[2014] UKUT 0204 (TCC)
Appeal number: FTC/32/2013

VALUE ADDED TAX – whether certain kinds of dog food were pet food – meaning of "meal" in expression "biscuits and meal" in zero-rating schedule

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

ROGER SKINNER LIMITED

Respondent

TRIBUNAL: MR JUSTICE NEWEY

Sitting in public in London on 31 March and 1 April 2014

Miss Eleni Mitrophanous, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Mr Michael Conlon QC and Miss Anne Redston, instructed by Gotelee Solicitors, for the Respondent

DECISION

Introduction

1. This case is concerned with whether certain dog foods sold by the respondent, Roger Skinner Limited ("Skinner"), between 1980 and 2009 were zero-rated as "animal feeding stuffs" within schedule 8 to the Value Added Tax Act 1994 ("the VATA"). The question turns on whether the foods were either "pet foods" or "meal" for dogs within the meaning of the schedule. The First-tier Tribunal (Judge Barbara Mosedale and Mr Nigel Collard) held that the relevant foods were largely zero-rated. HM Revenue and Customs ("HMRC") appeal against that decision ("the Decision").

Basic facts

2. Skinner has been selling dog food since 1980. Initially, it sold products known as "Skinner's Dog Food" ("Dog Food") and "Skinner's Dog Meal" ("Dog Meal"). The two were of similar composition, but the latter, unlike the former, was not made into pellets and, as a result, looked somewhat like muesli. Like the other dog foods at issue, both were complete foods: there was no need to give a dog any other food.

3. In 1987, Skinner introduced "Skinner's Protein 23" ("Protein 23"). This, too, was a complete food. In contrast with Dog Food and Dog Meal, Protein 23 was an "extruded" food.

4. "Skinner's Ruff & Ready" ("Ruff & Ready") followed in 1990 and is still on sale today. This is a moist muesli for dogs.

5. In addition to the products that it sold under its own name, Skinner supplied two concerns with food that they sold under brands of their own. The products in question, Waveney Gold and Crane Dog Food ("Crane"), were not very different from Ruff & Ready. Skinner sold each of them between 1989 and about 2004.

6. The foods at issue in the present proceedings are those mentioned in the last four paragraphs.

7. Mr Skinner, who was a director and chairman of Skinner until he retired from the business in 1997, formulated the various products with working dogs in mind. While, however, they were suited to gun dogs and other working dogs, they were also suitable for pet dogs. The First-tier Tribunal ("FTT") found (at paragraph 50 of the Decision) that the food was "a good quality food which could be fed safely to any dog but was particularly suitable for active dogs, whether pets or working dogs".

8. Early on, the two products Skinner was then selling (viz. Dog Food and Dog Meal) were packed in 20kg bags (the "size of an agricultural feed sack") bearing a sketch of a golden retriever (the "archetypal gun dog" but also a very popular pet). At some point in the 1980s, Skinner started using the strapline "Carefully balanced food for all dogs" on its bags, and bags also came to say "Delicious and nutritionally complete dog food for all breeds" (in the case of Dog Food, Dog Meal and Ruff & Ready) or "suitable for *all* dogs, and particularly for those dogs with a high energy requirement, such as hunting dogs and working dogs" (in the case of Protein 23). At this stage, the bags had a "very agricultural presentation".

9. New bags came into use in about 1998. These were plastic and had more detailed and sophisticated artwork. A feeding guide included pictures of dogs and examples of types of breed. Not all of those pictured or mentioned were breeds used as working dogs.

10. All the foods were mainly sold in 20kg bags, but small quantities were sold in smaller bags. The FTT accepted evidence to the effect that the owners of working dogs occasionally wanted small bags (e.g. when on shooting weekends).

11. Mr Skinner's strategy was to advertise his company's products by visiting gun dog breeders and trainers and exhibiting at field trials and country shows. The company was represented at some 12-15 events a year, and Crufts, which was not attended very often, was the only one of the events to include sections for pets.

12. Skinner also advertised in working dog magazines. It did not place advertisements in magazines concerned with show dogs or in general pet dog magazines. Sales representatives were told to hold the food out as suitable for all dogs, but also primarily to stress the products' suitability for gun dogs.

