



Neutral Citation: [2025] UKFTT 24 (TC)

Case Number: TC09396

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

At Taylor House, London

Appeal reference: TC/2023/07672

*VAT – Food – whether products standard rated as “sports drinks” – appeal allowed*

**Heard on:** 13 and 14 November 2024

**Judgment date:** 9 January 2025

**Before**

**TRIBUNAL JUDGE ANNE REDSTON  
MR MOHAMMED FAROOQ**

**Between**

**GLOBAL BY NATURE LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR  
HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Max Schofield of Counsel, instructed by Grant Thornton LLP

For the Respondents: Edward Hellier of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. The appellant, Global by Nature Ltd (“GBN”), imports, distributes and sells organic products in the UK. These include powdered vegan food supplements under the brands “Sunwarrior” and “Hemple”.

2. On 16 February 2021, Grant Thornton LLP (“Grant Thornton”) filed an Error Correction Notification (“ECN”) on behalf of GBN, requesting a repayment of output tax overdeclared between 1 October 2016 and 30 September 2020 totalling £1,246,566.08, on the basis that certain products, including those sold under the Sunwarrior and Hemple brands, were properly zero-rated as food.

3. On 20 October 2021, Officer Richard Shortland issued a decision letter rejecting the ECN in relation several of the products. On 20 April 2022, Grant Thornton submitted a revised ECN relating only to the Sunwarrior and Hemple products, totalling £809,739. On 1 August 2022, Officer Shortland agreed that the Hemple products were zero-rated, but held that the Sunwarrior products were “sports drinks” and therefore standard rated under excepted Item 4A at Group 1 of Schedule 8 to the Value Added Taxes Act 1994 (“VATA”). This reads:

“Sports drinks that are advertised or marketed as products designed to enhance physical performance, accelerate recovery after exercise or build bulk, and other similar drinks, including (in either case) syrups, concentrates, essences, powders, crystals or other products for the preparation of such drinks.”

4. Officer Shortland’s decision was upheld on statutory review, and on 17 March 2023, GBN appealed to the Tribunal. The Notice of Appeal said that the VAT in dispute was £798,855.87 (HMRC’s Statement of Case continues to refer to a figure of £809,739, but this appears to be an error).

5. There were three Sunwarrior products in issue (together, “the Products”):

- (1) Sunwarrior Classic Protein (“Classic”);
- (2) Sunwarrior Protein Classic Plus (“Plus”); and
- (3) Sunwarrior Protein Warrior Blend (“Warrior”).

6. Although there have been many appeals before courts and tribunals about the VAT status of various foodstuffs, this was the first which turned on the meaning and effect of Item 4A. We were therefore particularly grateful for the helpful submissions of Mr Schofield, who represented GBN, and Mr Hellier, who represented HMRC.

7. Having considered the law, the evidence and the parties’ submissions, we decided that the Products did not come within Item 4A for the following reasons:

- (1) Item 4A applied to certain “sports drinks”.
- (2) The term “sports drinks” refers to drinks which contain a significant quantity of carbohydrate, together with salts (such as sodium and potassium), designed to replenish the body after exercise.
- (3) The Products contained a maximum of 5% carbohydrate and were therefore not sports drinks.

8. We also considered the alternative approach to the statutory interpretation of Item 4A put forward by HMRC. Having done so, we decided that even on that alternative reading, Classic and Plus would be zero-rated, although Warrior would be standard rated.

## THE EVIDENCE

9. The Tribunal was provided with a Bundle of documents which ran to 628 pages, including a witness statement from Mr Andrew Lee, who at all relevant times was GBN's Finance Director. He was cross-examined by Mr Hellier and re-examined by Mr Schofield. We found him to be an entirely credible and honest witness.

