



TC04819

Appeal number: TC/2015/01759

VAT – zero-rating – whether a frozen fruit dessert “similar to” ice cream, ice lollies, frozen yoghurt and water ices – yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE FROZEN FRUIT COMPANY LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JONATHAN RICHARDS
JANET WILKINS**

Sitting in public at Fox Court, Brooke Street, London on 10 December 2015

Michael Ruse, director of the Appellant, for the Appellant

Mark Ratcliff, Officer of HM Revenue & Customs, for the Respondents

DECISION

1. This appeal concerns a decision that HMRC made on 5 February 2015 that
5 supplies that the Frozen Fruit Company Ltd (the “Company”) made of an “All Fruit
Frozen Dessert” product (the “Product”) are standard rated for VAT purposes. The
Company argues that supplies of the Product are zero rated since the Product consists
overwhelmingly of frozen fruit, whereas HMRC’s position is that the Product is
standard rated since it is similar to “ice cream, ice lollies, frozen yoghurt and water
10 ices”.

Evidence

2. There was no witness evidence on behalf of the Company.

3. Officer Lisa Shaw of HM Revenue & Customs, who made the decision against
which the Company appeals, prepared a witness statement explaining how, and why,
15 she made her decision. She supplemented that with some oral evidence at the hearing.
Mr Ruse did not cross-examine Officer Shaw and so none of her evidence was
challenged. We have accepted all of the evidence that she gave.

4. No samples of the Product were brought to the hearing as evidence. That was
unfortunate as we considered that it would have been helpful for us to experience
20 first-hand matters such as the texture, taste, appearance and presentation of the
Product. However, there was some documentary evidence on these matters in a
bundle of documents that Officer Ratcliff brought to the hearing. Both Officer Ratcliff
and Mr Ruse made submissions by reference to documents contained in that bundle.
Some of that evidence, particularly that relating to the taste, texture and appearance of
25 the Product as reported in reviews of it, was hearsay in nature. The authors of those
reviews did not themselves attend to give evidence, and so their views could not be
tested in cross-examination. However, neither Officer Shaw nor Mr Ruse objected to
the admissibility of this evidence and since the Company was not putting forward any
witness evidence and we could not ourselves examine the Product, we saw no real
30 alternative to considering this evidence in coming to our conclusions on the Product’s
properties.

5. Officer Ratcliff did, however, bring some samples of the tubs in which the
Product is sold.

Findings of fact

6. The findings of fact set out at [7] to [34] were either not in dispute or were
35 determined by us.

Overview of the Product

7. The Product is a fruit dessert which is available in three different flavours:
“Blackberryblue” (blackberry and blueberry), “Orangeberry” (orange and raspberry)

and “Strawgo” (strawberry and Alphonso mango). It is sold in 500ml and 120ml tubs. It was common ground that the Product consists only of frozen fruit with no added water, sugar or other ingredients except an amount of xanthan gum amounting to some 0.2% of total ingredients¹. It was also common ground that the Product is
5 designed to be eaten frozen, although there are ways in which the Product can be used other than in its frozen state.

8. We make more detailed findings on various aspects of the Product in the sections below.

Packaging

10 9. As we have noted above, the Product is sold, frozen, in 500ml and 120ml tubs. Those tubs include a spoon, so someone purchasing the Product could, if they wished, eat it straight from the tub. Mr Ruse agreed with Officer Ratcliff’s submission that these tubs were similar to ice cream containers.

15 10. Words on the sides of the tubs describe the Product as a “frozen fruit dessert”. They contain no instructions on defrosting the Product.

Appearance and texture of the Product inside the tub

11. We have found it difficult to make findings on these issues given that we were not given a sample of the Product itself and the copies of photographs of the Product contained in the hearing bundle were of poor quality.

20 12. Some photographs of the Product suggested that it was dark in appearance. One on-line review of the Product on a “Yum Dim Sum” blog said:

25 Popping off the lid, I was surprised at just how dark the dessert was. Ice cream is obviously a pastel colour, and even sorbet is much lighter than this. I suppose the lack of other ingredients keeps the colour of the fruit pure.

