



TC06382

Appeal number: TC/2016/05606

VAT – takeaway food – whether ‘hot’ – yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PEGASUS (MANCHESTER) LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
SHAMEEM AKHTAR**

Sitting in public at Manchester on 14 August 2017

Ms C Brown, Counsel for the Appellant

Mr B Haley, presenting officer for the Respondents

DECISION

Introduction

- 5 1. This is an appeal against a VAT assessment for £117,254 raised on 26 May 2016 for the VAT periods 11/12 to 11/16 inclusive. The assessment covers three aspects: £114,122 in respect of food sales, deemed to be hot and therefore standard rated; £298 in respect of motor car fuel scale charge; and £2,834 input tax error.
- 10 2. The latter two items are not in dispute and this appeal is in respect of the assessment of £114,122 in relation to food sales only.

Background

3. The appellant has been registered for VAT since 1 November 2009. Its business is that of a takeaway food outlet in the Arndale market in Manchester, providing African and Caribbean cuisine such as rice, wraps and curries.
- 15 4. Following a VAT visit to the appellant's premises on 14 January 2016 and a further visit on 15 February 2016, and correspondence as to the treatment of the supplies of takeaway food, the respondents (HMRC) raised an assessment to VAT on the basis that the appellant supplies hot food.
- 20 5. The appellant requested a review on 23 June 2016; HMRC responded, upholding the assessment, on 20 September 2016. The appellant appealed to this Tribunal on 17 October 2016, with further grounds of appeal added on 19 April 2017.

Relevant law

6. Section 30(2) VATA 1994 provides:
- 25 "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."
7. Group 1, Schedule 8 to VATA 1994 states:
- 30 "Group 1—Food
- 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.
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Notes:

(1) “Food” includes drink.

(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

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

...

10 (3A) For the purposes of Note (3), in the case of any supplier, the premises on which food is supplied include any area set aside for the consumption of food by that supplier's customers, whether or not the area may also be used by the customers of other suppliers.

(3B) “Hot food” means food which (or any part of which) is hot at the time it is provided to the customer and—

(a) has been heated for the purposes of enabling it to be consumed hot,

(b) has been heated to order,

15 (c) has been kept hot after being heated,

(d) is provided to a customer in packaging that retains heat (whether or not the packaging was primarily designed for that purpose) or in any other packaging that is specifically designed for hot food, or

20 (e) is advertised or marketed in a way that indicates that it is supplied hot.

(3C) For the purposes of Note (3B)—

(a) something is “hot” if it is at a temperature above the ambient air temperature, and

25 (b) something is “kept hot” after being heated if the supplier stores it in an environment which provides, applies or retains heat, or takes other steps to ensure it remains hot or to slow down the natural cooling process.

(3D) In Notes (3B) and (3C), references to food being heated include references to it being cooked or reheated.

30 **Appellant’s evidence**

8. The appellant’s directors, Mrs Victoria Modupe-Ojo and Mr Babatunde Modupe-Ojo, provided witness statements and gave oral evidence.

9. The appellant supplies food which it describes as “healthy foods, freshly prepared”, in a retail unit in the Arndale market. The unit is open seven days a week
35 from 11am to 6pm. The food is prepared on-site, in a kitchen in the market on a floor below the retail unit from which the food is sold.

10. Food is prepared from 6am in the morning and, each morning, a single batch of food is prepared for sale. During preparation, the food is cooked to 99-100C. The food is edible once cooked. Having been prepared, the food is cooled in the kitchen,
40 in the pans in which it was cooked, using a fan to accelerate the cooling process.

11. Once the food has been cooled to approximately 19-20C, it is placed into gastronorms, which are containers designed to fit into the bain marie used in the retail unit. Each gastronorm holds approximately 6 servings, and 3 gastronorms of each main dish are prepared each day although these are of different sizes. The
5 gastronorms have metal covers, although clingfilm is also used to cover the gastronorm if the food has a lot of liquid.
12. Temperature checks of the food are taken in the kitchen. Sample temperature charts were shown, indicating that the food has reached 19-20C at approximately 10m each day.
- 10 13. At 11am, when the retail unit opens, the kitchen staff finish their shift for the day and the gastronorms are taken up to the retail unit. One of each of the gastronorms is stored in a bain marie, which is a water-based container powered by electricity. The bain marie is switched on when staff arrive at the retail unit in the morning.
- 15 14. The other gastronorms are kept in the retail unit, at room temperature, for up to two hours, and are then swapped into the bain marie as replacements when the previous gastronorm has been emptied. Food is kept in the bain marie for approximately 1-1.5 hours.
- 20 15. The business is busiest between midday and 2pm so that the cooked food is mostly sold by 2pm although the retail unit stays open until 6pm and will sell anything leftover, as well as salads, soft drinks and frozen meat patties.
- 25 16. The cooked food is sold to customers in spill-proof polystyrene containers which are not intended to retain heat. Some of the dishes contain a lot of liquid and so the container is then also packed into a plastic bag. The appellant also provides customers with a fork and napkins.
- 30 17. The bain marie is used because s6 of The Food Safety and Hygiene (England) Regulations 2013 require displayed food to be kept in heated containers at or above 63C. Mrs Modupe-Ojo explained in her witness statement that this leads to a lot of waste as the food becomes dry and tasteless at 63C and has to be thrown away. Mr and Mrs Modupe-Ojo's witness statements stated that the bain marie was kept at 63C, but in oral evidence this was amended to state that the bain marie is in fact kept at a constant temperature of 56C, which the witnesses believe is permitted by the "hot holding defences" in s7 of The Food Safety and Hygiene (England) Regulations 2013.
- 35 18. The witnesses explained that the intention of the business is not to sell hot food because the nature of the food sold is such that it does not taste good when hot. The intention is, instead, to sell healthy food that is freshly prepared. They in fact try not to get the food particularly hot because it is not amenable to being consumed and enjoyed when hot.
- 40 19. Mrs Modupe-Ojo stated that they did not take temperatures of the food in the retail unit.

