TC02201

Appeal number: TC/2010/1082

VAT – whether appellant's dog food was pet food – meaning of "meal" in expression "biscuits and meal" in zero rating schedule – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROGER SKINNER LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
NIGEL COLLARD

Sitting in public at Bedford Square, London on 18-20 April and 14 May 2012

Mr Michael Conlon QC and Ms Anne Redston, Counsel, for the Appellant

Ms Eleni Mitrophanous, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant lodged voluntary disclosures totalling nearly £7million reclaiming output tax paid on sales of certain dog foods in the period 1 January 1980 to 31 January 2009. HMRC refused these claims on 21 September 2009 and upheld this refusal on review on 17 December 2009. The appellant appealed the review decision.

2. The claim was divided up in time as follows: the "Fleming claim" covering the period 1 January 1980 – 31 October 1996; the protective claim for the period 1 November 1996 to 31 January 2006; and the capped claim for the period 1 February 2006 to 31 January 2009.

3. The quantum of the claim has been agreed by the parties and we are not asked to address it, and in the event that our ruling is that some but not all the supplies in respect of the claim products were zero rated, the parties indicated that they expect to be able to reach agreement on quantum. In so far as there is an issue as to whether and to the extent that the appellant's voluntary disclosure was made in time (the protective claim), we are not asked to decide the matter. Similarly we are not asked to rule on (should the appellant succeed in principle), HMRC's liability to compound interest as that issue is also stayed behind other cases. Nor are we asked to address any question of unjust enrichment.

4. We are therefore asked to give a preliminary ruling solely on the question of the VAT status of the appellant's supplies of certain dog foods in that period: were the supplies standard rated or zero rated?

The facts

5. From the evidence we heard and saw, we find the facts to be as follows.

The background

6. The appellant is a company set up over some 30 years ago to take over the running of a very long established business. The family of the appellant's chairman, Mr Skinner, have been millers at the company's site in Suffolk for some two hundred years. In the last century, the business had evolved into being a manufacturer of farm animal feeds and dog biscuits, as well as producing flour.

7. Mr Skinner first joined the business (while it was still a partnership) in 1964. In 1971 the partnership manufactured its first dog food under the brand name of its customer, called Linacre. Linacre's customers were hill farmers with sheep dogs or breeders and trainers of working dogs. Linacre failed in 1972. But Mr Skinner was inspired to invent and manufacture a better quality, more digestible dog food. Basically, Mr Skinner's main insight was that the cereals used should be first cooked (to make them more digestible) before being mixed with other ingredients (meat and bone meal, fish, fat and vitamin and mineral supplements) and then passed through a

die used to produce cattle food. He also made other changes to the recipe to produce what he considered to be a unique dog food in 1970s.

8. The partnership marketed its new dog food for four years in a joint venture with another business and sold it under the name "Down's Dog Nuts". Its customers were owners of working dogs.

9. From 1 June 1977, the partnership sold its dog food under its own label as "Skinner's Dog Food". Shortly afterwards it added "Skinner's Dog Meal" which was essentially the same as the Dog Food, but not passed through a die, so that the purchasers could see the various constituents of the food. It looked somewhat like a muesli. Although the term was not used at the time, we find it is now common practice to describe dog foods of this type as "muesli".

10. At this time, the partnerhip's sales of dog food were modest. But in around 1979 Mr Skinner decided to market the product nationally in the belief that he had identified a niche market (working dogs and, in particular, gun dogs) for which he had a product that had been locally very successful.

11. On 1 January 1980, the appellant company took over the marketing and sales of the dog food. For a while the partnership continued to manufacture the dog food but, ultimately, the appellant took over the manufacturing too.

The witnesses

12. Mr Skinner was director and chairman of the appellant. He was knowledgeable and clearly very proud of his products. He was very actively involving in developing and marketing the claim products up to the time that he retired from the business in 1997 and handed over day to day running to a professional manager.

13. We find, as he agreed, that he was less familiar with what had happened with the business from that time onwards.

14. We accept him as a credible witness: he made a few mistakes over certain facts (for instance he said that he had asked Mr Livingston of BP Nutrition to check the formula of the dog food but then accepted it was not Mr Livingston but someone else at BP Nutrition who had been asked to check the formula.) Despite a few mistakes on details, we consider that overall his evidence was reliable

15. Mr Hart was employed by the appellant as sales manager and then as sales director (although he has no residual financial interest in the company). He was with the company from October 1990 until 2000. He now works as Sales Director for a pet food company, producing a specialist food that is not in competition with any of the appellant's products.

16. We found Mr Hart to be a reliable and credible witness. He was cross examined at length and gave open and consistent evidence. He freely admitted to matters that could not be expected to advance the appellant's case such as that he tried to expand the sales of the appellant's dog food into the pet food market.

17. Mr Hart's and Mr Skinner's evidence was largely but not entirely consistent. One such inconsistency was whether the claim products were ever held out as suitable for pets. Mr Skinner said no and Mr Hart said otherwise. We accept Mr Hart's evidence on this because Mr Hart explained what steps they had taken to market it as pet food (summarised in paragraphs 114-119 below), and, as mentioned above, Mr Skinner was better at remembering the business as it was in the 1970s and 1980s but we found Mr Hart's recollection of what happened in the 1990s was much sharper.

18. Mr Whittle was a chartered accountant acting for appellant and gave evidence about how the spreadsheets used to calculate quantum were compiled. Although quantum was not in issue, there was a query about what products were within the description "gundog foods" in his spreadsheets. We accepted his evidence as reliable and find this description was Mr Whittle's shorthand for the claim products and, therefore, the description did not give the Tribunal any information about who actually bought the products.

19. Mr Livingston was Mr Skinner's contact at BP Nutrition, a company which supplied vitamin and mineral supplements to food manufacturers. He confirmed that Mr Skinner did engage BP Nutrition to check the analysis of his dog food but Mr Livingston himself was not involved with this analysis.

20. Mr Hill. Mr Hill worked in the prison service at Dartmoor and was responsible for Dartmoor's prison dogs. He also owned his own gun dogs and represented England in championships with his dogs. He started to use the Skinner's claim products in 1980 and fed them to the prison dogs and his own dogs. Mr Hill thought it was an excellent product and recommended it. He bought Skinner's dog food as agent to sell on to others, selling some 100 tonnes per year when his business was at its peak. So far as he was aware, his customers only bought the food for working dogs. His customers were not exclusively gun dog owners: he mentioned as examples one customer who bought the food for his huskies which he ran in competitions and another customer who bought it for sheepdogs.

21. We accepted him as a reliable witness.

22. Mr & Mrs Halstead – the evidence of Mr & Mrs Halstead was unchallenged and we accept it. We discuss it in paragraph 107 below.

23. Mr Southey gave expert evidence on the meaning of "meal" which was relevant to the second limb of this appeal. He had a degree in Animal Nutrition and an employment background in the production of pet foods. He also chaired the additives committee of the Pet Food Manufacturers Association 2007-2010. We found him knowledgeable on his subject and had no hesitation in accepting him as an expert on it.

The products

24. The products in issue in the appeal are as follows:

Dog food	Period of sale
Skinner's *Dog Food*	1 January 1980 to May 2008
Skinner's *Dog Meal*	Entire claim period
Skinner's *Protein 23*	1987 to December 2002
Skinner's *Ruff & Ready*	1990 to date
Own label *Waveney Gold* and *Crane Dog Food*	1989 to approximately 2004

Samples

25. We were given "samples" of dog food to look at (we forebore to taste them) but with the exception of *Ruff & Ready*, which is still in production, the appellant was unable to produce samples of the actual claim products as they are no longer in production. Instead, we were given samples of the most similar product Mr Skinner could find. We were also given samples of comparator products.

26. *Skinners Dog Food.* We found this to be a cubed food of even consistency and light greyish in colour. It was fairly homogenous in appearance although tiny pieces of white and brown could be discerned evenly distributed throughout. As are all the other claim products, this was a complete food in the sense any dog fed it could subsist entirely on this food without supplementation with other foods.

27. Its ingredients were (in descending order of quantity): steam cooked flaked wheat, meat and meat derivatives, steam cooked flaked maize, porridge oats, wheat bran, white fish meal, vitamins and minerals & oils.

28. *Skinners Dog Meal.* We find that this was made from basically the same ingredients as *Skinners Dog Food* but was not put through the pelleting process. As we have already commented, the individual ingredients could be seen so its appearance was rather like a muesli. It contained visible flakes of cereal and was mixed with a brown powder. It was a complete food.

29. *Protein 23.* This was an extruded dog food. Again no sample of this could be produced as production of it had ceased but we were given a sample of *Field & Trial Working 23.* This was a dog food still produced by the appellant and which HMRC accept is zero rated. Mr Skinner informed us it was virtually identical to *Protein 23.* We explain the *Field & Trial* range in more detail in paragraphs 93-101.

30. An extruded food, we find, is made from raw ingredients which are mixed and placed in an extruder which puts them under high pressure. This results in a high temperature which "cooks" the food. Extruded foods are not baked or steamed. The

end product is superficially similar to a pelleted food, but the process of producing it is different. Unlike the pelleted food, its appearance was entirely homogenous.

31. The appearance of the product was of rough balls (larger than peas but smaller than marbles) of uniform reddish brown colour. Its ingredients were (in descending order of quantity): whole wheat, beef meat meal, maize, maize gluten, rice, oats, chicken fat, bran, vitamins & minerals.

32. We find on the evidence that many dog and cat foods produced today are complete, extruded foods but, relying on the evidence of Mr Southey and the Monopolies and Mergers Report referred to in more detail below in paragraphs 221-222, sales of extruded food for dogs and cats were rare or unknown before the 1980s. Extruded dog and cat foods have grown in popularity since that time for a number of reasons including that extruded foods are more easily digested.

33. *Ruff & Ready,* was a moist muesli food for dogs. It is a more sophisticated muesli than the *Skinner's Dog Meal* in that it was a mix of ingredients some of which were baked, some extruded, some cooked flaked cereals, and some pelleted proteins. By 1996 *Ruff & Ready* was the appellant's best selling dog food and it remains in production today.

