



HIGH COURT OF AUSTRALIA

Public Information Officer

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AVON PRODUCTS PTY LIMITED v COMMISSIONER OF TAXATION

Avon could not claim back overpayments of sales tax because it failed to prove that the excess amounts were not passed on to customers, the High Court of Australia held today.

Avon representatives sell cosmetics, fragrance, toiletries and other products door to door. Before introducing any product, Avon undertook a cost analysis and assigned each product a “regular price”, based on prices charged by competitors on comparable products or on what the market would bear, and including an acceptable profit margin. Most products were sold at discount during Avon’s 18 marketing campaigns a year and these discounts still covered Avon’s costs, including sales tax. The overpayments occurred before Avon obtained a sales tax private binding ruling in 1999 from the Australian Tax Office which determined that the taxable value of its products should be the “store cost of the goods plus 11.63 per cent”. This taxable value was lower than that on which Avon had previously based its payments. It submitted claims for credits of \$3,610,261 for the period from March 1993 to August 1999. There is no dispute that this amount was overpaid.

The *Sales Tax Assessment Act* contains a statutory code for relief against overpaid sales tax. The credit that can be claimed is the amount of overpaid tax the claimant has not passed on to customers. Therefore, the Act takes a stance against automatic recovery of sales tax merely because it has been overpaid. The claimant must show they have borne the cost and not passed it on. The taxpayer bore the onus of proof of the extent that the overpayment has not been passed on.

The Commissioner disallowed Avon’s claims on the basis that Avon had passed on the overpaid sales tax to its customers at point of sale and had not subsequently refunded them. In the Federal Court of Australia, Justice Graham Hill upheld the Commissioner’s decision. He held that Avon’s goods were always priced at a figure which exceeded cost plus sales tax and ensured a profit. Justice Hill held that Avon failed to satisfy the burden of proof imposed by the Act. The Full Court, by majority, dismissed an appeal. It held that where the facts disclose that the taxpayer has set prices at a level to ensure that they exceed costs, including sales tax, it will be difficult for the taxpayer to satisfy the onus under the Act to show it has borne the tax burden itself.

Avon appealed to the High Court, which unanimously dismissed the appeal. Avon contended that a tax is only passed on if the price at which goods are sold is increased by the amount of the tax. It submitted that since its regular prices remained constant and were fixed by reference to market benchmarks without reference to cost, and since its discounting policy remained constant, then its test was satisfied. Since buyers were no worse off when sales tax was overpaid and Avon was worse off, the tax was absorbed by Avon. However, the Court held that such tests were different from the language in the Act and that in the ordinary course of things sales tax will be passed on. It held that Avon had failed to demonstrate any error in the approach of the majority of the Full Court in rejecting Avon’s purported test and in affirming Justice Hill’s decision that Avon had failed to establish that it had not passed on the overpaid sales tax.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court’s reasons.*