[2017] UKFTT 849 (TC)

TC06244

Appeal number: TC/2017/02286

VAT – Cellect – categorisation for the purposes of the Combined Nomenclature – whether zero rated for VAT purposes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CAROL PANNETT **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE ALEKSANDER NICHOLAS

Sitting in public at Taylor House, London EC1R 4QU on 1 November 2017

The Appellant in person, attending by telephone link

Ben Zurawel, counsel, instructed by the Cash Forfeiture & Condemnation Legal Team, Home Office, for the Respondents

DECISION

1. Ms Pannett appeals against the imposition of customs duties and import VAT on her import of "Cellect" by post from the USA. Customs duties of £39.62 and VAT of £69.84 were levied on Cellect products with a declared value of US$340 plus US$81 postage. The value for import duty was determined to be £309.58. Customs duties were levied at the rate of 12.8% and VAT at 20%.

2. Ms Pannett has a terminal diagnosis of cancer. In view of her condition, and in order to deal with her appeal expeditiously, the Tribunal gave directions to allow her to attend and give evidence by telephone link. The Director of Border Revenue was represented by Mr Zurawel, who was in physical attendance at the hearing.

3. I heard evidence from Ms Pannett and a bundle of documentary evidence was placed before me. I note that a sample of the Cellect product was not produced in evidence, nor was there any evidence as to its packaging. However, extracts from the Cellect website and some of the manufacturer's recommendations as to its use were included in the bundle.

4. The onus of proof in this case falls on Ms Pannett to show that the decision against which she has appealed is incorrect.

Background facts

5. The factual issues are for the most part not in dispute and I find the background facts to be as follows.

6. On 8 November 2016 a parcel, containing Cellect unflavoured powder kit and Cellect unflavoured powder from Cellect Products Inc in the USA, was intercepted at the Coventry international postal hub. These products had been ordered by Ms Pannett and had been posted to her. The products were declared as "food supplements", and customs duties and VAT were imposed on the importation by the Border Force on behalf of HM Customs & Excise. Customs duties were imposed on the basis that Cellect fell within the Combined Nomenclature (CN) classification 2106 90 92 (miscellaneous edible preparations – food preparations not elsewhere specified or included – other - containing no milkfats, sucrose, isoglucose, glucose or starch or containing, by weight, less than 1,5 % milkfat, 5 % sucrose or isoglucose, 5 % glucose or starch). The duty rate for CN 2106 90 92 is 12.8%. VAT was imposed at the standard rate of 20%.

7. The decision of the Border Force was reviewed, and the review decision to uphold the customs and VAT charges was communicated to Ms Pannett by a letter dated 8 February 2017. This appeal is against the review decision.

8. Ms Pannett believes that Cellect could have a beneficial impact on her health. She told me about reports on the internet and in closed discussion groups given by

users of Cellect as to how the product benefitted them. Included in the bundle were screenshots of some of these reports.

9. Also included in the bundle was an extract of a report by the University of Mary Washington from 2006 that Cellect had a beneficial impact on Alzheimer's disease in mice.

10. However, it is clear from all of the information included in the bundle that the manufacturer makes no claims as to the efficacy of Cellect. Indeed, much of the material provided by the manufacturers includes an express disclaimer as to its efficacy. One such disclaimer is as follows:

> Please know that CELLECT[tm] or any person relative to this product do not make any implications, promises, nor guarantees that CELLECT[tm] will reverse any disease. The information herein is determined informational and observational. Although the observations and documentations show positive results, it is the reader's obligation to discuss with their medical professional, and make their own decisions.
>
> CELLECT[tm] is a dietary supplement formulated and manufactured by CELLECT[tm]. It is manufactured to meet the highest quality and standards set by CELLECT[tm].
>
> All decision are the responsibility of the reader and common sense of it shall apply.

11. Ms Pannett's evidence was that Cellect used to describe the conditions for which it was a remedy. However, a change in the law in the USA meant that they were no longer allowed to make any claims about its use as a remedy, without undertaking eight-year double-blind trials, which Cellect had not done. It was therefore described in the US as a dietary supplement. Ms Pannett confirmed that Cellect had not been recommended by her oncologist, but she believed that this was because normal medical doctors did not know about Cellect. However, she believed that it was effective against cancers.

