Neutral Citation: [2016] IEHC 569

THE HIGH COURT

REVENUE

[Record No. 2015/11R]

BETWEEN:

BOOKFINDERS LIMITED

APPELLANT

– AND –

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Keane delivered on the 14th October 2016

Introduction

11. This is an appeal by way of case stated for the opinion of the High Court pursuant to s. 941 of the Taxes Consolidation Act 1997 ('TCA') by Ronan F. Kelly ('the Appeal Commissioner'), arising out of an appeal brought before him by the appellant taxpayer, Bookfinders Limited ('the appellant'). On that appeal, the Appeal Commissioner found for the Revenue Commissioners ('the respondent'), whereupon the appellant requested that he state a case for the opinion of the High Court.

2. The litigation arises out of the appellant's contention that its supply of heated sandwiches, and hot teas and coffees, through a food outlet that it operates, should have been properly subject to a zero rate of Value Added Tax ('VAT'), rather than the 13.5% rate that the respondent (and, later, the Appeal Commissioner) determined should apply.

Background

3. The appellant is a limited liability company and a franchisee of the '*Subway'* chain of food outlets. The appellant operates from a premises on the Tuam Road, Galway, and prepares and sells, *inter alia*, heated sandwiches and hot teas and coffees, which can be either taken away or consumed on the premises. There are limited facilities on the premises for the consumption of food and drink, but there is no waiter service and most people consuming food on the premises do so at counters. The Appeal Commissioner found that 70% to 80% of the business is takeaway.

4. The appellant returned VAT on sales in accordance with a 'composite' rate of VAT, calculated at 9.2%. In or about December 2006, the appellant revised downwards its calculation of that composite rate on the basis of its belief that heated sandwiches and hot teas and coffees were properly subject to VAT at the zero rate, rather than the reduced rate of 13.5%. The appellant submitted repayment claims in respect of the periods January/February 2004 to November/December 2005 on the basis that it ought to have accounted for VAT on the said supplies at the zero per cent rate of VAT. The respondent refused that repayment claim and the appellant appealed that refusal.

The decision of the Appeal Commissioner

5. The appeal against the decision of the respondent was heard by the Appeal Commissioner on the 22nd May, 22nd June, and 9th December 2009, and the 18th October, 2010. The issue before the Appeal Commissioner was whether the appellant's supplies of heated sandwiches and hot teas and coffees were subject to a VAT rate of zero, as contended for by the appellant, or one of 13.5%, as contended for by the respondent. The Appeal Commissioner held in favour of the respondent.

Statutory provisions in issue

6. On the 1st December, 2010, the VAT Act 1972 ('the 1972 Act') was replaced with the VAT Consolidation Act 2010. However, as the issues arising in this appeal relate to 2004 and 2005, this judgment refers to the provisions of the 1972 Act which were then in force.

7. VAT was introduced in the 1972 Act in order to give effect to the mandatory provisions of directives adopted by the European Community. In particular, the 1972 Act, as amended, implemented *Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment* ('the Sixth Directive'). It is known as the Sixth Directive because it was the sixth VAT Directive published by the European Council, and it sets out the basic provisions of the VAT code. That Directive has since been repealed and replaced with *Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax*. The Sixth Directive, however, was in force for the entirety of the relevant period and, like the 1972 Act, provides for taxable and exempt supplies, and permits Member States to apply a range of VAT rates to various supplies.

8. VAT is a form of consumption tax. It is charged on consumer spending, collected by VAT-registered traders on their supplies of goods and services effected within the State, for consideration, to their customers. Generally, each such trader in the chain of supply from manufacturer through to retailer is required to charge VAT on his or her sales and is entitled to deduct from that amount the VAT that he or she has paid on his or her trade purchases, in accounting to the Revenue Commissioners as a taxable person.

9. S. 2 of the 1972 Act provides that VAT is a tax charged, levied and paid on:

> 'the supply of goods and services effected within the State for consideration by a taxable person in the course or furtherance of any business carried on by him…'

10. The 1972 Act then sets out in s. 3 the rules applicable to supplies of goods and, in s. 5, the rules applicable to supplies of services. The appellant is a taxable person in accordance with s. 8 of the 1972 Act, and made its supplies for consideration. S. 3 provides that a supply of goods means 'the transfer of ownership of goods by agreement…' and s. 5 provides that a supply of services is 'the performance or omission of any act or the toleration of any situation other than a supply of goods…'

The default rate of VAT

11. The rate of VAT is determined by s. 11 of the 1972 Act which provides, at subsection (1)(a), that 21% is the default rate in relation to the supply of taxable goods or services, save where otherwise specified in that subsection.

The zero rate of VAT
12. S. 11(1)(b) does specify otherwise, by providing that a rate of zero per cent applies to, *inter alia*, goods or services of a kind specified in paragraphs (iii) to (xx) of the *Second Schedule* of the Act.