30 13. However, without having seen any actual samples of the Product, we could not say whether this dark appearance was true only of the “Blackberryblue” version of the Product which, being made from blackberries and blueberries could be expected to be dark. Nor was it clear whether the statement above was indicating whether the “Blackberryblue” version of the Product was darker in appearance than ice cream or sorbet generally, or darker than ice cream or sorbets made out of blackberries and blueberries would be. We are not able, therefore, to conclude on a balance of probabilities that the Product is darker in appearance than ice cream or sorbet made from similar fruits.

¹ Mr Ruse submitted that the Product no longer includes xanthan gum but accepted that, even though he is a director of the Company, he is not close to the manufacturing process of the Product. We therefore did not accept Mr Ruse’s submission as evidence and have proceeded on the basis that, at all times material to this appeal, 0.2% of the Product is made up of xanthan gum.

14. We had similar difficulties in determining the texture of the Product. The Company, in submissions it made to HMRC in a letter which HMRC received on 21 July 2014, said that

5 In terms of the texture of our goods, consumers and buyers always comment that they have a very mousse/jam like texture.

15. However, the Yum Dim Sum blog referred to at [12] said that samples of the Product they tasted:

 ...start out with that lovely ice/raspy texture sorbet has, and as they warm become soft and juicy.

10 16. On 27 February 2014, the Daily Mail published a review of the Product stating that the Company

 ...have created a sorbet-type product that is literally made of pureed fruit, with a super-soft texture from the teeniest bit of xanthan gum (a natural product with a silly name).

15 17. It is clearly very difficult to make findings as to the texture of a product that we have not seen. The evidence that we have seen, referred to at [14] to [16] points in different directions. We note that the Company's letter of 21 July 2014 was, quite reasonably and properly, seeking to persuade HMRC of the differences between the Product and ice cream or sorbet. By contrast, the Yum Dim Sum blog and the Daily
20 Mail review were not prepared with any such considerations in mind. We have concluded that the latter sources are more likely to be correct and have concluded that the texture of the Product is similar to, but, because of the xanthan gum, softer than, that of sorbet.

25 *Ingredients of the Product as compared with the ingredients of ice cream, frozen yoghurt and sorbet*

18. As we have noted, it was common ground that the Product consists only of frozen fruit and no other added ingredients with the exception of the xanthan gum. The water in the Product comes entirely from the fruit with which it is made and the sweetness of the Product comes entirely from fructose within that fruit rather than
30 from added sucrose.

19. At the hearing, there was some discussion as to ingredients of ice cream, frozen yoghurt and sorbet. Neither HMRC nor the appellant submitted any evidence on that issue. It seemed to us that no evidence would be needed for the obvious proposition that ice cream and frozen yoghurt contain ingredients other than fruit (in particular
35 milk and/or cream). However, the position with sorbet was less obvious. We asked the parties whether the hearing should be adjourned in order to enable evidence on this point to be assembled. Both parties were agreed that no such adjournment was needed as they were content to proceed on the basis that the vast majority of ice cream, sorbets and frozen yoghurts would contain added ingredients other than fruit.

Taste

20. We were not able to taste the Product ourselves. However, the parties were agreed that it tasted of fruit which is scarcely surprising given that 99.8% of it consists of fruit.

5 *The process of manufacturing the Product*

21. For reasons of commercial confidentiality, we will not set out full details of the process by which the Product is made. In essence the process involves mixing fruit in particular ratios, pulping and blending that fruit until smooth, adding the gum and freezing the mixture in a particular way.

10 22. We had no evidence before us of the process used to manufacture ice cream, sorbet or frozen yoghurt. Mr Ruse accepted that there were “similarities” between the manufacturing processes of the Product and of ice cream. We were shown an extract from a blog entitled “Your Source Today” that described the Product and how the founders of the Company, Victoria and Michael Philippou devised it, in the following
15 terms:

The Frozen Fruit Company is the brainwave of Victoria and Michael Philippou, who have given up their careers as City lawyers to launch their exciting new desserts.

20 And after months of chopping, mixing and tasting in their kitchen, plus a lorry-load of fruit and four ice-cream machines later, they found the perfect blend of taste and healthy ingredients.

23. That suggests that Victoria and Michael Philippou used ice cream machines when they were developing the Product. But it does not shed any real light on the question of whether, and if so how, the process of manufacturing the Product is
25 different from the process of manufacturing sorbet, ice cream or frozen yoghurt.

