

Kingfisher Fails To Replicate The Argos Gift Voucher

In *Kingfisher* the Tribunal held that the principle laid down by the ECJ in *Argos*, whereby a supplier is liable for VAT in respect of the actual amount received for a gift voucher rather than its face value, did not apply to arrangements for the sale of vouchers at a discount between companies in the same corporate group.

BACKGROUND

Kingfisher plc (Kingfisher) was the parent company of the Kingfisher Corporate Group and representative member of a VAT group. Before 25 June 2000 Kingfisher operated a subsidiary company called Kingfisher Gift Vouchers Ltd (KGVL) that primarily sold Kingfisher gift vouchers to Kingfisher's retail outlets (such as Woolworths) at face value; the retailer then sold the vouchers (again at face value) to customers.

As part of a tax planning scheme (the Scheme) Kingfisher established a wholly owned subsidiary called Flogistics Ltd (Flogistics) outside the VAT group. Kingfisher provided vouchers to Flogistics at a discount (the Internal Discount). Flogistics would in turn provide the vouchers either to individual customers (through the retail companies) at face value or to corporate customers at a discount (the Corporate Discount).

The Scheme relied upon the Value Added Tax Act 1994 (VATA), Schedule 6, paragraph 5, which before 8 April 2003 provided that where a right to receive goods or services for an amount stated on a voucher was granted for consideration, the consideration was normally to be disregarded for VAT purposes, VAT becoming due when the voucher was finally exchanged for goods and services.

The Scheme further relied upon Case C-288/94 *Argos Distributors Ltd v Commissioners of Customs and Excise* [1996] ECR I-5331, in which the European Court of Justice (ECJ) held that the consideration received for a voucher when exchanged is not the face value but the actual amount received by the supplier of goods or services on the sale of the voucher. Based on that case Kingfisher argued that VAT was chargeable not on the amount paid

Christopher Vajda QC and Ian Hutton, Monckton Chambers, who acted for the Commissioners of Customs & Excise, discuss Kingfisher v Commissioners of Customs & Excise (LON/2001/1275)

by the customer but on the amount it received from Flogistics.

Although the Kingfisher Corporate Group demerged in 2001, the Scheme continued via Flogistics, which became a joint venture between Kingfisher and Woolworths Group plc.

THE ARGUMENTS BEFORE THE TRIBUNAL

Kingfisher's primary argument was that (in the light of *Argos*) consideration received by a supplier of goods in exchange for a voucher must be considered subjectively by reference to the value to the recipient. The face value of the voucher was irrelevant, as Kingfisher only receive that amount minus the Internal Discount.

Kingfisher further argued that there must be a direct link and a legal relationship between a supplier and the person to whom the supply is made. In the present case it was said that there was no such link between Kingfisher and the customers. The only relevant relationship for the purposes of VAT was the supply between Kingfisher and Flogistics and that again brought one to the conclusion that VAT was to be charged on the discounted amount.

The Commissioners of Customs and Excise (the Commissioners), on the other hand, decided that VAT should be charged on the face value of the voucher where it was sold to an individual, and at face value less the Corporate Discount where the voucher was sold to a corporate buyer. The Commissioners took the view that Kingfisher had absolute control over Flogistics and therefore, as a matter of commercial reality, vouchers were sold by Kingfisher to customers through the retail stores: Flogistics had little or no real commercial purpose. In other words, Flogistics did not act as a principal in the sale of vouchers but at best as Kingfisher's agent.

Alternatively, VAT was chargeable on the full amount paid to Flogistics for the

voucher, as that was the amount that had to be paid by the purchaser as a condition of Kingfisher supplying him with goods or services.

The Commissioners also argued that the Scheme amounted to an abuse of rights.

THE TRIBUNAL'S DECISION

Argos

The Tribunal began by distinguishing *Argos*. In that case the supplier sold vouchers to independent and unconnected businesses and as a result the relevant transactions were determined on a commercial and arms-length basis. Kingfisher sold vouchers to a wholly-owned subsidiary at non-commercial prices.

Nevertheless, the Tribunal accepted that *Argos* identified two relevant principles:

- a voucher is no more than a document which evidences an obligation by someone to accept that voucher, instead of money, at its face value; and
- that in order to ascertain the actual money equivalent when a voucher is given in exchange for goods, regard must *only* be had to the initial transaction comprising the sale of the voucher – that is, the consideration represented by the voucher must be the sum actually received by the supplier of the goods on the sale of the voucher.

The primary difficulty facing the Tribunal in applying those principles to the present case was whether Kingfisher sold vouchers to Flogistics, who then sold them on to private and corporate customers (as the contracts appeared to suggest), or whether as a matter of commercial reality Kingfisher was both the seller of the vouchers and the supplier of the goods.

Relying on *Telewest Communications plc v Customs and Excise Commissioners* [2004] STC 517 and *Kieran Mullin Ltd v Customs and Excise Commissioners* [2003]

STC 274 the Tribunal took the view that it must consider whether the evidence required it to depart from what would otherwise be the apparent contractual position.

In undertaking that exercise the Tribunal took into consideration the fact that decisions relevant to the inception of the Scheme were taken for Flogistics by Kingfisher's tax department, that those working for Flogistics were never transferred from Woolworths, the interlocking nature of the agreements between the various parties and in particular the fact that those arrangements ensured that the overall financial position remained as it had been before the Scheme was introduced, save for the VAT advantage. In the light of the above, the Tribunal concluded that Flogistics did not act independently of Kingfisher.