12. The composition of Cellect according to their website is as follows:

Ingredient	**Amount per Serving**	**Elemental Value% ***	**Daily Value ****
Vitamin A (as Bovine Colostrum Pre-Milk) (PI)	300 IU		6%
Vitamin C (from Hydrolyzed Bovine Collagen) (PI)	7 mg		12%
Vitamin D3 (as Bovine Colostrum Pre-Milk) (PI)	40 IU		10%

Natural Vitamin E (as d-Alpha Tocopherol Succinate)	500 IU	500 IU 100%	1,667%
Calcium (as AlgaeCal® Algas Calcareas)	2,016 mg	625 mg 31%	63%
Iodine (as AlgaeCal®Algas Calcareas)	19 mcg	19 mcg 100%	13%
Magnesium (as AlgaeCal® Algas Calcareas & Biokey® Amino Acid Magnesium Chelate)		110 mg	28%
Zinc (as Biokey® Zinc Amino Acid Chelate, Colostrum)	214 mg	30 mg 14%	200%
Selenium (as Albion® Selenium Amino Acid Chelate)	489 mcg	88 mcg 18%	126%
Chromium (as Albion® Chromium Polynicotinate)	1400 mcg	140 mcg 10%	117%
Sodium		30 mcg 100%	1%

The product is further described as

> Cellect Proprietary Blend (PI) - including 74 Trace Minerals - Providing 15 grams
>
> Hydrolyzed Bovine Collagen, Shark Cartilage, L-Glycine USP, Bovine Colostrum (Pre-Milk), Milk Thistle Seed Extract, 74 Trace Minerals
>
> Other Ingredients: Steviol Glycosides Contains: Milk - Bovine Colostrum (Pre-Milk), Fish - Shark Cartilage

13. Ms Pannett's evidence was that one serving of Cellect provided 50 calories – but that she should have eight scoops per day, which would provide 400 calories. This would form part of her daily allowance of 2000 calories.

14. Ms Pannett uses Cellect as an ingredient in smoothies, mixing it with coconut milk, water and bananas, and consumes it as part of her daily food routine. She told me that she was aware that other users of Cellect used it as an ingredient in pancakes.

15. She was asked by Mr Zurawel whether she would offer a Cellect smoothie to a friend who might be visiting, and her response was that she would offer to make her friend an ordinary smoothie. She later qualified her reply by saying that because Cellect was so expensive, she could not afford to offer to make her friend a Cellect smoothie – but ideally, she would have like to have offered to make her friend such a smoothie, because Cellect was good for so many things, and not just cancer.

Issues before the Tribunal

16. There are two issues before the Tribunal. The first is the classification of Cellect under the Combined Nomenclature for the purposes of the Common Customs Tariff. The second is whether Cellect is liable to VAT at the standard rate, or is zero rated or exempt.

Customs classification

17. As regards the CN classification, Ms Pannett submits that Cellect should be classified under Chapter 30 (Pharmaceutical products), which are (with limited exceptions) free of duty.

18. The only relevant heading under this Chapter is heading 3004 which is for:

> Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale:

19. Note 1(a) to the Chapter states that the chapter does not cover "foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters), other than nutritional preparations for intravenous administration (Section IV)".

20. Additional Note 1 to the Chapter states:

> Heading 3004 includes herbal medicinal preparations and preparations based on the following active substances: vitamins, minerals, essential amino-acids or fatty acids, in packings for retail sale. These preparations are classified in heading 3004 if they bear on the label, packaging or on the accompanying user directions the following statements of:
>
> (a) the specific diseases, ailments or their symptoms for which the product is to be used;
>
> (b) the concentration of active substance or substances contained therein;
>
> (c) dosage; and
>
> (d) mode of application.

> This heading includes homeopathic medicinal preparations when they meet the conditions of (a), (c) and (d) mentioned above.
>
> In the case of preparations based on vitamins, minerals, essential amino-acids or fatty acids, the level of one of these substances per recommended daily dose indicated on the label must be significantly higher than the recommended daily allowance to maintain general health or well-being.