20. Mr Modupe-Ojo considered that the ambient temperature in the retail unit was approximately 28-30C and that it was a hot environment because of cooking activities in other retail units in the market. He said that they had asked the Council for details of the market temperature but the Council did not keep such records and no-one had details.

21. In correspondence, Mr Modupe-Ojo noted that HMRC had agreed that the food was served “warm” and not hot, and that HMRC had agreed this in the visit to the retail unit.

Appellant submissions

22. The appellant submitted that the supplies of takeaway food should be zero-rated on the grounds that the cooked food was not hot and that cold food served separately from the cooked food fell within the zero-rating provisions.

23. The appellant submitted that the cooked food was not hot at the time that it is provided to the customer because:

- (1) The food is cooled in the kitchen before serving
- (2) African-Caribbean food should not be served hot as it loses its unique flavour and it is intended to be served at the ambient temperature
- (3) The bain marie’s temperature bears no reflection on the temperature of the food

24. The appellant submitted that as the food had been cooled to 19-20C in the kitchen it would be at approximately 20C when placed into the bain marie: it would not have heated to above the ambient temperature of approximately 28-30C within the hours or so that it was stored in the bain marie, let alone above that temperature.

25. The appellant submitted that HMRC’s assessment is based solely on the fact that the food has been placed in a bain marie at 56C. This does not translate to the temperature at which food is sold to a customer, which is confirmed by the fact that, in a visit to the premises, HMRC had agreed that the food was not hot and that no steam was observed from the food.

26. The appellant submitted that, in the alternative, none of the conditions are met for the food to be deemed to be “hot food” for VAT purposes in Note 3B to Group 1, Schedule 8 VATA 1994.

27. First: the food has not been heated for the purposes of enabling it to be consumed hot. The appellant submitted that the subjective test in *John Pimblett & Sons Ltd*[1988] STC 358 should be preferred in this respect, as supported by HMRC guidance. Therefore, it is the intention of the supplier which is important and not the intention of the customer as well. The primary and dominant intention of the appellant in keeping the food in a “hot holding” bain marie is to comply with health and safety laws. African-Caribbean food is not intended to be eaten hot. The case of *Deliverance Ltd* [2011] UKUT 58 was authority for the proposition that, as the dominant purpose

is to comply with food safety legislation, the supplies of hot food should be zero-rated.

28. Second: the food has not been heated to order. The appellant does not pre-heat food to order. Although there is a microwave on the premises, the staff are under
5 instructions not to use it to heat food for customers.

29. Third: the food has not been kept hot after being heated. Although the food is displayed in a bain marie which is at a temperature of 56C, this does not mean that the food is kept at that temperature. It was submitted that although some bain maries can heat food, but that this bain marie was simply a “hot holding” device. Heat from the
10 bain marie would be dissipated over the course of the two hours that the food is displayed. Accordingly, the food is not kept hot by reason for being displayed in the bain marie.

30. Fourth: the food is not provided in heat retentive packaging. The food is provided in polystyrene containers with no heat retentive properties.

15 31. Fifth: the food is not advertised or marketed in a way that indicates that it is supplied hot. The appellant’s advertising makes no mention of the food being supplied hot.

32. The appellant also submitted that approximately 25% of the food supplied is cold. These supplies were not taken into account when calculating the assessment, which should be amended accordingly. It was acknowledged that, during the period in
20 dispute, the appellant’s till did not distinguish between different types of purchases. The till had been replaced and an apportionment could now be produced.

33. The appellant submitted that the appeal should be allowed.

HMRC evidence

25 34. HMRC Officer Doherty, the officer who conducted the VAT enquiry, provided a witness statement and gave oral evidence.

35. Officer Doherty explained that, as the bain marie was kept to a constant temperature of 56C, it must necessarily heat the food placed in it where that food has been kept at below 56C. It was accepted that the food may not reach a temperature of
30 56C. It was also accepted that, at the visit to the retail unit, no steam had been observed rising from the bain marie.

36. Officer Doherty did not recall agreeing that the food was “warm” rather than hot but noted in any case that “hot” simply means above the ambient temperature for the purposes of the legislation.

