TC04279

Appeal number: TC/2013/03602

VAT – zero rating – Group 1, Part II, Schedule 8 VATA 199,4 Note 3(a) – "consumption on the premises" – kiosk – food court – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BAGEL NASH LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP
MISS SUSAN STOTT, FCA, CTA

Sitting in public at City Exchange, 11 Albion Street, Leeds on Monday 26 January 2015

Having heard Mr Andrew Young, instructed by HW (Leeds) LLP, for the Appellant

Mr Ewan West, Counsel, instructed by the Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by the appellant against a decision of the respondents ("HMRC") dated 24 October 2012, and upheld on subsequent review on 24 April 2013 to refuse an Error Correction notification in the sum of £118,067.23 covering the periods 07/08-01/12. This was in respect of allegedly overpaid output tax on the sales of cold takeaway food items sold in the food court area in the York Designer Outlet. HMRC refused the claim on the basis that the food was consumed on the premises and therefore output tax had been correctly declared. The appeal is based upon the simple proposition that since the supplies of food at issue are not consumed on the appellant's premises then those supplies of food fall to be zero rated for the purposes of Value Added Tax ("VAT").

Preliminary issues

2. There were a number of preliminary issues.

Quantum

3. Firstly on 21 November 2014, HMRC applied to the Tribunal for a Direction that the determination of quantum in this appeal be stood over pending the resolution of the substantive liability issues in dispute. On 3 December 2014, the appellant lodged a Notice of Objection in respect thereof. At the outset of the hearing it was agreed by the parties that that Notice of Objection was effectively withdrawn and that therefore the application should be granted. Accordingly the Tribunal did not consider the issue of quantum.

Late admission of evidence

4. The second issue was that on 21 November 2014, HMRC wrote to the appellant (with a copy to the Tribunal) pointing out that on 24 March 2014 the appellant had told the Tribunal that they intended calling one witness. Nevertheless, in terms of Direction 2 of the Tribunal's Directions of 27 November 2013, by no later than 7 February 2014, each party was required to send or deliver to the other party, the witness statements on which they intended to rely and should notify the Tribunal that they had done so yet nothing had been received. Without explanation or comment the appellant's representatives wrote to the Tribunal on 3 December 2014, when enclosing the Notice of Objection to HMRC's application, and stated simply "Also enclosed is a witness statement on behalf of the Appellant. If necessary we would request that this letter is treated as an Application for an extension of time to serve this statement." On 24 December 2014, HMRC wrote to the Tribunal, with a copy to the appellant's representatives, formally objecting to the admission of that evidence and intimating that they had been forced into preparing their case on the basis of no evidence from the appellant and that there was no explanation for the 10 month delay.

5. We heard submissions from both parties in regard to the said evidence. The evidence in question was a very short witness statement of Andy Micklethwaite, the Chief Executive of the appellant. The appellant was wholly unable to offer any explanation for the delay in submitting this witness statement other than that it had been an oversight.

6. HMRC's argument was based on the premise that the nature and purpose of the late admission of this witness statement was to widen the grounds of the appeal since, in their view, it purported to invite comparisons with other centres. HMRC pointed to the fact that the appellant's Skeleton Argument relied heavily on arguments on the principle of fiscal neutrality and 16 authorities on that topic had been produced but yet there were no pleadings in that regard.

7. We dealt separately with the admission of the witness evidence and fiscal neutrality.

Witness evidence

8. As far as Mr Micklethwaite's evidence was concerned, notwithstanding the long delay, which had undoubtedly prejudiced HMRC, we formed the view that it was so sparse in detail that firstly it was highly unlikely that it could be utilised to underpin any argument on fiscal neutrality and, secondly, it added very little to the information which had been referred to in the review decision. Accordingly the witness statement was admitted in evidence. In admitting that evidence we had had due regard to Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and the dicta of Judge Bishopp in *Leeds*[1] and Justice Morgan in *Data Select*[2] (neither counsel referred us to any law on this topic).

Fiscal neutrality

9. It is clear that the fiscal neutrality argument was raised only at the stage of Skeleton Argument. We agree entirely with the reasoning of Judge Berner at paragraph 6 in *Oasis Technologies (UK) Limited v HMRC*[3] where he stated that:

> "We decided that fiscal neutrality had to be regarded not simply as an argument, but as a fundamental, and distinct, ground of appeal that ought properly to have been pleaded at an earlier stage of the proceedings. In our view it could not at this stage fairly be considered in the absence of advance notice to HMRC."

