



20 June 2013

PRESS SUMMARY

Her Majesty's Revenue and Customs (Appellant) v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited) (Respondent) (No. 2) [2013] UKSC 42
On appeal from [2007] EWCA Civ 938

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lord Wilson, Lord Reed and Lord Carnwath

BACKGROUND TO THE APPEAL

The Respondent (“LMUK”) operates the Nectar loyalty card scheme (“the scheme”). As part of the scheme, it enters into contracts with certain retailers (“redeemers”). Under such contracts, each redeemer is required to provide customers (“collectors”) with goods and services wholly or partly in exchange for Nectar points. That they do so is essential to the functioning of the scheme. The collectors earn such points through purchases made from other retailers (“sponsors”), who pay LMUK for allowing them to do so. Those payments are subject to VAT, on the basis that LMUK provides a taxable supply of services. The Respondent pays each redeemer a “service charge” for allowing customers to exchange points for goods or services.

LMUK sought to deduct the VAT element of the service charge as input tax on the basis that, under the relevant EU legislation, the service charge was paid by LMUK to the redeemers for a service supplied to it for the purpose of its business. The Appellant (“the Commissioners”) maintained that under that legislation the service charge constituted third party consideration for the redeemers’ supply of goods and services to collectors, and that therefore LMUK could not deduct input tax. When the issue came before the House of Lords, it referred the question of how to characterise the service charge under EU law to the Court of Justice of the European Union (“CJEU”). The CJEU concluded that the service charges amounted, at least in part, to third party consideration.

When the case returned to the Supreme Court, it nevertheless decided ([2013] UKSC 15) by a majority of three to two that LMUK was entitled to deduct the VAT element of the service charge. It did so on the basis that, having regard to the contractual relationships between LMUK, the sponsors, the collectors and the redeemers, the service charge was paid by LMUK to the redeemers for a service supplied to LMUK for the purpose of its business. The Court respectfully declined to follow the CJEU’s characterisation of the service charge as third party consideration on the basis that the terms of the reference to it by the House of Lords had precluded the CJEU from considering all relevant aspects of the relationships between the parties involved in the Nectar scheme.

The Court allowed the parties an opportunity to make written submissions as to the form of the order it should make. The Commissioners invited the Court to make a further reference to the CJEU on two principal grounds. First, they argued that a national court is obliged under EU law to make a further reference if it finds the ruling of the CJEU on the first reference to be incomplete or unsatisfactory. Second, they argued that there must be an issue of EU law raised in the present appeal on which a decision is necessary and which cannot be considered to be reasonably clear, as the Supreme Court decided the case by a narrow majority. LMUK opposed a further reference and invited the Court to dismiss the appeal.

JUDGMENT

The Supreme Court unanimously refuses LMUK's request for a further reference to the CJEU and dismisses the appeal. Lord Reed gives the judgment of the Court.

REASONS FOR THE JUDGMENT

- The Court rejects the Commissioners' first principal argument [4-5]. It notes that its previous judgment had not questioned the CJEU's ruling on any question of EU law, but rather had proceeded on the basis of a more comprehensive account of the facts than the CJEU was afforded. The Court's previous judgment had, first, considered that the CJEU's judgment had identified the relevant principles of law but had applied them to the incomplete factual scenario it had been presented with by the House of Lords and, second, applied those principles to the fuller factual account of which it was apprised. As such, no question of EU law now arises and a further reference is not necessary.
- The Court also rejects the Commissioners' second principal argument [6]. It does so on the basis that, in the Court's previous judgment, the majority considered that the case could be decided by applying well-established principles to the facts of the case. Further, the majority and the minority both acknowledged that the CJEU judgment dealt with the case on the basis that it raised no new point of law. The issues raised by the minority in the previous judgment, so far as relating to EU law, are not considered to require or justify a further reference to the CJEU.
- As a result of the above findings, the Court does not consider a further reference to the CJEU to be necessary. It also notes that it would be unfortunate if the position were otherwise, given that this litigation commenced in 2003 [7].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html



13 March 2013

PRESS SUMMARY

Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited) (Respondent) [2013] UKSC 15
On appeal from [2007] EWCA Civ 938

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lord Wilson, Lord Reed, Lord Carnwath

BACKGROUND TO THE APPEAL

The Respondent (“LMUK”) operates the Nectar loyalty card scheme. Members of the scheme (“collectors”) have an account with LMUK and are issued with a Nectar card. When a collector purchases goods or services from a retailer which has agreed with LMUK to participate in the scheme by issuing Nectar points (“a sponsor”), the collector’s Nectar card can be used electronically to credit his or her account with points. A collector may use his or her Nectar card to obtain goods or services wholly or partly in exchange for Nectar points from retailers which have agreed with LMUK to participate in the scheme by redeeming points (“redeemers”).

The Nectar scheme operates on the basis of three contracts. First, a contract between LMUK and each collector, which requires LMUK to ensure that Nectar points can be obtained when making purchases from sponsors and can be used wholly or partly in exchange for goods or services from redeemers. Secondly, a contract between LMUK and each sponsor which requires LMUK to credit collectors’ accounts with Nectar points issued by the sponsor and ensure that collectors can later redeem those points wholly or partly in exchange for goods or services. The sponsors pay LMUK an agreed sum per point issued. LMUK charges VAT on those sums. Thirdly, a contract between LMUK and each redeemer which requires the redeemer to provide collectors with goods and services wholly or partly in exchange for points, in return for which LMUK pays the redeemer a “service charge” at an agreed value per point redeemed. The redeemers charge VAT on the service charge.