13. For the purposes of the present appeal, the relevant paragraph in the *Second Schedule* of the Act is paragraph (xii). It states:

> 'food and drink of a kind used for human consumption, other than the supply thereof specified in paragraph (iv) of the Sixth Schedule, excluding –
>
> (a) beverages chargeable with any duty of excise specifically charged on spirits, beer, wine, cider, perry or Irish wine, and preparations thereof,
>
> (b) other beverages, including water and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages, but not including –
>
> (I) tea and preparations thereof;
>
> (II) cocoa, coffee and chicory and other roasted coffee substitutes, and preparations and extracts thereof,
>
> (III) milk and preparations and extracts thereof, or
>
> (IV) preparations and extracts of meat, yeast, or egg;
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> […]
>
> (d) (I) chocolates, sweets and similar confectionary (including glacé or crystallised fruits), biscuits, crackers and wafers of all kinds, and all other confectionary and bakery products whether cooked or uncooked, excluding bread,
>
> (II) in this subparagraph 'bread' means food for human consumption manufactured by baking dough composed exclusively of a mixture of cereal flour and any one or more of the ingredients mentioned in the following subclauses in quantities not exceeding the limitation, if any, specified for each ingredient-
>
> (1) yeast or other leavening or aerating agent, salt, malt extract, milk, water, gluten,
>
> (2) fat, sugar and bread improver, subject to the limitation that the weight of any ingredient specified in this subclause shall not exceed 2 per cent of the weight of flour included in the dough,
>
> (3) dried fruit, subject to the limitation that the weight thereof shall not exceed 10 per cent of the weight of the flour included in the dough,
>
> other than food packaged for sale as a unit (not being a unit designated as containing only food specifically for babies) containing two or more slices, segments, sections or other similar pieces, having a crust over substantially the whole of their outside surfaces, being a crust formed in the course of baking, frying or toasting…'

The reduced rate of 13.5%
14. S. 11(1)(d) states that the reduced rate of 13.5% applies to those goods and services of a kind specified in the *Sixth Schedule* to the Act.

15. Paragraph (ii) of the *Sixth Schedule* recites:

> 'the provision of food and drink of a kind specified in paragraph (xii) of the Second Schedule in a form suitable for human consumption without further preparation-
>
> (a) by means of a vending machine,
>
> (b) in the course of operating a hotel, restaurant, cafe, refreshment house, canteen, establishment licensed for the sale for consumption on the premises of intoxicating liquor, catering business or similar business, or
>
> (c) in the course of operating any other business in connection with the carrying on of which facilities are provided for the consumption of the food or drink supplied.'

16. S. 5(d) of the 1972 Act deems the supplies just mentioned to be supplies of services, rather than of goods.

17. Paragraph (iv) of the *Sixth Schedule*, as amended, recites:

> '(iv) the supply of food and drink (other than bread as defined in subparagraph (d), of paragraph (xii) of the Second Schedule) (other than beverages specified in subparagraph (a) or (b) of paragraph (xii) of the Second Schedule) which is, or includes, food and drink which–
>
> (a) Has been heated, enabling it to be consumed at a temperature above the ambient air temperature, or
>
> (b) Has been retained heated after cooking, enabling it to be consumed at a temperature above the ambient air temperature, or
>
> (c) Is supplied, while still warm after cooking, enabling it to be consumed at a temperature above the ambient air temperature,
>
> and is above the ambient air temperature;'

18. Finally, it should be noted Section 11(1A)(b) of the 1972 Act provides:

> 'Goods or services which are specifically excluded from any paragraph of a Schedule shall, unless the contrary intention is expressed, be regarded as excluded from every other paragraph of that Schedule, and shall not be regarded as specified in that Schedule.'

Questions for determination

19. Against the background of the statutory framework just described, the Appeal Commissioner raises the following question for the opinion of this court.

> '1) Was I correct in law in holding that the supply of heated sandwiches and hot tea and coffee was subject to VAT at 13.5% and without prejudice to the generality of the foregoing question;
>
> 2) Was I correct in law in holding that the words food and drink contained in paragraph (iv) of the Sixth Schedule should be read disjunctively and not conjunctively with particular regard to the principle against doubtful penalisation?
>
> 3) Was I correct in law in holding that the 13.5% VAT rate applies to heated tea and coffee sold in drinkable form having found that these drinks were specified in paragraph (xii) of the Second Schedule?
>
> 4) Was I correct in law in holding that paragraph (xii) of the Second Schedule and the exclusions from paragraph (iv) of the Sixth Schedule to the VAT Act 1972, as amended, do not operate to apply the zero rate of VAT to heated sandwiches made with bread as defined in paragraph (xii)(d)(II) of the Second Schedule to the VAT Act?
>
> 5) Was I correct in law in holding that the appellant's bread was not bread as defined in paragraph (xii)(d)(II) of the Second Schedule with regard to the ordinary meaning of the word "each" in the first subparagraph of that provision and the principle against doubtful penalisation?
>
> 6) Was I correct in law in holding that the issue of fiscal neutrality did not operate to apply the zero rate to the appellant's sandwiches?'

