

Taxing Employee Benefits in Kind under EU VAT

In this article, the author discusses the circumstances under which the provision of benefits in kind to employees must be characterized as constituting a taxable supply for consideration, and the further consequences of such characterization, taking into account the ECJ's decision in *Astra Zeneca*. The author also discusses the significant differences between taxing those benefits as normal supplies or as so-called deemed supplies.

1. Introduction

By its recent judgment in *Astra Zeneca*,¹ the Court of Justice of the European Union (ECJ) answered questions regarding the VAT treatment of the provision by employers of retail vouchers to their employees in exchange for giving up part of their salary. The ECJ decided that, under the circumstances that prevailed in that case, the provision of these vouchers constituted a taxable supply of a service made for consideration by the employer (*Astra Zeneca*) to its employees. This decision raises the question of how employee benefits in kind (i.e. non-monetary benefits) must generally be treated for VAT purposes.

This article discusses the circumstances under which the provision of benefits in kind to employees must be characterized as constituting a taxable supply for consideration, and the further consequences of such characterization. Also discussed are the significant differences between taxing those benefits as normal supplies or as so-called deemed supplies.² In this context, employee benefits in kind are defined as goods and services provided by employers to their employees in the framework of a contract of employment and/or under conditions that are not necessarily at arm's length.

This article does not call into question the VAT treatment of (retail) vouchers as such, or the decision of the ECJ that, under the circumstances that prevailed in *Astra Zeneca*, the provision of retail vouchers is a service.³

2. *Astra Zeneca*

Astra Zeneca, a company that operates in the pharmaceutical industry, offered its employees, as part of their total remuneration package, a choice between money and, inter alia, retail vouchers. The employees could use those vouchers as means of payment for their private purchases in certain shops. In return for a retail voucher with a face value of GBP 10, the employees had to give up between GBP 9.25 and GBP 9.55 of their salary.

Astra Zeneca took the position that it was entitled to deduct the VAT it had incurred on the acquisition of the

retail vouchers and that it was not required to account for VAT on the subsequent provision of the vouchers to its employees. The tax authorities took the view that either the input VAT was not deductible or *Astra Zeneca* had to account for output VAT.

In resolving the dispute, the national court referred the following three questions to the ECJ:

- (1) Does the provision of the retail vouchers constitute a supply of services for consideration?
- (2) If not, must the provision of the retail vouchers be treated as a deemed supply?
- (3) If both questions were to be answered in the negative, was *Astra Zeneca* entitled to deduct the VAT which it had incurred on the acquisition of the vouchers?

As set out under section 1., the ECJ decided that the provision of the retail vouchers was a service subject to VAT because there was a direct link between the service and the consideration, i.e. the salary given up by the employee, and that the consideration could be expressed in money. Consequently, the provision of the retail vouchers was not a deemed supply, and *Astra Zeneca* had the right to deduct the related input VAT.

3. Further Aspects of Taxing Employee Benefits

3.1. Importance of *Astra Zeneca*

For a more general discussion of the VAT consequences of the provision of benefits in kind to employees, the most important element of the ECJ's judgment in *Astra Zeneca* is its decision that the provision of vouchers (i.e. benefits in kind) constituted a "normal" service subject

* Associated as lecturer and researcher to the VU University Amsterdam and as tax adviser to PricewaterhouseCoopers in Utrecht. This article only reflects personal views of the author.

1. ECJ judgment of 29 July 2010 in *Astra Zeneca UK Ltd v. Commissioners for Her Majesty's Revenue and Customs*, Case C-40/09, not yet officially published.
2. Deemed supplies are defined in Arts. 16 and 26 of the VAT Directive. Art. 16 concerns the withdrawal of business assets for private purposes of the taxable person or his staff, or their disposal free of charge or use for non-business purposes. Art 26. concerns the use of business goods for private use or for non-business purposes and the supply of free-of-charge services for the taxable person's private use or for that of his staff or, more generally, for non-business purposes (emphasis added).
3. As regards the question of whether vouchers must be treated as advance payments for supplies of goods or services or as money, see W. van der Corput, "Astra Zeneca – The VAT Treatment of Vouchers", *International VAT Monitor* 5 (2010), pp. 365-369. He also explains how double taxation in the chain from the point of issue to redemption of retail vouchers is prevented in the United Kingdom. See also D. Butler, "Elida Gibbs revisited: Further thoughts on the extent to which vouchers can constitute consideration for VAT purposes", *EC Tax Review* 2 (2002), pp. 71-79.

to VAT. The question is whether the provision of other benefits in kind provided to employees under different circumstances can also be taxed as normal supplies.