34. Mr Skinner's evidence which we accept is that its ingredients were very similar to those of *Field & Trial Muesli Mix for hard working dogs.* Indeed his evidence was that Skinners had taken the formula for *Ruff & Ready* and made a few minor changes and packaged it as *Field & Trial Muesli Mix.*

35. The product consisted of large yellow flakes, rough balls of red/brown colour, square biscuit pieces and some round pieces. Its ingredients were (in descending order of quantity): protein pellets containing meat and meat derivatives, terrier meal, cooked flaked maize, extruded wholewheat biscuits, cereal coating, dried meat greeves, cooked flaked peas, cooked wheatflakes, oils, vitamins & minerals.

36. *Waveney Gold and Crane Dog Food:* the appellant also sold dog food under two other supplier's labels. Mr Skinner's unchallenged evidence was that the company's two customers were agricultural companies which sold the own label dog food to people local to them with working dogs. He said selling like this gave the appellant a larger share of the overall working dog market. In appearance, these two own label foods were most similar to Ruff & Ready. They comprised yellow flakes, brownish extruded pieces, and lighter biscuit pieces. The ingredients were (in descending order of quantity): protein pellets, flaked maize, cereal coating, flaked wheat, baked terrier meal, dried meat, extruded wheat discs, flaked peas, soya oil, vitamins & minerals.

37. The appellant also did an own label food for greyhounds called *Trak Dog.* HMRC accept that it should have been zero rated and it is not one of the products in respect of which a claim has been made and refused.

38. We were also given samples of other dog foods for purposes of comparison.

39. *Omega G:* This was an extruded dog food produced from about 1980 onwards and sold into the pet food market. It was entirely homogenous, being a reddish brown colour, and comprised uniform circular discs with a hole in the middle. Its ingredients (in descending order of quantity) were: cereals, meat and animal derivatives, vegetable protein extracts, derivatives of vegetable origin, oils & fats, and minerals.

40. *Pig finisher nuts*. Mr Skinner's evidence which we accept is that it was a pelleted compound feed for pigs and produced by a manufacturing process similar to that used for *Skinner's Dog Food.* In fact, it looked very similar to the *Skinner's Dog Food* except that it was clearly made with a smaller die as the pellets were smaller. Its ingredients were (in descending order of quantity): wheat, barley, wheat feed, niprosoya, molasses, limestone, dical, soyaoil, sow supplement, salt and yeast.

41. *Pointers Plain Terrier Meal.* This comprised small irregular pieces which were a pale beige/cream colour and looked rather like coarse broken biscuits. We describe its production process more fully when we deal with the expert evidence below in paragraph 205. Its ingredients were (in descending order of quantity): wheat, oils & fats, and minerals.

Formulated for all dogs?

42. We have already said in paragraphs 7 & 10 that we accept Mr Skinner's evidence that from the start he formulated the dog food with working dogs in mind because he saw this a niche market in which the appellant might be successful.

43. We also find that he asked BP Nutrition (see paragraph 14), and more recently experts from Premier Nutrition, to check that the products were suitable for working dogs. It is high energy food and easily digestible.

44. Although the claim period covers some 30 years, we find that the recipes remained virtually unchanged from when first formulated.

Suitable for all dogs?

45. It was accepted by the appellant that all the claim products were suitable to be fed to pet dogs as well as gun dogs or other working dogs. Mr Skinner was not sure that *Skinner's Dog Food* was necessarily suitable for toy dogs as the pieces were large but accepted that the packaging held it out as suitable for dogs of any size.

46. We find the claim products were high quality dog food that, in particular, were good for a dog's digestion. In so far as some dogs were likely to have digestive problems, we find this was likely to be related to the breed of the dog rather than whether it was a pet or working dog. For example, we were told Alsatians, used as both pets and prison dogs, were prone to digestive problems.

47. We find that the protein content varied between the various claim products from 19.5% to 23%. One of the comparator products, the pet dog food *Omega,* had 24%

protein content. Therefore, although we accept the claim products contained a lot of protein, we find its protein levels were no higher than in pet food.

48. Mr Skinner's evidence was that the food also contained high fat and carbohydrates to give working dogs a lot of energy. We do not accept that this made it more suitable for working dogs than pet dogs as, firstly, we find that the fat content varied considerably between the various claim products (between 5% and 10%) and was comparable to that in the pet food comparator product. We accept Mr Skinner's explanation that historically (before the company had extruding machines) it was difficult to put a high fat content into the food. We had no evidence on carbohydrate content other than Mr Skinner saying it was high.

49. Secondly, Mr Skinner and Mr Hart accepted, and we find, that high energy foods can be as suitable for pet dogs as well as working dogs. Some pet dogs, taken on long walks, might use more energy than some working dogs who may have to sit quietly for long periods until given a command. Mr Skinner's evidence, which we accept, was that a pet which did not exercise much would get fat (but not ill) if it was fed the claim products: as Mr Hart colourfully put it, the claim products were not food for Tricky Woo.

50. Our conclusion is that it was a good quality dog food which could be fed safely to any dog but was particularly suitable for active dogs, whether pets or working dogs.

Of a type for working dogs?

51. Mr Skinner's evidence was that the claim products looked more like animal feed than pet food. We accept that *Skinners Dog Food* looked more like pig finisher nuts (a comparator product) than the extruded hoops of *Omega* produced from 1980s onwards. We also accept from reliance on the Monopolies and Mergers Report (mentioned in more detail below in paragraph 221) that complete dog foods were unusual in the 1970s.

52. Our overall impression is, and we find, that while the *Skinners Dog Food and Skinners Dog Meal* were on the whole unlike most pet dog foods available in the 1970s, when the market was dominated by canned food, over time the claim products and pet dog foods have tended to converge in appearance. While pelleted foods were and remain unusual as pet dog foods, it is clear that types of muesli-like complete dog foods are now marketed as pet foods, and types of extruded dog foods have been marketed as pet foods since around 1980.

Packaging - appearance

53. During the first part of the claim period the appellant sold only its *Dog Food* and *Dog Meal.* These were sold in 20KG blue bags with a sketch of a golden retriever. We find retrievers are the archetypal gun dog but we also take judicial notice of the fact that they are also very popular as pets.

54. At some point in the 1980s the appellant switched to selling the claim product in white bags with a colour picture of a golden retriever. These bags carried the strapline:

> "carefully balanced food for all dogs"

55. *Dog Food, Dog Meal* and *Ruff & Ready* also all carried the statement:

> "Delicious and nutritionally complete dog food for all breeds"

56. The description on *Skinner's Protein 23* stated:

> "suitable for *all* dogs, and particularly for those dogs with a high energy requirement, such as hunting dogs and working dogs."

57. Mr Hart described these bags as having a "very agricultural presentation" and we agree with him. They were large, heavy paper sacks with crude artwork. The earlier bags as described to us would have been even more basic in appearance.

58. The packaging changed again. Mr Skinner's and Mr Hart's evidence on when this happened was not consistent. Mr Skinner said it happened in around 2002 and Mr Hart said in around 1998. However, taking into account that Mr Skinner ceased to be responsible for the day to day management of the company in 1997 and was somewhat vague on events in relation to the company that took place after this date, and that Mr Hart stopped working at the appellant in 2000 yet had overseen the introduction of the new bags, we prefer Mr Hart's evidence that these new bags came into use in around 1998.

59. These new bags remained in use until the various claim products went out of production and were still in use for *Ruff & Ready* at least until the end of the claim period. They were plastic and had rather more detailed and sophisticated artwork. The artwork on the front page included a new logo. Mr Hart explained that the logo was meant to be representative of the dogs of Britain: the logo comprised the heads of five dogs. There was a retriever to represent gundogs; a spaniel to represent England; a Wolfhound for Ireland, a Collie (sheepdog) for Wales and a West Highland terrier (Scottie) for Scotland. All these breeds, with the exception of the wolfhound (wolves having been extinct in Britain for some centuries), could be used as working dogs, but, of course, were all breeds kept as pet dogs too.

60. Artwork on the bag included a feeding guide with both pictures of dogs and examples of types of breed. The appellant accepted and we find that not all the breeds pictured or mentioned were breeds that were ever used as working dogs.

61. In conclusion we find that none of the bags of food for the claim products (with the exception of *Protein 23)*, in any of the three incarnations, mentioned working dogs or pet dogs. So far as information could be gleaned from the packaging, the food was suitable for all dogs of any breed. So far as *Protein 23* was concerned this was explicit in the sense the bag said it said it was suitable for all dogs with high energy requirements such as working dogs.

Bag size

62. The various claim products were all sold mainly in 20kg bags, but all were available in a smaller size, ranging from 2.5kg, 3kg and 10kg. Mr Skinner said that the smaller sizes were really only used to be given away as samples. But while we find they were given away as samples, it is clear from Mr Hart's evidence and the sales figures produced to us that small but significant quantities of the smaller bags were also sold. Mr Hart's explanation is that working dog owners occasionally wanted small bags, for example, when staying away for a weekend's shooting with their dog. We accept this explanation as it explains why sales of the small bags were very limited compared with the large bags. We also find the appellant advertised in its leaflets the availability of all sizes of the dog food.

63. We find that the 20kg bag, is as Mr Hart said, the size of an agricultural feed sack and that most pet food is sold in smaller bags. Nevertheless, we also find that some pet food was sold in 20kg bags, and that the appellant sold its *Field & Track Working Dog 23* in 15kg bags.

Holding out

64. We find that the appellant introduced its Menu range for pet dogs and cats in 1990 and in or around 1996 it changed its logo to state:

> "pet food manufacturers"

Independent reports

65. A Mr Peter Moxon wrote an article about *Skinner's Dog Food* and *Dog Meal* in the *Shooting Times and Country Magazine* in early 1980. His article praised Skinners Dog Food. Nowhere does the text mention that the dog food is for working dogs: nevertheless the article is headed "Gundogs" and printed in a magazine intended for persons who shot game. Further, we find Mr Moxon was well-known in gundog-owing circles. He trained gundogs and wrote the "bible" for gundog trainers and competitors. The text might not mention gundogs but the intended audience of the magazine, we find, would know the author wrote the article with gundogs in mind.

66. An article in *Sporting Gun* by another author dated May 1991 reported on a visit to the appellant's factory as a visit to "a factory producing grub for gundogs". Again the article praises the food and the underlying assumption of the article is that it is food for gundogs from puppyhood to adulthood.