10. Further, and in any event, the grounds of appeal in this case were very briefly pled with no reference to fiscal neutrality. They read:

> "The products in question should be zero rated as they are not consumed on the appellant's premises. The appellant gained support for its position from the Tribunal decision in the Made to Order Tribunal [2009] UK VAT V209559."

[1] [2014] UKUT 0350 (TCC)
[2] [2012] UKUT 187 (TCC)
[3] [2010] UKFTT 292 (TC)

11. In the Statement of Case dated 14 November 2013, at paragraph 6, HMRC pointed out the paucity of information in the grounds of appeal and stated:

> "If the Appellant further particularises its Grounds of Appeal then the Respondents respectfully submit that they will respond to those particulars, if necessary at that time."

The appellant did not. That is surprising since the correspondence that we have seen in the Bundles shows that the appellant's representative had placed considerable emphasis on arguing that competitors were able to zero rate their products. Those arguments were rebutted by HMRC. Since those arguments have not been pled, HMRC would have been entitled to have assumed that that aspect of the appeal had been resolved. It was only when the Skeleton argument was lodged that that was revived.

12. The witness statement spoke directly only of the appellant's other premises. In the bundles there was a copy of a zero rated bill for a sandwich from the Pret a Manger outlet next door to the appellant's premises. It was attached to a letter which had been submitted in correspondence. The reply to that letter in correspondence stated "Without knowing the circumstances of the purchase from Pret a Manger I cannot comment on the till receipt provided …". There was no other evidence in regard thereto.

13. In addition to the photographs of the York outlet to which we refer below, there were also photographs in the Bundles of three other shopping centres but there were no pleadings relating thereto and they were not exhibited to the witness statement.

14. The question of whether or not supplies are objectively similar is a matter of fact in respect of which the Tribunal would be expected to make findings-in-fact based on the evidence. We have no such evidence.

15. Accordingly it seemed highly unlikely that even if an argument on fiscal neutrality were to be advanced that there would be any evidential basis on which to establish appropriate comparators. For all these reasons we declined to hear arguments on fiscal neutrality.

Site Visit

16. When listing this hearing provision had been made for a site visit. However, at the outset of the hearing Mr Young intimated that the premises had been substantially altered since the dates with which we were concerned and that therefore any site visit would be of extremely limited evidential value. Both parties agreed that should the Tribunal wish to attend the site then a site visit could be arranged. In the first instance we decided to hear the evidence from Mr Micklethwaite, who was the only witness, and as there were numerous photographs in the bundles we would decide thereafter whether or not a site visit was necessary. In the event no site visit was necessary since Mr Micklethwaite's evidence was very clear.

The facts

17. The facts were not in dispute.

18. The appellant was established 26 years ago and currently operates 14 coffee and bagel bars in Leeds, York, Huddersfield, Derby, Nottingham, Hull, Manchester and York. This appeal relates to the York McArthur Glen Outlet. The appellant operates kiosks to supply their products at the centres in Manchester, Leeds and York. Those kiosks are located in what is known as a "food court".

19. Mr Micklethwaite and his wife, with venture capital backing, purchased the appellant in July 2011.

20. The second set of photographs exhibited attached to a letter of 21 November 2012 show how the Bagel Nash outlet in York ("the outlet") looked in July 2011. Approximately 12 months later the appellant rebranded the product and the outlet had a "face lift". The photographs attached to the letter to HMRC dated 26 June 2012 show the refurbished outlet. The landlords then embarked on a major refurbishment, including structural work, in late 2013. The whole shopping centre was significantly changed. In particular, the tables and seating arrangements were radically altered.

The lease

21. The lease of the outlet is dated 20 July 2006. It is lengthy but includes a number of pertinent clauses.

(1) In the Particulars it is stated that the "Permitted Use" is:-

"The operation of a shop under the Trade Name in accordance with the Tenants concept trading in other retail locations are more particularly detailed in the General Terms for the retail sale of bagel sandwiches, hot salt beef, coffees, soups, fresh juices and all other items as detailed on the Tenants standard menu."

The General Terms are extensive but the relevant clauses form part of Schedule 4.

