



Neutral Citation: [2024] UKFTT 31 (TC)

Case Number: TC09024

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

London

Appeal reference: TC/2022/02283

VAT – snack foods – whether standard rated by Note 5, Group 1, Part II Schedule 8 VATA 1994 – whether products made from the potato or potato starch – yes – whether similar to potato crisps – yes – whether breach of fiscal neutrality – no – appeal dismissed

Heard on: 8 June 2023

Judgment date: 10 January 2024

Before

**TRIBUNAL JUDGE ANNE FAIRPO
SONIA GABLE**

Between

WALKERS SNACK FOODS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Mr Schofield, of counsel, instructed by Grant Thornton

For the Respondents: Ms McGowan of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

Introduction

1. This is an appeal against a decision by the respondents (HMRC) of 4 June 2021 that certain products sold by the appellants (Walkers) are standard rated for VAT purposes.
2. The products which are the subject of this appeal are called “Sensations Poppadoms” and they are available in two flavours: Lime & Coriander Chutney and Mango & Red Chilli Chutney. There was no distinction between the flavours for the purposes of this appeal and so the products are collectively referred to as “the products” in this decision.
3. Walkers contend that the products should be zero-rated for VAT purposes on the basis that they fall within Item 1 of Group 1 of Part II to Schedule 8 VAT, being “food of a kind used for human consumption” and that they do not fall within any of the excepted items in that Group. Walkers also contend that the products should be zero-rated under the principle of fiscal neutrality.
4. HMRC contend that the products fall within excepted item 5 of Group I, because they are “products [similar to potato crisps, potato sticks, potato puffs] made from the potato, or from potato flour, or from potato starch” and are “packaged for human consumption without further preparation”. HMRC contend that it would breach the principle of fiscal neutrality to treat the products as zero-rated.

Relevant law

5. It was agreed that the only question for this tribunal was whether the products fell within Note 5, of Group I of Part II of Schedule 8 of VATA 1994 (‘Note 5’).
6. Note 5 provides that the following food items will be standard-rated items for VAT purposes:

“Any of the following when packaged for human consumption without further preparation, namely, potato crisps, potato sticks, potato puffs, and similar products made from the potato, or from potato flour, or from potato starch, and savoury food products obtained by the swelling of cereals or cereal products; and salted or roasted nuts other than nuts in shell.”

7. It was agreed that the products were not specifically “potato crisps, potato sticks, potato puffs”; the dispute is as to whether or not the products are “made from the potato, or from potato flour, or from potato starch” and whether they are “similar products”.

Packaged for human consumption without further preparation

8. Walkers initially argued that the products were designed to be used with dips, chutneys and pickles, and as a side with a meal. On this basis, they contended that the products required further preparation before consumption and so did not fall within Note 5.
9. In the hearing, Walkers accepted that there was nothing on the consumer packaging that stated that any preparation was required. It was agreed that the packaging would be required to state any such necessary preparation. We also noted that Walkers’ own promotional material showed people eating the product directly from the package, without any dips etc, and without a meal. On that basis, and in the light of case law on ‘preparation’ in this context, Walkers agreed that they were no longer relying on this argument.
10. We find therefore that the products are packaged for human consumption without further preparation.

Potato content of the products

11. We were provided with a detailed list of the ingredients of the products. The relevant ingredients of the two flavours of the products are slightly different:

(1) Lime & Coriander flavour: Sunflower Oil (22.09%), Potato Granules (17.98%), Potato Starch (17.98%), Gram Flour (14.38%), Rice Flour (14.38%), Flavouring (6%), Modified Potato Starch (4.31%)

(2) Mango & Chilli flavour: Sunflower Oil (21.60%), Potato Granules (17.60%), Potato Starch (17.60%), Gram Flour (14.08%), Rice Flour (14.08%), Flavouring (8%), Modified Potato Starch (4.22%)

12. Broadly speaking, however, the two flavours contain 17.5-18% potato granules, 17.5-18% potato starch and approximately 4.25% modified potato starch.

13. We noted that the consumer packaging for the products did not include the modified potato starch in the ingredients list and that it also rounded down the amounts of potato granules and potato starch to the nearest whole number.

14. Walkers' submissions as to the potato content of the products were apparently based on the ingredients shown on the packaging and so they contended that the products had at most approximately 34% potato-derived ingredients, being the potato granules and potato starch. Walkers submitted that this was an amount far lower than the potato content of potato crisps, sticks and puffs.

