[2011] UKUT 58 (TCC)
Appeal number FTC/25/2010

VAT zero-rating- food supplied for delivery-whether supplied above ambient temperature for the purpose of enabling it to be consumed hot or of demonstrating that it is freshly cooked- appeal allowed on the basis of the latter

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

DELIVERANCE LIMITED **Appellant**

- and -

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

TRIBUNAL: Mrs Justice Proudman

Sitting in public at the Royal Courts of Justice on Thursday 20th January 2011

Philippa Whipple QC, instructed by RSM Tenon, accountants and business advisers, for the Appellant

Richard Smith, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Deliverance Ltd from the First Tier Tax Tribunal (Dr John F Avery Jones CBE and Mr Nicholas Dee), upholding a decision letter rejecting the appellant's claim for repayment of VAT. The issue is whether certain items of food supplied by the appellant are standard-rated for VAT as "hot food". If as the appellant contends they are not, they are zero-rated. The appeal lies in point of law only.

2. The appellant is a catering company which delivers a wide range of freshly prepared food to customers. It supplies European, Italian, Japanese, Chinese, Thai and Indian dishes as well as other snacks, puddings, wine and beer. As its name suggests, it supplies food for delivery only. There is no dispute about most of the items supplied. For example, burgers are standard-rated and salads are zero-rated. The dispute arises as to a small proportion of items which the appellant cooks and which leave the premises above ambient air temperature: crispy duck pancakes, spring rolls, samosas, falafels, sesame prawn toast, onion bhajis and breads of several kinds.

3. The VAT position is governed by s.30 of the Value Added Tax Act 1994 ("the Act"). The effect of s. 30 and Schedule 8 to the Act is that a supply of food is generally zero-rated. An exception is a supply in the course of catering. Note (3) to Group 1 of Schedule 8 to the Act provides:

"(3) A supply of anything in the course of catering includes-

…(b) any supply of hot food for consumption off those premises;

And for the purposes of paragraph (b) above "hot food" means food which, or any part of which-

(i) has been heated for the purposes of enabling it to be consumed at a temperature above the ambient air temperature; and

(ii) is above that temperature at the time it is provided to the customer."

4. It is common ground for the purposes of Note 3 (b) (ii) that the food items in the present case were supplied to the customer at a temperature above the ambient air temperature. The issue on this appeal is confined to whether Note 3 (b) (i) applies, that is to say whether the food was heated for the purposes of enabling it to be consumed at that temperature. I will refer to that temperature as "hot" for convenience sake, although that is not strictly accurate.

5. It is clear from the leading authority, the decision of the Court of Appeal in **John Pimblett and Sons v. CEC** [1988] STC 358 that the test is one of the supplier's subjective purpose in heating the items. It is the purpose of the supplier, not the customer, which is in issue.

6. In this context **Pimblett** also establishes the following propositions. First, that it is not part of the test that the supplier knows that the items will or may be consumed hot. The test is the precise one of the supplier's own purpose in

heating the items. Secondly, the Tribunal is entitled to test the evidence and may decline to accept the supplier's assertions as to his purpose. Thus evidence as to the customer's purpose, and evidence about the way in which the supplier deals with the food after it has been cooked or heated, goes to the weight of the evidence but it is for the Tribunal to determine the purpose of the supplier having considered all the circumstances of the case. Thirdly, in the event that the Tribunal finds more than one purpose, it must have regard to what is the supplier's dominant purpose, disregarding any inevitable results which may flow from that dominant purpose. A necessary consequence is to be distinguished from the supplier's purpose, even though this may result in different results as to rating as between traders conducting similar businesses: see **Pimblett** at 361.

7. In **Pimblett** the Court of Appeal held that the supplier's predominant purpose in heating pies which it sold to its customers was to cook them, rather than to enable them to be consumed hot. That was notwithstanding that a batch was made before the lunch hour and the supplier knew that some of its customers would eat the pies immediately. The fact that the taxpayers were aware that customers might purchase the pies to consume them while hot was not, on the statutory wording, a relevant consideration. Mr Smith for HMRC pointed out two particular features of the facts of that case which distinguish it from the present one. First, the pies were not kept hot with any kind of heating apparatus and, secondly, as the customer came to the supplier's premises to

buy the pies, added attractions were the atmosphere of the shop and the aroma of fresh baking.