67. The appellant benefited from word-of-mouth recommendations and indeed it was their evidence it was part of their marketing strategy. One example was a recommendation from a dog trainer in Suffolk to a dog handler at Dartmoor prison which secured the appellant a contract to supply the dog food to the prison service.

Leaflet

68. The appellant produced a marketing leaflet, 'Fit for Life', that was in use from the mid-1980s onwards. Although it stated many benefits for dogs fed on the appellant's product, nowhere did it explicitly state that the product was only intended for working dogs. Rather, it said:

> "No supplementation whatever is needed to sustain healthy life for the pet or working dog"

Elsewhere it referred to dogs without distinguishing between pet or working dogs. The leaflet had line drawing reproductions of pictures of dog heads. Many breeds were featured, many of which were breeds used as working dogs, but one dog represented was clearly intended as a representation of a pet dog as it had a bow on its head.

69. The leaflet also included on the whole of one of its 7 pages a reproduction of the full text of Mr Moxon's article referred to above together with its heading "Gundogs" in very large print. Indeed, apart from the strapline on the front page of "Fit for Life" and the name "Skinners" on the back page, this was the largest text used in the leaflet.

70. Our overall impression of this leaflet is that the food was intended for gundogs: it did not expressly say this but gave great prominence to the article headed 'Gundogs'. It also devoted space to the food's suitability for lactating bitches and puppies being weaned, which contributes to the impression that this was not ordinary pet food but food to be considered by persons in the business of raising puppies.

71. The leaflet ceased production at some point and was replaced with another, a sample of which we were not given. Mr Hart was responsible during his period of employment by the appellant for the production of this replacement leaflet and we agree with HMRC and find that it too would have had at least some representations that the products were suitable for pet dogs. This is because Mr Hart said in the hearing that in his period of employment he wished to broaden the customer base of the appellant and wanted to hold out the food as also suitable for pets. The leaflets were distributed to wholesale/retail purchasers of the appellant's products for them to distribute to their retail customers. They were also distributed at dog shows.

Website

72. The appellant set up its own website in 2002 to advertise its products. We had no evidence of how it appeared at that date. The evidence we had was that in 2010 (one year outside the claim period) the only two remaining claim products still in production at that time (*Ruff & Ready* and *Dog Meal)* were sold in the category designated "for domestic pets" rather than the category "for working dogs". However, a page accessed from the question "what product suits you" had a "pets" option and the products which came up under this option did not include any of the claim products.

73. Our finding based on this evidence is that the appellant did not use its website to actively promote *Ruff & Ready* and *Dog Meal* as pet food (because otherwise they

would have been listed under the "pets" option). Nevertheless the appellant chose to place them in the "pets" category rather than the "working dogs category". However, we accept that having worked hard to comply with HMRC's requirements for zero rating for its *Field & Trial* range the appellant did not chose to list the food that was not accepted by HMRC has having zero rated status with the range that did have such status.

Advertisements

74. The appellant advertised its product in magazines: the magazines in which it chose to advertise were working dog magazines, such as the *Shooting Times*, *The Field, Terrier and Lurcher Field Magazine*, and *Working Dog*. Its adverts featured imagery of men and dogs in the shooting field.

75. It did not advertise the claim products (although it did advertise its Menus range) in general pet dog magazines nor in periodicals aimed at show dogs. This was because the appellant perceived working dog (particularly gundog) owners to be its target audience. We note, though, that the appellant also advertised its Menu range in some working dog magazines.

76. It also advertised the claim products in year books for working dog breeds such as the year book for labradors and retrievers.

Dog shows and field trials

77. Mr Skinner's strategy from 1980 was to advertise the appellant's products by travelling around the UK visiting gun dog breeders and trainers, exhibiting at field trials and country shows. Sales in 1980 grew by about 700%. And by the end of the 1980s sales of the two dog foods were nearly 10 times what they were in 1980.

78. Attendance at dog shows continued throughout the claim period. The appellant sometimes even sponsored dog shows to advertise the claim products. Most of the dog shows attended were exclusively for working dogs, although later in the claim period the appellant's representatives attended a few shows which were also (but not exclusively) for pet dogs, such as Crufts, which had a large section for working dogs.

79. Representatives of the appellant would also attend field trials to advertise its dog food. Field trials, we find, are competitions between owners of gun dogs where a prize is given to the owner of the best performing dog retrieving shot game. Such trials would not include competitions for pet dogs.

80. Throughout the claim period the appellant regularly attended and promoted the claim products at game shows, such as the Country Landowners Association annual *Game Fair* and the Northern Irish and Welsh game fairs. It also exhibited at agricultural shows, such as the Black Isle Show, Royal Welsh Show, The Royal Bath & West and other shows.

81. In summary the appellant attended some 12-15 events per year and of the events attended, only Crufts, which they did not attend very often, included sections for pets.

Sponsorship

82. The appellant purchased dog trailers and allowed them to be used by persons transporting gun dogs to competitions: this was a marketing device as the outside of the trailer advertised the appellant's dog food and the trailer would be seen at field trials all over the country.

83. The appellant was also the sole sponsor of the England gun dog team at the *Game Fair* and of the International Gundog League's *Retriever Championships.*

84. The appellant also provided food as prizes in field trials.

Agents

85. The appellant was a manufacturer. It aimed to sell in bulk. The larger kennels (say with 10 dogs) might be able to buy in sufficient quantity for it to be worth the appellant's while to supply them direct. From the appellant's order books, it was apparent that it had supplied many kennels direct. But we find on the evidence an order for dog food of anything less than half a tonne had to go through an intermediary in order to be financially worth while.

86. Its first intermediaries were persons it described as agents: these were gundog owners who bought in bulk in order to feed their own dogs and to supply the food to other dog owners.

87. As already mentioned in paragraph 20, we had evidence from Mr Hill who was one such agent for very many years. His evidence was that he sold the food to working dog owners. He said he was unable to remember even one customer with a pet dog. He admitted that in his later years as agent that he had had also sold the appellant's products to his next door neighbour who ran a pet shop but even then he thought his neighbour's customers for the food were gundog people.

Sales representatives

88. To expand sales beyond the agents, before Mr Hart was employed, the appellant contracted with a self-employed sales representative on commission. Mr Hart joined in 1990 and recruited a team of five sales representatives.

89. Mr Hart agreed with HMRC's counsel that these sales reps were told to hold the food out as suitable for all dogs but he also said that the reps were told primarily to stress the products' suitability for gundogs. We accept this evidence because Mr Hart was a reliable witness and his evidence was consistent.

90. He said that any representations would have been made to owners of working dogs – and not wholesalers or retailers – because it was Mr Hart's strategy to identify

suitable kennels for the reps to target from lists of gundog breeders listed in the Kennel Club publication. Mr Hart's rule was to "start with the dog" in order to generate demand for the appellant's products.

91. It was the appellant's experience that an intermediary, such as a country store, farm shop or pet food retailer or wholesaler, would not stock the appellant's food unless satisfied it could sell it: so the appellant's strategy was to create demand at consumer level as described in the previous paragraph, and then find a retailer and/or wholesaler who would agree to buy the food in bulk in order to sell it on in smaller quantities to the identified customers. Mr Hart's evidence was that it was unlikely that the sales reps would discuss with the intermediaries the suitability of the food for all dogs as all the intermediary would want to know was that there were customers already lined up to buy the food: they would not buy in the food speculatively.

92. The evidence from the day books shows that originally many of the buyers were dog owners, breeders or trainers or suppliers thereto: over time the appellant was less able to state who the consumer of the food would be as a much larger percentage of its supplies were to intermediaries. By 1993 68% of buyers (measured by name not quantity) were not known to be working dog owners, breeders, trainers or suppliers thereto. We find this is consistent with the explanation we were given of the appellant's sales strategy over time which evolved from word of mouth in 1980 to agents and on to established business intermediaries.

The appellant's Field & Trial Range

93. We find that in response to HMRC's acceptance that specifically labelled and formulated working dog food could be zero rated, and in response to competition, the appellant created a new brand range of dog food called *Field & Trial.* HMRC accepted from the start of its production in 1998 that this was zero rated and it is not part of the claim.

94. The appellant still manufactures dog food under the name *Field & Trial.*

95. We find that, since the introduction of its *Field & Trial* range, sales of the claim products diminished. Sales have diminished to the extent that only one of them (*Ruff & Ready)* now remains in production.

96. We find all of the claim products showed a significant decrease in sales between September 1997 and May 1999, and (with the exception of *Ruff & Ready)* the decline continued. When sales had dropped to around £5,000 a month or less, production ceased. On the other hand, the *Field & Trial* range leapt from about £35,000 sales per month in mid-1999 to twice that a year later and then to over £200,000 per month after some years in production.

97. *Ruff & Ready* showed a different pattern. Its sales dropped by about one third shortly after the introduction of *Field & Trial* and then sales stabilised at this lower level of £60,000-£90,000 per month. It remains in production.

98. HMRC pointed out that it was a slow shift from the claim products to *Field & Trial.* The earliest to be discontinued (*Protein 23* in 2002) was discontinued only after about 5 years: the *Dog Food* and *Dog Meal* were not discontinued for at least 10 years. They pointed to an inconsistency between Mr Skinner's evidence (which was that some conservative working dog owners stayed with the claim products which they had been using for years) while Mr Hart's evidence was that they all switched.

99. We find that, as the figures show, there has been a gradual switch from the claim products to *Field & Trial.* HMRC's case is that the slow shift to *Field & Trial* and the retention of *Ruff & Ready,* indicated that some of the consumers were not owners of working dogs. What working dog owner would buy *Ruff & Ready* in 2009 at the end of the claim period in its non-specific packaging when the appellant had been offering *Field & Trial* "for hard working dogs", with its packaging featuring a shot gun and game bags, since 1998?

100. However, we accept what Mr Skinner said that, despite the price differential, there would have been product loyalty from the more conservative customers and this accounts for the slow switch over to the Field & Trial range. Our findings of fact in relation to the retention of *Ruff & Ready* are at 192-193.

101. We note in this regard that, of course, the continental buyers of the appellant's food would be unaffected by the VAT differential in price as either way the appellant's sales to the continent were free of VAT. However, we were informed and we find, that the sales figures produced to us excluded the continental sales. This was therefore not the explanation of the continuing sales of *Ruff & Ready.*.

