[2019] UKFTT 0067 (TC)

TC06953

Appeal number: TC/2009/12850

VAT – zero-rating – hot take-away food – grilled ciabatta rolls and breakfast muffins – rolls supplied to Appellant partly baked – baking finished at retail outlet – was food "hot" – yes – appeal dismissed – Group 1, Schedule 8 VAT Act 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

EAT LIMTED **Appellant**

- and -

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

TRIBUNAL: JUDGE ALEKSANDER

Sitting in public at Taylor House, London EC1 on 15 October 2018

Andrew Young, counsel, instructed by Haines Watts Leeds LLP, chartered accountants, for the Appellant

Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Eat Limited ("Eat") against decisions by HMRC that the supply of breakfast muffins and of grilled ciabatta products was liable to VAT at the standard rate.

2. On 23 January 2009, Eat made a voluntary disclosure claiming that the supply of breakfast muffins was zero rated, and claiming a refund of overpaid VAT of £486,215. By a letter dated 6 November 2009, HMRC ruled that the supply of breakfast muffins was standard rated. On 15 April 2009, Eat made another voluntary disclosure claiming that the supply of grilled ciabatta rolls was zero rated, and claiming a refund of overpaid VAT of £123,014. By a letter dated 14 July 2009, HMRC ruled that the supply of breakfast muffins was standard rated. On 9 October 2009, HMRC raised a VAT assessment for £632,620 against Eat for the VAT periods 09/05 to 06/08 inclusive on the basis that the supply of grilled ciabatta rolls should have been standard rated. Eat appealed against the rulings and the VAT assessment. Directions were given on 18 July 2017 that these appeals should be consolidated.

3. The appeals were stood behind the case of *Sub One Limited (t/a Subway) (in liquidation) v HMRC* [2014] EWCA Civ 773. The Court of Appeal handed down its decision on 10 June 2014.

4. Eat was represented by Mr Young and HMRC by Mr Watkinson. A bundle of documents was provided by way of evidence. In addition, there were witness statements (with exhibits) from Niall MacArthur (the co-founder of Eat) and Kate Ellis (who has been the Operational Development Manager of Eat since 2011). Ms Ellis had started working at Eat ten years ago, when she was the general manager at one of Eat's retail outlets where she had responsibility for managing and training the outlet's staff, and had significant interaction with customers.

5. Mr MacArthur did not attend the hearing as he had "ended his relationship with the Appellant and is now no longer available to give evidence". Ms Ellis did attend and was cross-examined. In her witness statement, she expressly stated that she had seen Mr MacArthur's witness statement, and believed it to be true and accurate. I found Ms Ellis to be an honest and reliable witness.

6. In view of Mr MacArthur's non-attendance at the hearing, I have placed no weight on his evidence, save where it is self-evidently non-contentious (such as the content of some of the exhibits to his witness statements which included training manuals for the preparation of breakfast muffins and grilled ciabatta rolls, and Eat's technical specifications and standards applicable to breakfast muffins and grilled ciabatta rolls).

7. Ms Ellis's witness statement was served only two working days before the hearing, and an application to allow her evidence to be admitted was only made – after some prompting by me - at the commencement of the hearing itself. I comment below on the procedural issues relating to the non-attendance of Mr MacArthur and the late filing of Ms Ellis's evidence.

Law

8. It is trite VAT law that all supplies are taxable at the standard rate, unless the VAT legislation provides otherwise. Zero-rating of food within Group 1 of Schedule 8, VAT Act 1994 is a derogation from the general rule. This is subject to an exception for supplies in the course of catering. Anything coming within the definition of catering reverts back to the general rule, and is taxable at the standard rate.

9. So far as is relevant, Group 1 of Schedule 8, VAT Act 1994 (Food) is as follows:

> The supply of anything comprised in the general items set out below, except –
>
> (a) a supply in the course of catering
>
> […]
>
> **General items**
>
> Item No.
>
> 1. Food of a kind used for human consumption.
>
> […]
>
> *Notes*:
>
> […]
>
> (3) A supply of anything in the course of catering includes –
>
> (a) any supply of it for consumption on the premises on which it is supplied; and
>
> (b) any supply of hot food for consumption off those premises;
>
> And for the purposes of paragraph (b) above, "hot food" means food which, or any part of which –
>
> (i) has been heated for the purposes of enabling it to be consumed at a temperature above the ambient air temperature; and
>
> (ii) is above that temperature at the time it is provided to the customer.