15. Walkers contended that Note 5 does not include potato granules in determining whether a foodstuff is within scope as it refers only to products "made from the potato, or from potato flour, or from potato starch". Walkers contended that only these three items should be taken into account. If anything derived from potato was sufficient to bring a product within Note 5 then there would be redundancy in the words used, and so it was submitted that the phrase should be strictly interpreted. On that basis, Walkers submitted that the products should be regarded as being approximately 17% potato for the purposes of VAT. Walkers made no submissions as to why the modified potato starch content should be ignored when considering the potato content of the products.

16. HMRC contended that both potato granules and modified potato starch should be included when considering the potato content of the products. They submitted that witness evidence included confirmation that potato granules are pre-cooked dehydrated potatoes and so should be considered to be within the term "the potato" for the purposes of Item 5.

17. Note 5 does not specifically refer to potato granules. However, the witness evidence was that potato granules are made from potatoes which are cooked and then dehydrated. They consist of "whole [potato] tissue cells or small aggregates of cells". Potato starch, in contrast, was stated to be produced by separating starch grains from destroyed potato cells and then drying the resulting starch. Given that the evidence was that potato granules contain whole tissue cells, we consider that potato granules are a cooked and dried form of the potato.

18. We therefore find that the potato granules are not a substance "derived from potato" as contended by Walkers but instead should be regarded as being within the term "the potato" for the purposes of Note 5. We note also that the statute does not state that only ingredients listed on consumer packaging should be taken into consideration.

19. We do not agree that the phrase "made from the potato, or from potato flour, or from potato starch" should be as strictly interpreted as Walkers contend. Given the purpose of Note 5 which we consider is clearly intended to catch products with a significant potato-based content which are similar to crisps, sticks and puffs, and in the context of continuing advances

in food technology since those terms were included in purchase tax legislation in 1969, it seems to us that it would be inappropriate to limit interpretation in this way. However, as we find that potato granules are “the potato” in this context, we are not required to conclude that the statute should be interpreted in such a limited manner in this case.

20. Walkers contended that the gram flour content should be considered the starting point when considering what the product is made from, submitting that it was the most recognisable ingredient from a taste perspective. They submitted that the word “from” in “made from” could be considered to refer to a focal point rather than the proportion of the ingredient. They compared this to cider being described as made from apples, although the majority content is water.

21. HMRC contended that “made from” should be given a natural meaning, and that it was not possible to say that the products were not “made from” potato.

22. Although Walkers’ contentions are interesting, we found that the gram flour was not the most recognisable ingredient from a taste perspective and their own witness evidence was that the potato content was included in part to reduce the gram flavour. We considered that the products tasted primarily of the added flavouring and we did not consider that it was possible to distinguish the gram flour from the added flavouring. Obviously the products are not “made from” the added flavouring in any meaningful sense, but equally we cannot conclude from a taste perspective that they are made from gram flour. Whilst Walkers might want to emphasise the gram flour to connect the products with traditional poppadoms, we do not consider that the gram flour content means that the products are not “made from” the potato.

23. Having considered the evidence, we find that the products contain approximately 40% potato-derived ingredients (in the form of potato granules, potato starch and modified potato starch). We consider that the proportion of potato content is therefore significant in comparison with the other ingredients.

24. We note that the legislation refers to the potato content in the form “the potato ... or potato starch”. We consider it self-evident that the use of the word “or” in this context is not intended to exclude products which contain more than one of the potential potato-related ingredients; the purpose of the legislation is clearly to include products which have one or more substantial potato-related elements.

25. Given also the purpose of Note 5, we find that we should consider the potato-based ingredients in the aggregate in determining whether the product is “made from” those ingredients. That is, we find that the test is not whether the products are “made from the potato” or separately “made from potato starch” but whether the products are “made from” one or more of those potato-based ingredients.

26. We find that there is more than enough potato content for it to be reasonable to conclude that the products fall within the provision in Item 5 that relevant food be “made from the potato ... or from potato starch”, noting the comments in *Proctor & Gamble UK* [2009] EWCA Civ 407 (“*Pringles*”) at [33].

Similarity

How “similar to” should be assessed

27. Walkers contended that the Tribunal should assess the ordinary meaning of similarity as a matter of first principle, and that the assessment of similarity did not need a multifactorial assessment.

