

***Regular Pringles - once you pop
(open VATA 1994, Schedule 8,
Group 1, Excepted Item 5), the
fun doesn't stop! ~***

***Procter & Gamble (UK) v HMRC
[2007] UKVAT 20205***

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Are Regular Pringles similar products to potato crisps? Are they made from the potato, from potato flour, or from potato starch? Surely, I hear you cry, such questions one would only be debated in the pub after a certain hour/intake or in the writings of cricket legend Dave Podmore (Pod, notoriously, did not include the Pringle in his Fantasy Snack XI)? Well, you would be wrong. In the world of VAT, the question was debated for three days in the VAT and Duties Tribunal. The Tribunal's decision will be of interest to VAT practitioners, members of the savoury-snack-consuming community, barflies and couch potatoes alike.

A picture, it is said, paints a thousand words (or thereabouts). Any reader not familiar with Regular Pringles is well-advised to purchase a (standard rated) tube before reading further (although for the sake of fairness we should point out that Other Snacks Are Also Available; indeed, the Tribunal helpfully lists a number in its decision).

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

"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 food products obtained by the swelling of cereals or cereal products; and salted or roasted nuts other than nuts in shell."

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Procter & Gamble claimed that Regular Pringles are not similar products to potato crisps and are not "made from the potato or from potato flour" within the meaning of Excepted Item 5 and should therefore be zero-rated. HMRC ruled that Regular Pringles fell within Excepted Item 5 and were thus standard rated.

Procter & Gamble appealed to the Tribunal, no doubt for substantial financial reasons and encouraged by their earlier success before a different tribunal in respect of "Pringle Dippers" (*Procter & Gamble (UK)*, [2003] UKVAT 18381, "*Pringles Dippers*"). In that case, they had persuaded the tribunal that "Pringle Dippers", a product consisting of 38% potato flour and intended for use with another product, namely a dip, was neither "packaged for human consumption without further preparation" nor "similar to other products made from the potato" nor "made from potato flour" and was thus zero rated. That decision was doubted (rightly, it is submitted) and not followed by a differently constituted tribunal in *United Biscuits (UK) Ltd* [2005] UKVAT 19319, concerning "McCoy's Dips". In that case, the tribunal held (again, rightly, it is submitted) that "dipping [what was undoubtedly a potato] crisp into a pot of salsa cannot amount to "preparation" in any normal sense of the English language. The purchaser of [United Biscuit's] product is required to do no more than open a packet of crisps and a pot of dip. He may, or may not, dip the crisps into the pot. The process of conveying crisp to mouth, whether or not it pauses at the pot, is, in our view, commonly and correctly described as eating; it is not preparation".

Back to Regular Pringles. Extensive oral and written evidence was deployed before the Tribunal; the Tribunal's findings of fact concerning the ingredients, manufacture and marketing of Regular Pringles make fascinating reading. For present purposes, it suffices to note that Regular Pringles are marketed as a savoury snack and are made from potato flour, corn flour, wheat starch, rice flour, fat, emulsifier, salt and seasoning. For the purposes of the decision, the potato content was taken as around 42 per cent, other flours as around 15 per cent and the fat content as around 33 per cent. Other choice morsels include: the unique feature of Regular Pringles is that the manufacturing process causes oil to go into the spaces throughout the texture of the product replacing the water content removed during the frying, thereby giving Regular Pringles their "mouth-melt" feel when eaten; Regular Pringles are normally eaten in the evening, for example in front of the television or with drinks with friends and not as part of a meal; they are not normally purchased primarily for nutrition; and Regular Pringles' top 10 competitor products are KP Skips, Monster Munch, Total McCoy's Large Sharing, KP Hula Hoops, Total Doritos, Walkers' Quavers, Walkers' Potato Heads, Quaker Snack-a-Jacks, Jacobs Twiglets and McVities Mini-Cheddars.

The Tribunal held in favour of HMRC and dismissed the appeal.

As its starting point, the Tribunal adopted the well-known approach of Lord Woolf in *CEC v Ferrero UK Ltd* [1997] STC 881 (which concerned whether certain products were "biscuits" under Schedule 8, Group 1): "I do urge tribunals, when considering issues of this sort, not to be misled by authorities which are no more than authorities of fact into elevating issues of fact into questions of principle when it is not appropriate to do so on any inquiry such as this." The Tribunal also pointed out that the Sixth VAT Directive was of no assistance in construing the domestic legislation: zero-rating of food was clearly permitted by EC legislation and whether a product falls on the taxable or zero-rated side of the dividing line drawn by Parliament is a matter of normal interpretation of domestic legislation.

The Tribunal considered the purpose of the legislation. It noted that VAT had taken over an existing purchase tax category that dated back to 1962 and that the current wording of Excepted Item 5 was the same as the 1969 purchase tax wording. It remarked that the industry had changed very considerably since 1969 and that singling out potato products now seemed strange given the variety of savoury snacks on the market, many of which had no potato content. The Tribunal commented that the "unreality" of its task was demonstrated by the fact that while the legislation concentrates on potato content, for which there was no doubt good reason in the 1960s when potato crisps were the main savoury snack, 6 of Regular Pringles' top 10 competing products had no potato content and 5 of them were zero-rated. The Tribunal accepted that, in general, Parliament's intention was to standard-rate food that was not purchased primarily for the purpose of nutrition, but noted also

that the age of the legislation and the very considerable changes in the market meant they could find little help in the purpose of the legislation in deciding the appeal.

