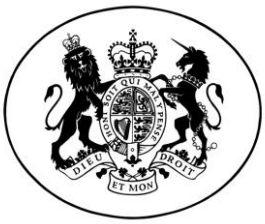
[2020] UKUT 0301 (TCC)



Appeal number: UT/2019/0049 (V)

VAT– zero rating-whether FTT erred in reaching its conclusion that Juice Cleanse Programmes should be zero rated as supplies of food rather than standard rated as supplies of beverages- held no- appeal dismissed-Group 1 Schedule 8 VATA 1994

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Appellants

- and -

THE CORE (SWINDON) LIMITED

Respondent

TRIBUNAL: The Hon. Mr Justice Zacaroli
Chamber President
Judge Timothy Herrington

Hearing conducted remotely by video conference deemed to be held in London on 6 October 2020

Joanna Vicary, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Max Schofield, Counsel, instructed by Grant Thornton UK LLP, for the Respondent

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal (Tax Chamber) (the "FTT") (Judge Philip Gillett and Mr Mohammed Farooq) released on 17 December 2018. By that decision (the "Decision") the FTT allowed the appeal of the taxpayer, The Core (Swindon) Ltd ("The Core"), which is now the Respondent in the Upper Tribunal to an appeal brought by HM Revenue and Customs ("HMRC") against the Decision.

2. The Core was successful before the FTT in its appeal against HMRC's decision of 26 October 2016 denying The Core's application to zero rate its supplies of juice cleanse programmes ("JCPs") for the purposes of Value Added Tax and confirming HMRC's view that such supplies were standard rated pursuant to excepted Item 4, Group 1, Schedule 8 to the Value Added Tax Act 1994 ("VATA").

3. The Core operates a juice bar which offers JCPs that consist of fresh drinkable products made from juicing raw fruits and vegetables. The FTT accepted The Core's contentions that the JCPs were not "beverages" and therefore did not fall within the scope of excepted Item 4 to Group 1 Schedule 8 VATA.

4. By a decision dated 23 September 2019, the Upper Tribunal (Judge Richards) gave HMRC permission to appeal against the Decision on the sole ground that the FTT erred in law in concluding, from the facts that it found, that the JCPs were not "beverages" for the purposes of Schedule 8 VATA. The particular contention of HMRC which supported this ground of appeal was that the FTT erred in law by allowing the way in which the JCPs were marketed to dictate the basis of their classification for VAT purposes.

Relevant legislation

5. Section 30(2) of VATA provides for the zero-rating of supplies of goods or services which are of a description specified in Schedule 8 of that Act. We are here concerned with Group 1 of Schedule 8, which, as far as is relevant, is set out below:

> "**Group 1— Food**
>
> The supply of anything comprised in the general items set out below, except –
>
> (a) a supply in the course of catering and
>
> (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.

…"

6. There are a number of items excepted from the exceptions to the general rule. We are concerned with Excepted Item 4 which is in the following terms:

"*Excepted items*

Item No

4 Other beverages (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages.

..."

7. There are certain items which are stated to override the exceptions, but these are not relevant to this case.

8. Note 1 to the Items listed in Group 1 provides that "Food" includes drink.

9. It was common ground that a JCP was a "drink" and therefore would benefit from being zero rated as "food" unless it was excepted on the basis that it was a "beverage" within the scope of Excepted Item 4.

The Facts

10. The FTT, having heard evidence from the owner and manager of the Core, from two of its customers and from the HMRC officer who carried out a review of its decision, and having tasted a number of the products (noting that they were palatable but quite thick and possibly difficult to drink through a straw, and that they would probably not choose to drink them as a casual drink for general refreshment), set out its findings of fact at [29] to [59] of the Decision. So far as relevant they can be summarised as follows (references to numbers in square brackets are to numbered paragraphs of the Decision).

