entitlement to something' has proven difficult. For example, because different EU Member States applied a different VAT treatment to transactions involving vouchers, the European legislator has worked for more than ten years on a common set of rules regarding the VAT treatment of vouchers. In this research, I have tried to establish how voucher transactions should be treated from a VAT perspective, using (amongst other things) the 'economic and commercial reality' of these transactions as a test to see how the current treatment, based on existing legislation and case law, compares to what in my view is the desired or appropriate VAT treatment of such transactions.

In this research, I argue and substantiate why transactions involving vouchers do not need a specific VAT treatment. Issuing, selling and redeeming vouchers are, in my view, not transactions that should be, as such, subject to VAT. The vouchers are, as I will advocate, only a form of practical means that enable certain transactions to be performed. In my view, only the transactions for which the vouchers are used are relevant from a VAT perspective. Because there are VAT rules for voucher transactions, I will, however, review and discuss these rules.

Because vouchers are (most) often used for promotional activities, and because promotional activities have a very specific VAT treatment, I will research the VAT treatment of promotional activities in order to establish the desired or appropriate VAT treatment of these transactions where they involve the use of vouchers. Because the range of different types of promotional activities also includes the types of non-promotional transactions for which vouchers are used, this method should cover the relevant types of transactions involving vouchers from a VAT perspective. Therefore, I will research the VAT treatment of promotional activities before I focus on voucher transactions. In the chapter about

vouchers, this research of the VAT treatment of promotional activities will culminate in a comprehensive review of the current as well as the desired or appropriate VAT treatment of transactions involving vouchers.

## 1.1 Vouchers, promotional activities and EU VAT

Many businesses perform promotional activities. If a business wants to grow its turnover, it needs to sell more of its products, whether they are goods, services or both. Growing turnover requires either existing customers to purchase more or to increase the amount of customers that buy the products. Promotional activities are employed to entice existing customers to make more purchases and potential new customers to actually start buying a business's products. Performing these promotional activities is, therefore, very much in the interest of the business and for the purpose of ensuring the continuation, if not growth, of the business. The costs of these promotional activities are business costs.

Promotional activities can be categorised into several types of activities, such as advertising, press releases, consumer promotions (schemes, discounts, contests), trade discounts, freebies, incentive trips, awards etc. Sales promotions, as distinct from advertising, publicity and public relations, include freebies, contests, discounts, free services, passes, tickets etc.<sup>1</sup>

Some promotional activities allow customers to purchase several items for a price that is lower than the combined shelf price of the individual products. Some of those products may be advertised as 'free' with the purchase of other goods or services. Discounts on the purchase of a single product can also be considered a sales promotion. Some businesses organise prize contests or lotteries to promote their products and/or brand. And, finally, vouchers are often used as sales promotion. Vouchers have many shapes and forms. Some examples are book tokens, cash back coupons and gift cards, but also loyalty reward 'points'. The VAT treatment of these promotional activities is not very straight forward, even since the EU legislator introduced new rules on the VAT treatment of (transactions involving) vouchers.<sup>2</sup>

Sales promotions<sup>3</sup> are one of the aspects of what is referred to by some as 'the marketing mix':<sup>4</sup> the four controllable variables that are combined to appeal to a business' target market, the other three being product, price and place (distribution). Promotional activities refer to the entire set of activities, which communicate the product, brand or service to the user. The idea is to make people aware, attract and induce to buy the product, in preference over others. For the purpose of this research, I will only look at 'sales promotions'. I will use the blanket term 'promotional activities' to refer to 'sales promotions'.

1 G.D. Harrell, *Marketing – Connecting with Customers*, Prentice Hall, 2004, Ogden-Barnes, S. and Minahan, S., *Sales Promotion Decision Making*, Business Expert Press, 2015 and Yeshin, T., *Sales Promotion*, Cengage Learning, 2006.

