Neutral Citation: [2024] UKFTT 00104 (TC)

Case Number: TC09055

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Reading Tribunal Centre

Appeal reference: TC/2022/02726

*Sports nutrition products – whether zero rated as cakes – no – whether Note 5 applies to treat as confectionery - yes -whether standard rated as confectionery on general principles – yes– appeal dismissed*

**Heard on:** 5 and 6 September 2023
**Judgment date:** 02 February 2024

**Before**

**TRIBUNAL JUDGE IAN HYDE**
**JULIAN STAFFORD**

**Between**

**DUELFUEL NUTRITION LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Max Schofield, counsel

For the Respondents: Howard Watkinson, counsel

## DECISION

### INTRODUCTION

1. This appeal concerns whether the sale of the Appellant's products – a flapjack and either a cake bar or brownie packaged and sold together ('the Products') – are to be treated as zero rated for VAT purposes.

2. All statutory references and references to VATA are to the Value Added Tax Act 1994 unless specified otherwise.

### THE FACTS

3. We had the benefit of witness statements from the following individuals:

(1) Tim Davies, the founder and owner of the Appellant, gave evidence generally as to the development and marketing of the Products.

(2) Hannah Meur, a graphic designer and independent brand consultant, gave evidence as to how she was engaged by Mr Davies to help with consumer focus groups, brand and the design of the packaging.

(3) Richard Soper, the managing director of Sweet Moments and Jenkins & Hustwit ("Sweet Moments"), wholesale baking companies specialising in baking flapjacks and cakes. Mr Soper gave evidence as to how Sweet Moments ran the production trials of the Products. Mr Soper also described the production method.

(4) Elizabeth Head, a food consultant specialising in the development of new products, gave evidence as to her role in advising Mr Davies on product development including ingredients, recipes, and kitchen trials.

(5) Peter Craig, an officer of HMRC, gave evidence as to HMRC's engagement with the Appellant on the VAT treatment of the Products with which he was personally involved since December 2021 including issuing the decision letter of 14 January 2022.

4. The witness statements provided by the witnesses were accepted by both parties and so witnesses were not required to give oral evidence. We accept the witness evidence, save that we note that at times the witnesses gave opinions on the nature and VAT treatment of the Products, as to which we cover below.

5. Following the hearing we asked the parties to make further written submissions on the question as to the proper construction of Note 5 to Group 1 of Schedule 8 to VATA.

### Preliminary matter

6. At the outset of the hearing a preliminary matter arose as to whether we should admit additional evidence from the Appellant being:

(1) A supplemental witness statement by Mr Davies;

(2) A replacement hearing bundle;

(3) Three plates of products including the Products, one being of products being (according to the Appellant), similar to the Appellant's flapjack and one being of products (again on the Appellant's case) similar to the Appellant's cake bar and brownie. These were described for convenience by both parties as the 'plates of cakes' but on HMRC's side without conceding the products were cakes for VAT purposes and we shall do the same; and

(4) Till receipts from the purchase of the comparator products on the plates showing their VAT treatment.

***Supplemental witness statement***

7. The supplemental witness statement by Mr Davies addressed comments by Mr Craig in his witness statement about the ingredients in the Products and that they were not the usual cake ingredients. It also made reference to the Food (Promotion and Placement) (England) Regulations 2021 (commonly known as the "HFSS Regulations", that is "high fat, sugar and salt" regulations) which, according to the Appellant, has prompted manufacturers to change their ingredients, for example to reduce sugar content.

8. Mr Schofield argued for the admission of the witness statement on the basis that it was very brief and HMRC could cross examine Mr Davies on its contents. Further, if it considered it appropriate, the Tribunal could decide what weight to give to the evidence. Mr Schofield characterised the Appellant's position under the directions as making an application rather than being in default. The statement had been provided three weeks before the hearing and was simply rebuttal evidence to counter HMRC's evidence. In accordance with the Tribunal's overriding objective in Rule 2 of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009, to deal with cases "fairly and justly", including the objective to enable parties to participate fully in proceedings (Rule 2(2)(c)), the Tribunal should admit the evidence.

9. Mr Schofield explained that the reason for the delay in serving the supplemental witness statement was that the Appellant wanted to serve a statement that also covered a new batch of the Products that the Appellant was trying to produce. In the event it became clear on 8 August 2023, a week or so before the supplemental statement was served, that it was not possible to produce the new batch. Accordingly, the supplemental witness statement dealing with just the ingredients issue was served.

10. However, in exchanges during the hearing Mr Schofield accepted that the latest information relevant to the supplemental witness statement as served was a Tate & Lyle report published in November 2022, 10 months ago and prior to the service of Mr Davies' first witness statement on 22 February 2023.

11. Mr Watkinson's principal objection was that in accordance with the directions of 7 February 2023, the parties were required to serve witness evidence by 24 February 2023 and their skeleton arguments on 14 August 2023. At 19:42 on 14 August 2023 and without notice, the Appellant filed and served a replacement hearing bundle including the further witness statement from Mr Davies and exhibits running to 64 pages. Further, as the witness statement made reference to the HFSS Regulations, HMRC would need to consider its position on those Regulations which would take time.

12. We agree with HMRC that the Appellant is late and the test to be applied in these circumstances is the three-stage test set out in *Denton and Ors v TH White Limited and Ors* [2014] EWCA Civ 90 as endorsed by the Upper Tribunal in *William Martland v The Commissioners for HM Revenue and Customs* [2018] UKUT 0178 (TCC) at [44]:

> "44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> > "(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that 17 applications can be granted for very short delays without even moving on to a consideration of those stages.

> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission."
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected…"

13. We find that there was a 6 month delay in serving the supplemental witness statement. There was no good reason for doing so as the information was available at the latest in November 2022, three months before Mr Davies' first statement was served. We accept for these purposes that the Appellant was trying to make another batch but that had no connection to the issues in this supplemental statement other than the convenience of grouping matters in the same statement. Even then the point does not in our view hold water given the Appellant was yet to serve Mr Davies' first statement and could have added the evidence it now wishes to adduce into that statement. We agree that there is some prejudice to HMRC in having to consider the HFSS Regulations with only three weeks' notice.

14. We therefore direct that the supplemental witness statement and associated exhibits is not admitted.

***Amended hearing bundle***

15. Mr Schofield justified the amendment to the bundle (aside from the supplemental statement and associated exhibits) on the basis that the Appellant had simply replaced some 200 pages of the existing bundle with new pages to make some graphs more readable. Mr Davies' supplemental witness statement and exhibits were added to the end, not disturbing the numbering.

16. Mr Watkinson objected to the admission of the amended hearing bundle and replacement of the 200 pages on the basis that he had already marked up the original bundle, prejudicing his ability to present his arguments to the Tribunal.

17. It was agreed in the hearing that Mr Watkinson could continue to use his annotated bundle but highlight where the number differed in the amended bundle. On that basis we direct that the amended 200 pages are admitted. We note in hindsight that this did not cause any difficulties.

***The plates of cakes***

18. Mr Watkinson did not object to the plates of cakes. He accepted that the comparator products had to be bought close to the hearing date so that they could be tasted and the plate of cakes test was part of the conventional evaluation of the VAT treatment of food.

19. We therefore direct that this evidence is admitted.

***Till receipts***

20. Mr Watkinson objected to the admission of the till receipts on the basis that their only conceivable purpose was to provide evidence as to the VAT treatment of the comparator products provided to the Tribunal on the plates of cakes. Further, some of the products were different from those considered by HMRC in the clearance application process.

21. Mr Schofield argued that he was not seeking to argue that the VAT treatment was in accordance with the till receipts, merely that that was how they were sold.

22. We do not see how the till receipts are relevant to this appeal. They are adduced as evidence of the VAT status of the comparator products but in our view, with which Mr Scofield agreed in the hearing, they are evidence not of the VAT status of the products but of the retailer's view of the VAT treatment. To the extent the comparator products had been the subject of decided appeals that information was available anyway. Decided appeals aside, Mr Schofield was unsurprisingly unable to produce evidence of an authoritative view of their VAT treatment.

23. Nevertheless, applying *Denton*, in the unusual circumstances of having to buy the products near to the date of the hearings, we accept that even if it could be said that there has been a delay, there was a good reason for it. However, we remain sceptical of the relevance or usefulness of the till receipts. On that basis, we do not consider there is significant prejudice to HMRC. Subject to that important qualification as to the weight to be ascribed to the evidence, we admit the till receipts as evidence.

***Observations***

24. Finally, on this preliminary matter, we note that this application was the subject of extensive and at times an intemperate debate between counsel, which took all morning of the first day of the hearing. We would hope that in future counsel, particularly experienced counsel from the same chambers, could maintain a more even debate in the Tribunal.

25. Based on the evidence before us including the late evidence which we have admitted we find the facts relevant to this appeal as set out below.

**Mr Davies and the Appellant**

26. Mr Davies has a background in international sales, marketing and business development at large companies. He is also a keen sportsman with an interest in maintaining an active lifestyle.