The Interpretation of VAT Legislation

20. The respondents rely on certain identified principles governing the interpretation of VAT legislation that have been developed over the last half-century or so. The appellant makes only limited reference to those principles. It seeks to rely instead on the jurisprudence concerning the interpretation of taxation statutes generally. In that context, the appellant draws no distinction between indirect taxes applied to the manufacture or sale of goods and services, on the one hand, and direct taxes applied to income or assets, on the other, in submitting that precisely the same principles, without modification, apply to each.

21. The principles governing the interpretation of VAT legislation can be summarised as follows:

(i) The general principle is that VAT is to be levied on all goods and services supplied for consideration by a taxable person; see, for example, the judgment of the Supreme Court in *Mac Cárthaigh v Cablelink Ltd* [2003] I.R. 510 at 513.

(ii) Exemptions whereby VAT is to be charged at a reduced rate rather than the standard date, are to be interpreted strictly, since they constitute an exception to the general principle; see, for example, *Blasi v Finanzamt München I*, Case C-346/95 at para. 18, and the cases cited there.

(iii) The requirement whereby terms used to specify exemptions are to be interpreted strictly, does not mean that they should be construed in such a way as to deprive them of their intended effect; see *Mìsto Žamberk v Finanèní øeditelství v Hradci Králové*, Case C-18/12 at para. 18.

(iii) An exclusion within an exemption, triggers the reapplication of the general principle, and cannot, therefore, be interpreted strictly; see *Blasi v Finanzamt München I* at para. 19 and, as an illustration of the application of that principle, the United Kingdom VAT Tribunal decision in *Quaker Trading Limited v Her Majesty's Revenue and Customs* (UK VAT Tribunal Decision 20604, 6 March 2008)

22. The appellant seeks to rely instead on a number of principles governing the interpretation of taxations statutes generally. Those principles are helpfully drawn together in the decision of this court (per Dunne J.) in the case of *Gaffney v The Revenue Commissioners* [2013] IEHC 651.

23. In that judgment, when considering a range of authority emphasising the fundamental importance of the literal approach to the construction of statutes, the Court cited the following dictum from the judgment of Kennedy C.J. in *Revenue Commissioners v Doorley* [1933] I.R. 750 at 756:

> 'A taxing Act (including of course any other Act or part of an Act incorporated in it by reference), of its own proper character and purpose, stands alone, and is to be read and construed as it stands upon its own actual language. … The duty of the Court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e., within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred.'

24. Dunne J. went on adopt the following observation of Henchy P. in *Inspector of Taxes v. Kiernan* [1982] I.L.R.M. 13 *at* 121-2:

> 'Leaving aside any judicial decision on the point, I would approach the matter by the application of three basic rules of statutory interpretation. First, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or extended connotation, or as a term of art, then, in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning. As Lord Esher M.R. put it in *Unwin v. Hanson* at p. 119 of the report:-

> 'If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.'
>
> […]
>
> Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language: see Lord Esher M.R. in Tuck & Sons v. Priester (at p. 638); Lord Reid in Director of Public Prosecutions v. Ottewell (at p. 649) and Lord Denning M.R. in Farrell v. Alexander (at pp. 650-1). As used in the statutory provisions in question here, the word 'cattle' calls for such a strict construction.
>
> Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed."

25. I do not think there is any disagreement between the parties in this case as to the fundamental proposition that, in construing the legislation at issue, words should be given their ordinary and everyday meaning. As the appellant points out, the matter was very well expressed in the context of VAT legislation by the Court of Appeal for England and Wales in the case of *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] STC 1990. There, the court was required to ponder, amongst other issues, whether the snack product known as 'Regular Pringles', including, as it evidently does, a potato flour content of about 40%, fell within the scope of the term 'potato crisps…and similar products made from…potato flour.' The judgment of Mummery LJ concludes with the following striking passage (at 2004-5):

> '**[78]** In the course of his urbane submissions on the "made from" aspect of Regular Pringles, Mr Cordara QC referred to the "potato as a fiscal contaminant", the "essential characteristics of the paradigm potato crisp", the absence of "findings of potatoness" and the "quantitative role of the potato." In contending that Pringles (42% potato, 33% fat) were not "made from" the potato he put forward this proposition: If a product has a number of significant ingredients it cannot be said to be "made from" one of them. So it is argued that Regular Pringles, which also contain fat and flour, cannot be said to be "made from the potato".
>
> **[79]** The response to these points is that it is vital to recall why the tribunal was required in the first place to answer the question whether the goods in question are "made from" the potato. It was not to answer a scientific or technical question about the composition of Regular Pringles, or in response to a request for a recipe. It was for the purpose of deciding whether the goods are entitled to zero-rating. On this point the VAT legislation uses everyday English words, which ought to be interpreted in a sensible way according to their natural and ordinary meaning. The "made from" question would probably be answered in a more relevant and sensible way by a child consumer of crisps than by a food scientist or culinary pedant.'