2 Council Directive (EU) 2016/1065 of 27 June 2016 amending Directive 2006/112/EC as regards the treatment of vouchers, OJ 2016, L 177, p. 9.

3 See G.D. Harrell, *Marketing – Connecting with Customers*, Prentice Hall, 2004, pp. 479 and 484.

4 See G.D. Harrell, *Marketing – Connecting with Customers*, Prentice Hall, 2004, p. 6.

From a VAT<sup>5</sup> perspective, these ‘sales promotions’ are most challenging because they can at the same time be considered an essential business costs (for the business performing these promotional activities) as well as a transaction leading to consumption at the customer’s end of the transaction. From a VAT perspective, VAT on business costs is generally deductible, unless the costs are attributable to specific activities that disallow VAT deduction, such as certain VAT exempt transactions and non-economic activities. On the other hand, some promotional activities provide customers and potential customers of businesses with free goods or services. A basic rule of VAT is that consumption should be taxed: the EU VAT is a general tax on consumption.<sup>6</sup> Taxation can be achieved in different ways, e.g. by adjusting the initial VAT deduction or by actually taxing the supplies that are made free-of-charge. This is especially true for transactions that occur at the end of a production and distribution chain (the business-to-consumer or B2C supplies) because by definition, these need to be taxed under the rationale underlying the EU VAT system. Consumers cannot deduct VAT – consumption has to be taxed. The tension between the right to deduct VAT on business related costs and the need to tax consumption makes the area of sales promotions a very rewarding research topic.

Vouchers are used by businesses in a wide range of promotional activities. Vouchers can be gift cards that are sold for consideration, enabling businesses to receive payments (at the time of the sale of the voucher) before they actually make a supply of a good or a service. Voucher can also be used to allow customers a discount, e.g. on the price of a specific product or on designated products for a specific period of time. Recent research in the field of VAT and promotional activities exists,<sup>7</sup> but not specifically focussed on the VAT treatment of vouchers (as used for promotional activities).

Because vouchers are used as instruments in a wide range of promotional activities, I will first focus on the current VAT treatment of promotional activities as such and how, in my view, these activities should be treated for VAT purposes. I will then research how the use of vouchers in these promotional activities is treated for VAT purposes and how, in my view, this ‘use of vouchers’ should be treated for VAT purposes. I started writing this research a long time ago, before the Commission presented its view on the VAT treatment of vouchers. By the time I finished this research, the EU rules for the VAT treatment of certain vouchers were accepted by the EU Member States and these rules came into force on 1 January 2019. In this thesis, I will explain why I don’t think that these new rules represent the ideal VAT treatment of transactions involving vouchers, even though the new rules do provide for a more uniform interpretation and therefore provide more legal certainty for businesses using vouchers in the EU.

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5 Where I use ‘VAT’ I mean EU VAT as applied in the EU Member States under Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

6 See Article 1 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1), hereinafter referred to as ‘the EU VAT Directive’.

7 The doctoral thesis of Nathalie Wittcock, titled ‘Sales promotion techniques and VAT – A search for neutrality for the sales promoter, also taking into account the other key features and principles of the VAT system’ was publicly defended on 15 December 2017, and had not been published at the time of closing this document. See also Nathalie Wittcock, *Sales Promotion Techniques and VAT*, EC Tax Review 2018/3, pp. 127-138.

## 1.2 Focus of the research (conceptual framework): the EU VAT treatment of vouchers, in the context of promotional activities

EU VAT aims to tax (final) consumption.<sup>8</sup> In that regard, certain transactions for which no (real) consideration is received by the taxable person, are treated as supplies of goods or services effected for consideration subject to VAT. The purpose of those provisions is to ensure equal treatment as between a taxable person who applies goods or services for his own private use or for that of his staff and a final consumer who acquires goods or services of the same type against payment. The taxation of these transactions is designed to prevent situations in which final consumption is untaxed.<sup>9</sup>