27. Mr Davies, in the course of exercising frequently in his local gym, identified what he saw as a gap in the market for selling a product to those carrying out vigorous exercise which provided both carbohydrates before exercise for energy and protein afterwards to help rebuild muscle. Specifically, Mr Davies identified that there was no product in the market doing both of these things in a convenient way and, with Mr Mike Naylor, a sports nutritionist, set up the Appellant for the purpose of developing and marketing this opportunity.

**Product development**

28. Having had the initial idea, Mr Davies carried out research including a survey through Survey Monkey posted to the Instagram and Facebook followers of a CrossFit coach he knew. The purpose was to try and understand the followers' activity, understanding of nutrition and eating and drinking habits before and after activity. He also carried out some desktop research including analysing data from Sports England on the extent to which adults participate in exercise.

29. Mr Davies concluded from the research that:

(1) There was a preference for homemade or familiar food.

(2) Two key sales channels would be supermarkets and gyms.

(3) The Appellant would be competing with a wide range of different foods eaten before and after exercise.

(4) It might be appropriate to include vitamins and minerals in the final product.

30. In order to address the preference for homemade or familiar food Mr Davies concluded a flapjack would be ideal to be eaten before exercise as that fitted with his experience of making

and eating them before doing so. A cake to be eaten afterwards would also fit the need for homemade or familiar food in the same was that many cyclists finish their activity at a preferred coffee or tea shop.

31. Mr Naylor advised as to the necessary nutritional content, that is proteins, carbohydrates, and fats and also the required vitamins and minerals.

32. Mr Davies also consulted with contract food manufacturers and food product development companies. He concluded that the product would be expensive to make and that the flapjack and cake needed to be the same length, height, and width to ensure consistent packaging.

33. The price point was identified as being no more than £3 per twin pack, any more and consumers could buy alternatives such as a meal deal.

34. Mr Davies also concluded that zero rated VAT treatment was essential to ensure it was commercially viable. Accordingly, Mr Davies took upon himself to become familiar with HMRC's manuals on the VAT treatment of food and took advice from Mark Buffery, a VAT consultant, to ensure that the products would qualify for zero rating. A number of features of the Products, for example, the use of oats as the only cereal in the flapjack and that the flapjack and cakes needed to be baked, were decided upon at an early stage to ensure VAT zero rating.

35. Mr Davies worked with Ms Meur on product development and they carried out market research on products, packaging, price point, flavours and other aspects. Ms Meur also worked on the package design.

36. The recipe was developed by Ms Head who took over from another food consultant due to the specific issues in developing the cake slice.

37. In exploring his idea, Mr Davies consulted with food manufacturers specialising in baking tray-baked flapjacks and cake slices.

38. Following production trials, Sweet Moments were selected for the production and a full production run took place in November 2021. As part of getting ready to commence production Sweet Moments obtained Informed Sport certification, which certifies that the product does not contain any substances which would result in a competing athlete failing an anti-doping test.

39. Following the adverse decision letter from HMRC on 14 January 2022 HMRC Mr Davies took the decision that the Appellant should cease trading pending the outcome of an appeal to this Tribunal as the price point for the Products was such that it was not possible to sell at a price increased by 20% VAT. Further, the distraction of dealing with HMRC meant Mr Davies was unable to sell the Products that had been manufactured before the expiry of their sell by date.

**The Products**

***The flapjack***

40. The flapjacks are on our measurements of the samples provided 8cm by 3cm and 1.5 cm high

41. The flapjacks weigh 35g and are produced in three varieties:

(1) Peanut butter and chocolate;

(2) Pecan, maple and chocolate;

(3) Berries and white chocolate.

42. The ingredients for the flapjacks are set out in Appendix 1 with percentages. We were presented with slightly conflicting percentages for each ingredient and the differences were not satisfactorily explained. The percentages of the principal ingredients are in any event slightly different for each variant as are the flavourings and toppings but in general neither party made anything of the differences and we do not find them to be material to the issues in the appeal. In summary the flapjacks contain between 41.96% and 47.62% oats (jumbo and porridge), and between 26.01% and 27.34% of syrup (being maple, golden date and brown rice syrup) and coconut sugar, as well as fats from oil and peanut butter, and baking powder.

43. At one point in the development it was noted that the difference in weight between the flapjack and the cake slices and differences in bulk densities meant that the products were of different height which was unhelpful for the production process and the presentation of the Products to consumers. A suggestion of using soya crispies to bulk up the volume of the flapjacks was rejected because this might make the flapjacks cereal bars for VAT purposes. Instead, additional baking powder was used.

***The cake and brownie***

44. The cake slices and brownie are again as measured by the Tribunal, 8cm by 3cm and 1.5 cm high, weigh 40g and are produced in three varieties:

(1) Chocolate brownie;

(2) Orange and chocolate cake slice;

(3) Lemon drizzle cake slice.

45. Ms Head in her witness statement gave evidence about how she developed the recipe for the cakes, which she described as more difficult than what she regarded as the more conventional flapjacks. Ms Head's brief was to develop a cake slice that was 35g in weight, contained 20g of protein and ultimately to develop a product which consumers would like and thought to be a cake.

46. Accordingly, what Ms Head described as "traditional flour" (by which we understand her to mean wheat flour), was replaced by protein powders, that is soya protein isolate, milk protein concentrate and bovine collagen protein. These protein powders are 51 to 53% of the total ingredients. The need to provide 20g of protein meant that the weight of the cake had to increase from 35g to 40g.

47. Further, Ms Head described how the eggs and fats such as butter normally found in cakes were replaced by cooking oil, water and brown rice syrup. The butter was replaced by the cooking oil but the use of water was limited to extend shelf life. The brown rice syrup and glycerine provided sweetness but also the three ingredients served as a liquid to bring all the ingredients together.

48. The ingredients of the cake slices and brownie are set out in Appendix 2. Again, we were presented with conflicting percentages for each ingredient. Further, as with the flapjacks, the percentages of the principal ingredients are slightly different for each variant as are the flavourings and toppings, with the most variation being between the two very similar cake slice variants and the brownie but again, in general, neither party made anything of the differences.

49. In summary the cakes and brownies comprise between 51.87% and 52.78% protein powders (soya, milk and collagen), 8.8% glycerine, 4.15 to 4.4% coconut sugar and 3.34% syrup plus vitamins and baking powder.

50. The level of protein in the cake slices and brownies are between 20.1 and 21.8g per 40g cake or brownie.

51. In tests conducted by MicroSearch, an independent food testing laboratory, samples of the Products tended to dry out when left exposed to air.

***The manufacturing process***

52. Mr Soper gave evidence as to the baking processes for the flapjacks and cakes which were very much the same as the processes Sweet Moments applied for other flapjacks and cakes.

53. The Products are all made in the same way:

(1) Weigh the ingredients,

(2) Warm up the liquids - syrups, fats and for cakes, water,

(3) Mix the dry ingredients,

(4) Mix the warmed liquids in with the mixed dry ingredients,

(5) Weigh out the combined mix to the target weight and tip into baking trays,

(6) Smooth out the mix into the trays by hand and press each tray before baking at 150 degrees to arrive at a uniform level,

(7) Each tray is then placed in a rack and into the oven to be baked,

(8) After baking the trays are allowed to cool,

(9) Each of the slices has a topping and this is added once the trays have cooled. This is then left to set,

(10) Once the topping is set, the cake trays are sliced, wrapped through the flow wrap machine, subsequently matched with their respective flapjack, cake or brownie, flow-wrapped together and boxed.

54. A suggestion that the Products should be manufactured by extrusion rather than tray baked was considered but this was ruled out because it was impractical and tray baking was similar to the method for homemade brownies and flapjacks.

55. We find that the manufacturing processes are in all material respects the same as would be used for the manufacture of other cake traybakes, brownies and flapjacks.

***Marketing***

56. The target market for the Products is adults who do regular exercise. According to evidence from Sports England and relied upon by Mr Davies, 14 million of adults do more than 150 minutes of exercise a week. The Appellant's marketing targeted that group. The purpose of the Products is to provide to that target market the nutrition needed immediately before and after exercise. Mr Davies regarded his competitors as any product that a consumer would eat immediately before and immediately after exercise.

57. The Appellant's marketing channels were through the DuelFuel website, social media marketing and approaching gym and health club owners to persuade them to stock the Products.

58. The website is consistent with that strategy. The overall impression and messaging of the website is to support those undertaking vigorous exercise, explain the benefits of good nutrition and market the Products as the ideal solution to the consumer's nutritional needs both before and after exercise. The landing page of the website describes the exercise benefits of the Products:

> "**Two fuels. One system**.

> DuelFuel gives you the powerful combination of terrific tasting performance and recovery nutrition in one convenient DuelPack.
>
> Every DuelPack contains a delicious flapjack designed to power you through your workout and a mouth-watering browning or cake slice to reward you and your muscles with, once you're through. Unsure how to fuel before and after exercise? DuelFuel supports you all the way."

