

More Humorous Tax Scribblings



Whilst 'what is a cake and what is not a cake' is not really an expat topic, I thought it was worthy of allowing us all to indulge in enjoying some more tax humour.

It's really not that easy to combine 'tax' and 'funny' in the same article, so I'll apologise in advance to those readers who are neither Brits nor Anglophiles, and (due to the items being discussed) may have no idea what this is all about.



There aren't many areas of tax law that make people laugh, but the labyrinthine quirkiness of the UK's VAT system achieves both every now and then.

"The wacky world of VAT continues to fascinate and frustrate the business world in equal measure," said Tom Herbert, editor of AccountingWEB and veteran VAT-watcher. "Recent VAT cases that have been argued over include whether a Jaffa Cake is a cake or a biscuit, or if banana-flavoured Nesquik milkshake powder should attract the same rating as chocolate flavour."

As Herbert implies, part of the fascination is the accidental but on-going British tweekness of one particular strand of the legal debate: what is a biscuit, and what is a cake?

So... Biscuit or Cake?



Cakes are zero-rated for VAT in the UK, meaning that retailers don't have to pass on a 20% VAT charge to customers. Biscuits are zero-rated too - unless they're not. And it's down 'Alice's rabbit-hole' of 'unless' and 'except' as to where the trouble begins...

In this case, biscuits cease to be zero-rated, and become standard-rated, if they've got chocolate on, or "some product similar in taste and appearance".

That's a reminder of the days when people distinguished between normal biscuits and fancy biscuits – Rich Tea or Custard Creams, between essential sustenance and the luxury of confectionery – and when banoffee caramel chocolate digestives weren't even a twinkle in some British Bake-off contestant's eye.

So far, so easy: Hob Nob? Zero-rated. Chocolate Hob Nob? Standard-rated. But what about those Jaffa Cakes mentioned by Tom Herbert?

In 1991, the Government changed the classification of Jaffa Cakes, declaring them to be biscuits. The maker, McVities, took umbrage and the question was debated by a VAT tribunal.

This prompted a now-famous debate about the nature of cake, and the meaning of biscuits, which has been rumbling on ever since.

At the hearing, Donald Potter QC, adjudicating, came at the question from various angles. On the one hand, he noted, Jaffa Cakes are of similar dimensions to biscuits, come packaged like biscuits, and are generally found in the biscuit aisle in the supermarket. What's more, like biscuits, they're usually eaten with the fingers, not cake forks.

At the same time, he observed, they are described as cakes on the packaging and, unlike biscuits, are not cooked twice. (The word comes from Latin: bis coctus – twice-cooked.)

Judge Potter found in favour of McVities and Jaffa Cakes have been cakes ever since.

But That's Not All...

Every few years, a new version of this debate breaks out, and some serious-minded legal super-brain is forced to have an intense on-the-record discussion about whether some new-variant packaged treat is a biscuit or a cake, and whether it is 'normally eaten with the fingers' - as journalists look on - giggling.



In January 2019 Judge Amanda Brown was obliged to peer closely at Pulsin Raw Choc Brownies and decide if they were cakes or confectionery.

To help with her decision she 'closely examined', among other sweet treats, Morrison's brownies, Pret-a-Manger's brownie bar, Mr. Kipling's brownies, gluten-free brownies, French Fancies and Battenberg bars. She also gave a Victoria sponge cake a long, hard stare - Tough job being a judge!

In her conclusion, she said:

"Put alongside a slice of traditional Victoria sponge, a French Fancy and a vanilla slice or chocolate eclair, the products may look out of place. However, put alongside a plate of brownies, or, for instance, at a cricket or sporting tea where it is more likely that bought and individually wrapped cakes will be served on a plate, the products would absolutely not stand out as unusual."

Having passed the cricket tea test, the Pulsin bar was judged to be a cake, and thus zero-rated.

The Pasty Tax

Another notable VAT debate with Great British Bake-Off overtones was around the sale of hot Cornish pasties, followed the introduction by then-Chancellor George Osborne of what was known as the 'pasty tax'.



In Cornwall, people eat a lot of pasties, and they like them hot, so declaring that suddenly consumers would have the choice of either paying 20% more for what was considered a staple food, or eating it cold, was a political bombshell.

This time, the in-depth discussion revolved around the distinction between selling something as hot food, and that had been deliberately kept hot in a warming cabinet, and a product that just happened to be warm as a result of being fresh.

Some Cornish bakers turned off their warming cabinets and began to cook smaller batches of pasties throughout the day. Others absorbed the price rise as best they could to avoid penalising customers.

A third group served lovely warm pasties at a new higher price, with a side order of bitter criticism directed at the Government.

Unfortunately, the chances of VAT becoming any less of a burden or bewildering seem slim, according to Herbert:

“Critics have labelled the tax as regressive and overly complex,” he added. “HMRC’s VAT guidance runs to thousands of pages, including a specific section on types of Bombay mix.

“However, given that VAT currently accounts for 21% of the Government’s total tax take, it’s unlikely it will be going anywhere soon.”

No Guesses, No Wishful Thinking

There are perhaps three things to take away from all of this.

First, don’t make assumptions about what will and won’t be zero-rated, especially if your product is in any way innovative, original, or ‘a clever twist’ on some other concept. Some of the dividing lines are fine – fruit pulp is zero-rated, but fruit juice is standard-rated, for example.

Secondly, resist the urge towards wishful thinking: unless you’ve got the time, money and appetite to appeal. It doesn’t matter whether you think your product ought to be zero-rated, only whether HMRC does - and the chances are they’ll think it’s a chocolate-covered biscuit.

Thirdly, I think it was Boris Johnson who, as Mayor of London, said ‘London is the best city in the world, because we have all the chocolate Hob Nobs!’

HMRC probably concur – they get their 20%!