11. The Core offers JCPs that consist of fresh drinkable products made from juicing raw fruits and vegetables. These products are marketed as "juice cleanse" programmes, which are based on the consumption of four 500ml bottles of juices and smoothies per day. The programmes are run over multiple days, for example, a customer might undertake a 5-day JCP whereby meals are replaced by JCP juices and smoothies for 5 days with four servings per day. The juices have to be made fresh on the day as they are unpasteurised, with a shelf life of only 12 hours. The batches of bottles are provided in a box, together with a menu plan as to when the products are to be consumed: [30] and [38].

12. The marketing material clearly shows that the JCPs are marketed as meal replacement programmes and not merely as healthy drinks. Customers use the JCPs to replace traditional meals with fruits and vegetables in liquid form and are encouraged to consume water and herbal teas in addition to the programme: [31] and [32].

13. The juices are made by the extraction of juice from raw fruits and vegetables (leaving behind insoluble fibre), and the smoothies contain juiced fruits and vegetables together with blended avocado.

14. The short shelf life means that the products do not lend themselves to competition with more widely distributed juices and smoothies, which are mostly intended for consumption as a drink and not as a meal replacement: [36].

15. Although there is an element of combined marketing of the JCPs and the individual juices and smoothies that make up the JCPs, which are also sold separately from The Core's Juice Bar, that combined marketing does not detract from the message that the JCPs are meal replacement programmes: [39].

16. Some customers are told to treat and consume the juices and smoothies like meals and drink at least a litre of water alongside. The products are labelled for consumption at particular times of the day as replacements for breakfast, lunch and an evening meal: [42].

17. Whilst details of the approximate breakdown of the ingredients in the products were supplied, full nutritional and similar information was not supplied: [45].

18. Based principally upon the evidence of the two customers of The Core and testimonials on The Core's website, the FTT found as a matter of fact that the JCPs were generally purchased as meal replacement programmes and not as beverages: [55].

The Decision

19. At [86] the FTT directed itself that in order to decide whether an item of food is zero-rated or standard rated it must conduct a multi-factorial assessment, citing the well-known case of *HMRC v Procter & Gamble* [2009] EWCA Civ 407 as authority for that proposition.

20. In the same paragraph the FTT said that "in addition" it endorsed a quotation from the FTT decision in *Kinnerton Confectionery Limited v HMRC* [2018] UKFTT 0382 (TC) ("*Kinnerton*") which in turn endorsed the statement of Laddie J at [14] of *Fluff Ltd (t/a) Mag-it v C & E Commissioners* [2001] STC 674 (*"Fluff")* that the issue as to whether an item of food was zero-rated was "in large part answered by the way in which it is sold or supplied".

21. At [87] the FTT cited the description given by Sir Stephen Oliver in the VAT Tribunal's decision in *Bioconcepts Ltd v HMRC* [1993] Lexis Citation 1149 ("*Bioconcepts*") of a liquid which constituted a beverage as follows:

"Liquids that are commonly consumed are those that are characteristically taken:

- To increase bodily fluid,
- To slake the thirst,
- To fortify, or
- To give pleasure."

22. Accordingly, at [89] the FTT stated that it was required to decide whether or not a drinkable liquid, which may be a beverage if purchased in some circumstances, can also not be a beverage when marketed and purchased in other circumstances. It went on to say that the multi-factorial assessment which it was required to carry out means that it should consider:

(1) How the product was marketed;

(2) Why it was consumed by the consumer; and

(3) What was the use to which it was put.

