[2020] UKFTT 0075 (TC)

TC07570

Appeal number: TC/2018/04488

VALUE ADDED TAX – zero-rating – "healthy truffles"/"healthy balls" – whether confectionary – if so, whether zero-rated as cake - whether standard rating would breach the principle of fiscal neutrality

FIRST-TIER TRIBUNAL
TAX CHAMBER

CORTE DILETTO UK LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE MARILYN MCKEEVER

MR JULIAN SIMS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 11 December 2019

Ms Ruth Corkin, Tax Advisor, for the Appellant

Ms Kate Balmer, counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs for the Respondents

DECISION

Introduction

1. This appeal concerns the classification of the Appellant's products "Nouri Truffles", subsequently called "Nouri healthy balls" (the "products") for the purposes of VAT zero-rating. Specifically the question is whether the products are to be zero rated as food or standard rated as confectionary.

2. The Appellant applied for a non-statutory clearance confirming that the products should be zero-rated. By a decision of 23 March 2018 HMRC decided that the products should be standard rated as confectionary. This decision was upheld on review on 29 May 2018 and the Appellant appealed against that decision on 19 June 2018.

3. The products are small balls made from dates, nuts and other natural ingredients with no added sugar. They are promoted as being vegan, gluten free and healthy but indulgent. At the time in question, they were produced in three flavours, matcha green tea, coconut and chia seeds and chocolate and hazelnuts. They were sold in packs of three balls and also in a "luxury box" of 16 truffles, also containing a fourth flavour not relevant to this appeal.

4. We had before us various bundles of documents and samples of the products in their original and present packaging. We also heard oral evidence from Ms Kalina Halatcheva who is the Appellant's CEO. In the course of the hearing we examined and tasted the products and were presented with samples of other items which the Appellant submitted were (or in the case of Ferrero Rocher were not) comparable.

The Law and HMRC guidance

5. The legal basis for zero-rating goods and services is derived from Article 110 of the Principal VAT Directive which is now implemented in UK law by the Value Added Tax Act 1994 ("VATA"). Section 30 VATA provides that goods are zero-rated if they are of a description contained in Schedule 8 VATA.

6. Group 1 of Schedule 8 zero-rates food. It provides, so far as material:

> **"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.
> …
> *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.
…
Items overriding the exceptions…
2 Drained cherries.
3 Candied peels…
Notes:
(1) "Food" includes drink.
…
(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, glacé or crystallised fruits; and any item of sweetened prepared food which is normally eaten with the fingers.
…"

7. So the starting point is that anything that is "food" is zero rated. "Confectionary" is excepted from the zero-rate and so is standard rated, but cakes and biscuits (which are confectionary) are excluded from the exception and are zero-rated. Chocolate cakes are zero-rated but chocolate biscuits are excluded from the exception to the exception and are standard rated. It is difficult to see any logic in these convoluted provisions but they are the rules which we must apply.

8. Note (5) contains a partial definition of "confectionary". That is, it specifies a number of items which will be regarded as confectionary, but it is not exhaustive and other items not listed can also be confectionary. The specific list ends with a general "sweep-up" provision on which HMRC rely:

> "…any item of sweetened prepared food which is normally eaten with the fingers".

9. The categories of zero-rating were originally fixed when the UK joined what was then the Common Market and were derived from Purchase Tax, the UK predecessor to VAT. Zero-rating was allowed under EU law where it served a social purpose. The government's policy was to zero-rate most items of food and drink meant for human consumption but to tax those items which might be regarded as "non-essential". The categories of zero-rating were effectively frozen in 1979. Although the categories could be reduced, the scope of zero-rating cannot be extended.

10. The legislation is supplemented by HMRC guidance in its Manuals and VAT notices. We emphasise that guidance is just that: guidance and cannot determine the correct VAT treatment of the products mentioned (except where they have been the subject of a case before the Tribunal or the Courts), but it is helpful in that it represents HMRC's view of the principles to be derived from the authorities and contains some detailed views about the VAT treatment of similar and sometimes identical products.

11. Paragraph 3.6 of VAT Notice 701/14 compares confectionary products. It states:

3.6 Confectionery

Standard-rated confectionery includes chocolates, sweets and candies, chocolate biscuits and any other 'items of sweetened prepared food which is normally eaten with the fingers.' Items of sweetened prepared food don't need to have added sweetening if they are inherently sweet, for example, certain fruit and cereal bar products.
Here are some examples of standard and zero-rated confectionery:

Zero rated	Standard rated
Cakes including sponge cakes, pastries, eclairs, meringues, flapjacks, lebkuchen, marshmallow teacakes and Scottish snowballs	Chocolates, bars of chocolate including those containing nuts, fruit, toffee, or any other ingredients, diabetic chocolate, liqueur chocolates and similar sweets
Chocolate spread, liquid chocolate icing, chocolate couverture, and chocolate chips, strands, vermicelli, mini-buttons etc held out for sale solely for culinary use; chocolate body paint	Sweets, pastilles, gums, lollipops, candy floss, sherbet, chewing gum, bubble gum, Turkish delight, marshmallow, fondants and similar confectionery
Biscuits coated with icing, caramel or some other product different in taste and appearance from chocolate	Compressed fruit bars and other items of prepared dried fruit confectionery that are sweet to the taste
Chocolate cups	Sweetened popcorn
Toffee apples and other apples on a stick covered in chocolate, nuts and so on	Nuts or fruit with a coating, for example of chocolate, yoghurt or sugar