(2) In Schedule 4, Part 1, which deals with service charges, at Clause 3, it stipulates that the proportion of the service charge:-

"…shall be calculated primarily on the comparison of the Floor Area of the Demised Premises with the aggregate Floor Area of those parts of the buildings from time to time forming part of the Centre which are let or are intended for letting. Save that in the case of any services provided in relation to any common seating areas within the food court forming part of the Centre, the due proportion shall be calculated primarily on a comparison of the Floor Area of the Demised Premises with the aggregate Floor Area of all kiosk units within the food court."

(3) The Demised Premises are defined as "the shop unit".

(4) The "food court" is not defined.

(5) In Schedule 4, Part 2, which deals with Essential Services to be provided by the landlord, Clause 9 reads:-

"The cleaning and cleaning of (and supply of such other services to as the Landlord shall reasonably consider appropriate) the common seating area within the food court forming part of the Centre".

22. Mr Micklethwaite confirmed that he had only ever received one service charge, which went up every year, but that to the best of his knowledge it had only ever been calculated by reference to the floor area of the entire centre.

23. The landlord did provide staff who cleaned and tidied the seating and tables in the food court area but those staff also cleaned and tidied the whole of the centre.

The plans

24. We had the benefit of two floor plans which had been produced by the appellant and appeared to be copies of the type of guide which would be found in the actual centre. The various units are identified on the plan by number and there a reference list of the lessees' trading names. One plan appeared to be an excerpt from the other. The only difference was that the larger one carried the names of all of the trading names and had no shading (see paragraph 57 below).

25. The outlet is on the first floor. The first floor is accessed by two sets of escalators at each end. At the relevant time the escalators at the north end opened into what is a thoroughfare. The four units closest to the escalators are described as 201-204.

26. At the relevant time, those four units were retail outlets, albeit Holland & Barrett sold flapjacks. Adjacent to them are units F8 and F7. Those two units are at the top of what is effectively a horse-shoe and they are flanked by units F1 to F5. The "horse-shoe" opens into a large open seating area. All of the units designated "F" open on to what is described as "food court seating area". All eight units designated "F" at all material times sold food (or were vacant awaiting reletting).

27. Since the refurbishment in 2013, it is the landlords aspiration that all units on the first floor are food outlets; currently all but one are.

28. Starbucks and Caffé Nero are situated on the ground floor of the centre and offer seating within their own premises. There are also benches on the ground floor where food and drinks could be consumed.

29. It was argued that it was relevant that there were toilets on the first floor so customers might access that floor with no intention of visiting the food court. That may be the case, but we note that there are also toilets on the ground floor.

What do the photographs, taken in conjunction with Mr Micklethwaite's evidence, show us?

30. We found Mr Micklethwaite to be a very clear and credible witness. It is accepted that the use of the tables and chairs is entirely "at will". There is no requirement that there has to be any purchase or that anyone has to eat or drink. Shoppers could bring their own food and drink with them and consume it in the food court. In theory it should be a self-clear area but that does not always happen so the landlord's staff, as part of their duties, do clear away trays and rubbish. Trays are provided by the landlord and these are available either at the individual kiosks or at the waste area where other customers may have left them.

31. Once a customer has ordered food (and or drinks) the appellant's staff wrap the food and either hand it directly to the customer with a napkin (and the drink) or place it in a bag or onto a tray.

32. There was a defined thoroughfare from the northern escalator past the four retail outlets and Pret a Manger and Pizza Express. There were tables and chairs close to the retail units. That thoroughfare continued past the southerly escalators (against which there are no tables and chairs) to what is marked in the plans as the "food court seating area". On the other side of those escalators at the southern side there were tables and chairs from the edge of the escalator barrier right up to the various kiosks. Customers could thread their way through those tables and chairs. There was not a defined thoroughfare along the edge of the horse-shoe of kiosks.

33. It can be seen that the same tables and chairs were used both in the thoroughfare and in the area which is clearly designated food court seating area.

34. It is quite evident that units F7 and F8, which at the time were occupied by Pret a Manger and Pizza Express, had dedicated seating outside their premises where they deployed their own seats and tables and the area was screened off.

35. It was equally clear that notwithstanding that, customers were consuming those companies' products at other tables in the food court.

36. The outlet is a kiosk fronted by a counter which means that no customers can go behind the counter. It is self-evident that there is no possibility of customers eating within the outlet. Indeed, it is evident that the customers are physically standing in the food court, and not in the outlet, when making purchases or enquiries.

