

THE “POTATONESS” OF PRINGLES: VAT DECISION IN UK

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VAT and GST regimes are renowned for being full of surprises! The following brief article illustrates.

In [HMRC v Procter & Gamble UK \[2009\] EWCA Civ 407](#), the Court of Appeal in the United Kingdom faced one of the more polarising questions to arise in the context of European VAT - Is a Pringle a potato crisp or a savoury snack? The result is a win for potato crisps and Her Majesty's Revenue, but a setback for Pringle owner Procter & Gamble UK, who will now have to answer for £100m in unpaid taxes.

While most foods in the UK are zero rated (or GST-free, in Australian parlance), the following statutory exception applies:

'Any of the following when packaged for human consumption without further preparation, namely, potato crisps, potato sticks, potato puffs and similar products made from the potato, or from potato flour, or from potato starch, and savoury products obtained by the swelling of cereals or cereal products...'

The Court rejected the taxpayer's submission that in order to attract this exception, a product should be 100% made of potato or nearly so. First, said Lord Justice Jacob, if that were right, it would lead to the untenable conclusion that a marmalade made from oranges and grape fruit would be made from neither. And secondly, 'not even potato crisps or potato sticks (no-one knew about potato puffs, even what they were) are 100% potato.'

The taxpayer's alternative submission was that the exception could only apply where a product contained sufficient potato to give it a quality of 'potatiness'. (Unlike normal potato chips, which have a potato content of roughly 70%, Pringles fluctuate around the 40% mark). Again, Lord Justice Jacob was unsympathetic:

'As to 'potatiness', I cannot think Parliament intended to invoke such an elusive test. It is an Aristotelian question: does the product have an 'essence of potato'? Moreover I have no real idea of what the suggested test means...'

Lord Justice Jacob took the view, rather, that the statute:

'was posing a kind of jury question 'is it similar to a potato crisp etc and made of potato?' The question is not capable of elaboration or complex analysis.'

The 'made from' argument

Lord Justice Mummery observed that, in the submissions by counsel for the taxpayer on the "made from" aspect of Regular Pringles, counsel referred to "the potato as a fiscal contaminant", the "essential characteristics of the paradigm potato crisp", the absence of "findings of potatiness" and the "quantitative role of the potato." The Lord Justice said that, in contending that Pringles (42% potato, 33% fat) were not "made from" the potato, counsel put forward the proposition that:

"If a product has a number of significant ingredients it cannot be said to be 'made from' one of them."

Lord Justice Mummery said it was therefore argued that Regular Pringles, which also contain fat and flour, 'cannot be said to be 'made from the potato'".

The Lord Justice said the VAT and Duties Tribunal was originally required to answer the question as to whether the goods in question were "made from" the potato, "not in answer to a scientific or technical question about the composition of Regular Pringles, or in response to a request for a recipe". Rather, it was, Lord Justice Mummery said,

"for the purpose of deciding whether the goods are entitled to zero rating. On this point, the VAT legislation uses everyday English words, which ought to be interpreted in a sensible way according to their ordinary and natural meaning. 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 a culinary pedant. On another aspect of party food, I think that most children, if asked whether jellies with raspberries in them were 'made from' jelly, would have the good sense to say 'Yes', despite the raspberries".

The final result

The Appeal Court endorsed the view of the VAT and Duties Tribunal and overturned the decision of Justice Warren in the High Court of Justice. Lord Justice Jacob expressed the view that the question was 'not one calling for or justifying over-elaborate, almost mind-numbing legal analysis' - a position possibly inspired by the judgment of Justice Warren, who set out in detail 4 possible interpretations of the law in his lengthy judgment.

Arguably, a win for rational statutory interpretation and common sense, perhaps when it is suggested that both are sometimes in short supply in relation to tax litigation.

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