The proforma letters

102. For the purpose of this appeal, the appellant sent out pro forma letters to its customers asking them to confirm that they were selling the claim products to "predominantly owners, breeders or trainers of working dogs or suppliers to such persons"

103. No negative responses were received and we agreed with HMRC's counsel that little can be read into this as a person unable to agree with the pro forma letter would simply not bother to respond. On the other hand, we do not think that anything could be read into the number of persons overall who failed to respond as we had no way of knowing whether they did not respond because they did not agree with the proposed statement or because they did not read the letter or simply did not find the time to respond to it.

104. Some 16 positive responses were received. Some were from private breeders and many were from kennels. One was from a company which described itself as "traditional millers of animal feeds and pet foods"; another was from a "general merchants" on Shetland; one was on behalf of the home office prison department dog section; two were from animal feed suppliers and one was from a veterinary practice.

105. Only one response was in the "don't know" camp. This was a farm shop which said it kept no records but assumed that its customers were likely to be gundog owners as the shop was based in the country.

Consumers

106. The Appellant's case was that the product was ultimately sold primarily to owners of working dogs, whether by itself or through an agent or an intermediary such as a wholesaler or retailer.

107. We had evidence from Mr & Mrs Halstead who owned and trained working dogs and had used Skinner's dog foods for over 40 years. It was apparent from their witness statements that, while they must originally have used either or both *Skinner's Dog Food* and *Skinner's Dog Meal*, as the only two products manufactured by Skinners 40 years ago, at some point they had swopped to the *Field & Trial* range, as they were under the mistaken impression it had always been called *Field & Trial*. Their evidence of their loyalty to the products was a testimonial to the products' quality but tells us little of relevance to this appeal: Mr & Mrs Halstead are clearly the archetypal customer Mr Skinner had in mind but their evidence does not tell us whether or not pet owners would also buy the claim products.

108. Mr Livingston (see paragraph 19) left BP Nutrition sometime in the 1980s and went to a pet food manufacturer where he was employed until he retired. We accept his evidence that his employer did not see the appellant as a "major competitor" because the appellant was perceived to manufacture gun dog food rather than pet dog food. We also accept his evidence that he understood that the appellant's intended market for its dog foods was gundogs and other working dogs.

109. We also find that the appellant had contracts for the food from the home office to supply various prisons, which used it to feed prison dogs.

110. The other evidence we had on consumers, such as that mentioned in paragraph 20 from Mr Hill, was that so far as he knew the product was ultimately purchased only by owners of working dogs. Mr Hart's evidence was to the same effect (see paragraph 119 below).

111. HMRC pointed to the sales of small bags as evidence that the claim products were bought by pet owners, but we do not agree. Sales of small bags were very low in comparison to sales of the 20KG bags of the claim products and therefore we accept Mr Hart's evidence that these were to the same persons who bought the 20KG bags but who occasionally wanted a smaller quantity for travel.

Conclusion on customer base

112. In conclusion, we find from evidence of the witnesses and from the fact that the introduction of the *Field & Trial* range spelled the demise of all bar one of the claim products, that the consumers of Skinner's own label dog food (barring *Ruff & Ready* after 1998) were mainly if not entirely owners of gundogs and working dogs.

113. From Mr Skinner's unchallenged evidence we find that the customers of the two claim products produced by the appellant under the label of agricultural companies (*Waveney Gold* and *Crane Dog Food)* were people with working dogs who lived locally to the two agricultural company customers of the appellant's.

Attempt to broaden customer base

114. Mr Hart's evidence was that when he joined the company the market knew that all Skinners did was food for gundogs. He was concerned that the entire business rested on a very small sub-sub-section of the market: in other words, the appellant depended on sales to gundog owners, gundogs being a sub-set of working dogs, and working dogs being only a small proportion of the dogs in the UK. He called this an inverted pyramid.

115. To improve the appellant's position he did a number of things in the decade he worked for the appellant. He introduced the appellant's "Menus" range for pet cats and dogs. This was sold in brightly coloured 15kg bags. It is still sold today.

116. Mr Hart's evidence was that pet food would usually not be sold in bags bigger than 15kg as, if they were any heavier, women (seen as the primary buyer of pet food) would be put off buying them. We accept his evidence that 20kg bags are unusual for pet food.

117. Mr Hart improved the bags used for the claim products and we have discussed these new plastic bags at paragraphs 58-60 above. He accepted that he wished to make the food attractive to a wider audience and in particular pet dog owners. He did not reduce the size of the bag to 15kg. He said it was impractical to do so. The *Ruff & Ready* 20 kg bag, however, had the strapline:

"special 20kg pack – a third more food than standard 15kg bags"

Mr Hart accepted that this was to point out the advantages of the larger bag to pet owners and said it was part of his strategy to widen the customer base.

118. He said he made no attempt to contact supermarkets as that would have been a waste of time: he said he put minimum effort into expanding the customer base of the claim products to pet dog owners. Other than the improved packaging, this comprised solely, when delivering an order, of including leaflets for distribution to consumers

119. His evidence, which we accept (as it was borne out by the other evidence such as in paragraphs 106-112), was that he was "singularly unsuccessful" in holding out the appellant's claim products for sale to pet dog owners. He managed to grow the appellant's sales during his time in office, but only by creating a market for it amongst gundog owners on the continent. Mr Hart summed up his evidence by saying "the reality of our offering is that it was about working gundogs".

The law

120. Although the claim covers nearly 30 years, the relevant legislation on the zero rating of animal feeding stuffs and pet food has remained unchanged although re-enacted, so in this decision we refer only to the legislative provisions in the current VAT Act.

121. As did its legislative predecessors since the introduction of VAT in 1973, Section 30 Value Added Tax Act 1994 ("VATA") combined with Schedule 8 VATA provides that certain supplies are zero rated. Group 1 of Schedule provides zero rating for certain supplies of food. In so far as relevant to this appeal it provides:

> **Group 1 – Food**
>
> The supply of anything comprised in the general items below, except –
>
> (a) ….
>
> (b) a supply of anything comprised in any of the excepted items set out below…….
>
> General Items
>
> Item No
>
> 1…
>
> 2 Animal Feeding stuffs
>
> 3…..
>
> 4…..
>
> Excepted Items
>
> 1 ….
>
> 2 ….
>
> 3 …
>
> 4 ….
>
> 5 ….
>
> 6 Pet foods, canned, packaged or prepared; packaged foods (not being pet foods) for birds other than poultry or game; and biscuits and meal for cats and dogs.
>
> 7 …"

122. The appellant's case is that various dog foods at issue in this appeal are "animal feeding stuffs" and not within the pet food exception. HMRC agrees that the dog foods are "animal feeding stuffs" but considers that the dog foods in issue are either or both "pet foods, ….packaged or prepared" or "…meal for … dogs". We deal with each exception in turn.

Interpretation

123. Firstly we look at the general rules of interpretation of this particular schedule. It has been considered in two Court of Appeal cases.

124. In *Ferrero UK Ltd* [1997] STC 881 the Court had to consider the meaning of "biscuits", as confectionary other than cakes and biscuits are an excepted item to food for human consumption. Lord Woolfe MR emphasised that it was a question of fact in each case whether the food in question was of a particular description:

> [884 b-c]"I commend the tribunal for the care which it took over this matter, but I am bound to say that, no doubt because of the submissions which were made to it by the parties, the treatment of the issue which was before it, was far more elaborate than was necessary. I do urge tribunals, when considering issue of this sort, not to be misled by authorities which are no more than authorities of fact into elevating issues of fact into questions of principle when it is not appropriate to do so on an inquiry such as this. The tribunal had to answer one question and one question only; was each of these products properly described as biscuits or not? If it had confined itself to that issue which is, and has to be, one of fact and degree, then the problems which subsequently arose would have been avoided."

125. The second case in which the Court of Appeal considered the construction of words in the food zero rating provisions was *Proctor & Gamble UK* [2009] EWCA 407 where the Court had to decide whether the product in issue was "similar" to "potato crisps" and "made from the potato". Mummery LJ said:

> [79] "…the VAT legislation uses everyday English words, which ought to be interpreted in a sensible way according to their ordinary and natural meaning."

126. We consider, therefore, that we are to give "pet", "pet foods" and "meal" their ordinary meaning; and that the findings of facts of previous tribunal decisions in no way bind us and indeed should not influence our decision.

What a child thinks

127. HMRC saw the case as being fundamentally very simple. The packaging held the claim products out as suitable for all dogs. Most dogs are pets. Therefore, they say, the claim products were pet foods. They referred to Mummery LJ's reference to the question in *Proctor & Gamble* being suitable for a child to answer:

> [79] "The 'made from' question would probably be answered in a more relevant and sensible way by a child consumer of crisps than by a food scientist or culinary expert."

128. The appellant does not agree that the question must be reduced to one that a child could answer and we agree that what Mummery LJ said should not be taken out of context. We take him as meaning that where the question was the ordinary meaning of a word used to describe a food children are fond of, a child might give a better answer than an expert on food. It was a stricture not to overcomplicate matters.

But it was not a stricture to ignore relevant evidence: we will consider all the evidence and not just the evidence in relation to the packaging.

129. While the question is simple, the evidence may be voluminous and not entirely consistent. As so often the Tribunal has to conduct a balancing exercise and (perhaps we flatter ourselves) it is not an exercise for a child.

Narrow construction?

130. HMRC also submitted that words conferring zero rated status should be narrowly construed on the basis that the CJEU has on many occasions ruled that exceptions to the general principle that supplies are subject to VAT should be narrowly construed. Ms Mitrophanous cited *Stichting Uitvoering Financiele Acties v Staatssecretaris van Financien* C-348/87 as authority for this and the principle is stated in many other CJEU decisions.

131. However, we agree with the appellant that it has no application in this case. In this case we are considering the meaning of a provision of VATA that is permitted but not directed by the Sixth VAT Directive (or its replacement the Principal VAT Directive). The rule of interpretation enunciated by the CJEU in *Stichting Uitvoering Financiele Acties* and many other cases applies to the interpretation of the Sixth VAT Directive (and Principal VAT Directive) or any national provision implementing a directly effective provision of those Directives.

