**IN THE GENERAL DIVISION OF**
**THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2023] SGHC 54**

Tax Appeal No 6 of 2022

In the matter of Section 54(2) of the Goods and Services Tax Act 1993

And

In the matter of Goods and Services Tax Board of Review Appeal No 2 of 2019 and a Grounds of Decision delivered on 6 June 2022 ensuing therefrom

Between

Herbalife International Singapore Pte Ltd

… *Appellant*

And

Comptroller of Goods and Services Tax

… *Respondent*

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# JUDGMENT

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[Revenue Law — Goods and Services Tax (GST) — value of supply]

# Herbalife International Singapore Pte Ltd
# v
# Comptroller of Goods and Services Tax

**[2023] SGHC 54**

General Division of the High Court — Tax Appeal No 6 of 2022
Choo Han Teck J
16 January 2023

6 March 2023 Judgment reserved.

**Choo Han Teck J:**

1 The appellant, Herbalife International Singapore Pte Ltd, is a Singapore incorporated company in the business of marketing, selling and the distributing of nutritional supplements, weight-management products and other personal care products ("Nutritional Products", each a "Nutrition Product"). The appellant adopts a "direct selling" business model — it does not sell directly to consumers. Instead, it sells only to members who are registered with the appellant ("Members", each a "Member"), who in turn sell them to consumers. This means that the public may only buy Nutritional Products from the appellant's Members. The Members retain as profit the difference between the price they pay to the appellant and the price they are contractually bound to sell the Nutritional Products. Members are not contractually bound to sell the products they purchase from the appellant, and may instead consume them personally.

2 This appeal concerns the Goods and Services Tax ("GST") liability of the transactions between the appellant and its Members. The appellant sells Nutritional Products to its Members at varying discount tiers. The discounts begin at 25% ("Standard Discount"), which all Members are entitled to. There are three further tiers of 35%, 42% and 50% ("Tiered Discounts"). Members move up the discount tiers as they accumulate volume points ("Volume Points"), the appellant's internal metric to measure the volume of each Member's purchases. Volume Points are credited for the Members' own purchases as well as the purchases of new members referred to the appellant by the Member (termed by the appellant as "Downlines"). Members also receive commission payments from the sales of their Downlines, but this is not in issue in this appeal.

3 It is not disputed that Nutritional Products supplied by the appellant to its Members are liable to GST. The issue in this appeal concerns the value of such supplies on which GST is levied – whether the discounted rate is taken as the value of the supply, as the appellant taxpayer says, or the open market value of the Nutritional Products, as the respondent Comptroller of Goods and Services Tax ("the Comptroller") says. The Comptroller issued Notices of Assessment and Additional Assessments for the accounting periods of 1 January 2012 to 31 March 2017 on the basis that the supplies were valued at open market value. The disputed amount of GST on appeal is $2,187,089.99 (inclusive of the 5% late payment penalty).

4 The Comptroller asserts that the appellant's business structure results in revenue leakage. The essence of the Comptroller's point is that if the appellant's Members were GST registered, the final sale to end-consumers would be taxable supplies and GST would be levied on the full price, which is the

contractually stated retail price of the Nutritional Products without the Tiered Discounts. However, because the Members are not GST registered, the only taxable supply is the supply between the appellant and the Members. Thus, by interposing a non-taxable intermediary between the appellant and the final consumer, the difference between the price at which Nutritional Products are sold to the intermediaries and the final retail price consumers pay is not brought to tax, hence the revenue leakage. There is no doubt that the revenue leakage ought to be plugged, but the question is, how? The Comptroller says that this revenue leakage is addressed by s 17(3) of the Goods and Services Tax Act (Cap 117A, 2005 Rev Ed) ("GST Act"). Conversely, the appellant argues that s 17(3) does not cover this instance of revenue leakage, and there exists a lacuna in the GST Act which must be closed by Parliament.