The CJEU has repeatedly held that the right of VAT deduction is an integral part of the VAT scheme and in principle may not be limited.<sup>10</sup> That right must be exercised immediately in respect of all the taxes charged on input transactions. Any limitation on the right to deduct VAT affects the level of the tax burden and must be applied in a similar manner in all the Member States. Consequently, derogations are permitted only in the cases expressly provided for in the EU VAT Directive.<sup>11</sup>

Within this playing field of VAT deduction and taxation, it is also possible that transactions are performed for no consideration and for private individuals, but for purposes which are not other than those of the business. In such cases, the personal benefit derived by individuals from such transactions is of only secondary importance compared to the needs of the business.<sup>12</sup> These transactions should not be taxed under the provisions mentioned above. The EU VAT Directive also explicitly excludes the application of goods for business use as samples or as gifts of small value from being taxed.<sup>13</sup>

The EU VAT rules don't allow businesses to deduct the VAT on costs that are directly linked to specific VAT exempt transactions, such as lotteries and other games of chance.<sup>14</sup> One of the questions I will examine in this research concerns the deductibility of VAT where a business organises a free lottery or sweepstake in order to promote its business, where

<sup>8</sup> See Article 1 of the EU VAT Directive.

<sup>9</sup> See CJEU case C-581/08, *EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs*, ECLI:EU:C:2010:559, paragraphs 17 and 18.

<sup>10</sup> See, for example, CJEU case C-62/93, *BP Soupergaz Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion v Greek State*, ECLI:EU:C:1995:223, paragraph 18, Joined Cases C-110/98 to C-147/98 *Gabalfria and Others v Agencia Estatal de Administración Tributaria (AEAT)*, ECLI:EU:C:2000:145, paragraph 43, CJEU joined Cases C-177/99 and C-181/99, *Ampafrance SA v Directeur des services fiscaux de Maine-et-Loire (C-177/99)* and *Sanofi Synthelabo v Directeur des services fiscaux du Val-de-Marne (C-181/99)*, ECLI:EU:C:2000:470, paragraph 34 case C-409/99, *Metropol Treuhand WirtschaftsstreuhandgmbH v Finanzlandesdirektion für Steiermark and Michael Stadler v Finanzlandesdirektion für Vorarlberg*, ECLI:EU:C:2002:2, paragraph 42.

<sup>11</sup> See, for example, CJEU case C-409/99, *Metropol Treuhand WirtschaftsstreuhandgmbH v Finanzlandesdirektion für Steiermark and Michael Stadler v Finanzlandesdirektion für Vorarlberg*, ECLI:EU:C:2002:2, paragraph 42.

<sup>12</sup> See CJEU case C-258/95, *Julius Fillibeck Söhne GmbH & Co. KG v Finanzamt Neustadt*, ECLI:EU:C:1997:491, paragraph 30.

<sup>13</sup> See Article 16, second paragraph, of the EU VAT Directive.

<sup>14</sup> See Article 135(1)(i) of the EU VAT Directive.



that business would have the right to fully deduct VAT on any costs directly related to his usual/normal business activities.

The VAT treatment of granting discounts or rebates, as included in the EU VAT Directive and as developed by the CJEU, is in my view not always clear nor compatible with the relevant principles underlying the EU VAT system. This is even more the case where vouchers are involved. It has taken the EU a long time to introduce specific rules regarding the VAT treatment of transactions involving vouchers, and these rules only apply to specific species of vouchers, leaving the VAT treatment of other types of vouchers to be dealt with by the EU Member States. The new rules also raise some fundamental questions of their own.

The types of sales promotions I will examine in this research are discounts, supplies free of charge as part of a combination of supplies as well as separate from any other supply, including samples and reward goods, barter transactions, free prize contests and vouchers (including coupons, gift cards, loyalty points etc.). The chapter about the VAT treatment of vouchers (Chapter 9) is largely based on the VAT treatment of the type of promotional activities for which they are used, as described in the chapters before I go into the VAT treatment of transactions involving vouchers.

