

## Food - subways and snowballs

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We have had quite a busy time with food recently. Two cases that have hit the headlines have been the *SubOne* (Subway) case, relating to toasted takeaway food products, and the Snowball case relating to a product of that name produced by Lees and by Tunnocks.

The point concerning the Subway product was the taxpayer's argument that the product should not be treated as standard rated hot food because very similar products have been treated as zero rated toasted (but not 'hot') food, and it was unfair to tax the Subway product when the competing products had not been taxed. This was the 'fiscal neutrality' test, which is the same as saying that there should be a level playing field. The Court did not agree with this analysis, since fiscal neutrality deals with cases where the law clearly treats two extremely similar products differently as regards their tax status. That is not the same as a situation where products which should have been taxed have not been pursued by HMRC or have been wrongly decided as not being taxed by the Courts. This 'two wrongs make a right' argument seems bound to fail. The Court decided that an old precedent case relating to hot pies was wrongly decided, and the application of that case in other cases down the last twenty years or so created a number of judicial errors. It was the cumulative effect of these errors which Subway said was unfair and should therefore allow it not to have to account for VAT.

An appeal may go forward even at this stage, but, though it does appear that Subway have faced a degree of unfairness, their prognosis looks poor.

The Snowball issue was whether the product itself was 'confectionery' or 'a cake'. This is very similar to the famous Jaffa Cakes case where it was decided that the product was a cake rather than a biscuit. HMRC said that Snowballs were confectionery, and the producers said that they were cakes. Confectionery is standard rated, and cake is zero rated. The Tribunal ate the Snowballs and found them to be exceedingly sticky. Since confectionery is defined as something which is normally eaten with fingers, they felt that Snowballs probably were too sticky to be eaten like that. I have to say that I find this surprising, although I have never eaten one, because I am sure some people would be happy to have sticky fingers. The product was also crumbly which militated against it being eaten in the open, and the tribunal decided that the only sensible way to eat a Snowball was on a plate, with a fork.

If you eat your product on a plate with a fork in order to save your fingers from being too sticky, then what you have in front of you is indubitably a cake. So that decides that point, and unless HMRC appeals on the basis that modern confectionery can be sticky and messy in the normal course of events, that will settle the tax status of the humble Snowball.

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