3.2. Normal versus deemed supplies

Where it is not a “normal” supply, the provision of benefits in kind to employees may be subject to VAT as a deemed supply because deemed supplies are defined to include the supply or use of business goods and services for the private purposes of the taxable person’s employees. However, based on their legal history, the legal provisions under which deemed supplies of employee benefits in kind are taxed should be seen as a safety net that is aimed at preventing VAT-free final consumption in exceptional circumstances.⁴ As regards the relationship between normal and deemed supplies, it is important to keep in mind that VAT is designed as a tax on final consumption, regardless of the manner in which final consumers acquire the goods or services. From the perspective of the mechanics of the VAT system, final consumption should preferably be taxed on the basis of a normal supply.⁵ Only in the absence of the conditions under which a normal supply is made, may final consumption be taxed as a deemed supply in order to prevent VAT-free consumption. It is, however, a healthy principle that an exceptional method for taxation of final consumption does not become a basic rule.

The finding that, depending on the circumstances, the provision of benefits in kind to employees is a normal or deemed supply may have significant consequences for the employer:

- the taxable amount can be different;⁶
- deemed supplies cannot be exempt from VAT, whereas normal supplies can.⁷ Consequently, the employer’s right to deduct related input VAT may be different;
- although it does not seem to be very likely, the applicable VAT rates may be different;⁸
- a deemed supply is probably always a domestic supply because it is aimed at correcting initial deduction of domestic input VAT.⁹ Normal supplies can be deemed to be made abroad; and
- the time when VAT becomes chargeable may differ.¹⁰

Employers who are not entitled to deduct input VAT normally do not have to account for VAT on deemed supplies, as most deemed supplies require that the related input VAT has initially been deducted.

In view of the different VAT consequences of normal and deemed supplies, treating all employee benefits in kind as deemed supplies would probably result in (disproportionately) unequal treatment of (almost) identical supplies, depending on whether or not the recipient of the supply is an employee. Nonetheless, it is true that, in respect of normal supplies, employers may charge a lower price to their employees but that is inherent in the concept of subjective consideration, and Member States have the power to neutralize that effect by introducing the open-market value as consideration for supplies made between con-

nected parties, including the relationship between an employer and employee.¹¹

3.3. Employee benefits as normal supplies

A contract of employment involves an employer and employee, and reciprocal performance between them. In the context of such a contract, the employee typically supplies labour to his employer and the employer remunerates his employee with a certain sum of money. Besides monetary payments, employees may also receive benefits in kind.

Benefits in kind for employees can be subdivided into three main categories. Firstly, those benefits can be part of the labour conditions as laid down by the contract of employment. For example, all workers of a wholesaler of beer may contractually be entitled to take home a tray of beer “for free” every month. Secondly, workers may choose to exchange part of their salary for benefits in kind. This choice may explicitly be agreed in the contract of employment, as was the case in *Astra Zeneca*, but this is not necessary. Finally, employers can voluntarily provide benefits in kind to their employees, for example Christmas presents.

The main categories can be subdivided by distinguishing benefits in kind destined to be used by the employees for both private purposes and for the purposes of carrying out their jobs, and goods and services that are solely destined for private use. A typical example of the first sub-

-
4. Based on the Explanatory Memorandum to Art. 5(3) of the Proposal for the Sixth Directive (Proposal of 20 June 1973 for a sixth Council Directive on the harmonization of Member States concerning turnover taxes, common system of value added tax: uniform basis of assessment, COM(73) 950, p. 10), it can be said that deemed supplies are corrections of the initial deduction of input VAT. It is questionable whether also the deemed supply laid down by Art. 26(1)(b) of the VAT Directive (the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business) is such a correction, as, unlike the other deemed supplies, it does not explicitly require that input VAT has been deducted. See Opinion of Advocate General Sharpston of 23 October 2008 in *Danfoss A/S and Astra Zeneca A/S v. Skatteministeriet*, Case C-371/07, [2008] ECR I-9549, Para. 41, and S.T.M. Beelen, *Aftrek van btw als (belaste) omzet ontbreekt* (Deduction of input VAT in the absence of (taxable) turnover), doctoral thesis (Deventer: Kluwer, 2010), pp. 163-164 and 287-289. Compare, in a different context, J.J.P. Swinkels, “Scope of the Self-Supply Rule under EU VAT”, *International VAT Monitor* 3 (2008), pp. 175-181, section 3.2.
 5. Final consumption may also be taxed on the basis of the importation of goods or the intra-Community acquisition of new means of transport by non-taxable persons. See Art. 2(1)(b)(ii) and 2(1)(d) of the VAT Directive. In the context of this article, these taxable events are not of importance.
 6. Under Art. 73 of the VAT Directive, in respect of normal supplies, the taxable amount includes everything which constitutes consideration obtained by the supplier. Under Arts. 74 and 75, in respect of deemed supplies, the taxable amount is the purchase price or cost price of the goods (or of similar goods) or services.
 7. See ECJ judgment of 8 May 2003 in *Wolfgang Seeling v. Finanzamt Starnberg*, Case C-269/00, [2003] ECR I-4101, Paras. 50-54.
 8. Id.
 9. See note 4.
 10. The time at which VAT becomes chargeable depends on the extent to which Member States have made use of the options available to them under Arts. 63 to 66 of the VAT Directive, i.e. at the time of issue of the invoice or of receipt of the payment, or at expiry of a specific deadline following the time of supply.
 11. See Art. 80 of the VAT Directive.

category is a company car, which the employee may also use for private purposes. Other examples include mobile telephones and laptops.