I have identified and chosen these specific promotional activities because in my view, all relevant VAT related questions that I will research are represented in these promotional activities. I am sure that businesses will apply and introduce countless other promotional activities, now and in the future, but in my view, the relevant basic VAT questions that I will examine and answer in this research will remain the same.<sup>15</sup>

I have chosen the VAT treatment of transactions involving vouchers as the focal point of this research, because it has become clear that legislators, courts and businesses struggle with this specific topic. Even though the EU legislator has tried to solve some of the issues in this respect, I will explain that these new rules may still require improvement. Also, the transactions involving vouchers that are not covered by these new rules pose challenges by themselves, and I will address these challenges in this research. My aim is to find the most optimal way of treating transactions involving vouchers, from a VAT perspective, based on the principles underlying the EU VAT system and the economic reality of these transactions, as I will explain in Sections 2.4 and 2.5.

### **1.3 Research questions**

This research is aimed at answering how transactions involving vouchers should be treated from an EU VAT perspective, under the current rules as well as under desired or appropriate rules/law, as (amongst other things) based on the economic and commercial reality of the relevant transactions. Given that voucher transactions can take many different shapes and forms, I have based this research on the VAT treatment of the promotional activities underlying the voucher transactions. This means that I will also have to establish the current

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<sup>15</sup> Unless the current EU VAT rules themselves are changed.

and desired or appropriate VAT treatment of these underlying promotional activities. For that purpose, I will also answer the following, preliminary, questions:

- How to determine whether a supply is made free of charge?
- How to determine whether a supply that is part of a composite supply (or: an element in a composite supply) that is made for consideration, is made free of charge?
- What is and what should be the VAT treatment of discounts or rebates granted to other persons than the actual recipient of the original transaction?
- Which free supplies are and should be taxed and how can this be best achieved?
- What is and what should be the taxable basis or taxable amount for free supplies?
- What is and what should be the taxable amount or taxable basis for barter transactions?
- Can the VAT on costs incurred for performing promotional activities always be fully deducted? Should it always be deductible?

The culmination of the answers to the above questions will then lead to the answer to the final question:

- How should transactions involving vouchers, in the context of promotional activities, be treated from an EU VAT perspective?

Where I answer the question about how certain transactions should be treated from an EU VAT perspective, I will test this 'desired' treatment against the referencing system I describe in Section 1.4.

Where relevant, I will answer these questions, applying positive EU law and case law and testing this against the basic principles of EU VAT as well as the main features of EU VAT.

#### **1.4 Research framework and referencing system**

In order to be able to answer the above questions, a referencing system or research framework is required. I will use positive law as a first reference system: I will use both the EU VAT rules and regulations, including the EU VAT rules regarding the VAT treatment of transactions that involve the use of vouchers as applicable from 1 January 2019, as well as CJEU case law on the relevant topics. It is possible that positive law, or rather the application thereof to promotional activities, is not in line with what I consider to be 'desirable law' or 'appropriate law'. By appropriate law I mean a principled approach that is in line with the principles of justice and fairness.<sup>16</sup> Appropriate law should, therefore, be based on and founded on the (relevant) fundamental principles underlying the EU VAT system as well as the basic features of the EU VAT system. I will also use 'economic reality' or 'commercial reality' as a reflection of justice and fairness, using it as a reference for testing whether positive law is in line with appropriate law. Therefore, I will have to clearly outline this framework and referencing system. Where I find that the application of positive law for determining the VAT treatment of promotional activities is not in line with appropriate law, I will provide guidance for formulating appropriate law and, where possible, actually provide suggestions for appropriate law.

<sup>16</sup> R. Wolfram and V. Röben (Eds.), *Legitimacy in International Law*, Springer (Germany), 2008, p. 385.

