[2019] UKFTT 480 (TC)

TC07283

VALUE ADDED TAX – Value Added Tax Act 1994, section 30(2) and Group 1 of Schedule 8 - zero-rating - whether a lawn repair product is seed for growing grass for animal feed – no – the product is standard-rated – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/00769

BETWEEN

WESTLAND HORTICULTURE LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE RICHARD CHAPMAN QC
MISS SUSAN STOTT

Sitting in public at Belfast Tribunal Hearing Centre, 2nd Floor, Chichester Street, Belfast, BT1 3JF on 28 March 2019

Mr Geoff Tack, Solicitor, for the Appellant

Mr Daniel Baird, Presenting Officer, of HM Revenue and Customs' Solicitor's Office, for the Respondents

(This decision was originally released on 25 July 2019 but has been amended to add [39] with consequent amendments to the numbering pursuant to the review decision of Judge Richard Chapman QC dated 14 October 2019 and submissions dated 16 October 2019 and 25 October 2019).

DECISION

Introduction

1. This is an appeal against HMRC's decision to disallow the zero-rating of a product known as "Aftercut Patch Fix" ("the Product"), manufactured and supplied by the Appellant, Westland Horticulture Limited ("Westland"). It is common ground that the Product constitutes a single composite supply rather than multiple supplies. The question which we have to resolve is whether or not the Product constitutes, "seeds or other means of propagation of plants comprised in animal feeding stuffs" for the purposes of Item 3, Group 1 of Schedule 8 to the Value Added Tax Act 1994 ("VATA 1994"). We treat the following as shorthand for this question: is the Product seed for growing grass for animal feed? If the answer is "Yes", the Product is to be zero-rated. If the answer is "No", the Product is to be standard rated. For the reasons which we set out below, our answer is "No".

Findings of Fact

2. There were no significant disputes of fact. We heard evidence from Officer James Girvan (the decision making officer) on behalf of HMRC and Mr Mark Hamill (Westland's head of technical matters) on behalf of Westland. Both witnesses gave evidence in an honest, helpful and credible manner, and we accept their evidence insofar as it related to facts rather than opinion or submissions. In those circumstances, we make the following findings of fact.

3. Westland carries on business in the manufacture and supply of a range of horticultural products. These include gardening products, lawn treatments, lawn seed, plant food, fungicides and weed killers. Sales are made through retailers and also directly to the general public.

4. In essence, the Product is a grass seed mixed with a combination of additional materials which promote the growth of the seed. The constituent parts of the Product are grass seed, seed sowing granules, Clinoptilolite and water. The grass seed is of various varieties and is not in itself any different to "ordinary" grass seed sold without any additives. The seed within the Product was referred to by the parties as being tough grass seed blend, which comprises perennial rye grass seed or chewings or fine fescues. The seed sowing granules consist of organic matter. Clinoptilolite is a chemical which helps neutralise the effects of excess salts and ammonia. Mr Hamill's evidence (which we accept) is that the use of Clinoptilolite is marketed by Westland as being a "pet urine neutraliser", although he notes that the chemical is an approved feed additive popular for use with dairy and beef herds to aid cows' digestion systems and to improve their overall health and well-being. It can be used in a similar way for other animals.

5. When using grass seed alone, the ground needs to be cultivated to protect the seed and to promote germination. The only difference between using grass seed in the ordinary course ("Generic Grass Seed") and using the Product is that the other materials within the Product carry out this protection and promotion and so the Product provides a means of achieving the planting, cultivation and germination in one application on unprepared land.

6. The Product's key purpose is (as the name suggests) to fill in patches of lawn where grass has not grown properly or has become damaged. In principle, however, the Product could be used on wider areas wherever grass is required and so is not restricted to patches of lawns. The seed is carefully selected with what Mr Hamill said was the primary aim of producing a full, healthy, thick and vibrant sward of grass post-application in areas where there had been no grass.

