AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

57TACD2022

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against assessments to Value Added Taxation ("VAT") raised by the Revenue Commissioners ("the Respondent") on the 20th September 2017.

2. The assessments cover the periods November/December 2015 to March/April 2017 inclusive and the total VAT due on the assessments amounts to €20,857. The Appellant is appealing the assessments in accordance with section 119 (1) Value-Added Tax Consolidation Act 2010, as amended ("VATCA 2010").

3. The issue giving rise to the appeal is whether the Appellant's product known as Biologically Appropriate Raw Food ('BARF') is a supply of food fit for human consumption within the meaning of paragraph 8(1) of the Second Schedule to the VATCA 2010.

Background

4. The Appellant operates exclusively as an online pet food supplier under the trading name [redacted] Limited and under the domain name [redacted]. It advocates the feeding to animals, primarily dogs and cats, of raw meats (known as "BARF" within the

industry) and supplies a combination of traditional pet foods and BARF to its customers which are delivered direct from their premises to those of their customers.

5. The Appellant properly charged VAT at the standard rate on its supply of traditional pet foods but argued that as its BARF product was made exclusively from meat "fit for human consumption" that it should be entitled to zero-rate such supplies.

6. The Appellant advised that the primary meats forming the ingredients of BARF consisted of beef, chicken, tripe, whole rabbit, duck, venison, offal (chiefly liver and heart) and sprat (fish). The Appellant informed the Commission during the hearing that they pride themselves on providing the product fresh and do not subject the ingredients to any form of treatment other than mixing, mincing or freezing it.

7. The Appellant submitted that since the ingredients of BARF are identical to those which can be purchased in a butcher's shop, it should be afforded the same treatment for VAT purposes. If this was so found, it would have the effect for VAT purposes of zero-rating the product rather than it being subject to the standard rate of VAT which is generally applied to the supply of pet foods.

8. The Respondent was of the view that the BARF product is a pet food and as such is liable to the standard rate of VAT on its sale.

Legislation and Guidelines

9. Section 3 VATCA 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…*'

10. Section 46 (1) (b) VATCA 2010 sets out the rates of tax. It provides;

> "*Tax shall be charged, in relation to the supply of taxable goods or services, the intra-Community acquisition of goods and the importation of goods, at whichever of the following rates is appropriate in any particular case:*
>
> > *(a) 23 per cent of the amount on which tax is chargeable other than in relation to goods or services on which tax is chargeable at any of the rates specified in paragraphs (b), (c) and (d);*

(b) zero per cent of the amount on which tax is chargeable in relation to goods in the circumstances specified in paragraphs 1(1) to (3), 3(1) and (3) and 7(1) to (4) and (6) of Schedule 2 or of goods or services of a kind specified in the other paragraphs of that Schedule…."

11. In this instance, the relevant schedule is the Second Schedule to the VATCA 2010 which sets out those goods and services which are zero-rated. At paragraph 12, it permits zero-rating in respect of fertilisers, feeding stuffs, certain seeds etc. Zero rating applies to certain animal feeding stuff as regulated by Paragraph 12(3) which is set out in the following terms:

"*12. (3) Animal feeding stuff, excluding feeding stuff which is packaged, sold or otherwise designated for the use of dogs, cats, cage birds or domestic pets."*

12. At paragraph 8, it provides for zero-rating in respect of food and drink in the following terms:

"*8. (1) A supply of food and drink of a kind used for human consumption other than [expressly excluded supplies]*".

13. S.46(3) provides:

"Goods and services which are specifically excluded from any paragraph of a Schedule shall, unless the contrary intention is expressed, be regarded as excluded from every other paragraph of that Schedule, and shall not be regarded as specified in that Schedule."

14. Article 110 of the Treaty of Functioning of the European Union ("TFEU") — (ex Article 90 TEC) states:

"*No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.*

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products."

15. At paragraph 15 of the Irish Tax Institute Publication on VAT under the section dealing with "Rates of VAT and Exemptions from VAT (History and Basis for the Rates)" it states:

"Most of the permitted reductions from the standard rate, which would include the zero rating, "are referable to a policy of low taxation on goods and services which serve a valuable social function or which are considered to be 'necessities', in order to lessen the incidence of the tax on low income consumers". The most important difference between the zero rate of VAT and the exempt status is that for suppliers of goods and

services at the zero rate there is an entitlement to recover input VAT incurred on the related costs of production, whereas exempt supplies usually give rise to no deduction".

Submissions

Appellant

16. The Appellant previously operated the business as a sole trade and incorporated as a limited company on the [redacted]

17. The Appellant advised that the business did not have a physical store presence and operated solely online under the business name [redacted] using the URL [redacted] It received orders online, fulfilled them and shipped them out to their customers using the service of couriers.