## 1.5 Relevance of the research

For the EU, VAT in itself is relevant for various reasons. The common Value Added Tax (VAT) system plays an important role in the European Union's Single Market. It was originally put in place to do away with turnover taxes which distorted competition and hindered the free movement of goods and to remove fiscal checks and formalities at internal borders.<sup>17</sup> It is a major and growing source of revenue in the EU,<sup>18</sup> raising almost EUR 1 trillion in 2014, corresponding to 7% of EU GDP.<sup>19</sup> One of the EU's own resources is also based on VAT. EU Member States should for this purpose all pay 0.3% (on average) of the harmonised VAT assessment bases determined according to Union rules.<sup>20</sup> This means that the correct application of the EU VAT rules can have a relevant financial impact.

Also, under one of the fundamental principles underlying the EU VAT system (the principle of 'neutrality'), similar transactions should be treated equally for VAT purposes.<sup>21</sup> For voucher transactions as well as the underlying promotional activities, this means that where a business decides to apply a certain promotional activity (involving vouchers), the VAT treatment thereof should be the same in all EU Member States but also the VAT treatment of similar promotional activities should be the same. Given the abundance of preliminary questions about the VAT treatment of various promotional activities (or transactions that

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17 Press Release from the European Commission, 7 April 2016, IP/16/1022.

18 See also, for example, S.B. Cornielje, *Fusies en overnames in de Europese BTW, Fiscale Monografieën nr. 146*, Deventer (Netherlands): Wolters Kluwer 2016, p. 6.

19 Press Release from the European Commission, 7 April 2016, IP/16/1022.

20 2007/436/EC, Euratom: *Council Decision of 7 June 2007 on the system of the European Communities' own resources*, OJ L 163, 23.6.2007, p. 17–21, Article 2(1)(b) and 2(4). The assessment base to be taken into account for this purpose shall not exceed 50 % of GNI for each Member State, as defined in paragraph 7 of Article 2 of this Council Decision.

21 A.J. van Doesum, H.W.M. van Kesteren, G.J van Norden, *Fundamentals of EU VAT law*, Alphen aan den Rijn: Kluwer Law International, 2016, p. 38.

apply the same principles as promotional activities) that have been referred to the CJEU,<sup>22</sup> it seems that neutrality has not been fully achieved yet.

The EU VAT rules did, until the adoption of the rules that will be applicable from 1 January 2019, not provide for specific rules on the treatment of transactions involving vouchers. Using a voucher in a taxable transaction can have consequences for the taxable amount, the time of a transaction and even in certain circumstances, the place of taxation. Uncertainty about the correct tax treatment can be problematic for cross-border transactions and for chain transactions in the commercial distribution of vouchers. The absence of common rules has obliged Member States to develop their own solutions, inevitably uncoordinated. The resultant mismatches in taxation cause problems such as double or non-taxation but also contribute to tax avoidance and form barriers to business innovation. Moreover, increased functionality in vouchers has made the distinction between vouchers and more generalised payment instruments less clear.<sup>23</sup> The VAT rules that are applicable from 1 January 2019 do not apply to all types of vouchers and do not solve all relevant issues, as I will demonstrate in this research.

Certainty enables businesses to perform well, grow and thrive. A stable business environment requires certainty about how the relevant rules should be applied. Ensuring legal certainty is one of the EU VAT system's objectives.<sup>24</sup> From the above it is clear that currently, there

