

ZERO-RATING - Food - Catering - Hot dishes sold by take-away with cold dips at inclusive price - Whether single supplies or separate - VATA 1994 Sch 8, Grp 1, item (a), Note (3)(b) - Appeal dismissed

LONDON TRIBUNAL CENTRE

DOMINO'S PIZZA GROUP LTD - Appellant
- and -
THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents

Tribunal: THEODORE WALLACE (Chairman)

A L ROBINSON FHCIMA, FCFA, MRSH

Sitting in public in London on 9 January 2003

Les Allen, barrister, of Ernst & Young, Chartered Accountants, for the Appellant

Philippa Whipple, counsel, instructed by the Solicitors for the Customs and Excise, for the Respondents

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DECISION

1. This decision concerns the VAT treatment of cold dips supplied by the Appellant with hot take-away dishes at an inclusive price. The dips are Barbecue, Honey & Mustard, 3 Chilli Peppers and Garlic & Herb. They are available for sale separately when they are zero-rated. Dips are also sold with chicken dunkers, chicken strippers, chicken combo and potato wedges at an inclusive price.
2. Until recently the Appellant accounted for VAT at the standard-rate on the full consideration for the dishes including the dips. This was on the basis that the supplies were single supplies of catering within Note (3) to VAT Act 1994, Schedule 8, Group 1.
3. On 28 March 2002, Ernst & Young, submitted a repayment claim in respect of the period ended 31 March 1999 for £5,944.47, of which £1,642.48 was attributable to supplies of dips which they contend should have been zero-rated. On 7 June 2002, the Commissioners ruled that the supplies in question were single standard-rated supplies. The appeal is against this decision. The question as to the actual figures has been held over pending a decision in principle.

4. The only witness was Stephen Hemsley, chief executive of the Appellant. The facts recorded below are based on the documents and on his evidence which was not challenged.

5. He produced three different containers in which the dishes are sold. These are small cardboard boxes which are centrally produced with the Appellant's name. The largest is marked on the top "CHICKEN COMBO" with underneath "CHICKEN STRIPPERS 6 tender gougons made from pure chicken breast, coated in crispy breadcrumbs" and also "POTATO WEDGES 7oz of seasoned potato wedges, a perfect match for any Domino's dip". On the bottom the box is marked "Not suitable for oven use". The box is just under two inches high, and roughly eight inches wide by seven inches long. It has a lid which opens and at one end a platform with three circular holes $1\frac{3}{4}$ inches in diameter to hold plastic containers for three dips which are sealed. The rest of the box is for the Chicken Strippers and Potato Wedges. The dips are each 28grs. The Chicken Strippers weigh 150grs and the Potato Wedges 200grs. The other boxes are the same size being 5" wide. One is for either Chicken Strippers or Chicken Dunkers ("Succulent chicken wing pieces with two dips"), the other is for Potato Wedges. Both of these boxes have holes for two dips.

6. A menu from the year 2000 for a franchised store in Romford showed the dishes in question and the dips under Starters which also included Garlic Pizza Bread, Coleslaw and 7" Kids Pizza. Chicken Strippers were served with two dips, Honey and Mustard and Barbeque for £3.49; Chicken Dunkers were served with Barbeque and 3 Chilli Pepper for £3.25; Chicken Combo was served with Garlic and Herb, Barbecue and Honey and Mustard for £4.99 and Potato Wedges were served with Garlic and Herb and Barbeque for £2.49. Dips were priced at 25p in four flavours: Garlic and Herb, 3 Chilli Pepper, Honey and Mustard and Barbeque. Delivery was free but there was a minimum order for £8 and starters were only delivered with pizzas. The menu also advertised a free Garlic and Herb dip with every pizza except 7" Kids Pizza and Personal Pizzas.

7. There are regional variations in the menu but the four dishes and the dips are core items. Managers have some price discretion; the price for dips varies between 25 and 35 pence. The Appellant's stores at Wokingham and Aylesbury charge 35 pence.

8. Mr Hemsley produced a schedule showing the number of dips sold in the period 25 November 2002 to 29 December 2002 from all 35 stores operated by the Appellant as opposed to franchised. This showed 233,739 dips sold with the four dishes and with pizzas and 19,533 sold with other products, giving a total of 253,272 dips sold. 92.3 per cent of dips were thus sold with the four dishes for an inclusive price and 7.7 per cent were separately priced. This was a typical split although covering the Christmas period.

9. Mr Hemsley agreed that it is highly unlikely that dips would be sold without any other products; he would not expect them to be eaten on their own, although he said that tastes vary. Customers sometimes use dips left over from (say) strippers with a pizza.

10. When contemplating a new product the Appellant tests the market in a small number of stores. Customers were purchasing dips with Chicken Strippers and the Appellant saw an opportunity to sell them together at a higher price for the Chicken Strippers. On the basis of testing, the Appellant decided which dips to include with which dish. A manager might agree to vary the dip with an order but would not normally agree to reduce the price if the customer does not want a dip.

11. He said that the dips are a factor in the price. He produced a schedule showing the cost elements of the materials, taken from inventory control for orders by the managers. Potato Wedge showed much the highest proportion for dips, the figures being (in pounds):

"Potato Wedge 0.167

Potato Wedge Box 0.095

Dips 0.152

Layer Pd 0.011

Potato Wedge Total 0.425"

Dips were a smaller element of Chicken Dunkers for which the Total was £0.958, Chicken Strippers £0.935 and Combo Meal £1.226.

