[2022] UKFTT 00108 (TC)

TC 08439/V

VALUE ADDED TAX—zero rating—General item no. 1 of Group 1 Schedule 8 VATA—food—Excepted item no. 2—confectionery—cakes—flapjacks

VALUE ADDED TAX—input tax—trader assessed to VAT on ground that zero rated supplies should have been standard rated—goods acquired by trader from supplier who had also zero rated them—whether trader entitled to credit for the input tax deemed to have been paid under the Tulică principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00257

BETWEEN

GLANBIA MILK LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
CAROLINE SMALL

The hearing took place on 2, 3 and 4 March 2022. The form of the hearing was V (video). All participants in the hearing attended remotely and the remote platform was Video Hearings Service. A face-to-face hearing was not held because of the COVID-19 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. As such, the hearing was held in public.

Philip Simpson QC, counsel, for the Appellant

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

DECISION

The appeal against the decision of HMRC dated 24 September 2018 to make an assessment to VAT is dismissed.

REASONS

SUMMARY

1. The Appellant appeals against a decision of HMRC to make an assessment to VAT. The decision was made as a result of HMRC having concluded that supplies of certain goods by a company in the Appellant's VAT group had incorrectly been zero rated rather than standard rated.

2. These goods were 36 varieties of food products described as "flapjacks", the principal ingredients of which were oats, syrup and protein. It is not in dispute that all were "confectionery" within the meaning of excepted item no. 2 in Group 1 of Schedule 8 to the Value Added Tax Act 1994. The Appellant contends that they were correctly zero rated because they were "cakes" within the meaning of that provision. In this decision, the Tribunal finds that the products were not "cakes", and that they fell to be standard rated as "confectionery".

3. The Appellant is the representative member of a VAT group that includes Glanbia Performance Nutrition (UK) Limited ("**GNUK**"). The 36 products in this case were manufactured by GNUK, then sold by GNUK to Glanbia Nutritionals (Ireland) Limited ("**GNIL**"), a member of the same corporate group that was outside the Appellant's VAT group. GNIL then supplied some of the products back to GNUK, which GNUK then supplied to third party customers. The assessment under appeal included output tax on these last supplies by GNUK to third party customers. The Appellant contends in this appeal in the alternative that if these supplies by GNUK should have been standard rated, then GNIL should also have standard rated its earlier supplies of those same goods to GNUK, and that GNUK is therefore entitled to a credit for the input tax that GNUK is deemed to have paid by virtue of the principle in *Tulică and Plavoşin*, C-249/12 and C-250/12, EU:C:2013:722. In this decision, the Tribunal rejects this argument, applying *Zipvit Ltd v Revenue and Customs* [2018] EWCA Civ 1515.

FACTS

4. Glanbia Performance Nutrition (UK) Limited ("**GNUK**"), a member of the Appellant's VAT group, is a manufacturer of nutritional sports and performance protein bars, shakes and powders. Its sales are business to business. The businesses who are its customers own the product brands, and market and distribute the products to their customer bases as their own products. GNUK has the factory facilities for manufacturing such products, and the various brand owners contract with GNUK for GNUK to manufacture their products for them. When a customer wishes to produce a new product, the customer provides GNUK with a product brief, and GNUK formulates a recipe which is then agreed with the customer. GNUK thereafter provides the customer with a finished product, which is wrapped and packaged. GNUK outsources the printing of the wrapping and the packaging, the artwork for which is provided by the customer. The customer is therefore responsible for any information or statements contained on the wrapping and packaging, although GNUK may draw the customer's attention to anything that appears questionable. Because it is GNUK's business customers who market the products to the end consumer, GNUK has no customer marketing team.

5. Following a visit carried out by HMRC at the Appellant's principal place of business in 2016, HMRC became aware that the Appellant had applied a zero rate of VAT to sales by GNUK of 36 varieties of food products described by the Appellant as "flapjacks". These had been produced by GNUK for various customers at material times. None remains in production today.

6. There followed further communications between the parties, in which the Appellant provided further information to HMRC. HMRC also requested and obtained from the Appellant samples of six of the products, which were reviewed by a specialist team within HMRC.

7. On 24 September 2018, HMRC issued a decision to make an assessment to VAT under s 73 of the Value Added Tax Act 1994 ("**VATA**") on the basis that supplies of each of the 36 products should have been standard rated rather than zero rated, being "confectionery" within the meaning of excepted item no. 2 in Group 1 of Schedule 8 VATA ("**Excepted Item 2**"). This is the decision under appeal.

8. This decision was upheld in a statutory review decision dated 6 December 2018. The decision led to assessments to VAT being made for periods 12/13 to 07/18 inclusive, although the assessments for two of the VAT periods have since been withdrawn for reasons not material to this appeal.

9. On 4 January 2019, the Appellant appealed to the Tribunal.

10. The hearing of this appeal was held on 2 to 4 March 2022. The documents before the Tribunal were the hearing bundle (546 pages), a supplementary hearing bundle (560 pages), a further supplementary hearing bundle (62 pages), an authorities bundle (703 pages), a supplementary authorities bundle (138 pages), a sales and distribution agreement between GNIL and GNUK (28 pages), an appendix to the witness statement of Mr Tobin (which was no longer relied on at the hearing), samples of each of the 36 products to which the appeal relates, a skeleton argument of the Appellant (13 pages), a supplementary skeleton argument of the Appellant (4 pages), and a skeleton argument of HMRC (25 pages). Several additional documents were introduced during the course of the hearing.