59. On another page on the website under the banner "two fuels.one system":

> "Only DuelFuel combines great tasting performance and recovery nutrition in one convenient DuelPack. Enjoy your Performance Flapjack thirty minutes or so before exercise to support energy release and treat yourself to your Recovery Cake Slice after exercise to get your recovery underway."

60. The flapjacks are then described under the banner "performance", for example, as follows:

> "DuelFuel's Pecan Maple & Chocolate Flapjack is a great way to top-up energy levels before exercise.
>
> Weighing in at an ideal 35g the flapjack is packed with a mix of complex and simple carbohydrates, along with a bespoke blend of 27 vitamins and minerals, to deliver sustained energy release.
>
> Got a performance goal in sight? Seriously, get ready to ring some bells…"

61. The cake slices and brownies are described under the banner "Recovery", again by way of example:

> "DuelFuel's Orange & Chocolate Cake Slice rewards your muscles and your tastebuds as you recover.
>
> Each 40g cake slice contains over 50% protein to support muscle repair and 20% carbohydrates to contribute to replenishment of glycogen stores.
>
> All this, along with a blend of 27 vitamins and minerals helps replace electrolytes and minerals and reinforce the body's immune system means you're setting yourself up for a great recovery."

62. The website also provides extensive detail on the Products including nutritional content, photographs of the wrapped and unwrapped product and the packs available. There is also a significant number of reviews from satisfied consumers.

63. The website has a large number of articles and commentaries focusing on exercise and nutrition written by Mr Naylor and the "DuelFuel Nutrition Team", for example articles titled "Carbohydrates In Performance and Recovery Nutrition", "The Role of Protein in Our Active Lives", "How To Lose Weight" and "From Mouth to Muscles".

64. To the extent the website shows people consuming the Products it is with their fingers.

***Packaging***

65. Consistent with Mr Davies' original concept, the Products are sold in a packet containing two products, a flapjack and a cake bar or brownie. They could be bought in a "Six Pack" box with six doubles or as a Selection Box with twelve doubles, and packs of twelve doubles of a single flavour combination of flapjack and a cake bar or brownie. There are pictures on the website of products wrapped singly, that is just a flapjack, cake or brownie on its own, but in pleadings and in the hearing both counsel focused entirely on the combined pack containing two products and we therefore assume for the purposes of this decision the single products were never sold as such.

66. Each pack has coloured wrapping with the two individual products side by side. The front has "DuelFuel" in prominent writing with "Two fuels. One system" above it, then a picture of two fists in a fist bump and below that photographs of the two products side by side. Over the picture of the flapjack in a circular wording are the words "sustained energy release" and over the brownie "supports recovery". Below each of the photographs are the product description, so for example "peanut butter & chocolate flapjack" and "chocolate brownie". Finally on the front of the package on the flapjack side is "performance" and on the brownie side, "recovery".

67. On the reverse of the package, alongside the usual ingredient and nutritional information is a box headed "Two fuels. One system" and in two sets of text side by side "enjoy your flapjack – 30 minutes before exercise to support energy release" and "enjoy your brownie after exercise to support muscle function".

68. The side of the package next to the flapjack has the following information:

> "complex and simple carbohydrates",
>
> "vitamins and 27 minerals",
>
> "wholegrain oats"
>
> "Made in the UK"

69. The side of the package next to the brownie has the following information:

> "oven baked"
>
> "1g leucine"
>
> "made with real chocolate"
>
> "over 25g protein"

70. Other varieties and flavours had comparable wording.

71. The Products within the outer wrapper also had individual inner wrappers btu they mirror the relevant half of the outer wrapper.

72. Ms Muer noted in her evidence that it was clear in the feedback from the focus groups that the Products should not feel aggressive but rather authentic and be 'real food' consumers might have cooked themselves rather than highly processed. The fist bump concept - one fist of fire and one of ice - was developed to reflect the warming up and cooling down before and after exercise. However, to avoid putting off consumers, many of whom were women, the fist bump was intended not to be challenging or aggressive but rather communicating support and teamwork.

73. Thought was given to the packaging for the Products and the need to show that there were two products inside. The eventual design split the design of the outer wrapper down the middle with clear photographs of the products taken at an angle to show the texture of the product, demonstrating that they were flapjacks and cakes. There was a conscious intention not to create packaging that made the Products look like confectionery.

74. The colour palettes for the packaging reflected the common colour and flavour associations for the varieties that were included, so for example red, a common colour for peanut butter branding, was used for the peanut butter and chocolate flapjack packaging, yellow for lemon drizzle and orange for chocolate orange.

**The plates of cakes**

75. As described above the Appellant produced three plates of products for the Tribunal, with a DuelFuel product on each plate and what the Appellant believes to be similar products.

76. The products on each plate were as follows:

(1) Plate 1:

(a) Three varieties of DuelFuel flapjacks

(b) Cadburys Dairy Milk Caramel Flapjack Bites

(c) Tesco's Oaty Flapjacks

(d) McVities HobNobs Oaty Flapjacks with Milk Chocolate

(2) Plate 2:

(a) DuelFuel brownies

(b) Mr Kipling Brownies

(c) Tesco's Chocolate Brownie Bites

(d) Pulsin Peanut Choc Chip Brownie

(3) Plate 3:

(a) Both DuelFuel cake slices

(b) Tesco's Lemon Cake Slice

(c) Mr Kipling's Chocolate Slice

(d) Kellogg's Strawberry Nutri-Grain bar

77. The Tribunal was also provided with the Products in their packaging.

78. The panel was warned that, as the Appellant had to cease production, the Products were more than a year past their best before date. That was the reason why the Appellant had tried to produce more product prior to the hearing. To the extent the panel wished to try the Products they should be aware that over time they had lost flavour, particularly the lemon drizzle slice.

**PROCEDURAL BACKGROUND**

79. The Appellant was registered for VAT in September 2021.

80. On 11 October 2021 Grant Thornton on behalf of the Appellant sought clearance from HMRC as to the VAT treatment of the Products.

81. In November and December 2021 HMRC requested and the Appellant provided further information.

82. On 14 January 2022 HMRC issued a decision letter to the effect that the Products were standard rated confectionery.

83. On 7 February 2022 the Appellant requested an independent review of the review conclusion.

84. In February and March Mr Davies provided more information including the results of the moisture loss analysis by Micro Search, an independent food testing laboratory.

85. On 22 March 2022 HMRC issued a review conclusion letter upholding the decision.

86. On 19 April 2022 the Appellant appealed to this Tribunal.

**RELEVANT LEGISLATION**

87. Section 30 VATA provides for the zero-rating of goods "of a description… specified in Schedule 8".

88. Group 1 of Schedule 8 to VATA provides, in as far as is relevant:

"GROUP 1 - FOOD

The supply of anything comprised in the general items set out below, except—

(a) …

(b) a supply of anything comprised in any of the excepted items set out below, unless it is also comprised in any of the items overriding the exceptions set out below which relates to that excepted item.

*General items*

Item No.

1. Food of a kind used for human consumption.

…

*Excepted items*

Item No.

…

2. Confectionery, not including cakes or biscuits other than biscuits wholly or partly covered with chocolate or some product similar in taste and appearance.

…

NOTES

…

(5): Items 2 and 3 of the items overriding the exceptions relate to item 2 of the excepted items; and for the purposes of item 2 of the excepted items "confectionery" includes chocolates, sweets and biscuits; drained, glace or crystallised fruits; and any item of sweetened prepared food which is normally eaten with the fingers."

89. Section 96(9) VATA provides:

"(9) Schedules…8 … shall be interpreted in accordance with the notes contained in those Schedules; and accordingly the powers conferred by this Act to vary those Schedules include a power to add to, delete or vary those notes."

**THE ISSUES IN THIS APPEAL**

90. This appeal concerns whether the Products are zero rated under Item 1 of Group 1 Schedule 8 VATA. It is agreed that the Products are 'food of a kind used for human consumption' within Item 1 of Group 1 Schedule 8. Accordingly, the interaction of the categorisations relevant to zero rating in this appeal can be summarised as follows:

(1) Whether the Products are zero rated as 'cakes' and so outside Excepted Item 2 even if they would otherwise be 'confectionery'. It is common ground that if the Products are found to be cakes then the Appellant succeeds in its appeal without need to consider the confectionery arguments.

(2) If the Products are not cakes, whether they are standard rated as confectionery within Excepted Item 2 because either:

(a) Note 5 deems the Products to be confectionery; or

(b) Even if Note 5 does not apply, the Products are confectionery on general principles.

91. We raised an issue with the parties in the hearing as to what the proper VAT treatment of the supply would be were we to decide that either the flapjack or the cake slice or brownie were standard rated and one zero rated. We expressed our tentative view there would need to be submissions on whether there was a composite or multiple supply in order for the Tribunal to decide that point. Both counsel agreed but noted that the point had not been an issue debated in the appeal and asked that the Tribunal simply decide the VAT status of the individual products and, if necessary, the parties be at liberty to bring the issue to the Tribunal.