10. There has been considerable litigation on the meaning of "hot food", and the decision of the Court of Appeal in *Sub One Limited (t/a Subway) (in liquidation) v HMRC* [2014] EWCA Civ 773 reviews the meaning of the legislation, and in particular whether the "purpose" test in the legislation should be construed objectively or purposively. The decision of the High Court in *John Pimblett v HMCE* [1987] STC 202 adopted a subjective interpretation. However, this is inconsistent with EU law, which requires an objective test. The Court of Appeal at paragraph 49 of its decision in *Sub One* said the following:

> […] This approach to the matter searches for the assumed common intention of the supplier and the consumer as to whether it is a term of the bargain that the product be supplied in order to be eaten hot. By this entirely objective enquiry, the court derives the terms of the bargain

from what each party to the contract says and does (including the presentation of the supply in the shop and in any advertising).

11. Therefore, the Tribunal needs to determine the common intention of Eat and its customers when buying breakfast muffins and grilled ciabatta rolls. This determination has to be made based on the evidence before the Tribunal.

12. The burden of proof is on Eat to show that the common intention of it and its customer was that the food (namely the breakfast muffins and the grilled ciabatta rolls) was not supplied in order to be eaten hot.

Background facts

13. The background facts are, for the most part, not in dispute, and I find them to be as follows.

14. Eat sells a range of hot and cold food and drink products through its many outlets in the UK. The food and drink can either be consumed at the outlet or be taken away for consumption elsewhere.

15. This appeal relates to the supply of breakfast muffins and grilled ciabatta rolls that are supplied by Eat to be consumed away from Eat's premises.

16. The breakfast muffins are filled bread rolls. The rolls are supplied to Eat by a bakery in a condition that enables Eat to finish baking the rolls at their outlets. The bakery supplying the rolls to Eat has to ensure that the rolls comply with Eat's technical specification; otherwise, the rolls would be rejected by Eat. The specification requires the rolls to be "pale and 90% baked". Eat sources cooked meats and other ingredients, such as pre-cooked chilled scrambled eggs, from third party suppliers. The breakfast muffin is assembled at Eat's central kitchen from the various ingredients, bagged, and then distributed to Eat's retail outlets.

17. The ciabatta rolls are also supplied to Eat part-baked. The relevant technical specification requires that they should be supplied "90% baked". Eat produces a colour chart to allow the colour of the ciabatta rolls to be verified on delivery, and this shows that the rolls have to conform to a pale target colour. There is a choice of three fillings for the ciabatta rolls: tuna mayonnaise, ham and cheese, and chicken. As with the breakfast muffins, Eat sources the different fillings for the ciabatta rolls from third party suppliers (pre-cooked and chilled where appropriate). The ciabatta rolls are assembled at Eat's central kitchen, where they are individually packaged in clear film before being distributed to Eat's retail outlets.

18. Ms Ellis remembers, when she was working at one of the outlets, that the breakfast muffins and panini arrived at the store from the central kitchen visibly part-baked. At that stage, these products were pale in colour, and doughy and not intended for consumption. It was intended that the products required further baking by being finished-off in the outlet's grill before they were eaten.

19. On arrival at the retail outlet, the part-baked breakfast muffins are unpacked, taken out of their bags, and displayed on the front counter with a price ticket. The part-baked ciabattas are displayed in the chiller cabinet.

20. If a customer purchases a breakfast muffin or a ciabatta roll, the product is finished-off in the outlet's grill. The process for finishing these products is described in Eat's training manual for "Toasties". Ms Ellis was cross-examined on this process, and her oral evidence was entirely consistent with the content of Eat's training manual. The training manual includes the following statement in the introduction:

> Important: because the bread in these products is only partly baked they need to be toasted in the grill to "finish them off" to the intended quality. Although customers are entitled to buy the products cold if they insist (and they may be grilling them back in their office) they are in fact partly raw so you must always advise your customers to have these products toasted.

21. In relation to the breakfast muffin, the filling includes bacon and scrambled egg. The ingredients have been cooked (and are not raw), but they are cold at the time the muffin is purchased. Ms Ellis stated that Eat does not have any raw food in any of its outlets (she regarded partly baked rolls as not being "raw" for these purposes). I take her reference to "raw food" to be a reference to meat or fish products that require cooking (or further cooking) before they are fit to be eaten, rather than to (say) cheese, fruit, or salads which are fit to be consumed raw.