11. At the hearing, members of the panel looked at and tasted the samples of four of the products. The Tribunal made clear that it was willing to look at and taste samples of all 36 of the products if the Appellant wanted the Tribunal to do so, but questioned whether there was any need to do so unless other products were said to have material features that were different to the four that had already been considered and tasted. The Appellant's representative indicated that in the circumstances he would not ask the Tribunal to look at and taste individually samples of the remaining 32 products.

12. Prior to the hearing, the Appellant had made an application to introduce additional evidence, in the form of samples of similar products made by other manufacturers, which had been sold commercially with a zero rating. The Tribunal questioned the relevance of this additional evidence, given that these other products had apparently been chosen for their similarity with the Appellant's products, and given that the Appellant's products had also been sold commercially with a zero rating. The Tribunal was not called upon in this appeal to determine whether or not other products of other manufacturers had been correctly zero rated. The Tribunal questioned whether the mere fact that other manufacturers had in fact applied a zero rating would be probative of the question whether or not the Appellant's products had been correctly zero rated. The Appellant's representative then withdrew the application to rely on this additional evidence.

13. In the course of tasting the samples of the four products, the Tribunal Judge made the observation that two of these samples did not taste sweet at all to him, and he raised the question whether a product that did not taste sweet at all would be "confectionery" within the meaning of Excepted Item 2. The Appellant's representative then made an oral application to add a new ground of appeal, to contend that some or all of the 36 products were not "confectionery" within the meaning of Excepted Item 2. The Tribunal gave an oral decision at the hearing, refusing this application and giving reasons for that decision. It follows that this appeal proceeds on the basis that it is not in dispute that all 36 products were "confectionery" within the meaning of Excepted Item 2.

14. The hearing bundles included witness statements ("**WS**") of Mr Allen Doherty, Head of Research & Development for the EU and Russia at GNUK, a food scientist by training; Mr Mark Blake, Commercial Director-EU for Contract at GNUK; Mr Patrick Tobin, Tax Manager for Glanbia plc, Chartered Tax Adviser and Fellow Member of the Association of Certified Chartered Accountants; and Amy Moss, VAT Tax Specialist at HMRC, who is the HMRC officer who made the decision under appeal. Oral evidence ("**OE**") was given at the hearing by Mr Doherty and Mr Blake.

15. At the hearing, it was confirmed that the following matters are not in dispute.

(1) The supply chain for the 36 products included the following steps.

Step 1: GNUK manufactured the products, then sold them to Glanbia Nutritionals (Ireland) Limited ("**GNIL**"), a member of the same corporate group that was outside the Appellant's VAT group.

Step 2: GNIL sold some of the products itself to third party customers, and supplied some of the products back to GNUK.

Step 3: GNUK sold to third party customers the products that it had acquired back from GNIL at step 2.

(2) The price at which GNUK sold the products at step 3 was higher than the price at which GNIL sold the products to GNUK at step 2.

(3) The HMRC decision under appeal finds that the Appellant should be assessed to output tax at the standard rate on GNUK's sales both at step 1 and step 3.

(4) The sales by GNIL to GNUK at step 2, and the sales by GNUK at step 3, both involve the very same goods and these sales at both steps should be subject to the same rate of VAT.

(5) GNIL's invoices to GNUK for the sales at step 2 indicated that the sales were zero rated. No amounts in addition to the purchase price stated in the invoices was ever paid by GNUK to GNIL in respect of VAT on those sales, and no amounts of VAT in respect of those sales have been paid by GNIL to HMRC.

(6) HMRC never issued a VAT assessment to GNIL in respect of its sales to GNUK at step 2, and HMRC are now out of time to issue any such assessment.

(7) At the time that HMRC formed the view that GNUK should be assessed to VAT in respect of its sales at step 3, HMRC were aware that GNUK had acquired the goods from GNIL, and at that time HMRC would have still been within time to issue a VAT assessment to GNIL in respect of its sales to GNUK at step 2.

(8) The quantum of the assessment to VAT issued by HMRC to GNUK on its sales at step 3 has been calculated on the basis that the price at which it sold the goods to its third party customers was a VAT-inclusive price; that is to say, one sixth of the

price actually paid to GNUK by its third party customers has been treated as the VAT element of the payment.

16. While disputing that the products in this case are standard rated, the Appellant contends in the alternative that in the same way that one sixth of the sale price at step 3 has been treated as the VAT element of the sale, one sixth of the price paid by GNUK to GNIL at step 2 should be treated as the VAT element of those sales, such that the Appellant should be entitled to a credit for input tax in that amount. HMRC disputes the claimed entitlement to a credit for input tax.

17. The Appellant submits that:

(1) the appeal should be allowed, and the decision under appeal should be set aside in its entirety, on the basis that the products were correctly zero rated as cakes within the meaning of Excepted Item 2 (the "**classification issue**");

alternatively,

(2) if the products did fall to be standard rated as confectionery, the appeal should be allowed in part, in that the amount of the VAT assessment should be reduced by the amount of input tax that would inevitably arise from that classification (the "**input tax issue**").

18. HMRC submit that the appeal should be rejected in its entirety on the basis that (1) all 36 of the products fell to be standard rated as confectionery, and (2) the Appellant cannot establish any entitlement to the claimed credit for input tax.

LEGISLATION

The classification issue

19. Section 30(2) VATA provides that goods of a description specified in Schedule 8 VATA shall be zero rated.

20. Group 1 in Schedule 8 VATA ("**Group 1**") specifies:

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

21. General item no. 1 in Group 1 is "Food of a kind used for human consumption".

22. Excepted Item 2 in Group 1 is "Confectionery, not including cakes or biscuits other than biscuits wholly or partly covered with chocolate or some product similar in taste and appearance".