Ginger preserved in syrup, drained ginger or dusted ginger can be zero rated as long as it's not held out for sale as confectionery	Crystallised, sugared or chocolate covered ginger
Candied peels, angelica, drained cherries for use in home baking often described as 'glacé' cherries and cocktail or maraschino cherries	Drained, glacé or crystallised fruits including Petha, Marrons glacés
Halva (unless coated with chocolate or chocolate substitute or held out for sale as confectionery)	Bars consisting mainly of seeds and sugar or other sweetening matter
Edible cake decorations	Cereal bars, whether or not coated with chocolate, with the exception of bars which qualify as cakes
Sweet tasting dried fruit held out for sale as snacking and home baking	Sweet tasting dried fruit held out for sale as confectionery, snacking
Traditional Indian and Pakistani delicacies such as barfis, halvas, jelabi, laddoos; and traditional Japanese delicacies	Slimmers' meal replacements in biscuit form that are wholly or partly covered in chocolate or something similar in taste and appearance

12. Paragraph 4.6.3 of the same Notice states:

"4.6.3 Cereal and fruit bars

> Standard-rated items include compressed fruit bars, consisting mainly of fruit and nuts, and also sweet tasting cereal bars, whether or not coated with chocolate, with the exception of bars which qualify as cakes …
> Standard rating applies to any product falling within the general definition of confectionery even when that product is intended to meet the special nutritional needs of athletes."

13. Some of these categorisations reflect authorities which we will return to below. Many defy common sense. Sweet dried fruit sold for home baking or snacking is zero-rated; the same fruit held out as confectionary or for snacking is standard rated. Chocolate buttons held out for culinary use are zero-rated; chocolate buttons held out as confectionary are standard rated. Bars consisting of compressed fruit and nuts are standard rated unless they are a cake. We are not the first Tribunal to remark that there is little or no logic to these distinctions and that tastes and attitudes as to what is a "staple" food and what is a "luxury" food and how people consume food generally have changed dramatically between 1972 and the present day. We do not doubt that if the matter were considered afresh, many of the zero-rated confectionary items would be standard rated and many of the anomalies which currently arise would no longer occupy the Tribunals and the Courts. Having said that, we are mindful that the role of this Tribunal is to apply the law as it is and that we shall do.

The Facts

14. There have been some changes in the name and packaging of the products since the application to HMRC for a ruling on the correct VAT treatment and there have been minor changes to the ingredients. We saw both sorts of packaging and we tasted the current formulation of the products together with another item called a "Pulsin' bar" which was the subject of a recent Tribunal case and which the Appellant asserted was similar to its products.

15. Ms Halacheva gave evidence that she launched the products as she identified a gap in the market for healthier fruit based snacks which were additive free and not over-sweet. She stated that the products were packaged in a luxurious way and promoted as a luxurious item in order to appeal to customers who might not normally seek out a healthy snack.

16. The products are branded as "Nouri" which is intended to indicate nourishment. They were originally described as healthy "truffles" but are now described as "vegan healthy balls", although some websites which sell them still refer to truffles. They are described on the packs as being vegan, with no added sugar and gluten free. The descriptions on some websites, including the company's own site states that they are "sugar free". This is inaccurate. The products contain natural sugars inherent in their ingredients and, in particular, dates and apricots, so it is true to say only that they contain no added sugars.

17. In appearance, the products are small balls, about 3cm across. The matcha green tea flavoured balls are a green/mid brown colour with a dusting of green flakes. The coconut and chia seed flavour are pale, creamy brown in colour and have darker brown flecks in them. They are coated with flakes of desiccated coconut.

The chocolate and hazelnuts flavour are dark brown with visible pieces of nut inside and a coating that appears to be powdered nuts.

18. Each flavour was different in texture and taste. The matcha green tea balls were quite hard (firm rather than crispy), quite dry and a little crumbly. They became creamier in the mouth and the taste was quite nutty with a discernible green tea flavour. They were only slightly sweet.

19. The coconut and chia seed balls had a soft, dry, crumbly texture with a crunch from the chia seeds.They tasted much sweeter than the green tea balls and again became smoother in the mouth. They tasted strongly of coconut.

20. The chocolate and hazelnuts flavour balls were quite soft and a little dry but, like the others became smoother in the mouth. They had a definite chocolate and nutty taste and were the sweetest of the flavours we tried.

21. The ingredients also differed although in each case there was a relatively small number of natural ingredients. The ingredients, as they appear on the present packs, are set out below. The ingredients are listed in order of quantity with the main ingredient first.

- Matcha green tea: Cashew paste, pumpkin seeds, dates, sultanas, almonds, millet flakes, green tea matcha (2%).

- Coconut and chia seed: coconut flakes (24%) coconut paste, apricots, almonds, sultanas, coconut butter, dates, chia (5%).

- Dates, hazelnut paste (30%), chocolate (10%), hazelnuts (7%), almonds, flavouring: vanilla.

22. Ms Halatcheva explained that the manufacturing process involved chopping and preparing the ingredients and mixing them together. No cooking or heating was required. The mixture was then formed into balls using gentle pressure to prevent the fat from being extracted.

23. A key element of the marketing and presentation of the products is that they are "healthy" as well as indulgent and luxurious. Whilst we acknowledge that the products are made with natural products which have some nutritional value, have no *added* sugar and may have lower levels of fat and sugar than some brands of chocolate truffle which are undoubtedly confectionary, it is misleading to say that they are therefore healthy and, as the Appellant seems to argue, that, as they are healthy they cannot be confectionary. The food "traffic light system" classifies with a red light items high in fat and/or sugar. The British Nutrition Foundation and NHS websites indicate that foods are regarded as high in fat and sugar (and a red light) if they have more than 17.5g of fat per 100g, more than 5g of saturated fat per 100g or more than 22.5g of sugar per 100g.