5 Section 17 of the GST Act governs how the value of the Nutritional Product is determined. The relevant portions of s 17 of the GST Act provide that:

> **Value of supply of goods or services**
>
> **17.–**(1) For the purposes of this Act and subject to the Third Schedule, the value of any supply of goods or services shall be determined in accordance with this section.
>
> (2) If the supply (other than one from which a reverse charge supply arises) is for a consideration in money, its value shall be taken to be such amount as, with the addition of the tax chargeable, is equal to the consideration.
>
> (3) If the supply (including one from which a reverse charge supply arises) is not for a consideration or is for a consideration not consisting or not wholly consisting of money, the value of the supply shall be taken to be its open market value.

6 According to s 17 of the GST Act, the value of the supply of Nutritional Products depends on the nature of the consideration that Members furnished. If the consideration consisted wholly of money, as the appellant says, then s 17(2)

of the GST Act will apply and the value of the supply will be the net price of the Nutritional Product less the applicable individual discount which a purchasing Member is entitled to. However, if the consideration does not consist wholly of money but includes some form of non-monetary consideration, as the Comptroller says, then the value of the supply ought to be the open market value. The Comptroller's position is that the open market value is the retail price of the Nutritional Products less the Standard Discount of 25%.

7 The arguments of the appellant's counsel, Mr Vikna Rajah, may be summarised as follows. First, he says that s 19 of the UK Value Added Tax Act 1994 (c 23) ("VAT Act 1994"), which is *in pari materia* with s 17 of the GST Act, was unable to bring to tax goods sold *via* a direct selling business model such as the appellant's in the present appeal, thereby requiring the enactment of a special valuation provision in the paragraph 2 of the Sixth Schedule of the VAT Act 1994 (the "special valuation provision"). Since this special valuation provision is absent in the GST Act, the appellant says that there is a lacuna in our GST Act that has to be filled by Parliament. Second, he argues that in any case, the consideration furnished by the Members does not fulfil the requirements to be considered non-monetary consideration under the GST Act, and thus consists wholly of money and falls to be valued under s 17(2) of the GST Act.

8 In response, counsel for the Comptroller, Mr Bjorn Lee, says that the absence of the special valuation provision is misleading because it was enacted pursuant to legislative constraints faced by the UK in respect of European Union ("EU") Law. He further contends that the UK tax authorities were able to tax direct selling structures under their equivalent provision of s 17(3) of the GST Act. Secondly, the Comptroller says that the undertaking of obligations by the

Members fulfil the requirements to constitute non-monetary consideration. In the alternative, the Comptroller argues that the Members provided non-monetary consideration in the form of marketing services to the appellant in exchange for the Nutritional Products.

**Comparison with the UK VAT Act 1994**

9 The special valuation provision is found in paragraph 2 of the Sixth Schedule of the VAT Act 1994. Whereas s 19(3) of the VAT Act 1994 (like s 17(3) of the GST Act) focussses on the nature of the consideration furnished, the special valuation provision in the Sixth Schedule of the VAT Act 1994 is directly worded to address a specific business structure involving the sale of goods through non-taxable agents. These include mail-order businesses, party-plan sales and direct selling businesses. It reads:

> Where —
>
> (a) the whole or part of a business carried on by a taxable person consists in supplying to a number of persons goods to be sold, whether by them or others, by retail, and
>
> (b) those persons are not taxable persons,
>
> the Commissioners may by notice in writing to the taxable person direct that the value of any such supply by him after the giving of the notice or after such later date as may be specified in the notice shall be taken to be its open market value on a sale by retail.

Under the UK VAT regime, the valuation of the goods sold *via* direct selling models (such as the appellant's) would be decided under this special valuation provision: see the House of Lords decision in *Fine Art Developments plc v Customs and Excise Commissioners* [1996] 1 WLR 1054 at 1062 ("*Fine Art Developments*").

