



TC01536

Appeal number TC/2009/15523

VAT ZERO-RATING - Beverage - Iced tea concentrate - whether soft drink or "tea, mate, herbal tea and similar product" - appeal against ruling that drink standard-rated - Appeal allowed

FIRST-TIER TRIBUNAL

TAX CHAMBER

THORNCROFT LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE WDF COVERDALE & MR GN BARRETT

Sitting in public at North Shields on 21st September 2010

Mr G Woodall, Director of Thorncroft Limited, for the Appellant

Mr R Chapman of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Thorncroft Limited (“Thorncroft”) is a manufacturer and supplier of soft drinks. It was registered for VAT with effect from 1st December 1991 under
5 Registration Number 568 5239 04.

2. By a letter dated 27th October 2008 (p51 in the Hearing Bundle), Thorncroft sought a decision from the Commissioners as to the VAT treatment of a range of products which it referred to as ice tea concentrate drinks (“the Drinks”). The letter described the range and the product process as follows:

10 We now plan an extended range of “iced tea concentrate” drinks for a private label customer, Whittard of Chelsea who you may know are tea specialists.

The range will include Earl Grey, Jasmine, Sencha with Peach flavour, Sencha with Pomegranate flavour, Wittard [sic] original (a black tea) with lemon, Chamomile, Roibos (also known as red bush tea), Very Very Berry (a Whittard
15 fruit tea blend), and Nettle.

The production process will be similar for all these drinks. A tea will be brewed in the normal way, but about fifteen times more strong than usual. i.e. using 1/15th or less the usual amount of water. Sugar will be added to make syrup at about 60 degrees Brix. The resultant syrup can be diluted with water,
20 hot or cold to make a tea drink, just as for the original Ginko Green Tea cordial.

3. The Ginko Green Tea Cordial referred by Thorncroft was a product which it had queried with the Commissioners in 2002 and 2003. The Commissioners advised by letter dated 10th October 2003 (p3) that this was a tea and so eligible
25 for zero-rating. The Ginko Green Tea Cordial is not a product covered by the decision which is the subject of this appeal.

4. By a letter dated 25th November 2008 (p55-61), Thorncroft further described the manufacturing process of the Drinks themselves, as follows:

30 These tea concentrates are all made according to the basic manufacturing process. Teas are brewed in the normal way by adding water to temperatures appropriate for the particular ingredient, varying from ambient to 80 degrees Centigrade, but in most cases at 55-60 degrees Centigrade. The proportion of tea to water is much greater than normal in order to make strong tea about thirty times the normal drinking strength of the tea, which is strained off,
35 filtered and mixed with the sugar to make a syrup at about 60 degrees Brix, which is then bottled and pasteurised without further additions or treatments. The only difference between this and the normal way of brewing tea is that it is stronger and that sugar is added directly after brewing rather than later in the cup. The syrups are then diluted about 15:1 for consumption as an “instant iced tea”, in a much more convenient form than tea brewed at home and then chilled.
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There are some variations for the different proposed teas as follows:

Jasmine- as the basic method above, made from Chinese Jasmine tea (green tea with jasmine flowers).

Earl Grey – as basic method (Earl Grey Tea is a black tea flavoured with oil of bergamot, a citrus fruit).

5 Black tea with Lemon. As above but before adding sugar a small amount of lemon juice and lemon oil is added. Although this may be seen as extraneous fruit addition which could turn this into a soft drink, we would argue that it would be unusual to offer a black (ie a fermented, not green or oolong) tea black (ie without milk) without the addition of lemon and that this is an essential part of a tea drink of this type, and that the form in which lemon is added to the concentrate is an exact analogy of this, both the juice of the lemon
10 (for acidity) and the oil (for the aroma) being required.

Sencha – as basic method above. Sencha is a Japanese green tea.

