

Revenue and Customs Comrs v Procter & Gamble [2009] EWCA Civ 407

By Laura Elizabeth John

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With uncanny foresight, (or in testament to the effectiveness of Procter & Gamble's marketing hook), an earlier edition of this Journal commented on the judgment of the VAT & Duties Tribunal in this case that "*Once you pop, the fun doesn't stop!*"¹. And, indeed, in the case concerning the VAT treatment of Procter & Gamble's snack food product, "Pringles", the fun has continued. The Court of Appeal in its recent judgment has restored the finding of the Tribunal that Pringles, with an approximate potato content of 40%, are "similar to potato crisps and made from the potato", and confirmed that they are standard rated for VAT purposes.

Supplies of "food of a kind used for human consumption" are zero-rated for VAT purposes (VATA 1994 Schedule 8, Group 1, General Item 1). However, Schedule 8, Group 1, Excepted Item 5 provides that supplies of the following are not zero-rated:

5. Any of the following when packaged for human consumption without further preparation, namely, potato crisps, potato sticks, potato puffs and similar products made from the potato, or from potato flour, or from potato starch, and savoury products obtained by the swelling of cereals or cereal products; and salted or roasted nuts other than nuts in shell

The Tribunal had ruled² that Item 5 requires a two-stage test be satisfied: (i) that the product be *similar* to potato crisps, potato snack or potato puffs, and (ii) that the product be *made from* the potato, or from potato flour or potato starch. It held that Pringles satisfy both stages of this composite test. On appeal to the High Court, Warren J held³ that the Tribunal erred in its conclusion that Pringles were "made from the potato". The Court of Appeal (Mummery, Jacobs and Toulson LLJs) overturned the

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¹ De Voil Indirect Tax Intelligence, 135 (21), 1 August 2007

² *Procter & Gamble (UK) v Revenue and Customs Comrs [2007] UKVAT 20205 (unreported, 25 June 2007)*. See also commentary at footnote 1.

³ [2008] EWHC 1558 (Ch)

judgment of Warren J, and has held that Pringles are indeed within Item 5 and therefore standard rated for VAT.

Approach to a second appeal from ruling originally given by a specialist Tribunal

The Court of Appeal began with an outline of the approach it would take to reviewing a judgment in a case such as this, where a second appeal was brought from a judgment given by a specialist Tribunal. It emphasized that its concern was whether the original Tribunal decision was correct in law, not with whether the decision of Warren J, on appeal from the Tribunal, was correct. Following *Osmani v Camden LBC* [2007] EWCA Civ 1281 at [34], and *Waltham Forest LBC v Maloba* [2007] EWCA Civ 1281 at [19], unless an error of law by the Tribunal could be shown, it was not for an appeal court to interfere. Thus although Procter & Gamble were Respondents to the appeal, "*in reality it is necessary for P&G to show that the Tribunal erred in law*" (paragraph 8).

It also emphasized that where the original judgment engages a multi-factorial assessment — or value—judgment — an appeal court will be slow to interfere, and the more so where that value—judgment has been reached by a specialist Tribunal. Following the approach outlined by Baroness Hale in *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, paragraph 30, "*Particular deference is to be given to such Tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker*" (paragraph 11 *per* Jacobs LJ; also paragraphs 48 and 73 *per* Toulson and Mummery LLJ respectively). Jacob LJ (with whom Mummery and Toulson LLJ agreed) indicated the test is one of *Wednesbury* unreasonableness, stating "*one can put the test for an appeal court considering this sort of classification exercise as simply this: has the fact finding and evaluating Tribunal reached a conclusion which is so unreasonable that no reasonable Tribunal, properly construing the statute, could reach?*" (paragraph 22).

In addition the Court also observed that as a matter of practicality in most cases it is easier to present an appeal to it by beginning with the first level judgment and then considering the first instance appeal judgment, rather than vice versa. Mummery LJ stated that "*what I wish to get across to users of this court and their legal representatives is that a detailed critique of a complex first level appeal judgment is not always the best way of persuading this court that the Tribunal ran off (or, as the case may be, stayed on), the legal rails.*" (paragraph 76).

"Similar to potato crisps"

In applying the first stage of the test to determine whether the Pringle product was "similar to potato crisps", the Tribunal had applied the approach taken in *CEC v Quaker Oats Ltd* [1987] STC 683 and considered the view of the hypothetical "ordinary reasonable man in the street", which should take into account appearance, taste, ingredients, process of manufacture, marketing and packaging of the product. Although the Tribunal considered Pringles were on the borderline of this test, it took the overall view that they were sufficiently similar that the test was met.

The Court of Appeal held that there was no error in this finding. Whether the test was satisfied was a matter of overall impression, and the Tribunal was not required to analyse each aspect of similarity/dissimilarity and spell out the weight attached to each aspect. This is the "*sort of question — a matter of classification — [that] is not one calling for or justifying over-elaborate, almost mind-numbing legal analysis. It is a short practical question calling for a short practical answer.*" (*per* Jacob LJ, paragraph 19). The submission for Procter & Gamble that the Tribunal had not attached sufficient weight to the shape of Pringles, or the size of their packaging, was rejected as falling short of establishing that the Tribunal's decision had been *Wednesbury* unreasonable.