The Tribunal then went on to consider customer perception and noted that a customer paid his money to a Kingfisher retail company and obtained a voucher called a Kingfisher Gift Voucher which contained the name and address of Kingfisher's voucher centre. In the circumstances, the Tribunal concluded that the purchaser was given to understand that the voucher evidenced an obligation by Kingfisher (and not Flogistics) to ensure that it would be accepted by the retail companies in exchange for goods or services – that is, the customer would consider that he was contracting with Kingfisher.

As a result, the Tribunal concluded that: *'... as a matter of commercial reality, the supply of the vouchers was made to the purchasers by the Appellant. Flogistics did not act independently as a principal and had no power to deal with the vouchers as an independent owner. A purchaser would think that he was receiving the supply of a voucher from the Appellant'* (paragraph 123).

Having come to this conclusion it was a simple matter for the Tribunal to determine that the amount received by Kingfisher, as supplier of the goods, on the sale of the voucher was the face value paid by the private customer or the discounted amount paid by the corporate customer. Thus whilst in *Argos* the supplier received nothing but the discounted amount, in this case, as a matter of commercial reality, Kingfisher received the whole sum paid by the customer and VAT was to be charged on that amount.

The Tribunal went on to accept the Commissioners' alternative argument that even if there were two supplies of the voucher, one from Kingfisher to Flogistics

and the other from Flogistics to the customer, the value of the supply of the relevant goods was still the price paid by the purchaser of the voucher. It reached that conclusion because there was an implied condition that the purchaser of a voucher had to pay the price set by Kingfisher: Kingfisher was only willing to exchange goods if the face value (or the discounted amount in corporate sales) had been paid.

Abuse of rights

The Commissioners also argued that the Scheme represented an abuse of Article 2 of the First Directive and Article 11(A)(1)(a) of the Sixth Directive, as Kingfisher was taking part of its taxable supplies outside the scope of tax by interposing a third party into the relevant transaction.

The Tribunal accepted that the Scheme was orchestrated by Kingfisher's tax department, was not of a kind that would have been entered into on a commercial basis between independent third parties and as a result was *'highly artificial'*. It was further accepted that the only purpose of the Internal Discount was to obtain tax advantages, that Flogistics was not run on a commercial basis and that in commercial terms it did not achieve anything that could not have been achieved by KGV. L.

In the light of the above the Tribunal concluded that the conditions set out in Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569 were satisfied – that is, there were objective circumstances in which, despite the observance of the conditions laid down by the Community rules, the purpose of those rules was not achieved and there was a subjective element consisting in the intention to obtain an advantage by creating artificially the conditions laid down for obtaining it. In other words, the Scheme amounted to an abuse of Community VAT rules.

CONCLUSION

This case stands as a warning to those who believe they can achieve a tax advantage simply by drafting contractual arrangements that mechanically attempt to mimic circumstances that have arisen in other cases. In the present case Kingfisher believed that it could recreate the factual scenario present in *Argos* merely by putting into place a wholly-owned subsidiary through which it sold its vouchers. In such a case it can come as no surprise that the Tribunal will examine the relevant contractual relationships closely and will depart from those contracts where the evidence demonstrates that it is necessary to do so.

Argos sold at a commercial discount to unconnected businesses that could do as they pleased with the vouchers. Kingfisher 'sold' at an artificial discount to a wholly owned subsidiary that could only 'resell' the vouchers under terms rigidly set by its parent. The Tribunal refused to accept that Kingfisher could as a matter of contractual theory place itself in a position comparable to *Argos* whilst nevertheless in practice obtaining the full amount paid by the customer for the voucher. When one adds the customer's perception that he or she was dealing with Kingfisher the divergence between the contractual picture that Kingfisher attempted to paint and the commercial reality accepted by the Tribunal is apparent.

With regard to abuse of rights, the case provides an important further indication of how this, still developing, area of law applies in the VAT arena. The Commissioners accepted that retailers obtain various benefits from operating voucher schemes and equally that there may be an advantage in having such a business operated by a subsidiary. However, the Commissioners argued that those benefits did not prevent the Scheme from being artificial and abusive, because it was not necessary to enter into the Scheme in order to obtain those benefits.

The Tribunal's acceptance of this approach indicates that if the sole or primary purpose of a scheme as implemented is tax avoidance, it will not be saved simply because it creates some commercial benefits. In order to prevent a finding of artificiality it may be necessary to undertake the more difficult task of demonstrating that those benefits would not have been available under a different, less burdensome, arrangement.

Kingfisher has not appealed the Tribunal's decision.

VATA, Schedule 10A (inserted by the Finance Act 2003) now makes a distinction between retail vouchers (broadly those that the issuer can redeem) and credit vouchers that cannot be redeemed by the issuer. With regard to the former, only the initial sale by the issuer is disregarded: any onwards sale is taxed when the voucher is sold. The consideration for the supply of a credit voucher is disregarded (except where it exceeds the face value of the voucher) unless the redeeming party fails to account for VAT on the supply of the relevant goods or services. Thus the new provision aims to ensure that tax is collected on any mark-up added by an intermediary and means that schemes of the kind envisaged by Kingfisher can provide no tax advantages.