10. Attached to his witness statement were over 250 pages of evidence, including pictures of the Products, pictures of other products, marketing material and downloads from various webpages. He also exhibited a copy of Grant Thornton's letter attaching the revised ECN, which included further pictures and other material. Mr Hellier did not submit that any of this embedded material should not be accepted as evidence, and we admitted it. Grant Thornton's letter also included stills from two videos. As HMRC had been provided with links to those videos, and as Mr Hellier did not submit that the stills were unrepresentative, we admitted those too.

11. Further marketing material and related evidence were incorporated in Officer Shortland's detailed decision letter of 20 October 2021; Mr Schofield did not submit that this embedded material should not be accepted as evidence, and we admitted it. However, we have not relied on some of the extracts and citations in that letter for one or both of the following reasons:

(1) we were unable to establish their source, for example whether they were from (a) the Sunwarrior or GBN websites or (b) from a third party website over which neither Sunwarrior nor GBN had control; and/or

(2) it was unclear to which of the Products the extract or citation related.

12. Various marketing materials and other evidence in the Bundle had been downloaded or were otherwise dated after the relevant period, but neither party submitted that any of that evidence did not accurately reflect the position during that period, and we have taken that to be the position.

## THE STATUTE

13. VATA s 30 provides for the zero-rating of goods "of a description... specified in Schedule 8". Group 1 of Sch 8 is headed "Food", which is defined as follows:

"The supply of anything comprised in the general items set out below, except—

(a) a supply in the course of catering; and

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

14. Note (1) to Schedule 8 provides that "'Food' includes drink". It was common ground that the Products were food. As set out at the beginning of this decision, excepted Item 4A reads:

"Sports drinks that are advertised or marketed as products designed to enhance physical performance, accelerate recovery after exercise or build bulk, and other similar drinks, including (in either case) syrups, concentrates, essences, powders, crystals or other products for the preparation of such drinks."

15. Item 4A was introduced by FA 2012 s 196, Sch 26, paras 1 and 2 with effect from 1 October 2012. We discuss the reasons for its introduction later in our decision, see §35ff below.

## Authorities on the principles of statutory interpretation

16. In *R (Project for the Registration of Children as British Citizens) v SSHD* [2022] UKSC 3 (“*PRCBC*”), Lord Hodge, giving the leading judgment with which all members of the Court agreed, summarised the process of statutory interpretation as follows:

“[29] The courts in conducting statutory interpretation are “seeking the meaning of the words which Parliament used”: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:

“Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.”

(*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.

There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:

“Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.”

[30] External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity...”

17. In *Centrica Overseas Holdings v HMRC* [2024] UKSC 25 (“*Centrica*”) at [48], Lady Simler, giving the only judgment with which other members of the Court agreed, endorsed that approach, and continued at [49]:

“As Lord Bingham explained in *Quintavalle*<sup>1</sup>, legislation is usually enacted to make some change, or address some problem, and the court’s task, within the permissible bounds of interpretation, is to give effect to that purpose (see para 8). He also approved as authoritative that part of the dissenting speech of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 at 822, where Lord Wilberforce said:

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<sup>1</sup> *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13

‘In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament’s policy or intention is directed to that state of affairs.’”

### STATUTORY INTERPRETATION

18. We first consider the meaning of the words as used in Item 4A, and then the pre-enacting history.

#### THE MEANING OF THE WORDS

19. As is clear from *PRCBC*, in order to establish which products come within Item 4A, we must determine “the meaning of the words which Parliament used”.

#### HMRC’s position

20. HMRC’s position, as set out in their Statement of Case, was that:

“Item 4A...states that food supplies will be considered to be sports or similar drinks due to the way that they have been advertised and marketed. In this respect, the Respondents contend that it is not the primary function of the Sunwarrior Protein Powder Products that determines their VAT rating, but the way they have been advertised and marketed.”

21. This reflected Officer Shortland’s position: he said:

“HMRC’s opinion is these products are advertised or marketed as products designed to enhance physical performance, accelerate recovery after exercise or build bulk or a similar drink falling within Excepted Item 4A”

22. HMRC’s review letter upheld Officer Shortland’s decision on the basis that “excepted item 4A does not rely on the primary function but rather how the product is advertised and marketed”.