23. VAT Notice 701/14 (10 February 2014), which does not have the force of law, gives at paragraph 3.4 examples of zero rated "bakery products", which include: "Cakes including sponges, fruit cakes, meringues, commemorative cakes such as a wedding, anniversary or birthday cakes", "Slab gingerbread", "Flapjacks", "Marshmallow teacakes …", "Scottish snowballs …", "'Crunch cakes' …", "Caramel or 'millionaire's' shortcake …", and "Lebkuchen". At paragraph 3.6 it gives examples of zero rated "confectionery", which include: "Cakes including sponge cakes, pastries, eclairs, meringues, flapjacks, lebkuchen, marshmallow teacakes and Scottish snowballs".

24. The HMRC internal manual *VAT Food*, which also does not have the force of law, states in paragraph VFOOD 6200:

> Though there is no accepted definition of the word, cakes [are] often made from a thin batter containing flour and eggs, and aerated in the process of cooking. …
>
> It is our policy that there is a difference between flapjacks and cereal bars. This policy development arose because, at the inception of VAT, flapjacks were widely accepted as cakes, and cereal bars were not widely available, if at all. Flapjacks were accepted as being a cake of common perception and widespread home-baking, not because of any specific reasoning behind such factors as their recipe, ingredients or the manufacturing process …
>
> The problem that has arisen is that a flapjack is, historically, accepted as a cake, but should probably now be categorized as a cereal bar, and therefore standard-rated, within the legislation. …
>
> We therefore define flapjack narrowly, as it is intended to only apply to that product as it was at the inception of VAT. We allow the zero-rating of standard flapjacks along with minor variations, for example when ingredients like dried fruit, raisins, chocolate chips etc are added. We view the addition of toppings similarly, such as with a layer of chocolate or yoghurt.
>
> We draw the line between flapjacks and cereal bars at any alteration to a flapjack that takes it into the category of being a cereal bar. We interpret this with our policy that a traditional flapjack consists solely of oats. The addition of other cereals to the product turns it into a cereal bar, as it is no longer a traditional flapjack.

The input tax issue

25. Article 167 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) (the "**Directive**") provides that "A right of deduction shall arise at the time the deductible tax becomes chargeable".

26. Article 168 of the Directive provides:

> In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person …

27. The right to deduct input tax is dealt with in ss 19, 24 and 25 VATA.

LEGAL PRINCIPLES

The classification issue

28. The distinction between categories of confectionery that are standard rated and those that are zero rated may today appear anomalous. When VAT was introduced in 1972, the policy was to zero-rate most items of food and drink other than those considered "luxury" or "non-essential". The categories of zero-rated items were then effectively frozen in 1979, yet public tastes, attitudes and the ways of consuming food have changed dramatically since then. However, the role of this Tribunal is to apply the law as it is. (*Corte Diletto Ltd v Revenue &*

Customs [2020] UKFTT 75 (TC) ("***Corte Diletto***") at [9] and [13]; also *Pulsin' Ltd v Revenue & Customs* [2018] UKFTT 775 (TC) ("***Pulsin"***") at [67].)

29. The words in Excepted Item 2 must be given the ordinary meaning that would be attached to them by the ordinary reasonable person in the street who is informed to the same extent as the Tribunal (the "**ordinary person**"). That is to say, items are to be categorised according to a reasonable view on the basis of all of the facts. The words must be read in their context, and not literally. (*Corte Diletto* at [56]-[62].)

30. The correct classification of a product for purposes of Excepted Item 2 is a short practical question calling for a short practical answer. The application of the wording of these provisions to particular products is a matter of informed impression, having regard to multiple factors, including, ingredients, taste, texture, appearance and presentation, size, packaging, marketing, manufacturing technique, shelf life, consistency when stale, circumstances of consumption, and name. The question is, having taken account of all the factors, what is the overall impression of the nature of the item. An over-elaborate analysis should not be undertaken. Each classification exercise must turn on its own particular facts. Decisions in previous case law on how products are correctly to be classified should not be considered as legal authorities on how particular factors are to be weighed against each other. It is not necessary for a Tribunal to identify each and every aspect of similarity and dissimilarity between the product in issue in the case, and the products that were in issue in previous cases. In any particular case a Tribunal may choose to focus upon and mention particular aspects of the product. The choice of description in one case should not be treated as decisive in another. (*Corte Diletto* at [59], [63]-[67]; *Lees of Scotland Limited v Revenue and Customs* [2014] UKFTT 630 (TC) ("***Lees of Scotland***") at [18]-[19].)

31. None of the factors referred to above is determinative on its own, and it is for the Tribunal to decide in the individual case what factors are or are not relevant in that case, and what relative weight should be attached to them. (See paragraphs 45-47 below.)

32. The healthiness or otherwise of a product generally has no bearing on its VAT classification (*WM Morrison Supermarkets Plc v Revenue and Customs* [2021] UKFTT 106 (TC) ("***WM Morrison***") at [175]-[176]). However, if the product is specifically intended to have particular physiological effects, this can be a relevant factor (see paragraph 60(3)(e)-(g) below).

33. If a product described as a flapjack is said to be zero rated on the basis that it is a "cake" for purposes of Excepted Item 2, the sole question to be determined is whether it can be categorised as a "cake". There is no need to determine whether it can be categorised as a "flapjack". Not all flapjacks are necessarily cakes for purposes of Excepted Item 2. (See paragraphs 37-44 below.)

34. In an appeal against an assessment to VAT made under s 73 VATA, the Tribunal has a full appellate jurisdiction to determine the correct classification of a product for purposes of Excepted Item 2. In relation to this specific issue, the Tribunal is not confined to exercising a supervisory jurisdiction, or to applying a "best judgment" standard of review.