22. After a breakfast muffin has been purchased by a customer, it is placed in the grill "closed" - without being opened - so that the grill is only in direct contact with the roll, and not with the filling. The breakfast muffin and its ingredients are cold when they are placed in the grill. After two minutes, the roll is checked to see if it is well toasted – it should be brown, not pale white or beige. If the roll is not well toasted, it is kept in the grill a little longer until it goes brown (this can happen if the grill temperature is too low, for example because it is being opened frequently). Although the grill is not in direct contact with the filling, the filling is heated up as the roll is grilled. Ms Ellis acknowledged in cross-examination that customers did not want cold bacon in a hot roll.

23. Ms Ellis's evidence was that all food sold by Eat was required to be served under food health regulations either at ambient temperature or at a temperature not less than 65°C, but not at any temperature in between. Therefore, the breakfast muffin should be at a temperature of not less than 65°C at the time it is provided to the customer.

24. Once the toasting is completed, if the customer has requested sauce (such as ketchup or brown sauce), the roll is opened and the sauce is added. The roll is then closed-up, wrapped in a foil-backed sheet, bagged, and handed to the customer. The foil sheet has "Eat Hot" printed on the outside.

25. The process for the grilled ciabatta rolls is similar. The ingredients have been cooked where necessary prior to being supplied to Eat (and are not "raw"), but the roll

and the ingredients are cold at the time of purchase (they have been kept in the chiller cabinet).

26. After a ciabatta roll has been purchased by a customer, it is first cut in half, through the clear film packaging. The two halves are then removed from the packaging and placed in the grill. The ciabatta roll and its ingredients are cold when they are placed in the grill. As with the breakfast muffins, the ciabatta rolls are grilled "closed", but for three minutes. After three minutes, the roll is checked to see if it is well toasted – it should be brown, not pale white or beige. If the roll is not well toasted, it is kept in the grill a little longer until it goes brown. Although the grill is not in direct contact with the filling, the filling is heated up as the roll is grilled. The "finished" roll is then wrapped in a foil-backed sheet, bagged, and handed to the customer. As with the breakfast muffins, the sheet has "Eat Hot" printed on the outside. And as is the case with the breakfast muffin, under food hygiene regulations, a grilled ciabatta roll should be at a temperature of not less than 65°C at the time it is provided to the customer.

27. In the course of cross-examination Ms Ellis confirmed that the breakfast muffins and the ciabatta rolls were wrapped in a foil backed sheet after finishing in order to ensure that they retained their temperature – in other words to keep the product hot, and prevent it from cooling down. Ms Ellis confirmed that both the breakfast muffin and the ciabatta rolls were intended to be eaten whilst they were hot – that is to say both the roll and the filling should be hot (and not cold ingredients in a hot roll – or *vice versa*).

28. An HMRC officer visited Eat to view a demonstration of the grilling process in April 2009 in relation to the grilled ciabatta rolls. The internal temperatures of three ciabatta rolls (coolest part) tested following completion of the finishing process were 72°C, 53°C, and 50°C. A similar exercise was conducted in relation to the breakfast muffins, and the internal temperatures (coolest part) of the three tested products after completion of the finishing process were 59°C, 47°C, and 56°C.

29. It is not disputed, and I find, that both the breakfast muffins and the ciabatta rolls were provided to customers at a temperature that, on any basis, was significantly above ambient air temperature.

30. Ms Ellis's evidence was that Eat wanted to sell fresh food, and that freshness is what the customer wants. She gave examples of anecdotal evidence from customer feedback about the freshness of Eat's breakfast muffin. Ms Ellis's evidence was that the products were grilled with the intention that they were served "fresh", rather than being "hot". Because the rolls were not fully baked, they required further cooking in order to complete the baking process. Thus, the grilling of the rolls was undertaken in order to be able to serve fresh rolls. It was Eat's objective to serve fresh food. In the case of the breakfast muffins and the ciabatta rolls, in order for these products to be fresh, they had to be toasted in the grill. The use of the phrase "Eat Hot" on the foil wrappers should not be taken as a command to eat the product whilst it was hot. Rather the "Eat" was a reference to the Appellant's brand name, and the "hot" was used because the content was hot.