12. The Appellant does some national advertising targeted to 18 to 35-year-olds, but mainly relies on leaflets. Orders are taken by telephone, internet, interactive TV and personal orders, but the typical order is on the telephone with the bill being added up before the order is finalised. 80 per cent of orders are delivered with drivers doing one order at a time to ensure that the food is hot. Delivery is free. The charge for each box is shown on a label fixed to the front, where an order includes several dishes one box will show the total. Drivers carry a small amount of change. Dips bought separately are delivered loose. Boxes are carried by the drivers in a container designed to retain the heat.

Submissions

13. Mr Allen for the Appellant adopted the summary by Dr Brice at paragraph 36 of *Southport Visionplus Ltd v Commissioners of Customs and Excise* (2001) Decision No.17502 of the principles laid down by the Court of Justice in *Card Protection Plan Ltd v Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270.

14. He said that it is necessary to look at all the circumstances of the transaction and its essential features. A customer of Domino's is seeking to purchase a meal which can comprise a number of elements, some standard-rated, some zero-rated. Dips purchased on their own are zero-rated; it is a distortion if dips are standard-rated merely because supplied with a hot dish at an inclusive price. Just as a single economic supply should not be artificially split so as to distort the VAT system, separate items should not be rolled together so as to distort the system. He said that the dips constitute an object in themselves because they can and are purchased individually. He relied on paragraph 36 of the Advocate-General in *Customs and Excise Commissioners v Madgett and Baldwin* (Joined Cases C-308/96 and C-94/97) [1998] STC 1189.

15. He said that the dips represent a substantial proportion of the supply by weight, particularly with potato wedges. They were not insignificant in any case. A dip bought with one dish might be eaten in whole or in part with another dish. He submitted that a single price is not decisive in this case and there should be an apportionment.

16. Miss Whipple for the Commissioners said that although paragraph 30 of *Card Protection* is not the only test, it does answer the present question since there is a principal and an ancillary supply. The word "must" in the second sentence indicates that it is mandatory where it applies.

17. She referred to the opinion of Lord Slynn at page 765f and 766e and Lord Hope at page 768e-f in *Customs and Excise Commissioners v British Telecommunications Plc* [1999] STC 758, to *Customs and Excise Commissioners v FDR Ltd* [2000] STC 672, to *Appleby Bowers v Customs and Excise Commissioners* [2001] STC 185 at page 190-1 and to *Sea Containers Services Ltd v Customs and Excise Commissioners* [2000] STC 82 at paragraphs 29 and 34.

18. She said that here the customer is getting delivery and packaging although 20 per cent collect their orders. In *Faaborg-Gelting Linien A/S v Finansamt Flensburg* (Case C-231/94) [1996] STC 774, which involved meals, the predominant element was goods. The Commissioners' view is that the supply of hot food here is a supply of goods. The commercial reality is that there is one supply. The dominant element is the hot dish : the dips are to make the basic product more attractive to the customer. No customer just wanting dips would buy chicken strippers or potato wedges. The dips bought with hot meals are not an aim in themselves. It is artificial to say that they are separate merely because they could be bought separately.

19. Miss Whipple said that the fact that there is an inclusive price is relevant. The relative cost of the dips is a possible factor but is not determinative.

20. She said that in deciding *Card Protection Plan* after the answers by the Court of Justice the House of Lords took a broad brush approach, see Lord Slynn at [2001] STC 174 looking at the purpose of the customer.

Conclusions

21. While the Court of Justice stated in *Card Protection* at paragraph 27 that "having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance," it did lay down some general principles.

22. Where the transaction comprises a bundle of features and acts, regard must first be had to all the circumstances of the transaction with the typical customer. The purchaser of Chicken Strippers is buying chicken gougons coated in breadcrumbs, heated and sold in a specially designed cardboard box designed to hold the dips also, and delivered hot to customers by drivers using special containers. The fact that some customers collect their food and some eat their dips with other dishes is not in our view relevant : the typical customer has the food delivered and eats the dip with the hot food.

23. Again, following *Card Protection*, we ask whether there is a principal element to which the others are ancillary. In our judgment the hot food is the principal element and the transport, packaging and dips are ancillary. In terms of the UK legislation, supplying it hot makes it a supply of catering as opposed to a supply of food. We do not consider that a customer asked what he is getting for his money would say hot food with cold dips. We accept Miss Whipple's submission that the dips are not aims in themselves for the customer, see *Card Protection* at paragraph 29 citing *Madgett and Baldwin*. On the evidence of Mr Hemsley they were included with the hot dishes to add to their attraction and to get a higher price. That was a perfectly legitimate commercial judgment and has apparently

proved successful. It is however significant that until recently the Appellant accounted for the whole consideration obtained at the standard-rate. We consider that this reflected the commercial reality.

24. In *Madgett and Baldwin* the Court of Justice paid regard to the proportion of the package price represented by the travel. At first sight the dips were a substantial proportion of the material cost of Potato Wedges. However those costs do not include the cooking costs including the labour element which must have represented a very significant cost element as also is the free delivery while keeping the food hot.

25. For the above reasons the appeal is dismissed.

THEODORE WALLACE

CHAIRMAN

RELEASED:

LON/02/527