13. From the mid-1980s, Skinner produced a marketing leaflet, "Fit for Life". This gave great prominence to an article headed "Gundogs", but it also referred to pets. It stated, "No supplementation whatever is needed to sustain healthy life for the pet or working dog", and, while many of the dogs featured were used as working dogs, one dog had a bow on its head. The FTT concluded that a successor leaflet would also have had at least some representations that the company's products were suitable for pet dogs.

14. Skinner set up a website in 2002. By 2010, the two relevant foods that were still in production (namely, Dog Meal and Ruff & Ready) were sold in the category designated "for domestic pets" rather than the category "for working dogs". However, a page accessed from the question "what product suits you" had a "pets" option, and the products which came up under this option did not include any of the foods at issue. The FTT found that, having worked hard to ensure that its "Field & Trial" range of food (as to which, see paragraph 18

below) would be entitled to zero-rating, Skinner "did not [choose] to list the food that was not accepted by HMRC [as] having zero rated status with the range that did have such status" (paragraph 73 of the Decision).

15. As for the customer base, the FTT found that Waveney Gold and Crane were bought by people with working dogs who lived locally to the two agricultural companies that supplied them. The FTT also said this (in paragraph 92 of the Decision):

> "The evidence from the day books shows that originally many of the buyers were dog owners, breeders or trainers or suppliers thereto: over time [Skinner] was less able to state who the consumer of the food would be as a much larger percentage of its supplies were to intermediaries. By 1993 68% of buyers (measured by name not quantity) were not known to be working dog owners, breeders, trainers or suppliers thereto. We find this is consistent with the explanation we were given of the [company's] sales strategy over time which evolved from word of mouth in 1980 to agents and on to established business intermediaries."

16. A Mr Hart, who worked for Skinner between 1990 and 2000, wished to make the company's products attractive to a wider audience and, in particular, to pet dog owners. To this end, he had the words "special 20kg pack – a third more food than standard 15kg bags" added to the company's bags, and customers were given leaflets when deliveries were made. On this aspect, the FTT said this (in paragraph 119 of the Decision):

> "[Mr Hart's] evidence, which we accept …, was that he was 'singularly unsuccessful' in holding out [Skinner's] claim products for sale to pet dog owners. He managed to grow the [company's] sales during his time in office, but only by creating a market for it amongst gundog owners on the continent. Mr Hart summed up his evidence by saying 'the reality of our offering is that it was about working gundogs'."

17. In about 1996, Skinner changed its logo so that it stated, "pet food manufacturers".

18. Skinner introduced its "Field & Trial" range in 1998 in response to competition and also to "HMRC's acceptance that specifically labelled and formulated working dog food could be zero rated" (paragraph 93 of the Decision). Sales of the foods in dispute all then declined, and production of most of them was in time discontinued. As regards, however, Ruff & Ready (see paragraph 97 of the Decision):

> "Its sales dropped by about one third shortly after the introduction of *Field & Trial* and then sales stabilised at this lower level of £60,000-£90,000 per month. It remains in production."

The legislative framework

19. Under section 30 of the VATA, a supply of goods or services is zero-rated for VAT purposes if the goods or services are of a description specified in schedule 8 to the Act. Among the goods so specified, in Group 1 of schedule 8, are "Animal feeding stuffs". However, Group 1 contains a list of "Excepted items" which are standard-rated unless also found in a list of "Items overriding the exceptions". The "excepted items" include these:

> "6. *Pet foods*, canned, packaged or prepared; packaged foods (not being pet foods) for birds other than poultry or game; and biscuits and *meal for* cats and *dogs*"

(emphasis added in each case).

20. In the past, HMRC maintained that all canned or packaged food for dogs was standard-rated for VAT purposes. In 1994, HMRC accepted that food specifically for greyhounds was zero-rated, but they continued to take the view that dog food was otherwise subject to standard-rate VAT. It was not until 2002 that HMRC recognised that food for dogs other than greyhounds could be zero-rated. In Notice 701/15/02 *Animals and animal food*, HMRC stated:

> "If a specially formulated food is held out for sale exclusively for working dogs it will come within the scope of the VAT relief – unless it is biscuit or meal."