31. Ms Ellis also stated that she considered that these products could be sold and eaten without being grilled – but they would be pale and doughy (and presumably unappetising as a consequence). That said, Ms Ellis could not recall any time while she was working as an outlet manager when these products were sold cold, nor could she recall any customer asking for it not to be "finished". If a customer had asked for it not to be finished, her team would have explained that it ought to be finished-off before consuming (in accordance with the requirement of the training manual).

32. Ms Ellis also said that these products could be allowed to cool down and be eaten cold.

33. During the course of her oral evidence, Ms Ellis was asked about the other food products served at Eat's retail outlets. These included baguettes and croissants that were cooked at the outlet, but were allowed to cool down to ambient temperature before being sold. Ms Ellis confirmed that she considered that the baguettes and croissants were fresh, even if they were not hot when sold.

Submissions

34. For Eat to succeed in its appeal, it must prove that the common intention of Eat its customers was that the breakfast muffins and grilled ciabatta rolls were not supplied to customers in order to be eaten "hot".

35. For these purposes, the products are treated as "hot" if:

(1) They have been heated for the purposes of enabling them to be consumed at a temperature above the ambient air temperature; and

(2) They are above that temperature at the time they are provided to the customer.

36. It is not disputed that the products were above ambient air temperature at the time they were provided to customers, and I have so found.

37. The issue before the Tribunal is whether the products had been heated for the purpose of enabling them to be consumed at a temperature above ambient air temperature. In considering the purpose of the heating, the Tribunal needs to ascertain the common intention of Eat and the customer.

38. HMRC submit that it was part of the deal between Eat and its customers that the products should be sold hot (and obviously so). Eat submit that the deal with the customer was that the products should be sold "fresh", and that the fact that they were above ambient temperature was merely incidental to this intention.

39. Mr Young's submission was that the common intention of the parties was that the supply of the products was to be finished as being "fresh" rather than partially complete. Any residual heat in the products was merely incidental to that common intention.

40. Mr Young gave as an example the purchase of a pie from a supermarket that was baked on the supermarket's premises. It is entirely rational that the customer would

want the pie to have been properly cooked before it was purchased. The pie is racked and is allowed to cool – but the customer can take the pie before it has cooled down completely to ambient temperature. In this case, the predominant purpose of the baking is to finish the cooking of the pie. The fact that the pie is hot is merely incidental to the common intention that the customer acquires a finished pie.

41. In the case of the supplies under appeal, Mr Young submits that the heating is incidental to freshness. And this, he says, is supported by the evidence of Ms Ellis, who has experience of managing one of Eat's retail outlets, and the evidence from the feedback from a customer.

42. Mr Watkinson submitted that the "common intention" proposed by Mr Young was artificial and bizarre. No customer seeks to enter into a bargain in a takeaway restaurant containing a term that the food he or she is to purchase is “to be finished as fresh rather than partially complete”. The customer either wants hot food, or does not. Either the supplier proposes to supply hot food, or it does not. Mr Watkinson submits that it was part of the deal between Eat and its customers that the products should be sold hot, and obviously so.

43. Mr Watkinson also submitted that Eat's advertising (at the point of sale and on its website) was that the products were "hot", although there is no evidence to this effect included in the bundle, and when Ms Ellis was cross-examined on this point, she said that she could not recall whether the products were advertised as being "hot".

44. Mr Watkinson submits that the breakfast muffins were grilled for 2 minutes which is inconsistent with any requirement simply to brown and crisp them. The internal temperatures of the breakfast muffins when tested were between 47°C and 59°C. The breakfast muffins were fit for human consumption prior to the grilling. The breakfast muffins were supplied to the customer in foil backed heat retaining packaging emblazoned with the words “Eat” and “Hot”. Mr Watkinson submits that the common intention of Eat and customer in respect of the breakfast muffins was that they would be sold hot. The grilled ciabattas were grilled for 3 minutes that is inconsistent with any requirement simply to brown and crisp them. The internal temperatures of the ciabattas when tested were between 50°C and 72°C. The ciabattas were fit for human consumption prior to the grilling. The ciabattas were supplied to the customer in foil-backed heat retaining packaging emblazoned with the words “Eat” and “Hot”. Mr Watkinson submits that the common intention of Eat and customer in respect of the ciabattas was that they would be sold hot.

45. Mr Watkinson submits that Eat cannot discharge the burden of proof on it to show that the common intention of the supplier and consumer was that the food was not supplied in order to be eaten hot.

