



## Landmark Herbalife Case Dissected

### GST Implications Of A Direct Selling Marketing Business

20 July 2023, Thursday

Facilitated by:  
Accredited Tax Practitioner (Income Tax) Mr Vikna Rajah

#### KEY TAKEAWAYS

- The meaning of consideration in section 17(3) of the GST Act should not be interpreted too broadly, such that items of de minimis value fall within the meaning of non-monetary consideration.
- Regular terms of trade would not generally constitute non-monetary consideration for GST purposes.
- Any lacuna in the GST Act should be remedied by Parliament, not the courts.

**T**he recent decision in the landmark Goods and Services Tax (GST) case of *Herbalife International*

*Singapore Pte Ltd (Herbalife) v Comptroller of GST* [2023] SGHC 54 has sparked a series of parliamentary debates on revenue collection leakages.

So, what exactly is the *Herbalife* case about and how will the Singapore High Court's decision affect other direct selling companies?

"The High Court's decision will have far reaching implications for the direct selling industry," said Vikna Rajah, Executive Committee Partner and Head Tax, Trust and Private Client, Rajah & Tann Singapore LLP, at a recent seminar organised by the [Singapore Chartered Tax Professionals](#). "It demonstrates that discounts granted purely on the volume of goods purchased by its members will not be taxed on the retail price of such goods but rather, the discounted price."

#### Background

The Appellant, Herbalife, is a GST-registered company that adopts a direct selling business model to distribute weight management products, nutritional supplements, and personal care products ("Nutritional Products") at a discounted price to its members ("Members"). Consumers (that is, non-Members) who wish to purchase the Nutritional Products can only do so from Members as Herbalife does not sell directly to consumers.

For an annual fee, individuals register as Members and receive a membership pack which contains materials that form a comprehensive agreement ("Membership Agreement") with Herbalife.

The Membership Agreement regulates the terms and conditions by which Members can purchase and market the Nutritional Products, as well as recruit other Members who form "downlines".

Members can purchase the Nutritional Products either for personal consumption or for resale to end-consumers at full price. Based on the volume of products they (or their downlines) purchase from Herbalife, Members earn volume points each month which, in turn, determine the discount that they enjoy while purchasing the Nutritional Products. The discount may range from the standard discount of 25% ("Standard Discount") to further tiered discounts of 35%, 42% and 50% ("Tiered Discounts").

## **Crux of The Issue**

---

When Members buy the Nutritional Products from Herbalife, GST is levied on the discounted price that Members paid for the products. Subsequently, if the Members choose to on-sell the products to end-consumers, GST is not applicable on the sale to the end-consumers as the Members, unlike Herbalife, are not GST-registered.

In effect, under the Appellant's direct selling business model, GST is only levied on the discounted price (that is, the price after the application of the Standard Discount or Tiered Discounts) of the Nutritional Products. The central issue in this case is whether GST should be levied on the discounted price or the open market value of the Nutritional Products.

## **Key Issues Before The High Court**

---

### **WHETHER THE SUPPLY OF NUTRITIONAL PRODUCTS FALLS WITHIN THE AMBIT OF SECTION 17(3) OF THE GST ACT**

#### ***The Comptroller's argument***

The Comptroller asserted that Herbalife's business model results in revenue leakage as it interposes a non-taxable intermediary between Herbalife and the end-consumer. This revenue leakage, according to the Comptroller, is addressed by section 17(3) of the GST Act.

Based on section 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 consists wholly of money, then section 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 discount which a purchasing Member is entitled to.

Conversely, if the consideration does not consist wholly of money but includes some form of non-monetary consideration, then the value of the supply should be the open market value in accordance with section 17(3) of the GST Act. The Comptroller's position was that the open market value is the retail price of the Nutritional Products less the Standard Discount of 25%.

#### ***Herbalife's argument***

According to Herbalife, the Members' undertakings of terms and conditions stipulated in the Membership Agreement did not fulfil the requirements to be considered non-monetary consideration under the GST Act.

The consideration provided by the Members in exchange for the discounted Nutritional Products consisted wholly of money and fell within the ambit of section 17(2) of the GST Act. The discounts given were also genuine volume discounts granted to the Members and not payment for services provided by the Members.

Further, counsel for Herbalife also submitted that any lacuna in the GST Act should be remedied by Parliament, not the courts.