10 Counsel for the Comptroller argues that direct selling models fall within s 17(3) of the GST Act because the UK enacted the special valuation provision as a derogation from EU Council Directive 77/338/EC (the "EU Sixth Directive"). Although the EU Sixth Directive has now been superseded by another Council Directive 2006/112/EC, this provision is not materially affected. Counsel says that unlike the UK, Singapore does not face the same legislative constraints as the UK and thus such a derogation is unnecessary. Secondly, counsel relies on *Customs and Excise Commissioners v Pippa-Dee Parties Ltd* [1981] STC 495 ("*Pippa-Dee"*) and *Rosgill Group Ltd v Customs and Excise Commissioners* [1997] 3 All ER 1012 ("*Rosgill*") for the proposition that the UK was able to value the supply of goods in direct selling models at open market value by reference to s 19(3) of the VAT Act 1994.

11 I am unable to accept the Comptroller's arguments. The special valuation provision is not a recent enactment. This provision has existed since the introduction of VAT in the UK by the Finance Act 1972 (c 41) ("Finance Act 1972"), located in paragraph 4 of the Third Schedule: see *Fine Art Developments* at 1059. It has endured through the evolution of UK's VAT legislation since the introduction of VAT in the Finance Act 1972, the amendments by the UK Finance Act 1977 (c 36) and now the VAT Act 1994. The special valuation provision was in force at the time that *Pippa-Dee* and *Rosgill* were decided — but the taxable supplies in those cases were not brought to tax under this provision, and rightly so, because those cases concerned different facts that did not fall within the special valuation provision. Although those cases concerned direct selling structures, the supply in question was not the supply of the goods sold as part of their direct selling business which were on-sold to consumers, but rather a supply of "reward goods" to the agents at a discounted rate in lieu of a cash commission which they would otherwise have

received for the sale of the suppliers' goods. In other words, it was not the direct selling model itself that was the subject of those cases, but the specific discount scheme available to all agents engaged in their direct selling business. Thus, *Pippa-Dee* and *Rosgill* at best apply when the issue is whether a supply is for non-monetary consideration, as opposed to a general authority that taxable supplies made under a direct selling model falls within s 17(3) of the GST Act.

12 Furthermore, although the Comptroller is correct in pointing out that the UK enacted this special valuation provision as a derogating measure from the EU Sixth Directive, the more accurate question is why did the UK have to do so? If s 19(3) of the VAT Act 1994, which is consistent with EU Law, applied such that taxable supplies made by direct selling companies to their agents could have been taxed at the retail price at which their agents on-sold the products, there would have been no need for the UK to seek this derogation to specially value the taxable supplies made in direct selling structures at retail price. Instead, the derogating measure had to be enacted because of the same revenue leakage as we observe in this appeal, which could not be addressed by s 19(3) of the VAT Act 1994. This difficulty was well stated in *Avon Cosmetics Ltd v Revenue and Customs Commissioners* [2018] 4 WLR 73 at [16] to [19]:

> 16 Avon is engaged in the manufacture and sale of products, mostly cosmetics. Their retail sale is carried out through independent female representatives ("representatives"), almost all of whom operating in the United Kingdom are not subject to VAT, as they are not registered for VAT and their turnover is not sufficient to make it compulsory for them to be subject to it.
>
> 17 Avon's sales to those representatives are at a price below the retail price envisaged by it and are subject to VAT. On the other hand, as the representatives are not accountable for VAT, the retail sales which they make are not subject to VAT.
>
> 18 The effect of that system is that the difference between the retail selling price and the price paid by the representatives to Avon is **not subject to VAT**.