23. Mr Hellier submitted that Item 4A had to be read as a whole, or, as he put it, “articulated”, so that a product would fall within the exception if it was:

(1) a “drink” which was “advertised or marketed” as “designed” to do one or more of the following, in a sports context:

- (a) enhance physical performance;
- (b) accelerate recovery after exercise; and/or
- (c) build bulk;

(2) or was a “similar drink” to one which fell within the above statutory description.

24. HMRC’s position was therefore that the term “sports drinks” was *defined* by the second part of the statutory phrase, so that all drinks advertised or marketed as designed to enhance physical performance, accelerate recovery after exercise or build bulk were “sports drinks” as long as there was a reference in the advertising and marketing to “sports”.

#### GBN’s position

25. Mr Schofield submitted that a product would only fall within Item 4A if it was:

- (1) a “sports drink”
- (2) which was “advertised or marketed” as “designed to enhance physical performance, accelerate recovery after exercise or build bulk”; or
- (3) was a “similar drink”.

26. In other words, Item 4A encompassed only **certain** sports drinks, namely those which were advertised or marketed in the way prescribed (or drinks which were similar to those types of sports drinks). This was, he said, clear from the words of the statute which read (his emphasis):

“Sports drinks **that are** advertised or marketed as products designed to enhance physical performance, accelerate recovery after exercise or build bulk...”

27. It was therefore first necessary to establish whether a product was a “sports drink”, and if it was, the second stage was to decide whether it was advertised or marketed in the way set out in the remainder of the statutory provision. If the product was not a “sports drink”, there was no need to consider the remaining words of the exception.

28. Mr Schofield emphasised that HMRC’s reading of the provision ignored the context and weight to be given to the word “sports”. If HMRC were to be correct, Item 4A would have same meaning if the word “sports” were absent, so the provision would then read:

“Drinks that are advertised or marketed as products designed to enhance physical performance, accelerate recovery after exercise or build bulk...”

29. He submitted that HMRC’s reading therefore conflicted with the statutory presumption that every word in an enactment is to be given meaning, see *Bennion, Bailey and Norbury on Statutory Interpretation* at 21.2:

“Given the presumption that the legislature does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded.”

## Discussion

30. We agree with Mr Schofield that Item 4A does not set out a definition of a “sports drink”. Had the statutory phrase been definitional it might have been drafted as follows:

“Sports drinks, **being drinks** that are advertised or marketed as products designed to enhance physical performance, accelerate recovery after exercise or build bulk.”

31. Or possibly as:

“Sports drinks, **namely drinks** that are advertised or marketed as products designed to enhance physical performance, accelerate recovery after exercise or build bulk...”

32. However, the Parliamentary draftsman did not use either form of words, or any similar phraseology. We also agree with Mr Schofield that HMRC’s construction essentially ignores the word “sports”, and that cannot be correct: Item 4A excludes “sports drinks”, not “drinks which have the following characteristics”.

33. Further support for what we have called Mr Schofield’s two stage test comes from the inclusion in Item 4A of “other similar drinks”. Assuming his reading is correct, a “similar drink” is one which is both (a) a “sports drink”, and (b) similar to other products which are “advertised or marketed as products designed to enhance physical performance [etc]”. The two stage test therefore gives a straightforward and comprehensible meaning to the term “similar drinks”.

34. However, were HMRC to be correct that “sports drinks” are drinks “advertised or marketed as products designed to enhance physical performance [etc]”, it is difficult to understand what is meant by “other similar drinks”. If a “sports drink” is *defined* by reference

to its marketing, how can a product which is not so marketed be “similar” to a “sports drink”? We asked this question during the hearing but did not obtain a satisfactory response.