The input tax issue

35. If it is discovered that a supply to a trader was erroneously zero rated by the supplier when it should have been standard rated, it may be possible to recharacterize the original payment by the trader to the supplier as a VAT-inclusive payment, in accordance with the principles in *Tulică and Plavoşin*, C-249/12 and C-250/12, EU:C:2013:722 ("***Tulică***"). However, in order to obtain a deduction for input tax for the VAT element of such a

recharacterized payment, the trader would first have to produce a fully compliant VAT invoice showing the correct amount of VAT paid in relation to the supply. (See paragraphs 48-57 below.)

FINDINGS OF DISPUTED FACTS

36. The parties confirmed at the hearing that there are no material facts in dispute.

FINDINGS OF DISPUTED POINTS OF LAW

The classification issue

A flapjack is not necessarily a cake

37. In the case of a product described as a flapjack that is said to be zero rated on the basis that it is a "cake" for purposes of Excepted Item 2, the question whether it is correctly described as a "flapjack" is of no direct material relevance: the VATA contains no provision for the zero rating of "flapjacks", or of certain types of "flapjacks". It relevantly provides only for the zero rating of "cakes", and the only thing that needs to be determined is whether the product can be categorised as a "cake". (*WM Morrison* at [182]; *Torq Ltd v Revenue and Customs* [2005] UKVAT V19389 ("***Torq***") at [73]-[74], [76].)

38. Some may take the view that a "flapjack" is inherently different to a cake (*Torq* at [71]; *Bells of Lazonby Ltd v Revenue & Customs* [2007] UKVAT V20490 ("***Bells of Lazonby***") at [13]). Others may take the view that certain flapjacks may be sufficiently close in characteristics to cake to allow them to be categorised as cake (*Torq* at [73]-[74]). The Tribunal need not take a position on this issue in the abstract. Even if the latter view were correct, that would not mean that any product that can be described as a flapjack must be categorised as a cake. (*WM Morrison* at [180]; *Asda Stores Ltd v Revenue & Customs* [2009] UKFTT 264 (TC) ("***Asda Stores***") at [37]-[38], [48].)

39. The Tribunal rejects the contention advanced by the Appellant at the hearing that it need only determine whether the 36 products in this case are "flapjacks", on the ground that if they are, they will necessarily be "cakes". The Tribunal also rejects the Appellant's contention that the appeal should be allowed on the basis that the 36 products, while different in certain ways to a traditional flapjack, are merely "flapjacks with a twist" rather than products similar to flapjacks (but not flapjacks).

40. VAT Notice 701/14 and the HMRC internal guidance (paragraphs 23-24 above) give examples of kinds of products that, in the view of HMRC, will or will not be "cakes" for purposes of Excepted Item 2. This guidance mentions very many products that are not mentioned in Excepted Item 2. This VAT notice and internal guidance are not law, and do not bind the taxpayer or the Tribunal. In any Tribunal appeal, the question will always be whether a product falls within the description of a "cake" for purposes of Excepted Item 2, not whether it falls within one of the more specific product categories mentioned in VAT Notice 701/14 and the HMRC internal guidance.

41. Nevertheless, the Tribunal will consider the HMRC guidance, and in the interests of consistency, will not discard it lightly (*Bells of Lazonby* at [12]).

42. The HMRC internal guidance does not state that all flapjacks should by definition be regarded as cakes. It says the opposite. It says that in principle a flapjack today would more properly be considered to be a cereal bar than a cake, but that at the time of inception of VAT in the 1970s, flapjacks as they then existed were widely accepted as cakes, and that HMRC therefore accept that a flapjack of the kind that was known in the 1970s, with possible minor

variations, will be treated as a cake. It is clear from this internal guidance that beyond this specific category of flapjacks, HMRC do not accept that flapjacks are cakes.

43. It is true that this passage in the internal guidance is discussing the specific question of the distinction between flapjacks and cereal bars. However, this passage can hardly be read as stating that every flapjack should normally be classified as a cake, other than in exceptional cases where it should more properly be characterised as a cereal bar. On the contrary, it states that all flapjacks in general should be classified as cereal bars, but that for historical reasons an exception will be made for a category of flapjacks that are of a kind that was made and known in the 1970s.

44. In cases where it is clear that a product is a flapjack of a kind that was made and known in the 1970s, or of that kind with only minor variations of the sort described in the internal guidance, that internal guidance may be of assistance in determining the classification of the product as a cake. However, in cases where this is not clear, it would be a rather sterile exercise to seek to determine whether the product should properly be regarded as a "1970s" flapjack with minor variations, or rather as something outside the "1970s" conception of a flapjack. This is because the internal guidance is not binding, and is not law. In cases where the effect of the guidance is not clear, it is simply of no particular assistance in the determination of the question whether or not the product is a cake. In such cases, the internal guidance should be put aside, and the case should be determined according to general legal principles.

None of the factors is determinative

45. None of the factors referred to in paragraph 30 above is determinative on its own. In a given case, some factors may point to the classification of a product as a cake, while other factors may point away from that classification. The Tribunal must determine whether the product has sufficient characteristics of a cake to fall within the definition of a cake for purposes of Excepted Item 2 (*WM Morrison* at [173], *Asda Stores* at [49]; *Lees of Scotland* at [17], [51] and [53]; compare also *Torq* at [72]).

46. In any given case, it will be for the Tribunal to determine, according to the circumstances of the particular case, which factors are and are not relevant to that question in that case, and what weight should be given in that case to each of the relevant factors. There are no specific factors that the Tribunal must necessarily take into account in every case, and no specific factors that must necessarily be given particular weight in every case (*Torq* at [75]).