24. The nutritional information on the current packs of the three flavours of the products indicate that they contain, per 100g:

- Between 446 and 494 calories
- Between 23g and 34g of fat, of which
- Between 7g and 24g is saturated; and
- Between 30g and 32g of sugars

25. On the basis of the traffic light system, they would not be regarded as "healthy" but, as we discuss below, this does not affect the VAT treatment.

26. The products were originally packaged in a small cardboard carton of three balls of the same flavour. Each ball was wrapped in gold foil.. The products were also available in a "luxury box" of 16 with four of each flavour (there is an additional flavour based on chickpea flour which was not sent to HMRC for categorisation). The box is white with a picture of each of the truffles on it and an image of a gold ribbon curling across the lid. The base of the box is lined with a gold coloured tray with "wells" in which the balls are placed. The balls are presented in petit four cases and one flavour is wrapped in gold foil.

27. The products are now also available in cartons of 10 balls and the individual balls are now each wrapped in a sealed plastic package which is white with "nouri", the company's logo and the flavour printed on it in gold. The Appellant indicated that the change was made as the new wrapper kept the products fresher than gold foil. The smaller packs of three are now to be produced in a foil bar type wrapper in the interests of reducing the shelf space needed to display them.

28. All formats of the packaging have the brand, nouri, printed on in gold with the company's logo. Below that is the company's strap line "nourish your body, indulge your soul". The pack states the flavour of the product and the number of balls in the pack. There is a picture of one or more of the balls and of the principal flavouring ingredients of that variety.

29. The products are sold in health stores and online. They do not appear to be sold in mainstream supermarkets. The Appellant stated that they were sold in gyms and yoga studios but there was no other evidence of this. The Appellant has no say in where the products are placed in a shop. The Appellant asserted that the products would not necessarily be placed in the confectionary aisle but would be with "free from" or healthy foods and bars. The only evidence we had on product placement were three photographs. One was of some shelves in Holland & Barrett in Oxford street, showing "healthy" snack bars such as Eat Natural fruit/chocolate/nut bars in various flavours, Bounce protein balls and Nakd cereal/fruit bars. Holland & Barrett does not stock the product. These were said by the Appellant to be comparable products.

30. The other photographs were from the health food shop As Nature Intended in Marble Arch. One photograph showed shelves of alleged comparator products which were high protein/sports energy bars such as Clif, Tribe, Bounce and

Pulsin'. The other photo was of shelves which included the products. It was difficult to identify some of the other products in the picture, but they included coconut bars, seed and nut mixes, dates and a range of chocolate coated fruits such as chocolate raisins, cherries and mulberries. We found these photographs of little assistance and if anything, detrimental to the Appellant's case. The only image which showed the products showed they were placed with other items which would undoubtedly be regarded as confectionary/snacks and which appear in HMRC's table above of items which would be standard rated.

31. Ms Halatcheva, in her oral evidence sought to argue that the products were a meal replacement or something to be eaten as a dessert at the end of a meal. There was no evidence to this effect and the impression given by the company's website and other social media and marketing materials indicates the opposite.

32. Our bundle contained various screenshots taken by HMRC from the Appellant's website and Facebook page between September and November 2018 and a screenshot of the Appellant's current homepage taken on 28 January 2019. There was also an interview with Ms Halatcheva from the Midlands Traveller website printed in November 2018.

33. The Midlands Traveller interview was part of its "meet the business" series. A number of comments made by Ms Halatcheva echo the wording which was then on the company's website. Relevant comments include the following:

> "The brand was inspired by the idea that healthy foods should be equally as delicious as every other snack out there".
>
> "Our chocolate flavour is frequently compared to Ferrero Rocher which really does put a smile on our faces."
>
> "Nouri is a new brand of healthy all-natural balls. They are vegan, sugar- and gluten-free while tasting really indulgent."
>
> "Nouri…can be found in the mini bars of some of the top hotels in the world, alongside other popular treats."
>
> "In the future, our goal is to be recognised as one of the main players in the confectionary market."

34. One of the HMRC screenshots from the website states:

> "All our truffles are vegan, sugar free and gluten free but most certainly not free from temptation. What's truly great about them is that they are enjoyed by everyone, whether that be those who are health conscious, dairy intolerant, vegan or just simply love seriously good tasting sweet snacks."

35. The current website is virtually identical to the screenshots taken in 2018 except that references to "truffles" in 2018 are now references to "healthy balls".

36. Both versions contain the following statements (with healthy balls being substituted for truffles in the current version):

> "NOURI HEALTHY BALLS
> BRIDGING THE GAP BETWEEN HEALTH AND INDULGENCE
>
> Nouri Health is a new brand of healthy, all natural balls. Our slogan 'nourish your body, indulge your soul' pretty much sums up our company ethos which surrounds the belief that we should all be able to eat delicious and indulgent foods whilst simultaneously giving our body all the nourishment it needs. Nouri brings you health and indulgence combined!
>
> We should all be able to indulge carefree, with the knowledge that what we are putting into our bodies is good for us. This very topic was the inspiration and drive behind the creation of nouri, a new range of vegan balls made with just a handful of simple ingredients. The idea is to give people a healthier yet equally delicious alternative to the standard truffles we usually find in confectionery isles. (sic) All our products are vegan, sugar free and gluten free without the addition of any artificial sweeteners.
>
> OUR VIRTUES
> SUGAR FREE, GLUTEN FREE, FULL OF INDULGENCE
>
> We found that many healthy treats taste very similar (concentrated with dates and other dry fruits) and leave you searching for something more satisfying with a proper sense of indulgence. That's why we decided that our number one focus with nouri was taste and we created our sugar free, vegan, gluten free balls, that taste really indulgent (no dates or fruits taste!). Now, available in 4 distinctive flavours."