21. Ms Pannett acknowledged that Cellect was not recommended by her oncologist and was not prescribed to her. However, she drew my attention to the levels of vitamin E, zinc and selenium in the recommended servings of Cellect, which materially exceeded their respective recommended daily allowances. The directions provided to the user of Cellect included details of the concentrations of the substances within Cellect, the recommended serving and the manner in which it was to be consumed. Ms Pannett submitted that the only reason Cellect did not set out the diseases or ailments for which it was to be used was due to the requirements of US law – but she submitted that Cellect provided online forums for users to be able to discuss their conditions and the success (or otherwise) that they had with Cellect.

22. The fact that it may only recently have become illegal in the US for Cellect to make such claims is irrelevant. Indeed, I am aware that it has been illegal since 1939 for any person to publish in Great Britain any advertisement relating to a cure for cancer (Section 4, Cancer Act 1939). "Advertisement" has an extended meaning in the Cancer Act and includes notices, labels, wrappers and documents.

23. I find that Cellect does not meet the requirements of Additional Note 1, and therefore does not fall within the scope of CN heading 3004. Although the requirements set out in paragraphs (b), (c), and (d) of Additional Note 1 are met, Cellect does not meet the requirements of paragraph (a). Nothing on the label, packaging or on the accompanying user directions sets out the specific diseases, ailments or their symptoms for which the product is to be used.

24. None of the other headings within Chapter 30 are relevant to Cellect, and I therefore find that Cellect does not fall within chapter 30 of the Combined Nomenclature.

25. As no other classification under the Combined Nomenclature is relevant to Cellect, I find that it has been correctly classified under CN 2106 90 92 for the purposes of customs duties.

VAT – Zero rating - Group 12

26. As regards VAT, Ms Pannett submits that Cellect was zero rated under Group 12, Schedule 8, VAT Act 1994.

27. Item 1 of Group 12 relates to medicines that are dispensed on prescription, which was not the case here.

28. Item 2 of Group 12 relates to the supply to a disabled person of certain goods for their domestic or personal use. I address this in more detail below.

29. The remaining Items in Group 12 deal with the provision of certain services (and closely associated supplies of goods relevant to those services), the supply of motor vehicles and the supply of alarm systems – none of which are relevant to this appeal.

30. Ms Pannett referred me to HMRC Public Notice 371 (Importing goods for disabled people free of duty and VAT) and to VAT Notice 701/7 (VAT reliefs for disabled and older people). These notices describe the scope of Group 12 and the procedures to be adopted to claim zero-rating. Ms Pannett submitted she was a handicapped person for the purposes of Group 12, and as Cellect was supplied for her personal use, it fell within the scope of the zero rating provisions.

31. Item 2 of Group 12 is as follows (I note that "disabled" was substituted for "handicapped" with effect from 1 April 2017 by s16 Finance Act 2017, but this makes little difference to practical application of these provisions):

> The supply to a disabled person for domestic or his personal use, or to a charity for making available to disabled persons by sale or otherwise, for domestic or their personal use, of—
>
> (a) medical or surgical appliances designed solely for the relief of a severe abnormality or severe injury;
>
> (b) electrically or mechanically adjustable beds designed for invalids;
>
> (c) commode chairs, commode stools, devices incorporating a bidet jet and warm air drier and frames or other devices for sitting over or rising from a sanitary appliance;
>
> (d) chair lifts or stair lifts designed for use in connection with invalid wheelchairs;
>
> (e) hoists and lifters designed for use by invalids;
>
> (f) motor vehicles designed or substantially and permanently adapted for the carriage of a person in a wheelchair or on a stretcher and of no more than 11 other persons;
>
> (g) equipment and appliances not included in paragraphs (a) to (f) above designed solely for use by a disabled person;
>
> (h) parts and accessories designed solely for use in or with goods described in paragraphs (a) to (g) above;
>
> (i) boats designed or substantially and permanently adapted for use by disabled persons.