23. Applying those considerations to the facts in this case, the FTT made the following findings at [95] and [96]:

> "95. Judging the JCPs by reference to these tests then we have found that the purchasers of the JCPs purchase them as meal replacements. They do not purchase them as beverages. They drink water in addition to consuming the products. They do not therefore purchase them in order to increase their bodily fluid, or to slake their thirst, or to fortify themselves or to give pleasure. The products are deliberately made palatable, in order not to deter consumers from drinking them, and they are not unpleasant to drink, but they are not consumed for pleasure. Customers purchase and consume them as a meal replacement, not as a beverage.
>
> 96. The Core's customers may have a number of different objectives as to why they purchase them as a meal replacement. They may wish to lose weight or they may believe that the products are good for their health, even though The Core does not make any specific claims in this respect. It does not matter why they wish to use them as a meal replacement. The simple fact is that that is why they purchase them. They do not purchase them for the purposes outlined in the *Bioconcepts* tests."

24. The FTT also referred to the alternative test for determining whether a drink was a beverage that was put forward in *Innocent Limited v HMRC* [2010] UKFTT 516 (TC) *("Innocent")*, namely whether the product would be offered to an unexpected guest. At [98] the FTT answered that question in the negative, on the basis that a JCP was a collection of a number of different products, together with a menu plan. It also found at [99] that it was unlikely that one of the individual products which make up the JCPs would ordinarily be offered to an unexpected guest as a general drink in a social situation.

25. The FTT referred to *Kalron Foods Ltd v HMRC* [2007] EWHC 695 (Ch) ("*Kalron*") , where a similar product of mixed fruit and vegetable juices was held to be a beverage in circumstances where it was found that the products were presented neither as a meal replacement nor as a drink like a fruit juice or cola. At [101] the FTT distinguished *Kalron* on the basis that the JCPs were specifically sold by The Core, and bought by its customers, as a meal replacement, and not as a beverage, whereas the products in *Kalron* may well have passed the *Bioconcepts* tests, and might also past the "unexpected guest" test suggested in *Innocent*.

26. At [108] the FTT reiterated its finding that the JCPs were specifically sold, and purchased, as a meal replacement programme, and not as a beverage. It then summarised the reasons it gave for its decision that the JCPs were not beverages at [114] and [115] as follows:

> "114. In summary therefore we decided that the JCPs were not marketed as beverages. They were marketed as meal replacements in liquid form, but not as beverages.
>
> 115. In addition, when applying the tests for beverages set out in *Bioconcepts*, we found that the JCPs did not satisfy those tests and were not therefore beverages."

The authorities

27. It is, in our view, helpful to examine a number of the authorities that were cited to us in order to establish the principles to be applied in determining matters of classification of this kind. In that regard, as Ms Vicary submitted, we should bear in mind the cautionary statement of Lord Woolf MR in *CCE v Ferrero UK Limited* [1997] STC 881 ("*Ferrero UK*") at 884:

> "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?"

28. Consequently, as the Court of Appeal observed in *HMRC v Procter & Gamble UK* [2009] EWCA Civ 407, where the question was whether the well-known snack Pringles were "similar to potato crisps and made from the potato" and were thus to be standard rated for VAT purposes, in determining questions of this kind the fact-finding Tribunal is not only the primary fact finder it is also the primary maker of value judgment based on those primary facts. As Jacob LJ said at [7], unless the Tribunal has made a legal error in that it has reached a perverse finding or failed to make a relevant finding or has misconstrued the statutory test it is not for an appeal court to interfere.

29. At [9] Jacob LJ observed that statutory tests of this kind will require a multi-factorial assessment based on a number of primary facts and the appeal court will be slow to interfere with that overall assessment. He went on to say at [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."

30. At [22] Jacob LJ summarised the approach to be taken by an appeal court considering this sort of classification exercise as simply:

> "has the fact finding and evaluating Tribunal reached a conclusion which is so unreasonable that no reasonable Tribunal, properly construing the statute, could reach?"

31. At [79] Mummery LJ observed that the VAT legislation uses everyday English words, which ought to be interpreted in a sensible way according to their ordinary and natural meaning.