7. The Product is advertised on Westland's website, which includes the following relevant details.

> "Aftercut Patch Fix is a unique blend of grass seed, feed and seeding soil designed to fix patches in your lawn quickly and easily.
>
> It is a 2 in 1 solution that treats both worn areas and dog spots
>
> - Grass Seed, feed & seeding soil blend
> - Repairs worn areas and patches
> - Fix dog spots with pet urine neutraliser
> - Children and pet safe
> - Ideal for play areas and shady areas
>
> …
>
> New grass will establish in the treated areas.
>
> …
>
> Patch Fix contains a special ingredient which absorbs the harmful salts and ammonia produced when pet urine breaks down, helping grass to re-establish where it would otherwise fail. Even better, Patch Fix also contains pet urine resistant grass seed varieties.
>
> …
>
> Where to Use:
>
> - In high traffic areas where lawn is worn away
> - Shady conditions, such as under trees
> - In patches caused by pet urine
> - In and around children's play areas, such as trampolines
>
> …
>
> Frequently asked questions
>
> …
>
> Q. Could I use Patch Fix to cover large areas or bare lawns?
>
> A. Patch fix is ideal for all patches that are approx. 45cm in diameter. For larger areas we recommend some lawn seeding soil and some fresh lawn seed."

8. We were shown boxes of the Product and were therefore able to consider the packaging in detail. The words "Total Lawn Repair" are prominent beneath the Product's name. It is clear that it is suggesting domestic use as the only animals on the packaging are dogs, there is an emphasis upon pets and the fact that it is "Children and Pet Safe" is highlighted. The box also includes the following information (repeating the substance – and in some respects the wording - of the website entry set out above):

> "Aftercut Patch Fix is a unique blend of grass seed, feed and seeding soil designed to fix patches in your lawn quickly and easily.
>
> …
>
> Neutralises harmful salts from pet urine.

Specially selected vigorous grass varieties.

Granulated growing media for moisture retention.

Added organic matter for better root establishment.

…

Children and pets need not be excluded from treated areas.

…

Comprising a mixture of 90% base material and 10% grass seed."

9. Mr Hamill informed us that the Product is sold in gardening stores and DIY retailers on the same shelves as Generic Grass Seed and also other patch repair products from competitors. Similarly, the search term "grass" on Amazon's website provides both Generic Grass Seed and path repair products. This was not challenged and we accept it.

10. In the course of correspondence between Westland and HMRC, Westland provided HMRC with a bill of materials ("the First Bill") setting out the percentage costs of the constituent parts of the Product as follows: 42% grass seed, 36% seed sowing granules, 4% Clinoptilolite and 18% packaging. The constituent parts by weight for a 4.8kg box (the box itself adding a further 0.27kg) were as follows: 0.48kg grass seed, 4.08kg seed sowing granules, and 0.24kg Clinoptilolite.

11. Westland later informed HMRC that the First Bill was incorrect and provided a second bill of materials ("the Second Bill"). The Second Bill provided that the percentage costs of the constituent parts of the Product were as follows: 92.3% grass seed, 6.4% seed sowing granules, 0.2% water and 1.1% Clinoptilolite. The constituent parts by weight (again for a 4.8kg box excluding the weight of the box itself) were similar to the First Bill and were as follows: 0.43kg grass seed, 3.624kg seed sowing granules, 0.72kg water and 0.024kg Clinoptilolite.

12. Westland maintained that the First Bill was inaccurate because it was based upon an experimental formulation of the Product, did not take into account revised production methods and relied upon budgeted costs, whereas the Second Bill was based upon actual costs for the actual Product. We find that the Second Bill provides the accurate breakdown of the costs. This is because there was no challenge to Westland's evidence (through Mr Hamill) that the Second Bill was based upon the actual costs of the Product. It follows that the actual costs are more representative of the cost breakdown of the Product than the budgeted costs. There is no substantial difference between the weight breakdown but, insofar as is necessary, we find that the Second Bill is more accurate. This is because it was based upon the actual Product rather than any experimental version.