28. In that context, they submitted that the ordinary person on the street (or as a matter of common sense) would appreciate that poppadoms are not crisps or similar products even if

there were factors under closer examination that might indicate similarity. They submitted that the ordinary consumer would not confuse or mistake a potato crisp, stick or puff for one of the products under appeal. They also noted that HMRC’s website distinguishes between crisps and poppadoms.

29. HMRC contended that a multifactorial assessment was required, that the term “similar to” needed to be considered into comparison with the specified potato products and not in comparison with non-potato products.

30. We note the comments of the Court of Appeal in *Pringles* (at [24]) that “similarity involves a question of degree and a multifactorial assessment of all the factors”. The Court also noted (at [19]) that “it is not incumbent on the Tribunal in making its multifactorial assessment not only to identify each and every aspect of similarity and dissimilarity ... but to go on and spell out item by item how each was weighed as if it were using a real scientist’s balance. In the end it was a matter of overall impression”. We further note that this impression required an informed impression. *Pringles* noted (at [21]) that “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”.

31. We find that a multifactorial assessment is required. Walkers’ submissions are interesting but the question of whether traditional poppadoms are, or are not, similar to potato crisps is not relevant to this appeal. The question posed by statute is whether the products which are the subject of this appeal are similar to potato crisps, not whether (or the extent to which) they are similar to anything else. It is not a binary test; a product may be similar to many things but the only similarity that matters in this context is whether it is similar to a potato crisp, stick or puff. We note also that a product might be similar to another foodstuff without being mistaken for that foodstuff – the items do not need to be identical to meet the test in Note 5.

32. Walkers’ comment about HMRC’s website is somewhat disingenuous: the lists compiled by HMRC do not have the force of law and, as already noted, traditional poppadoms that do not contain potato cannot fall within Note 5 regardless of any potential similarity to potato crisps.

33. Walkers also contended that the HMRC website allows an Indian food, “far fars”, which they contended were manufactured in a similar way to the products, to be zero-rated although they are primarily made of potato starch. However, the products under appeal are not “far fars” and, as already noted, the contents of HMRC’s manuals are not (in this context) binding on us.

Multifactorial assessment

Marketing

34. The marketing material provided to the Tribunal showed the products being eaten in settings which we consider are not dissimilar to those in which one would expect to find potato crisps: for example, being eaten by an individual from a bowl in front of a computer; being shared from a bowl with a takeaway meal, on a table with a notebook and pen, and cutlery, together with what may be a drink in a glass.

35. The appellants suggested that this latter example showed the product as being closer to a poppadom, being intended to be eaten with an Indian-style meal. However, the image in question shows an unopened takeaway foil box with a cardboard lid. It is not possible to tell what type of cuisine is involved and we note that potato crisps may also be eaten with a meal.

36. The other marketing images focussed on the flavours of the products and, in that context, we consider they are not distinguishable from advertising of potato crisps which may also focus on the flavours involved.

37. The products are sold in large ('sharing') bags and are no longer sold in smaller individual portion bags. We note that potato crisps are sold in similar sized bags, although many are also sold in individual portion bags and/or multipacks of smaller bags.

38. The packaging was consistent with other products in the same range produced by the appellants, including potato crisps. The appellants contended that the font used, which they described as "evocative of Indian text" is different from that used on the potato crisp packaging in that range. It is different but we consider that it does not particularly distinguish the products from the potato crisps in the same range – the overarching brand ("Sensations") is considerably more prominent on the packaging. The style (a bright image on the left hand side, against a principal colour, with the word Sensations across the packaging and other details in smaller letters) is consistent with the rest of the Sensations range, which includes potato crisps and nuts. As such, we do not consider that the packaging offers any particular distinction to the products.

39. The appellants argued that the products were called "poppadoms, unlike potato crisps". We consider that this simply means that the word "poppadom" is not a protected term. Nominative determinism is not a characteristic of snack foods: calling a snack food "Hula Hoops" does not mean that one could twirl that product around one's midriff, nor is "Monster Munch" generally reserved as a food for monsters. For the avoidance of doubt, neither of these has been used as a comparator for the products – we refer only to their names in this context. We do not consider that it is appropriate to give any weight to the name of the products in considering whether the products are similar to potato crisps, given the general freedom (within the constraints of trademark law) for manufacturers to choose the name of their product.

