TC03581

Appeal number: TC/2012/04744

VAT – Preliminary issue – Single supply made by appellant to its non-VAT registered sales consultants – Subsequent retail sale of goods sold by sales consultants – Direction that output tax on appellant's due at "open market value on a sale by retail" – Whether "open market value on a sale by retail" should include delivery charges made to sales consultants – Appeal Allowed – Paragraph 2 Schedule 6 Value Added Tax Act 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

ORIFLAME UK LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS
MS ANN CHRISTIAN

Sitting in public at Manchester on 30 April 2014

Mark Hetherington of UNW LLP Chartered Accountants for the Appellant

Philip Shepherd, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This decision is in relation to the "delivery issue" identified by the parties as a matter to be considered as a preliminary issue in the appeal of Oriflame UK Limited ("Oriflame"). All other issues raised by the appeal have, in accordance with the direction of Judge Cannan, released on 2 December 2013, been stayed pending the final determination of the *Avon Cosmetics Limited v HMRC* litigation.

2. Oriflame, which was registered for VAT, supplied cosmetics and other goods to sales consultants, who were typically not VAT registered, to sell, by way of retail, on to the general public. Invoices issued to the sales consultants by Oriflame included, in addition to the items supplied, a delivery charge for these items which are subsequently hand delivered by the sales consultants to their customers.

3. On 30 April 2009 HM Revenue and Customs ("HMRC") issued Oriflame with a 'Notice of Direction' in the following terms:

> In pursuance of paragraph 2 of schedule 6 to the Value Added Tax Act 1994, HM Revenue and Customs hereby DIRECTS that after 7 May 2009 the value by reference to which Value Added Tax is charged on any supply of goods:–
>
> (a) by you to persons who are not taxable persons within the meaning of Section 3 of the Value Added Tax Act 1994
>
> (b) to be sold by persons mentioned in (1) above or others, by retail shall be taken to be its open market value on a sale by retail.

In relation to this Notice we note that what is now paragraph 2 of schedule 6 to the Value Added Tax Act 1994 ("VATA") was introduced to implement a derogation from Article 11A(1)(a) of the Sixth Directive (1977/388/EEC) (which defined the "taxable amount") under the authorisation given by the Council of the European Union to the United Kingdom.

4. Oriflame subsequently accounted for VAT in accordance with the Notice of Direction and in doing so excluded the cost of delivery from the value of the goods. For example, on its invoice to a consultant it would have set out the goods supplied at a cost of, say £72 and £5 for their delivery which were then sold to a customer for, say, £95. The value on which Oriflame calculated its output tax in accordance with the Notice of direction was £95 with additional output tax calculated in respect of the £5 delivery charge.

5. However, Oriflame did not consider that such a delivery charge should be separately subject to VAT but treated as an element of a single supply to its consultants. Therefore, on 5 December 2011, it requested from HMRC, by way of voluntary disclosure, a repayment of £208,332 for the VAT periods 09/08 to 09/11 on the basis that it was output tax relating to delivery charges that had been paid in error. This request was rejected by HMRC and Oriflame appealed to the Tribunal.

6. On 19 February 2014 the First-tier Tribunal (Judge Nowlan and Andrew Perrin) released its decision in *Avon Cosmetics Limited v HMRC* [2014] UKFTT 172 (TC) in which it found, at [91] it to be "entirely appropriate" to make a reference to the Court of Justice of the European Union ("CJEU"). Although the terms of that reference are not yet known it would appear from the decision that it is likely to concern the validity of the derogation in the absence of any reference to the deduction of input tax.

7. Although it had been agreed that the "delivery issue" was to be determined as a preliminary issue given the reference to the CJEU in relation to the derogation Mr Philip Shepherd, for HMRC, made an application for this issue also to be stayed behind the *Avon* proceedings on 6 April 2014. However, Mr Mark Hetherington on behalf of Oriflame submitted that it was unlikely the reference, which probably will be in relation to input tax would have any bearing on the "delivery issue" which is concerned with output tax.

8. We agreed with Mr Hetherington and noted that there is no indication in the *Avon* decision that the "delivery issue", which is a discreet issue in its own right, will be raised in the reference to the CJEU. Therefore, having regard to the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to "deal with cases fairly and justly", in particular "avoiding delay, so far as compatible with proper consideration of the issues" (rule 2(2)(e)) we dismissed the 6 April 2014 application and proceeded to hear the "delivery issue"

9. This turns on the interpretation of paragraph 2 of schedule 6 VATA which provides:

> 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 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.

10. Mr Shepherd contends that in this case there are two separate and distinct supplies.

11. First, the supply of delivered goods by Oriflame to its sales consultants, which HMRC accept is a single supply of delivered goods; and secondly the supply of goods by the sales consultants to their customer by way of retail sales. He submits that the supply from Oriflame to the sales consultants has no bearing on whether the delivery charges for these supplies form part of the open market value of the sale of those goods. He relies on the words of paragraph 2 which refer to goods sold "by retail" which cannot include items such as delivery charges which Mr Shepherd submitted was just one of a number of overheads incurred by a sales consultant.

12. However, we prefer Mr Hetherington's submission that it is plain from paragraph 2 that the of the Notice of Direction has the effect of obliging Oriflame to substitute the value of its supplies to the sales consultant with the open market value paid by the member of the public who purchases from that sales consultant. In this case, to use the figures in the example in paragraph 4 above, the value of Oriflame's supply under the Notice of Direction, the £72 and the £5 should be substituted by the value of the retail supply, £95.

13. In our judgment it is clear that the words used in the final part of paragraph 2, in particular "*the Commissioners may by notice in writing to the taxable person direct that the value of such supply* ***by him***" (emphasis added) refer to the supply by the taxable person, in this case Oriflame.

14. It is not disputed that, although it does include delivery charges, Oriflame makes a single supply. In our view this single supply must be a supply of goods. As such we consider it wholly artificial and contrary to the principles enunciated by the CJEU in *Card Protection Plan v Customs and Excise Commissioners* [1999] STC 270 to describe the supply by Oriflame as that of "delivered goods" in order to distinguish it from the subsequent supply of goods by the sales consultants. Accordingly, under paragraph 2, the value of that single supply by Oriflame "*shall be taken to be its open market value on a sale by retail*" ie, to use the example in paragraph 4 above the £95 charged to a customer by a sales consultant on its retail sale.

15. It therefore follows that the appeal is allowed.

16. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 14 May 2014