32. That approach to interpretation was followed by the VAT Tribunal in *Bioconcepts Limited v CEE* [1993] Lexis Citation 1149, a case which is cited with approval in all tribunal cases concerning beverages. The issue in that case was whether a food supplement was a beverage. The supplement was intended as a slimming aid which was to be sipped throughout the day and would be a violent laxative if a glassful of it were drunk at once. The Tribunal set out its view of the meaning of "beverage" in the context of the legislation as follows:

> "It seems to us that notwithstanding the Oxford English Dictionary of "beverage" meaning drink, it is not used in the sense of meaning all drinkable liquids. Its meaning in ordinary usage covers drinks or "liquors" that are commonly consumed. This is the primary meaning in the Oxford English Dictionary. Liquids that are commonly consumed are those that are characteristically taken to increase bodily liquid levels, to slake the thirst, to fortify, or to give pleasure. That meaning covers the liquids recognised [by counsel] as beverages (e.g. alcoholic liquids, tea, coffee, cocoa, chocolate, and soft drinks and meat-based preparations.)"

33. As we record at [21] above, the FTT in this case cited part of this passage with approval. Furthermore, in its internal manual dealing with the VAT treatment of food, HMRC have adopted what it describes as the "Bioconcepts criteria." The manual observes that in considering the liability to VAT of "a specialist or unusual drink" the guidance observes that not all drinks are foods, and those that are not do not come into the scope of zero rating at all, such as liquids taken for medicinal purposes or liquid food supplements. The guidance then says that if a liquid is a food, consideration should be given as to whether it is also a beverage under the "Bioconcepts criteria" and, if it is not, it should be zero-rated. The guidance states that it should not be assumed that because a drink is specialised to a particular market or for particular consumers that it is not a beverage.

34. The guidance also expresses HMRC's view that complete meal replacements in liquid form, to be used as part of a slimmer's diet are considered to be food and not beverages.

35. HMRC's guidance makes it clear that the "Bioconcepts criteria" are not exhaustive and that how the product is marketed or consumed are relevant factors.

36. That is apparent from *Kalron*, where Warren J, sitting in the High Court considered an appeal by the taxpayer against a decision of the VAT Tribunal that a particular product sold under the designation "Zumo Fresh Blend" was a "beverage". The facts found by the Tribunal in that case were that the taxpayer made smoothies fresh on the customer's order from the liquefied edible parts of fresh fruit and vegetables. The resultant drink was served in disposable takeaway cups at Zumo bars. The Tribunal found that "although quite thick, the products were not difficult to drink. The colour was not such to be off-putting. The result was a refreshingly healthy drink."

37. Whilst the Tribunal had evidence on how the smoothies were produced, the evidence led on how the smoothies were sold at special Zumo bars did not indicate whether the smoothies were being purchased as a substitute for a different beverage or being purchased as a food substitute.

38. At [46], interpreting a statement of Lord Woolf MR at page 885 of *Ferrero UK*, Warren J said 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 the Tribunal is going to classified, it can be placed in the category to which it is more akin.

39. At [57] to [60] Warren J reviewed *Bioconcepts*, observing at [57] that the finding in that case was in essence that the product concerned was a liquid food, but it could also be described as a drink particularly when mixed with water. In referring at [60] to the passage quoted at [33] above, Warren J observed:

> "I would be surprised if the tribunal had thought that it was laying down an exhaustive definition of what a beverage is rather than listing common characteristics of a beverage not all of which needed to be present in any particular case. I do not consider that the tribunal can be taken to have ruled out other drinks not having any of those characteristics from being considered a beverage."

40. At [73] Warren J emphasised that it is not possible to be prescriptive as to the criteria which will determine whether a product is a beverage. He also emphasised that a tribunal can only act on the evidence before it: if material evidence is not put before the tribunal, it must make its decision on the evidence which is put forward.

