[2021] UKFTT 106 (TC)

TC08087

VAT – zero-rating – whether Organix and Nakd bars are confectionery – whether the change of law in 1988 achieved its purpose – whether purpose of Parliament relevant – multi-factorial test – whether the bars are cakes – whether claim reduced by input tax on the products – appeal refused

FIRST-TIER TRIBUNAL **Appeal number: TC/2018/05518**

TAX CHAMBER

BETWEEN

WM MORRISON SUPERMARKETS PLC **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

The hearing took place on 9, 10 and 11 February 2021 using the Tribunal's video platform. A face to face hearing was not held because of the coronavirus pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings, and the hearing was therefore held in public.

Mr Philip Simpson QC (Scot), instructed by Deloitte LLP, for the Appellant

Mr Howard Watkinson QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The Appellant, Wm Morrison PLC ("Morrison's" or "the Appellant") is a well-known large retailer. The products in issue in this appeal ("the Products") were sold under the Organix brand ("the Organix Bars") and the Nakd brand ("the Nakd Bars").

2. HM Revenue & Customs ("HMRC") decided that the Products were standard rated for Value Added Tax ("VAT") purposes because they were "confectionery" within the Value Added Taxes Act 1994 ("VATA"), Sch 8, Part II, Group 1, Item 2. The Appellant appealed to the Tribunal against those decisions, and also against HMRC's refusal to repay VAT of £1,000,163.39 in relation to the Nakd Bars and £97,162.80 in relation to the Organix Bars.

3. Morrison's submitted that the Nakd Bars and Organix Bars were not confectionery, or in the alternative, that they were zero-rated as cakes. I considered the following:

(1) whether I should follow the judgment of the VAT Tribunal in an earlier case which had decided the VAT status of three other Organix bars, and concluded I should not, see §165ff;

(2) whether there was binding authority as to the meaning of Note 5 to Group 1, which provides that "sweetened prepared food…normally eaten with the fingers" automatically falls within the meaning of "confectionery". HMRC's position was that *R&C Commrs v Premier Foods Ltd* [2007] EWHC 3134 (Ch) ("*Premier*") had decided that the meaning of "sweetened" in that statutory phrase includes items which are intrinsically sweet, such as dates. I decided that this was not the *ratio* of *Premier*, see §103ff;

(3) whether Parliament had intended, when it introduced Note 5 in 1988, that all cereal bars would be classified as confectionery. I found that this was their intention, see §146ff; and

(4) whether that intention could be taken into account in interpreting the meaning of Note 5, but found that it could not, see §162.

4. I went on to decide that the normal meaning of "sweetened" in Note 5 did not include sweetness which was intrinsic to the core ingredients, and that as a result neither the Organix Bars or Nakd Bars came within Note 5. Although they were sweet, they were not "sweetened".

5. As a result, a multi-factorial examination was required to decide whether they were confectionery. I made detailed factual findings about all the Products, and considered the parties' submissions. Having identified elements which are characteristic of confectionery, see §170ff, I carried out multi-factorial examinations and decided that the Bars and the Nakd Bars were confectionery.

6. I then considered whether they were cakes, taking into account in particular the similarity between the Organix Bars and flapjacks (which HMRC accept are cakes). However, I decided that none of the Products was a cake.

7. I therefore refused the appeal. The Appellant's Counsel, Mr Simpson, also made submissions about quantum, saying that Morrison's should be repaid the output VAT charged to customers on the Products, without reducing that figure by the input VAT paid to suppliers. I agreed with HMRC's Counsel, Mr Watkinson, that any such repayment had instead to be reduced by the related input VAT. However, this issue was academic given my conclusion on the other matters.

8. The decision below begins with a summary of the three different appeals made to the Tribunal, and then explains various disputes about the evidence. The main body of this decision begins at §80.

THE APPEALS AND THE PRODUCTS

9. The Appellant made three appeals concerning the Organix Bars and Nakd Bars. Those appeals were consolidated, and concerns all the Products listed below.

The Organix appeal

10. On 3 November 2017, the Appellant submitted an error correction notice on the basis that the following Organix Bars were zero-rated:

(1) Organix Carrot Cake Soft Oaty bar ("the Carrot Cake bar")

(2) Organix Banana Soft Oaty bar ("the Banana bar")

11. The Appellant also claimed it had overpaid VAT of £97,162.80 for the period from October 2013 to July 2017 in relation to the Organix Bars. HMRC decided that the Organix Bars were standard rated as confectionery, and on 25 October 2018, that decision was confirmed on review. On 23 November 2018, the Appellant appealed to the Tribunal.

The Initial Nakd Bars

12. On 14 December 2017 the Appellant applied to the Respondents for a non-statutory clearance relating to the rate of VAT chargeable on the supply of three Nakd Bars ("the Initial Nakd Bars"), being:

(1) Nakd Berry Delight Wholefood Bar ("Berry Delight");

(2) Nakd Cashew Cookie Wholefood Bar ("Cashew Cookie"); and

(3) Nakd Cocoa Orange Wholefood Bar ("Cocoa Orange").

13. The Appellant claimed that the Initial Nakd Bars qualified for zero rating. HMRC decided that they were standard rated as confectionery, and on 24 July 2018, after some further correspondence, HMRC issued a review conclusion that upheld that decision. The Appellant appealed to the Tribunal on 22 August 2018.

The Additional Nakd Bars

14. On 1 November 2018, the Appellant wrote to HMRC claiming that the VAT liability of supplies of the Initial Nakd Bars should be the same as that for supplies of an additional 15 products ("the Additional Nakd Bars"), and claimed that output tax of £1,000,163.39 had been overpaid on those Products during VAT periods October 2014 to July 2018.

15. These Additional Nakd Bars are:

(1) Nakd Apple Pie Wholefood Bar;

(2) Nakd Bakewell Tart;

(3) Nakd Banana Bread Wholefood Bar;

(4) Nakd Banana Crunch Wholefood Bar:

(5) Nakd Berry Bliss Wholefood Bar;

(6) Nakd Berry Cheeky Wholefood Bar;

(7) Nakd Blueberry Muffin Wholefood Bar;

(8) Nakd Cocoa Delight Wholefood Bar;

(9) Nakd Cocoa Loco Wholefood Bar;

(10) Nakd Cocoa Twist Wholefood Bar;

(11) Nakd Ginger Bread Wholefood Bar;

(12) Nakd Lemon Drizzle Wholefood Bar;

(13) Nakd Peanut Delight Wholefood Bar;

(14) Nakd Rhubarb and Custard Wholefood Bar; and

(15) Nakd Strawberry Crunch Wholefood Bar

16. In the rest of this decision, as with the Initial Nakd Bars, I have referred to these bars by the distinguishing parts of their names, so for example the Nakd Apple Pie Wholefood Bar is "Apple Pie".

17. On 8 November 2018, HMRC decided that the Additional Nakd Bars were standard-rated as confectionery, and refused the Appellant's claim for repayment. On 7 December 2018, the Appellant appealed that decision to the Tribunal.

The consolidations

18. On 1 February 2019, the Tribunal directed that the two Nakd Bars appeals be consolidated, and that the Organix Bars appeal be joined but not consolidated. On 28 February 2020, Judge Poole directed that the Organix Bars appeal be consolidated with the Nakd Bars appeal.

THE EVIDENCE

19. There were some disputes about the evidence. In this part of the decision, I first set out the evidence about which no challenges were made, and then that about which there was disagreement.

Evidence which was not challenged

20. The unchallenged evidence was made up of documents, witness statements and product samples.

The documents

21. The Appellant provided a bundle of documents, which included:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) a list of ingredients in the Products;

(3) a schedule setting out the "sugar by weight" in three Nakd Bars and in various chocolate bars;

(4) a schedule of the Nakd Bars' ingredients, covering 15 of the 18 Bars which were in issue; and

(5) pages from websites about the Nakd Bars.

The witness evidence

22. In August 2019, the following evidence was filed and served, in compliance with the Tribunal's directions:

(1) A witness statement from Mr Jack Howard, who had worked as Food Developer at Organix Brands Ltd, the manufacturer of the Organix Bars, since 2012. In addition to his witness statement, Mr Howard gave oral evidence led by Mr Simpson and was cross-examined by Mr Watkinson. I found him to be a credible and honest witness.

(2) A witness statement from Ms Stefanie Marston, who had been the Appellant's buying manager for "Free From" products between December 2013 and December 2017, and the Buying Manager for biscuits and cereal bars from January 2019 to August 2019. She provided a witness statement, but was unable to attend the hearing for medical reasons. I have accepted those parts of her evidence which were not challenged by HMRC; where her evidence was challenged, I have only accepted her evidence if it was independently corroborated by other documentary or pictorial evidence. She also exhibited various pictures of the Products, but the resolution of the images showing the Organix Bars was poor, with the result that it was impossible to see the names of adjacent and nearby products. I pointed this out to the Appellant but was told it was not possible to increase the size or improve the clarity of the images. This limited the findings of fact I was able to make.

23. By way of agreed directions, the Appellant was to file and serve any further evidence in relation to these appeals by 30 November 2020. On that date the Appellant made an application to serve Mr Andrew Galbraith's witness evidence. HMRC did not raise any objection to that evidence, and it was admitted. Mr Galbraith is the Customer Manager for the Appellant's Customer Insights team and had been in that role for over four and a half years. In addition to his witness statement, he gave oral evidence led by Mr Simpson and was cross-examined by Mr Watkinson. He was a credible and honest witness, but his evidence was rightly challenged by Mr Watkinson for the reasons explained at §130.

Samples of the Products and of the Get Fruity bars

24. On 29 January 2021, the Appellant despatched parcels containing six Nakd Bars and both Organix Bars to Mr Watkinson, Mr Simpson and the Tribunal. On 4 February 2021, the Appellant sent further packages containing:

(1) samples of six of the remaining Nakd Bars, together with a letter saying that the Appellant had been unable to source samples of the remaining six, being Apple Pie; Banana Crunch; Berry Cheeky; Cocoa Loco; Rhubarb and Custard and Strawberry Crunch; and

(2) samples of four comparator "Get Fruity" bars manufactured by Get Fruity Ltd. In its Grounds of Appeal the Appellant had submitted that Get Fruity bars been accepted as zero-rated by HMRC, and they could not reasonably be differentiated from the Organix Bars. HMRC had responded to that submission in their Statement of Case.

25. Most of the Nakd Bars were sold both in boxes and individually. Both the boxes and the individual bars were part of the evidence. However, it became clear on the first day of the hearing that although both parties' Counsel and the Tribunal had the same samples of the individual bars, we all had different boxes. It was agreed that the Appellant would take photographs of the boxes with the aim of ensuring that the parties and the Tribunal had the same evidence, and photographs of some of the boxes were subsequently distributed, and arrived before the second day of the hearing.

Earlier packaging?

26. The parties' submissions related to the above samples and the related photographs. However, after the hearing I noted that correspondence between the parties dated 17 April 2019 (almost six months after the Organix appeal had been made to the Tribunal) included a picture of an Organix Banana Bar box which is significantly different from the one produced as evidence for this appeal. However, as that picture is of only one side of the box, and so of limited evidential value, and as neither party asked me to consider the earlier form of packaging, my findings are based on the sample boxes and the photographs with which I was provided.

The other comparator products and the late witness evidence

27. On 19 January 2021, Mr Simpson filed and served his skeleton argument, in accordance with the Tribunal's directions. The skeleton included the following passage:

> "The Appellant will also provide samples of the following similar Products
>
> (1) Organix Fruit and Cereal bars: raspberry and apple soft oaty bar;
>
> (2) Go Energy bars: banana fudge and blueberry flavours;
>
> (3) Kiddylicious bars: cherry and blackberry, banana and strawberry, and pineapple, coconut and mango flavours;
>
> (4) Get Fruity bars: mango, raspberry, berry, strawberry flavours;
>
> (5) Humzinger bars: strawberry flavour.
>
> All of these are zero-rated."

28. The text of his skeleton did not provide any further information as to which of the Products were to be compared to these "similar products", other than it was already clear that the Go Fruity bars were to be compared to the Organix Bars, and it was reasonable to infer that the Organix raspberry and apple bar was to be compared to the Organix Bars in dispute.