In order to be subject to VAT as a normal supply, employee benefits in kind must be provided for consideration. In addition, in providing those benefits, the employer must be acting as a taxable person. These two conditions and various aspects of determining the monetary value of the consideration will be discussed in the following sections.

4. Employee Benefits

4.1. Direct link between labour and remuneration

It follows from the ECJ's judgment in *Tolsma*¹² that a supply is only made for consideration if a direct link exists between the supply and the consideration. Furthermore, the consideration must be a subjective value, i.e. not estimated according to objective criteria, which must be capable of being expressed in money. Where there is not such a subjective value, it must be concluded that there is no consideration.¹³

It is not a point of discussion that an employer can make supplies for consideration to his employees, nor, given the judgment in *Astra Zeneca*, that the provision of a benefit in kind to an employee, as part of a remuneration scheme, may constitute a supply for consideration. As set out before, the question is under what circumstances benefits in kind provided to employees constitute a supply for consideration. To answer this question, it is important to realize that a (counter) supply made by the employee can be consideration for a supply made by the employer (exchange of supplies). As a result, it is possible to distinguish (at least) two supplies and two considerations, which may be directly linked to each other under the contract of employment:¹⁴

- the employee supplies labour to his employer in exchange for remuneration in money and possibly in kind (consideration). Under Art. 10 of the VAT Directive, the supply made by the employee is outside the scope of VAT;¹⁵
- the employer pays the employee a salary and possibly provides other benefits in kind (supplies) in exchange for the employee's labour (consideration). Payment of the salary (in money) has no VAT consequences, but the provision of benefits in kind may be within the scope of VAT.

From the perspective of the employer, any consideration paid (regardless of its form) is in exchange for the employee's labour. Theoretically, employers can fully remunerate their employees in kind; the wholesaler of beer can pay his employees in beer only. Under the latter circumstances, it is beyond reasonable doubt that the supply of beer in exchange for labour is a normal supply for consideration made by the wholesaler to his employees.¹⁶ After all, labour provided by an employee is not excluded from the concept of consideration.¹⁷ The supply of beer is therefore subject to VAT if the wholesaler acts as a taxable person (see 5.). In this context, it should be noted that, in its judgments in *Empire Stores*¹⁸ and *Bertelsmann*,¹⁹

