

## **CJEU: introductory gift for taking out a subscription does not constitute a separate VAT-taxed (deemed) supply**

On October 5, 2023 the Court of Justice of the European Union (CJEU) rendered judgment in the *Deco Proteste – Editores* case (C-505/22) concerning the VAT consequences of an introductory gift for taking out a magazine subscription. The CJEU ruled that the introductory gift does not constitute a separate (deemed) supply of goods. The provision is ancillary to the principal service of supplying magazines, i.e. the subscription. Consequently, the publisher only has to pay VAT at the reduced rate on the principal service. In the Netherlands, promotional gifts are often treated as separate disposals and subject to VAT. This judgment may therefore have a positive impact. Our advice to businesses offering gifts to promote sales is to re-examine the VAT consequences of this.

### **Facts of the case before the CJEU**

Deco Proteste is a publisher established in Portugal which publishes and markets magazines and information on consumer protection. The publisher runs promotional campaigns whereby new subscribers who sign up for a subscription receive a tablet or smartphone (with a value of less than EUR 50) as an introductory gift. Deco Proteste sends the introductory gift to the new subscribers after the first monthly subscription payment and does not charge the subscribers anything extra for the gift. Even if the subscriber cancels the subscription after the first payment, they can still keep the introductory gift.

The publisher had only paid VAT at the reduced rate on the supply of the subscription and had not paid VAT at the ordinary rate on the supply of the introductory gift. The Portuguese tax authorities did not agree with this. It believed that there is a separate free supply that has to be taken into account and which, according to the VAT rules, must be treated as a deemed VAT-taxed supply in exchange for a consideration. The Portuguese tax authorities thus imposed hefty supplementary VAT assessments.

### **Questions for which a preliminary ruling was sought**

Deco Proteste appealed these supplementary tax assessments and the Portuguese court requested a preliminary ruling from the CJEU. The referring court asked about the VAT implications of the introductory gift and presented three options to the CJEU:

- The introductory gift is a separate, free disposal that must trigger VAT, unless it is considered a gift of small value.
- The gift and the subscription together constitute a single supply for consideration.
- The subscription constitutes the principal transaction and the gift is then taxed as an ancillary transaction which shares the tax treatment of the principal supply.

With regard to the first option, the court also asked whether the national definition for a gift of small value was allowed. The CJEU did not rule on that question.

## **CJEU judgment**

The CJEU applied its established case law to the issue of when multiple transactions together constitute one supply for VAT purposes. In this specific case, it ruled that the introductory gift is “an integral part of the commercial strategy” of Deco Proteste, i.e. that the publisher has successfully used the gifts for the sole purpose of selling more subscriptions and this is based on rational financial calculations.

According to the CJEU, in these circumstances the provision of the introductory gift does not have a distinct purpose from the perspective of the customer. It is an ancillary service to the principal service of providing magazine subscriptions. There is thus no supply made free of charge and Deco Proteste does not have to pay any VAT on the provision of the introductory gift, only on the subscription.

### *All facts are important*

It is worth noting that, in practice, the supply of goods free of charge takes many different forms and that the CJEU took all circumstances into account in its ruling. We would especially like to point out the following facts:

- The gift had a value of less than EUR 50.
- The customer does not have a choice, for example, to opt for a discount instead of a gift.
- The customer does not have to do anything extra for the gift (e.g. introduce another subscriber or redeem a coupon).
- The CJEU noted (perhaps superfluously?) that the customers can also use the tablet or smartphone they received to read a digital version of the magazine, so that the gift also enables subscribers to benefit, under the best possible conditions, from the principal service.

## **KPMG Meijburg & Co comments**

### *Does the new judgment differ from the Kuwait Petroleum judgment?*

That such variations in supplies made free of charge can play a role, can also be inferred from the old judgment (1999) rendered in the *Kuwait Petroleum* case (C-48/97), where an oil company ran a promotional campaign in which free vouchers were offered for the purchase of fuel. Customers could redeem their vouchers for gifts. In that particular case, the CJEU ruled that the provision of the gifts was a standalone free supply for which VAT on a deemed supply was payable by the oil company, unless the supply was considered a gift of small value.

In that judgment, the CJEU had not examined whether there was a principal service and an ancillary service, possibly because the referring court had not asked that question. However, what may also have made a difference in that judgment is that the vouchers could only be redeemed at a later date and that the customer had the option to not save any vouchers or to never redeem them for a gift. On the other hand, from a

business perspective the sole purpose of such loyalty programs is – similarly to the current case – to sell more.

*Is the CJEU adopting a new approach?*

Still, we believe that the difference with the Kuwait judgment is the result of the CJEU adopting a new approach. In another CJEU judgment rendered about a year ago in the *GE Aircraft Engine Services (C-607/20)* case, the CJEU ruled on vouchers that had been provided free of charge to high-performing members of staff. In that particular case, the CJEU ruled that the vouchers served to improve the performance of employees and thus to ensure the company was successful and profitable. Therefore, the free disposal should not lead to a VAT adjustment.

Although the facts and the legal framework differ and the CJEU does not pay attention to old case law, it has now ruled twice in a short period of time that promotional gifts must not lead to VAT adjustments. We can thus cautiously conclude that the CJEU is adopting a new, more positive approach than that found in old case law. Gifts arising from a business' rational, commercial strategy should not result in an additional VAT burden.

*Importance for the Dutch practice*

In Dutch practice, it is often the older approach that is followed. Especially in the case of the provision of free vouchers, but also with regard to other 'gifts', the rules applied in the Netherlands can sometimes result in an additional VAT burden for businesses running promotional campaigns or loyalty programs. This judgment will bring even more into question whether this is the right approach.

We therefore recommend re-examining your free disposals – certainly if they serve a promotional purpose – and to examine whether negative VAT consequences can be avoided. Because, as mentioned, each program or campaign has its own special features, it is often worthwhile to discuss this with the Dutch tax authorities. The advisors of Meijburg & Co can help you assess this and advise you further on this matter. Please feel free to contact the VAT team or your regular advisor.

KPMG Meijburg & Co  
October 2023

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