26. There does seem to be a significant disagreement between the parties concerning the manner in which the court should approach the construction of the relevant parts of the *Second* and *Sixth Schedules* of the 1972 Act. Simply put, the respondent argues that the court should apply the well-established principles for the construction of VAT legislation, including the requirement to strictly construe any exemption from the general principle that VAT at the standard rate should apply to any supply of goods and services for consideration by a taxable person, whereas the appellant contends that the court should instead narrowly construe the general principle and broadly construe any exemption from its application in reliance upon the principle against doubtful penalisation, whereby, where there is ambiguity a taxing statute will be interpreted in favour of the taxpayer.

27. The respondent further submits that, even absent the special considerations that apply to VAT, it is clear that the Irish courts require a party contending for an exemption to show that they fall full square within the statutory provision said to give rise to that result. The respondent emphasises that, in *Texaco Ireland Ltd v S. Murphy (Inspector of Taxes)* 4 ITR 91, the Supreme Court held that exemptions from, as well the imposition of, a tax must be brought within the letter of a taxing statute.

28. It seems to me that the approach urged upon the court on behalf of the respondent is the correct one. I have reached that conclusion for two reasons. The first is that the appellant's position takes no account of the conceptual distinction between direct and indirect taxation. Whether the obligation to collect and pay an indirect tax on the supply of goods and services is indistinguishable from the obligation to pay a direct tax on income or assets for the purpose of the application of the principle against doubtful penalisation is, in my view, itself a doubtful proposition, and one for which the appellant has cited no authority.

29. The second reason is that this court is subject to the obligation of 'conforming interpretation' under EU law, though obviously subject to the limits of that obligation. In that context, while I fully accept that the principle concerned cannot require the interpretation of national law in a manner incompatible with national law, I do not accept the appellant's submission that national procedural autonomy requires the court to favour domestic canons of construction (as distinct from domestic law) over its application. Nor do I accept the appellant's laconic assertion that this was the approach adopted by Edwards J. in *EPA v Neiphin Trading Ltd* [2011] 2. I.R. 575. On the contrary, I believe it is clear from the judgment in that case (at p. 620), and from the judgment of the Supreme Court (*per Fennelly J.*) in *Albatros Feeds Ltd v Minister for Agriculture* [2007] 1 I.R. 221 at 244, that the limits of the obligation are marked by the terms of the relevant national law (in *Neiphin*, the common law doctrine of separate legal personality and, in *Albatros Feeds*, the fundamental property rights of the affected trader) and not by the canons of construction *per se* (save, of course, to the extent that a particular canon of construction is itself prescribed by law under, for example, the provisions of the Interpretation Act 2005).

30. Having considered, in a general way, the principles applicable to the interpretation of the 1972 Act, I turn now to address the specific provisions of that Act that are at issue for the purpose of the present appeal.

Sixth Schedule, paragraph (ii)

31. Paragraph (ii) of the Sixth Schedule to the 1972 Act applies the reduced VAT rate of 13.5% to the supply of food and drink in what might loosely be described as a catering context. Specifically, it refers, in relevant part, to 'the provision of food and drink of a kind specified in paragraph (ii) of the Second Schedule in a form suitable for human consumption without further preparation … in the course of operating [a business] in connection with the carrying on of which facilities are provided for the consumption of the food and drink supplied.' S. 5(d) of the Act deems such supply to be one of services, rather than of goods.

32. In seeking to argue that its supply of heated sandwiches, and hot teas and coffees, through a food outlet that it operates, does not fall within the terms of paragraph (ii) of the *Sixth Schedule*, the appellant relies on two arguments; first that the provision must be read as applying only to the supply of food or drink that is actually consumed using the facilities provided; and second, that the characterisation of the supply of food in this way as the provision of services, rather than of goods, is unlawful as in breach of Article 5(1) of the Sixth VAT Directive and, hence, must be disregarded.

33. I reject the first argument on the basis that the construction contended for is contrary to the ordinary and natural meaning of the words used in the said paragraph, whereby it is only necessary that the supply occur through a business where 'facilities are provided for the consumption of the food and drink supplied' without the imposition of any additional requirement that the consumption of that food or drink occur through the utilisation of those facilities.

34. Here, the Appeal Commissioner found as a fact that, while 70% to 80% of the appellant's business is takeaway, there are limited facilities on the premises for the consumption of food and drink, although there is no waiter service and most people consuming food on the premises do so at counters. That is a primary finding of fact that cannot be disturbed for the purpose of the present appeal.

35. The second argument, though not without some force, does not avail the appellant either. In advancing it, the plaintiff relies on two decisions of the Court of Justice in relation to the appropriate classification of a particular supply of food and drink under the relevant article of the Sixth VAT Directive. In *Sub One Ltd (t/a Subway) v Revenue and Customs Commissioners* [2014] STC2508, the Court of Appeal for England and Wales addressed the effect of those two decisions on the application of the relevant provisions of broadly equivalent UK VAT legislation in the following way (*per* McCombe LJ at 2640-1):