132. As long as national legislation, such as the zero rating for food provisions in Schedule 8 VATA is within the derogation permitted by the Sixth VAT Directive (and there is no suggestion it is not), then the interpretation of those provisions is a matter of national law. And there is no rule of national law that says zero rating provisions are to be narrowly construed. On the contrary, the rule is as stated in *Proctor & Gamble UK*, that the words should be given their ordinary meaning.

Pet foods… packaged or prepared

133. It is common ground that the dog foods in issue were "packaged and prepared". On the evidence we agree that this was the case. The only issue between the parties here, therefore, is whether it was "pet food".

134. HMRC's case is that pet food includes a dog food for all dogs including pets and that on the facts the claim products were dog food for all dogs.

Are all dogs pets?

There were views expressed in the hearing on what a "pet" was. The Oxford Dictionary has this definition:

> "animal tamed and kept as favourite or treated with fondness"

135. The Tribunal in *Popes Lane* [1986] VATTR 221 said:

> "…a pet is an animal (tamed if it was originally wild) which is kept primarily as an object of affection, in which I would include an animal kept primarily for ornament. That test would exclude animals kept primarily (a) for study or research….(b) as objects of general interest; examples are animals in a zoo, (c) for work or produce, examples are cattle, sheep dogs, police dogs, guard dogs, gun dogs, breeding animals, show animals, racing animals such as greyhounds and racing pigeons, and a pack of hounds and (d) for sale, examples are animals kept for sale by a breeder or in a pet shop."

136. HMRC did not challenge the basis of the appellant's claim that gundogs and other working dogs were not pets. We find as a fact on the evidence that we were given that as a general rule gun dogs are kept in kennels and not allowed in the house, they are kept to work (to retrieve game that has been shot) and at the end of their working life are likely to be (if not kept for stud) re-homed or put down. They are not kept primarily as objects of affection. As Mr Hart colourfully put it, gundogs were not given fluffy toys.

137. We are satisfied that gun dogs are not pet dogs. Food "for" gun dogs is therefore zero rated while food "for" pets is standard rated as pet food (if canned, packaged or prepared).

138. In any event, HMRC no longer advance the view so long advanced by them in their public notices that all dogs are pets and therefore all dog food is pet food. They agree that the appellant's *Field & Track* range of dog food is properly zero rated as animal feeding stuffs. Although we had no evidence on working dogs in general, it was also not in dispute between the parties that all working dogs (including prison dogs) are not pets and so we find.

139. There was an assumption made by HMRC and Mr Hart that most dogs in the UK are pets. We take judicial notice of the fact that most dogs in the UK are pets and not working dogs.

Is HMRC's guidance relevant?

140. It was part of the appellant's case that their packaging on the claim products and leaflets would have referred to the product being intended for working dogs had they understood from HMRC's guidance that food for working dogs was properly zero-rated. It was Mr Skinner's case that, from when he started to manufacture dog food in the 1970's when he had heard an HMRC VAT officer inform Mr Linacre (see paragraph 7) that all dog food was standard rated, until 2002 (or 1996 for racing greyhounds) that had remained HMRC's published position. The appellant had been unaware that HMRC's published was not in accordance with the law.

141. We find that from 1976 to 1994 HMRC's written guidance to taxpayers (VAT Leaflet 701) stated that "canned or packaged food for cats, dogs or other pets" was standard rated. In 1984 VAT leaflet *Pet Food* 701/25/84 correctly reported the legislation and appeared in one place to recognise the difference between pets and working dogs (as it said food held for sale for pets but actually supplied for

consumption by working dogs would be standard rated) but then went on to repeat from before that "food…for cats, dogs and other pets" is standard rated if canned packaged or prepared.

142. The leaflet *Pet Food* was re-issued on 1 November 1986 and included this same phrase.

143. Any ambiguity on how HMRC may have intended this to be interpreted was made clear in its Business Brief no 17 published on 12 September 1994 where it stated that

> "Any canned, prepared or packaged dog food, including complete feed, not specifically held out for sale as greyhound food, is also standard rated."

144. In other words we find (and HMRC did not suggest otherwise) that HMRC's public position up to 1994 was that all dog food was standard rated. Neverthless, HMRC's published position changed with this Business Brief because it accepted for the first time that a complete food for *greyhounds* which was specifically held out for sale as food for greyhounds would be zero rated. It published Notice 701/15/95 *Food for Animals* on 1 June 1995 in which it stated at paragraph 12 that all dogs were pets unless racing greyhounds.

145. This Notice was replaced in March 2002 with *Animals and Animal Food* 701/15/02. Here HMRC recognised that working dogs were not pets. It stated:

> "A product which is claimed as being suitable for all breeds, size and age of dog is standard-rated.
>
> If a specifically formulated food is held out for sale exclusively for working dogs it will come within the scope of the VAT relief – unless it is biscuit or meal.
>
> Therefore ……
>
> Dog food (other than biscuit or meal) is zero rated if it is exclusively for….working sheep dogs of any breed, dogs trained and used as gun dogs, racing greyhounds."

146. Guidance agreed between HMRC and the Pet Food Manufacturers Association was that "only new products with approved packaging could be zero rated. Existing products continued to be standard rated." For this reason, says Mr Skinner, the appellant developed a new range (*Field & Trial)* rather than seeking zero rating for its claim products. It was not until much later, in 2009, that it lodged the claim to recover VAT charged on the claim products.

147. The appellant is particularly aggrieved that the view of the law stated in HMRC's public notices did not reflect a number of tribunal decisions starting with *Popes Lane* in 1986 (we refer to them in paragraphs 167-171 below) with the result that the appellant remained unaware that the tribunals had ruled the law to be something other than what HMRC represented the law to be in its public notices.

148. The appellant's position is also that we should give less weight to its packaging than we might otherwise, on the basis that HMRC's position on the appellant's packaging is disingenuous: HMRC having, in the words of the appellant, flouted three tribunal decisions and for so long stated that all dog food was standard rated, and that therefore by implication taken the position that it would have made no difference had the appellant's packaging stated the food was for working dogs, HMRC then took the position in this Tribunal that the appellant's packaging was highly relevant and indeed even determinative of the appeal against them.

149. We were given no explanation for why HMRC's manuals did not reflect the tribunal decisions we discuss below, but then we did not ask for one as we are not undertaking and nor do we have jurisdiction to undertake a judicial review. If the reason the decisions were not reflected in the public notice was that HMRC at the time considered the various Tribunal decisions to have been wrongly decided, we think the proper course of action for HMRC would have been to appeal the tribunal decisions, or at the very least acknowledge them in their public notices.

150. Nevertheless, it seems to us that, while HMRC's conduct may be open to criticism, and that the appellant might even have had some sort of claim against HMRC founded in judicial review on the basis it acted to its detriment in reliance on incorrect public notices, the question for this Tribunal is how the appellant actually held out the claim products for sale: it is not a question of how they would have held them out had HMRC's leaflets properly reflected the law.

151. Therefore, we are unable to agree with the appellant that HMRC's public notices are relevant to the questions in front of this Tribunal.

152. Mr Conlon referred us to Moses J in *Marks & Spencer* [1999] STC 1999 205 at 241, where the judge was dealing with the issue of unjust enrichment, to the effect that the tax authority could not expect perfect evidence when its own failure had led to the imperfect evidence:

> "…the tribunal of fact must bear in mind that in making that assertion [that passing on the tax to the customer caused the taxpayer damage] the trader may…. be forced into the position of providing material relevant to a time when it did not suspect and had no reason to suspect that it might be overpaying tax, and thus, have any need to prepare a claim for repayment. …. Lacunae in the evidence should not be considered to the detriment of the trader. It was, after all, the taxing authority which caused the problem in the first place. Thus, it seems to me, if, after considering all the evidence, there is uncertainty or absence of detail, that should not be held against the trader…."

153. We cannot agree that this is authority that we should ignore or downplay the relevance of the appellant's packaging. In that case, HMRC had the burden of proof to prove unjust enrichment, and had proved that the tax had been passed on to the taxpayer's customer. This meant that an evidential burden had shifted to the taxpayer to show that it had suffered damage despite the passing on of the tax to its customer. What Moses J was saying was whether the taxpayer had discharged that evidential burden was to be assessed sympathetically taking into account that, due to HMRC's

fault in incorrectly applying the law, the taxpayer would not have known at the time that it needed to keep the records necessary to prove such damage.

154. Here we are not concerned with lack of evidence to prove a point but with evidence that tends to disprove a point. In that case, Moses J did not say that the taxpayer did not need to prove damage, still less did he say that evidence tending to prove that there was no damage could be ignored: all he said was that less then complete evidence proving the point might be sufficient bearing in mind the circumstances.

155. There is therefore nothing in this case to assist the appellant. We give no less weight to the packaging and other marketing material than we would have given to it in a case where there was no question of HMRC being at fault for misrepresenting the law in its public notices.

Must food be specifically formulated for non-pet animals?

156. It was part of HMRC's policy that unless specially formulated for working dogs, a dog food was a pet food as it would be suitable to be eaten by pet dogs.

157. While we agree that a food unsuitable for a particular animal could not be described as food for that particular animal, we do not agree with HMRC that just because a food is suitable for a particular animal it is necessarily food for that sort of animal. In *Fluff Ltd (trading as Mag-it)* [2001] STC 674, which was a case where it had to be decided whether maggots, suitable as fish food, but sold from a vending machine as fishing bait, were "animal feeding stuffs", Laddie J said that:

> "in deciding that [whether it was fish food] one must look not just at the nature of the material but the way in which it is supplied"

So although suitable as fish food, the maggots were not zero rated because they were not intended as fish food but rather as fish bait.

158. On the facts of this case we find that the claim products were specifically formulated for gundogs (see paragraph 42) but that they were also suitable to be eaten by pet dogs, particularly those with high energy requirements (see paragraph 50).

159. This does not mean that the food was therefore pet food: applying *Fluff Ltd,* whether it was pet food depends on the way in which it was held out for sale.