15 Gunpowder with Peach flavour – as basic method above with the addition of peach flavour. Gunpowder is a green china tea. Does the addition of peach flavour mean that this concentrate crosses the line between tea drink and soft drink in which tea is only one of the several ingredients? If this is the case, why would the same not apply to a powdered instant tea, or a normal dry tea with an added flavour? We suggest that this tea is simply a liquid (and better tasting) form of instant tea and should be zero rated like other instant teas.

20 Chamomile – as basic method above, made from chamomile flowers with no additional flavours or ingredients.

Gunpowder with spearmint – “Berber Whisky”. This brew, which is based on the national drink of Morocco, is made by the same basic method brewing Chinese Gunpowder tea with fresh spearmint leaves, according to the Moroccan custom.

25 Elderflower – as basic method above but the brewing liquid is acidified with a small addition of citric acid. The citric acid is added mainly to help with the stability of the infusion, not exactly a preservative, but an inhibitor of various spoilage processes. Does this mean that this concentrated tea becomes a soft drink attracting standard rate VAT? Or is the addition of an acidity regulator a technical process that does not change the essential nature of the drink as a herb infusion?
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Roibos – as basic method above. Roibos (or red bush) is a herb tea from Southern Africa.

35 5. In that letter dated 25th November 2008 Thorncroft sought a liability decision with regard to the above range of “iced tea concentrate syrups” drinks. Thorncroft considered that the products should be zero rated under Item 4 of the Items Overriding the Exceptions to Excepted Item 4 Group1 Schedule 9 VAT Act 1994 i.e. “tea, mate, herbal teas and similar products and preparations and extracts thereof”.

40 6. By letter dated 29th December 2008 the Commissioners informed Thorncroft's representatives that they had considered the matter and had determined that the products were standard rated syrups within item 4 of the Excepted Items i.e. “other beverages (including fruit juices and bottled waters) and syrups, concentrates...or other products for the preparation of beverages”.

7. Thorncroft did not accept the above decision and further correspondence took place on the matter. By letter dated 17th September 2009 (p91 and 92) Thorncroft informed the Commissioners that they had begun test marketing the drinks and had zero rated the supplies. By letter dated 7th October 2009 (p93 and 94) the
5 Commissioners informed Thorncroft that they considered the Drinks were standard rated under the VAT Act 1994 Item 4 Schedule 8 Group1.

8. Thorncroft has appealed the decision by a notice dated 28th October 2009. The grounds of appeal are as follows:

10 Tea drinks are zero rated for VAT and hitherto tea syrups have also been treated as zero rated (for example our own Ginko Green Tea Cordial, HMRC ref 181100/178748, attached). When we applied to HMCR for clearance for an extension of our range of tea syrups (ingredients: tea and sugar – nothing else) to be marketed as instant iced tea or iced tea concentrate we anticipated similar
15 treatment but instead we found a change of view which went so far as to say that the earlier clearance that determined that Ginko Green Tea Cordial should be zero rated was in fact wrong. Given that HMRC themselves have given contradictory advice concerning the correct VAT treatment for tea syrups it seems inevitable that a tribunal decision will be required to resolve the issue.

HMRC have argued:

20 1. That the addition of sugar to tea changes it from a tea drink into syrup and therefore changes its VAT status from zero rated to standard rated.

2. For syrups, guidance 9.13 applies so that syrups intended for flavouring of other drinks are zero rated whereas syrups intended to make “new drinks” are standard rated.

25 We argue in contrast:

1. The addition of sugar does not change tea into another drink and the original ruling that tea syrup should be zero rated, in common with instant teas, and “camp” coffee both of which may contain large amounts of sugar, and are competing products, remains correct. We rely on the guidance 9.4, 9.10 and
30 9.11 as well as the Tribunal decision in Snapple. Tea with added sugar remains tea, and this is the test.

2. The guidance in 9.13 does not apply here as tea drinks and preparations thereof are covered separately by the guidance under “item 4 of the items overriding the exceptions” and syrups are included in the exceptions which are
35 overridden in this case. This point appears to have been conceded by HMRC at least in relation to “camp” coffee.

Issues

9. The Commissioners have properly submitted that the following issues arise for determination:

40 (1) The legislative framework.