92. The burden of proof is on the Appellant in this appeal.

**THE TEST TO BE APPLIED**

## The approach to be taken generally

93. Save for Note 5, which we consider separately below, there is no statutory definition of the term 'confectionery' or 'cake'.

94. The original purpose of the distinctions in the legislation was to zero rate staple foods but tax luxury foods at the standard rate (see for example *Bells of Lazonby Ltd v Revenue & Customs* [2007] UKVAT V20490 at [1]. However, we do not find that original purpose to be of any assistance in the current appeal.

95. Decided cases in the area of classification for VAT purposes have recommended a multifactorial assessment (for example *Lees of Scotland Ltd & Thomas Tunnock Ltd v HMRC* [2014] UKFTT 630 at [18], *HMRC v Procter & Gamble* [2009] EWCA Civ 407 and *HMRC v The Core (Swindon) Limited* [2020] UKUT 301 (TCC) at [16]).

96. In *Customs and Excise Commissioners v Ferrero UK Ltd* [1997] BVC 408, which concerned whether a product was a biscuit or confectionery, Lord Woolf MR said that:

> " …I do urge Tribunals, when considering issues of this sort, not to be misled by authorities which are no more than authorities of fact into elevating issues of fact into questions of principle when it is not appropriate to do so on an inquiry such as this. The Tribunal had to answer one question and one question only: was each of these products properly described as biscuits or not?...
>
> Having examined the authorities, the Tribunal in their decision set out the principles which they said they should apply. It is in the light of the authorities that they identify these principles. This explains why the principles are far too elaborate. However within the principles it is possible to identify the right approach. This is set out at the start of the statement of the principles in these words:
>
> > "The words in the statute must be given their ordinary meaning. What is relevant is the view of the ordinary reasonable man in the street."
>
> That is, what is the view of the ordinary person as to the nature of the product and whether or not the product is one which falls within the relevant category which here is that of a biscuit. The Tribunal continued:
>
> > "If a product has the characteristics of two categories then it can be placed in the category in which it has sufficient characteristics to qualify."
>
> That again is a perfectly satisfactory statement of the approach. A product can only be placed in a category when it has sufficient characteristics to qualify. They go on to say:
>
> > "Where there is doubt as to which category it belongs it can be placed in the category to which it is 'more akin'.

> That statement is perfectly appropriate as long as it is understood as meaning that, where there is a product which has the characteristics of two products, as long as it has sufficient of the characteristics of the product to which they are going to classify it, it can be placed in the category to which it is more akin. Thus, to give an example of what I mean. If there is a product which, given its ordinary meaning, is properly describable as a cake and a biscuit, for the purpose of the legislation it is necessary, if it is a covered with chocolate, to decide whether it is properly characterised as a cake or a biscuit. In that situation it is in order to take the category to which it is more akin. If it has more characteristics of a cake, it is characterised as a cake. If it has more characteristics of a biscuit, it is characterised as a biscuit, but in each case it must have sufficient characteristics to be characterised as a cake or a biscuit. If it has not, it cannot be so treated. The Tribunal then went on to apply the principles which they had identified to the facts."

97. In *Revenue & Customs v Proctor & Gamble UK* [2009] EWCA Civ 407 the Court of Appeal had to review the Tribunal's assessment and decision in respect of whether Pringles were potato crisps or similar to potato crisps within Excepted Item 5 of Group 1. Lord Justice Jacob recognised that the question was a composite one and provided a note of caution as to the application of extensive legal analysis in this area:

> "13. As Toulson LJ observed in oral argument, it is a composite question. So although it is convenient to ask separately whether Pringles are "similar" to potato crisps etc and whether they are "made from potato", one must also take into account the composite nature of the question. Moreover it is, to my mind, precisely the sort of question calling for a value judgment of the sort to which the *Biogen* principle applies…
>
> 14…This sort of question – a matter of classification - is not one calling for or justifying over-elaborate, almost mind-numbing legal analysis. It is a short practical question calling for a short practical answer. The Tribunal did just that…
>
> 19…It was not incumbent on the Tribunal in making its multifactorial assessment not only to identify each and every aspect of similarity and dissimilarity (as this Tribunal so meticulously did) but to go on and spell out item by item how each was weighed as if it were using a real scientist's balance."

98. As there is no definition the words should be given their ordinary meaning. The question is whether the product "was capable of being classified as a cake… giving cake its ordinary meaning" and whether it "displays enough of the characteristics of a cake that it should be classified as such" but what an ordinary person considers a cake can change over time (*Lees of Scotland Ltd & Thomas Tunnock Ltd v HMRC* [2014] UKFTT 630 at [17] and [42]).

99. In *United Biscuits (UK) Ltd (No 2)* (LON/91/160), the well-known decision as to whether Jaffa Cakes were cakes or biscuits, the VAT Tribunal applied 11 factors in reaching its decision. In *Lees of Scotland* at [53], the Tribunal considered 10 slightly different factors.

100. We take from these cases the following principles to be applied in deciding appeals involving classifications for VAT purposes:

(1) words should be given their ordinary meaning.

(2) there needs to be a multifactorial assessment of a range of factors that the Tribunal considers relevant which can include not only the objective characteristics of the goods in question such as their ingredients, texture and so on but also factors such as how they are marketed, how they are perceived by the public and how they are eaten.

(3) the test is the ordinary person's view as to the nature of the product and whether or not the product is one which falls within the relevant category.

(4) the precise factors to be considered and their relative importance may vary depending on the circumstances.

(5) the question does not lend itself to extensive legal analysis but is a short practical question.

(6) there may be features on both sides of the argument and the Tribunal should allocate the goods to the category which is most appropriate.

**CAKE**

101. If the Products are cakes then, by virtue of Excepted Item 2, they cannot be confectionery and so must be zero rated as food. The parties accept there is no definition of 'cake' and the above principles must be applied by the Tribunal to determine whether a product is a cake within its ordinary meaning.

102. HMRC in their guidance in VAT Notice 701/14 offer a wide range of products that they accept as being cakes:

"3.4 Bakery products

…

Examples of bakery products and their VAT liability:

| Zero rated | Standard rated |
|---|---|
| … | … |
| Cakes including sponges, fruit cakes, meringues, commemorative cakes such as a wedding, anniversary or birthday cakes | Cakes supplied in the course of catering (subject to the temporary reduced rate) – see VAT Notice 709/1: catering and take-away food |
| Slab gingerbread | |
| Flapjacks | Cereal, muesli and similar sweet tasting bars … |
| Marshmallow teacakes — | Other types of snowballs such as Swedish snowballs with a longer shelf life |
| with a crumb biscuit or cake base topped with a dome of marshmallow coated in either chocolate, sugar strands or coconut | |
| Scottish snowballs… | |
| 'Crunch cakes' corn flakes or any other breakfast cereal products coated in chocolate or carob and pressed into brittle flat cakes | Florentines |
| Caramel or 'millionaire's' shortcake… | Shortbread biscuits partly or wholly chocolate-covered |
| Lebkuchen | Coconut ice" |

103. At paragraph 3.6 the following are recognised as zero rated:

> "Cakes including sponge cakes, pastries, eclairs, meringues, flapjacks, lebkuchen, marshmallow teacakes and Scottish snowballs."

104. But cereal bars are standard rated:

> "cereal bars, whether nor not coated with chocolate, with the exception of bars which qualify as cakes."

105. At paragraph 4.4 cakes with non-traditional ingredients are recognised:

> "4.4 Diabetic and hypoallergenic products
>
> "You can also zero rate specialised food products designed specifically for diabetics or allergy sufferers, such as sugar-free preserves or gluten-free flour and cakes."

106. Applying the test of what an ordinary person would consider to be a cake we start with a conventional or archetypal cake to be something that is made from a batter containing flour and eggs and is sweet due to the presence of ingredients such as sugar, golden syrup or honey and to contain fat, normally in the form of butter, margarine or an oil. A cake is normally baked to produce an aerated sponge.

107. An ordinary person would consider a typical cake to be a high calorie food eaten as a treat whether sitting down with a cup of tea, after a meal or during a children's birthday party or standing up at a social function, perhaps a party or celebrating a birthday at work. An ordinary person would also expect a cake to be something eaten by all generations.

108. The healthiness a product can be taken into account when considering how an ordinary person on the street would view the product (*WM Morrison Supermarkets Plc v HMRC* [2023] UKUT 20 (TCC) at [97]).

109. However, the conventional cake can only be a starting point. In applying the multifactorial test some of these features of a conventional cake may be absent (for example *Goodfellow & Steven Ltd v The Commissioners of Customs and Excise* EDN/87/10 at page 4 "Despite what has been said flour is - upon the evidence in this case - not an essential ingredient… Nor is it necessary that the whole product be baked.") but the more that is the case the less likely the ordinary person would consider the product to be a cake.