The Tribunal noted that the legislation imposes a double test, both parts of which have to be satisfied if a food product is to be standard-rated: (a) whether the product is similar to potato crisps, potato sticks or potato puffs; and (b) whether it is made from the potato, or from potato flour, or potato starch. Potato content was therefore not decisive; only potato products that were similar to potato crisps, etc, were standard-rated. If a product contains no potato, it is not necessary to ask whether test (a) is satisfied. A product made entirely of potato is only standard-rated if it is "similar to" a potato crisp.

Test (a) – whether Regular Pringles were "similar to" potato crisps – presented difficulties: since Regular Pringles are a unique product in ingredients, taste, and shape. In applying the test, the Tribunal ignored the difference between potato crisps and Regular Pringles that the latter were made from flours and that the manufacturing process involved making a dough, on the basis that that would necessarily be true of any products made from potato flour or potato starch (which clearly could be capable of satisfying test (b)). The Tribunal also ignored certain US marketing material and Regular Pringles' World Customs Organisation categorisation (they are in a different category from potato crisps).

The Tribunal was reluctant to grade the other factors to be considered (as the Tribunal had done in the "Pringles Dippers" case). The Tribunal considered that the "reasonable man" would apply test (a) as a whole, without applying an order. The Tribunal placed little weight on the shape of Regular Pringles (given the wide variety of products on the market); or on the size of packaging; or on the potato content. "Standing back and taking all the factors of appearance, taste, ingredients, process of manufacture, marketing and packaging together" (other than the ones it had stated it should ignore) and applying the "reasonable man" test in test (a), the Tribunal considered that although in many respects Regular Pringles were different from potato crisps and were "near the borderline", they were sufficiently similar to satisfy test (a).

The Tribunal did not criticise the approach to test (a) in *Pringle Dippers*, commenting that test (a) was a matter of degree and that Pringles Dippers had differences from potato crisps that are not present in Regular Pringles. It further noted that the earlier tribunal had held that Pringle Dippers were in any case outside Excepted Item 5 as not being packaged for consumption without further preparation (the finding criticised in *United Biscuits*).

In relation to test (b) - whether Regular Pringles are made from the potato, potato flour or potato starch – the difficulty was that Regular Pringles were made of potato flour and something else and that Excepted Item 5 does not specify the proportion that satisfies the test that a snack is made "from the potato, or from potato flour, or from potato starch."

The Tribunal rejected the approach to test (b) taken in *Pringles Dippers* and criticised the earlier tribunal's reasoning. In *Pringles Dippers*, the earlier tribunal held that test (b) required products to be made wholly (or substantially wholly) from potato, and criticised its reasoning. The Tribunal considered that test (b) could be satisfied where a product was only partly so made. The Tribunal declined to opine on the minimum proportion of potato, etc, that would satisfy the test, since the threshold, whatever it was, was exceeded on the facts. In the Regular Pringle, the potato flour content was over 40 per cent; it was the largest single ingredient by about 9 percentage points; and it was nearly three times larger than the other flours in the ingredients taken together. Regular Pringles were therefore [partly] made from the potato, from potato flour or from potato starch. There were other ingredients, but it was made from potato flour in the sense that it could not be said that it was not made from potato flour. The proportion of potato flour was significant. The fact that it was also made from other things did not affect this. The Tribunal therefore found that Regular Pringles were "made from potato flour" and satisfied test (b).

Comment

This is the sort of case that gives law – and VAT legislation in particular – a bad name. That is not the fault of the parties: Excepted Item 5 is a mess and needs to be updated to take account of the changing landscape of savoury snacks. There is no discernible reason why Regular Pringles (or, for that matter, Monster Munch, Hula Hoops or potato crisps in general) should be standard rated while, say, Twiglets, Doritos, tortilla chips in general or any other maize-based snacks should be zero-rated. All compete for the “savoury snack pound” and all should be treated the same under the domestic legislation.

Note also that Community law (and, in particular, arguments based on fiscal neutrality and non-distortion of competition: see, e.g. Case C 363/05, *JP Morgan Fleming Claverhouse Investment Trust plc*, judgment of 28 June 2007) does not assist those who may wish to argue for zero-rating for all: where permitted by Community law, zero-rating is a matter for Member States. If fiscal neutrality and non-distortion of competition had a role to play, it would lead to one result only, namely standard rating for all.

The Tribunal’s “holistic” approach to test (a) is surely correct; but however described, it is in essence little more than a matter of impression. The Tribunal’s approach to test (b) is to be preferred to the approach taken in *Pringle Dippers*.

The correctness of *Pringle Dippers* must now be in doubt, having now been criticised and distinguished by two subsequent tribunals. It should, at least, be viewed with caution.

From a practical litigation perspective, parties might consider combining any dispute over the VAT treatment of a snack with a dispute under Excepted Items 3 or 4 over the VAT treatment of a suitable complementary liquid refreshment.

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