29. The hearing was listed to begin on Tuesday 9 February 2021. As noted at §24, the Appellant had despatched two parcels of samples, one on Friday 29 January 2021 and one on Thursday 4 February 2021. That second parcel was received by Mr Watkinson on Friday 5 February 2021, two working days before the start of the hearing.

30. In addition to samples of the Products, the first parcel included an Organix raspberry and apple bar; three Kiddilicous bars and a Humzinger bar. In the second parcel, the Appellant included a banana fudge Go Energy Bar and a Pulsin Peanut Choc Chip Brownie (which had not been referred to in Mr Simpson's skeleton). The Appellant made no application explicitly to admit any of these comparator products.

31. On 4 February 2021, the same day it despatched the second package, the Appellant applied to the Tribunal for permission to admit two further witness statements ("the Application"). The first of these witness statements was from Mr Gareth Dunne, the managing director of Natural Balance Foods Ltd ("Natural Balance"), the manufacturer of Nakd Bars. The second was from Andrew Marshall, Morrison's Senior Finance Manager, Indirect Tax; his witness statement related to the new comparator products and the Get Fruity bars.

32. HMRC were copied on the Application, and it was forwarded to me by the Tribunals Service the following day, Friday, 5 February 2021. I decided that it was not fair or just to decide the Application before the hearing, but instead informed the parties that Mr Simpson could make the Application orally at the beginning of the proceedings. On Monday 7 February 2021, I received HMRC's objection to the Application ("the Objection"), which had been filed and served at 16.30 the previous Friday.

33. The proceedings began on Tuesday 8 February 2021 with Mr Simpson making submissions on the Application and Mr Watkinson responding on behalf of HMRC. Mr Watkinson made it clear that HMRC were objecting not only to the two new witness statements, but also to the admission of the extra comparator products, in other words, to all the comparator products other than the Get Fruity bars which had been referred to in the original Grounds of Appeal.

34. Having taken time to consider those submissions, the Application and the Objection, I told the parties that I was refusing to admit the new witness statements and the new comparator products, and gave brief reasons. I said that I would include full reasons in the decision notice. The parties' submissions and my reasons are now set out below, beginning with Mr Dunne's witness statement and followed by Mr Marshall's witness statement together with most of the new comparator products. Finally, I explain my reasons for refusing to admit the Organix raspberry and apple bar and the Pulsin bar.

Mr Dunne's witness statement

35. Mr Dunne had been the managing director of Natural Balance, the manufacturer of Nakd Bars, since April 2020 and was previously its Operations Director. His witness statement contained detailed evidence as to the ingredients and the manufacturing process of the Nakd Bars and about their positioning in relation to consumers, including their marketing.

The Application and Mr Simpson's submissions

36. In the Application, the Appellant said that that admitting Mr Dunne's witness statement would "give the Tribunal a complete understanding of the products in dispute" and "may enable the Parties to reduce the matters in dispute in this Appeal and ultimately lessen the time and costs of the Parties and the Tribunal in hearing this Appeal".

37. The Appellant cited Lightman J in *Mobile Export 365 Ltd v HMRC* [2007] EWHC 1727 (Ch) ("*Mobile Export*") who said at [20(2)] that "the presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary". In the Appellant's submission, the evidence in Mr Dunne's witness statement was relevant, and there was no compelling reason not to admit it. In oral submissions, Mr Simpson reiterated that the evidence was relevant, and said there would be no prejudice to HMRC if it were to be admitted.

38. By way of explanation for the delay in putting forward this witness statement, the Application said:

> "The Appellant has been liaising with Natural Balance for some time in relation to the provision of a witness statement and has only recently been able to secure Natural Balance's agreement to provide a witness statement as part of these proceedings."

39. Mr Simpson expanded this by saying that in July 2019 Morrison's had raised with Natural Balance the possibility of providing witness evidence, but this had not been progressed because Natural Balance was in separate discussions with HMRC about the VAT status of the same products, and they "are still in these discussions". In October 2020, Morrison's re-opened the issue, and in mid-January 2021, Natural Balance indicated they would be willing to provide a witness statement: he said this was then produced "as quickly as possible". He added that some of the information in the witness statement was not in fact new, because it was already clear from the packaging that Nakd Bars were produced by the ingredients being "swooshed together".

The Objection and Mr Watkinson's submissions

40. In the Objection, HMRC said:

(1) the Appellant had had over two years to "get its house in order" in relation to the provision of witness evidence. They set out the time line as follows:

(a) the Tribunal originally issued directions on 27 December 2018; these required that witness evidence be filed and served by 15 March 2019;

(b) those directions were vacated when further Products were added to the appeals, and in accordance with revised directions the Appellant served its witness evidence on 23 August 2019;

(c) the original listing was vacated because of the pandemic, and the hearing was relisted in August 2020;

(d) by subsequent directions, the Appellant was permitted to apply to adduce any further witness evidence by 30 November 2020. Mr Galbraith's witness statement was then filed and served in accordance with those directions. .

(2) The late witness evidence was self-evidently a failure to comply with the Tribunal's directions requiring service of any further evidence by 30 November 2020. The Tribunal must therefore apply the three-stage process set out in *Denton v White* [2014] EWCA Civ 90 ("*Denton*"). That this was the correct approach could be seen from *Wolf Rock (Cornwall) Ltd v Langhelle* [2020] EWHC 2500 (Ch) at [35], and it was now well-established that the Tribunal should apply a similar approach to the courts in relation to compliance with directions.

(3) The Appellant's delay of at least two months after the deadline set by the directions, and the fact that the witness statement was submitted almost on the eve of the final hearing, was both "significant and serious", and no good reasons had been put forward for that delay.

(4) It would be prejudicial to HMRC if they now had now to respond to that very late evidence.

41. In oral submissions, Mr Watkinson said that Mr Dunne's witness statement contained "core evidence relating to the products"; that HMRC had not had any reasonable opportunity to consider that evidence in the context of the rest of the evidence, or to address it as part of their own submissions. He added that if the Appellant had considered evidence from Nakd Bars to be crucial to its case, it could have applied to the Tribunal for a witness summons to require someone from that company to give evidence, but had not done so.

Discussion and decision

42. There had plainly been a failure to comply with the directions, and HMRC are right that I must follow the approach in *Denton.* This is to:

(1) establish the length of the delay and whether it is serious and/or significant;

(2) establish the reason(s) why the delay occurred; and

(3) evaluate all the circumstances of the case, using a balancing exercise to 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, and in doing so 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".

43. I agreed with HMRC for the reasons they gave, that filing and serving Mr Dunne's witness statement only two full working days before the hearing was a serious and significant failure.

44. In relation to the reasons for the delay, I was provided only with the information in the Application that the Appellant "has only recently been able to secure Natural Balance's agreement to provide a witness statement as part of these proceedings", together with Mr Simpson's statement that Morrison's reopened discussions with Nakd Bars in October 2020, and that in mid-January 2021 the company indicated that they would be willing to provide a

witness statement. There was no evidence to support those statements, such as emails between Morrison's and Nakd Bars to demonstrate why it had taken so long, or where responsibility for the slippage of time actually lay, or why it was only in October 2020 that discussions recommenced; or why there had been a change of view by Natural Balance, given that Mr Simpson had said Nakd Bars were continuing to hold their own discussions with HMRC. I find that there was no good reason for the delay.

45. The third stage of the *Denton* approach is to consider all relevant circumstances. I took into account the following factors:

(1) "The need for 'litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders", to which "particular importance" must be given, see *Martland v HMRC* [2018] UKUT 0178 (TCC) at [43] citing in particular *Denton* and *BPP v HMRC* [2017] UKSC 55.

(2) No good reason had been given for the delay in providing the witness statement.

(3) The evidence was relevant, and in *Mobile Export* Lightman J said at [20(2)] that "the presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary". However, Lightman J went on to say at [21] that springing surprises on opponents and the Tribunal was "not acceptable conduct today in any civil proceedings" and was "clearly repugnant to the Overriding Objective" and to the duty of the parties and their legal representatives to help the court to further that objective. The Appellant in this case was "springing surprises" on HMRC.

(4) If the witness statement were to be admitted, it would cause prejudice to HMRC because:

(a) they would have to review how they were approaching their case, not only after the provision of the Statement of Case, but after both parties had served their skeleton arguments;

(b) HMRC had no information as to how the witness statement was going to be approached by Mr Simpson when he came to present the Appellant's case, because it was not part of the Appellant's Grounds of Appeal, and formed no part of his skeleton argument;

(c) Mr Watkinson would have had almost no time to prepare his cross-examination of Mr Dunne; and

(d) HMRC might have wished to put forward other evidence to challenge or respond to that in the witness statement, but had had no time to consider doing so.

(5) To the extent that the witness statement was supporting information on the Products' wrappers about the manufacturing process, the Appellant had already provided some evidence.

46. It is clear from the above analysis that the weight of the factors is overwhelmingly in favour of excluding the evidence.

47. I reached the same conclusion by applying Rule 15 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. This allows the Tribunal to exclude evidence that

would otherwise be admissible where it "was not provided within the time allowed by a direction or a practice direction" or where it would otherwise be unfair to admit the evidence. In this case, the evidence was not provided within the time allowed by the directions, and it would be unfair to HMRC to admit it, for the reasons set out above.

Mr Marshall's witness statement and related products (other than the Organix raspberry)

48. As noted above, Mr Marshall was Morrison's Senior Finance Manager for Indirect Tax, and had been in post for over three years. His witness statement set out Morrison's position in relation to the treatment of the following comparison products: the Organix raspberry and apple bar; the three Kiddylicious bars; three Get Fruity bars and certain Humzinger bars. His witness statement therefore related to most of the new comparator products, although the latter were not explicitly put forward as exhibits.

49. The next following paragraphs deal with Mr Marshall's witness evidence and all the new comparator products referred to in his statement, except the Organix raspberry and apple bar, which I consider separately below.

The Application and Mr Simpson's submissions

50. The Application stated that the purpose of Mr Marshall's witness statement was to explain why Mr Simpson had said in his skeleton argument that Morrison's had treated the Kiddylicious, Get Fruity and Humzinger bars as zero-rated. In addition, the Application said that this witness statement, like that of Mr Dunne "may enable the Parties to reduce the matters in dispute in this Appeal and ultimately lessen the time and costs of the Parties and the Tribunal in hearing this Appeal", and the same reliance was placed on the same words of Lightman J in *Mobile Export.*

51. In oral submissions, Mr Simpson very fairly admitted that it was only very recently that a decision had been made as to which comparator products should be put forward as part of the appeal, and the list was only "finalised in the past three weeks", in other words, shortly before Mr Simpson had filed and served his skeleton. Following the service of the skeleton with its reference to these other comparator products, it was thought appropriate to file and serve witness evidence from Morrison's as to why it treats these products as zero-rated. Mr Simpson did not consider that the inclusion of the products would cause problems for HMRC, saying that it was "reasonably plain to see what they are and what they taste like". In relation to the Humzingers, he said Morrison's understanding was that HMRC had indicated that zero-rating was correct, but that "Mr Watkinson will be able to confirm that or tell me I am wrong".

The Objection and Mr Watkinson's submissions

52. By the Objection, HMRC noted that Mr Marshall's witness statement dealt with products which were "neither trailed in the Amended Grounds of Appeal, nor in other witness statements produced by the Appellant" and that his witness statement is thus "not relevant" to the appeal. Moreover, it had not been provided in accordance with the directions; no good reason had been given for it being put forward at this very late stage, and the Tribunal was asked to refuse to admit it.

53. In oral submissions, Mr Watkinson confirmed that HMRC were objecting both to Mr Marshall's witness statement and to the comparator products it discussed. He submitted that there was no good reason why these comparator products had been identified for the first time in Mr Simpson's skeleton argument: Mr Marshall had worked for Morrison's throughout the period and had been involved in the appeal, so there was plainly no issue as to his availability. Yet he had only been provided with these comparator products just before the hearing. Mr Watkinson said that even now he had no idea which of these new products were being compared to which particular disputed Product, or in what respects, and he submitted that it would therefore be unfair to HMRC if the witness statement and the new comparator products were admitted as evidence.

Discussion and decision

54. There has again plainly been a failure to comply with the directions. The delay was serious and significant, not only because the witness statement was filed and served more than two months after the 30 November 2020 deadline set by the directions, but also because they were put forward so very close to the hearing.