12. ECJ judgment of 3 March 1994 in *R.J. Tolsma v. Inspecteur der Omzetbelasting Leeuwarden*, Case C-16/93, [1994] ECR I-743. By that judgment, the ECJ declared that "supply of services effected for consideration" does not include an activity consisting in playing music on the public highway, for which no remuneration is stipulated, even if the musician solicits money and receives sums whose amount is, however, neither quantified nor quantifiable. See also ECJ judgment of 5 February 1981 in *Staatssecretaris van Financiën v. Coöperatieve Aardappelenbewaarploaats GA*, Case 154/80, [1981] ECR 445, and ECJ judgment of 8 March 1988 in *Apple and Pear Development Council v. Commissioners of Customs and Excise*, Case 102/86, [1988] ECR 1443. In *Coöperatieve Aardappelenbewaarploaats*, the ECJ declared that there can be no question of any consideration in the case of a cooperative association running a warehouse for the storage of goods which does not impose any storage charge on its members for the service provided. In *Apple and Pear Development Council*, the ECJ declared that the exercise by the Apple and Pear Development Council of its functions pursuant to Art. 3 of the Apple and Pear Development Council Order 1980 and the imposition on growers pursuant to Art. 9(1) of that Order of an annual charge for the purpose of enabling the development council to meet administrative and other expenses incurred or to be incurred in the exercise of such functions do not constitute "the supply of ... services effected for consideration".
13. See *Coöperatieve Aardappelenbewaarploaats* (note 12), Paras. 13-15.
14. In her comments to *Astra Zeneca* (note 1) in *Highlights and Insights on European Taxation* 11 (2010), pp. 42-47, R. de la Feria seemed to deny that there is an exchange of supplies. Her basic assumption is that remuneration paid in the context of a contract of employment should in principle be outside the scope of VAT. De la Feria only accepted the supply of labour by the employee and she wonders whether the remuneration paid in kind by the employer should not be treated on the same footing with remuneration in money and, therefore, be outside the scope of VAT. In this context, the author referred to the ECJ judgment of 23 November 1988 in *Naturally Yours Cosmetics Limited v. Commissioners of Customs and Excise*, Case 230/87, [1988] ECR p. 6365. By that judgment, the ECJ equated payment in kind with payment in money. Naturally Yours supplied goods ("the inducement") to "retailers" for a monetary consideration which was less than the normal wholesale price. However, the retailers had to apply the inducement to procure or reward other persons for arranging a gathering at which further goods of Naturally Yours could be sold by the retailer to the public for mutual benefit of Naturally Yours and the retailer. If not, the retailer had to pay the normal wholesale price for the inducement goods. The taxable amount for the inducement goods sold by Naturally Yours "at a discount" was the sum of the monetary consideration and of the value of the service provided by the retailer, which consisted in having the gathering arranged. The value of that service must be regarded as being equal to the difference between the price actually paid for that product and its normal wholesale price.
15. Art. 10 provides that the condition that the economic activity be conducted "independently" excludes employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.
16. It could be interesting to discuss, as part of further study, what happens if the employee becomes ill and is still entitled to receive the beer.
17. It might be argued that an employer and his employee are together acting in "a closed circuit" and that transactions within such a closed circuit are outside the scope of VAT. However, in *Heerma*, the ECJ has dismissed the argument that a partner in a partnership and the partnership are together acting in a closed circuit. Although it related to a different scenario, this decision probably has the effect that an employer and his employee are not acting in a closed circuit. See ECJ judgment of 27 January 2000 in *Staatssecretaris van Financiën v. J. Heerma*, Case C-23/98, [2000] ECR I-419, Paras. 15 and 19. By that judgment, the ECJ declared that, where a person's sole economic activity consists of the letting of an item of tangible property to a company or a partnership, of which he is a member, that letting must be regarded as an independent activity.
18. ECJ judgment of 2 June 1994 in *Empire Stores Ltd v. Commissioners of Customs and Excise*, Case C-33/93, [1994] ECR I-2329. By that judgment, the ECJ decided that the taxable amount, in respect of an article supplied without extra charge to a person who introduced herself or another person as a potential new customer, was distinct from the taxable amount in respect of the goods bought from the supplier by the new customer and corresponded to the price paid by the supplier for that article.
19. ECJ judgment of 3 July 2001 in *Bertelsmann AG v. Finanzamt Wiedenbrück*, Case C-380/99, [2001] ECR I-5163. By that judgment, the ECJ confirmed its judgment in *Empire Stores* and decided that the taxable amount for the supply of a bonus in kind constituting consideration for the introduction of a new customer included, besides the purchase price of that bonus, the costs of delivery, when they were paid by the supplier of the bonus.

the ECJ took the position that the payment of a consideration in kind in exchange for a supply made by a non-taxable person can constitute a taxed supply.

Where an employee is remunerated for his labour, partly in money and partly in goods or services, it is logical that the employer still makes a supply for consideration in providing those goods or services to the employee as part of his remuneration. In his Opinion in *Astra Zeneca*, Advocate General Mengozzi pointed out that, in its judgment in *Fillibeck*,²⁰ the ECJ has implicitly acknowledged that a proportion of the labour supplied by an employee can be consideration for a supply made by his employer. From the ECJ's judgment in *Naturally Yours*,²¹ it can be derived that a consideration can consist of both money and a supply of services (and probably also a supply of goods).

However, in *Astra Zeneca*, the ECJ seemed to regard the giving-up of a part of their salary as consideration paid by employees for the benefits in kind provided by *Astra Zeneca*.²² Where giving up a part of their salary is consideration for the benefits, the labour supplied by the employee is necessarily not. The ECJ's conclusion in *Astra Zeneca* is therefore remarkable in the light of its judgments in *Fillibeck*, *Empire Stores* and *Bertelsmann*. Nevertheless, as judgments of the ECJ are often dependent on the facts presented by the referring court, it cannot (yet?) be said that the ECJ has changed its position. Under the circumstances that prevailed in *Astra Zeneca*, where employees could choose between money and other benefits, it cannot be ruled out that the ECJ implicitly reasoned that the employees first received their full salary and, subsequently, bought the benefits in kind from their employer.²³ It is also possible that the ECJ did not make a clear distinction between identifying and valuing the consideration, as, for valuing the consideration, the sacrificed amount of money is of primary importance (see 6.).