37. We note that the Midland Traveller article indicated that the Appellant wished to compete in the confectionary market and its website, at the time of the application to HMRC and at present, promotes the products as a healthy alternative "to the standard truffles we usually find in confectionary aisles".

38. The "shop" section of the website shows the products in their packaging. Other images on the website show the products unwrapped, some in gold foil, some in petit four cases, temptingly displayed and looking like normal chocolate truffles. Other images include a glass of chocolate mousse next to chocolate bars and hazelnuts, a stack of chocolate bars with nuts in and fresh coconut.

39. There are similar words and images in the screenshots of the company's Facebook page, for example:

- A picture of an open luxury box of the products on a side table with two glasses of champagne has the caption "The end of a busy Monday is wonderful in a (sic) good company, healthy truffles and a glass of champagne.

- A picture of a carton of the chocolate and hazelnut balls have the caption "if you are out of inspiration in writing or another task at hand, take a break,

make a short walk, have a couple of healthy truffles and return refreshed to whatever you were doing".

- "We thought the perfect serving size is three truffles but many customers say they can easily have four and more."

- A soft focus image of the products is accompanied by a comment "All set for the week ahead: these healthy truffles in your desk drawer will satisfy your sweet tooth in between meals."

- "Sweet, chewy melt in your mouth coconut truffles now available in London" with a picture of the products in petit four cases in a small silver dish.

40. It is clear from these examples that the products are being presented as a sweet treat, comparable to, but healthier than, ordinary chocolate truffles.We recognise that only one flavour of the product has chocolate it, but the clear message is that all flavours are sweet and are a substitute for ordinary chocolate truffles. They are presented as being a snack, a treat, something to keep you going between meals, something you would eat in small quantities (perfect serving size three truffles).

41. There is nothing to suggest that the products are, or are intended to be, a meal substitute or to be eaten as part of a meal. To constitute even a small meal providing approximately 400 calories, one would have to eat at least eight truffles. Despite the Facebook statement that customers say they can eat four and more we consider that the dry texture, richness and cloying nature of the products mean that it would be difficult to eat them in large quantities. Certainly, for most people, it would not be a pleasure to do so. The suggested serving size of three balls is the maximum most people would want to eat at once and this is a snack, not a meal. Further, the fact that the balls are individually wrapped suggests that they are intended to be eaten in small quantities.

42. Whilst we did not have any concrete evidence as to the circumstances of consumption, the presentation of the products on social media and the nature of the products themselves suggests to us that the products are likely to be consumed as a snack or treat as one might have a cereal bar or a piece of cake or a chocolate. We reject the Appellant's contention that they can be regarded as a meal substitute.

43. The Appellant stated that there are many posts on the company's Facebook and Twitter accounts and all the ones produced had been included by HMRC who had chosen them to make their point. That may be the case, but the screenshots we saw had a consistent message and the Appellant had the opportunity to, but did not, include other posts and pictures which might have given a different view. In any case, we find this marketing material to be of limited weight in considering how the average consumer would view the product.

The Appellant's submissions

44. The products are not confectionary

45. The products have some of the characteristics of cake and should be classified as such. This argument was not put forward in the Notice of Appeal, but was raised for the first time in the Appellant's Skeleton Argument. HMRC did not object to the addition of this ground and it was dealt with in the hearing.

46. As they are healthy they are fulfilling a social policy of encouraging people to cut down on sugar and so should be zero-rated.

47. As other, comparable products are zero-rated, to standard-rate the Appellant's products would be a breach of the EU principle of fiscal neutrality.

The Respondent's submissions

48. The truffles are confectionary and so standard rated.

49. An ordinary person would take the view that the products fall within the ordinary meaning of confectionary or are a "sweetened, prepared food which is normally eaten with the fingers" within Note 5.

50. The products have the appearance and size of confectionary.

51. The products are packaged and marketed in a similar way to confectionary.

52. Social policy is a matter outside the jurisdiction of this Tribunal.

53. The Appellant has not shown (the burden being on them) that there is any breach of the principle of fiscal neutrality.

Discussion

Are the products confectionary?

54. The Appellant quoted the dictionary definition of "confectionary" which is "sweets and chocolate". "Chocolate" is defined as "a food made from roasted cacao seeds, eaten as a sweet…A sweet covered with chocolate". "Sweet" is defined, so far as relevant as "a small piece of confectionary made with sugar". The Appellant argues that the products are not confectionary as no sugar is added and the products contain only natural sugars.

55. The chocolate and hazelnuts flavour balls would seem to fall within this definition of chocolate. The definitions are not very helpful as regards the other flavours as "confectionary" is a sweet and a "sweet" is a small piece of confectionary.

56. In any event, the Appellant cannot simply rely on the dictionary definition. There is the statutory definition in Note 5 to Group 1 of Schedule 8 VATA which extends the meaning of confectionary to include " chocolates, sweets and biscuits;

drained glace or crystallised fruits; *and any item of sweetened prepared food which is normally eaten with the fingers*." (emphasis added)

57. The italicised words must be read in the context of the rest of the note. Carried to their logical conclusion, they could include cooked sweet chilli flavoured chicken skewers which are manifestly not confectionary!