41. At [75] Warren J said that the process of blending or liquefying food could be enough to convert it from food to a beverage, but he made it clear at [78] that the circumstances in which the product is consumed should be taken into account. It is clear that the absence of evidence for the tribunal on that point was an obstacle to the taxpayer's contentions that the product concerned should not be treated as a beverage. He concluded at [82]:

> "In my judgment, the Tribunal did not apply an incorrect approach to the burden of proof. They were entitled to decide the case by concluding that they were not satisfied that Kalron had not met the burden of proof on it to show that the Products are not beverages."

42. In *Kalron* the product concerned had the characteristics of both a liquid food and a beverage. Applying the "Bioconcepts criteria" to the facts found, the Tribunal was entitled to conclude that the product was a "beverage", but an important factor in that conclusion was the *absence* of evidence as to the circumstances in which the product was consumed. Nothing in *Kalron* precludes a different conclusion in a case where the evidence indicated the product was not in fact consumed as a beverage.

43. *Innocent*, in which we consider the FTT followed the correct approach to the question whether a product is liquid food or a beverage, was a case concerned with fruit smoothies. These had, in many respects, characteristics similar to those found by the FTT in this case to be features of the products which make up the JCPs. The taxpayer's case was that the fruit smoothies were merely a liquid food and not a beverage, whilst HMRC considered them to be a beverage.

44. At [35] the FTT correctly directed itself that "beverage" must be given its ordinary and natural meaning and the Tribunal must decide whether a fruit smoothie is within that ordinary and natural meaning of the word beverage based on the evidence in front of it. It cited the *Bioconcepts* test and referred to the "unexpected guest" (whether the product is the kind of drink one might commonly offer an unexpected guest) as something that, while not definitive, could be taken into account.

45. At [72] it noted that it also needed to consider what other drinks are beverages and, at [73], it set out the factors that it said it would consider in deciding whether the fruit smoothies were within the ordinary meaning of beverage. These were:

- What characteristics the product had which are held in other products which clearly were beverages (such as fruit juices)
- How the smoothies are consumed. Are they consumed as drinks or are they merely drinkable liquids?
- How the smoothies are made and from what, and what is their resulting appearance and texture;
- Where the smoothies are sold and consumed;
- When the smoothies are consumed;
- Their effect on the human body; and
- Why the smoothie is consumed.

46. On the facts before it, the FTT concluded that the smoothies were beverages.

47. Finally, we mention two other authorities relied on by the FTT in this case at [86] in support of its general approach and in particular in support of its reliance on the way in which a product is sold or supplied.

48. Both the cases cited by the FTT involved products which could be used for different purposes. Ms Vicary referred to such products as having a "dual use". She accepted that the tax treatment of such a product will depend to a large extent upon how it is held out for sale. In *Fluff*, where the question was whether maggots sold as bait for fishing could be zero rated as animal feeding stuffs, Laddie J said this at [17] and [18]:

> "[17] It seems to me that the meaning of the words must take colour from the context in which they are used and, in particular, what is at issue here is the supply of animal feeding stuffs. It seems to me whether or not an edible substance is animal feeding stuffs is in large part answered by the way in which it is sold or supplied. I put it to Mr Storey that if his approach is right a straw boater, which of course is edible, would itself be animal feeding stuffs and therefore the supply of boaters would be zero rated under this legislation. He accepts that that is the inevitable conclusion of his submission. I do not accept that is the right approach to these words: it is not what the words mean. It seems to me that what counts is whether what is being supplied can properly be described as animal feeding stuffs. In deciding that one must look not just at the nature of the material but the way in which it is supplied. These maggots are not supplied as a foodstuff for fish; that is to say, for the purpose of feeding and growing fish. These maggots are sold for use in enticing fish towards hooks.
>
> [18] In my view, on any reasonable basis, the supply of packets of maggots, in the way in which it is done by the appellant, is not the supply of animal feedstuffs at all. In my view the conclusion arrived at by the Tribunal is right. This does not come within General Items (2) and therefore the supply of these goods is not zero rated."