### **WHETHER THE SUPPLY IN QUESTION WAS MADE IN EXCHANGE FOR SOME FORM OF NON-MONETARY CONSIDERATION**

#### ***The Comptroller's argument***

The Comptroller asserted that the terms and conditions in the Membership Agreement are contractual obligations undertaken by the Members which fulfilled the requirements to constitute non-monetary consideration under the GST Act. Alternatively, the discounts were consideration for services supplied by these distributors to the client, and thus should not be deducted from the value of its products for GST purposes.

#### ***Herbalife's argument***

The terms and conditions in the Membership Agreement were merely part of the contractual background underpinning the commercial relationship between the Members and Herbalife.

The terms and conditions constituted obligations that were merely ancillary to the purchase of the Nutritional Products and did not provide a benefit to Herbalife that went beyond the monetary transaction in question.

Herbalife also argued that there was no direct link between the supply of the Nutritional Products at discounted prices and the undertaking of obligations by the Members. In this regard, such terms and conditions should not constitute non-monetary consideration for the purposes of section 17(3) of the GST Act.

## *The High Court's Decision*

---

### **INTERPRETING SECTION 17(3) OF THE GST ACT**

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 the supply is not only money, but something additional of value in non-monetary form.

The meaning of consideration in section 17(3) should not, however, be interpreted too broadly, such that items of de minimis value fall within the meaning of non-monetary consideration, as there may be implications on all kinds of commercial practices that may not be intended to so be covered.

### **REGULAR TERMS OF TRADE DO NOT CONSTITUTE NON-MONETARY CONSIDERATION**

Regular terms of trade would generally be dependent and ancillary to the supply. Such regular terms of trade would not constitute non-monetary consideration unless they contractually demand the provision of something non-monetary in exchange for the supply. 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 section 17(3) of the GST Act.

On the facts of the case, the High Court was of the view that the terms of undertaking in Herbalife constituted terms of trade which were imposed by Herbalife 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 Herbalife.

Such terms of trade, without more, did not constitute non-monetary consideration for the purposes of section 17(3) of the GST Act.

Accordingly, it was found that the terms and conditions in the Membership Agreement did not contractually bind the Members to provide marketing services to Herbalife. Instead, they only governed how Members should act as a member of Herbalife as opposed to being the consideration furnished in exchange for the supply of Nutritional Products.

### **TACKLING REVENUE LEAKAGE VIA LEGISLATIVE CHANGE**

Finally, the High Court agreed with Herbalife that the solution to the revenue leakage raised by the Comptroller lay not in expanding the scope of non-monetary consideration, but in the adoption of a special valuation provision which specifically addresses business models akin to the appellant, without the potential negative collateral effects on commercial practices. This was beyond the power of the courts and had to be implemented legislatively.

For the reasons above, Herbalife's appeal was allowed.

## Conclusion

---

The High Court's ruling in Herbalife has been extremely useful in clarifying that consideration for the purposes of section 17(3) of the GST Act should be interpreted more narrowly than the meaning of consideration under general contract law, and that regular terms of trade would not generally constitute non-monetary consideration for GST purposes. This has far-reaching implications not only for the direct selling industry, but also for all cases where a determination has to be made whether a supply is wholly for monetary consideration or for a mixture of monetary and non-monetary consideration.

Please click [here](#) to rate this article.

## Facilitators

---



**Mr Vikna Rajah**

Executive Committee Partner and Head Tax,  
Trust and Private Client,  
Rajah & Tann Singapore LLP  
*Accredited Tax Practitioner (Income Tax)*

Email: [vikna.rajah@rajahtann.com](mailto:vikna.rajah@rajahtann.com)

This technical event commentary is written by SCTP's Tax Head, Accredited Tax Advisor (Income Tax) Felix Wong and Tax Manager, Joseph Tan. For more insights, please visit <https://sctp.org.sg/Tax-Articles>.

This article is intended for general guidance only. It does not constitute professional advice and may not represent the views of Rajah & Tann Singapore LLP, the facilitator or SCTP. While every effort has been made to ensure the information in this article is correct at time of publication, no responsibility for loss to any person acting or refraining from action as a result of reading this article or using any information in it can be accepted by Rajah & Tann Singapore LLP, the facilitator or SCTP.

SCTP reserves the right to amend or replace this article at any time and undertake no obligation to update any of the information contained in this article or to correct any inaccuracies that may become apparent. Material in this document may be reproduced on the condition that it is reproduced accurately and not used in a misleading context or for the principal purpose of advertising or promoting a particular product or service or in any way that could imply that it is endorsed by Rajah & Tann Singapore LLP, the facilitator or SCTP; and the copyright of SCTP is acknowledged.

© 2023 Singapore Chartered Tax Professionals. All Rights Reserved.