58. In addition there is an extensive body of case law considering the VAT classification of various types of cakes, bars and snacks. It is important to recognise that each of the cases turns on its own facts and it would be perilous to argue that because product A has some similarities with Product B which a Tribunal found to be zero-rated, product A must also be zero-rated. We look to the authorities for the general principles and to determine the appropriate approach to classification which we then apply to our case.

59. The cases indicate that the expression "confectionary" for the purposes of Schedule 8 VATA should be given its ordinary meaning and that one should take a multi-factorial approach to the question. So in *Customs and Excise Commissioners v Ferrero UK Ltd* [1979] STC 881 ("*Ferrero*") Lord Woolf in the Court of Appeal said:

> "Having examined the authorities, the tribunal in its decision set out the principles which it said it should apply. It is in the light of the authorities that it identifies 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 (at p 15):
> '8.36 ... 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.'
> *[1997] STC 881 at 885*
> 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."

60. This approach-what is the view of the ordinary person-was endorsed by the High Court in *HM Revenue & Customs v Premier Foods Ltd* [2007] EWHC 3134 (Ch) ("*Premier Foods*"). This approach was followed by the First Tier Tribunal in *Asda Stores Ltd v Commissioners for HM Revenue & Customs* [2009] UKFTT 264 (TC) ("*Asda*") and *Bells of Lazenby Ltd v Commissioners for HM Revenue & Customs* [2007] UKVAT V20490 ("*Bells*").

61. The concept of the reasonable man in this context was elaborated by Jacob LJ in the Court of Appeal case of *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] STC 1990 ("*Procter & Gamble*") where he said at paragraph 20:

> "**[20]** I should say a word about the tribunal's reference to the 'reasonable man'. It may come from this court's use of him in *Ferrero*. The issue was whether the product concerned was 'a biscuit' within the meaning of excepted item 2 of Sch 8 Group 1. The tribunal had used the test of 'what view would be taken by the ordinary man in the street, who had been informed as we have been informed' (see (1995) VAT Decision 13493 at para 8.50). This court accepted that approach.

> **[21]** To my mind this approach is saying no more than 'what is the reasonable view on the basis of all the facts'—it does not matter if some of the facts would not be known to the 'man in the street.' That is why the test accepted as proper in *Ferrero* adds 'who had been informed as we have been informed.' The uninformed view of the man in the street is deliberately not being invoked."

62. So the "reasonable man" is one who has been informed to the same extent as the Tribunal and in forming a view, one must look at all the facts.

63. The multifactorial approach has been examined in a number of cases.

64. In the case of *Torq Limited v The Commissioners of Customs and Excise* [2005] UKVAT V19389 ("*Torq*") the Tribunal set out at paragraph 40 the factors which were to be considered, in that case, to determine whether Torq Bars, a sports energy bar, were "cakes". The "tests" adopted were from the case of *United Biscuits (UK) Ltd (No 2)* (LON/91/160) which sought to determine whether Jaffa Cakes were cakes or biscuits. The "tests" or factors were as follows:

- Name (a minor consideration)
- Ingredients
- Texture
- Size
- Packaging
- Marketing
- Manufacturing technique
- Consistency when stale
- Presentation
- Attractiveness to children (cake, apparently being more attractive to adults)
- Core ingredients.

65. This approach was also adopted in the recent Tribunal case of *Pulsin' v The Commissioners for HM Revenue & Customs* [2018] UKFTT 0775 (TC) ("*Pulsin*"") where the question was, as in this case, whether the appellant's product was confectionary and whether it was a cake. At paragraph 64, the Tribunal said:

> **"64.**
> The 'test' for whether the Products are to be classified as cakes is a matter of informed impression. Considering the factors identified in turn the Tribunal concludes:
> (1) The ingredients used are not the same as a traditional sponge cake but by reference to the range of products that are treated as cakes, particularly allergen free/vegan cakes, the ingredients are consistent with those of a cake