47. At the hearing, counsel for the Appellant contended that in practice the most important factors are likely to be the actual products themselves, namely their taste, texture, appearance and size. He clarified that he was not suggesting that there was any legal requirement to treat these as the most important factors. The Tribunal agrees, and it is therefore unnecessary to speculate in what percentage of cases these factors have been or are likely in future to be the most important factors in practice. In any given case, the Tribunal must decide on the basis of the individual circumstances of the particular case.

The input tax issue

48. To the extent that it is material to the issues for decision in this appeal, the Tribunal is bound by the decision in Case C-156/20, *Zipvit Ltd v Commissioners for Her Majesty's Revenue and Customs*, ECLI:EU:C:2022:2 ("***Zipvit CJEU***"). This is a judgment of the Court of Justice of the European Union handed down after the end of the transition period, on a reference for a preliminary ruling made by a United Kingdom court prior to the end of the transition period (the reference having been made by the United Kingdom Supreme Court in

Zipvit Ltd v Revenue and Customs [2020] UKSC 15 ("***Zipvit SC***")). Notwithstanding s 6(1)(a) of the European Union (Withdrawal) Act 2018, this judgment of the Court of Justice of the European Union therefore has binding force in its entirety on and in the United Kingdom, pursuant to Articles 86(2) and 89(1) of the EU-UK Withdrawal Agreement and s 7A of that Act. See also *Zipvit CJEU* at [19].

49. In *Zipvit*, Royal Mail had supplied postal services to Zipvit under contracts which had been negotiated individually with Zipvit. UK legislation and HMRC guidance provided at the time that supplies of this nature were exempt from VAT. Thus, the Parliament, HMRC, Royal Mail and Zipvit all proceeded on the basis that these were exempt supplies. Royal Mail issued invoices without VAT, expressly indicating that those supplies were exempt from VAT. The contract between Royal Mail and Zipvit provided (through its incorporation by reference of Royal Mail's general terms of business) that all relevant charges payable by Zipvit were exclusive of VAT, that Zipvit "shall pay any VAT due on … charges at the appropriate rate", and that "VAT shall be calculated and paid on [the commercial price of the services]" (*Zipvit SC* at [9]). As a result of a subsequent judgment of the Court of Justice, it emerged that these supplies should in fact have been standard rated.

50. Zipvit argued that the price that it had paid Royal Mail for the supplies should be treated as a VAT inclusive price, on the basis of the decision in *Tulică*. In *Tulică* it was held at [43] that when the price of a good has been established by the parties without any reference to VAT, and the supplier is not able to recover from the purchaser the VAT claimed by the tax authorities, the price agreed must be regarded as already including the VAT. Zipvit argued that on this basis, the sums that it had paid Royal Mail were to be regarded as having included a VAT component, and that Zipvit was entitled to deduct the amount of this VAT component as input tax.

51. The Court of Justice rejected this argument. It reasoning for doing so made specific reference to the particular facts of the case. It noted that:

(1) The contract between Zipvit and Royal Mail expressly provided that the price of the supply was exclusive of VAT and that, if VAT were nevertheless due, Zipvit should bear the cost of it (at [29]). Unlike *Tulică*, this was not a case where a contract of sale has been concluded without reference to VAT (at [25]).

(2) It had been legally possible for Royal Mail to recover from Zipvit the amount of VAT mistakenly unpaid after it had become aware that the services which it had supplied should have been subject to VAT (at [30]). However, Royal Mail had not attempted to recover the VAT mistakenly unpaid from Zipvit (or from its other customers in the same situation) due to the administrative burden that this would have generated. Also, HMRC had failed to issue an assessment to Royal Mail for the unpaid VAT due to the legitimate expectation which it considered that it had created for Royal Mail in that regard (at [15]-[16]). Both HMRC and Royal Mail were now time barred from recovering the unpaid VAT from Zipvit (at [20]-[41]).

52. On the basis of these facts, the Court of Justice found that the price invoiced to Zipvit for the supply of postal services was a price exclusive of VAT, and that Zipvit could not deduct as input tax an amount of VAT for which it had not been charged and which it had therefore not passed on to the final consumer (at [31]).

53. Zipvit further argued that under Article 168(a) of the Directive, the input VAT needed only to be "due or paid", and that even if the input tax had not been paid by Zipvit, the input tax was "due". This argument was also rejected. The Court of Justice found that input VAT is only "due" if the trader has an obligation to pay it. It held that input VAT would not be deductible by Zipvit in circumstances where the supply by Royal Mail to Zipvit was regarded

as being VAT exempt at the time it was completed, where it was only subsequently regarded as being subject to VAT, where it was not impossible for Royal Mail to request Zipvit to pay the VAT on the supply, but where Royal Mail had not done so in good time. (At [37]-[38], [41].)

54. No consideration was given in *Zipvit CJEU* to whether any different considerations would apply if the input supply had been erroneously zero rated, rather than erroneously treated as VAT exempt. However, the Tribunal sees no reason why this would have made any difference to the result in that case. *Zipvit CJEU* also did not address expressly the situation where the supplier has no contractual right to recover the unpaid VAT from the trader.

55. However, at an earlier stage of the proceedings in the *Zipvit* case, when it was before the Court of Appeal of England and Wales (*Zipvit Ltd v Revenue And Customs* [2018] EWCA Civ 1515 ("***Zipvit CA***")), that Court held at [87] that if Royal Mail had had no contractual right to recover from Zipvit an amount equivalent to the VAT which should have been charged, the prices charged by Royal Mail for its supplies and paid by Zipvit would have been treated as VAT inclusive, in accordance with *Tulică* principles. In that situation, Zipvit would be regarded as having paid the input VAT for purposes of Article 168(a) the Directive.