HMRC submissions

37. HMRC submitted that, as the cooked food is kept in a bain marie with a constant temperature of 56C, the food is hot as it will be at a temperature above the ambient temperature, and the food has been kept hot as it is stored in an environment which provides, applies or retains heat.

38. HMRC further submitted that the dominant purpose of using the bain marie is to sell food which is hot, as the food is edible after the original cooking; compliance with the The Food Safety and Hygiene (England) Regulations 2013 is only required where the food is to be sold hot. "Hot" does not need to mean piping hot, so that the absence of steam in the retail unit does not mean that the food is not at above the ambient temperature, which is the definition of "hot" in VAT legislation for these purposes.

39. The provision of forks and napkins to customers indicates that the food is intended by the appellant to be consumed as sold.

40. HMRC accepts that some of the sales, such as sales of salads alone, have the potential to be zero-rated. However, the appellant has provided no evidence as to the quantification of such sales and so such sales have been treated as a side dish to the predominant hot dish.

Discussion

41. We find the following facts:

(1) The cooked food is prepared in advance of sale and is cooked to a temperature of 99-100C.

(2) The food is cooled after cooking to a temperature of 19-20C and reaches this temperature at approximately 10am.

(3) The food is kept at the ambient air temperature until it is placed in a bain marie.

(4) The ambient air temperature at the retail unit is approximately 28-30C.

(5) The food is placed in the bain marie at 11am at the earliest and by 12:30pm at the latest.

(6) The food is kept in the bain marie for at least an hour.

(7) The bain marie maintains a constant 56C temperature and is switched on when staff arrive to open the retail unit in the morning.

Is the food hot?

42. The appellant argues that placing the food in the bain marie does not mean that this raises the temperature of the food to above the ambient temperature, and that the food does not therefore become hot.

43. We consider that:

(1) The food will have been raised to the ambient temperature from 19-20C by being kept at the ambient temperature for at least one hour after cooling to 19-20C as that temperature is reached at approximately 10am, and the food is then held for at least one further hour before being placed into a bain marie.

5 (2) It is a matter of basic physics that heat will be exchanged between the water in the bain marie, which is maintained at a constant 56C, and the food which is in a gastronorm that enters the bain marie at the ambient temperature such that the food will be heated as a result of being placed in the bain marie.

10 44. This is, we consider, supported by the fact that Mrs Modupe-Ojo states in her witness statement that, if the bain marie is kept at 63C, the food becomes dry and tasteless and results in a lot of waste. This shows that the bain marie does heat the food: if it did not do so, the problem of the food becoming dry and tasteless as a result of being kept in the bain marie would not arise.

15 45. We note that the burden of the proof is on the appellant to demonstrate that the food has not become hot. No temperature readings of the food during the day in the retail unit were taken because it was considered not practical to do so, nor did the appellant take any readings of the ambient temperature in the retail unit. We note that the appellant did, however, take readings showing that the food had been cooled.

20 46. In the absence of any evidence to the contrary from the appellant we conclude that the bain marie will raise the temperature of the cooked food above the ambient temperature, so that it becomes hot for the purposes of the legislation.

25 47. Having found that the food was hot, for the VAT purposes, the question is then whether any of the conditions in Note 3B of Group 1, Schedule 8 VATA 1994 are met. We considered that it was common ground that only two of the conditions might apply.

Condition (a) - intention of the supplier

30 48. It was submitted by the appellant that the purpose of heating the food was not to enable it to be consumed hot but, instead, to comply with food safety legislation. Following *Deliverance* therefore, the supply of the food was capable of being a zero-rated supply.

49. However, Mrs Modupe-Ojo stated in her witness statement and it was also submitted that the appellants believe that the relevant food safety legislation does not apply to them as they believe that they benefit from the “hot holding defences” in s7 of the relevant legislation.

35 50. Accordingly, we find that the appellant’s purpose in heating the food cannot be to comply with relevant food safety legislation. As no other reason was given for the food being heated, we must conclude that the food is heated in order to enable it to be consumed hot. We consider that this is supported by the provision of napkins and forks, which indicate that the appellant expects that the food will be consumed shortly
40 after purchase.

Condition (b) - is the food kept hot after heating?

51. The food is maintained in a bain marie which is kept at a constant temperature of 56C. The food therefore clearly kept above the ambient temperature (ie: kept hot) after its temperature has risen above the ambient temperature (ie: been heated).

5 52. We find therefore that the food is kept hot after heating.

Decision

53. We find that the food is hot as defined in the relevant legislation when it is supplied to the customer. We find that the food has been heated for the purposes of enabling it to be consumed hot and also that the food is kept hot after being heated, so
10 that the supply of the cooked food is a standard-rated supply for VAT purposes.

54. The appeal is dismissed as to the supplies of cooked food. We note that HMRC agree that they will accept that a proportion of the supplies can be attributed to cold foods if the appellants can provide evidence as to the appropriate apportionment. The Tribunal leaves it to the parties to agree the amount which the appellant must pay in
15 respect of the VAT on the supplies of cooked food. If agreement cannot be reached, the appeal should be relisted for hearing by a Judge sitting alone.

55. 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
20 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.

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**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 8th MARCH 2018

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