21. By then, a number of Tribunal decisions had proceeded on the basis that food for dogs need not be "pet food": see e.g. *Popes Lane Pet Food Supplies Ltd* [1986] VATTR 221, *Norman Riding Poultry Farm Ltd* [1989] VATTR 124 and *P A Peters & K P Riddles t/a Mill Lane Farm Shop* (LON/94/1221). In the *Popes Lane* case, for example, the Tribunal concluded that "the great majority of the Appellant's sales consisted of foods, to some degree packaged and prepared, which were produced and offered for sale by the Appellant as foods for animals generally (carnivorous animals, of course) rather than as foods primarily for pets, and … it is the latter class alone which is within excluded item 6". Earlier in its decision, the Tribunal had said:

> "What are 'pet foods'? In my judgment they are foodstuffs which are offered by the supplier as being food primarily intended for pets, irrespective of the recipient's intention ….
>
> At the hearing, a substantial part of the evidence and the argument related to the Appellant's name and its advertising, which, it was

> argued [on behalf of HM Customs and Excise], meant that all of the Appellant's foodstuffs were offered as pet foods. I do not accept that argument. If a supplier holds out a particular product as being intended primarily for pets, or if he holds himself out as supplying pet foods and nothing else, I should have no difficulty in holding that in the former case the product is, and that in the latter case all of the products are, 'pet foods'. In the present case however, with some possible exceptions to be mentioned later, the Appellant has not held out any of its products as being primarily intended for pets, nor in my judgment has it ever held itself out, by its name, its advertisements or otherwise, as a supplier of pet foods only."

The Decision

22. The FTT concluded that, with the exception of Ruff & Ready from 2000, the dog foods at issue were neither "pet foods" nor "meal for … dogs" within the meaning of schedule 8 to the VATA.

23. With regard to when dog food is "pet food", the FTT did "not agree with HMRC that just because a food is suitable for a particular animal it is necessarily food for that sort of animal" (paragraph 157 of the Decision). A food suitable to be eaten by pet dogs will not necessarily, therefore, be "pet food". Whether such a food is "pet food" depends on how it is held out for sale (see paragraph 159). The question is "what was *objectively* … the holding out" (paragraph 184). As to that, it is necessary to "look at the overall holding out by the supplier, of which the packaging is a part, but not necessarily a determinative, part" (paragraph 173). It is, the FTT said, "the objectively determined intentions of the supplier that matters in order to decide whether the food was intended 'for' pets" (paragraph 165).

24. On the facts, the FTT explained its views as follows:

> "176. We do not find that the packaging gave an unambiguous representation that it was suitable for all dogs including pets. We accept the evidence that the package itself (up to the new bags in 1998) were agricultural in appearance, unusually large for pet food, and the food itself (with the exception of *Protein 23* and *Ruff & Ready*) not of the normal appearance of pet food. For these reasons, we do not consider that the packaging by itself represented the food as suitable for pets. It gave mixed messages.
>
> 177. But in any event, we are unable to agree that the packaging is determinative of the question in this case. While in many cases … the packaging was the only or main way in which the manufacturer made representations about its product to the ultimate consumers, in this case on the facts it is clear that [Skinner] made representations about its product to consumers by many other means. It attended shows and

field trials, it relied on word of mouth and recommendations by its agents; it sponsored gundogs; and it relied on its sales reps to go direct to kennels and promote the food as gundog food.

178. We find the packaging was not the only nor even the main method [Skinner] utilised to make representations about its product to would-be consumers. For this reason, too, the change in the logo in 1990 would have been insignificant at least to its claim products.

179. We do agree with [counsel for HMRC] that at shows and trials the packaged product would have been on display, nevertheless the evidence was that the stalls were manned. We did not have direct evidence on what was said at such events to prospective customers but we do not find that [Skinner] represented the food to be pet food. We find it represented the food to be gundog food. This follows because

(1) the evidence of all the witnesses, both from [Skinner] and from other businesses was that the market saw Skinner's food to be gundog food …;
(2) most shows attended were for gundogs;
(3) [Skinner] sponsored gundog events;
(4) its consumer base was gundog owners and owners of other working dogs ….

In these circumstances we find that the representations made by [Skinner] were that the food was gundog food and working dog food.

180. Further, we consider that it follows that the packaged product would in many cases have been available in a shop, but we find … that the shop only stocked the product where [Skinner] had already created a demand for it so we find the consumers would not have been relying on the packaging when deciding to buy it.