56. However, the Court of Appeal went on to decide at [116] that even if it were open to Zipvit to recharacterise its original payment to Royal Mail in this way, in order to obtain such a deduction for this input tax, it would first have to show that the tax in question had been paid by Royal Mail by producing a fully compliant VAT invoice showing the correct amount of VAT paid in relation to those supplies. The Court of Appeal noted that if the position were otherwise, the trader would receive an input tax credit, in circumstances where none of the input tax in question has been paid by the supplier to HMRC.

57. The Tribunal considers itself bound by this decision of the Court of Appeal in relation to this particular issue, which was not decided in *Zipvit CJEU*. In any event, this Tribunal, upon its own consideration of the matter, agrees with the reasoning of *Zipvit CA* in this respect.

REASONS FOR DECISION

The classification issue

58. All of the 36 products in this case fell to be standard rated.

59. None of the products in this case are "cakes" within the meaning of Excepted Item 2. They do not have sufficient characteristics of a cake to fall within the definition of a cake for purposes of that provision.

60. This conclusion follows from an application of the approach in paragraphs 28-34 and 37-47 above to the evidence presented by the parties relating to the various relevant factors.

(1) *Ingredients and manufacturing technique*:

(a) The Tribunal is satisfied that the ordinary person would consider an archetypal (or "platonic") cake to be something that is baked, which is made from a thin batter containing flour and eggs, and which is aerated in the process of baking. The ordinary person would also expect an archetypal cake to be sweet due to the presence of one or more ingredients high in glucose and/or fructose, such as sugar, golden syrup or honey, and to contain fat in the form of for instance butter, margarine and/or oil. As a result, the archetypal cake would be considered by the ordinary person to be a relatively high calorie food. (Contrast *Bells of Lazonby* at [9].)

(b) In a specific case, it may be possible for a product to be a cake despite the absence of one or more of the above features, but if so, it is likely to be regarded by the ordinary person an unusual kind cake, and the absent feature may well be expressly noted in the way that the product is described (eg, "low calorie cake", "flourless cake", "eggless cake", "no butter no oil cake", "no-bake cake").

(c) Commercially manufactured cakes may contain certain ingredients not normally found in home-made cakes (such as preservatives, emulsifiers and colourings), but the Tribunal is satisfied that the ordinary person would still expect the typical commercially produced cake to have as its main ingredients fat, wheat flour, egg or equivalent, and a high sucrose/fructose ingredient such as sugar, and to be baked.

(d) There will be a point at which a product departs from the features of an archetypal cake to such a great extent that it can no longer be considered a cake at all, unless there are sufficiently significant countervailing factors pointing towards its characterisation as a cake.

(e) An archetypal flapjack recipe would contain, say, 50g margarine, 50g sugar, 30ml golden syrup and 100g oats. The percentages of these ingredients within the product would thus be approximately 21%, 21%, 17% and 41% by weight (assuming golden syrup to have a specific gravity of 1.4). In the archetypal flapjack recipe, these ingredients would be mixed together, pressed into a tin, baked in an oven at 160 degrees Celsius, then cut into fingers. (OE Doherty, referring to a page of a 1980s edition of Mrs Beeton's cookbook produced at the hearing by HMRC). It is perhaps understandable that some might consider, or have formerly considered, a flapjack made according to such a traditional recipe as a form of cake, given its high levels of fat, sugar and golden syrup together with a complex carbohydrate (albeit oats rather than flour), given the absence of other ingredients, and given that it is baked. However, as has been noted, even such a traditional flapjack might not necessarily be considered by the ordinary person today to be a type of cake.

(f) The most significant ingredients of each of the 36 products in this case (the precise proportions of which varied between the different products) were oats (ranging between 20% and 50% of the product by weight), syrup (ranging between 21% and 39%) and protein (ranging between 8% and 28%). Most of the products had a coating, which ranged between 2% and 22% of the product by weight. Other ingredients found in most or all of the products were "whey", "flavour", "amino acid", "peanut, nuts and flour" (ranging between 0% for most of the products, 3-4% for 3 of the products, and 7.5% for one of them), "oils and fats" (ranging from less than 1% for just under half of the products, 1-2% for just under another half and 3.15% for the highest), "flaxseed", and "other nuts, seeds and fruit".

(g) The products in this case thus differ from the archetypal cake, in that they contain no or only very small amounts of flour, and minimal amounts of oil or fat. They contain no or only trace amounts of egg. Compared to a "standard" flapjack purchased in a café or at a supermarket, the products in this case had fewer calories, about 10 times less sugar (with no sucrose or other standard sugar added), and very low levels of fat (OE Doherty). Also,

the oats in these products were an oat blend which was different to the kind of oats that would be found in an "archetypal" flapjack (OE Doherty).

(h) On the other hand, each of the products contains significant amounts of protein, an ingredient not traditionally associated with cakes. Indeed, protein is one of the three main ingredients in nearly all of the products (and in all of the products, if coatings are not taken into account). The ordinary person would consider it highly unusual for a cake to contain protein, let alone in such quantities.

(i) The products in this case undergo no baking as part of their production process. Instead, the dry goods are mixed together, and then the syrup is added after having been heated to 85 degrees Celsius, which "is sufficient to complete that procedure" (WS Doherty). This is not the typical method used for making a cake. The fact that the products could potentially have been baked, and that this would in fact have improved their quality (OE Doherty), does not alter the fact that they were not baked.

(2) *Texture and appearance*:

(a) The Tribunal is satisfied that the ordinary person would not consider the products in this case to have the texture or appearance of a typical flapjack, let alone that of a typical cake.

(b) Each of the products is an individually wrapped food item, in a more or less cuboid shape, in the general order of some 10 cm long, 4 cm wide and 3 cm deep.