55. The failure was caused by the Appellant's delay in deciding which comparator products it wished to put before the Tribunal as part of its case, and this was not a good reason. By the time of the hearing the parties had been preparing for this appeal for over two years, and there had been plenty of time for the Appellant to consider whether it wished to put forward comparator products and to provide them to HMRC, along with any related witness evidence and submissions.

56. I considered factors (1) to (4) as set out at §45 in relation to Mr Dunne's witness statement, plus the following additional factors:

(1) By the time Mr Marshall prepared his witness statement, he had been working for Morrison's as Senior Finance Manager, Indirect Tax for over three years, and thus must have been aware of and involved in the appeal process, and, as Mr Watkinson said, would therefore have been available to give evidence in accordance with the directions;

(2) Mr Simpson exemplified the problem facing HMRC when he said that Morrison's understood HMRC had indicated that the Humzingers were zero-rated but that "Mr Watkinson will be able to confirm that or tell me I am wrong". In other words, on the first day of the hearing and for the first time, the Appellant was asking HMRC's Counsel to confirm the VAT status of that comparator product and the reasons for that status. That is self-evidently unreasonable and unfair to HMRC.

(3) In relation to all the comparator bars, Mr Simpson submitted that it was "reasonably plain to see what they are and what they taste like". However, if the comparator products were admitted, this might require findings about their wrapping, their positioning in the stores and other matters, none of which had previously formed part of the Appellant's case.

(4) I did not overlook the fact that one of the products covered in Mr Marshall's witness statement was the Get Fruity bars which had formed part of the Appellant's Grounds of Appeal. However, no related witness evidence had previously been provided and, as already set out above, there was no good reason for that delay.

57. It is again clear from that the weight of the *Denton* factors is overwhelmingly in favour of excluding the evidence, and I came to the same conclusion having considered and applied Rule 15.

Organix raspberry and apple and Pulsin

58. I have considered these two comparator bars separately because there had been previous FTT decisions involving an Organix raspberry and apple bar and a Pulsin bar, and for those reasons, the parties put forward additional arguments.

Organix raspberry and apple

59. Mr Simpson referred to the Organix raspberry and apple bar in his skeleton argument as an extra product; it was included in the package sent out by the Appellant on 29 January 2019 and was referred to in Mr Marshall's witness statement.

60. Mr Simpson sought to distinguish this bar from other comparators, because:

(1) the VAT Tribunal had considered an Organix raspberry and apple bar in 2005, and decided it was zero rated, see *Organix Brands plc v C&E Commrs* [2005] UK VAT V19134 ("the *Organix* case"); and

(2) the Appellant had referred to and relied on the *Organix* case in its Grounds of Appeal.

61. Mr Watkinson accepted that admitting this bar into evidence would cause HMRC less prejudice than admitting the other new comparator bars. With those other bars, he did not know which of the Products they were going to be compared to, or on what basis. With the Organix raspberry and apple bar, he had made the reasonable inference that the Appellant would be seeking to compare it with the two Organix products in dispute and by reference to the *Organix* case.

62. However, Mr Watkinson asked that this bar nevertheless not be admitted, because the VAT Tribunal's decision in the *Organix* case was made in 2005, and there was no information before this Tribunal as to whether this new comparator bar was substantially identical to the one considered by that VAT Tribunal. He noted that at least the packaging must have been different, because, as is clear from the *Organix* case, the bars in issue were sold as "Goodies Organic Fruit and Cereal Bars".

63. I found that the factors set out at §56 in relation to Mr Marshall's witness statement applied equally to this bar. Neither of the two additional factors put forward by Mr Simpson carried any weight:

(1) the fact that the VAT Tribunal had decided, over 15 years earlier, that three Organix bars had zero-rated, did not mean that the current Organix Raspberry bar, with a related witness statement, should be admitted as evidence g; and

(2) the fact that the *Organix* case had been cited in the Grounds of Appeal only entitled Mr Simpson to make related submissions, not to provide exhibits.

Pulsin

64. The final comparator product was the Pulsin bar. There had been no reference to this product being provided as evidence in: the Grounds of Appeal, in Mr Simpson's skeleton argument, or in Mr Marshall's witness statement. It was simply included in the package delivered to Mr Watkinson on the Friday before the hearing.

65. Mr Simpson said that the bar had been provided because in *Pulsin' Ltd v HMRC* [2018] UKFTT 775 (TC) ("*Pulsin*"), the FTT had decided that Pulsin bars were cakes and not confectionery, and he had referred to that case in his skeleton argument.

66. I decided that there was no good reason to take a different approach. This product had been provided by the Appellant extremely late, without any context or information as to the products to which it was to be compared, and there was also no evidence that the sample bar provided by the Appellant was identical to that considered by the Tribunal when *Pulsin* was decided in 2018.

Overall conclusion

67. For the above reasons, I refused permission to admit Mr Dunne's and Mr Marshall's witness statements and I also refused permission for any comparator products other than the Get Fruity bars referred to in the Grounds of Appeal to be admitted in evidence.

Mr Watkinson's Appendix

68. Mr Watkinson filed and served his skeleton argument on 26 January 2021, in accordance with the directions. Attached to the skeleton was an Appendix containing extracts from Morrison's online shopping website and from Nakd's website "eatnakd.com" ("the Appendix"). In the main body of his skeleton, he said:

> "Appendix 1 to these submissions collates the current information on the Products (where available) from the Appellant's and manufacturers' websites. The Respondents do not anticipate any dispute as to the contents of the Appendix being admitted into the proceedings, since they are largely taken from the Appellant's own website. If there is some dispute the Respondents will make any necessary application."

69. On 4 February 2021, Mr Simpson filed and served a supplementary skeleton argument relating to the issue of quantum. That skeleton did not attach or contain any objection to the admission of the evidence in the Appendix. On the same date, the Appellant filed the Application to admit the further witness evidence, as discussed above. Neither as part of the Application, nor separately, did the Appellant make any pre-hearing objection to the Appendix.

70. Shortly before the lunch adjournment on the second day of the hearing, as his submissions were coming to an end, Mr Simpson indicated for the first time that the Appellant might object to the admission of the evidence in the Appendix. I drew his attention to the paragraph in Mr Watkinson's submission set out at §68 above, and directed that he should have an opportunity to discuss with his client whether or not an objection was being made; both parties agreed that this was in the interests of justice.

71. When the Tribunal reconvened, Mr Simpson said that the Appellant was not objecting to the admission of the evidence in the Appendix, but invited me not to place much weight on it, because (a) it was HMRC's selection of pages from the website, and (b) website information was only one of many possibly relevant factors.

72. In deciding whether to admit the evidence, I took into account that it had been filed and served after the date given in the directions and that no reason had been given as to why HMRC had not put it forward earlier. Having given significant weight to those factors, I nevertheless found that the balance of factors favoured admitting the evidence, because:

(1) Mr Watkinson had invited the Appellant to agree or object to the Appendix, and had said that if the Appellant objected, HMRC would make a formal application. No such objection was made during the following two weeks. HMRC had reasonably proceeded on the basis that the Appellant did not object;

(2) the evidence was already known to the Appellant as it was taken from its own website and that of Natural Balance;

(3) the Appellant had had two weeks to consider the evidence in the context of its own submissions;

(4) if the Appellant had thought that HMRC's selection was unbalanced, it could have objected and/or asked for other website evidence to be admitted; and

(5) the possibility that the Appellant might object was raised for the first time on the middle of the second day of the hearing, shortly before the conclusion of Mr Simpson's submissions; in other words, on the same day that Mr Watkinson was expecting to do his opening, which was procedurally unfair.

The Get Fruity bars

73. As a result of the points discussed above, the only comparator products remaining as evidence were the Get Fruity bars, which were put forward as comparators to the Organix Bars. The use of comparator products in cases about food classification can be helpful. For example, in *Kinnerton v HMRC* [2018] UKFTT 382 (TC), where I was also the presiding judge, the parties' Counsel identified differences and similarities between (a) the way the taxpayer had sold and packaged the disputed products, and (b) the placement and packaging of the comparator products, in order to demonstrate whether there were alternatives to the taxpayer's approach.

74. In this appeal, it was unclear until the second day of the hearing exactly how the parties were going to put their case in relation to the Get Fruity bars. Mr Watkinson had thought that the Appellant was raising issues of fiscal neutrality and/or equal treatment under European law. However, Mr Simpson said that the Appellant was not seeking to raise those issues, but that instead the reasons for putting the bars forward as evidence were that:

(1) HMRC had agreed they were zero-rated;

(2) in the Appellant's view they were insufficiently different to the Organix bars to merit that difference of treatment; and

(3) the Tribunal was therefore asked to come to the same conclusion, and agree that the Organix bars were also zero rated.

75. I considered whether there was relevant evidence about the Get Fruity bars about which I should make findings of fact. The only evidence to which I was taken during the hearing was the samples themselves and their wrappers. Afterwards I located in the Bundle earlier correspondence between the Appellant and HMRC, which said that the Appellant considered the products to be very similar to the Get Fruity bars; set out a schedule of ingredients, and asked HMRC to explain why Get Fruity bars had been zero-rated. On 10 April 2018, Ms Leonard of HMRC agreed with the Appellant there were some similarities, but that she was only giving a decision on the Organix Bars, and adding:

> "HMRC are currently carrying out a review of their policy with regard to products such as cereal and fruit bars in order to provide more clarity around the border line between zero rate and standard rate products. Depending on the outcome of the review, it is possible that the liability of some products might be reconsidered."

76. Ms Leonard offered to delay making a decision on the Organix Bars until the outcome of that review, but the Appellant said it understood the review had already been ongoing for some time and had no known end date, and there was thus no good reason to delay. Ms Leonard then issued HMRC's decision that the Organix Bars were standard rated.

77. Like Ms Leonard, the Tribunal can only make findings of fact which are relevant to the issue in question. I have to decide whether the Organix Bars are correctly standard rated, or whether they should be zero rated. In carrying out that exercise, I cannot take into account an HMRC ruling (which may or may not be correct) as to the VAT status of the Get Fruity bars, about which I had very limited evidence. Instead, I must make findings about the Organix Bars. I have therefore not made any findings about the Get Fruity bars, as they are not relevant to the decision I have to make.

The findings of fact

78. The findings of fact in this decision are based on the evidence admitted for the hearing, namely the documents in the Bundle and in Mr Watkinson's Appendix; the witness statements of Mr Howard, Ms Marston and Mr Galbraith; the samples of the Products; the wrapping of the individual bars and the pictures on the boxes. In addition, at the beginning of the hearing, I was invited by Mr Simpson to taste each of the Products and did so.

79. My main findings of fact about the Organix Bars are at §110ff, and my findings about the Nakd Bars are at §185ff. Additional findings are made during the discussion parts of the decision, and are identified as such in the text.

THE LAW

80. This section of the decision sets out the legislation, the leading case law, and summarises the *Organix* case.

The legislation

81. Zero-rating of goods or service was permitted by Art 28(2)(a) of the Sixth Directive, now Art 110 of EC Council Directive 2006/112. VATA s 30(2) provides for zero-rating "if the goods or services are of a description for the time being specified in Schedule 8". Group 1 of that Schedule provides that zero-rating is applied to:

> "The supply of anything comprised in the general items set out below, except… a supply of anything comprised in any of the excepted items set out below…which relates to that excepted item."

82. The first of the "general items" is "Food of a kind used for human consumption". Item 2 of the excepted items is:

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

83. Note 5 to the list of excepted items reads:

> "…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."

The leading case law

84. There was no dispute that the leading case law was the Court of Appeal judgments in *C&E Commrs v Ferrero Ltd* [1997] STC 881 ("*Ferrero*") and *R&C Commrs v Proctor & Gamble Ltd* [2009] EWCA 407 ("*Proctor & Gamble*"), together with the judgment of the Chancellor, Andrew Morritt, in *Premier Foods*. The parties differed, however, as to the Chancellor's conclusions, and I consider their rival submissions below.

Ferrero

85. The disputed items in *Ferrero* were two wafer products, called Giotto and Melody. The issue was whether they were zero-rated as biscuits, or standard-rated as confectionery. The Master of the Rolls, Lord Woolf, giving the leading judgment, referred at p 884 to excepted Item 2, saying that it:

> "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 2."