**Flapjacks**

110. The concept of a flapjack has a problematic position in the categorisation of cakes for VAT purposes.

111. HMRC in its manuals at VFOOD6200 (prior to amendment in July of this year) set out the original approach to flapjacks:

> "It is our policy that there is a difference between flapjacks and cereal bars. This policy development arose because, at the inception of VAT, flapjacks were widely accepted as cakes, and cereal bars were not widely available, if at all. Flapjacks were accepted as being a cake of common perception and widespread home-baking, not because of any specific reasoning behind such factors as their recipe, ingredients or the manufacturing process.
>
> However, since that time, the difference between flapjacks and cereal bars has narrowed due to the development of cereal bars and their current proliferation on the market. The amendment to the law in 1988 was made to bring products, particularly cereal bars, within the scope of the standard rate by defining confectionery as sweetened items of prepared food normally eaten with the

> fingers. As a result cereal bars were standard-rated as long as they are sweetened.
>
> The problem that has arisen is that a flapjack is, historically, accepted as a cake, but should probably now be categorized as a cereal bar, and therefore standard-rated, within the legislation.
>
> VAT treatment of flapjacks
>
> We therefore define flapjack narrowly, as it is intended to only apply to that product as it was at the inception of VAT…"

112. Even for flapjacks the test is always not whether the product is a flapjack but whether it is a cake *(Asda Stores Ltd v HMRC [2009] UKFTT 264* at ([48] - [49], *Torq* at [74]). Further, the Tribunal in *Bells of Lazonby Ltd v Revenue & Customs* [2007] UKVAT V20490 agreed with HMRC that a flapjack was not a normal cake but something distinct:

> "13…We share the Commissioners' evident view that flapjacks (that is, a product, in its most familiar form, usually composed of oats held together by fat and syrup) are, at best, at the borderline; they may be eaten instead of cake, and at the same time of day, but in our view it is unlikely that an ordinary person would consider that a flapjack was merely a variety of cake—he would, we think, consider it a distinct, even if in some respects similar, product."

113. Nevertheless, HMRC have historically accepted that traditional flapjacks - made of oats, butter and syrup – are cakes even if there are minor variations such as adding dried fruit, chocolate chips or toppings such as chocolate or yogurt. However, HMRC have resisted zero rating for newer products including cereal bars and energy or sports nutrition bars and where other cereals or other non-traditional ingredients such as dried fruit, raisins, chocolate chips (HMRC manual at VFOOD6200). The manuals were updated on 11 July 2023 (Mr Schofield argued the timing in relation this appeal is not coincidental) to reference protein powder, vitamins and minerals and added fibre as other new ingredients that would make a flapjack fail to qualify as a traditional flapjack and so as a cake.

114. Mr Schofield resisted HMRC's argument that flapjacks were a different kind of cake. HMRC have accepted they are cakes (see VAT Notice 701/14 at 3.4 and HMRC's Manual VFOOD6200). Notwithstanding the Tribunal's comments in *Bells of Lazonby* at [13] that flapjacks are at the borderline of cake, the ordinary consumer would not question the presence of a flapjack slice next to a Victoria sponge whether on a stall at a village fête and baked by the Women's Institute or in a display cabinet in a coffee shop next to a millionaire square and a rocky road slice.

115. Further, it is accepted that cakes have developed (*Pulsin* at [60], *Bells of Laxonby* at [12]) and according to Mr Schofield there is no justification for flapjacks as a subset of cakes not also to develop. Thus, cereal bars can be cakes if they have a soft cake-like structure, see VFOOD7140, which provides:

> "There are products that appear to be similar to cereal bars. These include traditional flapjacks (see also VFOOD6200), which may be zero-rated as cakes. More recently, there have been new products developed that have the appearance of cereal bars in terms of marketing, packaging and size, but have a soft, cake-like texture. These have also been zero-rated as cakes. An oft-quoted example is a Kellogg's Nutri-Grain® bar."

116. Ultimately, we find that the test is whether the product is a cake and therefore the description of being a flapjack, traditional or otherwise is irrelevant.

**The multifactorial test**

117. In considering whether the Products are cakes we have considered the following facts and features.

***Name and description***

118. The products are described as flapjacks, cake slices and brownies with conventional flavours but we do not think this in itself goes very far if at all in deciding whether they are cakes.

119. We address below the wider "fuel" and exercise related descriptions applied to the Products.

***Ingredients***

120. We have described the ingredients above.

121. As we have described, in our view an ordinary person would consider a conventional cake to be something that is made from a batter containing flour and eggs and to be sweet due to the presence of one or more ingredients such as sugar, golden syrup or honey and to contain fat in the form of butter, margarine or an oil. As a result, the archetypal cake would be considered by the ordinary person to be a relatively high calorie food. Cakes can contain different ingredients, for example different flours and preservatives, indeed many products accepted as cakes do not contain flour at all. However, the further a product departs from the conventional cake the less likely an ordinary person would see it as a cake.

122. As regards the cake slice and the brownie in this appeal, the ingredients are very different from those of the conventional cake in three respects:

(1) the use of powdered soya protein isolate, milk protein concentrates and bovine collagen protein instead of conventional flour;

(2) the eggs and fats such as butter normally found in cakes are replaced by cooking oil, water and brown rice syrup; and

(3) the inclusion of vitamin and mineral blends.

123. We find that the use of the protein powders instead of conventional flour to be different from what an ordinary person might think of as the ingredients of a cake, both as to the nature of the ingredient but also the fact that as a result each 40g cake slice or brownie contained around 20g of protein. In our view an ordinary person would not associate high protein levels with a cake. We do not find the use of the other ingredients as significant but, to the extent all of these ingredients are intended to make the product healthier, this points away from them being cakes.

124. The ingredients for the flapjack in this appeal are discussed above and set out in Appendix 1. Mr Watkinson argued these were not typical ingredients for a cake as there was no margarine or golden syrup. Further the flapjacks included a vitamin and mineral blend, baking powder, coconut sugar and either ground nut meal or peanut butter.

125. Mr Schofield argued that, excluding toppings (which can be ignored, *Goodfellow & Steven Ltd v CCE*) between 89-95% of the ingredients for the flapjack were oats, syrups and fats, typical flapjack ingredients. The fact that the syrups were not golden syrup and the fats were in the form of oils not butter and margarine did not matter and, in any event, customers were looking for heathier ingredients. Baking powder was synonymous with cakes and the presence of a small amounts of vitamins and minerals did not affect the look and feel of the cake (VFOOD1940).

126. We note the need to satisfy the test of being a cake not just a flapjack, but we consider that an ordinary person would expect that a traditional flapjack would consist of oats, sugar, golden syrup and butter or margarine. However, in determining whether the flapjack in this appeal is a cake, we do not find the variation from a conventional flapjack recipe to be material. Both the conventional and the current flapjack are very different from the conventional cake.

***Manufacturing process***

127. In our view an ordinary person would consider a conventional cake to be something that is baked and in the process becomes aerated to create a sponge like texture. As described above, this is the process used in the manufacturing of the Products.

***Size and appearance***

128. The Products are of dimensions similar to flapjacks, cakes or brownies sold as a rectangular slice rather than, particularly in the case of cakes, sold whole. However, biscuits, cereal bars or other confectionery might also be of the same dimensions, so we do not ascribe any importance to size as a factor.

129. In both cases, aside from the topping, the structure of the cake slice and the brownie was the spongelike aerated consistency expected from the baking process and in this respect was more akin to a cake than a cereal bar or biscuit.

130. In terms of overall impression the cake slice looked like a cake slice from a traybake and the brownie looked like a brownie. As shown by the plates of rectangular cake slices presented to us, the cake slices and brownies would not look out of place on a plate of other traybake cake slices and brownies but less so when compared to more traditional wedge shape slices of sponges and other cake.

131. The general appearance of the unpacked flapjack was that it looked like a flapjack with the oaty consistency one would expect. The flapjack would not look out of place next to other flapjacks but, as with flapjacks generally, would only not look out of place on a plate of cakes taking that as a broad variety of cakes.

132. We find the size and appearance of the unpacked Products to be consistent with being cakes.

***Taste and texture***

133. The Tribunal was advised that the use by date on the Products had expired over a year ago and the panel might choose not to taste the Products.

134. I did not try the cake slices or brownie due to bovine collagen being an ingredient but Mr Stafford, with allowance given for the Products having deteriorated since being manufactured, found the cake to be cake-like but heavier than he would like if he were eating them as a treat. He also found the consistency to be rather denser than he would have expected and that there was a slightly unpleasant mouth feel and dryness.

135. We both tried the flapjack and found it to be flapjack like, sweet and with an oaty consistency. Mr Stafford felt the flapjack suffered from similar defects to those affecting the cake slices and brownies.

136. There were clearly limitations in testing products long past their use by date. However, we find that they were edible but, the even taking into account their being stale, Mr Stafford did not find the cake, flapjack or brownie to be of a standard to be served to guests as a treat with afternoon tea and I agree as regards the flapjack..