(c) If held up to a group of contestants in a game where a point is awarded to the first contestant to call out correctly what the object is, the Tribunal is satisfied that the majority of contestants would say spontaneously that the product is a "bar", or a "fruit bar", or an "energy bar". Indeed, some of the products have the word "bar" written on the wrapping in addition to the word "flapjack".

(d) The products are not aerated, and have a dense, chewy consistency similar to a fruit bar or an energy bar. The ordinary person would not consider this to be the typical texture of a cake. Some of the products have a crunchy rather than a chewy texture (WS and OE Doherty), but this also would not be considered to be the typical texture of a cake.

(e) It is contended for the Appellant that the texture of the oats is visible when the products are looked at, as in the case of a traditional flapjack, and that they have the colour of a traditional flapjack. The Tribunal considers this to be at best a neutral factor. The lack of aeration is in fact apparent merely from looking at the products. While their visible texture and colour may otherwise not be inherently inconsistent with that of a cake, they could also be consistent with that of products such as fruit bars and energy bars, which the Tribunal is satisfied would not be considered by an ordinary person to be a cake.

(f) The Tribunal gives limited weight to the physical dimensions of the products, but notes that each product is approximately twice or more as long as it is wide, and not very deep, giving it a "bar-like" appearance. The Tribunal is

satisfied that an ordinary person would consider it typical for any cake that is flat and not deep (such as a traybake or brownie, or indeed an archetypal flapjack, assuming any of these to be a cake) to have a smaller length to width ratio. That is to say, it would be more squarish rather than long and thin.

(3) *Function and typical circumstances of consumption*:

(a) The products in this case do not have the same function as cakes, and are not typically consumed in the same kinds of circumstances.

(b) The Tribunal is satisfied that the ordinary person would consider that most people regard an archetypal cake to be more pleasant to eat than other everyday food, due to its sweetness and texture. It is for this reason that cakes are typically eaten at celebratory functions. The Tribunal is satisfied that the ordinary person would consider the archetypal circumstances of consumption of an archetypal cake to be as follows. It is something normally eaten sitting down, for instance as the dessert course of a meal or at an afternoon tea. It might also be eaten standing up, for instance from a paper napkin and/or a paper plate, at a casual social function such as a workplace celebration of a colleague's birthday. Cakes can of course be bought and eaten as a snack while on the go, but the ordinary person would not consider this to be the typical way in which they are consumed.

(c) The Tribunal is satisfied that the ordinary person would not consider the products in this case to be suitable for consumption in the same way. Despite Mr Doherty's oral evidence that some consumers of the products would consider them a treat to go with tea or coffee, the Tribunal is satisfied that the ordinary person would consider them to look wholly out of place as a dessert at the end of a meal, or as the food to be consumed at an afternoon tea, or even at a casual social function (compare *WM Morrison* at [210(1)]; *Lees of Scotland* at [53]). The Tribunal is satisfied that the ordinary person would assume that the products are most commonly eaten with the fingers directly from the wrapper, for instance while holding the wrapper in one hand with one end of the product protruding from the top of it, that they are commonly eaten while on the go, and that if eaten in the company of others this would most likely be in the context of normal daily activities.

(d) Whether or not people of all ages enjoy cakes to the same extent, the Tribunal is satisfied that the ordinary person would consider the archetypal cake to be something that can be enjoyed by people of any age, including children, other perhaps than babies and the youngest children. On the other hand, the wrappers of most of the products in this case contain warnings that excessive consumption may have laxative effects (presumably due to the high protein content, an ingredient not associated with cakes), and some contain warnings that the products should be kept out of reach of children.

(e) Although the healthiness or otherwise of a product generally has no bearing on its VAT classification (see paragraph 32 above), if the product is specifically intended to have particular physiological effects, this can be a relevant factor. For instance, if a product is specifically intended to have medicinal or therapeutic effects, that may point away from its categorisation as a cake.

(f) The Tribunal is satisfied that the ordinary person would not consider the archetypal cake to be intended to produce any such physiological effects, other perhaps than a mild sugar rush and increased energy for a period.

(g) On the other hand, the Tribunal is satisfied that the ordinary person would consider the products in this case to be intended to produce physiological effects, namely speedier muscle recovery after exercise, and growth of muscle mass. This is due primarily to the high protein content, an ingredient not normally associated with cakes. The wrappers of some of the products contain statements such as that the products "can contribute to the growth of muscle mass", or that they contain "High protein for muscle growth and mass gains", or that they "help build lean muscle". The hearing bundle contains pages from the Sports Direct website advertising one of the products, stating that it "can be taken straight after a workout to provide immediate benefits and help with your recuperation". Another page from a sports nutrition website advertises one of the products as having "a healthy supply of protein" that "provide[s] you with the perfect snack to support your training goals". Another website advertises one of the products as suitable for "hard gainers or any athlete undertaking the bulk phase of their nutritional plan". The archetypal cake would not be considered suitable for these functions. On the contrary, the ordinary person would be aware that consumption of cake risks increasing body mass in the form of additional fat, rather than additional muscle.

(4) *Marketing and markets*:

(a) All of the products in this case were originally targeted at consumers in the sport nutrition category, and the brands were affiliated to sports nutrition (OE Blake).

(b) Nevertheless, Mr Blake said that in the last 7 years or so, consumer trends had changed, and that the products of the kind in this case were now seen by many simply as a healthier version of the traditional flapjack. The Tribunal cannot give significant weight to this evidence. Mr Blake said that he was not involved in the marketing of the products, and could not say what was the marketing strategy (OE Blake). He accepted that anyone under 18 would be unlikely to consume the bars, but said that anyone over the age of 20 might potentially do so, either for sports nutrition purposes, or simply for a healthier lifestyle option, yet without identifying with any precision to what extent consumers did so for the latter purpose.