18. The Appellant advised over the years that it sold both traditional pet food (on which it charged standard rate VAT) and its BARF product (which it considered was eligible to be charged at the zero rate of VAT).

19. The Appellant advised after the company was incorporated that its accountant engaged with the Respondent seeking clarification whether it was correct to apply the zero rate of VAT to its BARF product.

20. After an exchange of correspondence between the parties, the Respondent informed the Appellant that the supply of all of its products, including BARF, was considered pet foods and liable to VAT at the standard rate. The Appellant, disappointed with this decision, duly appealed the matter to the Commission.

21. The Appellant contended as its product being meat was "*food of a kind fit for human consumption*" that it should be afforded the zero rate of VAT when supplying its product onto its customers.

22. The Appellant submitted that it was irrelevant that it operated as a pet store or indeed that the consumers of its product were supposedly animals, so long as the product which they supplied confirmed with the exemptions contained within the VAT Acts entitling them to avail of the zero rate of VAT. They added that since schedule 2, part 2, section 8(1) VATCA 2010 did not make any reference as to specific outlets where the goods referred to must be sold from, that this rendered the Respondent's argument that they operated as a supplier of pet foods and therefore must be supplying pet foods void.

23. In further support of this submission, they produced a sample of a purchase invoice from one of its main suppliers. The invoice was for the supply of duck necks and showed the rate of VAT applicable to the duck necks as zero percent. They argued since they took that product, supplied it fresh or frozen in its original or minced condition, to their customers that they were entitled to supply the product to their customers at the identical zero percentage rate.

24. The Appellant submitted that fiscal neutrality, which in the instant context, provides in essence that similar products should be afforded identical treatment for VAT purposes, should be applied to their supplies. Under that principle, the Appellant stated that the BARF product which they sold could be bought in any butcher's shop across Ireland and there would be no VAT charged on that supply. The Appellant argued that to subject the supply of their product to the standard rare of VAT was not only a distortion of competition but also could not be equitable.

Respondent

25. The Respondent submitted under section 43 VATCA 2010, that the starting point in establishing the correct rate of VAT was to assume that the standard rate applied and then to look at the exemptions and reduced rates which they stated were exceptional in nature. To be eligible for the exemptions or reduced rates, they stated, one had to fall within the strict confines of the legislation. Furthermore, they submitted that section 43 VATCA 2010 provided that if a party is excluded from zero rating by virtue of coming within a particular paragraph then they were prohibited from applying the zero rate on its supplies.

26. The Respondent submitted under EU law, that Article 28(2) of the 6th Directive (now Article 110 of the Treaty on the Functioning of the European Union "TFEU") permitted Member States who had exemptions or reduced rates of VAT in operation as of 1 January 1991 to retain those rates provided they were adopted for clearly defined social reasons and for the benefit of the final consumer. Any adaptation or infringement of those rules they stated could lead to Ireland or indeed any EU member nation being subject to an enforcement action being taken against them and so in order to comply with EU legislation a very strict approach must be taken to classifying goods or services liable at the zero percent rate of VAT.

27. To support the foregoing and the application of the strict approach, the Respondent opened the case of *Talacre Beach Caravan Sales Limited v Commissioners for Customs and Excise* C-136/97. In that case, the Court was concerned with zero rating and in particular Article 28(2) of the Sixth Directive (now Article 110 TFEU). In paragraph 8 of

that judgment, in response to an application in which the Applicant was seeking to benefit from the zero rate of VAT by widening the definition of a paragraph the Court stated:

> *"Clearly such an interpretation of Article 28(2)(a) of the Sixth Directive would run counter to the provision's wording and purpose, according to the scope of the derogation laid down by the provision is restricted to what was expressly covered by national legislation on 1 January 1991. The Advocate General observed in points 15 and 16 of his Opinion, Article 28(2)(a) of the Sixth Directive can be compared to a 'stand-still' clause, intended to prevent social hardship likely to follow from the abolition of exemptions provided for by the national legislature but not included in the Sixth Directive. Having regard to that purpose, the content of the national legislation in force on 1 January 1991 is decisive in ascertaining the scope of the supplies in respect of which the Sixth Directive allows an exemption to be maintained during the transitional period. Furthermore, as the Court has pointed out on a number of occasions, the provision of the Sixth Directive laying down exceptions to the general principle that VAT is to be levied on all goods and services. They're there as a stand-still clause to keep the law as it existed in 1991 in place, those exemptions in place to prevent social hardship by the removal. It's permissive on the State, it's not mandatory and what, what cannot be done is it cannot be extended any further than the terms provide in the national legislation….."*

28. The Respondent proceeded to open the *Commission v Ireland Case* C-108/11. In that case, Ireland was found to have infringed VAT legislation and, in particular, Article 110 in terms of the (provided) exemption from VAT which did not benefit the final consumer and was held not to have been enacted for clearly defined social reasons.