4.2. Direct link between labour and employee benefits

Although labour may be consideration for the provision of an employee benefit in kind, it is still required that a direct link exists between the two. In view of this requirement, it is not very likely that all employee benefits in kind can be seen as supplies for consideration.²⁴

It follows from the ECJ's judgment in *Astra Zeneca* that a direct link exists if an employee can exchange (part of) his salary for benefits in kind. A direct link should also be found to exist in the example of the wholesaler of beer whose employees receive a monthly remuneration in money and beer based on their contract of employment. In this situation, the provision of beer is one of the elements of the legal relationship of "employer and employee" under which there is reciprocal performance within the meaning of the ECJ's judgment in *Tolsma*. In other words, it must be assumed that the employee's labour is what he actually provides to the employer in return for the sum of money and the beer. It can also be assumed that subjective and personal motives, such as feelings of sympathy, normally do not play a significant role in including a monthly tray of beer in a contract of employment. Furthermore, the part of the labour provided by the employee

that is attributable to the provision of the beer can be expressed in money without having to estimate it on the basis of objective criteria (see 6.).

Although the judgment of the ECJ in *Kuwait Petroleum*²⁵ did not concern the provision of benefits in kind to employees, it might nevertheless give rise to some doubts about the existence of a direct link between supply and consideration, where the employee does not receive extra money if he declines the employer's offer of the beer. In *Kuwait Petroleum*, purchasers of Q8 fuel could receive vouchers from the operator of the filling station, depending on the quantity of fuel bought. The price for the fuel was the same, regardless of whether or not the purchaser accepted or redeemed the vouchers. Consequently, the ECJ found that there was not a direct link between the value of the vouchers and the subsequent supply of the premium goods by *Kuwait Petroleum* to the final consumers who redeemed their accumulated vouchers.

It should be noted that the scenario in *Kuwait Petroleum* concerned the very specific case of a sales promotion scheme, and, in formulating its decision, the ECJ also attached importance to the fact that the premium goods that customers could receive were described as "gifts". Therefore, the principles on which that decision is based should not be applied too broadly, especially not in respect of benefits in kind provided in the framework of a contract of employment.²⁶

-
20. Para. 53 and footnote 17 of the Advocate General's Opinion, which refer to the ECJ's judgment of 16 November 1997 in *Julius Fillibeck Söhne GmbH & Co. KG v. Finanzamt Neustadt*, Case C-258/95, [1997] ECR I-5577. Julius Fillibeck ran a building undertaking and conveyed some of its employees in company vehicles free of charge from their homes to the various building sites where they were required to work. In Para. 16 of its judgment, the ECJ observed: "Furthermore, since the work to be performed and the wages received are independent of the use or otherwise by employees of the transport provided to them by their employer, it is not possible to regard a proportion of the work performed as being consideration for the transport services."
 21. See note 14.
 22. In Para. 24 of its judgment in *Astra Zeneca* (see note 1), the ECJ observed: "in so far as it provides retail vouchers to its employees in exchange for them giving up part of their money remuneration" and, in Para. 29: "there is a direct link between the provision of retail vouchers by *Astra Zeneca* to its employees and the part of the money remuneration which the employees must give up as consideration for that provision." It should be noted that, in Para. 29, the ECJ examined the question of whether the value of the vouchers can be expressed in money.
 23. It should be noted that the ECJ did not explicitly make that assumption.
 24. In M.E. van Hilten and H.W.M. van Kesteren, *Omzetbelasting* (Turnover tax), (Deventer: Kluwer, 2010), p. 380, the authors state that benefits in kind for employees do not often qualify as wages in kind. As wages are consideration for labour, it seems logical to conclude that the authors also believe that, for VAT purposes, benefits in kind do not often qualify as supplies for consideration. In view of the requirement of a direct link between supply and consideration, it may be true that many benefits in kind for employees do not qualify as supplies for VAT purposes. However, the statement of the authors is not necessarily true for the purposes of national wage taxes.
 25. ECJ judgment of 27 April 1999 in *Kuwait Petroleum (GB) Ltd v. Commissioners of Customs and Excise*, Case C-48/97, [1999] ECR I-2323, Paras. 29-31.
 26. The ECJ's judgment in *Kuwait Petroleum* has been criticized by several authors, inter alia, S.T.M. Beelen, see note 4, pp. 165-169, and J. Watson and K. Garcia, "EU VAT and the Rule of Economics", *International VAT Monitor* 3 (2009), pp. 190-197, and "Babylonian Confusion Following the ECJ's Decision on Loyalty Rewards", *International VAT Monitor* 1 (2011), pp. 12-16.