24. Overall, it is clear that the parties agree that there are “similarities” between the process of manufacturing the Product and the process of manufacturing ice cream. However, we had no evidence as to how strong or weak those similarities were. If the Company wished to rely on any material difference between the respective processes,
30 it would have the burden of demonstrating those differences and it has not satisfied us that there is any material difference.

Marketing of, and consumers’ response to, the Product

25. We were shown a print-out of a page on the Company’s website dated 3 September 2014. That described the product as:

35 At last ... the exquisite and healthy alternative to ice cream sorbet and frozen yoghurt

26. We saw an extract from the UK Trademark Register that registered the word “Strawgo” as a trademark in “Class 30 – Staple Food Products – frozen fruit desserts”

and in “Class 29 – Meals and processed foods – fruit desserts; healthy dessert products”.

27. We saw a range of quotes from food blogs and reviews, some of which we have already quoted that described the products variously as

- 5 Guilt free ice-cream alternatives
- Saintly sorbet substitutes
- Alternatives to traditional ice-cream

28. Having read those quotes in their full context, we were satisfied that the authors of those quotes were not describing the Products as “alternatives” or “substitutes” because they considered the Products were completely different from ice cream or sorbets but rather because they had the desirable features of ice cream or sorbet, but were healthier as a consequence of being made entirely from natural ingredients.

29. Mr Ruse accepted that the Product is in competition with ice cream, sorbets and frozen yoghurt but contended that marketing and advertising materials were simply “marketing fluff” that were not relevant to the true characterisation of the product for VAT purposes. We will return to that objection when we consider the characterisation of the Product in the light of the facts that we have found. However, at this stage we will simply express our conclusion that the Company markets the Product as a frozen fruit dessert which has similar properties to ice cream and sorbet, but is to be preferred to those products by virtue of being made entirely from fruit with no added artificial ingredients. We also conclude that at least some reviewers of that Product agreed with the Company’s description of the Product.

Way in which the Product is consumed

30. We have already noted at [29] that the Company markets the product as a “frozen fruit dessert”. In a letter of 26 August 2014 to HMRC, the Company listed a number of ways in which the Product could be used that did not involve consuming it in its frozen state. We will not list all of these (as the list was lengthy) but will set out the first ten alternative uses advanced to give an indication of the propositions that the Company was advancing.

- 30 As an ingredient to baby/infant food when defrosted
- As an ingredient to cake base or mix
- In cheesecake – either in the place of cheese or to flavour the biscuit base
- Blended into alcoholic cocktails
- 35 Blended with champagne to make a Bellini
- As a milk/dairy replacement
- As a milk replacement on granola/cereal
- Jam replacement

Jelly if mixed with gelatine

As the filling to deep fried filo pastry balls

5 31. Officer Ratcliff suggested that ice cream or sorbet could be used in similar ways to those set out by the Company in its letter. However, we had no evidence on this point and, moreover, Officer Shaw accepted in her evidence that the Product is “more versatile” than other frozen desserts such as ice cream and sorbet.

10 32. We have, therefore, concluded that there are a number of ways in which the Product can be consumed that do not involve eating it in its frozen state and that the Product is more versatile than ice cream, sorbet or other frozen desserts in this respect.

“Uniqueness”

15 33. Mr Ruse submitted that there was no other product on sale in the United Kingdom similar to the Product (in the sense of being made entirely of fruit). He made that submission in the course of an argument that, because there was no other product similar to the Product, it followed that the Product could not be similar to ice cream, frozen yoghurt, sorbet or ice lollies.

20 34. However, Mr Ruse produced no evidence for this assertion. In the absence of any evidence as to products generally sold as frozen desserts in the United Kingdom, we are not satisfied on a balance of probabilities that the Product is unique (or close to it).

The law

35. It was common ground that, if supplies of the Product were not zero rated, then they were standard rated for VAT purposes.