29. In light of the above EU law, the Respondent submitted that the provisions of the VAT Acts must be interpreted strictly and that no deviation from the wording of the provisions could be entertained.

30. Turning to the domestic principles governing the interpretation of statutory legislation, the Respondent opened the case of *Dunnes Stores v Revenue Commissioners* [2019] IESC 50. In that case, McKechnie J said at para 63:

> *"As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reason to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail…..When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many*

aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker."

31. The Respondent additionally opened the case of *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60, where it was held (at paragraph 54),

> "*It means, in my view, that it is a mistake to come to a statute – even a taxation statute – seeking ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision. It is only if, after that process has been concluded, a court is genuinely in doubt as to the imposition of a liability that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.*"

32. The Respondent submitted that in applying the literal approach, while the Appellant made a distinction between processed and unprocessed food in its submissions, that such a distinction was irrelevant as the food was clearly targeted as pet food for the consumption by pets and as such fell foul to the exclusion from zero rating contained in paragraph 12(3) to the second schedule of the VATCA 2010.

33. Turning to the issue of fiscal neutrality, the Respondent stated that in order for products to be considered to be similar products they should be similar in nature and in competition with one another. They proceeded to argue that as the Appellant operated as a pet food supplier, maintained a pet food website which contained sole *dicta* on the benefits of its product for cats and dogs, with associated pictures of cats and dogs, numerous quotes from satisfied customers expressing how their pets were benefiting from the BARF product and the quotation that the company was established to provide the option of a natural, a healthy natural diet for your cat and dog; then it could not reasonably be held that the product was the same as that offered by that of, for example, a butcher's shop.

34. The Respondent further submitted that In order to determine whether two supplies of services are similar, account must be taken of the point of view of a typical consumer, avoiding artificial distinctions based on insignificant differences. The Respondent was of the view that in assessing the similarities of services that it is a question of fact and they stated that the Court of Justice of the European Union provided useful guidance in the

case of *The Rank Group v Revenue Commissioners* C259/10 and C260/10. At paragraph 43 and 44 of that judgment they stated:

> "*In order to determine whether two supplies of services are similar within the meaning of the case law cited in that paragraph, account must be taken of the point of view of a typical consumer (see, by analogy, Case C-349/96, avoiding artificial distinctions based on insignificant differences). Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of the consumers, the test being whether their use is comparable and where differences between them do not have a significant influence on the decision*"

35. The Respondent submitted that while the Appellant distinguished between traditional dog and cat feeds and their BARF product because they think that one is better than the other from a nutritional point of view that this did not alter the fact that the supplied product was a pet food.

36. In summation, the Respondent submitted that BARF product supplied by the Appellant was marketed to and sold solely as a pet food and as such fell foul of the provisions of section 12 (3) to the second schedule of the VATCA 2010.

Material Facts

The Commissioner found the following material facts:

37. The Appellant was within the charge to VAT under Section 3 VATCA 2010 as they supplied goods in the State.

38. The Appellant accepted that the standard rate of VAT applied to the supply of pet foods.

39. The central issue of the appeal was whether the BARF product supplied by the Appellant was considered a pet food or whether it was considered "food of a kind fit for human consumption".

40. The Appellant was registered as a wholesaler of meats by the Department of Agriculture but did not have their business registered with the HSE, Food Safety Authority of Ireland or similar regulatory bodies.

41. The Appellant was not subject to any hygienic or regulatory checks on its operations such as refrigeration temperature control checks, methods of storing products, or the packaging and transportation of its products.

42. The BARF product was supplied in polystyrene type boxes and packaged in translucent cellophane type bags.

43. There were no labels on the supplied product indicating the origin of the supplied meats, best before dates and similar required consumer information.

44. The product was exclusively marketed through a pet food domain name and the website targeted exclusively the supply of feeds for domestic pets primarily dogs and cats.

45. The BARF product was supplied at a lower price point than that of a retail butcher.

46. The Appellant lodged VAT returns for all periods under appeal showing NIL VAT due on sales in advance of the Respondent issuing revised assessments to VAT.

Analysis

47. While not binding in this jurisdiction, it was held in the UK decision of *Phoenix Foods Limited v HMRC* [2018] UKFTT18 (TC) that provided a substance is a foodstuff and is used as such it can benefit from zero-rating even if it has other applications. In that case, the Appellant used bicarbonate soda in its production of food and the Respondent argued that since bicarbonate soda is a generic item with multiple uses that it should not be regarded as a "food of a kind used for human consumption". The First-Tier Tribunal finding in favour of the Appellant determined the issue by the nature of the product and not how it was marketed.