181. It is of course possible that other persons, not being gundog owners, bought the product if it was displayed in retail shops such as a farm shop. As they would have had no contact with [Skinner], they must have relied on the packaging and there was nothing on the packaging that suggested it was food only for gundogs. Our finding of fact is that such sales were minimal: this is because (1) it was Mr Hart's unchallenged evidence that his attempts to broaden the customer base to pet owners were unsuccessful; (2) as a matter of fact the introduction of Field & Trial led to the discontinuance of all claim products bar one indicating that [Skinner's] market truly was working dogs only. We find … that occasional sales of the food as pet food are irrelevant where the overall holding out was, as we find it was, (bar the exception discussed below in paragraph 192-193) that the food was gundog food."

25. Overall, the FTT found that, except as regards Ruff & Ready from 2000 onwards, "objectively [Skinner] held the food out as gun dog food" (paragraph 186 of the Decision). So far as Ruff & Ready is concerned, the FTT said (in paragraph 193):

> "we find in respect of Ruff & Ready [Skinner] has failed to prove that its sales after 1998 were the result of pre-1998 holding it out as working dog food rather than post-1998 representations (via its website and packaging) as suitable for all dogs."

Skinner had, accordingly, "failed to make out its case that its sales of Ruff & Ready after demand for it stabilised in about 2000 were not as pet food" (paragraph 198).

26. The FTT also rejected HMRC's submission that the foods at issue were for the most part "meal for … dogs". The FTT summarised its conclusions on this aspect of the case in these terms:

> "251. In excepted item 6 of group 1 of Schedule 8 VATA 'meal' means a mixer for use with meat or canned dog food made primarily from wheat flour with other ingredients and baked; and in particular made from the same or similar ingredients to a dog biscuit and baked in the same way but crumbled or broken up rather than cut into shapes.
>
> 252. 'Meal' had only one meaning in this context.
>
> 253. During the claim period, [Skinner] did not manufacture dog biscuits nor dog meal in the sense of this baked mixer food. All the claim products were complete foods in the sense of being nutritionally complete feeds.
>
> 254. Therefore, we reject HMRC's case that some of the claim products were standard rated as meal'."

The scope of the appeal

27. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 provides for a right of appeal to the Upper Tribunal on a "point of law arising from a decision made by the First-tier Tribunal".

28. Guidance as to the grounds on which factual findings can be challenged on appeal is to be found in *Edwards v Bairstow* [1956] AC 14. Viscount Simonds there said (at 29) that a finding of fact should be set aside if it appeared that the finding had been made "without any evidence or upon a view of the facts which could not reasonably be entertained". Lord Radcliffe (at 35) quoted a passage from a judgment of Lord Normand in which the latter had said that an appellate Court could intervene if the lower tribunal had "misunderstood the

statutory language" or had "made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it". Lord Radcliffe went on to say this (at 36) about the position where "the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal":

> "I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

29. The decision of the Court of Appeal in *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] STC 1990, where the question was whether "Pringles" were standard-rated rather than zero-rated because they fell within Item 5 of the "Excepted items" in Group 1, indicates other limits on the circumstances in which an appellate Court should intervene. Jacob LJ said (in paragraph 9):

> "Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that it so, an appeal court (whether first or second) should be slow to interfere with that overall assessment—what is commonly called a value-judgment."

Further, Jacob LJ (like Mummery and Toulson LJJ – see paragraphs 48 and 73) drew attention to the fact that the appeal before the Court was from a specialist tribunal. Jacob LJ observed (in paragraph 11):

> "It is also important to bear in mind that this case is concerned with an appeal from a specialist tribunal. Particular deference is to be given to such tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker; see per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* …."

Jacob LJ described the issue for an appellate Court in these terms (in paragraph 22):

> "So one can put the test for an appeal court considering this sort of classification exercise as simply this: has the fact finding and

> evaluating tribunal reached a conclusion which is so unreasonable that no reasonable tribunal, properly construing the statute, could reach?"

For his part, Mummery LJ said (in paragraph 74):

> "I cannot emphasise too strongly that the issue on an appeal from the tribunal is not whether the appellate body agrees with its conclusions. It is this: *as a matter of law, was the tribunal entitled to reach its conclusions?*"

Pet foods?