8. In **Malik (t/a Hotline Foods) v. CEC** [1998] STC 537, the only other decision (directly in point) of a superior court to which I have been taken, the decision went the other way. In that case Mrs Malik ran a company delivering curries. The High Court accepted that the food was heated as part of the cooking process but upheld the Tribunal's conclusion that the supplier's predominant purpose, judged in the light of all the evidence including the steps taken by the supplier to keep the food hot, was to supply food for consumption hot. Indeed, Mrs Malik honestly said in her evidence that she wanted to ensure that the meals arrived at the customer's home as hot as possible. She referred (see p. 541) "to giving customers 'a hot meal'". Keene J said, at 541,

> "I note that the tribunal found that the appellant sought to deliver the food to customers warm enough to enable it to be consumed above ambient air temperature without reheating. Indeed, they added 'that much is clear'. Mr Ghosh [the appellant's counsel] seeks to challenge that finding of fact on the basis that there was no evidence for that. But I am bound to say that there was considerable evidence for that finding in the shape of the use of the hot cupboard, the use of the insulated boxes and the appellant's own evidence about giving customers a 'hot meal'. Once that finding has been reached, it was open to the tribunal to find that at least one of her purposes in cooking the food was to enable it to be consumed hot. The tribunal was entitled to look at all the circumstances to arrive at a conclusion as to her purpose or purposes, and those circumstances would include not only what she said about her purpose or purposes but also what she did after the food had been cooked and what she said about that stage in her activities. That was capable of throwing some light on the purpose she had when heating the food by way of cooking it…"

9. I was also taken to a number of First Tier Tribunal decisions by way of illustration of these principles: **The Lewis's Group Limited Ltd v. CCE** Decision [4931] 1990, **Stewarts Supermarkets Ltd v. CCE** Decision [13338] 1995, **Domino's Pizza Group Ltd v. CEC** Decision [18866] 8 December 2004 and **Coffee Republic Plc v. HMRC** Decision [20150] 18 May 2007.

10. With those principles in mind, therefore, I turn to the decision in the present case. It is common ground that the Tribunal was seized of the correct test, and purported to apply it. The issue is whether the Tribunal did so correctly.

11. I note three findings of fact in particular, numbered (6), (9) and (10), as follows. The emphasis is mine.

> "(6) All the cooked items are put into a cardboard box which is put on a shelf with heating above while the complete order is assembled. Cold items are put in bags. The hot items of the complete order are put in a heated cupboard for a maximum of 15 minutes pending dispatch. The complete order including the cold items is then put into a padded bag which goes into a lined box on the motorcycle for delivery. **The reason for treating the disputed items in the same way as other hot food in this respect is to save having a separate system for dealing with them and in order to comply with the Regulations below**."

The regulations, and the application of them to the facts of the case, were considered by the Tribunal in some detail. They were food safety regulations requiring food which had been heated either to be kept at or above 63° C or to be blast-chilled down to 8° C. Although the regulations provided a defence if the food was kept for no more than two hours after being heated, the Tribunal

found (at paragraph 12) that it was understandable for the appellant not to want to rely on this defence "because it assumed that it was otherwise in breach of the regulations".

> "(9) The majority of complaints were about food intended to be supplied hot not being hot. The disputed items did not normally give rise to any such complaints.
>
> (10) Mr Dye's evidence [Mr Dye was the appellant's witness] was that the Appellant's purpose in heating the food and keeping it hot pending and during delivery was so as to demonstrate that the food was freshly cooked. **We accept this and consider below the effect on the interpretation of Note (3).** We accept his evidence that all the disputed items could be eaten cold. We regard it as a matter of opinion whether they are better eaten hot or cold."

Finding (10) is reiterated in paragraph 12 of the Decision in which the Tribunal said,

> "Mr Dye's evidence, which we have accepted, was that the purpose of heating and keeping hot the disputed items was to demonstrate that they were freshly cooked."

12. Paragraph 12 of the Decision goes on, referring to the passage just quoted,

> "The issue is, given that stated purpose, whether the disputed items (or part of them) have been heated for the purposes of enabling them to be consumed hot…"

The issue as it appeared to the Tribunal is then stated in paragraph 13, and this is the point on which the Decision turns. The emphasis is again mine.

> "A purpose is something that exists in the mind, here the mind of Mr Dye, the Director of Operations of the Appellant. A purpose is limited

> to what is in the person's mind, unlike intention, which includes the natural consequences of a person's acts. **Is it then possible for the purpose of demonstrating that the food is freshly cooked not to include the purpose of enabling it to be consumed hot, which follows necessarily from demonstrating that it is freshly cooked? Is it the case that they are different purposes, one of which is the dominant one?**"

13. The Tribunal went on to explain in paragraph 14 why the Chairman decided that the answer to both questions was in the negative. The lay member disagreed. He thought that the purpose, or at any rate the predominant purpose, of the supplier, subjectively considered, was to demonstrate that the food was freshly cooked. The Chairman's casting vote prevailed and the appellant failed. It was held, (at paragraph 14),

> "on the facts of this case the two formulations (demonstrating that the food was freshly cooked and enabling it to be consumed hot) are different ways of describing the same purpose… The only way of demonstrating that the food is freshly cooked is that the Appellant enables the customer to consume it hot."

An inference of fact?

14. HMRC submitted that the Tribunal's decision should be upheld for two independent reasons. As I have said, the appeal lies in point of law only.

15. Mr Smith's first contention was that the Decision was reached by way of inference from the facts, and as such could only be reversed on **Edwards v**

Bairstow [1956] AC 14 grounds which (it is accepted) are not relied on by the appellant for the purposes of this appeal.