#### **THE PRE-ENACTING HISTORY AND EXTERNAL AIDS**

35. Further support for Mr Schofield’s reading comes from the pre-enacting history, including by reference to admissible external aids, see *Centrica* and *PRCBC* cited above.

#### **The original legislative position**

36. The starting point is Items 3 and 4 of Group 1: both of these provisions have been included in the statute since the introduction of VAT:

“3. Beverages chargeable with any duty of excise specifically charged on spirits, beer, wine or made-wine and preparations thereof.

4. Other beverages<sup>2</sup> (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages.”

#### **Case law and guidance**

37. In *Bioconcepts Ltd v C & E Comrs* [1993] VAT Decision 11287 (“*Bioconcepts*”), the VAT Tribunal held that a dietary supplement called Bio-Light was not a “beverage”, because a “beverage” was a drink which was consumed “to increase bodily liquid levels, to slake the thirst, to fortify or to give pleasure”.

38. HMRC did not appeal *Bioconcepts*, and in 1994 issued guidance that most sports and athletics drinks were zero-rated because they were aimed at heightening athletic performance.

39. A subsequent VAT Tribunal found that a Ribena drink with added fibre was a “beverage” because it “could be drunk for pleasure...consumed to increase bodily fluids and to slake the thirst”, see *SmithKline Beecham plc v C & E Comrs* [1995] VAT Decision 13674.

40. Following concerns in the industry about distortion of competition, in 1997 HMRC, issued new guidance stating that sports drinks were closer to “Ribena juice and fibre” than to “Bio-Light” and so should be standard-rated. The guidance said:

“This is a growing market, with new types of products emerging aimed at the specific needs of those participating in different types of sports and athletics. These range from drinks aimed at replacing liquids lost during exercise, carbohydrate-rich powders designed to heighten athletic performance and protein powders for body builders who want to increase muscle mass or those who want to gain weight.”

41. The next relevant case was *SiS v C&E Comrs* [2000] VAT Decision 16555, which concerned supplements high in carbohydrates and/or creatin, a type of protein. The products were consumed before or after intense physical exercise “by the athletes, sportspersons and others who characteristically take them for nutritional purposes”. The Tribunal held that the products were not beverages, and observed:

“[Customs’] policy is flawed in failing to distinguish between ‘sports drinks’ that are in reality drinks, and ‘dietary integrators’ which happen to be made up as drinks. In our judgment, the latter will seldom if ever amount to beverages or products for the preparation of beverages.”

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<sup>2</sup> In FA 1973, Sch 4 and VATA 1983, Sch 5 the phrase was “manufactured beverages”; the word “manufactured” was deleted with effect from 1 December 1993 by the VAT (Beverages) Order 1993 (SI 1993 No. 2498).

## **Budget 2012 and related consultation**

42. In Budget 2012, the Government announced that it was going to introduce secondary legislation “to address long-standing VAT anomalies and loopholes”, including ensuring that “VAT will also apply, to the extent that it does not already do so, to...sports drinks”.

43. On the same day, 21 March 2012, HMRC issued a consultation document entitled “VAT: Addressing borderline anomalies” (“the Consultation”). This said that one of the measures being considered was to “tax sports nutrition drinks at the standard rate to ensure that all sports drinks receive the same tax treatment whether or not they are consumed for nutritional purposes”. The Consultation asked:

“Does the proposed legislation meet its objective of ensuring that sports nutrition drinks are taxed consistently with other sports drinks at the standard rate of VAT? If not, why not and what changes are needed?”

44. Under the heading “why do the current rules need changing”, the Consultation said:

“Despite their similarity to other standard-rated beverages, the courts have found some sports drinks not to be beverages because of their nutritional content and therefore zero-rated. This change ensures that all sports drinks are taxed in a similar way, ensuring that there is consistent treatment of sports drinks whether consumed for rehydration or nutritional purposes.”