30. Miss Eleni Mitrophanous, who appeared for HMRC, challenged the FTT's conclusions on whether the products in dispute were "pet foods". Miss Mitrophanous argued that all the relevant foods should have been held to be "pet foods". Her submissions on this part of the case can be conveniently addressed under the following headings:

    (a) the significance of composition;

    (b) the significance of packaging;

    (c) the significance of customer intentions;

    (d) the holding out of the products at issue;

    (e) *Waveney Gold* and *Crane*;

    (f) findings as to the customer base.

The significance of composition

31. Miss Mitrophanous took issue with the FTT's rejection of the view that "just because a food is suitable for a particular animal it is necessarily food for that sort of animal". Miss Mitrophanous argued that dog food that is suitable for all dogs is also "pet food". For a dog food to be something other than pet food, she submitted, it has to be particularly adapted to working dogs. If a food is equally suited to working dogs and pets, it is properly to be regarded as "pet food" even if the packaging states that it is suited to working dogs and it is sold only at outlets aimed at owners of working dogs.

32. This submission is, however, hard to square with the decision of Laddie J in *Fluff Ltd (trading as Mag-it) v Customs and Excise Commissioners* [2001] STC 674. That case concerned the sale by Fluff Limited ("Fluff") of live maggots for use by fishermen engaged in coarse fishing. It was not in dispute that maggots are capable of being used on fish farms, and Fluff argued that its sales were to be categorised as the supply of "animal feeding stuffs" within the

meaning of schedule 8 to the VATA. Laddie J, however, decided otherwise. He said this in paragraph 17 of his judgment:

> "It seems to me that the meaning of the words must take colour from the context in which they are used and, in particular, what is at issue here is the supply of animal feeding stuffs. It seems to me whether or not an edible substance is animal feeding stuffs is in large part answered by the way in which it is sold or supplied. I put it to [counsel for Fluff] that if his approach is right a straw boater, which of course is edible, would itself be animal feeding stuffs and therefore the supply of boaters would be zero-rated under this legislation. He accepts that that is the inevitable conclusion of his submission. I do not accept that is the right approach to these words; it is not what the words mean. It seems to me that what counts is whether what is being supplied can properly be described as animal feeding stuffs. In deciding that one must look not just at the nature of the material but the way in which it is supplied. These maggots are not supplied as a foodstuff for fish; that is to say, for the purpose of feeding and growing fish. These maggots are sold for use in enticing fish towards hooks."

33. Laddie J thus considered that sales of maggots did not involve the supply of "animal feeding stuffs" even though the maggots could have been used as such. In deciding whether something was to be seen as "animal feeding stuffs", it was necessary to "look not just at the nature of the material but the way in which it is supplied". Whether or not an edible substance is "animal feeding stuffs" is "in large part answered by the way in which it is sold or supplied".

34. It seems to me that it is similarly important to "look not just at the nature of the material but the way in which it is supplied" when deciding whether dog food is "pet food". The fact that a food could be fed to pet dogs is no more determinative of that issue than the fact that maggots could be used as a foodstuff was of whether, in *Fluff*, they were "animal feeding stuffs". I therefore agree with the FTT that a food suitable to be eaten by pet dogs will not necessarily be "pet food" and that whether such a food is "pet food" depends on how it is held out for sale.

The significance of packaging

35. Miss Mitrophanous criticised the FTT's approach to packaging. Packaging, Miss Mitrophanous said, is both part of the product and a key means by which the supplier holds out the product and through which he expects the consumer to understand what the product is. Packaging, and in particular the wording on it, should thus (so it was said) play a key role in determining how a product is held out. What the product says of itself is determinative or at least of crucial importance.

36. While, however, a product's packaging may often be determinative, I agree with the FTT that that need not be the case. As the FTT recognised, in many cases packaging will be the only or main way in which a supplier makes representations about its products. Even where that is not so, the packaging may be of overwhelming significance. Like the FTT, however, I take the view that packaging will not necessarily trump all other factors. If a supplier makes representations about his products by means other than packaging, it must be right to have regard to them, and especially so if the message conveyed by the packaging is a mixed one. What is of key importance is how the product is held out for sale. That *may* turn just on packaging, but it will not do so in every case.