86. He continued:

> "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?

87. At p 885 he said that the question the Tribunal should ask 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 …'

88. This was an endorsement of the view taken by the FTT in that case: they had said that they were required to decide "what view would be taken by the ordinary man in the street, who had been informed as we have been informed".

89. Hutchinson LJ, giving a concurring judgment, said at p 888:

> "…the tribunal was approaching its task in the correct manner by asking itself whether, given the characteristics it identified, these products could properly be classed as biscuits. There is no ideal concept conformity with every aspect of which is necessary before an aspiring manufacturer can call his product a biscuit. It is a question of fact in each case whether the article in question can properly and sensibly be said to be a biscuit".

Proctor & Gamble

90. The issue in *Proctor & Gamble* was the classification of Pringles. Jacob LJ gave the leading judgment; Toulson and Mummery LJJ issued concurring judgments. At [14] Jacob LJ said:

> "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."

91. At [20] he referred to the statement in *Ferrero* that the relevant test was the view of the "ordinary man", and continued at [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."

92. At [32] Jacob LJ said, in relation to classification, that "you do not have to know where the precise line is to decide whether something is one side or the other".

93. At [63] Toulson LJ added

> "I agree with Jacob LJ that the approach approved in *Ferrero* really amounted to saying no more than that it was for the tribunal to decide what was the reasonable view on the basis of all the facts known to the tribunal; and it conveys that this is not a scientific question. In determining that question I do not see that any advantage is gained by referring to the hypothetical ordinary person in the street."

Premier

94. The products at issue in *Premier* are described in the headnote as follows:

> "The taxpayer produced three types of fruit bar. The bars came in airtight packaging, which stated, inter alia, that one bar was 'one fruit portion', and

that there was no added sugar and no artificial flavour or colours. The manufacturing process for all three types of bar involved the use of a mixer at ambient temperature to mix dried fruits to create a viscous fibrous mass. That was combined with a fruit juice/starch mix (the latter mix having previously been heated to pasteurise it to prevent microbiological growth). That was combined with maltodextrin, a carbohydrate, rolled into slabs and cut into bars."

95. The FTT had decided that the bars were zero-rated, and HMRC appealed. At the High Court the Chancellor summarised the decision below:

> **"[7]** I turn now to the decision of the Tribunal….They included, as far as is relevant, the following. First, the issue depended on whether the fruit bars are confectionery for the purposes of excepted item 2. Second, there being no statutory definition of the word 'confectionery' and applying the decision of the Court of Appeal in *Customs and Excise Comrs v Ferrero UK Ltd* [1997] STC 881, the relevant question would be what view would be taken by the man in the street, informed as the Tribunal had been; but that would not help as such a man would ask what the questioner meant by 'confectionery'. Third, the last part of note (5) had been taken from the judgment of Lawton J in *Customs and Excise Comrs v Popcorn House Ltd* [1968] 3 All ER 782 in relation to Group 34 for purchase tax purposes in the Purchase Tax Act 1963 but neither the Act nor any dictionary afforded much help.
>
> [8] In paras 26 and 27, they said:
>
> > '(26) Mr Singh was entirely correct in pointing out that the meaning of words could alter, however, we do not consider the essentials of the concept of confectionery have altered since the judgment of Lawton J in Popcorn House. There is no doubt confectionery is normally eaten with the fingers. Products which are regarded as confectionery are made with a cooking process and do include a substantial amount of sweetening matter. A cooking process clearly involves heating. The derivation of the word "confectionery" involves the concept of putting together or mixing and confectionery is invariably sweet. In our view, the normal use of confectionery involves the ingredients being sweeter than their natural state.
> >
> > (27) On the evidence in this case the primary ingredients namely the fruits were intrinsically sweet and were not sweetened in any way. Furthermore the only part subjected to any heating process were the juice concentrates, starch and fruit flavours which were pasteurised before being added to the other ingredients and only account for a small proportion of the whole.'
>
> They then commented that counsel had referred them to various dictionaries, none of which they found of any particular help, and concluded in para 29:
>
> > 'Turning to the criteria mentioned in *Customs and Excise Comrs v Quaker Oats Ltd* [1987] STC 683, we do not consider that the ingredients are those normally associated with confectionery; in particular, there was no added sweetening matter. The production process is not that which is typical of confectionery; in particular it

> was not cooked. These of course were aspects considered by Lawton J in *Popcorn House*. Although sweet to taste, the bars have a distinctive tang which would not appeal to all children…the overall sugar content of the manufactured fruit bar is either similar to or less than the sugar content of the main ingredient – dried fruit. Neither of us considered that their taste was what we would associate with confectionery, in particular, the tangy after taste. The marketing stressed there was no added sugar, no artificial flowers or flavours and low fat. This is not typical of confectionery; nor is the reference to the recommended portions of fruit'."

96. At [15]-[16] the Chancellor held that the FTT had wrongly relied on *Popcorn House,* as that decision related to the definition of confectionery in in the Purchase Tax Act 1963. He then said at [17]:

> **"**Accordingly, it appears the error of the Tribunal in applying the dictum of Lawton J in *Popcorn* must be recognised as an error of law. Its application also gave rise to two more errors. 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."

The parties' submissions on the case law

97. There was no dispute that if an item came within Note 5, it was automatically "confectionery", and that if it did not fall within that item, the question as to whether it was confectionery was a multi-factorial test in accordance with the guidance in *Ferrero.*

98. It was also common ground that:

(1) in *Premier* the Chancellor had held that, for a product to be confectionery within the meaning of Item 2:

(a) it "must involve some process applied to the ingredients in their natural state", but that "any process of mixing or compounding" sufficed; and

(b) it must be sweet, but that the sweetness may come about either because of added sugar or because of the inherent sweetness of the ingredients; and

(2) when applying the multi-factorial test required by Item 2, a product will therefore not be confectionery if it is not sweet (including inherently sweet), and/or has not been subjected to a process.

99. However, the parties disagreed as to whether the Chancellor had also found that inherent sweetness was sufficient to meet the requirement in Note 5 that a product was automatically confectionery if it was "sweetened prepared food which is normally eaten with the fingers".

100. Mr Simpson argued that the Chancellor was only making a finding that inherent sweetness was a necessary condition for a product to be classified as confectionery using the multi-factorial test, because all confectionery was sweet, and had not also made a finding that inherent sweetness was sufficient to meet Note 5. In his submission, to fall within Note 5, a product had to be "sweetened" by having some sweetening added to it. Thus, if the Tribunal found that all the Products were intrinsically sweet, that would not lead to the appeal automatically being refused. Instead, the Tribunal would have to apply a multi-factorial test to decide whether the Products were confectionery, taking into account that they were sweet, which was a necessary condition for them to fall within the meaning of that term.

101. Mr Watkinson disagreed, and said that part of the Chancellor's *ratio* was that inherent sweetness met the "sweetened" requirement in Note 5, and thus a product which was both inherently sweet, and "prepared food which is normally eaten with the fingers" had to be classed as confectionery. He relied in particular on the underlined words in the following passage from *Premier*:

> "…the error of the Tribunal in applying the dictum of Lawton J in *Popcorn* must be recognised as an error of law. Its application also gave rise to two more errors. 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."

102. Mr Watkinson also drew attention to *H5 Ltd t/a High Five v C&E Commrs* [2005] VATD 20821 ("*High Five*"), a decision of Judge Tildesley and Mr Grice, which held at [25] that "Sir Andrew Morritt C clearly stated that the requirement sweetened was met if the product could be described as sweet", and *Corte Diletto Ltd v HMRC* [2020] UKFTT 75 (TC) ("*Corte Diletto*"), a decision of Judge McKeever and Mr Sims, which held at [70] that *Premier* provided "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".

The Tribunal's view

103. On this point I agree with Mr Simpson. The extract relied on by Mr Watkinson does not set out the *ratio* of *Premier,* but is instead a summary of the view of the VAT Tribunal. The *ratio* comes later in the judgment, where the Chancellor says that subjection to a process

and sweetness were both "essential to the categorisation of these fruit bars as confectionery" (my emphasis). In other words, he did not say that inherent sweetness is sufficient to satisfy Note 5, but instead that the sweetness required for a product to come within the normal meaning of "confectionery" can be provided either by adding sugar, or by the inherent sweetness of the core ingredients.

104. The VAT Tribunal (Judge Bishopp and Ms Ramm) in *Bells of Lazonby v HMRC* [2007] VATD 20490 ("*Bells of Lazonby*") had the same understanding of the *ratio* of *Premier*. At [18], the Tribunal said (my emphasis):

> "We…adopt the view of Sir Andrew Morritt C in *Premier Foods (Holdings) Ltd v Revenue and Customs Commissioners* [2007] All ER (D) 363, a judgment given after this appeal was heard, that inherent (as distinct from added) sweetness is not incompatible with the classification of a product as confectionery."

105. However, that Tribunal also held at [16] that "we are satisfied that an ingredient which is an integral part of the recipe cannot be regarded as something which has sweetened the product; without it the product would be something else". In other words, they held that inherent sweetness was a significant and relevant factor in deciding whether a product is confectionery, but that intrinsic sweetness did not mean that a product has been "sweetened" within the meaning of Note 5.

106. I therefore respectfully disagree with the Tribunals who decided *High Five* and *Corte Diletto.* Instead I agree with the Tribunal in *Bells,* and thus with Mr Simpson, that *Premier* is not authority for "sweetened" as including inherent sweetness. Instead, some sweetening must be added. I return to the consequences of this analysis later in this decision, see §139ff.

The *Organix* case

107. I have summarised the *Organix* case here because it is referred to in the parties' submissions. In 2005, so two years before *Premier*, the VAT Tribunal (Dr Williams and Mr Robinson) heard Organix's appeal against a VAT decision made by Customs & Excise that three Organix bars – apple and orange, apricot, and raspberry and apple – were standard rated.

108. That Tribunal allowed the appeal. They found that the bars were not "sweetened", because sweetness was inherent in the ingredients. Despite finding as facts that the sugar content in these 30g bars was between 19% and 30% by weight (5.7g in the apricot bar, 8.2g in the raspberry and apple bar and 9.1g in the apple and orange bar), the Tribunal also held that the bars were not "sweet" as they understood the term. I return to the *Organix* case later in this decision, see §165.

ORGANIX BARS

109. In this section of the decision, I set out my findings of fact, the submissions of the parties, my discussion of the issues and my conclusion.

Findings of fact

110. The findings are divided into: ingredients and process; marketing; packaging; taste and texture and purchasers.

Ingredients and process

111. Both Organix Bars have two main ingredients, wholegrain oats and raisins. In the Banana bar, the oats are 46% and the raisins 27%; in the Carrot Cake bar the oats are 46.5% and the raisins 32.2%. The raisins contain sunflower oil, and further sunflower oil is added, at 12% and 12.1% respectively. The next main ingredient by weight is fruit juice: the Banana bar has 10% apple juice concentrate and the Carrot Cake bar has 7% carrot juice concentrate and 2% apple juice concentrate.

112. Those four ingredients form what Mr Howard described as the base "dough mixture" to which flavours are added. In the Banana bar this is dried banana (5%), and in the Carrot Cake bar it is cinnamon powder (0.4%) plus a touch of orange oil (less than 0.1%).

113. The principal reason for adding the fruit juices is to bind the other ingredients together. Concentrate is used because single strength fruit juice contains too much water and would be insufficiently sticky. Concentrate has, as Mr Howard said, a "syrup like" quality. Sunflower oil is added to offset the stickiness of the fruit juice. In evidence-in-chief Mr Howard explained that the concentrate "is needed in the bars as a source of sugar to make the bars work"; when asked by Mr Simpson to expand, he added that what is required is "a relatively high sugar level – either fat based or sugar based – to hold the bars together".

114. Each Banana bar contains 4.6g of fat and 18g of carbohydrate, including 8.1g of sugar; each Carrot Cake bar contains 4.7g of fat and 17g of carbohydrate, including 7.9g of sugar. On a percentage basis, the Banana bar is 27% sugar and the Carrot Cake bar 26% sugar. This is around half the sugar content of most of the confectionery provided by way of comparison: KitKats are 51% sugar; Maltesers are 51.7% sugar and a Mars bar is 59.9% sugar. The only comparator which is close to the Organix Bars is Green & Black's organic dark chocolate, which is 28.5% sugar.