37. Since the outlet is the most southerly unit it faces directly onto the main part of the food court and not the thoroughfare. It was not disputed that the outlet was in the food court.

38. There is a retractable barrier between the food court and the outlet which enables potential customers to form an orderly queue to make enquiries and/or to make purchases.

The sales

39. The product sold is bagels and everything that goes with that. In Mr Micklethwaite's words it is "a specialised sandwich business".

40. The appellant's representatives had confirmed in correspondence to HMRC, dated 26 June 2012, that prior to the claim in question being made, the appellant had made zero rated sales where a customer proactively specifically stated that they were taking the appropriate goods away. At outlets other than the one with which we are concerned here, the customers had been asked if relevant goods are "eat in" or "take away". At this outlet, however, until the claim was made, it had been assumed that all sales were standard rated unless the customer specifically informed the till operator that they would be eating out.

41. The claim had been made because the decision in *Made to Order* had been drawn to Mr Micklethwaite's attention and he had been advised that the impact of that case was that all of the appellant's supplies should be zero rated.

The arguments

The appellant

42. As we indicate above the appellant's argument is quite simply that the supplies of food are not consumed on their premises and therefore should be zero rated. There should be a level playing field and it would be irrational to say that the food court is part of the appellant's premises.

HMRC

43. HMRC's stance was that the only question that the Tribunal had to determine is whether the appellant's relevant supply is a "supply in the course of catering" and therefore within the scope of the exception from zero rating in Group 1 of Part 2 of Schedule 8 VATA 1994 on the basis that it meets the condition in Note 3(a), ie that it has been supplied "for consumption on the premises on which it is supplied".

44. HMRC submit that the *Made to Order* decision was wrongly decided. We were also referred to HMRC's guidance.

45. As we indicated in the course of the hearing that guidance is simply HMRC's opinion of what the law says. In this instance we have restricted ourselves to finding the facts and having done so, considering the law.

Relevant legislation

46. Section 30 VATA 1994 provides in relevant part as follows:

"**30. — Zero-rating**

(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section —

(a) no VAT shall be charged on the supply; but

(b) it shall in all other respects be reated as a taxable supply;

and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

(2) A supply of goods or services is zero-rated by virtue of this subsection if the gods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified…"

47. Group 1 of Part II of Schedule 8 VATA 1994 provided in relevant part, and as in force at the material time that zero-rating would apply to:

"The supply of anything comprised in the general items set out below, except—

(a) a supply in the course of catering; and

(b) a supply of anything comprised in any of the excepted items set out below, unless it is also comprised in any of the items overriding the exceptions set out below which relates to that excepted item.

General items

Item No.

1. Food of a kind used for human consumption

48. Note (3) to Group 1 of Schedule 8 VATA 1994 then provided that:

"(3) A supply of anything in the course of catering includes—

(a) any supply of it for consumption on the premises on which it is supplied; and

(b) any supply of hot food for consumption off those premises;

and for the purposes of paragraph (b) above 'hot food' means food which, or any part of which—

(i) has been heated for the purposes of enabling it to be consumed at a temperature above the ambient air temperature; and

(ii) is above that temperature at the time it is provided to the customer."

Authorities

49. Although the numerous authorities on fiscal neutrality were removed from our Bundles, the remaining authorities cited to us, were:

Made to Order [2009] UK VAT V20959 ("*Made to Order*")
HM Revenue & Customs v Compass Contract Services UK Ltd [2006] STC 1999 ("*Compass*").
Pret a Manger (Europe) Ltd [2006] UK VAT V19755 ("*Pret*")
Sub One (In Liquidation) v Commissioners for HM Revenue & Customs [2012] UKUT 34 (TC).
Sub One (In Liquidation) v Commissioners for HM Revenue & Customs [2014] EWCA Civ 773.
Customs & Excise v Cope [1981] STC 532 and 539.
Marjorie Armstrong VTD 1609.
Crownlion (Seafood) Limited VTD 1924.
Breezes Patisserie VTD 10081.
Ashby Catering 4220.
Bishop & Elcocks 17620.
R v Customs and Excise Commissioners ex parte Sims [1988] STC 210.
Travellers Fare Ltd 13482.
West Country Vending Limited [2010] UKFTT 124 (TC).
Oasis Technologies (UK) Limited v Commissioners for HM Revenue & Customs [2010] UKFTT 292 (TC).
BLP v CEC C-4/94 [1955] STC 424.