A typical situation of a benefit in kind without a direct link is the handing-out by employers of Christmas presents to their employees. Although the employees receive the Christmas presents just because they are employees (and they have provided labour during the year), such presents are commonly not included in the contract of employment or otherwise formalized; whether or not he hands out Christmas presents is fully at the discretion of the employer and, if he gives such presents, the employer can also determine their nature and size. Consequently, there is no legal or contractual relationship on the basis of which the employer gives the presents. It is furthermore rather far fetched to assume that a direct link nonetheless exists just because employers are bound in honour to provide Christmas presents to their employees.²⁷

Between the extreme scenarios in which there is definitely a direct link between supply and consideration, and those in which there is definitely not such a direct link, lies a grey area. This grey area consists of the benefits in kind that are commonly not provided for the exclusive private use of the employee but also for business purposes (i.e. use by the employee to carry out his job). Those benefits in kind include company cars, mobile telephones, laptops, etc. In many cases, it may even be more realistic to say that employers provide those goods primarily for business purposes and simply allow the employees to also use them for private purposes because they already have the goods at their disposal. Whether or not there is a consideration, being a subjective value capable of being expressed in money and directly linked to the service in the form of allowing "private use" depends on the arrangements made between the employer and employee.

For example, an employer may provide an employee with a company car if he sees business reasons to do so and he may allow the employee to use the company car for private purposes free of charge. If the employee does not have a choice of exchanging the company car for a higher salary (or an allowance for travel expenses),²⁸ it will be difficult to argue that, by allowing the employee to use the company car for private purposes, the employer makes a supply for consideration because, firstly, there is no enforceable obligation for the employer to provide a company car and, thus, to allow private use thereof. Secondly, the provision of the company car – and thus private use of the car – does not (necessarily) depend on the quantity or quality of the labour provided by the employee; it probably depends on the need for the employee to travel.²⁹ Thirdly, it will be difficult to determine the subjective value of private use of the company car, as the employee does not have to pay a price and the costs incurred by the employer for having the car in operation cannot be attributed *solely* to private use of the car. Therefore, the approach of the ECJ in *Naturally Yours*, *Empire Stores* and *Bertelsmann* cannot be adopted by analogy.

The entire situation changes, of course, where the employer and employee have agreed that the employer withholds a certain amount from the employee's salary for every kilometre of private use of the company car. Under those circumstances, there will definitely be a direct link

between a supply made by the employer and the consideration paid by the employee.³⁰

4.3. Tentative conclusion

It appears that employee benefits in kind provided in the context of a contract of employment may be provided in exchange for labour and, therefore, be characterized as (normal) supplies for consideration. Typically, all benefits in kind that belong to the first two categories of benefits in kind, as defined in 3.3., are provided for consideration, unless they concern benefits in the form of private use of goods and services that are not solely provided by the employer for private use by the employee. In the latter case, it will depend on the circumstances whether or not a consideration (a subjective value that can be expressed in money) can be attributed to the private use. The provision of the third category of benefits in kind, i.e. benefits that employers provide voluntarily to their employees, can generally not be characterized as constituting a normal supply for consideration, as a direct link is missing between the benefit and labour received by the employer in return.

5. Employers Acting as Taxable Persons

Apart from the fact that, in order to qualify as a normal supply, benefits in kind must be provided to employees for consideration, they must also be provided by the employer acting as a taxable person. At first glance, this element does not seem to give rise to any problems. It seems logical that, by providing benefits in kind to their employees, employers act in their capacity as taxable persons *by definition*. The provisions of the VAT Directive do not

-
27. Compare ECJ judgment of 17 September 2002 in *Town & County Factors Ltd v. Commissioners of Customs and Excise*, Case C-498/99, [1999] ECR I-7173. By that judgment, the ECJ decided that a supply of services which was effected for consideration, but was not based on enforceable obligations because it had been agreed that the provider was bound only in honour to provide the services, constituted a transaction subject to VAT. It should be noted that, in *Town & County Factors*, the ECJ creatively circumvented the condition of a necessary and direct link, as required under *Tolsma* (see note 12), by stating that the party involved in the main proceedings was bound in honour to pay out a prize if a customer won a game. Being bound in honour must be equated with having assumed an enforceable obligation.
 28. The outcome may not be different if the employees had the option of receiving extra salary to make arrangements for suitable transport themselves. After all, it can be derived from *Fillibeck* (see note 20) that the employer does not supply a service to his employee in so far as he provides transport for business reasons (i.e. necessary to enable the employee to carry out his job at varying locations).
 29. Compare *Tolsma* (see note 12), Para. 17. The ECJ motivated its view that donations received by a musician who performed on the public highway from passers-by cannot be regarded as the consideration for a service supplied to the passers-by by pointing out that, firstly, there was no agreement between the parties, since the passers-by voluntarily made a donation, whose amount they determined as they wished. Secondly, there was not a necessary link between the musical service and the payments to which it gave rise. The passers-by did not request music to be played for them; moreover, they paid sums which depended not on the musical service but on subjective motives which might bring feelings of sympathy into play. Indeed some persons placed money, sometimes a considerable sum, in the musician's collecting tin without lingering, whereas others listened to the music for some time without making any donation at all.
 30. The consideration is still likely to consist of labour, but the employer and employee have agreed which portion of the labour, expressed in money, can be attributed to the private use of the car.