32. The practice of HM Revenue & Customs is to treat a person with a terminal diagnosis (such has Ms Pannett) as being disabled. The requirements that the goods (in this case Cellect) are supplied for the personal use of a disabled person, as required by the introductory wording of Item 2, is therefore satisfied. The question is whether

Cellect falls within any of paragraphs (a) to (i). It is self-evident that Cellect does not fall within any of these paragraphs.

VAT – Zero rating – Group 1

33. Alternatively, Ms Pannett submits that Cellect is zero rated for VAT as a food under Group 1, Schedule 8 VAT Act 1994. Group 1 zero rates "Food of a kind used for human consumption". This is subject to certain exceptions, none of which is relevant to this case. Note (1) to the group provides that "Food" includes drink (although certain beverages, and (amongst other things) powders used for the preparation of beverages are excluded from being zero-rated).

34. What constitutes a "food" has been the subject of many cases before this Tribunal and its predecessors. I was referred to three cases in particular – *Hunter Ridgeley* (1995) V13662, *Arthro Vite* (1996) V14836. *Stephanie Ridal* (2002) C00149, and *Durwen Banks* (2005) V18905. These are all decisions of the VAT and Duties Tribunal. Unfortunately, the texts of these cases was not included in any authorities bundle, and because of the age of these cases, they are not available on any publicly accessible website (such as BAILII or the Tribunal's own web site). I have also considered the following cases that were not cited to me, namely: *Brewhurst Health Food Supplies* (1992) V8928, *Nature's Balance* (1994) V 12295, and *Durwen Banks* (2008) V20695. Again, these are all decisions of the VAT and Duties Tribunal, and because of their age are not available on any publicly accessible web site.

35. *Brewhurst Health Food Supplies* concerned the supply of artisan fruit cubes with stimulant laxative ingredients. In its decision the tribunal made the following remarks:

> The approach to the question whether an edible substance is "food of a kind used for human consumption" requires the Tribunal to consider
>
> "... whether, in the whole circumstances of the case, the word "food" as a matter of ordinary usage of the English language covers the ... product in the light of the facts that have been proved": see the Decision of Judge Medd, QC in *Ayurveda Ltd v Commissioners of Customs and Excise* (case No 3860) LON/88/1372X.
>
> In that case the Tribunal concluded that a fruit concentrate manufactured in New Delhi consisting mainly of cane sugar with Indian gooseberry and chelubic myrobalan fruits in accordance with an ancient set of principles adopted by Maharishi Mahesh and designed to prevent imbalances arising in the physiology was such a food. In the words of that Tribunal:
>
> "... an ordinary Englishman having seen and tasted the product and knowing what we know about it would so regard it".
>
> This Tribunal recollects that Dr Johnson once defined oats as a grain which in England is generally given to horses but which in Scotland supports the people. As we are here concerned with laxatives, and no doubt oats can fall into the bulk-forming category, the Tribunal heeds

> the Doctor's warning. Looking down the lists of decided cases where the question has been whether some esoteric substance, such as paan or royal jelly is food, this Tribunal wonders whether the "ordinary" Englishman is the best guide. Instead, the Tribunal asks itself would a broad-minded VAT payer having seen and tasted an Ortisan fruit cube and knowing what the Tribunal has learned from the evidence about it regard it as "food of a kind used for human consumption".

36. *Nature's Balance* concerned the supply of fresh water micro-algae, *chlorella pyrenoidosa*, in tablet form. The tribunal said the following in reaching its decision that the tablets were not "food":

> The question I ask myself is whether an ordinary educated Englishman (or if one prefers, as in *Brewhurst*, a broad-minded VAT payer who has heard the evidence and tasted the product) would regard it as food. Applying this test as a matter of impression, I do not think that the tablets would be described as food, even bearing in mind that the tablets in *SmithKline Beecham* must have so qualified. I believe that an ordinary person would regard chlorella tablets in a similar way to vitamin tablets, no doubt good for you but not themselves food. I have been troubled about the logic that the Commissioners would regard the identical product in its natural form as food, but this follows from the form of the product being a relevant factor. If I am right, it would not be the only product to have a different VAT categorisation in different forms. I was told that garlic is regarded as zero-rated in its natural form but as standard-rated as capsules sold as a dietary supplement, rather than a food flavouring. I believe that ordinary educated people would not regard garlic capsules sold as a dietary supplement as a food. The same is true of chlorella.