(2) The appropriate test.

(3) Whether or not the Drinks are teas.

The Legislative Framework

10. The VAT Act 1994, section 30 provides for items to be zero rated as set out in Schedule 8.

5 11. Schedule 8, Group 1, includes the following under the heading “General Items” at item 1 which are zero rated:

1. Food of a kind used for human consumption.

10 12. Schedule 8 Group 1 includes the following under the heading “Excepted Items” at item 4, which are therefore standard rated (being exceptions to the zero-rating):

4. Other beverages (including fruit juices and bottled waters) and syrups, concentrates essences, powders, crystals or other products for the preparation of beverages.

15 13. Schedule 8 Group 1 includes the following under the heading “Items Overriding the Exceptions” at item 4, which are therefore zero-rated (disapplying the exception to zero-rating):

4. Tea, mate, herbal teas and similar preparations and extractions thereof.

20 14. It is properly submitted by the Commissioners that the crux of the present appeal is whether the Drinks fall within Item 4 of the Excepted Items and are therefore standard rated, or within Item 4 of the Items Overriding the Exceptions and therefore zero-rated.

25 15. As mentioned above, reference has been made by Thorncroft to some guidance notes. These are Guidance, Notices, and Information Sheets relating to Beverages issued by HMRC and a copy of the Guidance Notes has been produced to the Tribunal by Mr Guy Woodall of Thorncroft Ltd who has attended the Tribunal today and made submissions and given evidence. The reference is V1- 07; paragraph 9.13 is one of several paragraphs that are relevant to this case and the Tribunal notes that it has now been re-labelled VFOOD7741 – Excepted Items: Beverages: Syrups for the Preparation of beverages. The Tribunal is aware that the Commissioners’ guidance is not determinative and has no legal force but it has been helpful for the parties and, indeed, the Tribunal to be able to refer to such guidance notes by way of assistance in focusing upon the issues in this case.

The Appropriate Test

35 16. It is submitted by the Commissioners that the appropriate test is whether the ordinary person would treat the Drinks as teas. This is the essence of a substantial part of the judgment in the case of *HMRC v Procter & Gamble Ltd* [2009] EWCA Civ 407 per Jacob LJ at paragraphs 21 and 22. This was also expressed as follows by the Tribunal in *Orchid Drinks Co Ltd v Commissioners of Customs and Excise*, MAN/95/2419, at paragraph 21 as follows:

21. In the same way we think that we should in this case ask ourselves the question, would the ordinary, educated Englishman, or “broad-minded” VAT payer” accept “Norfolk Punch” as a similar product to tea, mate or herbal teas?

5 17. In *Orchid Drinks* the Tribunal considered the liability of Norfolk Punch, a non-alcoholic bottled drink made from extracts of herbs, fruits and spices, sugar and honey. The appellant claimed that it was similar to tea, mate, or herbal tea and therefore zero-rated under item number 4 of the Items Overriding the Exceptions. The Tribunal found Norfolk Punch to be a dilute syrupy drink, not made by infusing leaves like ordinary tea or herbal tea with the herbal extract
10 only one of its ingredients and not the most significant by volume. It was not marketed or presented like tea and was unlikely to be regarded by its drinkers as an alternative to tea. It was found to be a beverage, not similar to tea, mate or herbal tea and therefore standard-rated. The appeal was dismissed.

15 18. The present case can be distinguished from *Orchid Drinks* because although the Drinks can be described as a dilute syrupy drink (see tasting observations below) they are indeed made by infusing leaves like ordinary tea or herbal tea and the leaves are a principal ingredient; the drinks are to be marketed or presented like tea (see below) and are likely to be regarded by their drinkers as an alternative to tea.