40. The evidence was that the products are primarily sold in the snack food aisle of retailers, placed with potato crisps and similar snacks. The appellants stated that they had no control over where the product was placed in a store, as that was a choice made by each individual chain or shop. In this context, we consider that the retailers clearly consider the product to be a snack food, in the same way as potato crisps etc, rather than something which would be more commonly eaten as an element of a meal.

41. Walkers contended that the products were designed to complement Indian meals and that potato crisps are unlikely to be dipped or eaten as an accompaniment to a meal; however, their own marketing products (as set out above) show the product being eaten alone and they are clearly considered by supermarkets to be more of a snack food than a meal accompaniment. There is also nothing on the packaging that indicates that the products are primarily intended to be part of a meal rather than a snack food.

Appearance

42. The products are small, generally round, bite-sized objects. They are somewhat wavy, with small bubbles on the surface. Their colour is a pale yellow/orange depending on the flavour. Considering the comparators provided by the parties, we considered that they were visually similar to the potato crisps (particularly the Sensations balsamic vinegar & caramelised onion flavoured potato crisps), which were generally of a similar size and also somewhat wavy and had bubbled surfaces. The colour of the crisps was also generally similar. We note that colour of potato crisps will also vary with the flavours added; crisps with paprika or similar flavour will generally be more orange/red, for example, and so we do not consider any weight can be given to the colour.

43. Walkers contended that the products were a uniform size (due to the production process) whereas potato crisps varied in size because they were sliced from potatoes. As already noted, the test is similarity and not identity, and we did not consider that this was a significant difference.

44. The products were described as being shaped to make it easier to pick up chutney or dips, compared to potato crisps. In practice, we did not consider that they were significantly different to potato crisps with regard to their ability to convey dips etc, particularly given that we consider that there is a practical limit to the amount of dip or chutney that most people are likely to want to combine with the crunch of the conveyor product.

Flavour

45. The products tasted principally of the flavouring added to them; there are no unflavoured versions of the products. The appellants argued that the flavours were distinct from the types of flavours which were used for potato crisps but, in a world which contains crisps with flavours as diverse as hedgehog, haggis, sweet chilli, sour cream, and 'cheese & port', we are not convinced by the argument that there are any flavours which could be said to be distinct from those used for potato crisps.

Texture

46. The products are crunchy at the first bite; they then become somewhat softer thereafter although they did not dissolve completely in the mouth. We did not consider that they were significantly different to comparator potato crisps provided for us to test.

Manufacturing process

47. Generally, potato crisps are made by deep-frying sliced potatoes. It was not disputed that the products are made by deep-frying a dough pellet. We do not attach any particular weight to this difference as the statute clearly envisages that a product made from dough can be similar to a potato crisp, given that products made of potato flour or potato starch will involve the use of a dough.

Ingredients

48. The products obviously contain potato; this appeal would not exist if there were not some form of potato in the ingredients list. We agree that this is not determinative of whether the products are similar to potato crisps. We have concluded, above, that there is enough potato content for the products to be "made from" the potato or potato starch.

49. The second main ingredient in the products is oil (22%); oil is also usually the second main ingredient in potato crisps (unsurprising, given that both involve deep frying).

50. The witness evidence was that the potato granules and potato starch supported the structure of the products in the pellet manufacturing process and the granules also provided a crunchy texture to the finished product. The gram flour also provided crunch. Rice flour was added to provide a lighter texture to the finished product. The ratio of ingredients determined the texture of the finished products. Walkers argued that the potato content was included because it was cheaper than gram flour, and they had established contacts and economies of scale for potato supply and production. The potato inclusion was therefore for commercial reasons, and they contended that this was not the same as for potato crisps. However, the witness evidence stated that potato was also used to reduce the taste of the gram flour and provide a more neutral flavour to the products.

51. Walkers nevertheless argued that the gram flour included distinguished the products from potato crisps, as it was used to provide a distinct flavour to the product. However, we could not distinguish any such gram flavour from the added flavouring.

Other factors

52. Walkers also provided in evidence the results of a survey carried out by PepsiCo (owners of Walkers). We do not consider that these were particularly helpful: the test is not "what does

the general public think in a survey”, but also the information did not clearly set out what questions were asked nor the context in which they were asked.

53. Firstly, 58% answered “any poppadoms” to the question “what would you buy instead?”. However, this is clearly an incomplete question (presumably instead of the products under appeal, but in what context?), and the answers added up to considerably more than 100% - indeed, the survey results showed that 84% of respondents would apparently buy some form of potato crisp (Sensations crisps, Pringles, Walkers crisps) instead of whatever was being offered to them as an unavailable option.