115. The above ingredients are mixed together, "sheeted out", and cut into oblong bars, which are then baked, cooled and packed.

The market and the marketing

116. The target market for the Organix Bars is the parents of toddlers and young children; the bars are labelled as being for "12 months plus". They are normally located in the baby/infant section of stores, and when working with large retailers, Organix only deals with buyers who represent the "baby food" section.

117. In Morrison's, Organix Bars have only ever been positioned in the baby food part of the stores. Ms Marston described Organix as "the number one player in the 'baby dry food snacking area'" and her unchallenged evidence was that customers "would expect to find them with toddler foods and snacks". As noted at §22(2), although Ms Marston attached to her witness statement pictures of Morrison's baby food aisles, the resolution of those images meant that it was not possible to see the names of adjacent and nearby products. I therefore

find as a fact that the Organix Bars were held out for sale with other snacks for babies, and make no finding as to whether they were next to, or close to, any form of traditional confectionery which was similarly aimed at very young children.

118. Morrison's also sell Organix bars online, where they are located by the following route: Baby and Toddler – Baby and Toddler Meals and Drinks – Toddler (12-36 months) – Snacks.

119. Organix's website states that their bars "won the title of Best Toddler Snack at the Loved By Parents Award". It also describes the Banana bar as "deliciously yummy" and includes the following text:

> "Soft, scrummy and deliciously fruity, our organic Banana Soft Oaty Bars are packed full of real fruit pieces, juicy raisins and wholegrain oats for toddlers on the go. These banana oat bars for babies make the perfect snack for toddlers and kids off on life's little adventures."

120. The description of the Carrot Cake bar is similar:

> "Packed full of juicy raisins and wholegrain oats with flavour from real carrots for toddlers on the go. These carrot oat bars for babies make the perfect snack for toddlers, kids lunchboxes and life's little adventures."

121. Morrison's website describes both bars as "ideal toddler snack bars". In correspondence with HMRC on 17 April 2019, Mr Marshall said that "the Organix Bars are held out for sale [by Morrison's] as healthy snacks". Mr Howard agreed in cross-examination that the Organix Bars were not marketed as cakes.

The packaging

122. The Bars are sold both singly and in boxes of six. The wrapper for each individual Banana bar is yellow, and that for each Carrot Cake bar is orange; the same colours predominate on the related boxes. The wrappers and the boxes have the word Organix in large letters, and in smaller letters, the name of the product: "Banana Soft Oaty Bar(s)" and "Carrot Cake Soft Oaty Bar(s)", so emphasising that the main ingredient by weight is oats. The Banana bar has three slices of banana on the front of the packaging for the single bar; the box has two slices of banana and two bananas, as well as a picture of the bar. The Carrot Cake bar and box are similar, but with pictures of carrots and raisins instead of bananas.

123. The front of the Carrot Cake box has the words "perfect for lunch boxes" in clear white writing against an orange background in the top left hand corner; the box for the Banana bars has instead the words "the UK's No 1 toddler oaty bar" in the same position in black against a yellow background. In the opposite corner are the words "12+ months – on the go" again in clear white writing against a green background. The words "12+ months" are repeated on the individual wrappers. The boxes for both bars have the following words in white on a brown background on the bottom of one of the side panels, and the same words are on the back of the wrappers, above the ingredients:

> "SAFETY ADVICE: for little ones 12 months+. Please ensure they are sitting down and supervised when enjoying this food."

124. On the basis of Mr Howard's evidence-in-chief, I find that this was a standard sentence on all Organix's food, because it is always safer if small children are sitting down when eating.

125. Both boxes have the words "I'm organic – No Junk Promise – Nothing artificial" on the front. The side of the Banana bar box says (emphasis in original) "We're here to create deliciously tasty, utterly organic foods that little ones love"; in the same place the Carrot Cake bar box similarly says "We're here to create deliciously tasty, utterly organic feel-good food to fuel your little ones' wonder".

126. The colour contrast between the white writing and the backgrounds of the boxes means that the words which stand out are, in order: "Organic" ; "12+ months – on the go"; "No junk promise"; and, in the case of the Carrot Cake bars, the words "Perfect for lunch boxes".

Taste and texture

127. I tasted the Organix Bars both during the hearing and subsequently. I found the Banana bar to be sweet and crumbly with the some banana flavour; the Carrot Cake bar was also sweet, although less so than the Banana bar, with a carrot flavour and it was also less crumbly. It did not taste like carrot cake

128. They are soft in texture and break up easily in the mouth. Mr Howard said that this was intentional, as the children were very young and so not much chewing was required. He also described the texture as "flapjack-like" and said this was "intentional given that flapjacks are one of the most popular products for our target consumer group".

The purchasers

129. Mr Galbraith's witness statement summarised the results of a "basket association analysis" which had been run for the Organix Bars, Nakd Bars, and "other snack products" namely "healthy biscuits, cereal bars and multipack chocolate bars" during a twelve week period ending 30 July 2017. He said that the conclusions of that analysis were that customers who bought Organix Bars and Nakd Bars were more likely than other customers also to buy other health and well-being products, free-from products and dried fruit, and less likely to buy products from the in-store pie shop, cakes, or "food to go". He also considered four "lifestyle groups" previously identified by Morrison's, and concluded that customers who purchased Organix Bars and/or Nakd Bars were more likely to be in the lifestyle group categorised as "health conscious" rather than in one of three other groups which Morrison's called "cooking aptitude", "time starved" and "value sensitive".

130. Mr Watkinson criticised Mr Galbraith's analyses for a number of reasons, including the following:

(1) the basket association analysis only considered in-store sales and not online sales;

(2) the lifestyle groups were based on customers who had a Morrison's "More" card and so were only a subset of purchasers;

(3) there was no definition or explanation as to what was included in "healthy biscuits" or in "cereal bars", or how Mr Galbraith ensured that the products themselves were not included in either of those two comparator groups;

(4) there was no explanation as to why the particular comparison products had been selected – for instance, why "multi-pack chocolate bars" had been selected, and not single bars;

(5) although Mr Galbraith accepted under cross-examination that Morrison's had data about confectionery sales and snack bar sales, he did not use those datasets to see whether they shed any light on how customers viewed the Organix Bars or the Nakd Bars; and

(6) Mr Galbraith also accepted under cross-examination that the analyses were based on how Morrison's viewed the products, rather than how the customers viewed them.

131. I agree with Mr Watkinson that Mr Galbraith's evidence is of very limited value for the reasons set out above. I accept on the basis of the packaging that the purchasers of Organix Bars are likely to be parents of young children who are avoiding "junk food" and who are positively selecting organic products, and that it is reasonable to infer from those facts that the purchasers are health-conscious. That inference is confirmed by Mr Galbraith's research. I make no further findings from his evidence.

Submissions on behalf of the Appellant

132. Mr Simpson submitted that:

(1) although sweet fruit juice is added to the Organix Bars, its primary purpose is to bind the other ingredients rather than to add sweetness to the bars;

(2) the Products were thus intrinsically sweet and so are not "sweetened" within the meaning of Note 5;

(3) the Products consist almost entirely of fruit and nuts and/or oats that have been crushed and pressed together, and it was "difficult to understand why a product that is in essence fruit, nuts and oats in a particular form should be given a different VAT treatment to fruit, nuts and oats when presented in their original, separate form";

(4) the VAT Tribunal had decided in the *Organix* case that three other Organix Bars – apple and orange, apricot, and raspberry and apple – were zero-rated, and the Banana bar and Carrot Cake bar should receive the same treatment;

(5) the ingredients one would associate with the essential idea of confectionery, namely sugar, flour and butter, are absent from the Organix Bars. I understand this reference to "sugar" to mean cane sugar;

(6) although the packaging resembles that used for confectionery, it also resembles that used for food that is not confectionery;

(7) customers for the Organix Bars are likely to be health-conscious;

(8) the marketing is directed at parents who want to provide their young children with healthy snacks, in essence as an easy means of eating fruit and nuts;

(9) the Bars are not placed in the confectionery section of supermarkets; and

(10) the names used for the Organix bars point slightly away from them being confectionery: "oaty" in the name refers to a texture; "Banana" refers to a fruit, and "Carrot Cake" refers to a cake.

133. Mr Simpson said that, taking into account the above, the Organix Bars should be classified as general food and not as confectionery, because they do not fall "within the reasonable ambit of that term as a matter of ordinary language". However, he went on to say that if the Tribunal was against him on that, he submitted in the alternative that the Organix Bars are cakes, because the process of manufacture is the same as for traditional flapjacks, which are cakes, and because of the name given to the Carrot Cake bar.

Mr Watkinson's submissions

134. Mr Watkinson's primary submission was that the Products were self-evidently confectionery, because:

(1) they were prepared food normally eaten with the fingers;

(2) they were intrinsically sweet; and

(3) the word "sweetened" in Note 5 included products which were intrinsically sweet.

135. In the alternative, if the Tribunal was not with him on that argument, he submitted that the Tribunal should find that the Products were confectionery because they:

(1) are preparations to eat with the fingers as a snack or treat;

(2) are brightly packaged in a manner suggestive of a "treat";

(3) are shaped and sized like more traditional confectionery;

(4) are mainly marketed as alternatives to confectionery; and

(5) are to be consumed in circumstances similar to those in which confectionery is consumed.

136. Mr Watkinson also submitted that the Organix Bars were not cakes because they:

(1) do not share ingredients with items commonly understood to be cakes;

(2) were not manufactured in the same way as the vast majority of cakes;

(3) do not, unpackaged, look like cake;

(4) would not look "in place" on a plate of cakes;

(5) are not held out for sale as cake;

(6) are not called "cakes", but rather "bars";

(7) do not taste like any form of "cake" or have the texture/mouth feel of "cake";

(8) do not behave like cake after removal from the packaging; and

(9) are not consumed in circumstances akin to the consumption of the majority of cakes.

137. He added that the purported "healthiness" or otherwise of the products in issue is irrelevant, because there is no "healthiness" policy behind the relevant VAT exceptions and overrides to those exceptions. He relied on *Kalron Foods v HMRC* [2007] EWHC 695 (Ch) ("*Kalron*") at [9]-[11], which I consider further below.

Discussion

138. I begin with the meaning of the word "sweetened" in Note 5, before going on to consider the parties' other submissions.

The meaning of "sweetened"

139. As noted above, Mr Watkinson's primary case was that in Note 5, the phrase "sweetened prepared food which is normally eaten with the fingers", the reference to "sweetened" included items which were intrinsically sweet.

140. He relied on *Premier*, but as I have already found (see §103ff) the Chancellor decided that appeal on the basis that an intrinsically sweet product can be confectionery within excepted Item 2, but did not also decide that intrinsic sweetness satisfied Note 5. Thus it is for me to decide, without any binding authority, whether the word "sweetened" in Note 5 includes products which are intrinsically sweet.

The normal meaning of the word

141. My starting point is that, as a matter of normal English usage, there is a difference between "sweet" and "sweetened". A raw apple can be "sweet", but it is only described as "sweetened" if some sweetening material, such as sugar, has been added.

142. The primary meaning given for the verb "sweeten" in the Oxford English Dictionary is (emphasis added):

> "To make sweet to the taste; esp. to add sugar or other sweet substance to (food or drink) so as to impart a sweet flavour."

143. The Cambridge English Dictionary contains a similar definition: the primary meaning of sweetened is "to make something taste sweet", and contains the exemplar sentence "the apple mixture can be sweetened with honey".

144. I therefore find that the normal meaning of "sweetened" does not encompass products which are intrinsically sweet, but only those to which sweetening material has been added for the purpose of making them sweet.

145. Applying that normal meaning to the Organix Bars would lead to the conclusion that they do not fall within Note 5, because the sweetness is inherent in the fruit juice and to a lesser extent in the banana and carrot. The fruit juice was required to bind the dry materials together, and both the banana and the carrot are also core ingredients.