Purchasers' intentions

160. All parties were agreed, as we agree, that the subjective intention of the purchaser is irrelevant. As the Tribunal in *Popes Lane Pet Food Supplies* [1986] VATTR 221 said, a person might buy cat food as rodent bait but that does not mean the food is anything other than cat food. Any other conclusion would require the private intentions of a purchaser to be ascertained before the vendor would know whether the item sold was subject to VAT or not.

161. It is HMRC's case that because the subjective intentions of the purchaser are irrelevant, it is irrelevant whether or not the purchasers of the appellant's various dog foods in issue were in fact gun dog owners.

162. We do not agree. While we agree that individually the subjective intentions of the purchasers are irrelevant, where it is apparent that the food is principally bought for particular kinds of dogs, this is an indication (although not conclusive) that objectively determined the intention of the supplier was to supply food for that kind of dog.

163. In other words, the intentions of any particular purchaser must be irrelevant: but if the evidence is that all or virtually all customers bought the product for a particular purpose, that is evidence (albeit not conclusive) that the product was held out for sale for that particular purpose. And that is objectively determined evidence of the *supplier's* intention.

164. And it also follows that, if we find in fact the food was held out as gun dog food, it would be irrelevant if a few persons purchased it for their pets.

Objectively determined intention of supplier

165. We think that it is the objectively determined intentions of the supplier that matters in order to decide whether the food was intended "for" pets.

166. Despite strictures in *Ferrero* against treating Tribunal decisions on food zero rating as authorities on law rather than decisions on their own particular facts, we were treated to an analysis of the various tribunal decisions on the meaning of pet food.

167. HMRC considered the *Popes Lane* case mentioned above as authority for the proposition that dog food supplied in a manner that it was unlikely to be bought as pet food (lumps of meat wrapped in bin liners) would not become pet food merely because the supplier, in an attempt to broaden its customer base, changed its name to include the word "pet" and advertised pet foods for sale. This just seems to us to be an application on its particular facts of the principle that that it is the intentions of the supplier objectively determined that dictate whether the animal food is intended primarily for pets.

168. *Supreme Petfoods Limited* [2011] UKFTT 19 (TC) seems to be another application of the same principle but to very different facts. Ferret food was found to be pet food because as a matter of fact the Tribunal found that most ferrets were kept as pets.

> "From the objective evidence we conclude (and find as a fact) that food held out for feeding ferrets generally is pet food, because ferrets generally are pets"

169. HMRC consider this to be a "key" case in this appeal as it demonstrates that food for all types of one animal species where most of that species are kept as pets is

pet food. In other words, their case is that as the appellant's packaging stated the claim products were suitable for all dogs, and as most dogs are pets, it follows that they were pet foods.

Importance of packaging and labelling

170. HMRC saw *Norman Riding Poultry Farm Ltd* [1989] VATTR 124 as application of the principle that ascertaining objectively the supplier's intention requires the Tribunal to consider how the food is held out for sale. In that case minced chicken wrapped in clingfilm, not specifically stated to be pet food and 75% of which was sold to owners of working dogs, was found not to be pet food.

171. HMRC also relied on the case of *P A Peters & K P Riddles t/a Mill Lane Farm Shop* (VTD 12937) as indicating that what matters is the packaging and signage. In this case (say HMRC) the appellant's intention was to sell to owners of working dogs but his food was held out for sale under signs saying "frozen pet food" and was therefore found to be standard rated.

172. We cannot agree that this case is authority that the labelling (and by extension packaging) (where there is any) exclusively determines what the holding out was and therefore objectively the intentions of the supplier. Indeed the Tribunal went on to look at the "predominant" holding out in respect of telephone sales and bulk purchasers saying that the label over the freezer would be "insignificant" to these purchasers and the significant matter was what was said to them over the phone. The Tribunal said:

> "how the products are held out for sale will depend upon a number of factors including what is said to the customer leading up to the sale, what is said on the products or their packaging, how they are advertised and how the trader generally holds out his business."

173. We agree with the chairman in this case that we must look at the overall holding out by the supplier, of which the packaging is a part, but not necessarily a determinative, part.

174. We reject HMRC's case that the packaging alone will always determine how the seller is holding the food out for sale.

The importance of packaging when sale is wholesale

175. By the 1990s many, probably the bulk, of the appellant's sales were wholesale sales in that the appellant was only selling directly to the consumer (the dog owner) in the minority of cases. HMRC considers a comparable case to be *Supreme Petfoods* as that is the only case on pet foods involving a sale by a manufacturer. In that case, the tribunal decision revolved around the packaging: there could be no sign above the door for the tribunal to consider as the taxpayer was not a retailer. Similarly HMRC think this case should revolve on the packaging as what was on the packaging was how the appellant held the product out for sale to the ultimate consumers.

176. We do not find that the packaging gave an unambiguous representation that it was suitable for all dogs including pets. We accept the evidence that the package itself (up to the new bags in 1998) were agricultural in appearance, unusually large for pet food, and the food itself (with the exception of *Protein 23* and *Ruff & Ready*) not of the normal appearance of pet food. For these reasons, we do not consider that the packaging by itself represented the food as suitable for pets. It gave mixed messages.

177. But in any event, we are unable to agree that the packaging is determinative of the question in this case. While in many cases, and indeed in the *Supreme Petfoods* case, the packaging was the only or main way in which the manufacturer made representations about its product to the ultimate consumers, in this case on the facts it is clear that the appellant made representations about its product to consumers by many other means. It attended shows and field trials, it relied on word of mouth and recommendations by its agents; it sponsored gundogs; and it relied on its sales reps to go direct to kennels and promote the food as gundog food.

178. We find the packaging was not the only nor even the main method the appellant utlilised to make representations about its product to would-be consumers. For this reason, too, the change in the logo in 1990 would have been insignificant at least to its claim products.

179. We do agree with Ms Mitrophanous that at shows and trials the packaged product would have been on display, nevertheless the evidence was that the stalls were manned. We did not have direct evidence on what was said at such events to prospective customers but we do not find that the appellant represented the food to be pet food. We find it represented the food to be gundog food. This follows because

(1) the evidence of all the witnesses, both from the appellant and from other businesses was that the market saw Skinner's food to be gundog food (see paragraph 108 & 110);

(2) most shows attended were for gundogs;

(3) the appellant sponsored gundog events;

(4) its consumer base was gundog owners and owners of other working dogs (see paragraph 112).

In these circumstances we find that the representations made by the appellant were that the food was gundog food and working dog food.

180. Further, we consider that it follows that the packaged product would in many cases have been available in a shop, but we find (see our summary of the evidence in paragraph 91) that the shop only stocked the product where the appellant had already created a demand for it so we find the consumers would not have been relying on the packaging when deciding to buy it.

181. It is of course possible that other persons, not being gundog owners, bought the product if it was displayed in retail shops such as a farm shop. As they would have had no contact with the appellant, they must have relied on the packaging and there was nothing on the packaging that suggested it was food only for gundogs. Our

finding of fact is that such sales were minimal: this is because (1) it was Mr Hart's unchallenged evidence that his attempts to broaden the customer base to pet owners were unsuccessful; (2) as a matter of fact the introduction of Field & Trial led to the discontinuance of all claim products bar one indicating that the appellant's market truly was working dogs only. We find (as explained in paragraph 160 & 164) that occasional sales of the food as pet food are irrelevant where the overall holding out was, as we find it was, (bar the exception discussed below in paragraph 192-193) that the food was gundog food.

Subjective intention

182. Mr Hart's evidence is that he wished to expand the appellant's customer base for the claim products to include pet owners. The steps he took to achieve this were (1) the introduction of plastic bags (2) producing leaflets.

183. It is part of HMRC's case that because Mr Hart (on behalf of the appellant) wished to widen the claim products' market to pet dog owners and actively took steps to do so, then objectively the claim products were held out for sale as pet food.

184. But as a matter of law the question is what was *objectively* the appellant's holding out. This requires the Tribunal to look at what the appellant actually did overall, rather than considering what it intended to do. We find from the start in the 1980s the appellant put a great deal of effort into marketing the claim products as gundog food as set out in paragraphs 177 and continued to do so up to 1998. Any effort in representing the product as suitable for pet dogs – such as an inconspicuous line in a leaflet which gave much greater prominence to the article "gundogs"; the packaging that said "suitable for all dogs" and the leaflets distributed ineffectively to wholesalers, was very minor in comparison to the effort and cost involved in its main marketing of attending field trials and working dog shows, employing sales reps to visit working dog kennels, advertising in shooting magazines, and sponsoring gundog events.

185. This finding of fact is backed up by the related finding (paragraph 112) that the appellant's market was gundog and working dog owners.

186. Overall we find that objectively the appellant held the food out as gun dog food (bar the exception mentioned in paragraph 192-193 below).

Late claim

187. HMRC considered it relevant that, when the PFMA guidance changed in around 2001, the appellant did not at that point simply re-label its food as working dog food and claim it was zero rated. Yet the guidance only said that a *pet food* that was repackaged and labelled as working dog food would not qualify. This, said HMRC, implies the appellant thought its dog food was pet dog food.

188. We do not agree. As is clear from the summary of the evidence given above, we find that the appellant did not consider its claim products to be pet food. We also find that no one else considered the appellant's claim products to be pet food.

The position post 1998

189. The new, more sophisticated bags were introduced in 1998. At about the same time, the *Field & Trial* range was introduced.

190. We have accepted the appellant's evidence that it actively marketed the claim products as gundog and working dog food. But we did not have any evidence (apart from the evidence about its website) about how it was marketed after Mr Skinner retired in 1997 and Mr Hart left in about 2000. We infer that, from that from around about the time of the introduction of its *Field & Trial* range in 1998, the appellant would have ceased to actively market the claim products as gundog food. This follows as (1) logic dictates the appellant would have switched its marketing activity to its new zero rated range; (2) sales of the claim products did fall off significantly; and (3) by 2010 the remaining claim products in production were relegated to the "pet" side of the appellant's website.

191. Therefore, should we give the packaging a greater significance to the claim products sales post-1998 sales then we have given to its earlier packaging? With one exception, we think not. For all the claim products bar Ruff & Ready, demand fell steadily if slowly until production ceased. As we have already said, this indicates to us that its market was gundog and working dog owners because it indicates that the consumers switched to the new working dog food range. Although the buyer's intentions are irrelevant by themselves, they are as we explained in paragraph 162 an indication of how the seller held out the product for sale. As the sales fell away to nothing, we find that the post-1998 sales of the claim products were in response to pre-1998 holding out (described above in paragraph 177) of the claim products as gundog and working dog food. In particular, we do not find that (for the reasons given in paragraph 73) that the sales were in response to the appellant's website and we accept Mr Skinner's explanation of why the remaining claim products were placed on the "pet" side.