(2) The process of manufacture is to mix press and cool, which is entirely consistent with the manufacture process of items uncontroversially cakes such as crunch cakes or tiffin.
(3) The unpackaged appearance was of a cake bar. HMRC assert in their public guidance that the liability of comparator products is not relevant (see below vis fiscal neutrality) however, comparison of the appearance to items accepted, or at least taxed, as cake must be relevant. The appearance was not dissimilar to the Morrisons bakery brownie in terms of shape and whilst different to the other brownie products the Tribunal considered it would be a most odd outcome to decide that by cutting the Product in half it could become a brownie as it more resembled other manufactured brownies. In terms of surface appearance it was similar to slightly glossy Jamaican ginger cakes or the equivalent.
(4) The taste of the simpler Maca Bliss was as one would expect from any high quality chocolate brownie cake. A wide range of textures was apparent in brownies, as indeed there is in cakes (see list above). The taste and texture was consistent with a conclusion that the Products were cakes.
(5) It is famously but incorrectly said that Marie Antoinette said “let them eat cake” purportedly in response to an assertion that there was no bread for the peasant population. The circumstances of consumption of cake in 2018 or, by reference to the period covered by Pulsin's claim, from 2013 to 2018 are not what they were in 1972 or 1988. Eating habits have changed. All food manufacturers including the manufacturers of traditional cakes have adapted their products to reflect those changing habits. The Tribunal was given approx. 100 different reviews of the Product but of those only 40 or so gave any indication of the circumstances of purchase. However, as part of a multi factorial exercise those reviews are relevant but what do they show? They show that most people saw the Product as a snack but reading all of those reviews (as distinct from the selection referenced during the hearing) also gave the impression that the individuals giving the reason for consumption as “snack” may well have also consumed an individually wrapped cake bar in the same circumstances. However, the possibility cannot be excluded that confectionary would have been consumed as an alternative. It is all but impossible to determine in which way this factor points particularly as the Tribunal does not understand that HMRC requires that for instance the 40g Jaffa Cake snack pack containing 3 Jaffa Cakes is taxed differently to the full box containing 10.
(6) The packaging of the Product points to convenience/hygiene. An individually wrapped item undoubtedly facilitates on the go eating but as above snacking cakes are, the Tribunal understands, taxed as cakes and not confectionary with the consequence that the fact that the Product is individually wrapped is unlikely, in today's world, to offer much weight in the multi factorial exercise to be undertaken. The legends on the packaging may be more illustrative but in the case of the Product the information included on the packaging gives no indication that the Product is considered by Pulsin' to be anything other than a brownie. The Tribunal also formed the view that, in and of itself, packaging had to be a lesser factor as it is so easily changed. It would be astonishing if a decision to use an individual laminated foil packet changed the liability of the product inside.
(7) The marketing of the Products is as a healthy, vegan, egg, dairy and gluten free brownie. The marketing reinforces that it may be eaten as a snack but as indicated above the Tribunal considers that cakes too are frequently eaten as snacks.
(8) The shelf life of the product is certainly a contra-indicator that the product is a cake but mostly because the ingredients are less subject to deterioration over time. However, on the basis of this factor taken in isolation it indicates that the product may not be a cake.

(9) The name of the product is Raw Choc Brownie. Brownies are generally considered to be cakes and the name and description are indicative of the Products being cakes.
(10) The Products behave very differently to a sponge cake, less differently to a crunch cake, marshmallow tea cake and certainly similar to tiffin all of which will behave when exposed to the air in a way similar to more traditional confectionary.
65.
As indicated above the Tribunal is required to undertake a multi factorial exercise. The Tribunal stands in the shoes of the suitably informed ordinary man and essentially asks whether the Product has sufficient characteristics to be considered as a cake. Judge Scott asked herself whether a snowball would look out of place on a plate of cakes.
66.
Put alongside a slice of traditional Victoria sponge, a French Fancie and a vanilla slice or chocolate éclair the Products may look out of place. However, put alongside a plate of brownies, or, for instance, at a cricket or sporting tea where it is more likely that bought and individually wrapped cakes will be served on a plate the Products would absolutely not stand out as unusual."

66. Although the Tribunal must take account of many factors in reaching its conclusion, the cases also warn against an over-elaborate analysis and the question is, having taken account of all the factors, what is the overall impression of the nature of the item. In *Torq* at paragraph 75, the Tribunal said:

"Furthermore, with reference to *United Biscuits (UK) Ltd (No.2)* (LON/91/160), we have had regard to the characteristics of the product (Jaffa Cakes) that were taken into account there. We think, however, that we should avoid treating the particular way in which that the Tribunal in that case chose to describe each aspect of a Jaffa Cake as if it were a description of principles to be applied in each and every case. It was the Tribunal's choice of description based on the product involved and the question that the Tribunal has to answer by reference to that product. Thus in any particular case a Tribunal may choose to focus upon and mention particular aspects of the product – its ingredients, texture, size, packaging and marketing – but we do not think that the choice of description in one case should be treated as decisive in another. Cakes and biscuits come in a wide variety of ingredients, textures, sizes and packaging and may be marketed in a number of different ways. *The final decision in any particular case is likely to be a matter of impression based on any number of different combinations of those aspects (and possibly others) rather than just seeing how many ticks there are on the list in comparison to the number of ticks on the particular list compiled by another Tribunal in another case.*" (emphasis added)

67. In *Procter & Gamble,* the Court of Appeal said:

"**[14]** Before going further, I have this general observation. *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.
[15] In so stating I am saying no more than was said by Lord Woolf MR in *Customs and Excise Comrs v Ferrero UK Ltd* [1997] STC 881 at 884:
'I commend the tribunal for the care which it took over this matter, but I am bound to say that, no doubt because of the submissions which were made to it by the parties,

> the treatment of the issue which was before it, was far more elaborate than was necessary. *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? …*
> **[19]** I cannot see anything wrong, still less anything wrong in principle, with this. It was not incumbent on the tribunal in making its multi-factorial 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. In the end it was a matter of overall impression." (emphasis added)

68. The question before this Tribunal is whether the Appellant's products are to be classified as confectionary for VAT purposes. HMRC must succeed if they are confectionary in the ordinary sense or if they are "sweetened prepared food which is normally eaten with the fingers" in the context of Note 5.

69. Ms Corkin submitted that the products could not be confectionary as they had not been sweetened and the only process in their manufacture was mixing.

70. There is, however, binding authority for the proposition that it is not necessary for sweetness to be added and that products which are naturally sweet because they use sweet ingredients, in this case dates, can fall within Note 5. Similarly, "prepared" can include simply mixing the ingredients together. There is no need for any cooking or heating process. This is set out in *Premier Foods* at paragraph 17:

> "In paras 26, 27 and 29, the tribunal clearly directed themselves that for an item to be classified as confectionery for the purposes of excepted Item 2 and Note 5, its production must have involved (a) a process which can be recognised as cooking and (b) the addition to the primary ingredient of an extra element as sweetness. In my judgment, neither of those elements is a necessary condition for a product to be classified as confectionery. 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. Similarly, 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. So far as I know, a stick of barley sugar does not involve any addition of further sweetness over and above its principal ingredient yet no one would doubt that it should be categorised as confectionery. It appears that in paras 26, 27 and 29, the tribunal erred in law in considering those two elements were essential to the categorisation of these fruit bars as confectionery."