37. In short, I do not consider that the FTT erred in law in approaching the case on the basis that it is necessary to "look at the overall holding out by the supplier, of which the packaging is a part, but not necessarily a determinative, part".

The significance of customer intentions

38. It was common ground before the FTT that the subjective intentions of individual purchasers are irrelevant. The FTT said this on the subject (in paragraph 160):

> "All parties were agreed, as we agree, that the subjective intention of the purchaser is irrelevant. As the Tribunal in *Popes Lane Pet Food Supplies* [1986] VATTR 221 said, a person might buy cat food as rodent bait but that does not mean the food is anything other than cat food. Any other conclusion would require the private intentions of a purchaser to be ascertained before the vendor would know whether the item sold was subject to VAT or not."

39. The FTT went on, however, to say this:

> "162. … While we agree that individually the subjective intentions of the purchasers are irrelevant, where it is apparent that the food is principally bought for particular kinds of dogs, this is an indication (although not conclusive) that objectively determined the intention of the supplier was to supply food for that kind of dog.
>
> 163. In other words, the intentions of any particular purchaser must be irrelevant: but if the evidence is that all or virtually all customers bought the product for a particular purpose, that is evidence (albeit not conclusive) that the product was held out for sale for that particular purpose. And that is objectively determined evidence of the *supplier's* intention."

40. Miss Mitrophanous argued that these paragraphs showed the FTT to have attached undue significance to customers' intentions. The FTT erred, it was suggested, in assuming that the customer base is indicative of how a product is held out by the supplier. In any case, the FTT had direct evidence of how the dog foods at issue were held out for sale so there was no need to try to work that out by reference to the customer base. The FTT, Miss Mitrophanous said, wrongly allowed its findings on the customer base to trump findings on how the relevant dog foods were held out by the packaging.

41. Judge Mosedale commented on this suggestion when considering whether to grant HMRC permission to appeal. She said in paragraph 12 of her decision on the application:

> "The Tribunal did not 'allow its findings on the customer base to trump findings on how the Products were held out by their packaging.' The reasons why the Tribunal did not consider the packaging determinative of the appeal are set out in paragraphs 170-181 of which its customer base was only one factor."

42. In my view, the FTT was entitled to take the approach it did. As is apparent from the Decision itself as well as Judge Mosedale's subsequent observations, the FTT did not treat the customer base as all-important, and it had regard to it for a limited purpose, viz, for the light it might cast on how the products in dispute had been held out for sale. No error of law is, to my mind, disclosed.

The holding out of the products at issue

43. If the FTT asked itself the correct legal question, did it nevertheless err in its application of the law to the facts?

44. As mentioned above, the FTT expressly found that, except as regards Ruff & Ready from 2000 onwards, the "overall holding out was … that the food was gundog food" and not pet food. For HMRC to upset that conclusion, they must do more than merely show that the FTT could properly have taken a different view. It has to be demonstrated that the FTT's finding was one that it was not entitled to make. That involves establishing that there was no evidence to support the FTT's finding or that the finding was otherwise an unreasonable one.

45. In my view, HMRC have not succeeded in surmounting that hurdle. It can, I think, be seen from the passage from the Decision quoted in paragraph 24 above that there was at any rate *some* evidence to support the FTT's finding. Moreover, the finding was, as it seems to me, one that was reasonably open to the FTT. It may well be that the FTT could also properly have arrived at the opposite conclusion, but that does not matter.

46. I comment briefly below on a few of the particular matters on which Miss Mitrophanous relied:

(a) *Leaflets*: Miss Mitrophanous argued that the FTT failed to place any or sufficient weight on the marketing leaflets that Skinner produced (as to which, see paragraph 13 above). While, however, the earlier of the leaflets referred to pets as well as gun dogs, the FTT's "overall impression" of the leaflet was that "the food was intended for gundogs" (paragraph 70 of the Decision). I would not be justified in rejecting that conclusion. As for the later leaflet, the FTT found that "it too would have had at least some representations that the products were suitable for pet dogs". There is no reason to suppose that FTT did not take that fact into account when deciding that the "overall holding out was … that the food was gundog food" and not pet food, and its existence cannot render the FTT's view unreasonable;