Considering the mischief

146. However, the normal meaning is not always apposite. In *C&E Commrs v Top Ten Promotions* [1969] 1 WLR 1163 ("*Top Ten*"), Lord Upjohn said at p.1171:

> "It is highly dangerous, if not impossible, to attempt to place an accurate definition upon a word in common use; you can look up examples of its many uses if you want to in the Oxford Dictionary but that does not help on definition; in fact it probably only shows that the word normally defies definition. The task of the court in construing statutory language such as that which is before your Lordships is to look at the mischief at which the Act is directed and then, in that light, to consider whether as a matter of common sense and every day usage the known, proved or admitted or properly inferred facts of the particular case bring the case within the ordinary meaning of the words used by Parliament."

147. The "mischief" at which Note 5 was directed can be seen from the Chancellor's Budget speech, recorded in Hansard, and from the explanatory Note to the relevant Order changing the primary legislation. Neither Hansard nor the Order was referred to by either party, but both are set out in the *Organix* case which formed a key part of both parties' submissions.

148. I therefore considered whether Hansard and/or the explanatory Note should to be taken into account in determining the meaning of the statutory term at issue in this case, namely "sweetened".

The purpose of Note 5

149. The current legislation is set out at §82-83. Until March 1988, the exception to the zero-rating for food was in the Value Added Taxes Act 1983, Sch 5, Group 1, excepted item 2, and it read as follows:.

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

150. In his Budget speech on 15 March 1988[1], the Chancellor of the Exchequer announced that he was changing that provision, because:

> "The emergence of new products has rendered this definition…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."

151. The Value Added Tax (Confectionery) Order 1988 came into force on 1 May 1988. It rewrote excepted Item 2 so that it read (as it does now):

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

[1] HANSARD 1803–2005 → 1980s → 1988 → March 1988 → 15 March 1988 → Commons Sitting → Budget Statement at HC Deb 15 March 1988 vol 129 c1003

152. The Order also added Note 5, which read, again as it does now:

> "…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."

153. The Explanatory Note following the Order read:

> "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."

154. As is well known, reference can be made to *Hansard* if the requirements set out by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593 at p.634 are met. He said:

> "In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity.'

155. As the meaning of "sweetened" in the relevant amending provision is neither ambiguous or obscure, the *Pepper v Hart* principle does not apply.

156. It is also well-known that Lord Steyn said in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 ("*NASS*") that Explanatory Notes were "always admissible aids to construction" in so far as they "cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed". However, Lord Steyn was here referring to the Explanatory Notes which began to be issued in 1999, following a change in practice. The Explanatory Note with which we are concerned was published on 15 March 1988. Thus, those well-known words of Lord Steyn cannot be relied upon.

157. However, in the same case, Lord Steyn also said at [5]:

> "The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen."

158. In accordance with that guidance, having considered both Hansard and the Explanatory Note at the end of the amending Order, I find that by the words "confectionery includes…any item of sweetened prepared food which is normally eaten with the fingers", Parliament intended that all cereal bars would be taxed at the standard rate. The "mischief" at which the change was aimed was that the previous wording allowed some cereal bars to be zero rated.

159. However, I must also take into account the warning which Lord Steyn gives, at [6] of the same judgment:

> "What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."

160. These passages from *NASS* were discussed and considered by Brookes LJ in *Flora v Wakom* [2006] EWCA Civ 1103, where he said at [17]:

> "If, however, it is impossible to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament, it is in my judgment equally impossible to treat the Government's expectations as reflecting the will of Parliament. We are all too familiar with statutes having a contrary result to that which the Government expected through no fault of the courts which interpreted them."

161. The application of that principle can be seen in *R v Najib* [2018] EWCA Crim 909, the Court of Appeal (Leggatt LJ, McGowan J, Sir Peter Openshaw) who were considering an entirely different issue: the scope of food safety regulations. Those regulations referred only to cattle, but the explanatory note included sheep. The judgment of the Court was handed down by Leggatt LJ, who said at [30] that the explanatory note:

> "…cannot be used to read into paragraph 14 a provision which is not actually to be found there…It seems likely that the failure to include in the Regulations any provision which imposes such an obligation [in relation to sheep] is an oversight on the part of the Secretary of State. But only the legislature has the power to repair that omission. It is not permissible for courts to fill gaps in legislation by creating obligations which do not otherwise exist."

162. The same is true in this case. Parliament clearly wanted to change the law so that "all cereal bars are taxed", but the amending provision not only failed to include the words "cereal bars", but by including the word "sweetened" limited its application to products where sweetening had been added. As with the food safety regulations considered in *Najib,* only Parliament has the power to repair that mistake.

Conclusion

163. Although Parliament's intention when introducing Note 5 was that all cereal bars would be taxed at the standard rate, the wording of that Note does not produce that result. Instead, the only cereal bars which fall within that Note are those which have been "sweetened" by the addition of sugar or another sweet substance so as to impart a sweet flavour. Cereal bars such as those produced by Organix, where the core ingredients are themselves sweet, are outside Note 5.

Same treatment when separate products combined?

164. One of Mr Simpson's submissions was that a product made of zero-rated foodstuffs pressed together should be zero-rated. I reject that submission. The VAT status of an item of food is determined not by its ingredients, but by the nature of the supply. Section 1 of VATA provides that "Value added tax shall be charged, in accordance with the provisions of this

Act, on the supply of goods and services in the United Kingdom". By way of illustration, cream, milk, sugar and salt are all zero-rated when supplied in their natural state, but when combined into ice cream the supply is standard rated; similarly potatoes and oil are both zero-rated, but crisps are standard rated.

The Organix case

165. I next consider Mr Simpson's submission that I should in effect adopt the findings of the VAT Tribunal in the *Organix* case. I decline to do so, for reasons both of fact and of law.

166. In relation to the facts, as noted earlier in this decision:

(1) the *Organix* case was decided in 2005, and there was no evidence before this Tribunal that the Organix Bars now in dispute are substantially identical to those considered by the VAT Tribunal; and

(2) the members of that VAT Tribunal decided that the three bars in issue were not "sweet" as they understood that term, although they also found as facts that the "sugars" content in each 30g bar was between 19% and 30% by weight. In contrast, I have found as facts that both Organix Bars were sweet to the taste.

167. In relation to the law, Mr Simpson invited me to agree that the Tribunal in the *Organix* case had decided the bars were not confectionery because they were not sweet. However, the final paragraph of the judgment in the *Organix* case reads:

> "On that basis, the tribunal finds as fact that none of the bars are 'items of sweetened prepared food which is normally eaten with the fingers' within the definition in note (5) to excepted item 2 of Group 1 of Schedule 8 to the VATA. The appeal is therefore allowed."

168. The *ratio* of the Tribunal's judgment is therefore that the bars were not confectionery because they did not satisfy Note 5. It is clear from the later judgment of the Chancellor in *Premier* that this is not the end of the matter: it is instead, necessary to go on and consider whether a product is confectionery within the normal meaning of the term, applying a multi-factorial test.

169. I accept that, had the Tribunal in the *Organix* case carried out such an exercise, it is likely they would have come to the same conclusion, because they had found as a fact that the products were not sweet, and we know from *Premier* that sweetness is necessary for a product to be confectionery. Nevertheless, the *ratio* of the case no longer holds good.

The meaning of confectionery

170. The word "confectionery" is not defined in the legislation. Mr Simpson submitted that the Organix Bars did not fall "within the reasonable ambit of [confectionery] as a matter of ordinary language", but did not put forward a definition. Mr Watkinson said that there was no need for me to define the term in order to decide the appeal. I am also mindful that Jacob LJ said in *Proctor & Gamble* that "you do not have to know where the precise line is to decide whether something is one side or the other". Nevertheless, it is difficult to decide this case without having first having some clarity as to what is meant by confectionery.

171. I begin by taking into account the guidance provided by *Ferrero* and *Premier*. On the basis of those cases, I find that all confectionery has the following two characteristics:

(1) *Sweetness*. In *Premier* the Chancellor said at [17] that "in its ordinary usage, confectionery is limited to products which can be described as sweet".

(2) *Subjection to a process*: In the same paragraph, the Chancellor said that "the production of confectionery must involve some process applied to the ingredients in their natural state for that is necessarily implicit in the word" and went on to find that "any process of mixing or compounding is, in principle, sufficient".

172. I find that the ordinary person would also consider that confectionery had the following characteristics:

(1) *Normally eaten with the fingers*: this is true of chocolates, sweets, cakes and biscuits, as well as of products falling within the expanded definition at Note 5 in the context of "sweetened prepared food". In *Premier* the Tribunal held that "there is no doubt confectionery is normally eaten with the fingers", and the Chancellor did not disagree with that statement

(2) *Held out to be eaten as a treat or snack*: In *Premier* at [18] the Chancellor called chocolates and sweets "the paradigm of confectionery", and in *Ferrero* Lord Woolf said that the normal meaning of confectionery included both cakes or biscuits. All of cakes, biscuits and sweets are eaten as a treat or a snack. The FTT in *Corte Diletto* similarly identified as significant the fact that the products in question were "a snack, a treat, something to keep you going between meals, something you would eat in small quantities".

173. The above characteristics are not intended as a definition, but as certain elements which the ordinary person would consider when deciding whether a product falls on the "confectionery" side of the line. By way of example, apple sauce is not "confectionery" even though it is sweet and has been subjected to a process, because it is not eaten on its own as a snack or treat nor is it eaten with the fingers. The same is true of raspberry jam: it is sweet, has been subjected to a process, but is not normally eaten with the fingers or on its own as a snack or a treat. In any given case, other factors may additionally be relevant, including packaging and in-store placement.

Healthy food ?

174. Mr Simpson said that the customers for the Organix Bars were health conscious, and that the Organix Bars were marketed as a healthy alternative to confectionery. Mr Watkinson said this was irrelevant. He relied on *Kalron,* which considered the VAT status of smoothies made from liquified fruit and vegetables. In that judgment, Warren J first set out the excepted items under the heading of "food" in Group 1 of Sch 8, followed by the overrides to the exceptions and the Notes, and then said:

> "[9] It is difficult to detect any policy behind these detailed exceptions and overrides. Mr Thomas (who appears for Kalron) claims to identify a policy which is to exclude what he calls junk food…
>
> [10] It is impossible, in my judgment, to spell out of the structure and content of Group 1 a policy such as Mr Thomas submits can be detected.

> There are plenty of 'junk' foods which do not fall within the exceptions; and there are healthy drinks which are within the exception, for instance, freshly squeezed orange juice."

175. I respectfully agree. I also agree with the FTT in *Corte Diletto* when they said at [100]:

> "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 [statutory] tests…The most sugary, cream filled, chocolate covered cake will still be zero rated. The healthiest of low sugar, low fat confectionery will still be standard rated."

176. I therefore agree with Mr Watkinson that whether or not a product is healthy rather than "junk" food is irrelevant when carrying out the multi-factorial test necessary to decide a product's VAT status, and I have not taken it into account below.

Whether the Organix Bars are confectionery: the multi-factorial test

177. In deciding ether the Organix Bars are confectionery, I take into account the following:

(1) *Sugar content:* The Banana bar is 27% sugar and the Carrot Cake bar is 26% sugar. Although this is around half the sugar content of most of the confectionery provided by way of comparison, it is nevertheless more than 25% of the bars by weight.

(2) *Sweet to taste:* Both bars were sweet, although the Carrot Cake bar was less sweet than the Banana bar.

(3) *Subjected to a process:* The ingredients are mixed together; "sheeted out"; cut into oblong bars, baked, cooled and packed, and so are clearly subjected to a process.

(4) *Normally eaten with the fingers:* The Appellant accepted t this was the case.

(5) *Held out to be eaten as a snack:* I find as a fact that the Organix Bars are held out for sale as snacks because:

(a) they are positioned in the baby dry food snacking area of stores;

(b) when Morrison's sell the Bars online, they are categorised under "snacks" for babies and toddlers;

(c) the Morrison's website describes them as "ideal toddler snack bars";

(d) the bars won an award for being the Best Toddler Snack;

(e) Mr Marshall accepted in correspondence with HMRC that "the Organix Bars are held out for sale [by Morrison's] as healthy snacks"; and

(f) customers expect to find Organix Bars with toddler foods and snacks.