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- 22 See, for example, CJEU cases 230/87, *Naturally Yours Cosmetics Limited v Commissioners of Customs and Excise*, ECLI:EU:C:1988:508, C-126/88, *Boots Company plc v Commissioners of Customs and Excise*, ECLI:EU:C:1990:136, C-68/92, *Commission of the European Communities v French Republic*, ECLI:EU:C:1993:888, C-33/93, *Empire Stores Ltd v Commissioners of Customs and Excise*, ECLI:EU:C:1994:225, C-288/94, *Argos Distributors Ltd v Commissioners of Customs & Excise*, ECLI:EU:C:1996:398, C-317/94, *Elida Gibbs Ltd v Commissioners of Customs and Excise*, ECLI:EU:C:1996:400, C-48/97, *Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise*, ECLI:EU:C:1999:203, C-108/00, *Syndicat des producteurs indépendants (SPI) v Ministère de l'Economie, des Finances et de l'Industrie*, ECLI:EU:C:2001:173, C-86/99, *Freemans plc v Commissioners of Customs & Excise*, ECLI:EU:C:2001:291, C-380/99, *Bertelsmann AG v Finanzamt Wiedenbrück*, ECLI:EU:C:2001:372, C-184/00, *Office des produits wallons ASBL v Belgian State*, ECLI:EU:C:2001:629, C-427/98, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2002:581, C-398/99, *Yorkshire Co-operatives Ltd v Commissioners of Customs & Excise*, ECLI:EU:C:2003:20, C-438/01, *Design Concept SA v Flanders Expo SA*, ECLI:EU:C:2003:325, C-149/01, *Commissioners of Customs & Excise v First Choice Holidays plc*, ECLI:EU:C:2003:358, C-412/03, *Hotel Scandic Gåsabäck AB v Riksskatteverket*, ECLI:EU:C:2005:47, C-1/08, *Athesia Druck Srl v Ministero dell'economia e delle finanze and Agenzia delle entrate*, ECLI:EU:C:2009:108, C-40/09, *Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs*, ECLI:EU:C:2010:450, C-581/08, *EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs*, ECLI:EU:C:2010:559, C-53/09 and C-55/09, *Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd (C-53/09) and Baxi Group Ltd (C-55/09)*, ECLI:EU:C:2010:590, C-270/09, *Macdonald Resorts Ltd v The Commissioners for Her Majesty's Revenue & Customs*, ECLI:EU:C:2010:780, C-300/12, *Finanzamt Düsseldorf-Mitte v Ibero Tours GmbH*, ECLI:EU:C:2014:8, C-461/12, *Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag*, ECLI:EU:C:2014:1745 and C-462/16, *Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co. KG*, ECLI:EU:C:2017:1006.
- 23 From the Explanatory Memorandum to the original 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 of 10 June 2012, under "Grounds for and objectives of the proposal", p. 2.
- 24 See, for example, CJEU case C-259/11, *DTZ Zadelhoff vof v Staatssecretaris van Financiën*, ECLI:EU:C:2012:423, paragraph 25.

is a lack of legal certainty regarding the VAT treatment of many promotional activities. This research aims at providing more unambiguous suggestions for the VAT treatment of promotional activities where application of the current EU VAT rules fails to do so. Where EU VAT rules and CJEU case law are not in line with the basic features or the fundamental principles underlying the EU VAT system, I will provide alternatives that should bring the VAT treatment of those activities more in line with these features and principles.

## **1.6 Research method and structure**

Because this research focuses on EU VAT, I will take the provisions of the EU VAT Directive and other EU VAT rules, as well as the interpretation of those provisions by the CJEU, as a first point of reference. Because of the fact that the EU VAT Directive is transposed into the national law of all EU Member States and because the relevant rules are applied and interpreted by taxable persons, tax authorities, courts and other parties, I will make reference to local rules and regulations where I have deemed this appropriate. Given the fact that most of the CJEU cases regarding the VAT treatment of voucher transactions as well as other promotional activities were referrals from UK courts, I will use the UK as a local reference country. Also, the UK tax authorities (Her Majesty's Revenue and Customs) have published a lot of guidance on the VAT treatment of these transactions. I have also chosen the Netherlands as a country for local reference, because of its rich tradition of academic research and publications on VAT and also because the Netherlands has a thriving market for vouchers, tokens, coupons and similar instruments. Therefore, when looking at the specific application of VAT rules regarding voucher transactions and promotional activities, I will mainly rely on the relevant VAT rules and regulations as applicable in the Netherlands and the UK. Besides using the EU VAT rules and regulations as well as CJEU case law as a referencing system, I will also make reference to international literature on the topic of value added taxation in order to ensure that I take account of as many relevant viewpoints and (possible) building blocks for answering the research questions as possible.