> '**[95]** There are three outstanding points. The first is the Appellant's argument that is should succeed because the supplies made in this case were of food as goods and not food as services.
>
> […]
>
> **[96]** Dealing with the first point, we were referred to two cases; *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C0231/94) [1996] STC 774, [1996] ECR I-2395 and *Finanzamt Burgdorf v Bog* (Joined cases C-497/09, C-499/09, C-501/09 and C-502/09) [2011] STC 1221, [2011] ECR I-1457. It was submitted for the Appellant that the statutory provisions, allocating a zero rate to a supply of food unless it amounts to a supply in the course of catering', give an implicit classification of the supply as a supply of services. It is then argued…that:
>
> > "This classification is obviously incorrect, since in EU law the relevant supplies are supplies of goods and not of services. There is virtually no service element at all."
>
> It is submitted that the domestic legislation is inconsistent with EU law and it said that [the Upper Tribunal] was in error in concluding otherwise.
>
> **[97]** I do not follow this argument, with respect. It seems to me that the UK legislation has simply adopted a definition of the zero rate in this area well within the ambit of its national discretion under art 110 of the Principal VAT Directive. It was entitled, in my view, to decided that food supplied in the course of catering should be standard-rated. The two cases cited required a decision as to whether the particular supplies were in fact supplies of goods or services. I do not read them as deciding that 'catering' or, more precisely in this case, a supply of take-away food could not properly be classed by a member state as falling outside the zero rate applied to supplies of other food for human consumption.
>
> **[98]** I also agree with the learned judge that for the purposes of the definition in the UK legislation, it matters not whether the supply in question is of goods or services, provided that the supply is "in the course of catering".'

36. I find the logic underpinning the analysis of McCoombe LJ persuasive. Applying it to the relevant provisions of the 1972 Act now at issue, it seems to me that, while the Court of Justice decisions referred to might have implications for the validity of s. 5(2) of the Act, whereby a supply of the kind described in paragraph (ii) of the Sixth Schedule is deemed to be a supply of services rather than a supply of goods, they do not affect the definition of supplies subject to the reduced rate of 13.5% under the *Sixth Schedule*. Differently put, whether the supply of food and drink through a business where 'facilities are provided for the consumption of the food and drink supplied' is a supply of services or a supply of goods, it falls within the terms of paragraph (ii) of the Sixth Schedule, and is thus subject to the application of the reduced VAT rate of 13.5% either way.

37. Accordingly, I am satisfied that the Appeal Commissioner would have been correct to hold that the appellant's supply of heated sandwiches and hot tea and coffee was subject to VAT at 13.5%, had he done so by reference to the express terms of paragraph (ii) of the *Sixth Schedule* to the 1972 Act.

Sixth Schedule, paragraph (iv)

38. Paragraph (iv) of the *Sixth Schedule* applies the reduced VAT rate of 13.5% to the supply of hot food and drink in defined circumstances.

39. The appellant submits that, insofar as paragraphs (ii) and (iv) of the *Sixth Schedule* both apply to the supply of "food and drink", those references should be read as applying only conjunctively, *i.e*. to the supply of food and drink together, thereby taking the appellant's supply of food on its own or drink on its own outside the scope of the *Sixth Schedule*. The appellant appears to believe that this would permit it to successfully argue that such supply comes within the scope of paragraph (xii) of the *Second Schedule* to the 1972 Act, making it subject to a zero rate of VAT, even though paragraph (xii) also uses the expression 'food and drink.'

40. In support of the construction of the terms 'food and drink' for which it contends, the respondent invokes the legislative history of paragraph (iv) of the *Sixth Schedule* and, in particular, the amendment of that paragraph introduced by s. 197 of the Finance Act 1992, whereby the word 'or' was replaced by the word 'and' in the term 'food and drink' as it now appears. The respondent counters, quite correctly in my view, that such an approach to the interpretation of statutes is entirely impermissible, relying on the following

clear statement of the Supreme Court (*per* Griffin J) in *Cronin (Inspector of Taxes) v Cork and County Properties* [1986] 1 IR 559 (at 572):

> '[T]he Court cannot in my view construe a statute in the light of any amendments that may thereafter have been made to it. An amendment to a statute can, at best, only be neutral – it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be.'

41. The respondent, reiterating its submission that the principle against doubtful penalisation is of no application in this case, submits that the purpose of paragraph (iv) of the *Sixth Schedule* is to list supplies that, by way of exception to the general rule, are taxed at a lower rate of VAT. It is a list, and the purpose of the word "and" is best described as inclusive; i.e. food and drink are both taxed at the lower rate. The respondent submitted that a plain reading of the provision does not require that the words food and drink be conjoined.

42. The Appeal Commissioner did not accept that the words 'food and drink' in paragraph (iv) of the *Sixth Schedule* to the 1972 Act are an acknowledged concept permitting only a conjunctive reading. The Appeal Commissioner agreed with the submission of the respondent that certain of the authorities cited permit the disjunctive reading of 'and', depending on context. The Appeal Commissioner determined that paragraph (iv) of the *Sixth Schedule* is such a context. I agree with that analysis and would add only that I am also satisfied the use of the term 'food and drink' in paragraph (ii) of the *Sixth Schedule* and in paragraph (xii) of the *Second Schedule* should be construed in precisely the same way.