49. In *Kinnerton* the FTT had to consider whether a chocolate bar which had been zero-rated by the taxpayer on the basis that it was cooking chocolate was in fact confectionery and therefore should be standard rated. The FTT directed itself at [3] that whether the product was zero rated or standard rated depended on how it was objectively "held out for sale" by the supplier, the answer to that question being found via a multi-factorial assessment. The FTT specifically said at [42] that it came to its decision (that the product should be standard rated as confectionery) by reference to how the product was held out for sale, and not on the basis that it was similar to or different from other chocolate bars.

50. Ms Vicary submits that the FTT in the case before us fell into error by allowing the marketing material to predominate. She contends that while that may be the right approach in "dual use" cases such as *Fluff* and *Kinnerton*, the present case is not a dual purpose case, but a pure classification case, where the Tribunal is instead tasked with resolving the question of the VAT category to which the product is more akin. In such a case, the manner of holding out will attract no greater weight than any other characteristic to be weighed in the balance on a multi-factorial assessment. We return to those submissions later.

Grounds of Appeal and issues to be determined

51. The decision of Judge Richards granting permission to appeal states HMRC's sole ground of appeal as follows:

> "The FTT erred in law in concluding, from the facts that it found, that the JCPs were not 'beverages' for the purposes of Schedule 8 of VATA. In particular, the FTT erred in law in concluding that (i) because The Core marketed the JCPs as meal replacements and/or (ii) because The Core's customers purchased the JCPs as meal replacements, the JCPs were not beverages."

52. In granting permission to appeal Judge Richards made it clear that he was not granting permission for HMRC to make challenges to the FTT's findings of fact or its multifactorial factual conclusions. It was made clear that it was intended that HMRC be permitted to challenge what they submit was an error of principle in the way the FTT approached the task of deciding whether the JCPs were beverages.

53. We therefore need to determine whether the FTT erred in law in the approach it followed in determining that the JCPs were not beverages, as set out at [89],[95] and [96] of the Decision and as reflected in its conclusions at [114] and [115] of the Decision.

Discussion

54. We start by emphasising that the scope of this appeal is very limited. In particular, there can be no challenge to the primary findings of fact made by the FTT on which it carried out its evaluation of the JCPs. We have summarised the relevant findings at [10] to [18] above.

55. Neither, according to the terms of the grant of the permission to appeal, can the FTT's evaluation of those primary facts be challenged. The only basis on which HMRC has permission to challenge the decision is that the FTT made errors of principle in the approach it followed in determining that the JCPs were not beverages.

56. Ms Vicary submits that the errors of law can be categorised in three ways:

(1) Attributing undue weight to the way in which the JCPs were marketed and held out for sale;

(2) Giving undue prominence to its finding that the JCPs were meal substitutes as a result of the weight it gave to the manner in which the JCPs were marketed as meal replacements; and

(3) Treating the tests in *Bioconcepts* as definitive.

57. Underlying the first two ways in which Ms Vicary categorises the errors of law, is her submission (see [50] above) that the JCPs are a "single use" product so it was wrong for the FTT to follow the approach taken in relation to "dual use" products of treating the marketing of the product as the central consideration. We do not accept this submission. In particular, we do not accept that there is a sharp distinction between single and dual use cases and we do not accept that there is such a distinction

in this respect between the products in *Fluff* and *Kinnerton* and the products in this case.

58. In all cases involving classifications for VAT purposes there needs to be a multifactorial assessment. The way the product is marketed and sold is (as Ms Vicary accepts) a potentially relevant factor in every case. In some cases it may carry little weight, and in others it may carry great, or even dominant, weight as in *Fluff* and *Kinnerton*. The lack of clear distinction between "classification" cases and "dual use" cases is illustrated by the facts of this case: the items that make up the JCPs (i.e. fruit juices or smoothies) may be used as a beverage (for example for the reasons outlined in the *Bioconcepts* case) or they may be used as a meal replacement. While this is a classification issue, this involves a dual use in a similar way that the same underlying product (chocolate) could be eaten as a snack or as an ingredient in some other food.

