

# Tax alert

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## Value of supply in a direct selling model

In this tax alert, we examine a recent tax case in which the High Court ruled to overturn the decision of the GST Board of Review to charge goods and services tax (GST) based on the open market value of goods sold by a business with a direct selling model. This publication also provides insight into the High Court's view on non-monetary consideration in the context of section 17(3) of the GST Act (s 17(3)).

### Background

This case involves a GST-registered Singapore company, Herbalife International Singapore Pte Ltd ("the Company"), which sells nutritional supplements, weight-management products and other personal care products ("Products") to consumers through members.

Its business model, commonly known as a "direct selling" business model, is one in which a company only sells Products to members of the company. Members may buy the Products for their own consumption or for resale to end consumers. The Company offers several tiers of discounts to members, ranging from the standard discount of 25% to tiered discounts of up to 50%, depending on the volume of Products purchased.

The issue before the High Court was the value of supply of the Products that the Company sells to members — specifically whether the value is taken to be the amount before (being the open market value) or after the tiered discount, and if there was non-monetary consideration provided by members to the Company.

### The Comptroller of GST ("the Comptroller")'s view

The Comptroller took the view that the value of the supply of the Products should be that after the standard discount, but not tiered discount, as this supply involves both monetary and non-monetary consideration. The latter was in the form of undertaking of obligations by the members and the marketing services performed for the Company which were in the contract between the Company and the members. Hence, relying on s 17(3), the value of supply of the Products should be the open market value, which is the selling price after the standard discount. Otherwise, there would be revenue leakage as the members were not registered for GST and their mark-ups thus not subject to GST.

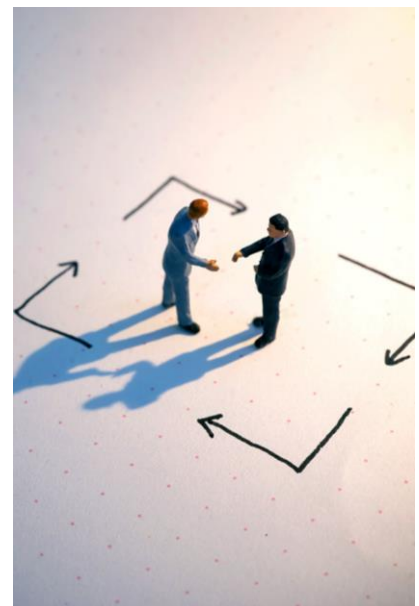
### GST Board of Review's view

The GST Board of Review upheld

the Comptroller's view on the grounds that there were contractual obligations to be fulfilled by the members, which thus formed the non-monetary consideration in return for purchasing the Products after tiered discounts.

### High Court's decision

The High Court allowed the appeal of the Company and held that the value of supply of the Products should be the monetary consideration only, that is the price after tiered discounts. On the Comptroller's concern of revenue leakage, the Judge opined that it should be addressed by an amendment of law and not in expanding the scope of non-monetary consideration.



## Key observations and takeaways

This is a welcome decision for businesses. Not only does it affirm the value of supply of products under a direct selling business model, it also affords valuable guidance on the interpretation and application of s 17(3). One of this is the definition of “consideration” of the UK value-added tax (VAT) regime, which along with the special valuation provision, is wider than that in the Singapore GST regime. Specifically, the Singapore GST regime does not contain a special valuation provision for a supply of goods through non-taxable agents. Hence, such a difference in definition should be taken into consideration when UK cases are relied upon for guidance on the interpretation of “value of supply”.

The other is that non-monetary items of de minimis value should not fall within the scope of non-monetary consideration in s 17(3) as this “could lead to draconian taxing outcomes”. Consequently, in determining the value of supply, it must be “the value of

consideration which the consumer furnishes”. By opining that “an overly broad conception of consideration threatens to introduce considerable uncertainty as to the taxable value of these supplies”, the High Court’s ruling drives home the key message that GST rules should be kept simple and easy to apply by businesses. After all, GST is a self-assessment tax and any complexity in the rules introduces uncertainty which in turn drives up compliance costs.

Another interesting point raised in this case by the High Court is that even the presence of a contractual term requiring a recipient of a supply to act in a particular way does not mean that the act itself is a consideration within the meaning of s 17(3). If any, these are “terms of trade” and do not constitute non-monetary consideration. In the same vein, a “benefit” that a supplier receives from a recipient may not constitute non-monetary consideration. This further demonstrates the intended narrow application of s 17(3).

In short, the Judge opined that for something to be considered non-monetary consideration furnished by the recipient to the supplier (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 of the goods (for example, a trade-in of an item or a provision of a service). This succinctly captures the spirit and intention behind s 17(3) and how this section ought to be applied.

## How we can help

You may have encountered scenarios where the Comptroller has taken the position that the value of supply includes non-monetary consideration wherein you are not convinced. This High Court judgment has now set out clearly the scope of non-monetary consideration in the context of s 17(3), which is intended to be narrow.

As your committed tax advisor, we welcome any opportunity to discuss the relevance of the above case to your business transactions.



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