



119TACD2020

BETWEEN/

[NAME REDACTED]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

This appeal concerns the question of whether certain church candles produced by the Appellant company are to be zero rated for VAT purposes pursuant to paragraph 13(4) of Schedule 2 of the VAT Consolidation Act 2010 ('VATCA2010').

In accordance with paragraph 13(4) of Schedule 2 VATCA2010, candles and night-lights are zero rated for VAT purposes if they are white and cylindrical. However, paragraph 13(4) excludes candles and night-lights that are '*decorated, spiralled, tapered or perfumed.*'

The Respondent assessed the Appellant to VAT at the standard rate in respect of certain candles it produced on the basis that the candles were tapered in shape and thus excluded by the provisions of paragraph 13(4) Schedule 2 VATCA2010.

The Respondent raised assessments to value added tax for the periods 1/1/2013 – 31/12/2013, 1/1/2014 – 31/12/2014, 1/1/2015 – 31/12/2015 and 1/1/2016 to 31/12/2016 in the total sum of €394,802. The Appellant duly appealed.

Background

The Appellant is involved in the production and distribution of church candles and has applied a zero VAT rate to church candles sold by it within the State, pursuant to paragraph 13(4) Schedule 2 VATCA2010.

The Respondent is of the view that zero rated VAT does not apply to a certain range of candles produced and sold by the Appellant and that the standard VAT rate of 23% applies to these candles. The Respondent's position is that the candles are tapered in shape and that they are excluded from zero rating by paragraph 13(4) of Schedule 2 VAT Consolidation Act 2010.

Legislation

Section 3 Value Added Tax Act 2010, which sets out the charge to VAT provides;

'Except as expressly otherwise provided by the Act, a tax called value-added-tax is, subject to and in accordance with this Act and regulations, chargeable, leviable and payable on the following transactions;

(a) the supply for consideration of goods by a taxable person acting in that capacity when the place of supply is in the State...'

The rates of VAT applicable are contained in section 46 VATCA 2010. The standard rate of VAT applies unless the taxable supply falls within one of the provisions of the Schedules to the VATCA 2010.

Paragraph 13(4) Schedule 2 Value Added Tax Act 2010 provides;

'Other zero-rated goods and services

'13. (1)...

(2)...

(3) ...

(4) The supply of wax candles and night-lights that are white and cylindrical, excluding candles and night-lights that are decorated, spiralled, tapered or perfumed.'



Submissions in brief

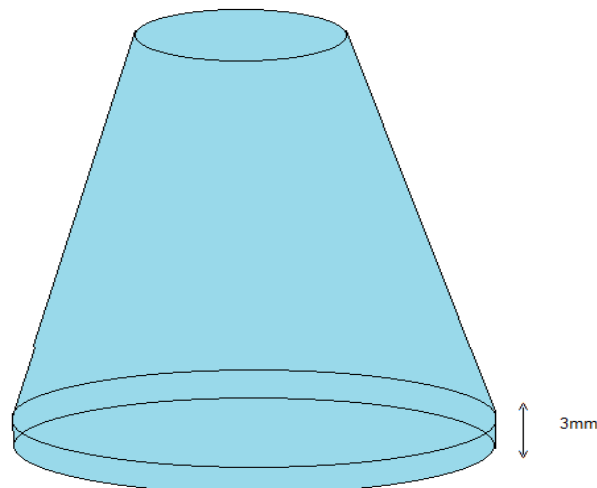
The Appellant submitted that the church candles were not '*tapered*' but were frustoconical and part cylindrical in shape. The Appellant submitted that the candles satisfied the legislative requirements of paragraph 13(4) Schedule 2 VATCA2010 and that they were correctly characterised as zero rated for VAT purposes.

The Respondent submitted that the candles were '*tapered*' in shape, that they fell within the exclusions to paragraph 13(4) Schedule 2 VATCA2010 and that as a result, the standard rate of VAT applied.

ANALYSIS

In addition to documentation in relation to the candles including contract and patent documentation, the candles themselves were produced in evidence. Oral evidence was provided by a director of the Appellant company in relation to the development, production and use of the candles.

The Appellant submitted that the candles at issue were frustoconical in shape *i.e.* that the shape of the candle resembled the truncated frustum of a cone. The Appellant stated that each candle was also part cylindrical, bearing a three-millimetre cylinder part at the broad end of the frustum. The following diagram represents the shape of the candle;



In relation to the candles at issue in this appeal, the centre points at both end planes were positioned directly above one another. The top of the candle was circular with a three millimetre cylindrical piece positioned directly on top of the broad end of the frustum. The Appellant contended that the candles were similar to a cylinder except that the circular end planes were not of equal sizes.

The Appellant submitted that the frustoconical shape was for additional fire safety. The Appellant stated that the candle contained smoke and environmental protection features and was self-extinguishing. The Appellant submitted that in this regard it was different to traditional church candles. The Appellant submitted that there was a public interest element to be taken into consideration and that the Respondent failed to take into account the reasons for the shape of the candle namely, additional fire safety together with smoke and environmental protection features. The Appellant stated that the shape of the candle was required to accommodate the candle being placed into a candle holder. The Appellant's candle burning system has been patented in Ireland, Europe and Canada.

The Appellant submitted that the Respondent was acting inconsistently in its classification of church candles and that this undermined the EU law principles of legal certainty and fiscal neutrality. The Appellant opened a number of legal authorities including Case C-499/16 *AZ v Minister Finansów* and Cases C-25R9/10 and C-260/10 *HMRC v Rang Group plc*.