> 19 To remedy that situation, the United Kingdom, in particular by the Finance Act 1977, granted the commissioners the power to issue persons liable to pay VAT with directions so that the tax payable by them would be calculated by reference to the retail selling price.
>
> [emphasis added]

13 More specifically, the derogation was needed because the special valuation provision in the UK VAT legislation was inconsistent with Article 11(A)(1)(a) of the EU Sixth Directive (see *Fine Art Developments* at 1058-9), which requires that the value of a taxable supply is to be:

> in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, **everything which constitutes the consideration** which has been or is to he obtained by the supplier from the purchaser, the customer or a third party for such supplies including supplies directly linked to the price of such supplies".
>
> [emphasis added]

14 If, as the Comptroller asserts, the taxable supplies between direct selling companies and their agents ordinarily consist of non-monetary consideration, then the UK tax authorities would have had no difficulty in ascribing a taxable value to that non-monetary consideration, as the position under EU Law is that the value of a taxable supply is "everything which constitutes the consideration". However, the UK's enactment of the special valuation provision strongly suggests that consideration furnished for transactions between suppliers and agents in direct selling models do not have non-monetary consideration and thus did not meet the requirements to be valued by reference to s 19(3) of the VAT Act.

15 Although there is a slight difference between the s 17(3) of the GST Act and s 19(3) of the VAT Act 1994 as to the implication of finding non-monetary consideration, it does not affect the analysis above because the mischief which

the special valuation provision sought to address was not an indeterminacy of valuation (as demonstrated in *Pippa-Dee* and *Rosgill* where the UK tax authority was able to ascribe a value to the non-monetary consideration without difficulty), but rather the absence of non-monetary consideration. Thus, if supplies similar to the ones in this appeal were able to be brought to tax, there would not have been difficulty with valuation — the problem there was that the UK VAT regime could not bring it to tax in the first place.

16 For the above reasons, I agree with the appellant that the special valuation provision in the UK's VAT Act 1994 and its corresponding absence in our GST Act is a strong indicator that direct selling cases ordinarily do not involve supplies made for non-monetary consideration which would cause it to fall within s 17(3) of the GST Act.

**Position under Singapore revenue law**

17 Notwithstanding the above, the question remains as to whether the supply of the Nutritional Products in this appeal falls to be valued by s 17(3) of the GST Act. Although persuasive, the fact that direct selling structures do not fall within the ambit of s 19(3) of the VAT Act 1994 does not dispose of this appeal. Section 17(1) of the GST Act provides that the valuation provisions in s 17 of the GST Act are "subject to the Third Schedule". Thus, although the Third Schedule does not specifically address this issue, owing to the absence of a special valuation provision similar to that under the VAT Act 1994, the court must nevertheless determine whether, on the facts, the supply in question was made in exchange for some form of non-monetary consideration. This requires an examination of the scope of the word "consideration" under s 17 of the GST Act.

18 A distinction must first be drawn between the concept of consideration in the law of contract and the statutory definition of consideration in the GST Act. Whereas UK precedents have held that consideration ought to bear its ordinary meaning under English Law (see *Theatres Consolidated Ltd v The Commissioners* [1975] VATTR 13), I am of the view that the contractual doctrine of consideration is wider than the intended scope of the word "consideration" in s 17(3) of the GST Act for several reasons. The doctrine of consideration in contract at common law is concerned with the regulation of the formation and enforceability of contractual relationships rather than the valuation of the obligations owed under the contract. On the other hand, consideration in revenue law is concerned not only with the taxability of a supply, but the taxable value to be ascribed to a supply. Consideration in revenue law is thus concerned with the question of "what was the payment in the taxable transaction?", and not, "was there sufficient consideration furnished for that transaction to be valid and binding?" Seen in this light, it becomes clear why the rules of consideration that apply to contract law cannot be directly applied to revenue law. For example, it is accepted in contract law that consideration must move from the promisee to the promisor: see *Gay Choon Ing v Loh Tze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [66]. However, in revenue law, it is well accepted that consideration for a supply may be furnished by a third party: see the UK Supreme Court decision of *Airtours Holidays Transport Ltd v Revenue and Customs Commissioners* [2016] 4 WLR 87. Furthermore, the fact that consideration is non-existent because a contract was executed by way of deed is no bar to the imputation of open market value to that taxable supply under the GST Act. Finally, and of particular relevance to this appeal, once consideration is sufficient for the purposes of contractual formation, contract law is not concerned with the issue of adequacy of consideration, its valuation, and the

form which it takes – monetary or non-monetary. Conversely, the scrutiny of its exact contents and value in revenue law is fundamental to the assessment of the value of any taxable supply.