Conclusions

46. This is a hopeless appeal by Eat, and I have no hesitation in finding that it was the common intention of Eat and its customers that breakfast muffins and grilled

ciabatta rolls were heated for the purpose of enabling them to be consumed at a temperature above ambient air temperature.

47. This is self-evidently not a case where pies are baked on retail premises, but are then racked to be allowed to cool down – but customers buy the pies before they have fully cooled. Eat's products were not racked to be allowed to cool. Instead, they were wrapped in foil-backed sheets that keep them warm. I find that this shows an intention on the part of Eat that the products should be consumed whilst they were hot. The fact that "Hot" was printed on the sheets reinforces my view. I find that this must have been the common intention of the parties, as the customer would have agreed to have the products grilled – they self-evidently chose not to take the products away without being "finished".

48. I also note that croissants and baguettes are baked at Eat's retail premises, and are then allowed to cool before being sold. But this was clearly deliberately not done with the breakfast muffins and grilled ciabatta rolls.

49. I consider that the fact that Eat wanted to sell "fresh" food to be irrelevant to the analysis. Food can be fresh irrespective of whether it is hot or cold. There is no contradiction in the products being both "hot" (for the purposes of Group 1 of Schedule 8) and being "fresh". Although not relevant to my decision (and I have not taken it into account), there is perhaps a certain irony in describing these products as "fresh", as they were prepared in a central kitchen, away from the retail premises, using pre-cooked or pre-prepared ingredients.

50. Although Mr Watkinson made submissions in relation to Eat's advertising, as no examples of the advertising were included in the hearing bundle, and Ms Ellis could not recall what advertising there was, I have therefore reached my decision on the basis that there was no such advertising.

51. The appeal is therefore dismissed.

Procedural matters

52. On Thursday 11 October 2018, Hains Watts emailed the Tribunal centre stating that Mr MacArthur has ended his relationship with Eat and was now no longer available to give evidence. A witness statement from Ms Ellis was attached to the email. The hearing was due to take place on Monday 15 October, two working days later. No application was made to allow the late submission of this evidence.

53. At the commencement of the hearing, I asked Mr Young why Mr MacArthur was no longer available to give evidence. His explanation was that there had been a restructuring of Eat, and Eat's shares were largely worthless. In consequence, Mr MacArthur had left Eat in July 2018 and no longer wanted to be involved in the appeal.

54. I consider that Hains Watts' conduct to have been wholly unprofessional. They were aware for about three months prior to the hearing that Mr MacArthur was no longer willing to be a witness. They should have applied to the Tribunal well before the

hearing date for permission to file a new witness statement and to offer Ms Ellis for cross-examination, thus giving HMRC adequate time to consider the new evidence.

55. I invited submissions from the parties as to whether (a) the tribunal should consent to the admission of Ms Ellis's evidence, and (b) if so, whether the hearing should be adjourned in order to give HMRC time to consider it.

56. Mr Watkinson said that he had been able to review Ms Ellis's evidence in the time available, and was prepared to allow her evidence to be submitted and for the hearing to progress without adjournment. However, he reserved his position as to costs under Rule 10(1) of the Tribunal's procedure rules.

57. I therefore directed that Ms Ellis's evidence be admitted.

58. As regards costs, Rule 10(1)(a) gives the Tribunal jurisdiction to make a wasted costs order if wasted costs have been incurred as a result of any improper, unreasonable, or negligent act or omission on the part of any legal or other representative or any employee of such a representative. Rule 10(1)(b) gives the Tribunal discretion to make a costs order against a party if it has acted unreasonably in bringing, defending or conducting the proceedings.

59. Rule 10 sets out the procedure for dealing with applications for costs, and provides that any application must be made no later than 28 days after the release of the Tribunal's decision.

60. In order to deal efficiently with any application that HMRC might make in respect of costs, I direct that if HMRC decide to make an application (which must be made within the 28 day time limit), they must serve the application (together with the schedule of costs as mentioned in Rule 10(3)(b)) on the Tribunal and on the Appellant's representatives, Hains Watts. Any representations to be made by the "paying person" in response to such application shall be sent to the Tribunal and to HMRC no later than 28 days after receiving HMRC's application. If the paying person is an individual, the representations shall be accompanied by a statement of the paying person's financial means.

61. 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 JANUARY 2019