13. We were told by Mr Hamill (and, in the absence of any challenge, we accept) that the Product complies with the same regulatory requirements as would be applicable to Generic Grass Seed. In particular, the Product complies with Council Directive 66/401/EEC, the Seed Marketing Regulations 2011 and the guidance of the Animal and Plant Health Agency. Westland is licensed by the Department for Environment, Food and Rural Affairs for, amongst other things, preparing mixtures of seed for marketing. Further, the Product is not toxic and both the Product and the resultant grass could be consumed safely by animals (and, in principle, humans).

14. Westland have also obtained advice about the Product from a consumer protection perspective. The following advice was given by Cambridgeshire County Council:

> "Advice requested
>
> Aftercut Patch Fix lawn repair product is a blend of various species of grass as well as a seed sewing medium which is a combination of peat plus organic nutrients and a very small inclusion of Clinoptolite which is incorporated into this blend as an active ingredient to neutralise the harmful effects of pet urine on germinating grass seedlings.
>
> This product has NOT been marketed as a repair kit as we do not believe that it constitutes a kit as it is a simple homogenised blend rather than a collection of individual components that are de-compartmented within the final product packaging.
>
> Please advise whether this material should be classified as a kit rather than a blended product and whether or not we could actually be deemed to be in breach of consumer legislation if we actually were marketing this product as a kit.
>
> …
>
> Assured advice
>
> …
>
> Aftercut Patch Fix lawn repair product does not consist of [a] set of distinct components and it does not require assembly. In my opinion it has neither of the characteristics required to meet any reasonable definition of "kit".
>
> To describe the product as a "kit" could deceive as to the main characteristics of the product in relation to its composition and use. This may amount to a misleading action as defined in CPRs."

15. Westland has treated the Product as zero-rated in accordance with its analysis of the legal position. Upon becoming aware that HMRC had made a ruling that a competitor's similar product was standard-rated, Westland requested a liability ruling from HMRC in respect of the Product by a letter dated 19 December 2014. Following visits and correspondence, Officer Girvan issued a liability decision on 15 September 2015 to the effect that the Product was standard-rated. Westland requested a review of this decision. By a letter dated 11 January 2016, HMRC informed Westland that the result of the review was to uphold the liability decision.

16. In the light of the liability decision, HMRC raised VAT assessments on 25 September 2015 and 26 October 2015. Following various withdrawals and amendments, these resulted in an amended assessment being issued on 19 March 2016 in the sum of £588,882 in respect of periods 10/11 to 03/15. Subject to the question of liability, the amounts of the assessments are not in dispute.

17. The notice of appeal was notified to the Tribunal on 9 February 2016. The parties agreed that the appeal is in respect of the liability decision, with the effect that the assessments will either stand in full if we hold that the Product is standard-rated and the assessments will be cancelled by HMRC if we hold that the Product is zero-rated.

The Issues

18. In the course of these proceedings, it appeared that there was an issue between the parties as to whether or not the Product was to be treated as standard-rated by virtue of it being (on HMRC's previous case) a kit. HMRC now accept that the Product is not a kit and so this is no longer in issue.

19. Further, neither party seeks to separate out the component parts of the Product into multiple supplies. They both accept that there is a single composite supply. Westland argue

that this is a single supply of seed for grass for animal food. HMRC argue that this is a single supply of seed for lawn treatment. Whilst we were referred by both parties to (and therefore considered) authorities in respect of single composite supplies, there is no dispute in that regard. For completeness, however, those authorities are *Card Protection Plan* (Case C-349/96), *Card Protection Plan v Commissioners of Customs and Excise* [2001] UKHL 4, *Levob Verzekeringen BV* (C-41/04), *Brockenhurst College* (Case C-699/15), and *Colaingrove Ltd v Commissioners for Her Majesty's Revenue and Customs* [2017] EWCA Civ 332).

20. As set out above, the key question is whether or not the Product is seed for grass for animal feed. In the light of the helpful submissions made by the parties, this gives rise to the following issues:

(1) The legal framework.

(2) The proper approach to classification.

(3) The classification of the Product.