(explicitly or implicitly) exclude employers from the concept of taxable person in respect of the provision of benefits in kind to their employees. Where the employer – for example, the wholesaler of beer – is a taxable person for his primary activity,³¹ it seems inevitable that, by providing benefits in kind to his employees, the employer is acting as a taxable person.

In its judgment in *Astra Zeneca*, the ECJ observed in this context that:

Having regard to the wide scope of VAT, it must be held that a company such as *Astra Zeneca*, in so far as it provides retail vouchers to its employees in exchange for them giving up part of their money remuneration, carries out an economic activity within the meaning of the Sixth Directive³² (emphasis added).

It appears from the ECJ's observation that, just like the wholesaler of beer, *Astra Zeneca* was a taxable person for its primary activity and that the provision of benefits in kind to its employees must be considered as being made in the course of this primary (economic) activity. Therefore, *Astra Zeneca* apparently provided the benefits in its capacity as a taxable person. This conclusion seems logical because *Astra Zeneca* employed (and remunerated) its employees for the purposes of its economic activity.

The situation becomes less obvious where the employer is, for example, a municipality that only qualifies as a taxable person in respect of specific activities, or a pure holding company that does not qualify as a taxable person because it only holds the shares in other companies without making supplies for consideration. In these cases, the employees are not, or not exclusively, employed for the benefit of their employer's economic activity, which gives rise to the question of whether the provision for consideration of benefits in kind to the employees, constitutes a separate economic activity of the employer. If it does not, the question arises of whether the municipality must only account for VAT on the benefits in kind provided for consideration to the extent that the employees contribute to the employer's economic activity.

The answers to those questions depend on the weight that must be attributed to the phrase "a company such as *Astra Zeneca*" in the quote above. If the phrase is essential, only taxable persons whose primary activities constitute an economic activity must account for VAT on the provision of benefits in kind to their employees. If the phrase is not essential, provision of the benefits in kind constitutes an economic activity in general (*ceteris paribus*). Having regard to the observation of the ECJ in the preceding paragraph of its judgment in *Astra Zeneca*, that "the scope of the term economic activities is very wide, and that the term is objective in character", the more plausible conclusion would be that the provision of benefits in kind (in the case of *Astra Zeneca*: retail vouchers) to employees constitutes an economic activity in general. In this respect, it may also be relevant that the scale of *Astra Zeneca*'s voucher system seemed to be quite extensive and that *Astra Zeneca* did not provide the vouchers on an incidental basis. In any case, even if the condition of the direct link between supply and consideration is fulfilled (see 4.), the answer to the question of whether, by

providing benefits in kind to their employees, municipalities and pure holding companies act as taxable persons probably depends on the circumstances. Employers such as the wholesaler of beer will normally act as a taxable person when they provide benefits in kind to their employees, even if the provision of those benefits would not constitute an economic activity in itself.³³

It is interesting to reflect on the VAT consequences for employers that are only partly engaged in economic activities, such as municipalities, if, by providing benefits in kind for consideration to their employees, employers did not act as taxable persons under all circumstances. By its judgment in *Scandic*,³⁴ the ECJ decided that supplies of goods and services for which employees actually pay a price cannot be regarded as deemed supplies. *Scandic*, which was already a taxable person for its primary activity, had to account for VAT on the actual consideration it received from its employees for the benefits in kind. If the provision by employers of benefits in kind for consideration to their employees is not a separate economic activity, the same conclusion may not apply to non-taxable employers because the provision of those benefits in kind constitutes neither a normal nor a deemed supply.³⁵ Those employers may still be entitled to deduct (part) of the VAT on the expenses incurred for the provision of the employee benefits if those expenses must be regarded as overhead expenses incurred by the employer for the purposes of his total (economic and non-economic) activities.

6. The Amount of the Consideration

Since the consideration is the subjective value of a supply (i.e. not a value determined on the basis of objective criteria), the starting point for determining the amount of the consideration is the value that parties attribute to a supply. That principle also applies for the purposes of determining the consideration for the provision of employee benefits in kind that constitute a supply for consideration.