71. The Products are indeed sweet although not as sweet as traditional confectionary such as chocolate truffles and the matcha green tea balls are only slightly sweet. That sweetness comes from the inherent sweetness of the principal ingredients of the products; dates, other dried fruit and coconut.

72. The products have also been "prepared" even if that preparation involves only careful mixing and moulding.

73. The requirement for some sort of preparation distinguishes confectionary from the fruit which might be an ingredient in it. Ms Corkin submitted that a raw date was "sweetened and normally eaten with the fingers" and on this test would be confectionary. She suggested that the ordinary person in the street would not distinguish between the products and raw dates in terms of ingredients. We do not necessarily accept that, but in any event, a date is not "prepared" and is not within Note 5.

74. We have taken account of all the information which was submitted to us and our own "taste test" and seek to apply the approach set out in the authorities.

75. The products were originally called "truffles" and are now called "healthy balls". With apologies to Shakespeare we observe that "a truffle by any other name would taste as sweet", and the products do taste sweet, even if not very sweet.

76. The texture of the products is quite dry and crumbly, a little like halva.

77. The original packaging and presentation of the products resembles what one would expect of premium sweets and chocolates. In particular, the "luxury box" has the appearance of a box of chocolates. The newer foil packaging for the three ball pack looks less of a premium product but still has the appearance of many confectionary items.

78. The products are presented as an indulgent treat on the company's website, on the packaging and on the company's social media feeds.

79. The unpackaged appearance of the product is very similar to items which are undoubtedly confectionary. Whatever they are called and whatever their ingredients, they have a similarity to and in cases where the coatings are similar, they look like chocolate truffles. They are the same size and shape and they are appealingly dusted with nuts or coconut.

80. They are designed to be eaten in small quantities as a nutritious and healthy, but delicious and indulgent snack or between meals as a "pick me up".

81. We did not have any concrete evidence as to the circumstances of consumption, but the factors above and the company's own social media output give the impression that the products are snacks/treats which one might eat in place of (allegedly less healthy) confectionary.

82. Further, they are clearly "sweetened, prepared foods normally eaten with the fingers" and so are confectionary within the definition of Note 5.

83. We are of the view that the informed man in the street, having taken account of all the facts would form the overall impression that the products are confectionary. The short, practical answer to the short, practical question "are the products confectionary?" is "yes".

Are the products cake?

84. Ms Corkin introduced a new argument in her Skeleton Argument in the light of the *Pulsin*' case which was decided after submission of the Notice of Appeal. The question in *Pulsin*' was whether the appellant's "raw choc brownie" was sufficiently like other brownies (which are cakes) to be classified as a cake, and therefore zero-rated as an exception to the standard rating of confectionary. The Tribunal decided that although the case was very close to the borderline, the Pulsin' bars had sufficient characteristics of brownies to be classified as cake and so zero-rated. Ms Corkin sought to argue that the products were similar to Pulsin' and so ought to be zero-rated as cakes also. She submitted that the ingredients in the Pulsin;' bars were similar to those of the products and, like the products were healthy, vegan, gluten free items produced by a cold press manufacturing process. Although the Pulsin' bars were bigger than the products, some brownies are produced in "mini" versions which are similar in size to the products and such brownies are zero rated. She submitted that the products should be compared with a mini brownie in terms of its consistency and characteristics.

85. She acknowledged that the products had not been marketed as cake, but submitted that they reacted to air like cakes, in that they became dry and crumbly and their taste deteriorated if left unwrapped.

86. She submitted further that the products had the consistency of cakes, or at least cakes like brownies which have a rich taste and dense and chewy texture and that the products have a similar shelf life to Pulsin'. She argued that the products would be eaten in the same circumstances as cake, eg with a cup of tea (though no evidence was submitted). The new packaging of the three ball pack of the products was similar to the packaging of a cake.

87. In short, Ms Corkin submitted that the products had sufficient of the characteristics of a cake to be classified as such and be zero-rated.

88. She produced a plate which included the products, mini muffins, mini chocolate brownies and Thorntons' chocolate fudge brownies. She stated that they had all been left out for a week and had all become dry and crumbly.

89. In addition, she suggested that on the "plate test" referred to in paragraphs 64 and 65 of *Pulsin*' which is set out above, the products did not look out of place among the other items which were unarguably cakes.

90. We also tasted a Pulsin' bar.

91. Pulsin' bars come in a number of flavours. The ingredients of the salted caramel and peanut flavour include dates, nuts and cacao powder, which also appear in

the products, or some of them, but also include chicory fibre, peanut butter, sweetener, brown rice bran, rice starch, rice protein and concentrated grape juice. The additional ingredients make them more cake- (or at least, brownie-) like. There is nothing comparable in the products.

92. The appearance of the bar is different from the products in terms of size, shape and surface texture. The taste is different (as one would expect). The consistency and texture when eaten is soft, chewy and dense also different from the products.

93. Like the products, Pulsin' bars are presented as a healthy but delicious choice-the foil packaging of the bar bears the words "naturally indulgent".