20 19. In the closely analogous case of *Snapple Beverage Corporation (now Quaker Oats Ltd) v Commissioners of Customs and Excise*, LON/94/1991A, the Tribunal considered item 4 of the Items Overriding the Exceptions which applies the zero rate to all varieties of leaf tea, powdered instant tea and tea bags but not to soft drinks containing tea which are generally fruit flavoured, containing tea as one of
25 many ingredients and compete in the same market as other soft drinks. One such product was a drink called Snapple Real Brewed Iced Tea in a variety of fruit flavours. Tea solids produced by drying dried brewed tea were incorporated during its manufacture. The appellant in that case argued that the product was either tea in its ordinary meaning or a preparation of tea and that the meaning of
30 the term should be looked at as it is today, which may not be the same as it was 20 years ago.

35 20. In *Snapple* the Tribunal found that tea within overriding item 4 is usually sold as leaf and if sold ready brewed would generally be standard-rated as by way of catering it would not normally contain flavourings other than lemon and it would be made with boiling water and not ready sweetened as a opposed to the hot but not boiling water and added glucose syrup used in producing Snapple. In that case the predominant taste was stated to be the fruit flavour and it would have been difficult to detect tea in a blindfold test. Overall it was not considered to be tea “pure and simple, in the ordinary use of the term” and the appeal was
40 dismissed.

21. The present case can be distinguished from *Snapple* because there are not so many ingredients in the Drinks. Tea is the principal ingredient. The predominant flavour is not fruit (see comments on taste below) and tea can easily be detected as a flavour.

22. In *Snapple* the Tribunal considered that the relevant factors for consideration were as follows:

5 It seems to us that in the present case we should consider the ingredients, the process of manufacture, the appearance and taste and, to a lesser extent, the packaging, marketing and user, and taking an overall general view, should decide whether Snapple is “tea” or a preparation of tea in ordinary English usage.

23. Notwithstanding the fact that the present case is distinguished from *Snapple* it is, nevertheless, appropriate to consider those four factors which will be addressed in turn.

10 24. With regard to the ingredients Thorncroft have clearly kept these as simple as possible. Tea is the principal ingredient. Further details appear at paragraph 4 above. Sugar is added to all of them in a substantial proportion (60% sugar, 40% strong tea extract). There are further additives to some of the teas: a small amount of lemon juice and lemon oil is added to “Black tea with Lemon”, peach flavour is added to “Gunpowder with Peach Flavour”; a small amount of citric acid is added to “Elderflower”. Otherwise, the teas are all made with leaves, hot water and sugar, together with flowers in the case of Chamomile tea and spearmint leaves in the case of Gunpowder with Spearmint.

15 25. The Tribunal has addressed the question of whether the addition of these further ingredients means that the concentrate crosses the line between a tea drink and a soft drink in which tea is only one of several ingredients. The amount of the additional ingredients is very small and the Tribunal concludes that the substance remains substantially tea. True tea is, of course, *Camellia sinensis* but the use of other herbs does not prevent infusions from being tea. Chamomile, Elderflower and Roibos can therefore properly be classified as ingredients of tea.

20 26. With regard to the process of manufacture this is simply done by the addition of hot, if not boiling, water, to dry leaves. This is how tea is made in a domestic scenario. Apart from a small addition of Citric Acid to the Elderflower tea and peach flavour to Gunpowder with Peach Flavour tea there are no additions of other chemicals or preservatives. Essentially, therefore, the Drinks are herb infusions.

25 27. Turning now to appearance and taste the Tribunal has had the benefit of tasting a number of the teas in question, samples having been brought to the Tribunal hearing by Mr Woodall. The concentrate was in bottles and this was suitably diluted with water. The Tribunal has been able to taste Earl Grey, Gunpowder with Peach Flavour, Elderflower and Roibos. Some observations by Mr Chapman, Counsel for the Commissioners, with regard to the taste of these items, are largely accepted by the Tribunal.

30 28. All of the Drinks tasted by the Tribunal were very sweet. Earl Grey had the distinctive Earl Grey flavour with a “finish” of tea on the tongue. Gunpowder with Peach Flavour was indeed particularly notable for the peach but it had an aftertaste of tea. Elderflower was similar to an Elderflower Pressee with the

predominant flavour being of elderflower but with no conventional tea taste. Roibos had a milder flavour with a finish of tea. In each case, therefore, while sweetness was the initial sensation nevertheless a flavour of tea was present if only as an aftertaste.

