

DIXONS RETAIL v HMRC

Raymond Hill
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The ECJ has recently ruled on retailer sales where a customer fraudulently uses a credit card. In doing so, it has shed further light on the concepts of “supply of goods” and “consideration” in VAT cases. Its judgment will affect the entire retail sector. More specifically, it will determine a large number of Tribunal cases stood behind the Dixons case.

Background

Dixons is a well-known retailer of electrical items. It sought repayment of VAT which it had accounted for on fraudulent credit and debit card transactions.

Dixons had agreements with a card issuer (American Express) and a merchant acquirer bank (Nat West Streamline) under which it was obliged to accept certain debit and credit cards from customers. In return, the two banks undertook to pay Dixons the ticket price of goods purchased by those of its customers using cards. Provided that Dixons complied with the procedures laid down in the two agreements, the banks had to pay Dixons the price of the goods even if it later turned out that the cards had been used fraudulently. In the relevant transactions, cards were used fraudulently but the banks were not entitled to make a chargeback and had not sought recourse against Dixons, as the retailer had complied with the necessary procedures. Dixons had retained the payments which included a VAT element.

Dixons argued that there was no supply of goods within Article 5(1) of the Sixth Directive and Article 14(1) of the Principal VAT Directive because the transactions in dispute were analogous to thefts. It also argued that it received no consideration for the relevant supplies within the meaning of Article 11A(1) of the Sixth VAT Directive and Article 73 of the Principal VAT Directive, since the payments made by the card issuer to Dixons were not made in satisfaction of any contractual obligation between Dixons and the fraudster and the card issuer received no benefit from the fraudster in return for making the payment to Dixons. Dixons argued that part of the service provided by the card issuer to it was a financial guarantee against the risk of fraud, so that the payment made by the card issuer to Dixons represented a type of insurance payout (which fell outside the scope of VAT), rather than the consideration for any supply between Dixons and the fraudster.

Judgment of the ECJ

The Court of Justice held that there was a supply of goods for consideration where a customer used a bank card fraudulently to obtain goods from a retailer and the retailer received payment for the goods from a card issuer or merchant acquirer.

The Court rejected Dixons’ argument that the transactions were indistinguishable from theft and ruled that there was a supply of goods. It reached that conclusion because the

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concept of supply of goods covered any transfer of tangible property by one party which empowered the other party actually to dispose of it as if he were the owner. The theft of goods does not empower the thief to dispose of the goods as if he were the owner, whereas Dixons had voluntarily handed over the goods to the customer in return for the fraudulent presentation of the debit or credit card. Dixons had thereby transferred ownership of the goods to the fraudster.

Furthermore, the Court stressed that the concept of supply of goods is objective in nature and it applies without regard to the intentions of the parties to the transaction. Fraudulent use of a bank card does not affect the objective criteria on which the concept of supply of goods is based; the intention of the fraudulent customer and therefore his fraud are irrelevant.

The Court also rejected Dixons' submission that there was no consideration for the supply. Credit card sales involved a number of transactions. The relevant one for these purposes was not the provision of services by the card issuer to Dixons, but the provision of goods by Dixons to the fraudster. That second transaction was made in return for third party consideration from the card issuer. It was true that a theft did not involve consideration because the thief gave nothing in return for taking the goods. But where a fraudster purchased goods using a credit or debit card, there was a direct link between the supply of the goods and the receipt of third party consideration from the card issuer or merchant acquirer bank. The fact that Dixons received payment from third parties (American Express and Nat West Streamline) could not change the taxable amount. Accordingly, the Court concluded that the payment of the price of the goods was consideration obtained by Dixons in respect of the sales, even though the sales subsequently turned out to have been purchased by means of cards used fraudulently.

Comment

Before the Court's judgment in Dixons, it was already clear that the theft of goods from their lawful owner was neither a supply of goods and nor was it performed for consideration (see Case C-435/03 *British American Tobacco and Newman Shipping* [2005] ECR I-7077 at paragraphs 32 to 40).

However, in *British American Tobacco*, the Court appears to have distinguished that situation from a later onward sale of stolen goods by the thief to a third party. Such a sale would be subject to VAT "because the chargeable event of the tax, namely importation or the supply of goods, has occurred, subsequent to the theft, and the consideration for the transaction, which constitutes the taxable amount, has been identifiable" (see *British American Tobacco* at paragraph 39 and the Opinion of AG Poiares Maduro in that case at paragraph 28). Although, certainly in English law, a thief cannot normally pass good title to goods so that he is not in a position to dispose of goods as if he were the owner of them, the Court seems to have been influenced by the principle of fiscal neutrality to require onward unlawful sales of goods to be taxed, since otherwise they would have a competitive advantage in relation to lawful transactions (see here more generally Case C-455/98 *Tullihallitus v. Kaupo Salumets* [2000] ECR I-4993).

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In *Dixons*, the Court had to consider a case where the illegal act, the fraudulent use of a credit or debit card, took place at the same time as *Dixons* gave possession of the goods to the fraudster. *Dixons* had argued that any payment received by *Dixons* from the relevant bank was not consideration because any agreement between *Dixons* and the fraudster was vitiated by the fraud, which gave *Dixons* the right to rescind for fraudulent misrepresentation. Therefore, the payment was not reciprocal performance of any contractual obligation owed by *Dixons*. Furthermore, the bank did not receive any benefit in return for its payment. Accordingly, *Dixons* argued that there was no objective difference between a thief taking goods or obtaining them through fraudulent use of a debit or credit card.

The Court in *Dixons* rejected these arguments holding that there was a distinction between theft and card fraud, apparently once again because of concerns about fiscal neutrality. The judgment confines *British American Tobacco* to cases where there is no legal relationship at all between the thief and the victim. Where, as in *Dixons*, there is a legal relationship between the supplier and the fraudster and the supplier voluntarily hands over the goods, it does not matter whether in national law the supplier may rescind the transaction for fraud. Just as in a lawful transaction, the supplier voluntarily hands over possession of the goods to the fraudster and allows him to treat the goods "as if" he were owner (even if in national law, he is not to be regarded as the owner).

The logic of the Court's approach to the issue of consideration is that the same treatment must apply to transactions undertaken by a fraudulent cardholder as to the situation where a genuine cardholder defaults on paying its debt to the card issuer. The Court's reasoning seems to have been that *Dixons'* argument failed to fully differentiate between the supply of goods from the retailer to the customer and the supply of services between the card issuer and the retailer. Referring to its previous decision in *Case C-18/92 Bally* [1993] ECR I-2871, the Court held that the fact that the customer paid *Dixons* the agreed price through the card issuer could not change the consideration or taxable amount for that first supply. It follows that, in a non-fraudulent transaction, the third party payment by the card issuer to *Dixons* would be consideration for the supply by *Dixons* to the customer. Therefore, the fact that the customer subsequently failed to reimburse the card issuer cannot change the objective features of the first transaction between *Dixons* and the customer.

Conclusion

The Court's decision in *Dixons* will be important to all retailers, since it determines that VAT will still be due on fraudulent transactions where payment is obtained from the card issuer or merchant acquirer bank. More generally, the case is important in establishing yet again the very wide meaning given by EU law to the terms "supply of goods" and "consideration" in VAT.

Peter Mantle represented the United Kingdom in the ECJ (as well as representing HMRC in the First-tier Tribunal which made the reference).

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.