192. However, we were given no explanation of why Ruff & Ready remains in significant demand. We find that after an initial fall in demand, sales of Ruff & Ready stabilised and continue to this day. We do not accept that the continuing sales of Ruff & Ready are still in response to customer loyalty generated by pre-1998 promotion of the product. So why is Ruff & Ready still in production? The only representation made by the appellant after 1998 in respect of Ruff & Ready of which we had any evidence was on its packaging and on its website. Neither of these held it out as gundog food.

193. Our conclusion is that we do not know what holding out by the appellant has caused demand for Ruff & Ready to remain to this day. Therefore, we find in respect of Ruff & Ready the appellant has failed to prove that its sales after 1998 were the

result of pre-1998 holding it out as working dog food rather than post-1998 representations (via its website and packaging) as suitable for all dogs.

Own label claim products

194. We had virtually no evidence about the own label claim products. What matters is how they were objectively held out for sale. We infer that the appellant's only holding out would have been made to its customers, the two businesses which bought the dog food to sell under their own brand.

195. For the reasons given above and in particular that Mr Skinner considered the appellant's product to be gundog food, and that we find based on his evidence (see paragraph 36) that his purchasers required working dog food, we find he would have held out the *Waveney's* and *Crane* own-label food to the company's two purchasers to be working dog food.

196. We also find based on this same evidence in paragraph 36 that the two purchasers would themselves have held out the food to their customers to be working dog food.

197. For these reasons we find that the holding out (during the entire claim period) in respect of the two own label foods was that the products were for working dogs. It was not pet food.

Conclusion

198. For the reasons given above we find that the appellant has failed to make out its case that its sales of Ruff & Ready after demand for it stabilised in about 2000 were not as pet food. It has succeeded in showing that all other sales of the claim products, including Ruff & Ready before 2000, were not sales of pet foods. So we find that apart from sales of Ruff & Ready from 2000 onwards, its sales of the claim products were sales of "animal feeding stuffs" and were not within the exception for "pet foods, canned packaged for prepared" as they were not pet foods.

199. We move on to consider whether any or all of them were within the exception "biscuits and meal for cats and dogs."

Meal for … dogs

200. A second and distinct ground on which HMRC considered that some of the appellant's claim products should not have been zero rated was that they were "meal" and thus excluded from zero rating even if animal feeding stuffs. As mentioned above, excluded from animal feeding stuffs are:

> "…biscuits and meal for cats and dogs"

This exclusion applies whether or not the biscuits and meal are for pet dogs or other dogs.

201. HMRC suggested that "meal" in this context meant "dried dog food that takes a muesli-like form excluding extruded pellets". They suggested all of the claim products were meal with the exclusion of Protein 23 (on the basis Protein 23 was extruded pellets).

202. We are concerned with the ordinary meaning of "meal". However, "meal" is a word which can carry different meanings. So what we need to do is determine which of its ordinary meanings it carried in the context of food zero rating. And for that we had the assistance of evidence, and in particular expert evidence.

Expert evidence

203. Mr Southey's evidence was that only a baked product could be called a biscuit. Extruded or pelleted foods are not biscuits.

204. In Mr Southey's opinion meal had different meanings depending on the context in which it was used.

205. One type of "meal" was made from the same ingredients as dog biscuits. These were made mostly from wheat cereal with added vitamins, minerals oils and fats. The raw ingredients were baked. We find this type of "meal" was baked like a biscuit but on a continuous roller in a very long oven. By the time it emerged from the oven it was cooked. It was then crumbled and bagged for sale.

206. An example of this type of meal was the Pointers Plain Terrier Meal which we described in paragraph 41.

207. Dog biscuits were made from very similar or identical ingredients and baked in a similar or identical fashion except that the mixture would be put in a mould to create a biscuit shape (often a bone shape) rather than cooked as a continuous sheet and crumbled. Producing the meal rather than the biscuits was obviously the more efficient process but the result was a crude, irregular shape.

208. We find that this kind of meal, like dog biscuits, was an incomplete food for dogs and was properly described as a mixer in that it was intended to be fed to dogs together with other food such as raw or tinned meat. The meal would act as a binder, absorbing moisture from the meat and provide abrasive medium for cleaning the dogs' teeth. Biscuits and meal (in this sense) could also be used as a snack or training treat for a dog.

209. It was Mr Southey's opinion that these two kinds of similar feedstuffs would be referred to together as "biscuits and meal".

210. Mr Southey said "meal" was also used to describe products with a floury or mealy ground texture such as bone meal or fish meal. These were produced by cooking animal by-products and grinding the cooked product to a powder. Such meals are not fed to animals by themselves but can comprise an ingredient from which animal feeds are made.

211. He said in the dog food industry what Mr Skinner called "meal" in the sense of Skinner's Dog Meal would now be described as a muesli-like dog food. This was because it comprised microionised (ie steam cooked) flakes of cereal. Mr Livingstone said muesli in the dog food sense was also likely to contain pelleted protein.

212. In the context of dog food he would expect 'meal' to refer to the baked product made primarily of flour. When muesli-like dog foods began to be sold in the 1970s he would not have expected them to be referred to as meal, as meal already had the "biscuits and meal" meaning of the crumbled, baked flour product.

What the witnesses understood by the term

213. Mr Skinner's evidence was that he called the appellant's claim product *Dog Meal* because his background was as an agricultural feed merchant and familiar with a dry complete food for animals such as sow and weaner meal. Although such meals contain ground cereals, these are only steamed, they are not baked and the production of meal in this sense in no way resembles how a biscuit would be produced. Mr Skinner clearly believed that his customers would understand that a meal was a complete food because otherwise he would not have named the product *Skinners Dog Meal.*

214. Mr Livingston, whose background was also in agricultural feeds also understood "meal" in the sense of a complete food such as sow meal or cattle meal. The same was true of Mr Hill.

215. This was in contrast to Mr Southey's opinion which was that his clients (pet food suppliers) would have been ill-advised to describe a complete dog food as "meal" as it would be understood to be a mixer. We do not find Mr Skinner's, Mr Livingstone or Mr Hill's evidence on the point detracted from Mr Southey's expert opinion as the two were readily reconciled: Mr Southey's clients were pet food suppliers; Mr Skinner considered his clients to be working dog owners and suppliers to working dog owners. Such persons were much more likely to be of an agricultural background and familiar with pig meal and would understand "dog meal" to be a dry, complete food.

216. Mr Skinner in any event said that in the context of "biscuits and meal" he would understand meal to be a crumbled biscuit mixer. Mr Hart gave exactly the same evidence at the hearing. We note that in an earlier letter he gave "meal" the meaning of complete food. It is not surprising that Mr Hart, familiar with Skinner's Dog Meal and meal with the meaning of a biscuit-type mixer food, was inconsistent in his use of the terms.

HMRC guidance

217. HMRC's guidance is not, of course, the law, but we refer to it as evidence of what HMRC at least understood the meaning of "meal" in this context was at the time the leaflets were written, and therefore as evidence of the common meaning of the

term in that context at that time . We note that in its 1984 Leaflet "Pet Food" 701/25/84 HMRC stated of "meal" that:

> "You must standard rate supplies of biscuits and meal for cats and dogs and waste from the manufacturer of such products. This includes rusk and similar cooked or baked cereal based products for cats and dogs."

218. In its Business Brief no 17 of 1994 mentioned above in paragraph 143 we also note that HMRC said:

> "Ordinary biscuit or cereal based meal designed to be mixed with meat or other food as part of the diet for dogs, including greyhounds, is standard rated."

219. HMRC repeated this view the following year in New Notice 701/15/95 *Food for Animals* at paragraph 17(c). A similar view was expressed in the replacement notice in March 2002 *Animals and Animal Food* 701/15/02, which stated at paragraph 6.5:

> "The terms 'biscuit' and 'meal' mean dry products either –
>
> -coarsely ground basic commodities; or
>
> -baked products consisting predominantly of cereal and fat and not providing all the nutrients required by the animal."

220. We find from this that HMRC has for at least 20 years consistently considered 'meal' in the 'biscuits and meal' context to refer to be a baked biscuit type product made primarily from cereals and used as a mixer food.

Monopolies and Mergers

221. Similarly we refer to the Monopolies and Mergers Report ("MMR") published in 1977 on *The supply in the United Kingdom of cat and dog foods* as evidence of the meaning commonly attached to "meal" in the context of "biscuits and meal". At page 3 Chapter 1 divided up prepared dog and cat foods as follows:

> "(a) canned foods;
>
> (b) semi-moist foods;
>
> (c) complete dry (including rehydratable) foods;
>
> (d) biscuits and meal;
>
> (e) others, including quick-frozen products and cooked foods not supplied in cans."

It further defined each of these terms. For (c) and (d) it said:

> "(c) Complete dry foods are based on cereal with added animal or plant-based protein meals. They may be intended to be fed dry or to be steeped in water beforehand (rehydratable).
>
> (d) Biscuits and meal are intended to be fed to dogs with suitable canned food, fresh food or scraps."

It said (page 4):

> "[9] Dog biscuits were the earliest type of food to be manufactured specially for consumption by pets, originating in the nineteenth century. Spillers has long been the principal manufacturer of dog biscuits and meal in the United Kingdom….
>
> [10] Canned meat for dogs and cats appeared on the market in the inter-war years….The market for canned products expanded rapidly after about 1950….
>
> [11] Since 1970 two other American-owned companies….have attempted to challenge the market leaders by introducing the semi-moist and complete dry types of pet food which were new to the United Kingdom market though already familiar in the United States. The impact of these new products has not been very great so far, but with the increasing cost of tinplate and increasing processing costs for canned foods, they are expected to become more important in the future…."

222. From this it is clear that the MMR regarded meal in the context of "biscuits and meal" to be a mixer food in the nature of a biscuit and not the same as a complete dry food, which it described under a different heading.