(4) Whether or not fiscal neutrality requires the Product to be treated in the same way as other Generic Grass Seed.

The Legal Framework

21. Section 30(2) of VATA 1994 states that:

> "(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods 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."

22. Group 1 of Schedule 8 to VATA 1994 relates to food and (to the extent relevant) provides as follows:

> "The supply of anything comprised in the general items set out below, except –
>
> …
>
> (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
>
> …
>
> 2. Animal feeding stuffs.
>
> 3. Seeds or other means of propagation of plants comprised in item 1 or 2."

The Proper Approach to Classification

The parties' submissions

23. Mr Tack argued that the proper approach to classification is to consider what is actually being supplied and to see if that fulfils the requirements of the Group. Mr Tack argued that the way in which a product is held out is not relevant to that process. Similarly, he argued that the eventual use of a product is not relevant, at least where it is not possible to know in advance exactly what that use would be or where a number of potential uses are possible.

24. Mr Baird argued that the way in which a product is held out is relevant. He also argued that the use of the relevant product is the determinative factor in classifying that product. The natural meaning of the words in the legislation should be taken and applied to the relevant product.

Discussion

25. In our view, the proper approach is to make a multi-factorial assessment to consider whether or not the Product is seed for grass for animal feed. This must include how the Product is objectively held out for sale by Westland.

26. The capacity for a product to be a food stuff is not of itself sufficient as it is necessary to take into account the way in which the relevant product is held out for sale. Laddie J stated as follis in *Fluff Ltd (t/a Mag-it) v Customs and Excise Commissioners* [2001] STC 674 at [14] to [17].

> "[14] I must say it seems to me that this is primarily an issue of fact, not law. The words used in the statute are just matters of common English usage and I am far from clear that this is a question of law at all. But in any event it appears to me that it is possible to answer the issues raised before me quite simply as follows. Mr Storey's argument really came down to a fundamental central proposition. He said that maggots can be fed to fish: at fish farms they can be so used. That means that they are foodstuffs. They are of nutritional value to fish: therefore they are animal feeding stuffs and they so remain, whatever the intentions of the supplier or the intentions of the purchaser. A maggot is an animal foodstuff, whatever happens to it: whether it is fed to animals or not and whether it is used as a bait or not, it is in all circumstances an animal foodstuff and that, therefore, should determine this issue in favour of his clients. No one is to be taxed unless there are clear words in the relevant statute covering the type of activity or product which he is engaged in or is selling.
>
> [15] There is, as it seems to me, a problem with Mr Storey's submission when one looks at the legislation and the definition of the general items. I have set that out above. Animal feeding stuffs is only one of four categories under the general items and if Mr Storey is right, any material which is edible and of nutritional value to an animal must be an animal foodstuff and therefore, by its inclusion in the heading (2) of general items, comes within Schedule 8 Group 1 and therefore must be zero rated. But, if that is so, it is difficult to see why it was necessary to have four categories under the general items at all. It would simply have been sufficient to say "edible material for animals" or "edible material capable of being eaten by animals".
>
> [16] The point can be illustrated, it seems to me, by reference to item No (4) in the general items; that is, the category of "live animals of a kind generally used as or yielding or producing food for human consumption". Taken by itself, that appears to mean that live animals of a kind which are not generally used as yielding or producing food for human consumption are excluded, whereas live animals which are of a kind which are generally used as yielding or producing food for human consumption are included within the general items. Yet all live animals are edible and of nutritional value and can be fed to other animals. Therefore, on this basis, the inclusion of item (4) and, for that matter, items (1) and (3) appears to make the meaning of this provision less clear than Mr Storey says it is. I do not accept his proposition that these provisions mean that anything which is edible and is of nutritional value to animals is "animal feeding stuffs". It is not, as it seems to me, the natural meaning of those words and nor is it the meaning of those words naturally in the context of the legislation.
>
> [17] It seems to me that the meaning of the words must take colour from the context in which they are used and, in particular, what is at issue here is the supply of animal feeding stuffs. It seems to me whether or not an edible substance is animal feeding stuffs is in large part answered by the way in