(b) *Website*: Miss Mitrophanous criticised the FTT for failing to place any or sufficient weight on the way in which Dog Meal and Ruff & Ready were categorised on Skinner's website (as to which, see paragraph 14 above). However, there was no evidence as to how the website looked before the end of the claim period, and even in 2010 Dog Meal and Ruff & Ready were not listed under the "pets" option reached from the question "what product suits you". In any case, I do not think the website evidence can make the FTT's conclusion that the "overall holding out was … that the food was gundog food" an unreasonable one;

(c) *The position after 1998*: Miss Mitrophanous submitted that the FTT's "most serious error" related to the period after 1998. By then, she pointed out, Skinner had introduced its new and more sophisticated bags (see paragraph 9 above). However, the FTT specifically addressed the position after 1998 in paragraphs 189-193 of the Decision, and, as regards products other than Ruff & Ready, it found that "the post-1998 sales … were in response to pre-1998 holding out … of the claim products as gundog and working dog food". Earlier in the Decision (at paragraph 100), the FTT had accepted "what Mr Skinner said that, despite the price differential, there would have been product loyalty from the more conservative customers and this accounts for the slow switch over to the Field & Trial range". I do not think HMRC can go behind these findings.

Waveney Gold and Crane

47. Miss Mitrophanous submitted that, even if some of the disputed products could be said to have been held out as food for working dogs, the FTT ought to have found that Skinner had not discharged the burden of showing that Waveney Gold and Crane were so held out.

48. The FTT said this about how Waveney Gold and Crane were held out:

> "194. We had virtually no evidence about the own label claim products. What matters is how they were objectively held out for sale. We infer that [Skinner's] only holding out would have been made to its customers, the two businesses which bought the dog food to sell under their own brand.
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> 195. For the reasons given above and in particular that Mr Skinner considered [Skinner's] product to be gundog food, and that we find based on his evidence (see paragraph 36) that his purchasers required working dog food, we find he would have held out the *Waveney's* and *Crane* own-label food to the company's two purchasers to be working dog food.
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> 196. We also find based on this same evidence in paragraph 36 that the two purchasers would themselves have held out the food to their customers to be working dog food.
>
> 197. For these reasons we find that the holding out (during the entire claim period) in respect of the two own label foods was that the products were for working dogs. It was not pet food."

49. Paragraph 36 of the Decision (to which the FTT referred in paragraphs 195 and 196) included this:

> "Mr Skinner's unchallenged evidence was that the company's two customers were agricultural companies which sold the own label dog food to people local to them with working dogs."

50. It seems to me that, in the light of Mr Skinner's evidence, the FTT was entitled to conclude that Waveney Gold and Crane were held out as food for working dogs. While the evidence about the products was (as the FTT recognised) very limited, it was not non-existent and, such as it was, supported Skinner's case.

Findings as to the customer base

51. Miss Mitrophanous advanced specific criticisms of findings that the FTT made as to Skinner's customer base. In particular, she argued that the FTT was wrong to conclude (in paragraph 112 of the Decision) that "the consumers of Skinner's own label dog food (barring *Ruff & Ready* after 1998) were mainly if not entirely owners of gundogs and working dogs".

52. One of Miss Mitrophanous' points was that this finding was inconsistent with the FTT's earlier finding (in paragraph 92 of the Decision) that "[b]y 1993 68% of buyers … were not known to be working dog owners, breeders, trainers or suppliers thereto". However, paragraph 92 does not in fact

contradict paragraph 112. As Judge Mosedale said in relation to the application for permission to appeal:

> "The reference in paragraph 92 of the decision to some 68% of buyers not being known to be dog owners/breeders or suppliers thereto was, as is obvious from the immediately preceding sentence in that paragraph, a reference to the sales being increasingly to wholesalers and for that reason it not being possible to identify by name the actual consumers. Paragraph 112 determined on the basis of the evidence summarised in paragraphs 106 that even the sales to wholesalers were ultimately consumed by working gundog owners."

53. Miss Mitrophanous also argued that the FTT drew the wrong inferences from what happened to sales of the disputed products after the Field & Trial range was introduced. To my mind, however, the FTT's conclusions were reasonably open to it and cannot be disturbed. It does not matter whether the FTT could reasonably have taken a different view.

Conclusion

54. The FTT was entitled to arrive at the conclusions it did on whether the products at issue were "pet foods".

Meal for dogs?