19 Thus, the concept of what constitutes valuable consideration in contract law, which include "some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility" (*Gay Choon Ing* at [67]), is not necessarily the same as what constitutes consideration within the meaning of the GST Act. The UK VAT regime accommodates the expansive definition of consideration because the taxable value of the supply includes the valuation of such consideration (see s 19(3) of the VAT Act 1994). However, our GST regime is different because the mechanism to value taxable supplies made for non-monetary consideration is valuation at open market value. If non-monetary items of *de minimis* value are accepted to fall within the scope of non-monetary consideration in s 17(3) of the GST Act, it could lead to draconian taxing outcomes.

20 For example, it is common for taxable supplies to be made at discounts (such as, buy-one-get-one-free discount schemes or prompt payment discounts). Suppose that such a taxable supply is made for a consideration consisting of money and the proverbial peppercorn valued at $1.00, which is accepted as sufficient consideration under contract law. Under the UK VAT regime, the taxable value of that supply would be the money and $1.00, being the value of the peppercorn (assuming it is accepted as non-monetary consideration under s 19(3) of the VAT Act 1994). However, under our GST regime, if the peppercorn was an accepted form of non-monetary consideration, the taxable value must, according to s 17(3) of the GST Act, be the open market value of that supply. The open market value of such taxable supplies would be the full

price without the discount, which would be wholly disproportionate to the actual value of the consideration furnished. Since GST is a tax on consumption, the taxable value for purposes of assessment must be the value of the consideration which the consumer furnishes. Moreover, being a self-assessed tax, it is necessary for the scope of non-monetary consideration under s 17(3) of the GST Act to be easily ascertainable by GST registered taxpayers for GST accounting purposes.

21 For this reason, I am of the view that the Board below was correct in narrowing the scope of consideration for GST purposes, which the parties did not dispute on appeal. Specific to the question of whether the undertaking of obligations can constitute non-monetary consideration, the Board laid down two requirements (which was referred to as "touchstones" at [36]-[37]), which I endorse broadly with further refinements. These requirements, as laid down by the Board are first, whether the undertakings were independent of, and not ancillary to the supply of the Nutritional Products; and second, whether the undertakings provided a benefit which goes beyond the monetary transaction in question.

22 On the first requirement, I am of the view that regular terms of trade would not ordinarily be "independent of, and not ancillary to" the supply of goods. Thus, these terms of trade would not constitute non-monetary consideration except where they contractually demand the provision of something non-monetary in exchange for the supply. Terms of trade provide the contractual structure to regulate the functioning of a business model, which in this case is a direct selling business model. The fact that a contractual term requires a recipient of a supply to act in a particular way does not necessarily mean that the act of the recipient is consideration within the meaning of s 17(3)

of the GST Act. A distinction must be drawn between contractual conditions which are imposed on the recipient of a supply that regulates what the recipient can or cannot do with that good, and the contractual obligations which stipulate the consideration that the recipient must furnish in exchange for the supply. For example, if a country club sells a club membership directly to a new member, the new member has to undertake to abide by the code of conduct expected of members, the various by-laws of the club, and rules concerning on-sale of club memberships. However, such conditions do not constitute the consideration moving from the member to the club because they are not furnished in exchange for the club membership. Instead, they are merely conditions which must be fulfilled before the sale can occur.