50. Thankfully we were not referred to all of these cases. Other than where we refer specifically to a particular case, we find them to be useful illustrations but ones which depend on their particular facts. In any event, and particularly since we were invited to consider *Made to Order* to be authoritative and a clear statement of "current law" we make the point that we are not bound by other First-tier Tribunal or VAT Tribunal decisions.

Reasons for decision

51. In the course of their oral submissions both Counsel agreed that there was no argument in regard to whether or not the food was supplied in the course of catering and that therefore the only issue was whether the food supplied was for "consumption on the premises on which it is supplied" which is the wording in Note 3(a).

52. We agree that the correct approach to interpreting Note 3(a) was set out by the Court of Appeal at paragraph 58 in *Compass*, namely that the Tribunal should "…

stick close to the language of the legislation and apply it with common sense to all the relevant circumstances of the particular case".

53. We also adopt paragraph 99 of the original Tribunal decision in *Compass*, which is also adopted by the Tribunal in *Pret,* where it is said "… it is apparent that whether anything constitutes premises is a question to be answered by reference solely to the facts of the individual case".

54. Having studied the pictures carefully and heard the evidence it is very clear that a customer at the outlet is definitively in the food court area at all times. On moving from the kiosk itself there are tables and chairs immediately in front and next to the customer. We were provided with absolutely no evidence as to the percentage of customers who consumed their purchases in the food court but we did have the evidence that at that outlet it had been assumed that they would not be "eating out" (see paragraph 40 above). On that basis, on the balance of probability, the vast majority of the customers would have been consuming their purchases very close to the outlet.

55. Does it matter that the appellant has no control over the food court and does not have an exclusive right of occupancy such as that enjoyed by Pret a Manger and Pizza Express? Using the words of Mummery LJ at paragraph 56 of *Compass* we have looked at "the geographical situation" of the outlet and the food court and have asked whether or not those are "sufficiently identified to be regarded or recognisable as separate premises". In this instance since the appellant's outlet is at the heart of the food court and at all times, even when making a purchase the customer is in the food court, we think not. In our view, the average customer, who would not be familiar with the terms of the lease, would consider that in purchasing the appellant's products there was also a right to eat in the food court.

56. We do not agree with the appellant that the facts in this appeal are substantially the same as those in *Made to Order*. In particular there is a fundamental difference in that at paragraph 10 of that decision, it states that "The kiosks are separated from the central seating area by a pedestrian circulating area." That is completely different to the situation in this case where the appellant is operating right in the food court and not adjacent to, and separated by, a public thoroughfare. HMRC made that point to the appellant's representative on 13 February 2013, having reviewed the photographs both of the appellant's premises and also those which purported to be of the premises in the *Made to Order* case. In passing we would comment that even if those photographs had been exhibited, which they were not, they are of very limited evidential value since the *Made to Order* decision related to a ruling dated 26 February 2007 and there is absolutely no information as to whether or not the physical layout in 2012 would have been the same.

57. One of the issues for the Tribunal was to ascertain precisely what was the "food court seating area". One of the plans had yellow shading which included the horse-shoe area and the thoroughfare towards the north but the appellant, who had produced the plans, could not tell us how or why or by whom that shading had been introduced. The other plan had no such shading.

58. HMRC had argued that the food court extended only to the area bounded by units F1-F8 being the food outlets. We do not consider it to be a material issue since there is no doubt whatsoever that the outlet itself is in the food court but we find that the food court seating area extends to include also the thoroughfare where there are tables and chairs. There are no such tables and chairs in the thoroughfare running through the centre of the first floor in the area bounded by the food outlets.

59. We did consider whether or not it was relevant that only one service charge was levied. We think not. The key issue is that the landlord could at any time decide to levy a service charge directly attributable to the food court.

60. The fact that the food outlets are identified separately on the plan by reference to "F" indicates to the general public that those are food outlets in the food court.

61. In summary, on the evidence before us, whilst we accept that no food could possibly be eaten in the outlet itself, since no customer could enter it, nevertheless on a common sense view, objectively considered, we find that "the premises" for the purposes of Note 3(a) includes the food court.

62. Accordingly, the appeal does not succeed.

63. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 10 February 2015