55. As mentioned above, the FTT concluded that, in the context of schedule 8 to the VATA, "meal" refers to:

> "a mixer for use with meat or canned dog food made primarily from wheat flour with other ingredients and baked; and in particular made from the same or similar ingredients to a dog biscuit and baked in the same way but crumbled or broken up rather than cut into shapes".

56. HMRC dispute this view. According to HMRC, "meal" includes muesli-like products and can encompass complete foods as well as mixers. The FTT should, accordingly, have held Dog Meal, Ruff & Ready, Waveney Gold and Crane to be "meal" regardless of whether they were also "pet foods".

57. Among other things, Miss Mitrophanous pointed out that Dog Meal was described as "meal" in its name. Miss Mitrophanous also made much of evidence given by Mr Skinner and two of Skinner's other witnesses: a Mr Livingston, who was Mr Skinner's point of contact at a company that supplied vitamin and mineral supplements to food manufacturers, and a Mr Hill, who was responsible for prison dogs as well as owning his own gun dogs. As the FTT noted, Mr Skinner gave evidence to the effect that he gave Dog Meal its name "because his background was as an agricultural feed merchant and familiar with a dry complete food for animals such as sow and weaner meal"

(paragraph 213 of the Decision), and Mr Livingston, whose background was likewise in agricultural feeds, "also understood 'meal' in the sense of a complete food such as sow meal or cattle meal" (paragraph 214).

58. On the other hand, a Mr Southey, who gave expert evidence before the FTT, expressed the view that "his clients (pet food suppliers) would have been ill-advised to describe a complete dog food as 'meal' as it would be understood to be a mixer" (paragraph 215 of the Decision). Further, while Mr Southey acknowledged that the word "meal" had come to be used to refer to complete meals for pets, he was "clear that it would not carry this meaning if used in the phrase 'biscuits and meal'" (paragraph 243). Similarly, Mr Skinner and Mr Hart each said that, when used in the composite "biscuits and meal", they would understand "meal" to be a crumbled biscuit mixer. A 1977 report by the Monopolies and Mergers Commission on "Cat and Dog Foods" is also significant. This stated that cat and dog foods comprised:

> "(a) canned foods;
> (b) semi-moist foods;
> (c) complete dry (including rehydratable) foods;
> (d) biscuits and meal;
> (e) others, including quick-frozen products and cooked foods not supplied in cans".

With regard to item (d), the Commission said:

> "Biscuits and meal are intended to be fed to dogs with suitable canned food, fresh food or scraps."

The Commission thus referred to "meal" as a mixer and distinguished between "complete dry … foods" and "biscuits and meal".

59. HMRC have themselves treated "meal" as a mixer in the past. For example, Notice 701/15/02 *Animals and animal food* included this:

> "The terms 'biscuit' and 'meal' mean dry products either:
>
> - coarsely ground basic commodities; or
> - baked products consisting predominantly of cereal and fat and not providing all the nutrients required by the animal."

Interpreting "meal" in that way, none of the disputed products was "meal".

60. In all the circumstances, it seems to me that the evidence before the FTT entitled it to conclude that, as used in schedule 8 to the VATA, "meal" referred to a mixer and, hence, that the word could not apply to any of the products at issue.

61. Miss Mitrophanous argued that paragraph 246 of the Decision shows the FTT to have misunderstood the law. The FTT said this in that paragraph:

> "Lastly, if 'meal' meant a complete food, then this would lead to the bizarre result that all dog biscuits are standard rated but crumbled biscuits for working dogs would be zero rated."

Miss Mitrophanous submitted that the FTT can be seen to have wrongly assumed that any food "for working dogs" will be zero-rated even if it is "biscuits or meal". In contrast, Mr Michael Conlon QC, who appeared with Miss Anne Redston for Skinner, said that the sentence quoted above was no more than a throwaway line and does not go the heart of the FTT's decision on whether products at issue were "meal". I essentially agree. While I do not find it easy to follow the particular sentence, I do not see it as crucial to the FTT's reasoning.

62. In short, I consider that the FTT was entitled to take the view that none of the products in dispute was "meal for … dogs".

Overall conclusion

63. The appeal will be dismissed.

Mr Justice Newey

RELEASE DATE: 15 MAY 2014