16. The Court must not re-open primary findings of fact. This is an appeal in point of law, not a re-hearing. Further, inferences drawn from primary facts should not be interfered with (save on the **Edwards v. Bairstow** principle) if they are comprised within a number of possible inferences that could be made: see **Furniss v. Dawson** [1984] STC 153 at 167.

17. I bear in mind that legal evaluation may require "a multi-factorial assessment based on a number of primary facts" so that "the appeal court should be slow to interfere with that overall assessment-what is commonly called a value judgment": per Jacobs LJ in **Proctor & Gamble UK v. HMRC** [2009] STC 1990 at 1993-5. That is particularly so where, as here, the appeal is from an experienced Chairman and where, as here, the Tribunal received a great deal of evidence including a site visit. Accordingly, I approach the substitution of my own judgment for that of the Tribunal with circumspection. It is one thing to review the conclusions of law reached by the Tribunal on the basis of the facts which it found; it is another to substitute one's own conclusions for the "multi-factorial assessment" or value-judgment reached by the Tribunal as a matter of inference from those facts.

18. However the finding of fact as to purpose is plainly expressed as such in finding (10) quoted above. There are two aspects to this. First, the purpose of

heating the food was to demonstrate to the customer that the food was freshly cooked. Secondly, the purpose of keeping the food hot was to comply with food safety regulations (blast-chilling not being a financially acceptable option) and to avoid the expense of treating the items differently from other items which had been heated.

19. The further finding that the purpose was to enable the food to be consumed hot is not based on any evaluation of the evidence. The relevant facts are not in dispute, for example the way in which the food was kept hot and supplied hot. The finding is based on an inference founded on logical analysis. I find that it is open to Miss Whipple QC on behalf of the appellant to question that conclusion as one of whether the **Pimblett** test was applied correctly. I find that she does not seek to go behind an inference of fact.

A logically correct application of the test in Pimblett?

20. I therefore turn to HMRC's second contention. Mr Smith submitted that in any event, the Chairman's reasoning was correct because the purpose asserted by the supplier and the Chairman's finding are two sides of the same coin.

21. Mr Smith pointed out that under Note (3), the purpose is to *enable* the customer to consume the food hot, the purpose is not that the food *should* be eaten hot. This point was also made by Dr Avery Jones as Chairman of the

Tribunal in the **Domino's Pizza** case at [12]. His stance was that if the food is delivered hot, because active steps have been taken to keep it hot, then the customer is able to consume it hot. It is irrelevant, the argument runs, whether the supplier has any view on whether the customer should actually eat the food hot, cold or tepid or indeed reheated later. The key point is that the supplier intends to enable the customer to consume the items while hot by taking steps to keep them hot with the intention of providing them hot. I quote from Mr Smith's skeleton argument, as follows:

> "It is wrong to say that the ability of the customer to eat the food while it is hot is simply an inevitable consequence of the Appellant's purpose of demonstrating fresh cooking. It is not a consequence, but part of the purpose itself. The Appellant demonstrates fresh cooking by enabling the customer to consume the food while hot. The inevitable consequence argument is applicable in **Pimblett** because there the asserted purpose in heating the pies was simply to render them edible- if someone bought one shortly after it had been cooked then he would get a hot pie, but a later purchaser would get a cold pie. Their Lordships held that the former cannot be used to say that, knowing that certain customers will be able to consume a hot pie means that the pie-maker's purpose in heating the pie is to enable consumption while hot. However, in this case, the intention is that all customers get hot food and they get it because the Appellant intends to provide it to them while it is still hot."

22. The fallacy in Mr Smith's argument is in the use of the word 'intention'. The Chairman himself drew a distinction between the intention and the purpose of the supplier, saying that the former imported an element of inevitable consequence. I do not want to indulge in semantics as to the meaning of the word intention, but it does seem to me that HMRC's argument disregards the clear distinction made in **Pimblett** and **Malik** between the subjective purpose of the supplier and the consequence of the heating. Bread is an obvious

example. It is not good enough for the supplier's purposes to provide fresh-baked bread; he wants the bread to appear fresh-baked. It may well be the consequence of providing hot bread that the customer is enabled to eat it hot. However, that is separate from the question of whether his *purpose* is to enable the bread to be eaten while still hot.

23. I agree with Mr Smith that the facts of the present case are distinguishable from those in **Pimblett**. However the appellant's evidence as to its purpose in heating the items, and also the appellant's evidence as to the two reasons why the items were kept hot, was accepted by the Tribunal without qualification. The purpose of demonstrating that the food is freshly-baked and the purpose of enabling the food to be consumed hot are conceptually separate. One may be the consequence of the other (see **Pimblett** at 361) but I do not accept that the two formulations are different ways of describing the same subjective purpose of the supplier.

24. In those circumstances the appeal succeeds. I note that both skeleton arguments ask me to deal with costs, but costs fall to be dealt with under rule 10 of The Tribunal Procedure (Upper Tribunal) Rules 2008 as amended.

Mrs Justice Proudman

RELEASE DATE: 08 February 2011