43. At the hearing before the Appeal Commissioner, the respondent mounted a further elaborate argument that hot tea and coffee do not fall within the scope of the paragraph (iv) of the *Sixth Schedule* on the basis that they were excluded by the words that appear in the second set of parenthesis immediately following the words 'food and drink' in that paragraph. Those words are 'other than beverages specified in subparagraph (a) or (b) of paragraph (xii) of the Second Schedule to the Act.' I will address that argument in the next section of the judgment, which deals with paragraph (xii) of the *Second Schedule*.

Second Schedule, paragraph (xii) – tea and coffee

44. Paragraph (xii) of the *Second Schedule* of the 1972 Act applies a zero rate of VAT to 'food and drink of a kind used for human consumption, other than the supply thereof specified in paragraph (iv) of the Sixth Schedule' to that Act.

45. As considered in the preceding section of this judgment, the supply of food and drink specified in paragraph (iv) of the *Sixth Schedule* to the Act is that of hot food and drink in certain defined circumstances, which attracts the reduced VAT rate of 13.5%. Those circumstances include the supply of food and drink 'which is, or includes, food and drink which…has been heated for the purpose of enabling it to be consumed at a temperature above the ambient air temperature.'

46. Returning to the terms of paragraph (xii) of the *Second Schedule* of the Act, having set out the exclusion for food and drink specified in paragraph (iv) of the *Sixth Schedule*, and having next excluded what are essentially alcoholic beverages, it then goes on to exclude:

> '(b) other beverages, including water and syrups, concentrates, essences, powders, crystals, or other products for the preparation of beverages but not including-
>
> (I) tea and preparations thereof,
>
> (II) cocoa, coffee and chicory and other roasted coffee substitutes, and preparations and extracts thereof,
>
> (III) milk and preparations and extracts thereof, or
>
> (IV) preparations and extracts of meat, yeast and eggs.'

47. The Appeal Commissioner accepted the respondent's submission that, on a proper construction of these provisions, paragraph (iv) of the *Sixth Schedule* is concerned with teas and coffees supplied above ambient temperature when provided to consumers, whereas paragraph (xii) of the Second Schedule is concerned with such items in a cold state. I also accept that construction on the basis that it seems to me to accord with the relevant and sensible way in which the plain meaning of those (albeit somewhat dry and abstract) words would be understood by an adult consumer of such beverages. I reject the appellant's argument that the more obvious and, therefore, correct interpretation of the relevant words limits their application to all beverages heated from cold that were already a fully constituted beverage when cold, that is to say, that paragraph (iv) is capable of applying only to hot tea and coffee when made from cold tea and coffee. I do not accept the appellant's contention that the relevant words used in paragraph (iv) are ambiguous or that they comprise slack and obscure language.

48. As flagged in the preceding section of this judgment, the appellant mounts a further elaborate argument on this point in reliance on the use of the words 'other than beverages specified in subparagraph (a) or (b) of paragraph (xii) of the *Second Schedule* to the Act' in paragraph (iv) of the *Sixth Schedule* to qualify the application of that paragraph to hot food and drink. As we have just seen, subparagraph (b) of paragraph (xii) specifies beverages (other than alcoholic beverages) and products for the preparation of such beverages in various forms but goes on to expressly state that it is 'not including', amongst other items, 'teas and preparations thereof' and 'coffee…and preparations and extracts thereof.'

49. In this connection, the appellant points to the terms of s. 11(1A)(b) of the 1972 Act, which, as we have already seen, deals with goods and services specifically excluded from any paragraph of a schedule to the Act by providing that they are to be regarded as excluded from every other paragraph of that schedule and, thus, not specified in that schedule. The Appeals Commissioner recorded the appellant's submission on the point as being the following: that the terms of s. 11(1A)(b) of the Act mean that items (presumably goods or services) 'specified' in any paragraph of any schedule to the Act are subject to the provisions of that schedule and no other. In my view, that is simply not a plausible, logical or proper construction of the meaning or effect of the terms of s. 11(1A)(b) of the 1972 Act and I do not accept it.

50. Nor do I accept the further proposition that the appellant appears to put forward as a corollary of the first (which I have just rejected), namely, that it somehow follows that the exclusion of beverages specified in subparagraph (b) of paragraph (xii) of the *Second Schedule* from the category of hot drinks established under paragraph (iv) of the *Sixth Schedule* must be construed instead as the exclusion from the latter category of those items expressly not included among the beverages specified in that subparagraph, which would have the effect, if accepted, of specifically excluding tea and coffee from the scope of paragraph (iv) of *the Sixth*

Schedule and, thus, by operation of the terms of s. 11(1A)(b), from the scope of the *Sixth Schedule* entirely.

Second Schedule, paragraph (xii) – bread
51. As already described, paragraph (xii) of the *Second Schedule* applies a zero rate of VAT to the supply of food and drink for human consumption 'other than the supply thereof specified in paragraph (iv) of the Sixth Schedule' to the Act, which is, in essence, the supply of hot food and drink.