(6) *When consumed:* Mr Watkinson submitted that the Organix Bars were "are to be consumed in circumstances similar to those in which confectionery is consumed". Confectionery is not normally eaten as part of a main meal, but between meals. I have already found that the Bars are held out for sale as snacks, and it is in the nature of snacks that they are not eaten as part of a main meal. In addition, Organix's website sells the Bars as being "for toddlers on the go" and as "the perfect snack for toddlers

and kids off on life's little adventures". On the boxes, the words "12+ months – on the go" are particularly visible. The only factual findings which might point in the other direction are:

(a) the warning to "ensure [children] are sitting down and supervised when enjoying this food". However, this was a standard sentence on all Organix's food, because it is always safer if small children are sitting down when eating. It is therefore not an indicator that Organix Bars are normally eaten as part of a meal; and

(b) the statement on the Carrot Cake bars that they were "perfect for lunch boxes". However, children may eat food from their lunch boxes at times other than lunch, and this one statement is insufficient to outweigh the evidence pointing in the other direction.

I therefore find as a fact that Organix Bars are not normally eaten as part of a main meal, but between meals, in the same way as traditional confectionery.

(7) *Packaging:* The packaging is bright and colourful, being yellow and orange, and similar to products which are clearly confectionery, such as sweets. Mr Simpson accepted this was the position, while also submitting that some other food products have bright coloured wrappers. While that may be true (although no evidence was put forward to support his statement), I agree with Mr Watkinson that the packaging is indicative of the Organix Bars being held out for sale as treats in the same way as confectionery.

(8) *Ingredients:* Mr Simpson submitted that the Organix Bars did not contain ingredients associated with the essential idea of confectionery, namely sugar, flour and butter. As noted above, the products considered in *Premier* were "fruit bars" and the sugar content was derived from the dried fruit, but they were nevertheless confectionery. The absence of cane sugar, flour and/or butter is therefore not a factor pointing to the Organix Bars falling outside the meaning of confectionery.

(9) *Placing not with confectionery:* Mr Simpson also relied on the fact that the Organix Bars are not placed in the confectionery section of stores. However, the bars the bars are placed in the snack section of the baby and toddler part of the physical stores and I was unable to make any findings of fact as to whether it was located close to traditional confectionery within the snack area.

178. Even if the Organix Bars were not positioned near traditional confectionery, that would be insufficient to outweigh the other factors. Instead, the multi-factorial test gives the clear answer that the Organix Bars are confectionery.

Whether the Organix Bars are cakes

179. If the Organix Bars are confectionery, Mr Simpson submitted that they should be zero-rated because they are cakes. This submission rested on (a) the Bars' similarity to flapjacks, which were, he said, zero-rated as cakes; and (b) on the name of the Carrot Cake bar.

180. Mr Watkinson compared the Organix Bars to "the majority of cakes", and I agree that the Organix Bars do not share ingredients with the majority of cakes; they do not look like

most cakes; they are not called "cakes", but rather "bars"; they are not held out for sale as cakes and they would not look "in place" on a plate of cakes. Mr Watkinson did not grapple with the question of whether the Organix Bars were flapjacks. Instead he noted that although HMRC's published guidance accepts that flapjacks are cakes, in *Torq v C&E Commrs* [2004] VATD 19389 ("*Torq*") a decision of Mr Gammie QC and Mr Marsh), the Tribunal said at [75] that:

> "The issue is not whether Torq Bars can be categorised as flapjacks but as cake. Flapjacks (or certain 'traditional' flapjacks) may be sufficiently close in characteristics to cake to allow flapjacks to be categorised as cake. The fact that another product – in this case Torq Bars – is sufficiently similar in character to flapjacks to allow it to be categorised with flapjacks (if there were such a category) does not mean that it can be categorised as cake. The question always is whether Torq Bars have sufficient affinities with cake to be categorised as cake."

181. In *Bells of Lazonby,* which considered the classification of a fruit, nut and seed bar, the Tribunal held at [13]:

> "…if we are right in our view that the word 'cake' is intended to bear its ordinary meaning in the context in which it used, we should ask ourselves whether an ordinary person, aware of that context, would consider the Appellant's product to be a cake: that was the approach endorsed by the Court of Appeal in *Ferrero*. We do not think such a person would limit the term to what might be regarded as a conventional, or traditional, cake such as the sponge or fruit cake mentioned in the Public Notice, but even adopting a fairly liberal interpretation we doubt if he would class this product as a cake. 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."

182. I agree with the judgments of both the above Tribunals. The question I have to decide is whether the Organix Bars are cakes, not whether they are flapjacks, and for the reasons set out at §180, they are not cakes. For completeness I also share the view of the Tribunal in *Bells of Lazonby* that the ordinary person would not classify a flapjack as a cake, but instead as a distinct but similar product.

Overall conclusion

183. I decide, for the reasons set out above, that the Organix Bars are confectionery and are not cakes.

THE NAKD BARS

184. As with the Organix Bars, I first set out my findings of fact, followed by the parties' submissions and my analysis and conclusions.

Finding of fact

185. The findings are divided into ingredients and processing; packaging; positioning; marketing; taste and texture, and purchasers.

The ingredients and processing

186. There are three types of Nakd Bars: Fruit and Nut bars, Oaties and Crunchies:

(1) the Fruit and Nut bars in issue are: Bakewell Tart; Berry Delight; Blueberry Muffin; Cashew Cookie; Cocoa Delight; Cocoa Orange; Ginger Bread; Lemon Drizzle; Peanut Delight, and Rhubarb and Custard;

(2) the Oaties in issue are: Apple Pie; Banana Bread; Berry Bliss; Berry Cheeky; Cocoa Loco and Cocoa Twist; and

(3) the Crunchies in issue are: Banana Crunch and Strawberry Crunch.

187. The main ingredient in all Nakd Bars is dates, at between 37% and 58%. All Fruit & Nut bars contain significant percentages of nuts and/or dried fruit, with the type of nut and/or fruit varying depending on the bar. For example, Blueberry Muffin contains cashews (15%); raisins (15%); almonds (10%) and blueberries (2%). All contain "natural flavourings", and some also have additional flavouring, such as cocoa, ginger or lemon.

188. In the Oaties, the second main ingredient after dates is oats, at between 20% and 25%. All Oaties contain raisins (ranging from 13% to 21%), plus one or more types of nuts (ranging from 8% to 13%). Two Oaties contain apple juice concentrate at 8% and 9%; another two contain "apple and carob extract" also at 8%, and the remaining two contain fruit extract (4% and 5%). The Banana bar is 25% banana, and the other Oaties contain small quantities of various different additional ingredients, plus in each case "natural flavourings".

189. Of the two Crunch bars, Banana Crunch contains soya protein crunchies (18%); cashews (15%); raisins (15%); dried banana (6%); apple juice concentrate (2%) and banana flavouring. Strawberry Crunch is similar but with strawberry replacing the banana.

190. The sugar content by weight of the Nakd Bars ranges from 33% for Ginger Bread through to 52% for Blueberry Muffin, Berry Delight and Rhubarb and Custard. The sugar content of all Nakd Bars is thus between one-third and half of their total weight. By way of comparison, KitKats are 51% sugar; Maltesers are 51.7% sugar and Mars bars are 59.9% sugar, while Green & Black's organic dark chocolate contains 28.5% sugar. In some Nakd Bars the sugar content is thus similar to that of other well-known confectionery brands, and even the Bars with the lowest percentage contain more sugar than Green & Black's.

191. The above ingredients are not baked but mixed or (as the packaging tells us) "swooshed" together, and then cut into rectangular bar shapes.

Packaging

192. The findings in this part of the decision are based on the evidence provided for the Fruit & Nut bars and the Oaties. I can make no findings about the packaging for the Crunch bars, as no samples were provided; neither were there any pictures of the boxes or wrapping. There was also no sample evidence for three of the Oaties (Berry Cheeky, Cocoa Loco and

Apple Pie) and the only evidence for Rhubarb and Custard was the picture of the front of the box. However, packaging for other Oaties and Fruit & Nut bars was supplied, and I have assumed that the findings below about the Fruit & Nut and the Oaties apply to all the products of that type which are under appeal.

193. The Fruit and Nut and Oaties are sold both singly and in boxes of four. The main part of the front of each bar has the name "Nakd" in large letters, followed by the product's name. To the left, in slightly smaller letters, are the words "gluten, wheat and dairy FREE". The Fruit & Nut bars also contain the words "raw fruit and nut bar"; the Oaties have instead "raw fruit, oat and nut bar". On all bars this is followed by the words "simply yummy". The back of the bars includes the messages "guilt-free and delicious", "no added sugar or syrup", "nature is nice", and, depending on the percentage of dried fruits, also the words "1 of your 5 a day", or "100% yummy". The background colour varies with the product: for example Cocoa Delight is brown; Cocoa Orange is brown and orange; Blueberry Muffin is royal blue and Lemon Drizzle in bright yellow.

194. For each bar, the colours of the boxes are the same as the wrappers, and the format is similar, with the same messages, together with the words "100% natural ingredients". The Banana Bread box has the words "breakfast bars" on the front, together with the message "make your morning marvellous". The back of all boxes has three pictures: a steaming cup, and the words "with a cuppa"; a car or bicycle, with the words "on the go" and a shoulder bag with the words "just in case".

Positioning in store

195. Ms Marston's unchallenged evidence was that between 2014 and May 2019, the Nakd Bars were positioned in Morrison's "free from" aisle, and "to a lesser extent" next to the checkouts. As the Bars became more popular, other stores moved them to "a more mainstream section of the store", and Natural Balance asked Morrison's to do the same. Between May and August 2019, the Nakd Bars were moved to the "healthy biscuits and cereals" section of Morrison's. Ms Marston said they are now located next to "healthy snacks" such as Go Ahead yogurt breaks and Fibre One chocolate fudge brownies and are not located next to traditional chocolate biscuits. The pictures of the display provided as exhibits to her witness statement show that they are between Trek Bars, which are described as "Protein Flapjacks" and Morrison's own brand "Fibre Bars". There was no other information about either of these bars and I am unable to make any findings about them.

196. On Morrison's website, Nakd Bars are sold both under "Biscuits and crackers – cereal bars and breakfast biscuits – healthier cereal bars" and under "crisps, snacks and nuts – healthier options".

Online marketing

197. Extracts from the Nakd website included the following product descriptions:

(1) Cocoa Orange: "the collision of sweet zesty orange and rich cocoa makes for an incredible and indulgent taste…a yummy combination of fruit and nuts, gently smoothed together into a handy bar shaped snack". Under the heading "want guilt-free chocolateness", purchasers are offered "a few weeks of happy snacking".

(2) Cashew Cookie: "a snack that is simple and wholesome…stock up on these yummy bars today" and "the ultimate healthy cookie snack you can eat anytime any where".

(3) Bakewell Tart: "a healthy on the go snack bar".

(4) Blueberry Muffin: "the perfect treat to indulge in when you're looking for something a little sweet and easy to eat, not to mention super healthy as it counts as one of your five a day".

(5) Berry Delight: "Give them a try next time you are looking for something to pop in your lunchbox"; "for grabbing on the run" and "super healthy snacks for people who get peckish between meals"

198. Extracts from the Morrison's website included the following comments:

(1) Cocoa Orange: "the perfect alterative to chocolate".

(2) Banana Bread: "bursting with awesome oats that will keep you going from breakfast to snack time…we want everyone to have the best start to their day".

(3) Berry Bliss: "all that scrummy goodness in only 99 calories".

Taste and texture

199. I tasted each of those Nakd Bars of which a sample had been provided, both during the hearing and subsequently, and they all tasted sweet. I infer that the same is true of those for which no sample was provided. All had a similar consistency, being firm and solid when opened, but breaking down easily on being chewed, with a texture similar to fudge with finely chopped nuts and/or fruit.

200. Cocoa Orange tasted like the well-known product by another manufacturer known as a chocolate orange, and Cocoa Delight tasted like liquid chocolate. Although I could detect the ginger in Ginger Bread and the lemon in Lemon Drizzle, neither tasted like the related cakes. In contrast, Bakewell Tart did taste like its namesake, although its texture was entirely different, without the contrast between pastry and filling that is characteristic of the actual tarts.

The purchasers

201. Customer comments on the Nakd website include the following:

(1) Cocoa Orange: "this more than satisfies my chocolate cravings. It's so much healthier than my normal chocolate bar (and much more filling) but still so chocolatey and yummy and makes a perfect treat!!" and "I think they will make a pleasant change from the chocolate and sugar bars you usually end up with if you are in a 'snack-grabbing' mood".