25 36. Section 30 of the Value Added Tax Act 1994 (“VATA 1994”) provides for supplies of goods or services falling within Schedule 8 of VATA 1994 to be zero rated for VAT purposes. Schedule 8 consists of a number of Groups. Group 1 (being ‘Food’) provides for zero-rating to apply to

The supply of anything comprised in the general items set out below, except—

- 30 (a) a supply in the course of catering; and
(b) a supply of anything comprised in any of the excepted items set out below, unless it is also comprised in any of the items overriding the exceptions set out below which relates to that excepted item.

37. These “general items” include:

- 35 1 Food of a kind used for human consumption.

38. Included within the “excepted items” are:

1 Ice cream, ice lollies, frozen yoghurt, water ices and similar frozen products, and prepared mixes and powders for making such products.

39. The terms used within this definition are all well understood with the possible exception of “water ices” which we considered to be a somewhat old-fashioned term.
5 The Oxford English Dictionary gives the following definition of “water-ice”:

A frozen flavoured refreshment or dessert made with water and sugar, and typically no dairy ingredients.

40. Therefore, since there was no dispute that the Product is “food of a kind used for human consumption”, it will be zero rated unless it falls within excepted item 1 referred to at [38] above.
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41. We were referred to the decision in *Ross Young Holdings Ltd*, [1996] VATDR 230 (VTD 13972) which determined that the concept of “similar frozen products” embraced any frozen product that was similar to any of ice cream, ice lollies, frozen yoghurt or water ices and not merely to products similar to “water ices” (the last product specified in the list). We respectfully agree with that decision and follow it.
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Discussion

The issue to be decided and the test to apply

42. HMRC are not arguing that the Product is itself an ice cream, ice lolly, frozen yoghurt or water ice (although given the dictionary definition of “water ice” set out at [39], we would have thought it at least arguable that the Product is a “water ice”).
20 Rather, HMRC are arguing that the Product is a “similar frozen product” within the terms of excepted item 1 and accordingly, the question to be determined is (i) whether it is a “frozen product” and (ii), if so, whether it is “similar to” at least one of these.

43. Mr Ruse’s argument was simple. He said that, since it was common ground that (with the exception of the small amount of xanthan gum) the Product consists only of frozen fruit, supplies of the Product should be zero rated on exactly the same basis that supplies of frozen fruit are zero rated. He submitted that this conclusion should not be affected by the fact that the fruit has first been pulped to make the Product or that the Product consists of different types of fruit pulped together. In short, Mr Ruse’s submission was that the Product was no different from frozen fruit and should have the same VAT treatment as frozen fruit.
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44. We do not agree with that submission. The exception referred to at [38] is not concerned only with the ingredients of the Product; it is also concerned with the question of whether (i) the Product is a “frozen product” and (ii) whether it is “similar to” other types of frozen product. Moreover, we do not agree that the Product can fairly be described as being nothing more than frozen fruit for the same reasons that one cannot describe a cake as being nothing more than flour, butter, sugar and eggs. The frozen fruit is subjected to a process in order to make the Product and describing the Product by reference only to its ingredients ignores that process.
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45. The parties were in broad agreement that the “similar to” question needs to be determined by reference to the perspective of the “reasonable man”, although no authority was cited to us for this proposition. Having reviewed relevant authorities ourselves, we agree broadly with the parties’ agreed approach but will expand on it somewhat.

46. The perspective of the “reasonable man” is indeed a useful way of approaching the question. As Woolf LJ said in *C&EC v Ferrero UK Ltd* [1977] STC 881

... the words in the statute must be given their ordinary meaning. What is relevant is the view of the ordinary reasonable man in the street.

47. The case of *Ferrero* concerned the question of whether an item was a “biscuit” or not. Woolf LJ went on to amplify on the passage above saying:

We must give the word biscuit its ordinary meaning and must ask what view would be taken by the ordinary man in the street, who had been informed as we have been informed.

48. The passage above makes it clear that we should not concern ourselves unduly with the question of how much a reasonable man might expect to know about the manufacturing process of the Product, or its precise ingredients. That is because the perspective that is to be applied is that of a reasonable person who has the same knowledge as the Tribunal of those matters. Jacob LJ emphasised this point in his judgment in *Revenue & Customs Commissioners v Procter and Gamble* [2009] EWCA Civ 407 saying, at [21]:

To my mind this approach is saying no more than "what is the reasonable view on the basis of all the facts" – it does not matter if some of the facts would not be known to the "man in the street." That is why the test accepted as proper in *Ferrero* adds "who had been informed as we have been informed." The uninformed view of the man in the street is deliberately not being invoked.