52. Having next dealt with excluded beverages, paragraph (xii) goes on to exclude various kinds of confectionery at sub-paragraph (d)(I), before expressly excluding 'bread' from that exclusion. Subparagraph (d) then elaborates on the definition of that terms as follows:

> '(II) in this subparagraph 'bread' means food for human consumption manufactured by baking dough composed exclusively of a mixture of cereal flour and any one or more of the ingredients mentioned in the following subclauses in quantities not exceeding the limitation, if any, specified for each ingredient-
>
> (1) yeast or other leavening or aerating agent, salt, malt extract, milk, water, gluten,
>
> (2) fat, sugar and bread improver, subject to the limitation that the weight of any ingredient specified in this subclause shall not exceed 2 per cent of the weight of flour included in the dough,
>
> (3) dried fruit, subject to the limitation that the weight thereof shall not exceed 10 per cent of the weight of the flour included in the dough…'

53. Here, the Appeal Commissioner found as a fact that the white bread used in the appellant's sandwiches contained 8.9% sugar as a percentage of flour weight in the dough, 1.4% fat as a percentage of flour weight in the dough and 1.93% bread improver as a percentage of flour weight in the dough. The Appeal Commissioner noted that 8.9% sugar is exceptionally high for bread. The Appeal Commissioner found that it was a type of 'sweet dough bread.' For brown bread used in the appellant's sandwiches the same respective weights were 8.66% sugar, 1.45% fat and 1.93% bread improver. Accordingly, the Appeal Commissioner concluded that the bread used by the appellant in its heated sandwiches is not bread as defined in paragraph (xii)(d)(II) of the *Second Schedule*.

54. The appellant submits that, in order to fall outside the definition of 'bread' under subparagraph (d)(II) of paragraph (xii) of the Second Schedule it is necessary for the product concerned to contain quantities in excess of the limit for each and every one of the ingredients mentioned in the relevant subclauses of that paragraph. In making that argument, it relies expressly on the words 'in quantities not exceeding the limitation, if any, specified for each ingredient' as necessarily connoting that requirement, because of the use of the word 'each' before the word 'ingredient' in that phrase.

55. The respondent submits that the interpretation of the provision contended for by the appellant is wrong both as a matter of common sense and plain English. First, the appellant's submission completely ignores the presence of the words 'any one or more' in the earlier part of the provision. Secondly, the appellant has completely ignored the words 'any ingredient' in subparagraph (d)(II)(2).

56. The respondent submitted that clearly, bread, for the purposes of subparagraph (xii)(d)(II) of the Second Schedule, is manufactured by baking dough which is composed of cereal flour and any one or more of a number of other ingredients. If the limitation for any one or more of those other ingredients is exceeded then the product is not bread as defined. The words "each ingredient" simply refer to the respective limitations applicable to each of the different ingredients listed, which differ from one subclause to another. Subclause (2) makes it perfectly clear that if the limitation for any of the ingredients specified, namely fat, sugar or bread improver in a dough mixture is exceeded, then the end product is not bread as defined.

57. In determining the appeal, the Appeal Commissioner accepted the respondent's submission that 'each ingredient' refers to the limitation applicable to each ingredient (i.e. that 10% applies to fruit and 2% each to fat, sugar and bread improver) of any of the ingredients comprising the product concerned. He stated that this view was fortified by subclause (2), which provides that 'fat, sugar and bread improver, subject to the limitation that the weight of any ingredient specified in this clause shall not exceed 2 per cent of the weight of the flour included in the dough.' The Appeal Commissioner found that this interpretation was correct as it represents the ordinary meaning of the words.

58. I am satisfied that the interpretation of the relevant words of the definition urged by the respondent, and accepted by the Appeal Commissioner, is correct. It seems clear to me that word 'each' preceding the word 'ingredient' must be interpreted by reference to the words which condition its use. Depending on the context in which it is employed, the use of the word 'each' can denote 'each of any', 'each of every' or, indeed, 'each of some'; a consideration of the word in isolation does not indicate which. In this instance, it seems to me that the respondent is correct to suggest that a consideration of the word in context immediately clarifies that it refers to the applicable limitation on the quantity of each of any of the ingredients mentioned that is included in the product.

59. In reliance on the argument just rejected that the bread used in the appellant's sandwiches falls within the definition of 'bread' under paragraph (xii) of the *Second Schedule*, the appellant advanced the further argument that, in utilising that bread to make heated sandwiches, those sandwiches fell within the exclusion of such bread as defined from the scope of the reduced VAT rate of 13.5% applicable to the supply of hot food and drink under paragraph (iv) of the *Sixth Schedule* to the 1972 Act.

60. In addressing that argument, the respondent submitted that it is necessary to recall the relevant terms in paragraph (xii) of the Second Schedule and to consider those terms in light of the correct approach to interpretation. The respondent reiterated that, while bread as defined in paragraph (xii)(d)(II) of the Second Schedule is subject to zero rating, the appellant's bread is not bread as defined. More fundamentally, the respondent pointed out that, even if the appellant's bread did qualify for zero rating, its heated sandwiches do not because heated sandwiches are not the same thing as bread. The respondent submitted that a heated sandwich is subject to VAT at 13.5% because it falls full square within the terms of paragraph (iv) of the Sixth Schedule.