> which it is sold or supplied. I put it to Mr Storey that if his approach is right a straw boater, which of course is edible, would itself be animal feeding stuffs and therefore the supply of boaters would be zero rated under this legislation. He accepts that that is the inevitable conclusion of his submission. I do not accept that is the right approach to these words: it is not what the words mean. It seems to me that what counts is whether what is being supplied can properly be described as animal feeding stuffs. In deciding that one must look not just at the nature of the material but the way in which it is supplied. These maggots are not supplied as a foodstuff for fish; that is to say, for the purpose of feeding and growing fish. These maggots are sold for use in enticing fish towards hooks."

27. This was reinforced by Newey J in *Revenue and Customs Commissioners v Roger Skinner Ltd* [2014] UKUT 204 (TCC), [2014] STC 2335 at [34].

> "[34] It seems to me that it is similarly important to "look not just to the nature of the material but the way in which it is supplied" when deciding whether dog food is "pet food". The fact that a food could be fed to pet dogs is no more determinative of that issue than the fact that maggots could be used as a foodstuff was of whether, in *Fluff*, they were "animal feeding stuffs". I therefore agree with the FTT that a food suitable to be eaten by pet dogs will not necessarily be "pet food" and that whether such a food is "pet food" depends on how it is held out for sale."

28. The need to consider all the facts was set out by the Court of Appeal in *Procter & Gamble UK v Revenue & Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1996 *per* Jacob LJ at [20] and [21].

> "[20] I should say a word about the tribunal's reference to the 'reasonable man'. It may come from this court's use of him in *Ferrero*. The issue was whether the product concerned was "a biscuit" within the meaning of excepted item 2 of Sch 8 Group 1. The tribunal had used the test of 'what view would be taken by the ordinary man in the street, who had been informed as we have been informed' (see (1995) VATT Decision 13493 at para 8.50). This court accepted that approach.
>
> [21] To my mind this approach is saying no more than 'what is the reasonable view on the basis of all the facts' – it does not matter if some of the facts would not be known to the 'man in the street'. That is why the test accepted as proper in *Ferrero* adds 'who had been informed as we have been informed.' The uninformed view of the man in the street is deliberately not being invoked."

29. It is of note that Jacob LJ also warned of the danger of over-analysis at [14]:

> "[14] Before going further, I have this general observation. This sort of question – a matter of classification – 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. The tribunal did just that."

The Classification of the Product

The parties' submissions

30. Mr Tack submitted that the grass seed used within the Product was exactly the same as the grass seed used in Generic Grass Seed. There was no difference between how the Product was used, the Product is regulated in the same way as if it were Generic Grass Seed, the cost breakdown of the Product means that its cost is predominantly the cost of the grass seed itself rather than the additives and it is not restricted to use on a lawn. If Generic Grass Seed is

treated as seed for grass for animal feed, he argued, there is no justification for the Product not doing so.

31. Mr Tack also relied upon HMRC's VAT Notice 701/38 ("the Notice"). In particular, paragraph 5.3 provides as follows:

> "5.3 Grass Seed
>
> Most grass seed is zero-rated because of the extensive use of grass as animal feed. This includes supplies to and by garden centres, local authorities and grass seed to be sown on set aside land."

32. Mr Tack made the point that the Product was sold in garden centres alongside Generic Grass Seed and so fulfilled the requirements of the Notice.

33. Mr Baird submitted that the Product was aimed at repairing and improving lawns and so was not intended to be seed for growing grass for animal feed. He submitted that the reason the notice allowed for Generic Grass Seed to be zero-rated was because of the difficulty in establishing what Generic Grass Seed is intended to be used for in any particular supply. However, this does not arise in respect of the Product because its use for lawns (as distinct from animal feed) is clear.

34. Mr Baird relied on the First-tier Tribunal case of *Branded Garden Products Ltd v HMRC* [2017] UKFTT 86 (Judge Jonathan Richards and Mr Peter Davies) to the effect that it is not sufficient of itself that a product is edible, as this is just one of the factors in a multifactorial assessment (see especially [35] to [40]).