***Packaging***

137. We have described the packaging above. It is aimed at consumers wanting to eat "on the go" and specifically at gyms or places of exercise. We find that the packaging is not what an ordinary person would expect for a cake.

***Marketing***

138. The Products were aimed at people going to the gym and doing other strenuous exercise, for example cycling. The website clearly promoted the Products for that purpose.

139. The Products were not marketed in the same way as normal cakes. They were sold through the website and in gyms and health clubs. Whilst mentioned as a target market in the early surveys, we did not see any marketing efforts aimed at conventional retail outlets such as supermarkets. Whilst the Products look like flapjacks or cakes, we find they would not realistically be sold with conventional cakes in a supermarket. Further, the combination in a sealed packet of a flapjack with a cake slice or brownie, whilst entirely understandable given the Appellant's target market, makes the products less suitable for general sale. The prepackaged combination pre-supposes a customer wants both a cake and flapjack and of the flavour combination in the packet which seems to us unlikely as an offering to the general public. That combination might be plausible in a lifestyle section but not a general cake section alongside conventional cakes. We were not shown any similar combined product.

140. The priority in the marketing as illustrated by the website and reflected in the evidence is to convey to consumers that the Products deliver the optimum nutrition to the consumer to enable them to perform at their best at whatever exercise they are engaged in. The nutrition is delivered in a flapjack or cake form which is marketed as being enjoyable to eat. However, in our view that is of secondary importance to the nutritional objective.

141. We find that an ordinary person would consider the marketing of the Products strongly indicative of them not being cakes.

***Circumstances of consumption***

142. The Products are intended to be eaten immediately before and after exercise. The packaging and matching of the flapjack with the cake slice or brownie are intended to be convenient for this purpose. We accept that conventional flapjacks are commonly eaten as fuel before or during hiking, cycling or other activities and cake is often eaten after some sporting activities such as cycling. We also find that the Products would be eaten with the fingers from the packet and not from a plate with a knife or fork.

143. As we have set out above, we find that the ordinary person would expect a conventional cake to be a sweet product eaten as a treat whether sitting down with a cup of tea, after a meal, during a children's birthday party or standing up at a social function, perhaps a party or celebrating a birthday at work. An ordinary person would also expect a cake to be something eaten by all generations.

144. The marketing on the website also emphasises the Products are a treat, thus "delicious", "treat yourself", "rewards your muscles and your tastebuds as you recover" and so on.

145. Whilst in principle there would be nothing to stop this from happening, we do not find that the Products would be eaten in the typical circumstances where cakes might be eaten as part of a non-exercise related occasion. They are designed for eating immediately before and after vigorous exercise and, by their ingredients and marketing, not as a cake which might be eaten by consumers of all generations.

**Conclusion on cakes**

146. Applying the multifactorial test and weighing all the relevant factors we find that the Products are not cakes within the meaning of Excepted Item 2. In our view they look and have the appearance of cakes but the ingredients, taste, packaging, marketing and pattern of consumption of the Products are such that an ordinary person would not consider them cakes.

**CONFECTIONERY: THE NOTE 5 ARGUMENT**

147. If as we have determined, the Products are not cakes then if the Products are confectionery within Excepted Item 2 then they will be standard rated. If not then, as the parties agree they are food, the Products will be zero rated as food within Item 1 of Group 8.

148. There are two alternative grounds on which the Products could be treated as confectionery within Excepted Item 2:

(1) They are deemed to be confectionery within Note 5; or

(2) They are confectionery on general principles

149. The application of the general principles is considered below.

150. If the Products fall within Note 5 to Group 1 then the Products would be deemed to be confectionery within Excepted Item 2 irrespective of whether that would otherwise be the case. As we have noted, following the hearing we asked the parties for written submissions on this point and we are grateful for counsels' helpful responses which we have now considered.

**The history of Note 5**

151. Note 5 in its current form provides in so far as relevant to this appeal:

> "(5): …for the purposes of item 2 of the excepted items "confectionery" includes chocolates, sweets and biscuits; drained, glace or crystallised fruits; and any item of sweetened prepared food which is normally eaten with the fingers."

152. The legislative history of what is now Note 5 starts in what was Group 34 of Schedule 1 Purchase Tax Act 1963, which taxed goods:

> "Comprising Chocolates, sweets and similar confectionery (including drained, glace or crystallised fruits); and chocolate biscuits and other confectionery having a case or coating of chocolate couverture, but not including cakes in such a case or coating.
>
> Articles not comprised below in this Group … 15%
>
> Exempt
>
> (1) Chocolate couverture not prepared or put up for retail sale.
>
> (2) Drained cherries.
>
> (3) Candied peels."

153. Ahead of joining the European Economic Community, and taking advantage of the transitional provisions in Article 17 of Directive 67/228 which permitted Member States to provide for reduced rates or reduced rates with a refund, the UK introduced Finance Act 1972, Schedule 4, Group 1, which preserved zero rating for food subject to exceptions including Excepted Item 2:

> "Chocolates, sweets and similar confectionery (including drained, glace or crystallised fruits); and chocolate biscuits and other confectionery having a case or coating of chocolate, but not including cakes in such a case or coating"

154. The Value Added Tax Act 1983 preserved zero-rating for food in Schedule 5 Group 1, and Excepted Item 2:

> "Chocolates, sweets and similar confectionery (including drained, glace or crystallised fruits); and biscuits and other confectionery (not including cakes) wholly or partly covered with chocolate or some product similar in taste or appearance"

Note 5 provided:

> "Items 2 [Drained cherries] and 3 [Candied peels] of the items overriding the exceptions relate to item 2 of the excepted items."

155. The Value Added Tax (Confectionery) Order 1988 came into force on 1 May 1988. Paragraph 2 of the Order varied what was then Group 1 of Schedule 5 to VATA 1983:

> "(a)substituting for excepted item no. 2—
>
> "2. Confectionery, not including cakes or biscuits other than biscuits wholly or partly covered with chocolate or with some product similar in taste and appearance."; and
>
> (b) adding at the end of Note (5)—
>
> ", and for the purposes of item 2 of the excepted items "confectionery" includes chocolates, sweets and biscuits; drained, glacé or crystallized fruits; and any item of sweetened prepared food which is normally eaten with the fingers".

156. The explanatory note to the Order stated:

> "This Order amends Group 1 of Schedule 5 to the Value Added Tax Act 1983 in relation to confectionery. It removes certain uncertainties and, while maintaining relief for cakes, restricts the scope of the relief for other confectionery products which are not wholly or partly covered with chocolate or with some product similar in taste and appearance. The main immediate effect will be to tax all cereal bars at the standard rate."

157. The Chancellor of the Exchequer's statement to Parliament in the Budget Statement on 15 March 1988 as contained in Hansard Vol.129 included the following statement:

> "I have one change to propose today affecting the coverage of value added tax, which will remain at 15 per cent. Confectionery was brought in to VAT by the right hon. Member for Leeds, East (Mr. Healey) in 1974, and the legal definition of confectionery goes back further still to the days of purchase tax. The emergence of new products has rendered this definition, rather like the right hon. Gentleman himself, somewhat obsolete. In particular, recent legal decisions mean that some cereal bars are subject to VAT, while others are not. I propose to clarify the law so that all cereal bars are taxed."

158. Value Added Tax Act 1994, Schedule 8, Group 1, Excepted Item 2 and Note 5 now reflect those 1988 amendments.

159. It is relevant to note at this stage that, to the extent it is relevant, it is common ground that the purpose of the 1988 amendments was to exclude from zero rating all cereal bars. However, Parliament failed to do so (*WM Morrison Supermarkets PLC v HMRC* [2021] UKFTT 0106 at [162]-[163]).

**Interpretation of Note 5**

160. It is also common ground that the effect of Note 5 is to expand the definition of confectionery to include "chocolates, sweets and biscuits; drained, glace or crystallised fruits" even if they would not otherwise be so treated.

161. It is further agreed that the Products meet the constituent requirements of the phrase "sweetened prepared food which is normally eaten with the fingers", that is the Products are sweetened, they have been prepared, they are food and they are normally eaten with the fingers.

162. The issue is the construction of that phrase in the context of Note 5 as a whole, that is whether those words should be construed differently given the context of the ordinary meaning of 'confectionery' and the preceding words "chocolates, sweets and biscuits; drained, glace or crystallised fruits". The alternative is that the words should be construed separately as a stand-alone test, that is to include or deem "sweetened prepared food which is normally eaten with the fingers" to be 'confectionery' even if the relevant item does not have the characteristics of confectionery and/or bears no relation to "chocolates, sweets and biscuits; drained, glace or crystallised fruits".