59. In any event, we reject the submission that the FTT attributed undue weight to the way in which the JCPs were marketed.

60. In the first place, the FTT gave equal prominence to the way in which (1) the JCPs were marketed and (2) the way they were in fact used. See in this regard, for example, the Decision at [89] where the way in which the JCPs were marketed is merely one of three factors the FTT identified, the other two being *why* it was consumed by the customer and *what* was the use to which it was put. Moreover, one of the main findings of fact made by the FTT was (as noted above) that the JCPs *were generally purchased as meal replacements*, not merely that they were marketed as such.

61. This readily distinguishes the examples advanced by Ms Vicary of a retailer marketing a Mars bar or a cola drink as a meal replacement. She submitted that the FTT's conclusion would enable a retailer, by doing this, to claim that their products should be zero-rated. We disagree, because it clearly cannot be sufficient, to establish that a product (in the case of the Mars bar) is not confectionery or (in the case of a cola drink) is not a beverage, to rely on the fact that it is marketed for a particular purpose, if there is no evidence to show that customers in fact used the product for that purpose.

62. Secondly, we consider that the submission that the FTT allowed the way in which the JCPs were sold or supplied to dominate its conclusion is based on too narrow a reading of the Decision. As to this, the FTT correctly directed itself at [86] that in order to decide whether an item of food is zero rated or standard rated it must carry out a multifactorial assessment. It then said that "in addition" it would adopt the approach of answering the question as to how the product was sold or supplied. It then went on to say at [87] that it had "also" used the *Bioconcepts* tests, recognising at [88] that the tests were not exhaustive.

63. The FTT then correctly observed at [89] that in this particular case they were required to decide whether or not a drinkable liquid, which may be a beverage if purchased in some circumstances, can also not be a beverage when marketed and purchased in other circumstances. That starting point was informed by the extensive

findings of fact that it had made regarding the characteristics of the JCPs. That approach is entirely consistent with the approach taken in *Kalron*, as we observed at [43] above.

64. Consequently, the FTT proceeded with its multifactorial assessment on the basis set out at [89] clearly having in mind the findings of fact it had made (as summarised at [10]-[18] above) on (i) the circumstances of consumption whereby the JCPs were consumed in place of and at the normal time of traditional meals over a period of days; (ii) shelf life; (iii) taste and texture; (iv) ingredients; (v) process of manufacture and (vi) marketing.

65. As to the third way in which Ms Vicary categorises the FTT's alleged error of law, we do not accept that the way that [95] and [96] of the Decision are expressed shows that the FTT treated the *Bioconcepts* tests as being exhaustive. It would be surprising if the FTT had done so, in light of its express statement (at [88]) that the tests are not definitive or exhaustive. The FTT's conclusion on the application of those tests was that the JCPs were purchased as meal replacements rather than beverages. These findings were then fed into the FTT's overall conclusions at [114] and [115] that the JCPs were not marketed as beverages but as meal replacements in liquid form and, as it said, "in addition" when applying the *Bioconcepts* tests it found that the JCPs did not satisfy those tests and were not therefore beverages. Furthermore, the FTT also considered the "unexpected guest" test identified in *Innocent* and explained at [98] why that test was not satisfied, in particular because a JCP was a collection of a number of different products, together with a menu plan.

66. Accordingly, we conclude (1) that the FTT considered all relevant factors in reaching its conclusions, (2) that the weight to be applied to the relevant factors on a multifactorial assessment is a matter for the FTT, which should not be interfered with on appeal unless the conclusion reached is plainly wrong or irrational, and (3) that we do not think there is any such error in the Decision.

67. We therefore see no basis on which we should interfere with the Decision.

Disposition

68. The appeal is dismissed.

Signed on original

MR JUSTICE ZACAROLI **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 11 November 2020