(c) There is in fact no real evidence before the Tribunal as to the extent to which, during the VAT periods concerned, the products in this case were marketed to and consumed by the sports nutrition market, and to what extent they were marketed to and consumed by the general public as a healthier lifestyle option. Mr Blake made a few general comments in oral evidence, but did not indicate the basis for his knowledge or provide specific details. He said that few were sold in gyms, and that a large amount were sold in mainstream outlets such as Boots and Tescos, or online via Amazon. However, he did not give precise figures, and did not indicate in which sections of these mainstream businesses the products were placed. For instance, there is no evidence that they were typically placed in the cake sections of such

businesses, alongside other products specifically labelled as cakes. There is, however, some evidence of them being sold on specialist sport nutrition websites, and on the Ocado website in the category of "health and medicines—sports nutrition" (see below).

(5) *Packaging and name*:

(a) Although the name given to a product is a factor to which limited weight can be given, the Tribunal notes that the word "cake" does not appear on the wrapping of any of the products in this case. There is no evidence that any of them have ever been referred to as "cakes" outside the context of this Tribunal appeal and the HMRC enquiry leading up to it. For instance, there is no evidence that the word "cake" appeared in any of the design briefs for any of the products (no design briefs having been put in evidence), or in any of the marketing for the product. A page from the Ocado website shows that one of the products is listed in three different sub-categories in its "health and medicines—sports nutrition" category, namely the sub-categories "bars & snacks", "mass & strength—bars & snacks" and "everyday exercise—bars & snacks". On that webpage, it is listed in only one sub-category in the "bakery" category, namely the sub-category "bites & mini rolls—brownies & flapjacks—flapjacks". On other websites, as on their wrapping, the products are also referred to as "flapjacks" and/or "bars", but not as "cakes". Mr Blake has referred to them multiple times as "flapjack bars" (WS Blake).

(b) The word "protein" features prominently on the wrapping of most of the products, often as part of the name of the product (eg, "Pro Flapjack High Protein Oat Bar", "Myprotein Oats & Whey Flapjack", "Lucozade Sport Elite Protein and Chocolate Bar", "High Protein Flapjack", "Premium Protein Flapjack", "PhD Protein Flapjack", "Matrix High Protein Flapjack"). Some have a prominent statement on the front of the wrapper making claims about the amount of protein contained in the product (eg, "18g protein", "protein 21g", "21g protein per bar", "High Protein, Healthy Energy, Great Taste! 18g of High Quality Protein!", "High protein for muscle growth and mass gains / Creatine to aid high-intensity performance", "24g Protein", "18g protein per flapjack to help build lean muscle", "Over 17g of premium protein / Contributes to the growth & maintenance of muscle mass", "30 g protein", "7+g protein".

(c) The claims on the wrappers about the protein content were considered important (OE Blake). Indeed, the Tribunal is satisfied from the matters above that the high protein content was considered to be the major feature of the products, which enabled them to perform the specific functions of speeding muscle recovery after exercise and promoting muscle growth (for instance, some wrappers contain statements that the products are "to increase your daily protein intake").

(d) The Tribunal is satisfied that the ordinary person would consider that the very purpose of the products in this case is to achieve the ingestion by the consumer of a significant quantity of protein. The ordinary person would not consider this to be the purpose of a cake.

(e) It is accepted by the Appellant that all of the products were originally targeted at consumers in the sport nutrition category (see (4)(a) above). There is

insufficient evidence that this has changed significantly, and on the basis of the evidence before it, the Tribunal is not satisfied that any change in this respect has been significant.

61. It is not in dispute that the products in this case are confectionery within the meaning of Exempted Item 2 (paragraph 13 above). Counsel for the Appellant confirmed at the hearing that there is no contention that they are "biscuits". They therefore fall to be standard rated.

The input tax issue

62. The Appellant is not entitled to credit for input tax on the supply of the products made by GNIL to GNUK.

63. Even if it is assumed that GNIL had no contractual or other means of recovering from GNUK the unpaid VAT on those supplies, the Appellant could not recover the input tax deemed to have been paid by virtue of *Tulică* principles in the absence of a fully compliant VAT invoice issued by GNIL showing the correct amount of VAT paid in relation to those supplies (*Zipvit CA* at [116]-[117]). There is no suggestion that the Appellant has such invoices.

64. The appeal is therefore dismissed in relation to the input tax issue.

65. For completeness, the Tribunal adds that it does not find it to be established on the evidence that GNIL has no means of recovering the input tax from GNUK, or that it had no means of doing so at the time of the HMRC decision under appeal. The burden of proof would be on the Appellant to establish this, not on HMRC to establish the contrary. The Appellant has produced a sales and distribution agreement between GNIL and GNUK, which appears to contain no reference to VAT. However, that of itself is not enough to discharge the burden of proof. There is no evidence that this one contract was necessarily the sole document governing relations between GNIL and GNUK at the relevant time. If it was, witness evidence could have been provided to establish that this is the case.

66. If GNIL could have recovered the unpaid VAT from GNUK, then *Tulică* would not apply. Rather, the reasoning in *Zipvit CJEU* would apply. The invoices issued by GNIL to GNUK indicated that the supplies were treated as zero rated, so no part of the sale price could be treated as VAT. Rather, the VAT on the sales remains unpaid. The Appellant cannot claim a credit for input tax in respect of VAT that it has not paid. It would be immaterial that HMRC are now out of time to issue an assessment to GNIL, or (if it were so) that GNIL has since become time barred from asserting against GNUK a claim for payment of the VAT.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

67. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

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