45. Under the heading “what is the scope of the change”, the text said:

“The change will only affect ‘sports nutrition’ drinks that are currently treated as zero-rated and ensures that all sports drinks receive the same tax treatment (‘sports energy drinks’ for example are already standard-rated as beverages). The products affected exist pre-mixed in liquid form and also in powder form to be made up into a liquid by the consumer.

They are often marketed as supplying energy to enhance performance, accelerating recovery after exercise, providing energy, or building bulk and often contain creatine.

*Examples of products affected by the change include:* sports nutrition drinks such as carbohydrate drinks, protein drinks, creatine drinks, work-out recovery products, whether or not in powder form.

*Examples of products not affected by the change include:* meal replacement drinks for slimmers and invalids.”

## **The Explanatory Notes and the VAT Manual**

46. Item 4A was introduced into VATA by FA 2012, Sch 1. The relevant Explanatory Note said that the change had been made “to make it clear that certain sports drinks (as specified) are not included within the VAT zero rate”. Within the Explanatory Note, the Background Note explained:

“A number of anomalies have arisen along the borderlines of the VAT exemptions and the VAT zero rates, leading to loss of revenue, uncertainty for business and costs for HMRC.

In his Budget Statement of 21 March 2012, the Chancellor announced a number of changes to address some of these anomalies. This Schedule gives effect to those changes, taking into account responses received to an HMRC consultation on the draft legislation.”

47. HMRC’s VAT Food Manual at VFOOD7590 says that the final phrase “and other similar drinks” was included in the legislation following concerns that “some suppliers of sports nutrition drinks might change their advertising or marketing campaigns to gain an unfair



advantage”. Although the Manuals normally “set out HMRC’s view of the law rather than principles of law that are binding either on HMRC or the Tribunal”, see *Flix v HMRC* [2015] UKFTT 0558 (TC) at [61], endorsed in *Flix v HMRC* [2016] UKUT 301 (TCC) at [50], this passage does not have that purpose. Instead, it provides factual information about the drafting of Item 4A, a provision which was formulated “taking into account responses received to an HMRC consultation on the draft legislation”, see the Explanatory Notes cited at §46 above. It can therefore be regarded as an external aid which helps to identify the mischief to which this part of Item 4A was directed.

## Discussion

48. Mr Schofield submitted that the Red Book, the Consultation and the Explanatory Notes make it clear that Item 4A was not drafted in order to introduce a statutory definition of “sports drinks”, but instead to cover “certain” sports drinks, namely those which were not already standard rated as beverages.

49. We agree: this can be seen from the following (our emphases):

- (1) The Consultation identified the mischief as being that “the courts had found **some sports drinks** not to be beverages because of their nutritional content”.
- (2) To remedy that mischief the law was changed so that:
  - (a) “**sports nutrition drinks** are taxed consistently with **other sports drinks** at the standard rate of VAT” (the Consultation);
  - (b) “**all sports drinks** receive the same tax treatment whether or not they are consumed for nutritional purposes” (the Consultation); and
  - (c) “to make it clear that **certain sports drinks (as specified)** are not included within the VAT zero rate” (the Explanatory Notes).

50. Item 4A was thus aimed at those “sports drinks” which had hitherto been zero-rated to bring them into line with sports drinks which were already standard rated as beverages.

51. Further support can be found in the explanation given in VFOOD7590 for the words “other similar drinks”. This explains that the words “other similar drinks” were included because sports drinks which had been “designed to enhance physical performance, accelerate recovery after exercise or build bulk” would otherwise be able to retain zero-rating providing they were not advertised or marketed as such. That explanation cannot be reconciled with HMRC’s position that a sports drink is one which is defined by its advertising and marketing. It is instead consistent with Mr Schofield’s reading of the provision, namely that a “similar drink” is both (a) a “sports drink”, and (b) similar to other products which are “advertised or marketed as products designed to enhance physical performance [etc]”.