94. We do not accept that the products are similar to Pulsin' bars and even if they were, that is not the test. Each case turns on its own facts.

95. Although the products might become dry and crumbly in the air like cakes, they do not possess other characteristics which would enable them to be classified as cakes. They do not look like cakes, even mini cakes. They do not taste like cakes even brownies or tiffin bars or similar. They do not have the texture or consistency of any kind of cake. Their ingredients are different from those of cakes. They are not described or presented or marketed as cakes. They are different in size and shape from cakes. Despite Ms Corkin's submissions, when we apply the "plate test" to the items presented to us, the products *did*, in our view, look out of place among the mini brownies and muffins. They would have looked much more at home in a dish with Ferrero Rocher and Thornton's rum truffles.

96. The informed ordinary person would, we consider, form the overall impression that the products are not cakes.

97. Accordingly, as we have found that the products are confectionary, but are not cakes, they remain properly standard rated for VAT purposes.

Does social policy have an impact?

98. The Appellant has been at pains to emphasise the healthy nature of the products and that they are in line with Public Health England's stated aim of reducing the amount of sugar, and in particular added sugar, which confectionary and cakes contain.

99. She submits that the products are aligned with the clear social purpose of reducing the consumption of refined sugar and that they should therefore be zero-rated.

100. We can deal with this argument very briefly. The healthiness or otherwise of a product has no bearing on its VAT classification. Zero-rating depends solely on whether a product has sufficient characteristics to fall within one of the Groups in schedule 8 when applying the tests set out above. The most sugary, cream filled, chocolate covered cake will still be zero rated. The healthiest of low sugar, low fat confectionary will still be standard rated. This Tribunal has no jurisdiction to determine otherwise.

Is there a breach of the principle of fiscal neutrality?

101. The Appellant has asserted that similar products from competitors have been zero-rated and that HMRC's classification of the products as standard rated breaches the EU principle of fiscal neutrality. That principle means that similar products should be treated for VAT in the same way. The test is set out in the CJEU case of *Rank Group plc v Revenue and Customs Commissioners* [2012] STC 23 where the Court said:

> "36. … the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established."

102. In order for a difference in the VAT treatment of two products to constitute a breach of the principle, the two products must first be identical or similar from the point of view of the typical consumer of those products and secondly they must meet the same needs of the consumer. The burden of proof is on the Appellant to show this to the normal civil standard on the balance of probabilities.

103. We set out below the items which are alleged to be similar to the products but zero-rated. We were not provided with examples of these items, but we summarise what they are on the basis of an internet search. The items were all marketed as vegan and dairy free, some as gluten free:

- Bounce coconut and macadamia. These are protein energy balls
- Livia's Kitchen Nugglets. These come in various flavours such as cookie dough and almond butter. They are chocolate covered balls with a soft centre, sold in small packets.
- Livia's Kitchen raw millionaire shortbread salted caramel. These are tubs of small square products which resemble traditional millionaire's shortbread "mini bites" but in a vegan version.
- Primal Pantry hazelnut and macadamia. This is a bar made of dates, nuts and cacao, similar in appearance to Pulsin' bars.
- Deliciously Ella coconut and oat. This is an "energy ball" based on dates and oats.
- Deliciously Ella Cacao and almond. This is an oat based cereal bar.
- Various Indian religious sweetmeats such as Barfi, Gulab and Jalebi.

104. HMRC's position is that the Indian sweetmeats are eaten as cake as part of a meal and are zero-rated on that basis. HMRC submit that these high sugar cakes and

sweets are plainly not similar to the Appellant's vegan, gluten free no added sugar balls and they would not meet the same needs of the typical consumer.

105. With regard to the other items, the Appellant has produced invoices from various supermarkets which seem to show that:

- Bounce is zero-rated at Tesco and Sainsbury's
- Livia's Kitchen is zero-rated at Tesco but standard rated at Sainsbury's
- Primal Pantry is standard rated at Tesco and Asda but zero-rated at Sainsbury's
- Deliciously Ella is standard rated at Tesco and Sainsbury's.

106. This demonstrates little except that there is a great deal of confusion about how these kind of items should be treated for VAT purposes.

107. In *Torq*, the Tribunal observed at paragraph 15:

> "The Torq Bars' main competitors are the High 5 Energy Bar and Science in Sport GO-Bar, Powerbar Performance Bars and Maxim Energy Bars. Mr Hart said that the SiS GO-Bar and the High 5 Energy bar were zero-rated. In this respect we saw invoices showing that those products had been supplied at the zero-rate. Miss Taylor on behalf of the Commissioners objected to this evidence on the basis that it was not evidence of the VAT classification of these products. We accept that the invoices do not mean that these products were *correctly* supplied at that rate, save that the SiS GO-Bar has been subject to a previous decision of this Tribunal, to which we shall come."

108. In order to make out the case that the standard rating of the products is a breach of the principle of fiscal neutrality the Appellant would need to show that the items mentioned in paragraph 103 above (or one or more of them) are identical or similar to its products from the perspective of the typical consumer, that those competitor products have been *correctly* zero-rated and that the competitor products meet the same needs of the consumer as its own products.

109. The Appellant has not even begun to satisfy these requirements and we therefore find that there is no breach of the principle of fiscal neutrality.

Decision

110. For the reasons set out above we have concluded that the Appellant's healthy balls are correctly standard rated for VAT purposes as "confectionary".

111. Accordingly, we dismiss the appeal.

112. 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.

MARILYN MCKEEVER

TRIBUNAL JUDGE

RELEASE DATE: 6 FEBRUARY 2020