54. The second survey question asked whether people agreed that the products were poppadoms. It was submitted that 78% agreed that the product was a poppadom. In fact, 32% agreed completely, and 45% agreed somewhat. As already noted, the test that we are asked to apply is not binary. The products may indeed be like poppadoms to a greater or lesser extent, but that does not prevent them from also being similar to potato crisps.

55. Walkers argued and produced evidence that, in India, poppadoms may be made with potato in some regions. This was in support of their argument that the Tribunal should consider that the use of potato ingredients in these products did not mean that they had to be within Note 5, as poppadoms could have potato ingredients. The evidence that there are recipes for poppadoms in India which include potato products was not disputed.

56. The fact that a poppadom made to a traditional recipe from gram flour without potato is zero-rated for VAT purposes does not mean that a poppadom made to a traditional recipe which includes potato must also be zero-rated for VAT purposes (although it should be noted that we make no findings in that respect, as we were not asked to consider such items). The former is not excluded because it is a “poppadom” but, instead, because it contains no potato. In that context, we note Toulson LJ, in Pringles at [54] “The words “made from the potato, or from potato flour, or from potato starch” qualify the preceding words “similar products” and exclude savoury snacks made from other vegetables, such as tortilla chips (which are made from maize)”.

Conclusion as to similarity

57. Balancing all of the factors, on balance, we consider that the products are similar to potato crisps. They are packaged and sold in a manner similar to potato crisps. Removing them from their packaging, we consider that their appearance and texture is similar to potato crisps. Given the predominance of the flavouring, we consider that taste is not a distinguishing factor.

58. Whilst the manufacturing process is different, we note that the statute envisages similarity encompassing products made of potato starch and flour which cannot be made in the same way as sliced potato crisps and, as such, we give little weight to this distinction.

59. Noting the contention that the potato content was included to make the product cheaper and that this was not true of potato crisps, we do not consider that this is a sufficient distinction to outweigh the overall perception of the products as being similar to potato crisps, particularly given the witness evidence that the potato content was also used to provide a more neutral flavour in preference to the flavour of the gram flour.

Fiscal neutrality

60. Walkers contended that the CJEU decision in the joined cases C-259/10 and C-260/10 *The Rank Group Plc v HMRC* was that supplies will be treated as similar when they meet the same needs from the point of view of the customer and when the differences between them do not have a significant influence on the decision of the average customer. If goods are the same or similar, competition and distortion of the relevant market can be presumed.

61. In this context, they contended that fiscal neutrality should be used as a method of interpretation to ensure that the UK does not discriminate between objectively similar supplies and that, as poppadoms are zero-rated, the products should also be zero-rated.

62. HMRC contended that the principle of fiscal neutrality had not been breached, as other supplies described as “poppadoms” were not objectively similar, as they were not made of potato.

63. Given the evidence as to the attitude of retailers to the products and the inconclusiveness of the survey responses, we do not consider that the appellants have established that the products are objectively similar to poppadoms in the manner envisaged by *The Rank Group* decision.

64. We do not consider that there is any breach of fiscal neutrality in concluding that the products are within Note 5.

Decision

65. We note the words of Jacob LJ in *Pringles* at [13] “although it is convenient to ask separately whether Pringles are “similar” to potato crisps etc and whether they are “made from potato”, one must also take into account the composite nature of the question.”

66. We also remind ourselves that, at [14], Jacob LJ observed that “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.”

67. The arguments about similarity included comparisons to poppadoms, and reference was made to HMRC guidelines which indicate that poppadoms will be zero-rated. However, the use of the word “poppadom” is something of a red herring (to badly mix foodstuffs). The title given to a foodstuff is not what determines its VAT rating – what matters, in this particular case, is whether it is similar to a potato crisp and is made from potato.

68. Having concluded that the products are made from the potato and potato starch, it is therefore irrelevant whether the products are similar to poppadoms. What matters is whether they are similar to potato crisps. For the reasons set out above, we consider that they are. We find that they are therefore within Note 5 and standard rated for VAT purposes. We also find that there is no breach of fiscal neutrality in treating the products as standard-rated.

69. The appeal is therefore dismissed.

Right to apply for permission to appeal

70. 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 FAIRPO
TRIBUNAL JUDGE**

Release date: 10th JANUARY 2024