163. It was accepted by Mr Watkinson and therefore common ground that Note 5 did not override the zero rating for cakes. Thus, Note 5 might deem food to be confectionery but if it was nevertheless a cake then it is excluded by the wording within Excepted Item 2. This was never Parliament's intention, see the explanatory note to the 1988 Order:

> "…It removes certain uncertainties and, while maintaining relief for cakes, restricts the scope of the relief for other confectionery products…"

164. Mr Watkinson for HMRC argued that Note 5 was a deeming or, as expressed in his written submissions, an inclusive provision, so that any food that meets the description "any item of sweetened prepared food which is normally eaten with the fingers" would be deemed to be confectionery, even if the food was not otherwise confectionery and it could not otherwise be described as "chocolates, sweets and biscuits; drained, glace or crystallised fruits".

165. Mr Watkinson relied on Bennion on Statutory Interpretation at [18.3]:

> "(1) An inclusive definition modifies the natural meaning of the defined term by enlarging it or clarifying potential doubt about what is covered. This kind of definition typically takes the form 'X includes'. …
>
> An inclusive definition is used to enlarge the meaning of the defined term to cover things that are not or might not otherwise be caught. It 'does not normally affect the width of the term being enlarged.' The term as used in the Act has its natural meaning (which is left undefined) and in addition has the special meaning given to it by the inclusive definition…
>
> An inclusive definition typically takes the form 'X includes…'. As Lord Watson explained in *Dilworth v Commissioner of Stamps* the word 'includes':
>
> > "… is used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include."

166. In *Premier Foods* the Chancellor described Note 5 as "an enlarging definition" [18].

167. As an inclusive definition, the words had their natural meaning but also includes those things that the interpretation clause declares it includes even if it would not otherwise do so. An inclusive definition can therefore be seen as a form of deeming provision (*WM Morrison Supermarkets Plc v HMRC* [2023] UKUT 20 (TCC) at [94]).

168. Alternatively, according to Mr Watkinson, Note 5 could be construed as a deeming provision, thus Bennion at 17.8:

> "The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried out as far as necessary to achieve the legislative purpose and no further."

169. Mr Watkinson also relied on observations by Peter Gibson J in *Marshall (Inspector of Taxes) v Kerr* [1993] STC at 366 quoted by Bennion and approved by the House of Lords on appeal ([1995] AC 148 at [164]):

> "For my part I take the correct approach in construing a deeming provision to be to give the words their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

170. Construing Note 5 as a deeming provision would exclude that which is absurd, for example the sweet chilli chicken snack skewers cited by Judge Brown in *Pulsin* at [53], since that result would go beyond the legislative purpose and Parliament cannot have intended that result by 1988 amendments. See the comments of Lord Hodge in *Project Blue Ltd v HMRC* [2018] UKSC 30, at [31] where he said it was:

> "without question a legitimate method of purposive statutory construction that one should seek to avoid absurd or unlikely results"

171. Mr Watkinson submitted that in this appeal deeming the Products to be confectionery would not be absurd.

172. Mr Schofield for the Appellant objected to the characterisation of Note 5 as a deeming provision. The comment at [94] in *WM Morrison* that Note 5 was a "deeming provision" was not a ground of appeal nor was it argued in the Upper Tribunal and accordingly it is entirely *obiter*. The point is entirely new in this appeal.

173. Note 5 does not use the ubiquitous language of deeming provisions, such as "is to be treated as" or "is to be regarded as". Thus Bennion at 17.8:

> "The language used to set up a statutory hypothesis varies. The traditional form of words 'shall be deemed' has generally given way to expressions such as 'treated as', 'regarded as' or 'taken to be'. Whatever form is used the effect is the same."

174. Mr Schofield agreed with Mr Watkinson that Note 5, which reads "'confectionery' includes…", should be seen as an "inclusive definition" provision but took a different conclusion, relying on Bennion at 18.3:

> "An inclusive definition modifies the natural meaning of the defined term by enlarging it or clarifying potential doubt about what is covered. This kind of definition typically takes the form 'X includes'… It does not normally affect the width of the term being enlarged… [which] has its natural meaning"

175. Mr Schofield noted that as the Products were not cereal bars, they fell outside the purpose of the 1988 amendment but accepted that little value could be obtained by applying a purposive

approach in relation to taxing cereal bars. The ordinary principles of interpretation required a purposive and contextual approach (for example, *R (O (a minor, by her litigation fried AO) & R (The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3 at [29] and [30])). Here in Mr Schofield's view the contextual approach limits 'confectionery' to either food that has a direct similarity to the preceding words (the *ejusdem generis* or "of the same kind" rule) or, in any event, to the ordinary and natural meaning of the word 'confectionery'.

176. The words "and any item of sweetened prepared food which is normally eaten with the fingers" was collared or bounded by the preceding words "chocolates… fruits". See *AG v Brown* [1919] 1 KB 773 at 797 which considered the rule:

> "…by this it is meant that general words coming after particular words are restricted to and controlled by the meaning of the particular words"

177. Accordingly, in that appeal, the statutory wording:

> "The importation of arms, ammunition, gunpowder, or any other goods"

meant that "any other goods" was restricted to things of the same class as the previous examples, that is "arms, ammunition, gunpowder" rather than being a freestanding term of "any other goods".

178. Accordingly, if Parliament had intended the words "any item of sweetened prepared food which is normally eaten with the fingers" to stand alone, it could simply have used that sentence, and omitted the previous words.

179. Similarly, see the observations of Judge Brown in *Pulsin* at [53]:

> "53. Note 5 provides that confectionery includes "sweetened prepared food normally eaten with the fingers". In a modern world in which a majority of processed foods are sweetened that definition cannot mean every sweetened prepared food eaten with the fingers comes within the definition of confectionery as to do so would include sweet chilli chicken snack skewers which precisely meet that definition. There must therefore be an element of context provided by the word itself which is being defined."

180. That problem, according to Mr Schofield is resolved by applying *ejusdem generis* and requiring "any item of sweetened prepared food which is normally eaten with the fingers" to be of the same genus or similar to "chocolates, sweets and biscuits; drained, glace or crystallised fruits".

181. Mr Watkinson objected to the application of the *ejusdem generis* rule on the basis that it would defeat the purpose of the inclusive definition seeking to expand the scope of 'confectionery', particularly where Parliament deliberately replaced the wording "similar confectionery".

182. In Mr Schofield's alternative case the phrase "any item of sweetened prepared food which is normally eaten with the fingers" must be limited by the need to look at the context of the provisions generally: it defines "confectionery" and cannot go beyond the meaning of that term. The Notes provide a means of guiding the interpretation. The word that is being interpreted is "confectionery" and Note 5 cannot rob that word of its ordinary and natural meaning. In this appeal the Products must be able to be properly categorised as confectionery, like chocolate or sweets, in order to fall within Note 5. On the facts they do not. They are not confectionery in the normal meaning of the word nor are they "*chocolates, sweets and biscuits; drained, glace or crystallised fruits*" and, further, are not similar to such items.

**Conclusion on Note 5**

183. The parties are agreed that the Products are "sweetened prepared food which is normally eaten with the fingers" in that they meet the constituent elements in the phrase – they are sweetened, prepared, food and are normally eaten with the fingers. The issue is whether any rules of construction apply which require the words to be read differently. Those potentially contrary conclusions arise from the context in which the phrase is set, that is as part of a definition of 'confectionery' and following other food items being "chocolates, sweets and biscuits; drained, glace or crystallised fruits".

184. The intention behind the 1988 amendment to Note 5 was to ensure all cereal bars were treated as confectionery. That policy does not appear to us to be helpful save that we note cereal bars are not obviously 'confectionery' or within the phrase "chocolates, sweets and biscuits; drained, glace or crystallised fruits". Indeed, the purpose of the 1988 amendment was to bring cereal bars within the definition of 'confectionery' when they would not otherwise be so treated. It also appears to us therefore that Parliament did not intend the 1988 amendment to be limited either by the surviving wording in the rest of Note 5 or by the ordinary meaning of 'confectionery'.

185. In our view the definition of 'confectionery' can best be described as an inclusive definition, and in doing so it expands the meaning beyond its normal meaning so as to include those items specifically included in the definition.

186. The Upper Tribunal in *WM Morrison Supermarkets*, which was considering a different question, summarised Note 5 as follows:

> "117. Note 5 …deems products with certain attributes: (1) prepared food (2) normally eaten with the fingers (3) sweetened to fall within the "confectionery" exception under Item 2 of Group 1 Schedule 8 VATA 1994."

187. The Upper Tribunal did not construe those words as qualified by the relevant product also having to be either within the ordinary meaning of 'confectionery' or similar to "chocolates, sweets and biscuits; drained, glace or crystallised fruits" nor do we.

188. Parliament intended to expand the definition of 'confectionery' by making the 1988 amendment, albeit for a different purpose. We do not see any reason to impose on that wording – which in isolation clearly applies to the Products - an interpretation requiring the 1988 amendment to be limited by the *ejusdem generis* rule or in the narrow approach taken by the Appellant limiting the 1988 amendment to food that would otherwise fall within the ordinary meaning of 'confectionery'. There may be circumstances where such a construction is appropriate but in our view this is not such an instance. We agree with HMRC that there is no obvious injustice or absurdity in treating the Products as being within Note 5 and therefore deemed to be confectionery.