23 On the second requirement, I am of the view the word "benefit" which the Board used is susceptible to an overly broad interpretation. An overly broad conception of "benefit" would render nugatory any attempt to restrict the scope of consideration for GST purposes. It flows from the previous paragraph that "benefits" which arise from regular terms of trade would not constitute non-monetary consideration. As contracting parties do not contract in vain, every contractual term could be said to "benefit" the contracting parties in some way. For example, a non-compete clause would benefit the business of any company by preventing its employees from poaching its clients. Even governing law clauses can be said to provide the procedural benefits of resolving disputes in a particular jurisdiction. Although there is some "benefit" that the supplier receives from recipients conducting themselves according to those contractual terms of trade, it does not mean that these "benefits" were furnished in exchange for the supply. For something to be considered non-monetary consideration furnished by the recipient of a supply (in the context of s 17(3) of the GST Act specifically), it must be sufficiently valuable, and it must be clear that it was

given by the recipient in exchange for the supply of goods (for example, a trade-in of an item or a provision of a service).

24 I disagree with the Board's reasoning (at [38]) that the fact that the suite of contractual obligations enabled the business model to function constituted a "benefit" which the Members provided to the appellant in exchange for the goods. The Board reasoned (at [38]) that:

> It is evident that in the appeal before us, the host of terms and conditions that are found in the terms of Membership constituted obligations that were independent of the underlying transactions, and which presented a clear and practical benefit to the Appellant in a manner which was separate from the benefit of the transaction itself. The combined effect of the obligations undertaken by Members was not only of practical and commercial benefit to the Appellant, it was in fact integral to their business model, and was critical to allowing the Appellant to run a direct sales infrastructure that remained exclusive to its Members only

25 To hold that the result of a contractual arrangement is the "benefit" the supplier receives is tautological because every contractual arrangement has a result. That alone is not a "benefit" that is furnished by the counterparty to the contract, it is merely a by-product — the result.

26 On the contrary, the alleged "benefit" to the supplier asserted to be non-monetary consideration must be something that the recipient of the supply provides in exchange for the goods supplied. In this regard, a useful indicator of whether a "benefit" is provided in exchange for the supply is whether there is parity of value between the non-monetary "benefit" and the good received. The non-monetary benefit should "make up" for the discrepancy between the money paid and the regular price of the product. A paradigm example where there is parity of value is where a new car is purchased partly with money and partly with the trade-in of an old car and the supplier ascribes a "trade-in value"

for the non-monetary consideration: see *Lex Services plc v Customs Excise Commissioners* [2004] 1 WLR 1. In this situation, the non-monetary benefit (the traded in car) makes up for the difference between what the consumer would have to pay in monetary consideration but for the trade-in.

27 Where parity of value is subjectively recognised by parties, the identification of the non-monetary benefit is easy because parties have made clear that the non-monetary benefit supplements the monetary consideration such that the value of the supply is justifiably the open market value.

28 However, this does not mean that there can never be non-monetary consideration in the absence of contractual apportionment of value. In such cases, where parties do not explicitly provide for the value apportioned to the non-monetary consideration, the contractual arrangement when construed by the court may evince tangible monetary value attributed to non-monetary elements. In such cases, parity of value may be determined objectively by the court. For example, in *Naturally Yours Cosmetics Ltd v Customs and Excise Commissioners* [1988] STC 879, the supplier was a wholesaler of cosmetic products for resale by retail agents who approached friends for sale and received a commission for it. The taxable supply which fell to be valued was the sale of a pot of cream retailing at £10.14 sold to agents at £1.50. The pot of cream was sold at £1.50 on the basis that it had to be used for promotional purposes and if the agent did not do so, the agent would have to pay the full price for it. Although the parties there did not ascribe a subjective value to the pot of cream, the court, looking at the transaction, was satisfied that the promotional services rendered by the agents accounted for the difference between the retail and discounted price and accordingly valued the transaction at £10.14.