49. Toulson LJ agreed with that approach saying at [63]:

I rather regret the introduction of the ordinary man in the street into this area, because I do not regard it as necessary and it has led on to a distracting argument about what knowledge should be attributed to that hypothetical person. I agree with Jacob LJ that the approach approved in *Ferrero* really amounted to saying no more than that it was for the Tribunal to decide what was the reasonable view on the basis of all the facts known to the Tribunal; and it conveys that this is not a scientific question. In determining that question I do not see that any advantage is gained by referring to the hypothetical ordinary person in the street.

50. We will follow that approach and will address the question of classification by forming a reasonable view based on the facts that we have determined.

“Frozen product”

51. We are satisfied that the Product is a “frozen product”. As we have noted at [9], the Product is sold in a frozen state. It is described on the tubs in which it is sold as a “frozen fruit dessert”. The spoon sold with the Product is plainly designed to enable the Product to be consumed straight from its tub while frozen.

“Similar to”

52. We considered that the similarities between the Product and the items listed in excepted item 1 are as follows:

- (1) It is designed to be eaten frozen (see [7] above).
- 10 (2) Its packaging resembles packaging used for ice cream (see [9] above).
- (3) Like a “water ice”, it is made with water, sugar and no dairy ingredients, although its water comes solely from the fruit with which it is made and the sugar is fructose coming from that fruit rather than being added sucrose (see [18]).
- 15 (4) We have concluded, on a balance of probabilities, that its texture is like that of sorbet but somewhat softer (see [17]).
- (5) We were not satisfied that there is any material difference between the manufacturing process of the Product and the manufacturing process of ice cream (see [24]).
- 20 (6) It is marketed as a healthy alternative to ice cream and sorbet (see [25] above) and consumers respond to it in that way (see [27] to [29] above).

53. Aspects in which the Product is dissimilar to the items listed in excepted item 1 are:

- 25 (1) The Product is made entirely from fruit with the addition of a small amount of xanthan gum (see [7] above).
- (2) The Product is more versatile than the items listed in excepted item 1 as it can be consumed in ways that do not involve eating it in its frozen state (see [32] above).

54. The elements of similarity are more numerous than the elements of dissimilarity. Moreover, we consider the elements of dissimilarity to be of less weight than the elements of similarity. For example, we do not consider that a reasonable person would consider the versatility of the Product to be a particularly strong indicator of dissimilarity. In addition, while the fact that 99.8% of the Product is made from fruit clearly is an indicator of dissimilarity, it does not alter the fact that the Product, like a “water ice”, is a frozen dessert made with water, sugar and no added dairy products; it simply means that the water in the Product comes from the fruit itself and the sugar in the Product is fructose that comes from the fruit itself rather than being sucrose that is added separately.

55. As we have noted at [29], Mr Ruse submitted that the Company’s marketing of the Product was simply “marketing fluff” that was not relevant to its characterisation for VAT purposes. We consider that a reasonable person would have a degree of healthy scepticism in relation to marketing material as he would be aware that such material is designed to increase sales. However, we do not consider that a reasonable person would regard marketing material as completely irrelevant to the question of whether the Product is “similar to” a water ice particularly where that marketing material was consistent with his or her own views of the product. Since, as we have found at [29], a number of food reviewers had a similar response to the Product to that which the Company was seeking to promote, we conclude that a reasonable person would regard marketing material as relevant in the circumstances of this appeal.

56. We consider that a reasonable person, fully informed of the factors outlined at [52] and [53] would consider that the Product is, at very least, similar to a “water ice”. In fact, we consider that a reasonable person might conclude that the Product is itself a “water ice” but, since HMRC did not argue the appeal on that basis, we will not make any determination to this effect.

Conclusion

57. The Product is a frozen product that is similar to a “water ice”. As such it falls within excepted item 1 referred to at [38] above and supplies of it are not zero rated.

58. The appeal is dismissed.

59. 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.

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JONATHAN RICHARDS

TRIBUNAL JUDGE

RELEASE DATE: 11 JANUARY 2016

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