

# VAT, DUTIES & INDIRECT TAX LAW

## THERE IS A CASE TO ANSWER ON THE ZERO RATING OF TAKE AWAY HOT FOOD FOLLOWING THE ECJ'S DECISION IN THE CASE OF MANFRED BOG AND OTHERS

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***The ECJ's decision in joined German cases concerning Mr Manfred Bog and others has generated much debate over the United Kingdom's VAT treatment of hot takeaway food. HMRC's declared view in Revenue & Customs Brief 19/11 that the ECJ's judgement has no implications for the UK treatment of supplies of hot food is unlikely to put the matter to rest. The German courts' reasons for referring the cases to the ECJ, and the ECJ's reasoning in its decision expose a basis for the proposition that there is a case to answer in the UK.***

Mr Bog supplied prepared food for consumption, in particular sausages and chips, at mobile snack bars. His case was joined with three others. A cinema operator, CinemaxX, supplied heated popcorn and tortilla chips at its outlets. The third supplier, Mr Lohmeyer supplied fried and grilled meats and chips at snack stalls. The fourth supplier, Fleischerei Nier, supplied hot food in closed containers and made available crockery, cutlery and staff to its customers. Each supplier therefore supplied hot food for immediate consumption or take away.

Food and beverages supplied for consumption "on the spot" were treated as supplies of services taxable at the standard rate under the German law in point. However, supplies of certain prepared foodstuffs were taxed at a reduced rate. The dispute between the taxpayers and the German tax authorities was essentially over two issues. First, were the taxpayers supplying services? Second, if not, was there a supply of food stuffs eligible for taxation at the reduced rate? The ECJ answered both questions in favour of the first three taxpayers. The Court

stated that the food or meals freshly prepared for immediate consumption 'on the spot' were supplies of goods "if a qualitative examination of the entire transaction shows that the elements of services preceding and accompanying the supply of food are not predominant". Furthermore, foodstuffs eligible for taxation at the reduced rate covered food and meals prepared for immediate consumption by boiling, grilling, roasting, baking or other means. The ECJ's answer in relation to Fleischerei Neir's supplies suggested they would be supplies of standard rated catering services.

The ECJ's recent decisions in cases such as *Levob*, *Tellmer Property* and *Everything Everywhere* caused the referring courts to doubt whether the services element in preparing the foodstuffs in question for immediate consumption required their supplies to be properly characterised as supplies of services. Hence the references to the ECJ. The relevant German tax law was not concerned with zero rating. Although the ECJ ruled in the *Marks & Spencer* case that the right to have supplies zero rated was not directly effective under EU law, the Court also stated that the general EU law principle of equal treatment of similar transactions, which in the context of VAT takes the form of the principle of fiscal neutrality, cannot be undermined.

Supplies in the course of catering are excluded from zero rating in the UK. Two statutory examples of supplies in the course of catering are supplies for consumption at the premises of the supply and take away hot food. Hot food means food which as been heated "for the purposes of enabling it to be consumed at a temperature above the ambient air temperature." Note (3) to VATA 1994, Sch.8 Group 1 does not state whether the supply in the course of catering is a supply of goods or services. In 1988, the Court of Appeal ruled in the case of *John Pimblett and Sons Ltd* that whether there is a supply of hot food is established by applying a subjective test of the dominant purpose of the supplier: The *John Pimblett* decision has been followed in a number of cases, most recently in the case concerning *Deliverance Limited*.

The ECJ, in *Mr Bog's* case, however, stated that the process of classifying a supply as one of goods or services had to take account of all the circumstances in which the transaction takes place, but the predominant element must be determined from the point of view of the typical customer: If nothing else, the *Manfred Bog* case calls into question the status of the authority in *John Pimblett*. There have been significant developments in the UK courts' approach to taking account of EU law in applying domestic VAT legislation since 1988 and

none of the cases in which the test in *John Pimblett* has been applied appear to have taken account of the developments in that jurisprudence. It must follow that outright dismissal of the relevance of the *Bog* decision to the UK appears to be premature, notwithstanding the UK's domestic zero rating regime.

***Tarl has over 20 years' experience as a tax lawyer. He gained that experience advising businesses, their owners and managers at two prominent City law firms, DLA Piper LLP and Charles Russell LLP. At the latter, Tarl founded and headed the Corporate Tax department. Tarl transferred to the Bar and joined Monckton in 2011 where he continues to specialise in direct and indirect taxes, advising businesses and individuals on both contentious and non-contentious matters.***