The issue in this appeal is whether LMUK, under the relevant EU legislation, is entitled to deduct as input tax the VAT element of the service charges. LMUK argues that it is entitled to do so because it pays the service charges as consideration for the supply to LMUK of services by the redeemers, and those supplies are made for the purpose of LMUK’s business. The Appellant (“the Commissioners”) say that the service charges are third party consideration for the redeemers’ supply of goods and services to collectors and, therefore, LMUK is not entitled to deduct the input tax. The VAT Tribunal decided in favour of LMUK. The issue reached the House of Lords, which referred the case to the Court of Justice of the European Union (“CJEU”) for a preliminary ruling. The interpretation of the CJEU’s judgment is central to this appeal.

JUDGMENT

The Supreme Court by a majority of three to two (Lord Wilson and Lord Carnwath dissenting) is minded to dismiss the Commissioners’ appeal, but invites the parties to file written submissions as to the precise form of the order to be made. Lord Reed gives the lead judgment for the majority.

REASONS FOR THE JUDGMENT

The CJEU concluded that the service charges amounted, at least in part, to third party consideration paid by LMUK to the redeemers for the supply of goods and services to collectors [47]. However, it had not been possible for the CJEU to consider, as a whole, the relationships between LMUK, the sponsors, the collectors and the redeemers because the questions referred to the CJEU by the House of Lords neither made sufficiently clear the central issues which arose for determination nor highlighted the facts found by the tribunal that most

directly bore on those issues [30, 38, 41, 48, 49, 88, 91]. The CJEU, therefore, understandably did not consider a number of important matters [48, 49].

The CJEU's role in the present case was to rule on the correct interpretation of the relevant EU legislation. However, the evaluation of the facts of a case and the application of EU law to those facts, following a preliminary reference, is a matter for national courts [54, 103, 107, 108]. In determining this appeal, the Supreme Court must take into account all of the relevant facts found by the VAT Tribunal. The judgment of the CJEU was based on an incomplete evaluation of those facts. In the exceptional circumstances of this case, therefore, the CJEU's judgment cannot be treated as decisive of the nature of the service charges paid by LMUK [56]. However, the CJEU did provide important guidance, by stating that consideration of the economic reality is a fundamental criterion for the application of the EU legislation relating to VAT and that, where a transaction comprises a bundle of features and transactions, regard must be had to all the circumstances in which that transaction took place [56].

VAT is chargeable on each transaction in a production and distribution process only after deduction of the amount of VAT paid in relation to the costs of the various price components [73]. The right to deduct VAT is an integral part of the EU system of VAT; it is intended to relieve a trader entirely of the burden of the VAT payable or paid in the course of all his economic activities [73, 74]. VAT is paid, therefore, at each stage in a production and distribution process only on the added value and is ultimately paid by the final consumer [75].

No monetary consideration is paid by a collector in so far as goods and services are exchanged for his or her Nectar points, but a payment is subsequently paid to the redeemers by LMUK based on the value of those Nectar points. It is possible, if these aspects of the case are considered in isolation, to conclude that the service charge should be regarded as third party consideration for the supply by the redeemer to the collector [76]. However, LMUK provides to collectors a contractual right to obtain goods and services from redeemers wholly or partly in exchange for Nectar points. The counterpart of that right is an obligation on LMUK to procure that redeemers provide goods and services wholly or partly in exchange for Nectar points. The service charges paid by LMUK constitute the costs of fulfilling that obligation and, therefore, are an essential cost of LMUK's business [77]. The economic reality is that the redeemers make taxable supplies to LMUK [79, 111]. The service charges represent the value to LMUK of the services which the redeemers provide [81]. LMUK should, therefore, be entitled to deduct from the VAT for which it is accountable the VAT charged by the redeemers so that LMUK pays VAT only on the added value for which it is responsible [78].

If the provision of goods or services by redeemers to the collectors is treated as a taxable supply (other than to the extent to which money is paid by the collectors), the tax authorities would receive not only VAT on the amount received by LMUK from sponsors for supplying the right to receive those goods or services, but also VAT on the amount which LMUK must pay to satisfy that right [85]. However, if the service charges are regarded as consideration for the supply of a service by the redeemers to LMUK (a service which includes providing goods and services to collectors), the tax authorities will still receive VAT from LMUK on the difference between the value of the supply by LMUK of Nectar points to collectors and the value of the supply of services by redeemers to LMUK; that sum represents the value added by the taxable transactions entered into by LMUK [85].

Lord Hope notes that neither the reference nor the judgment of the CJEU addressed LMUK's argument that the redeemers were making supplies both to the collectors and also to LMUK [91, 93-94, 96, 99, 101]. The point in issue in the case had not been answered [102]. Whether there were as a matter of economic reality two supplies within the same transaction was a question of fact for the domestic court to decide [107-108].

Lord Carnwath (with whom Lord Wilson agreed), dissenting, notes that the questions referred to the CJEU and the facts drawn to its attention in the reference were agreed by both parties and the House of Lords [122, 123]. He takes the view that the service charges paid by LMUK were simply third party consideration for the supply of goods and services by redeemers to collectors and no portion of them can be treated as consideration for a supply of services by the redeemers to LMUK [139, 145].

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