The Court also clarified what the "reasonable man" test, endorsed by it in *Ferrero UK Ltd. [1997] STC 881*, signified. The test is intended to import no greater requirement than that a reasonable view be taken of all the facts. In particular it is not necessary to determine whether the ordinary man in the street would be aware of all the facts, or what level of knowledge to attribute to him. To the extent that a hypothetical person is to be invoked, he is to be fully informed. Thus, in this case, it was a reasonable view to take of all the facts that Pringles were "similar to potato crisps",

and it was not necessary to consider whether the reasonable man would be aware of their potato content.

“Made from potato”

The Court of Appeal also upheld the Tribunal's judgment in respect of the second limb of the test under Item 5. The Tribunal had ruled that Item 5 did not require a product be comprised wholly, or substantially, from potato. The Court of Appeal agreed that there was no need to interpret Item 5 as including such a requirement. Procter & Gamble had submitted that the absence of the words “wholly or partly” from Item 5 indicated that the words “made from” should be interpreted as meaning “made from 100%” or thereabouts. The Court considered that the ordinary meaning of the words did not require such an interpretation. Further, potato sticks and potato crisps themselves contain only approximately 60% potato content. Although other Items in Schedule 8 include the words “wholly or partly”, an argument might equally be made that the absence of the word “wholly” from Item 5 indicates they can be made only partly from potatoes. Toulson LJ also noted that were the words to bear the meaning contended for, and required the product to be wholly or substantially made from potato, there was no product which he, or Counsel, could think of that would in that event be considered “similar to potato crisps” within Item 5 (paragraph 56).

The Court also rejected the submission from Procter & Gamble that the product must have some *specified minimum* potato content in order to fall within the provision. Although Item 5 does not specify any minimum percentage of potato, it was possible to reach a conclusion as to whether Pringles were above the threshold requirement without pinpointing exactly where that threshold was. To outline exactly where such a threshold was “*was not only unnecessary, but would have been to legislate under the guise of interpretation*” (per Toulson LJ at paragraph 58). The Tribunal's conclusion that Pringles have sufficient potato content to satisfy Item 5 was not wrong, still less was it a conclusion no reasonable Tribunal could have reached. Mummery LJ illustrated the point with the colourful analogy (should Pringles themselves not be sufficiently colourful) that “*The “made from” question would probably be answered in a more relevant and sensible way by a child consumer of crisps than by a food scientist or a culinary pedant. On another aspect of party food I think that most children, if asked whether jellies with raspberries in them were “made from” jelly, would have the good sense to say “Yes”, despite the raspberries.*” (paragraph 79).

Reasons for the decision

Finally, the Court of Appeal rejected the submission that the Tribunal had failed to give sufficient reasons for its decision. It held on the facts that sufficient reasons had been given, but in addition observed that all that is required from a judgment is that it makes clear how and why the Tribunal reached its conclusions. In particular the decision “*must contain .. a summary of the Tribunal's basic factual conclusion and statement of the reasons which have led them to reach the conclusion which they do on those basic facts*” (per Thomas Bingham MR in *Meek v Birmingham City Council [1987] IRLR 250*).” (per Jacobs LJ at paragraph 19, and Toulson LJ at paragraph 61). That the reasoning of the Tribunal is concise is to be commended; it is not a criticism that can be leveled at the judgment on appeal.

Departing from the rulings of earlier Tribunals

Jacob LJ also noted that the Tribunal's decision in respect of the potato content of Pringles had departed from a ruling by an earlier Tribunal, given in respect of another Procter & Gamble product, Pringles Dippers⁴. There, the Tribunal had concluded that Item 5 required a product be comprised wholly or substantially from the potato. That test is overruled by the Court of Appeal's decision. However, the Court noted that the Tribunal had been entitled to conclude that the earlier decision had erred in law and should not be followed, as there is no requirement of *stare decisis* as between Tribunals of co-ordinate jurisdiction. Although it was noted that Tribunals should strive to ensure consistency as between their judgments, nonetheless their duty is to rule upon the law

⁴ (2003) VAT Decision 18381

as they consider it to be, and therefore to depart from earlier rulings if necessary to apply the law correctly (paragraph 43).

Conclusions

Given the amount of revenue at stake (some £100 million, and £20 million per year in future revenues) it is perhaps not surprising that this case reached the Court of Appeal. The Court's judgment is, however, a victory for common sense. Though some tax advisers may lament the loss of the guidance provided by a "wholly or substantially" test for potato content, the "short practical question calling for a short practical answer" approach (or the raspberry jelly test if one prefers Mummery LJ's approach) is equally workable. Coupled with the Court's strong indication that it will consider overturning the assessments of specialist Tribunals only where *Wednesbury* unreasonable — which must surely be of significance not only to tax practitioners but to all who appear before specialist Tribunals — it remains to be seen whether other such cases will find themselves before the court in future. And, indeed, whether the fun in this particular case, has yet stopped...!

Christopher Vajda QC appeared for The Commissioners for Her Majesty's Revenue and Customs.

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