Discussion

35. In our view the Product is not seed for growing grass for animal feed. This is for the following reasons.

36. First, the Product is clearly marketed for domestic use on lawns and is not held out in any way to be for the purposes of animal feed. The website and the packaging are clear in referring to lawns. The website and the packaging make it clear that one of the selling points of the Product is that it absorbs pet urine. The pictures on the packaging show pet dogs and provide a domestic context. The frequently asked questions include advice to use other products for areas larger than patches of 45cm in diameter. There is no mention in any of the marketing literature or packaging to the seeds being for growing grass to be consumed by animals.

37. Secondly, the Product's intended use is on lawns and not for animal feed. The advice requested from Cambridgeshire County Council, albeit in a consumer protection context, refers to it being a "lawn repair product". The website's explanation of where it is to be used points to a domestic context, being high traffic areas were lawn is worn away, shady conditions, patches caused by pet urine and in children's play areas. The aim is clearly to achieve an even lawn. If the intention was for grass to be grown from the seeds as animal feed, the evenness of the lawn would be of little relevance and a larger area than a 45cm patch would be likely to be required.

38. Thirdly, the fact that the seed within the Product is the same as Generic Grass Seed does not mean that it should be classified in the same way as Generic Grass Seed. Highlighting the fact that the seeds are the same does nothing more than highlight that the grass grown from the Product is *capable* of being animal feed. That capacity for the grass grown to be animal feed is not determinative and is emphatically overridden by the fact that the Product is held out for domestic use on lawns rather than for growing grass for animal feed.

39. Fourthly, the Notice does not assist Westland for the following reasons:

(1) Paragraph 5.3 of the Notice does not have the force of law. As such, it does not override Group 1 of Schedule 8 to VATA 1994. It follows that the classification of the Product is not affected by whether or not it fulfils any requirements set out in the Notice.

(2) Even if the classification is affected by the Notice, the Product does not fulfil its requirements:

(a) The Notice links the zero-rating to the extensive use of grass as animal feed. The matters set out in [35] to [38] above show that the Product is not intended to be used as animal feed and so does not fulfil this requirement.

(b) If (contrary to [39](2)(a) above) the proper construction of the Notice is that there is no requirement for the grass to be animal feed, the Notice's reference to "most grass seed is zero-rated" does not provide any assistance in explaining which grass seed is zero-rated and which is standard-rated.

(c) As set out in [10] and [11] above, the Product does not comprise only grass seed. Indeed, grass seed is only approximately 10% by weight of the Product. As such, the Product does not fall within the requirements of the Notice as it is not only grass seed.

(3) The fact that the Product is sold in garden centres alongside Generic Grass Seed is not determinative as this is merely one of the features in the multi-factorial assessment in considering whether or not the Product is seed for grass for animal feed. The placing of the Product alongside Generic Grass Seed is overridden by the fact that it is held out for domestic use on lawns rather than for growing grass for animal feed as set out in [35] to [38] above.

Fiscal Neutrality

The parties' submissions

40. There was no dispute as to what the principle of fiscal neutrality entails. In essence, it precludes treating similar goods and supplies of services, which are therefore in competition with each other, differently for VAT purposes. We were referred to the decision of *Rank Group plc v Revenue and Customs Commissioners* (Cases C-259/10 and C-260/10) [2012] STC 23, in which the ECJ stated as follows at paragraphs [31] to [36]:

> "[31] By this question the Court of Appeal (England and Wales) (Civil Division) seeks to know, essentially, whether the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for VAT purposes of two supplies of services which are identical or similar from the point of view of the *j* consumer and which meet the same needs of the consumer is sufficient to establish an infringement of that principle or whether such an infringement requires in addition that the actual existence of competition between the services in question or distortion of competition because of the difference in treatment be established.
>
> [32] According to settled case law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, *European Commission v France* (*Finland intervening*) (Case C-481/98) [2001] STC 919, [2001] ECR I-3369, para 22; *Kingscrest Associates Ltd v Customs and Excise Comrs* (Case C-498/03) [2005] STC 1547, [2005] ECR I-4427, paras 41 and 54; *Marks & Spencer plc v Revenue and Customs Comrs* (Case C-

309/06) [2008] STC 1408, [2008] ECR I-2283, para 47, and *European Commission* v *Netherlands* (Case C-41/09) (3 March 2011, unreported), para 66).