61. The Appeal Commissioner accepted the respondent's submission on this point in concluding that heated sandwiches are not excluded from paragraph (iv) of the Sixth Schedule. The Appeal Commissioner reasoned that while the supply of 'bread' is excluded from the scope of paragraph (iv) of the Sixth Schedule, there is no basis to conclude that the effect of this is to similarly exclude all products containing bread as defined from the scope of that provision. Bread as defined is excluded, but a sandwich, being bread and heated filling or fillings, is not the same as bread and is not excluded by paragraph (iv) of the Sixth Schedule. The Appeal Commissioner thus determined that VAT at 13.5% applies to hot food in that form. I can see no basis upon which to interfere with that finding, which appears to me to be correct both in law and on the facts as found.

Fiscal Neutrality and legal certainty
62. The appellant submits that by applying different VAT treatments to supplies of food based only upon the temperature of those goods compared to ambient air temperature - that is to say by applying a different rate of VAT to the sale of heated sandwiches than that applicable to cold sandwiches - the terms of paragraph (iv) of the *Sixth Schedule* to the 1972 Act are in breach of the principle of fiscal neutrality and, hence, are contrary to EU law.

63. The appellant further submits, in the alternative, that by applying a rate of VAT by reference to the differential between the temperature of the goods and the ambient air temperature, the terms of paragraph (iv) of the *Sixth Schedule* to the 1972 Act are so arbitrary and impractical as to infringe the principle of legal certainty and, hence are contrary to EU law on that basis also.

64. I will deal with each of those arguments in turn.

65. In his opinion in the case of *K Oy*, Case C-219/13, [2015] STC 433, Advocate General Mengozzi provides the following helpful summary of the principle of fiscal neutrality:

> '37. According to the case law, the principal of fiscal neutrality, which is inherent in the common system of VAT, precludes treating similar goods or services, which are thus in competition with each other, differently for VAT purposes. This is therefore an expression of the general principle of equal treatment in matters relating to VAT.'

66. In the same case, the Court of Justice explained (at para. 25):

> '25. To determine whether goods or services are similar, account must be taken primarily of the point of view of a typical consumer. Goods or services are similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one or other of those goods or services.'

67. In response to the appellant's implicit submission that this Court should conclude that heated sandwiches and cold sandwiches have the same characteristics and meet the same needs from the point of view of consumers, the respondent points out that there is no finding by the Appeal Commissioner to that effect and, hence, no factual basis from which to launch the argument that there has been a breach of the principle of fiscal neutrality. I accept that submission and, thus, it seems to me that there is no basis upon which this Court can, or should, interfere with the Appeal Commissioner's conclusion that the principle of fiscal neutrality does not operate to apply the zero rate to the appellant's sandwiches.

68. The appellant further alleges that the provision concerned breaches of the principle of legal certainty. In *Traum EOOD*, Case C-492/13, the Court of Justice stated (at para. 28):

> 'The principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them (judgment in *Plantanol*, C 201/08, EU:C:2009:539, paragraph 46 and the case-law cited).'

69. However, the appellant's argument on this point runs headlong into the same objection, as its argument concerning fiscal neutrality, namely, that it lacks the necessary substratum of fact. In this instance, there does not seem to have been any finding of fact whatsoever to support the proposition that the distinction drawn between hot and cold food (or, more accurately, between 'food' and 'food that has been heated; or retained heated after cooking; or which is supplied while still warm after cooking, enabling it to be consumer at a temperature above the ambient air temperature') is in any way arbitrary or impractical in its application.

70. The respondent submits that there is no uncertainty in the imposition of different VAT treatment on the basis of 'ambient air temperature'; hot food and cold food are two entirely different products, readily distinguishable one from another for that purpose.

71. It seems to me that a further essential weakness in the appellant's argument on this point is that it is of a type considered by Jacob LJ in his judgment in the *Proctor & Gamble UK* case ('*the Pringles case*') already cited. In dealing with the argument that a test for whether a product is 'made from potato' that does not require 100% purity is impermissibly vague and uncertain because it sets no lower limit for potato content, Jacobs LJ observed as follows (at 1997):

> '[32] What then of the lower limit challenge? I am reminded of what Justice Holmes wrote:
>
> > "When he had discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other." Holmes, Oliver Wendell, *Collected Legal Papers (Law and Science in Law)* (2006 reprint) The Lawbook Exchange Ltd, pages 232-233
>
> Putting the point another way: you do not have to know where the precise line is to decide whether something is on one side or the other.'

72. By application of the same logic, I reject on that basis also the appellant's argument concerning the asserted arbitrariness or impracticality of seeking to draw a distinction between heated sandwiches and cold sandwiches.

Answers to the questions
73. For all of the reasons set out in the preceding paragraphs of this judgment, I would answer 'yes' to each of the six questions posed in the case stated.