5 29. Engaging in semantics, for one moment, the Tribunal is attracted by Mr Woodall's argument that in each case the flavour is tea (whether it be *Camellia sinensis* or any other herb) while sugar has simply added taste. This is, in fact, an important observation because in the Snapple case it was emphasised that a fruit
10 flavour predominated; in the case of the Drinks the only flavour that can be said to predominate is tea. The Tribunal will not accept that the addition of sugar (albeit in substantial proportions) is sufficient to transform tea into a "soft drink".

30. The appearance of the Drinks is of a dark brown liquid, as would be expected of concentrated tea.

15 31. With regard to packaging Mr Woodall tells the Tribunal that the bottles produced today are not shown in their final packaging and the labels are only provisional. The final labels will be revised and refined. The labels seen today refer to "Iced Tea Concentrate" and "T time" (the T evidently referring to Thorncroft).

20 32. With regard to marketing the Drinks will be sold in bottles. Conventional leaf tea is, of course, sold in packets and not bottles but this is not considered to be significant. Mr Woodall has stated in correspondence that the Drinks will be targeted at the tea sections of supermarkets and specialist shops and are intended to compete with other teas, not other soft drinks that may be standard rated. This is important evidence because generally all soft drinks are standard rated for VAT
25 purposes and this includes (guidance notes V1-07 paragraph 9.6) syrups, crystals, powders and flavourings for making any standard-rated drink and soft drinks containing tea. It is clearly the intention of Thorncroft that the Drinks should not be included in the category of soft drinks at all.

30 33. The Tribunal concludes that, with regard to user, the Drinks will be used by the consumer as teas: they will be purchased as teas, described on the bottles as teas and served at home as teas. They will be considered as teas in ordinary English usage and as considered by the notional ordinary, educated Englishman or broad-minded VAT payer.

35 34. Factors that are considered by the Tribunal as not being of substantial importance in this case are the fact that the temperature of the water used in the infusion during the manufacturing process of the Drinks is 55-60 degrees rather than boiling; furthermore the addition of sugar after brewing, rather than in the cup, is clearly designed to appeal to a certain taste; the addition of other flavours has been mentioned above. The Tribunal further concludes that the syrup (i.e.
40 sugar) element of the Drinks merely adds a taste to a tea beverage without producing a new product; sugar is never the principal ingredient of the Drinks: it is an additive to the other ingredients (i.e. tea and water). Tea is the principal

ingredient. Without it the product would simply be sugared water and the addition in some instances of substances such as Peach Flavour and Lemon Juice would be insignificant.

5 35. On a number of occasions during this appeal reference has been made to
“Camp” Coffee which is a concentrated liquid form of coffee with sugar added. It
is clearly a very similar product to the Drinks; the Commissioners treat it as zero
rated; Mr Woodall wishes to rely upon this as a precedent for the treatment of the
Drinks. This is an attractive argument but it has not been necessary for the
Tribunal to address it as a prime issue because this case has been decided upon
10 the nature of the tea drinks being considered and debated today and in any case,
as the Commissioners have pointed out, “Camp” coffee is a zero-rated product
under Item Number 5 to the Items Overriding the Exceptions, the rationale being
that it is drunk as a substitute for coffee as well as being used in baking. It is Item
4 that has been considered by the Tribunal today namely “tea, mate, herbal teas
15 and similar products and preparations and extracts thereof”.

36. The Drinks are teas; they fall within Item 4 of the “Items Overriding the
Exceptions” in Group 1 of Schedule 8 of the VAT Act 1994; they are properly
zero-rated; this appeal succeeds.

20 37. 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)”
25 which accompanies and forms part of this decision notice.

30 **WDF COVERDALE**
TRIBUNAL JUDGE
RELEASE DATE: 1 November 2011