While the Appellant contended that other church candles were zero rated for VAT purposes, the Appellant did not tender specific evidence in support of this submission. The director of the Appellant company accepted under cross-examination that he had no correspondence from the Revenue Commissioners that confirmed that church candles attracted a zero rating for VAT purposes. He stated his belief that church candles were VAT zero rated, based on the provisions of paragraph 13(4) of the second schedule, VATCA 2010.

The Respondent submitted that the zero rating of certain candles for VAT purposes as set out in paragraph 13(4) of the second schedule, VATCA 2010, applied to all candles covered by that provision irrespective of the use of the candles. The Respondent stated that the provision was not aimed at church candles and did not refer to church candles. The Respondent stated that the submitted public interest element in relation to the fire safety of the candles and their use in churches was irrelevant to the consideration of the proper interpretation and application of paragraph 13(4) of the second schedule to the VAT Consolidation Act.



Material finding of fact

The question of the shape of the candle is a question of fact. On consideration of the evidence and having viewed the candle, I accept the submission of the Appellant and find as a material fact that the candle is frustoconical in shape, meaning that the shape of the candle resembles the truncated frustum of a cone. I accept also the submission of the Appellant that the candle bears a 3mm cylindrical piece at the broad end of the frustum.

Statutory interpretation

The matter at issue in these proceedings is whether paragraph 13(4) Schedule 2 VATCA2010 applies to render sales of the candles the subject of this appeal, zero rated for VAT purposes.

Paragraph 13(4) Schedule 2 Value Added Tax Act 2010 does not expressly reference church candles and does not refer to the use to which the candles are put. The statutory wording refers to *'the supply of wax candles and night-lights that are white and cylindrical, excluding candles and night-lights that are decorated, spiralled, tapered or perfumed.'* [emphasis added]

As is evident from paragraph 13(4), the legislation as enacted does not refer to church candles specifically but applies to candles in general.

A section of an approximate 3mm depth of the candle in this appeal is cylindrical. The remaining aspect of the candle resembles the truncated frustum of a cone and is correctly described by the Appellant as frustoconical in shape. The Appellant contended that a frustoconical shape is cylindrical or is similar to a cylinder. However, the legislation is specific and provides express exclusion for candles that are *'decorated, spiralled, tapered or perfumed.'*

The words contained in paragraph 13(4) Schedule 2 VATCA2010 are clear and unambiguous and as is well established, the interpretative approach to be applied in such instances is a literal one based on the established authorities including *inter alia*, *Revenue Commissioners v Doorley* [1933] IR 750, *Inspector of Taxes v Kiernan* [1982] ILRM 13, *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 and *Texaco (Ireland) Ltd v Murphy* [1991] 2 IR 449.

In particular, in relation to exemption legislation, Kennedy C.J. in the Supreme Court authority of *Revenue Commissioners v Doorley* [1933] IR 50, stated; *'As the imposition of, so*



the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable.'

In short this means that the Appellant is obliged to bring itself squarely within the terms of the VAT exemption, to be entitled to avail of same.

The Supreme Court in *Kiernan v Inspector of Taxes* [1981] 1 IR 117 held that where a statutory provision is directed at the public at large, the word or expression should be given its colloquial meaning.

I am satisfied that a cylinder in colloquial terms is a three-dimensional object with parallel sides in which the circular end planes are also parallel and are equal in size. I am satisfied that the ordinary and colloquial meaning of the word '*tapered*' means; for an object or an item to become gradually thinner at one end. The Oxford English dictionary describes the verb '*taper*' to mean to '*reduce in thickness at one end*'.

The Appellant contended that the word '*tapered*' referred to an object that converged to a point and stated that the candles the subject of consideration in this appeal were flat at the top and bottom and did not converge to a point. However, I am satisfied that a candle that is frustoconical in shape can be described as '*tapered*' and that for an object to be regarded as '*tapered*' it is not necessary for the object to converge to a point. A candle that is '*tapered*' is expressly excluded from the zero rate of VAT by paragraph 13(4) of the second schedule, VATCA 2010.

In this appeal, there is a small 3mm cylinder at the broad end of the frustum however, based on the express statutory language contained in paragraph 13(4) which refers to '*the supply of wax candles and night-lights that are white and cylindrical, excluding candles and night-lights that are decorated, spiralled, tapered or perfumed*' I am satisfied that the candle falls within the exclusions contained in paragraph 13(4) of the second schedule to the Value Added Tax Act 2010 on the basis that it is '*tapered*' in shape and that this conclusion is not otherwise affected by the existence of the 3mm cylindrical piece at the base of the frustum.

The Appellant relied on Article 110 of Council Directive 2006/112/EC however, a challenge to the legislation and its enactment was not clearly evident in this appeal. In fact, the Appellant sought to avail of the exemption in accordance with the legislation as enacted and thus the issue in this appeal was whether the Appellant was entitled to avail of the exemption and that has been dealt with above. While the Tax Appeals Commission may refer a question





to the CJEU pursuant to Article 267 in certain circumstances, the Appellant did not articulate a specific question for referral and I am satisfied that none arises.

In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the assessments are incorrect. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another*, [2010] IEHC 49, at para. 22, Charleton J. stated: *'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'*

Determination

Based on the clear statutory wording contained in paragraph 13(4) Schedule 2 VATCA2010 and in particular the express exclusion from zero rated VAT for candles that are 'tapered' and having found, on consideration of the evidence and the applicable principles of statutory interpretation that the candles the subject of this appeal are tapered, I determine that the assessments to value-added tax shall stand.

COMMISSIONER LORNA GALLAGHER

2nd day of March 2019

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.