-
31. The primary activity of the wholesaler of beer is to sell beer to other wholesalers and retailers, and the provision of benefits in kind to his employees is ancillary thereto.
 32. Para. 24 of the ECJ's judgment in *Astra Zeneca*; see note 1 (emphasis added).
 33. By providing benefits in kind to their employees, employers may not act as a taxable person at all where the provision is based on purely subjective motives, such as feelings of sympathy. Compare Para. 17 of the ECJ's judgment in *Tolsma* (see note 12 and note 29).
 34. ECJ judgment of 20 January 2005 in *Hotel Scandic Gåsabäck AB v. Riksskatteverket*, Case C-412/03, 2005 [ECR] I-743. By this judgment, the ECJ decided that the fact that the price paid for an economic transaction is higher or lower than the cost price is irrelevant to the question of whether the transaction is to be regarded as a "transaction effected for consideration" and that, where the transaction in question is effected for consideration, even where that consideration is less than the cost price of the goods or services supplied, there is no reason to apply Arts. 16 and 26 (deemed supplies), since those provisions relate only to transactions effected free of charge.
 35. Compare Paras. 62 and 63 of Advocate General Mengozzi's Opinion in *Astra Zeneca*. The Advocate General stated that one of the conditions for recognizing a deemed supply is that the supply is made free of charge. In his view, a supply for consideration is not free of charge, even if the supply is outside the scope of VAT. However, the Advocate General would have denied *Astra Zeneca* the right to deduct the VAT on the acquisition of the retail vouchers.

For example, in *Astra Zeneca*, the employees had to sacrifice a certain part of their salary if they wished to receive retail vouchers. The salary they sacrificed was the amount of the consideration for the provision of the retail vouchers. However, it is not clear whether the sacrificed salary expressed the value of the labour received by the employer in return for the retail vouchers, or that the sacrificed salary itself was consideration for the vouchers (see 4.1.).

Under the assumption that the sacrificed salary merely expressed the value of the labour received by the employer in return for the benefits in kind, the consequences for the wholesaler of beer are as follows. If the wholesaler gives his employees the choice between receiving a monthly salary of EUR 2,500 and a salary of EUR 2,496 plus a tray of beer (with a cost price of EUR 5 and a retail price of EUR 10), the consideration for the tray of beer should be equal to EUR 4 (i.e. EUR 2,500 – EUR 2,496), which is the subjective value attributed to the tray of beer by the employer and the employee.³⁶

If no price has been agreed for the benefits in kind, the consideration for the provision of the benefits must be determined on the basis of the principle set out by the ECJ in *Empire Stores* and *Bertelsmann*, i.e. on the basis of the cost price for the supplier.³⁷ Where the wholesaler in the previous example does not give his employees a choice and pays them a salary of EUR 2,500 plus a tray of beer every month, the value of the benefit in kind is EUR 5. From the perspective of the employer, the value of the labour received from the employee is apparently EUR 2,505 (the employer sacrifices EUR 2,500 in money plus the cost price of the beer of EUR 5).

As was shown in 4.2., the ECJ's approach in *Empire Stores* will not, under all circumstances, provide a solution for determining the subjective value of a consideration. If the subjective value cannot be established, it must be concluded that there is no consideration and, consequently, no supply has been made.

7. Conclusions

In the circumstances that prevailed in *Astra Zeneca*, the provision of employee benefits in kind (in the form of retail vouchers) is to be regarded, according to the ECJ, as a normal supply for consideration. As is shown in this article, the provision of benefits in kind to employees can also in other circumstances be characterized as constituting a normal supply for consideration subject to VAT. This conclusion is important for employers because the VAT consequences of treating the provision of employee benefits as normal supplies may differ significantly from treating them as deemed supplies.

Uncertainty exists where the benefits in kind consist of private use of business goods and services that employees (also) have at their disposal to carry out their job (e.g. company cars). It has to be determined on a case-by-case basis whether private use is allowed for consideration. Furthermore, there is still uncertainty as to whether the provision of benefits in kind to employees constitutes a separate economic activity which would have the effect that, regardless of his other activities, the employer becomes a taxable person and, if it can be a separate economic activity, under what circumstances it qualifies as such. This issue is important for employers whose primary activities are not exclusively economic activities.

The final conclusion is that, also in this respect, VAT is not nearly as simple as it should be. As early as in the year 1 BC, Ovid wrote: "*aevo rarissima nostro simplicitas*" or simplicity is nowadays very rare.³⁸ Unfortunately, complexities in the area of VAT cannot be dispelled with beer (or wine) like the complexities Ovid referred to.

-
36. It is assumed that the price of EUR 4 for a tray of beer is not symbolic and, although it is below the cost price, the low price does not have the effect that the transaction must be qualified as being based on purely subjective motives, including feelings of sympathy (see note 29), which would result in the conclusion that, by providing the benefits in kind, the wholesaler of beer is not acting as a taxable person.
 37. This approach is criticized by Farmer and Lyal, who take the view that the consideration should be equal to the (estimated) retail value of the goods provided and not to the costs of those goods: P. Farmer and R. Lyal, *EC Tax Law* (Oxford: Clarendon Press, 1994), pp. 124-125.
 38. Ovid, *Ars Amatoria I 241-242*. Full text and translation are available on the Internet (for *connaisseurs*).