Other complete foods

223. HMRC referred us to descriptions on their websites by other manufacturers of dog food of their dog food as "meal". One was called Pedigree Complete Junior Maxi Poultry and Rice and was described as "Pedigree complete meal for large breed, growing dog…..". Cereals were the major ingredient followed by meat and meat by-products.

224. Another was Pitti Boris Vegetarian Complete Meal. Its wheat content was not more than 25%. Another was "Wilson's Dog Meal Original".

225. All these websites were printed out in 2012 and are therefore no guide to how dog food would have been sold in the 1960's and 1970's. Some of them were extruded foods. The copy of the Wilson's Dog Meal Original advert was particularly unhelpful as the only words which could be made out apart from the title was "working dog" although it was clear a description of the food was given on the bag.

Case law on the meaning

226. The only case previously to consider the meaning of "meal for … dogs" which was brought to our attention was *Bambers Frozen Meats Ltd* (VTD 17626). In that case the Tribunal held that the product, which was an extruded mixer food, was not "meal" because it had a high wheat content of over 70%. The tribunal arrived at this decision in reliance on the dictionary definition of "meal" as:

> "the edible part of a grain or pulse ground to powder. Now commonly understood to exclude the product of wheat (this being called flour)."

The possible meanings of "meal"

227. From all this evidence, in the context of this case, we find "meal" could have one of four meanings:

Meaning 1: Ground cereals other than wheat; or ground fish and bone.

Meaning 2: A mixer for use with meat or canned dog food made primarily from wheat flour with other ingredients and baked; in particular made from the same or similar ingredients to a dog biscuit and baked in the same way but crumbled or broken up rather than cut into shapes;

Meaning 3: A complete feed for an farm animal (such as pig meal);

Meaning 4: A serving of various foods sufficient at that time to dispel hunger.

228. It can be seen that the first three of these four meanings are mutually exclusive. Meaning 1 refers to something not containing wheat, while meaning 2 refers to something largely made of wheat; Meaning 1 also is inconsistent with Meaning 3 as ground cereals by themselves are not a complete feed for any animal (and certainly not for dogs) and there is no evidence that ground cereals by themselves were served as a complete feed.

229. Meaning 2 is inconsistent with Meaning 3 as one is a mixer and the other a complete food.

230. Meanings 3 & 4 look superficially similar but one is "meal" and the other is "a meal". One is a type of food, the other is a serving of food. "Meal" in the Meaning 3 sense cannot be plural. They do not mean the same thing. Meal cannot be fed to humans, whereas all humans consume meals. Meal can be fed to a dog, and a serving of meal may be a meal to a dog. But although the pronunciation and spelling is the same, and both uses imply something that is complete by itself, the two meanings are distinct.

231. Nevertheless, there is a clear overlap between Meanings 3 & 4 at least in the context of working dog food. Skinners Dog Meal was meal in the sense of Meaning 3; but it was also a complete food and could be described as "a meal" in the sense of Meaning 4. We also note that Wilson's dog food was a food for working dogs and it is not clear if they used the description referred to above in paragraph 225 as "meal" in the Meaning 3 or Meaning 4 sense.

More than one meaning?

232. We have to determine what the legislature meant by "meal" in the context in which it appears in the VAT food zero rating provisions.

233. The first thing we note, and contrary to HMRC's submissions, is that whatever "meal" meant in that context, it carried only one meaning. This is a basic rule of

statutory construction. Had the legislature intended to refer to more than one thing, then it would have said so.

234. It is even more obvious to us that "meal" could have only one meaning in the context in which it was used in Group 1 when the choice of meanings which it could carry are mutually exclusive or virtually mutually exclusive with each other.

235. Contrary to HMRC's submisstion, when Parliament used the word "meal" they did not intend it to mean meal with Meaning 2 (crumbled biscuit mixer food) *and* meal with Meaning 3 (dry complete food). They intended only one meaning.

236. So we reject HMRC's case that "meal" simultaneously carried Meaning 2 and Meaning 3 (and potentially Meaning 4). While just possible it could have carried Meanings 3 & 4 simultaneously, Meanings 2 & 3 are entirely incompatible. "Meal" could not have been intended to mean meal, the incomplete mixer food, at the same time as (a) meal, a complete food.

237. Whichever of these 4 meanings the word "meal" carried in VATA, it carried only one of these meanings. And it has retained that meaning since it was first enacted.

Meaning 1

238. Neither party suggested "meal" in the context of food zero rating carried the meaning ascribed to it in *Bambers* (Meaning 1). We agree. As ground cereals, fish or bone by themselves and without processing are not fed to dogs and cats, we are quite sure that Parliament did not consider the use of the word "meal" in the phrase "biscuits and meal for cats and dogs" to refer to 'ground cereals other than wheat' or ground fish and bone.

239. Indeed, were it to carry that meaning, it seems no food for dogs would be within the definition as even in dog foods which include ground cereals, the predominant cereal used appears to be wheat.

240. We had the advantage of expert evidence and the MMR and must respectfully diverge from *Bambers* on its reasoning. In the context of food zero rating, "meal" in excepted item 6 does not mean 'ground cereals other than wheat' nor ground fish nor ground bone.

Meanings 2 & 3

241. It is HMRC's case that it carries the meaning of a dry muesli like product which is a complete food. This, they say, was how it was understood by Mr Skinner, Mr Livingstone and Mr Hill.

242. We are unable to agree. This was how "meal" was understood by those witnesses as a stand alone term because of their background in agricultural feeding stuffs. The evidence overall, from Mr Southey, Mr Skinner, the MMR and HMRC's

use of the terms in its own leaflets, is that in the 1970's and thereafter "meal" in the context of "biscuits and meal" referred to a biscuit-like mixer food for dogs.

243. We find at some point "meal" came to be used in a pet food sense to refer to complete meals. However, Mr Southey's evidence was clear that it would not carry this meaning if used in the phrase "biscuits and meal". Further, in two of three examples of we had of such useage (see paragraph 223 above) the manufacturers qualified or explained the word "meal" with the word "complete" (and the wording was illegible in the third and, as a food for working dogs, the manufacturer, like the appellant, may have used "meal" in the animal feed sense).

244. Parliament in using the term "biscuits and meal" would have intended "meal" to carry the normal meaning as it would be understood by persons producing or consuming dog food. That meaning in that phrase was, we find, a biscuit-like mixer.

245. Parliament would not have used the word "meal" in the phrase "biscuits and meal" in 1973 (when VAT was introduced) still less in 1969 (when the phrase was first used in the purchase tax legislation) to indicate a complete meal. In the 1960s, we find on the evidence of the MMR, that no complete dry foods were available in the UK and still only a very small part of the market in the 1970s. Parliament would not have used "meal" with the meaning "complete meal" when at the time to the vast majority of dog owners "meal" meant a mixer.

246. Lastly, if "meal" meant a complete food, then this would lead to the bizarre result that all dog biscuits are standard rated but crumbled biscuits for working dogs would be zero rated. And while it is not always possible to discern a logic to the food zero rating rules, Parliament could not possibly have intended to draw a distinction between bone-shaped dog biscuits and the same product just crumbled up.

Can a meaning change over time?

247. We were referred to *Innocent* [2010] UKFTT 516 (TC) because it was said to show that Parliament could be taken to have intended to legislate in respect of something that did not exist at the time the law came into force:

> [37] As Warren J noted in *Kalron*, the word beverage is not commonly used now. There is also the point that smoothies are a recent innovation. Would the draftsman of Group 1 back in 1972 have considered a smoothie to be a beverage? If asked "is a smoothie a beverage?" we assume he would answer "what's a smoothie?". Yet if we were now in the year 2010 to follow Mummery LJ's suggestion (see paragraph 32 above) of asking a child the same question, his reply would no doubt be "what's a beverage?".

The Tribunal in that case decided nevertheless that a smoothie was a beverage.

248. But that is not relevant here. The legislation in that case referred to 'beverages'. The meaning of beverage was known at the time of the legislation. The question was merely whether a smoothie, although a drink unknown at the time of the legislation,

was within the definition of beverage as intended at the time the legislation was enacted.

249. Here HMRC are arguing the defined word "meal" should carry a meaning – that of a dry complete dog food - that was unknown or virtually unknown at the time the provision we are dealing with in this case first came into force in 1969. That it was a virtually unknown meaning in 1969 is shown by paragraph [11] of the MMR (see paragraph 221 above) where it is stated that only since 1970 were companies seeking to sell complete dry dog foods. And even then the MMR does not refer to them as meal.

250. For this reason alone it is extremely unlikely that the legislature could have intended "meal" in the dog food context in 1969 to refer to dry complete foods for dogs, but it is virtually inconceivable that, had they wished to refer to such dry complete foods they would have done so by utilising the phrase "biscuits and meal", which on the evidence we heard had a well-understood meaning in the 1970s (and we find earlier from what is said in the MMR) of biscuits and crumbled biscuits mixer food for dogs.

Conclusion

251. In excepted item 6 of group 1 of Schedule 8 VATA "meal" means a mixer for use with meat or canned dog food made primarily from wheat flour with other ingredients and baked; and in particular made from the same or similar ingredients to a dog biscuit and baked in the same way but crumbled or broken up rather than cut into shapes.

252. "Meal" had only one meaning in this context.

253. During the claim period, the appellant did not manufacture dog biscuits nor dog meal in the sense of this baked mixer food. All the claim products were complete foods in the sense of being nutritionally complete feeds.

254. Therefore, we reject HMRC's case that some of the claim products were standard rated as "meal".

255. We note in passing, just for the sake of completeness, that although we did not agree with the interpretation of "meal" in the case of *Bambers*, we agree with the tribunal's overall conclusion that the product in that case was not "biscuits and meal". This is because the mixer in that case was an extruded product and not baked. It was therefore not a biscuit nor meal within the meaning of the zero rating provisions.

Overall conclusion

256. We find for the appellant in principle that its sales of the claim products were zero rated except in relation to sales of Ruff and Ready in 2000 and afterwards. If the parties are unable to agree the quantum, they are at liberty to revert to the Tribunal. In so far the appellant's claim for repayment of this overpaid VAT is stayed behind

other cases in respect of other legal issues which arise, as referred to in paragraph 3, it remains so stayed with liberty for either party to apply.

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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 16 August 2012