189. Giving the words in the 1988 amendment their ordinary and natural meaning, they apply to the Products.

190. Finally, we do not accept that the 1988 amendment renders the preceding words "chocolates, sweets and biscuits; drained, glace or crystallised fruits" redundant. We were not taken through examples but it appears to us that, for example, "drained fruits" would not necessarily be sweetened and so would be caught by the first phrase but not the second.

191. Accordingly, we find that the Products are within Note 5 and therefore deemed to be confectionery within Excepted Item 2.

## Confectionery

192. We have found that the Products are within Note 5 and so deemed to be confectionery. Therefore it is unnecessary for us to consider whether the Products are confectionery on general principles. However, the point was addressed by counsel in the hearing albeit briefly and so for completeness we will do so in the event we are wrong.

193. Mr Schofield's primary argument was that if something was a cake it was not confectionery. Here, on the Appellant's argument, the Products were a cake and therefore necessarily not confectionery.

194. As far as the meaning of confectionery was concerned Mr Schofield relied on Lawton J's definition in *CCE v Popcorn House Ltd* [1969] 1 QB 760, a decision on purchase tax:

> "I adjudge that the word "confectionery" …means any form of food normally eaten with the fingers and made by a cooking process other than baking which contains a substantial amount of sweetening matter. That is the characteristic of both chocolates and sweets: they are normally eaten with the fingers; they are not made by baking" (p.762 at F).

195. Mr Schofield concluded that baked goods such as the Products are therefore not confectionery.

196. Mr Watkinson challenged Mr Schofield's reliance on *Popcorn House* on the basis it was concerned with old legislation (*Premier Foods* at [11]). Mr Watkinson instead relied upon the factors applied by this Tribunal in *WM Morrison* at [206] being:

(1) sugar content:

(2) sweet to taste:

(3) subjected to a process:

(4) normally eaten with the fingers:

(5) held out as snacks

197. Mr Watkinson, specifically objected to the exclusion in *Popcorn House* of baked goods as confectionery, preferring the Chanceller's comments in *Premier Foods* at [17] that the products must have been subject to a process;

> "17…I accept the production of confectionery must involve some process applied to the ingredients in their natural state for that is necessarily implicit in the word. I do not consider that such process can only be one capable of being described as cooking. Any process of mixing or compounding is, in principle, sufficient."

198. Further, confectionery is sweet but the sweetness need not be added:

> "17…I accept in its ordinary usage, confectionery is limited to products which can be described as sweet but I cannot see why such sweetness may not be inherent in the principal ingredient in its natural state but must be added by some further sweetener with which it is mixed or compounded."

199. The ingredients need not be those traditionally associated with confectionery. See also the Upper Tribunal in *WM Morrison:*

> "115…A consideration of whether something is confectionery will inevitably involve comparison with products which are present in items commonly accepted to be confectionery. There will no doubt be examples of confectionery which do not contain such ingredients but which are

> nevertheless confectionery. But that does not mean consideration of the ingredients, and the absence of traditional ones, will not add to the overall picture of the product's classification."

200. The healthiness of a product, including nutritional value and the packaging or marketing that relates to healthiness can be relevant to a determination as to whether a product is confectionery (*WM Morrison Supermarkets Plc v HMRC* [2023] UKUT 20 (TCC) at [97], [134],[135]). Mr Schofield suggested that in this appeal the Products are intended to confer health benefits which is at odds with being confectionery.

201. We do not accept Mr Schofield's argument that a cake is necessarily not confectionery. For example, *Bells of Lazonby* at [7] and *Ferrero*, at page 3:

> "That note underlines what I have already said, that confectionery would include, for these purposes, both cakes or biscuits but for the express terms to the contrary in item no 2."

202. In any event, the argument as to confectionery only arises where as here, the product is found not to be a cake. If the product is a cake then, to the extent cake can be confectionery, it is necessarily excluded by the wording of Excepted Item 2. The point for practical purposes is moot.

**the multifactorial test**

203. In considering what amounts to confectionery we prefer the formulation in *Premier Foods* at [17] and have have applied a multifactorial test including those indicators and other features of the Products we consider relevant.

***Ingredients and taste***

204. Syrups and coconut sugar have been added to the Products to sweeten them which is a characteristic of confectionery.

205. However, some of the ingredients contain particularly high levels of protein which is not characteristic of confectionery.

***Made by a process***

206. The Products are baked and therefore made by a process but we consider that an ordinary person would consider baking to be unusual in confectionery.

***Size, appearance and packaging***

207. The Products look like in size and general appearance like flapjacks, traybake cakes and brownies and not confectionery.

***Consumption***

208. The Products are intended to be eaten immediately before and after strenuous exercise but it is common ground that they would be eaten with the fingers.

***Marketing***

209. We find the Appellant's positioning of the Products to be difficult to characterise for this purpose.

210. As we have found, the Products are marketed at adults doing strenuous exercise and the advertised purpose in buying and consuming the Products is to improve their physical health. Further, they are not marketed along with other confectionery, for example in supermarkets. They are not marketed to children or non-exercising adults.

211. The marketing on the website also emphasises the Products are a treat, thus "delicious", "treat yourself", "rewards your muscles and your tastebuds as you recover" and so on but we

find the treat element is subsidiary to the primary purpose of the Products being to provide sports-related nutrition.

212. An ordinary person might decide that the Products are promoted as a snack, that is a small amount of feed eaten between meals. We do not think an ordinary person would be able to say the Products are promoted as a treat.

***Healthiness, ingredients***

213. An ordinary person would not expect confectionery to be healthy.

214. We find that an ordinary person would not regard the ingredients of the cake slice or brownie including the protein powders, vitamins and minerals to be typical of confectionery.

**Conclusion on application of confectionery general principles**

215. In considering whether the Products are confectionery outside of the deeming provision in Note 5, we are left in a similar position to Judge Bishopp in *Bells of Laxonby*:

> "18…The informed ordinary person, asked to classify this product after having discarded the description "cake", would struggle to find any appropriate term other than "confectionery". Thus it falls within Excepted Item 2 and is correspondingly standard-rated. The fact that it is so treated while cakes are zero-rated is one of the unreal results at which the tribunal hinted in Procter & Gamble UK (2007, Decision 20205) at paragraph 9. Examination of the two lists, of zero-rated and standard-rated products, set out in the Public Notice shows little logic in the distinctions between the two categories. Why, to take the example we have already mentioned, "crunch cakes" should be zero-rated while Florentines are standard-rated is a mystery which we are, fortunately, not required to solve."

216. Nevertheless, we have to apply the legislation as it is and applying the multifactorial test we find that an ordinary person would find that the Products are not confectionery within the meaning of Excepted Item 2.

**DECISION**

217. We find that the Products are not cakes for the purposes of Excepted Item 2 of Group 1 of Schedule 8 VATA.

218. Further, we find that the Products are deemed to be confectionery within Excepted Item 2 by virtue of Note 5 to Group 1. However, for completeness we do not find that the Products are confectionery on general principles.

219. Accordingly, the Appellant's appeal is dismissed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

220. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**IAN HYDE**
**TRIBUNAL JUDGE**

**Release date: 02nd FEBRUARY 2024**

## Appendix 1

## flapjack ingredients

| Ingredient | Percentage range of ingredient (%) |
|---|---|
| Oats (jumbo and porridge) | 41.96 - 47.62 |
| Syrups (maple, golden date and brown rice) | 21.79 - 23 |
| Sunflower oil | 5.16 - 5.24 |
| Vitamins and minerals | 2.31 |
| Coconut sugar | 4.28 – 4.34 |
| Baking powder | 0.52 |
| Specific flavourings, depending on variant | |
| Peanut butter | |
| ground peanuts | |
| Ground pecans | |
| Cocoa butter | |
| Natural maple flavour | |
| Natural berry flavour | |
| Specific toppings, depending on variant | |
| milk chocolate | |
| peanuts | |
| Pecan nuts | |
| Raspberry pieces | |

## Appendix 2

## brownie and cake slice ingredients

| Ingredient | percentage |
|---|---|
| Protein powders (soya protein, milk protein concentrate and collagen protein) | 51.87 – 52.78 |
| Water | 11.22 -11.8 |
| Glycerine | 8.8 |
| Coconut sugar | 4.15 – 4.4 |
| Sunflower oil | 4.25 |
| Vitamin blend | 2.025 |
| Syrup | 3.34 |
| Baking powder | 0.33 |
| Colourings | 0.1 – 0.2 |
| Specific flavourings, depending on variant | |
| Cocoa powder | |
| Chocolate flavour | |
| Orange oil flavour | |
| Lemon oil | |
| Golden syrup natural flavour | |
| Specific toppings, depending on variant | |
| Chocolate (milk, white or dark) | |
| Cocoa nibs | |
| Orange oil | |
| Orange pieces | |
| Lemon pieces | |