48. During the course of the hearing, the Appellant advised that they received in a zero rated supply of meat and at most minced and froze the product before shipping it to their customer. The Respondent argued that since they operated as a pet store and marketed their product to primarily the owners of dogs and cats then the BARF product must be considered a pet food. The *Phoenix Foods* case did not agree with this approach and preferred rather than focusing on how the product was marketed that the more appropriate test was to examine the nature of the product.

49. The Appellant submitted that since the meats they received were "human grade" quality then it fell within the exemption contained within paragraph 8(1) of the second schedule of the VATCA 2010 and were a supply of food of a kind used for human consumption and as such entitled to avail of zero-rating for VAT purposes.

50. In considering if the food was of a kind used for human consumption, regard must be had to the appropriate Health and Safety and other regulations regarding the handling, storage and sale of such items. The Appellant advised during the course of the hearing that while they held a licence from the Department of Agriculture as a wholesaler of meats they were not regulated by the Food Safety Authority or like body, nor was their storage and refrigeration equipment subject to any monitoring. In addition, they confirmed that the

product was supplied in a label free translucent plastic bag which would fall foul of numerous consumer protection provisions such as the European Communities (Labelling of Beef and Beef Products) Regulations, 2000.

51. Regulation (EC) No 258/97 exclusively covers foods and food ingredients. It sets out the criteria for establishing whether a specific product has been used for human consumption to a significant degree within the Community before 15 May 1997 or not. It states that the assessment should take into consideration if the product in question is part of the normal diet of the average population and what type of outlet sell the product in considering if it should qualify as a "human foodstuff" or not. It was not contested by the Appellant during the hearing that the BARF product was exclusively marketed and sold on its pet food website and that the ultimate consumers of the product were most likely cats and dogs. Notably, the Appellant did not produce any evidence of human consumption of their product or the availability of their BARF product in other retail outlets such as butcher shops.

52. In light of the foregoing, the Commissioner does not agree with the Appellant's submission that the meat supplied by them is of a kind fit for human consumption. Additionally, the Commissioner does not consider the argument on fiscal neutrality to have any merit. By their own admission the Appellant advised that they were able to sell the product cheaper than a traditional butcher and this is likely to be caused by the strict Health and Safety regulations which a butcher must abide to in order to remain operational unlike that of the Appellant's business. The *Rank Group* case, while dealing with supplies of services, determined that in order for two supplies of services to be considered similar then account must be taken of the view point of a typical consumer. The Commissioner sees no reason why this test should not be similarly applied to the supply of the Appellant's product and in so doing, considers that it is unlikely that a typical consumer would order food for their personal consumption from an online pet food store regardless of the alleged nutritional benefits. This was demonstrated by the Appellant's failure to produce any evidence indicating human consumption of their product.

53. As the Appellant's product does come within the exemption contained within schedule 2, part 2 section 8(1) of the VATCA 2010 and taking into account the foregoing and the intended use of the product, the Commissioner is of the view that the BARF product is a pet food and should be taxed as such.

54. In terms of statutory interpretation, the approach to be applied is a literal one based on the relevant jurisprudence including inter alia, *Bookfinders Limited v Revenue Commissioners*

[2020] IESC 60, *Dunnes Stores v Revenue Commissioners* [2019] IESC 50, *Inspector of Taxes v Kiernan* [1982] ILRM 13 and *Revenue Commissioners v Doorley* [1933] IR 750.

55. The Commissioner finds that the Appellant's BARF product is liable to VAT at the standard rate in accordance with schedule 2, part 2 section 12(3) and section 46(1) (b) VATCA 2010.

56. The burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:- "*This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the tax is not payable.*"

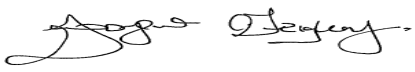
57. The Commissioner is not satisfied that the Appellant has discharged the burden of proof in this appeal and the Commissioner finds that the Appellant has not shown that the disputed tax is not payable.

Determination

58. For the reasons set out above, the Commissioner determines that the Appellant has failed in their appeal and has not succeeded in showing that the relevant tax was not payable.

59. It is understandable that the Appellant might be disappointed with the outcome of his appeal but the Commissioner has no discretion to stray beyond the legislation and is further constrained by the canons of EU law and associated case law.

60. This Appeal is determined in accordance with Part 40A TCA 1997 and in particular, section 949AK thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.



Andrew Feighery
Appeal Commissioner
1 April 2022