37. *Hunter Ridgely* concerned algae in a tablet or powder form. Adopting the approach taken in *Natures Balance*, the tribunal held that the algae tablets were not food.

38. *Arthro Vite* concerned a powdered product to be mixed with water and taken as a drink. The product was intended to relieve pain caused by rheumatism and arthritis. The Medicines Control Agency challenged the name and marketing of the product. As a result it was renamed Activ-Vite, the formulation changed somewhat, and the marketing was changed to focus on benefiting mobility of joints to enable the user to lead an active life. The Tribunal found the case to be finely balanced, but decided that because of the nutritional value of the product it was "food".

39. *Ridal* concerned the supply of NuTriVene-D, a product in powder form for use solely by sufferers of Down's Syndrome. The objective of taking NuTriVene-D is to prevent loss of brain function. It provides the essential anti-oxidant vitamins and minerals, together with others that are not available in ordinary food. The tribunal considered that this was a borderline case, but that on balance, NuTriVene-D was "food". The tribunal placed particular weight on its nutritional value to suffers of Down's Syndrome and that it was used and mixed in with other food ingredients, in the same way as other ingredients (such as flour or cocoa) might be used.

40. *Durwen Banks* concerned the supply of unrefined linseed oil. There are two relevant decisions. The first (in 2005) held that the oil was not food. The second (in 2008) having the benefit of further evidence, held that the oil (at least when supplied in bottled form, and not in capsules) was food. But in both cases, the tribunal applied the principles set out in *Brewhurst* that the question to be considered when deciding whether the word "food" as a matter of ordinary usage of the English language covers a product, the matter must be approached from the viewpoint of an informed person who knows the product.

41. The question I have to answer is whether Cellect is "food of a kind used for human consumption". The test consistently used by the tribunals that have had to consider this question (although with minor variations from time to time) is whether a broad-minded VAT payer who has heard the evidence and tasted the product would regard it as food.

42. No samples of Cellect were provided by Ms Pannett, so I have not been able to taste the product. But I did have considerable documentary evidence about the product as well as the benefit of Ms Pannett's oral evidence.

43. I have reached the conclusion that Cellect is not "food". I find that an ordinary person would not describe Cellect as "food", the manufacturers do not, and neither did Ms Pannett.

44. I note that the nutritional value of Cellect is small – 50 calories per serving – and a person would need 40 servings to meet their daily calorific requirement.

45. Cellect (at least in the form being imported by Ms Pannett) is a powder. It cannot be consumed readily in powdered form. It has to be mixed into a drink or something else (such as a pancake) in order to be consumed. So can it be regarded as a food ingredient?

46. Although Ms Pannett submitted that Cellect was an ingredient in her daily smoothie, I wonder whether she is putting the cart before the horse? In my view, having heard her evidence, the reality is not that Cellect is an ingredient used to make the smoothie, but the smoothie is being used as the vehicle through which she consumes Cellect.

47. My view is reinforced by Ms Pannett's evidence that she would not serve a visiting friend a smoothie made from Cellect, but serve her a normal smoothie instead (although she subsequently qualified this statement by saying that because of Cellect's benefits, she would have served such a smoothie, but for its cost).

48. Whilst I note the decisions of the VAT and Duties Tribunal in *Ridal*, and the superficial similarities with this case, there are also critical differences. The tribunal in Ridal stated that it was a borderline case, and they placed considerable emphasis on the nutritional value of NuTriVene-D to persons with Down's syndrome. In contrast, the nutritional value of Cellect is low.

Conclusions

49. I find that Cellect was correctly classified under CN 2106 90 92 and is liable to customs duty at the rate of 12.8%.

50. I find that Cellect does not fall within any of the items within Group 12, Schedule 8, VAT Act 1994, and that it does not fall within item 1, Group 1, Schedule 8, VAT Act 1994 ("food of a kind used for human consumption"). Accordingly Cellect is liable to VAT at the standard rate of 20%

51. The appeal is therefore dismissed.

52. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 28 NOVEMER 2017