[33] According to that description of the principle the similar nature of two supplies of services entails the consequence that they are in competition with each other.

[34] Accordingly, the actual existence of competition between two supplies of services does not constitute an independent and additional condition for infringement of the principle of fiscal neutrality if the supplies in question are identical or similar from the point of view of the consumer and meet the same needs of the consumer (see, to that effect, *European Commission v Germany* (Case C-109/02) [2006] STC 1587, [2003] ECR I-12691, paras 22 and 23, and *Finanzamt Gladbeck v Linneweber; Finanzamt Herne-West v Akritidis* (Joined cases C-453/02 and C-462/02) [2008] STC 1069, [2005] ECR I-1131, paras 19 to 21, 24, 25 and 28).

[35] That consideration is also valid as regards the existence of distortion of competition. The fact that two identical or similar supplies which meet the same needs are treated differently for the purposes of VAT gives rise, as a general rule, to a distortion of competition (see, to that effect, *European Commission v France* (Case C-404/99) [2001] ECR I-2667, paras 46 and 47, and *JP Morgan Fleming Claverhouse Investment Trust plc v Revenue and Customs Comrs* (Case C-363/05) [2008] STC 1180, [2007] ECR I-5517, paras 47 to 51).

[36] Having regard to the foregoing considerations, the answer to question 1(b) and (c) in Case C-259/10 is that the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established."

41. Mr Tack submitted that the Product is a similar product, and thus is in competition with, Generic Grass Seed. Given that HMRC have made it clear in the Notice that Generic Grass Seed is zero-rated, there is no basis for treating the Product differently. He makes the point that consumers' reasons for buying either Generic Grass Seed or the Product are not known and so the extensive use of grass as animal feed referred to in the Notice is as applicable to the Product as it is to Generic Grass Seed. Mr Tack also notes that the Notice makes reference to supplies by garden centres, which he says is equally applicable to the Product as it is also sold at garden centres and, indeed, may even be on the same shelves or in the same areas as Generic Grass Seed.

42. Mr Baird submits that the Notice is merely making the point that HMRC is prepared to treat Generic Grass Seed as zero-rated because of the combination of the extensive use of grass as animal feed and the fact that it is not normally possible to divine any intention or purpose behind the supply of Generic Grass Seed. Mr Baird said that where HMRC is unable to determine whether or not seed is intended to be used for growing grass for animal feed it will allow zero-rating, but where it is possible to show that it is not intended to be used for growing grass for animal feed HMRC will treat it as standard-rated. As such, the Product is taken out of that context by the purpose and intention of its supply being for the repair of lawns rather than for the growing of grass for animal feed.

Discussion

43. We find that the principle of fiscal neutrality does not preclude the standard-rating of the Product. Crucially, whilst the seed within the Product is the same as Generic Grass Seed, the Product is itself different to Generic Grass Seed as it includes the additional materials. It is of note that the seed is less than 10% of the Product's unpackaged weight, which is in fact stated on the box. As such, the Product is physically different to Generic Grass Seed as the Product contains more than just seed. The Product (as distinct from the seed within the Product) is therefore not a similar product to Generic Grass Seed for the purposes of fiscal neutrality.

44. Further, for the reasons set out above, the Product is marketed and held out as being for the repair of lawns rather than for the growing of grass for animal feed. This distinguishes the Product from Generic Grass Seed that is not marketed or held out in this way.

Disposition

45. It follows that we dismiss the appeal for the reasons set out above.

46. 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.

RICHARD CHAPMAN QC

TRIBUNAL JUDGE

RELEASE DATE: 2 DECEMBER 2019