I have divided the research into specific types of promotional activities that I will examine, using the above referencing system and research framework to answer the research questions that are relevant to those specific promotional activities.

## **1.7 Scope of the research**

For this research I examine the EU VAT treatment of voucher in the context of promotional activities. Because, as I will demonstrate, the VAT treatment of vouchers greatly depends on the VAT treatment of the underlying transactions, I will start by examining the current EU VAT treatment of promotional activities. Where possible, I compare this treatment under positive law with the treatment under desired law or appropriate law. I will examine different types of promotional activities that, together, provide for a comprehensive overview of all relevant VAT issues surrounding promotional activities. I will, where appropriate, look into whether a supply is made for consideration, the question whether VAT on costs attributable to supplies that are not made for consideration can be deducted and how to determine the taxable amount (the basis for calculating the VAT due) for transactions that are not performed for considerations and for barter transactions. Further, I will examine when and how to adjust the

taxable basis where a business provides discounts, rebates or cash backs. I will also investigate whether it is always appropriate to tax supplies that are not made for consideration. Also, I will examine the VAT treatment of promotional lotteries and other games of chance, as well as promotional activities that involve vouchers (in the broadest sense of that concept). I will examine all these promotional activities within the framework of the EU VAT rules, CJEU case law as well as desired or appropriate law, where this deviates from positive law. After that, I will examine the current EU VAT treatment of vouchers, and compare this treatment under positive law with the treatment under desired law or appropriate law.

I will not examine the EU VAT treatment of all possible promotional activities. For example, I will not examine the VAT treatment of advertisement services, the supply of cause-related products,<sup>25</sup> point-of-sale promotions,<sup>26</sup> end-cap marketing,<sup>27</sup> customer appreciation events or after-sale customer surveys. The VAT treatment of these activities can be very interesting, but they will never involve the use of vouchers, and vouchers are the ultimate focus of my research.<sup>28</sup> This research focuses on the promotional activities performed by the business whose products or activities are promoted himself. These are the activities that warrant taxation since they may lead to private consumption, and that should also not create a VAT cost because these activities are performed for the purposes of (promoting) the business' (taxable) activities. That's why this research focuses on the VAT treatment of vouchers in the context of promotional activities as performed by the business whose own goods or transactions are promoted.

## 1.8 Approach of the research

A research framework or referencing system is necessary for examining the VAT treatment of promotional activities, because I need a framework to establish whether the VAT treatment of promotional activities as based on positive law is in line with the (relevant) fundamental principles underlying the EU VAT system as well as the basic features of the EU VAT system. Therefore, I will first describe the theoretical framework and referencing system in Chapter 2.

In Chapter 3, I describe the current VAT treatment of transactions that are subject to VAT and economic activities in general, focussing on the 'direct link' that is necessary for linking a payment (in cash or in kind) to a supply of goods or services, making it 'consideration' from a VAT perspective. If there is no consideration, a supply is made free of charge, which can have a different VAT treatment from a supply made for consideration.

Before examining the VAT treatment of supplies that are not made for consideration, I will examine in Chapter 4 how composite supplies (multiple-element supplies) are and should

<sup>25</sup> Cause-related marketing is a mutually beneficial collaboration between a corporation and a nonprofit designed to promote the former's sales and the latter's cause.

<sup>26</sup> Point-of-sale displays (POS) are a specialized form of sales promotion found near, on, or next to a checkout counter (the "point of sale"). They are intended to draw the customers' attention to products.

<sup>27</sup> An endcap, or end cap, is a display for a product placed at the end of an aisle. It is perceived to give a brand a competitive advantage.

<sup>28</sup> Where these promotional activities imply a barter transaction, the VAT treatment of these transactions will be clarified in the Chapter 5 on the VAT treatment of Barter Transactions.