## WHAT IS A “SPORTS DRINK”

52. Since a product must be a “sports drink” to fall within Item 4A, the next question is “what is a ‘sports drink’? There is no definition in the legislation, and we considered the ordinary usage. GBN put forward numerous dictionary definitions of the term, including the following:

- (1) “a drink that consists mainly of water, electrolytes (such as sodium or potassium), and carbohydrates (such as sucrose or fructose) and that is designed to replenish those substances in the body during or after usually strenuous exercise” (Merriam-Webster);
- (2) “a type of cold drink that contains sugar and other ingredients that help you to get back energy lost through exercise” (Oxford Learners Dictionaries); and

(3) “a soft drink containing electrolytes such as sodium, potassium, and chloride, and a high percentage of sugar, designed to restore energy during or after sporting activity or strenuous exercise” (Oxford Languages Dictionary, used by Google).

(4) “a drink containing sugar and salts, etc designed to help replace fluid and energy lost through the physical exertion of sport” (Collins); the following example of usage is cited:

“*Sports drinks* such as Gatorade or Powerade should generally be avoided in favor of water unless you're doing an intense workout. That's because some sports drinks contain more than 30 grams of added sugar...and you may not need its carb- and electrolyte-heavy fuel if you're just going for a 45-minute easy ride”.

53. Mr Hellier did not submit that those definitions were incorrect, or put forward any alternatives. GBN also relied on the following examples of usage, none of which was challenged by Mr Hellier:

“sports drinks are designed to supplement the body's daily carbohydrate intake, and contain high levels of carbohydrate in order to provide maximum energy uptake...[they are] functional drinks specifically designed to help athletes and other active people hydrate before, during and after exercise” (British Soft Drinks Association (“BSDA”).

“Sports drinks are marketed as beverages that: replenish electrolytes lost during exercise, supply carbohydrates, prevent dehydration and sustain endurance capacity” (Canadian Paediatric Society Position Statement published in *Paediatrics & Child Health*, published by the Oxford University Press in 2017).

“Sports drinks typically contain carbohydrates from sugar sources ...carbohydrate content in the range of 5gm to 14g per 240ml/8oz serving is reported” (*ibid*).

54. All of these definitions and usages refer to “sports drinks” as containing carbohydrates. together with salts (such as sodium and potassium) which provide electrolytes. The BSDA says that the level of carbohydrate is “significant”, and the Oxford Languages Dictionary that they contain a “high percentage” of carbohydrates. Merriam-Webster defines sports drinks as consisting “mainly” of three ingredients, one of which is carbohydrate, and the example cited refers to “carb- and electrolyte-heavy fuel”. The Oxford Learners Dictionary and Collins both defines sports drinks by reference to their sugar and salt content.

55. Taking into account all of the above, we find that “sports drinks” contain a significant amount of carbohydrate (usually sugar). What is significant can be inferred from the Canadian Paediatric Society Position Statement, which referred to sports drinks as containing between 5gm and 14g of carbohydrate per serving<sup>3</sup>.

56. We were not provided with any evidence as to the level of salts within a “sports drink” and make no related finding.

### **Protein drinks?**

57. It was not part of HMRC’s case (even in the alternative) that a protein powder consumed by being mixed with water and drunk was a “sports drink”, and Mr Hellier did not make any submission to that effect.

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<sup>3</sup> We have taken the reference to a serving as consisting of 240ml or 8 ounces as being to a product consumed in liquid form, ie after water or other fluid is added to a powder and not to the dry weight of the powder.

58. Mr Hellier’s approach was also consistent with HMRC’s guidance in VFOOD2020, which says that HMRC’s policy department accepts (our emphasis):

“...that **powdered food supplements can be zero-rated** if the product:- has a nutritional content; and/or provides a significant dietary requirement (such as recommended daily fibre); and is consumed in a manner commonly associated with food, for example, it is mixed in with other foods as an ingredient...or **it is mixed with water and drunk** (as in the *Arthro Vite* case); and is not otherwise standard-rated (that is, as a preparation for making a beverage).”