(2) Cocoa Delight: "they are soft, sweet, but not overly sweet, and they leave this deep chocolate aftertaste in your mouth".

(3) Carrot Cake: "Nakd bars are perfect between breakfast and lunch with a cup of tea".

(4) Nakd Berry: "perfect for those moments when you want something sweet but healthy…I don't always want to snack on unhealthy foods".

(5) Bakewell Tart: "tastes just like the real thing…definitely recommended for the sweet-toothed out there".

202. Mr Galbraith's evidence related to both the Organix Bars and the Nakd Bars and has been considered earlier in this decision. I accept on the basis of the packaging and the marketing that the purchasers of Nakd Bars are health-conscious, and that inference is confirmed by Mr Galbraith's research. I make no further findings from that evidence.

Mr Simpson's submissions about the Nakd Bars

203. Mr Simpson's submissions about Nakd Bars overlapped with those he had made about the Organix Bars, and where this was the case, they are set out in the preceding part of this decision. His additional submissions were as follows:

(1) Nakd Bars are intrinsically sweet as the result of the ingredients, in particular the dates; the other ingredients served to reduce the sweetness when compared to eating dates on their own.

(2) The focus of the packaging is on health benefits and minimal processing, and this supports classification as general foods rather than as confectionery.

(3) Nakd Bars are not placed in the confectionery section of Morrison's.

(4) Many of the product names − Berry Delight, Cashew Cookie, Cocoa Orange, Cocoa Delight, Peanut Delight, Berry Bliss, Berry Cheeky, Cocoa Loco, and Cocoa Twist − refer to a key ingredient as being fruit or nuts, and this pointed slightly towards classification as general foods. The name "Rhubarb and Custard" also referred to a general food.

(5) Other product names refer to cakes − Bakewell Tart, Blueberry Muffin, Ginger Bread, Lemon Drizzle, and Apple Pie, and were "intended to be healthy replacements for the relevant types of cake". As the other Nakd Bars were similar, they too should be classified as cakes.

(6) Banana bread is bread for the purposes of VAT, rather than cake, and so does not even need to rely on the exception to Item 2 to be zero-rated, and the Nakd Bar of the same name should have the same treatment.

Mr Watkinson's submissions

204. Mr Watkinson also made many of the same submissions about Nakd Bars as he had about the Organix Bars, and these have been set out earlier in this decision. In addition he said that Nakd Bars were marketed by "borrowing heavily from the lexicon" associated with confectionery, such as by using the words snack, treat, luxury, chocolatey, etc. In addition, he said that some product names had been "borrowed" from confectionery, including Bakewell Tart, Blueberry Muffin, Ginger Bread and Lemon Drizzle, but as they had none of the characteristics of cakes, they could not benefit from the specific VAT exclusion. Overall, the marketing generally was very different from that which would be used for fruit or nuts;

Discussion

205. I first consider whether the Nakd Bars are confectionery and then whether they are cakes.

Whether the Nakd Bars are confectionery

206. In deciding this issue I take into account the following:

(1) *Sugar content:* The Nakd Bars contain between 33% and 52% of sugar, so between one-third and one-half of each bar by weight. The sugar content for some of the bars is similar to that of other well-known confectionery brands, and even those bars with the lowest percentage contain more sugar than Green & Black's organic dark chocolate. The sugar content is therefore consistent with the Nakd Bars being confectionery.

(2) *Sweet to taste:* The Nakd website describes the Blueberry Muffin (which contains over 50% sugar) as "a little sweet"; customers describe Nakd Bars as "sweet, but not overly sweet"; as "definitely recommended for the sweet-toothed out there" and as "perfect for those moments when you want something sweet but healthy". I found all the Nakd Bars I tasted to be sweet. Mr Simpson submitted that the Bars were less sweet than eating dates on their own, but no dates were provided as evidence, and even if he were to be right, it is clear that all the Nakd Bars were sweet, and I so find.

(3) *Subjected to a process:* The ingredients are mixed together and pressed and cut, and so the Nakd Bars have been subjected to a process.

(4) *Normally eaten with the fingers:* The Appellant accepted that this was the case.

(5) *Held out as snacks:* Morrison's website describes Nakd Bars as "handy bar shaped snack", "the ultimate healthy cookie snack" and as "super healthy snacks"; customers say they are suitable for those who are in a "snack-grabbing" mood. I find as a fact that Nakd Bars generally are held out for sale as snacks. I considered whether the position was any different for Banana Bread. This is described on the box as a breakfast bar, and the relevant part of Morrison's website says it contains "oats that will keep you going from breakfast to snack time" and that they "want everyone to have the best start to their day". However, the back of the Banana Bread box has the same three messages, namely that it is to be eaten "on the go", "with a cuppa" and taken along "just in case". In addition, the packaging of the individual Banana Bread bars contains no reference to it as a "breakfast" bar. I find as a fact that the Banana Bread bar is held out as suitable both for breakfast and as a snack

(6) *When consumed:* As already noted in the context of the Organix Bars, it is in the nature of a snack that it is not eaten as part of a main meal. This can also be seen from the messages on the back of the boxes referred to in the previous paragraph: "on the go", "with a cuppa" and "just in case. In addition, the Nakd website says that the Bars can be eaten "anytime any where" and are "for people who get peckish between meals". Customers refer to them as "perfect between breakfast and lunch with cup of tea" and as "perfect for those moments when you want something sweet but healthy". I find as a fact that the Nakd Bars are not normally eaten as part of a main meal, but between meals, in the same way as traditional confectionery.

(7) *Held out as treats:* Although the Nakd Bars are sold as healthy food, I agree with Mr Watkinson that they are also positioned as treats. The wrapping says they are "simply yummy"; "100% yummy" and "guilt-free and delicious". The descriptions on the Nakd website include: "indulgent taste"; "the perfect treat to indulge in" and "all that scrummy goodness". Customers agree, saying that a Nakd Bar "makes a perfect treat".

(8) *Held out as filling the same role as traditional confectionery:* I also agree with Mr Watkinson that although the Nakd Bars are positioned as being more healthy than traditional products, they are also are described using the language of confectionery. The cocoa-based bars in particular emphasise their similarity to chocolate: the Nakd website recommends Cocoa Orange to those who "want guilt-free chocolateness", and customers concur.

(9) *Taste and texture:* The texture of the Nakd Bars was similar to fudge; Cocoa Orange tasted like a chocolate orange and Cocoa Delight was like liquid chocolate. Customers described Cocoa Orange in particular as "the perfect alternative to chocolate"; "healthier than my normal chocolate bar (and much more filling) but still so chocolatey and yummy" and with a "deep chocolate aftertaste". I find that the taste and texture of Nakd Bars is characteristic of confectionery.

(10) *Names:* Mr Simpson submitted that the names of nine of the Nakd Bars referred to a natural product, namely Berry Delight, Cashew Cookie, Cocoa Orange, Cocoa Delight, Peanut Delight, Berry Bliss, Berry Cheeky, Cocoa Loco, and Cocoa Twist, and that this was a factor in favour of classification as general foods. I do not agree: many items of traditional confectionery refer to a fruit or other food – consider lemon drops, mints or opal fruits. The other parts of some of these names are also relevant: Delight and Bliss evoke treats, and "Cookie" is an American word for a type of cake. The reference to "cocoa" in four of the names evoke chocolate, which is "the paradigm of confectionery", see *Premier*. Mr Simpson made a similar submission about Banana Bread and Rhubarb and Custard. The texture of the Banana Bread was significantly different from its namesake: no-one could mistake it for actual banana bread. As regards Rhubarb and Custard, no sample was provided, and there was no evidence from websites or customers. It would clearly be unreasonable to classify it as "general food" on the basis only of its name.

(11) *Packaging:* The packaging of the cocoa-based Nakd Bars is brown, the colour of chocolate; the others are brightly coloured and similar to products which are clearly confectionery. I agree with Mr Watkinson that the packaging is indicative of Nakd Bars being regarded as treats in a similar way to traditional confectionery.

(12) *Ingredients:* For the same reasons as set out in relation to the Organix Bars, the absence of cane sugar, flour and/or butter is not a relevant factor.

(13) *Placing not with confectionery:* The positioning of the Nakd Bars has changed over time. They were originally within the free-from range, which covers all types of foods; there was no evidence as to its positioning within that range, so it is not possible to make a finding as to whether or not it was close to free-from confectionery or otherwise. They were subsequently placed with healthy biscuits and cereals. Biscuits are within the normal meaning of confectionery, see *Ferrero* cited at §85. Nakd Bars

are also sold online with other cereal bars and snacks. Placement is at best a neutral factor.

207. Having considered and balanced all the above factors, it is clear that all the Nakd Bars are confectionery. That includes Banana Bread, as there were only small differences between that and the other Nakd Bars.

Whether the Nakd Bars are cakes

208. To the extent that the parties repeated submissions made in relation to the Organix Bars, I come to the same conclusions.

209. Both parties made additional submissions which turned on the names of the products. Mr Simpson said that the references to cakes in some of the names was a pointer in favour of the Nakd Bars being classified as such. Mr Watkinson took the opposite position, saying that "borrowing" names from cakes was in terms an admission that the Nakd Bars were confectionery, but as the Bars had none of the characteristics of cakes, they could not benefit from the specific VAT exclusion which applies to cakes.

210. I agree with both parties that the names are intended to evoke the related cakes. However, that alone is far from sufficient. I find as follows:

(1) The majority of the 18 Nakd Bars are not so named, and have no characteristics in common with cakes (other than sweetness). They do not look like typical cakes; their ingredients are not those of typical cakes; they would look out of place on a plate of cakes, and they are not held out for sale as cakes. Instead, they are held out for sale as cereal bars to be eaten as snacks.

(2) I was unable to taste the blueberries in the Blueberry Muffin, although that was unsurprising as they were only 2% of total ingredients. The Bar had no physical resemblance to its namesake: it did not taste or look like a blueberry muffin. Although there was no evidence before the Tribunal as to the recipe for muffins, it was part of Mr Simpson's case that cakes (presumably including muffins) were normally made with cane sugar, flour and butter, and on that basis there is no overlap between the ingredients of this Nakd Bar and an actual muffin, other than the small quantity of blueberries.

(3) Although it was possible to taste the ginger in Ginger Bread and the lemon in Lemon Drizzle, neither tasted like the cakes of the same name, and their texture was entirely different. Apart from ginger and lemon, so too were the ingredients. No-one could have confused either Bar with their namesakes. Merely producing a cereal bar which tastes of ginger or lemon does not mean it should be classified as a cake.

(4) No sample was provided for Apple Pie, and there was also no other evidence from websites or customers. It would clearly be unreasonable to classify this bar as a cake on the basis only of its name, even if Mr Simpson was right that apple pies are cakes (rather than puddings).

(5) Bakewell Tart did taste like its namesake. However, its texture was entirely different, and the characteristic contrast between pastry case and filling was absent.

211. It follows that I reject Mr Simpson's submission that the Nakd Bars named after cakes should be classified as cakes; his submission that the other Nakd Bars should be so classified because they are essentially similar to those named bars also falls away.

Conclusion

212. I decide, for the reasons set out above, that the Nakd Bars are confectionery and not cakes.

QUANTUM

213. The Organix Bars are manufactured by Organix Brands Ltd, and the Nakd Bars by Natural Balance. Both manufacturers added VAT when they sold the Products to Morrison's, and Morrison's added VAT when it sold the Products to customers.

214. When Morrison's completed its VAT returns, it deducted the VAT paid to the manufacturers as input tax; included the VAT charged to customers as output tax, and paid over the balance to HMRC.

215. Mr Simpson submitted that the Appellant was entitled to repayment of the output VAT charged to customers, without reducing that sum to take the input tax into account. He did not cite any authority for that submission.

216. Mr Watkinson said Mr Simpson was plainly wrong. VATA s 80 provides that HMRC's obligation would be to repay only the net amount, subject to any defence of unjust enrichment, and the Court of Appeal had confirmed this was the position in *Birmingham Hippodrome v HMRC* [2014] EWCA Civ 684, and *Rank Group plc v HMRC* [2020] EWCA Civ 550.

217. Given my findings on classification, the question of quantum is academic. Had it been in issue, I would have agreed with Mr Watkinson. I have however decided not to add to this already long decision by setting out my reasons.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

218. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 13 APRIL 2021