29 With these principles in mind, I now consider the facts of this case. The Comptroller relies on a suite of obligations which all Members undertake when they join the appellant. The essence of this contractual relationship is contained in the declaration by the appellant's director, Mr Leng Song Oon ("Mr Leng"), in his affidavit dated 8 July 2022, which sets out the contractual obligations that bind all Members:

> The Applicant and all its Members are mutually bound by an agreement as set out in the Herbalife Nutrition Member Application and Agreement (the "**Membership Agreement**"), which incorporates the Terms and Conditions of Doing the Herbalife Nutrition Business, the Statement of Average Gross Compensation Paid by the Herbalife Nutrition (Compensation Statement), and Books 1 & 2 which include the Sales & Marketing Plan and the Rules of Conduct, as well as the Business Tools and Other Optional Expenses and other documents (collectively, the "**Materials**").
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> [emphasis in original]

30 This clause is found in Clause 3 of the application form that potential Members sign when joining the appellant. The significance of this is that whether Members choose to consume or resell the Nutritional Products bought, or not buy any at all, they are in exactly the same contractual position.

31 Counsel for the appellant invited me to find that the contractual entitlement to resell the Nutritional Products amounted to a legally binding option, which upon exercise, creates binding obligations concerning the resale of Nutritional Products on Members. I do not agree. Although the membership application form suggests that some terms are conditional on reselling (for example, "I agree that if I chose to conduct the Herbalife Nutrition business in any respect […]), Clause 3 of Section A of the membership application form defines the Member Pack to include the "Terms and Conditions of Doing the Herbalife Nutrition Business". Ultimately, the appellant's own concession that

all Members are bound by every contractual obligation incorporated in the Membership Agreement (which includes those governing the resale of the Nutritional Products) contradicts counsel's arguments that there were different binding obligations depending on whether a Member decided to consume or to resell the Nutritional Products. I thus affirm the finding of the Board that all Members are bound by all the obligations of the Member Pack regardless of their subjective intention.

32 The issue is whether these terms and conditions in the Member Pack are non-monetary consideration moving from the Members to the appellant in exchange for the supplies of Nutritional Products. In its submissions, the Comptroller highlighted the following undertakings by Members, which the Board below found to constitute non-monetary consideration:

(a) Undertaking to not use the appellant's infrastructure for private benefit;

(b) Undertaking to not promote the business of another Multi-Level Marketing or direct-selling company to any Member or customer;

(c) Undertaking to not give media interviews without the appellant's consent;

(d) Undertaking to not engage in any business activity of the appellant in any country the appellant is not officially open for business in;

(e) Undertaking to not display the appellant's products in retail establishments;

(f) Undertaking to be kind and courteous when selling the appellant's products;

(g) Undertaking not to sell the appellant's products to non-Members who intend to resell them;

(h) Undertaking to sell the appellant's products at the stipulated prices if they decide to sell;

(i) Undertaking not to auction the appellant's products;

(j) Undertaking not to use social media for the sale of the appellant's products; and

(k) Agreement to grant to the appellant the right to use its photograph, story and name in the appellant's publicity materials.

33 On the principles discussed above on non-monetary consideration, I am of the view that the Board erred in holding so. First, regarding the requirement that the undertakings are independent and not ancillary to the supply of the goods, I am of the view that those terms of undertaking constitute the terms of trade which were imposed by the appellant on its Members either to qualify to receive the supply, to regulate the use of Nutritional Products once obtained or to regulate the conduct of the Members as members of the appellant. As I have said above, I do not think that terms of trade, without more, constitute non-monetary consideration. Furthermore, nowhere in the appellant's terms and conditions does it state that Members are contractually bound to provide marketing services to the appellant — thus distinguishing it from the cases of *Rosgill* and *Pippa-Dee* where the transactions in question indisputably involved services of value rendered by agents to the taxpayer companies in return for a

commission which was directly converted into a discount on goods. These obligations only govern how the Member should act as a member of the appellant as opposed to being the consideration furnished in exchange for obtaining Nutritional Products.

34 Secondly, I think that the Board erred in finding that these obligations provide the appellant a benefit which amounted to consideration because it was pivotal to the functioning of the appellant's direct selling structure. A contract defining a business relationship between parties would necessarily be integral to the business model in question. But it does not mean that all the undertakings would constitute consideration. While it is factually accurate that the appellant obtains some "benefit" in that it is always better to have Members being courteous as opposed to being rude, or having Members as exclusive Members as opposed to non-exclusive Members, I am of the view that these "benefits" received by the appellant were just the compliance of its members with the contractual terms of trade as opposed to valuable consideration within the meaning of s 17 of the GST Act. On an objective interpretation of the contract, these obligations are not furnished in exchange for the Nutritional Products, but rather, obligations that the Members undertake as conditions to purchase the good for consideration in money.

35 The Comptroller has not pointed to a tangible thing, whether in the form of a good, service, or something else furnished by the Members to the appellant which has objective parity of value with the discount that the Members receive, thereby bringing it within s 17(3) of the GST Act. The Comptroller attempted to characterise the Members of the appellant as commission agents. However, the difficulty with this argument is twofold. First, if the Members were truly commission agents, then the supply would not be between the appellant and its

Members but between the appellant and end-consumers. The mark of agency is that the agent binds its principal in the contract. However, the Comptroller did not raise this as a basis of taxation in its notice under s 49(3) of the GST Act, and rightly so since the contractual arrangement permits the Members to choose what they wish to do with these Nutritional Products. This is unlike *Rosgill* where the title to the goods did not pass to the hostesses at any point in time, and the only role was for the hostesses to persuade end-consumers to contract with the Rosgill Group to purchase their products. Secondly, even if I were to accept that the Members are agents of the appellant, the taxable supply in question would then be between the appellant and the end-consumer, as the agents would merely be a conduit, which is not the basis on which the Comptroller issued its notices of assessment.

36 Thus, I am of the view that the Members stand as principals as opposed to agents in relation to the goods sold. Although Members have the commercial incentive to sell these goods for profit, they retain the legal discretion to do as they pleased with the goods, subject to the rules of conduct they undertake to the appellant. I do not agree with the Board that the supply is of a "blended nature". There can only be one objective contractual interpretation of the Members' position vis-à-vis the appellant, and the fact that title passes to Members, amongst other factors, weighs in favour of a finding that the Members are principals.

37 Section 17(3) of the GST Act is intended to cover situations where valuing a supply by reference only to its monetary value is underinclusive, because what the consumer gives in exchange for that supply is not only money, but something additional of value in non-monetary form. But if the meaning of consideration in s 17(3) of the GST Act is interpreted too broadly, such that

items of *de minimis* value fall within the meaning of non-monetary consideration, there may be implications on all kinds of commercial practices that may not be intended to so be covered. For example, it is not uncommon for companies to run promotional campaigns which require purchasers to do certain acts to qualify for the discount such as sharing the purchaser's campaign on their social media or liking their posts. It is also commercial practice for distributorship agreements regulating the supply chain for the sale of goods to contain terms and conditions stipulating purchase price, advertising restrictions and on-sale prices. An overly broad conception of consideration threatens to introduce considerable uncertainty as to the taxable value of these supplies. Thus, the solution to the revenue leakage raised by the Comptroller lies not in expanding the scope of non-monetary consideration but in the adoption of a special valuation provision such as paragraph 2 of the Sixth Schedule of the VAT Act 1994, which specifically addresses business models akin to the appellant without the potential negative collateral effects on commercial practices. This, however, is beyond the power of the courts, and must be implemented legislatively. For the reasons above, the appeal is allowed.

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Choo Han Teck
Judge of the High Court

Vikna Rajah and Koh Chon Kiat (Rajah & Tann Singapore LLP) for the appellant;
Bjorn Lee Long Jin and Flora Koh Swee Huang (Inland Revenue Authority of Singapore (Law Division)) for the respondent.