59. The case referenced in that guidance is *Arthro Vite v C&E Commrs* [1997] VAT Decision 14836 (“*Arthro Vite*”), which concerned protein powders consumed as a drink. The VAT Tribunal decided they were zero-rated because they had a high nutritional value.

60. The documents in the Bundle show that HMRC’s position on protein powders is consistent with other usage: the NHS describes them as “protein powders, available as shakes”, not as “sports drinks”; Medical News Today used the terms “protein powders” and “protein shakes”, while the British Nutrition Foundation said that “many protein products exist on the market such as protein shakes, bars, balls and powders”. The dictionary definitions of “protein shake” were consistent with the usage in the documents provided to us:

(1) “A drink made by mixing protein powder (a powder containing a substance that makes the body grown and be strong) with milk or water” (Cambridge dictionary).

(2) “A blended drink resembling a milkshake that contains high levels of protein, typically drunk to help someone gain muscle or weight or increase their level of energy. (Oxford Languages Dictionary).

(3) “A beverage containing protein mixed with milk or water for the purposes of improved nutrition” (Wiktionary).

(4) “A drink that looks like a milkshake and contains a lot of protein” (Oxford Learners Dictionaries).

### Meaning of “sports drink”

61. For the reasons given above, we find that the ordinary meaning of the term “sports drinks” is a drink which contains a significant quantity of carbohydrate, usually sugar, together with salts (such as sodium and potassium) which provide electrolytes. That is a finding of fact, see *Brutus v Cozens* [1973] AC 854, where Lord Reid stated at 861D-E:

“The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is.”

62. Neither party submitted that the term “sports drinks” was used in an “unusual sense” in Item 4A. However, we noted that the Consultation had said that the proposed legislative change would encompass “protein drinks” (see § 45), and we therefore considered whether the meaning of the term “sports drinks” in Item 4A should be expanded to include protein shakes. However, we decided that this would be incorrect: as Lord Hodge said in *PRCBC*, an external aid such as the Consultation cannot:

“...displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.”

63. That echoed the words of Lord Neuberger in *Williams v Central Bank of Nigeria* [2014] UKSC 10 at paragraph [72]

“When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used.”

64. Moreover, as we have already noted, Mr Hellier did not make any such submission, while HMRC continue to rely on *Arthro Vite* to allow protein powders to be zero-rated.

### **Conclusion**

65. We therefore find that the meaning of a “sports drink” in Item 4A is a drink which contains significant amount of carbohydrate (usually sugar) and may contain salts (such as sodium and potassium).

66. Having decided on the meaning of the statutory phrase, we next considered whether the Products were “sports drinks”. As Jacob LJ said in *Proctor & Gamble UK v HMRC* [2009] EWCA Civ 407 at [14], this is “a short practical question calling for a short practical answer”.

### **FINDINGS OF FACT**

67. On the basis of the evidence summarised earlier in this decision, we make the findings set out below. We make further findings of fact later in this decision. In making our findings, we considered the many examples and extracts shown to us by the parties, but we have not found it necessary to refer to each and every one of them in our judgment.

### **Drinks?**

68. The first factual question was whether the Products were “drinks”. It was common ground that they are not sold in liquid form, but as powders. However, Item 4A expands the normal meaning of “drinks” to include “syrups, concentrates, essences, powders, crystals or other products” used for the preparation of sports drinks.

69. It was GBN’s case that although the Products could be consumed in a drink, they were a “food supplement”. Mr Schofield relied on the inclusion on websites of recipes for “choc chip cookies” and “choc bliss protein balls”, both of which included the Products as ingredients, and a page headed “plant based protein powder uses beyond smoothies” which referred to using the Products in pancakes, muffins, breakfast cereals and various baked goods. There was no dispute that the Products were used in these ways.

70. However, we agree with Mr Hellier that the overwhelming impression from the packaging and other marketing is that the Products were primarily sold to and used by consumers as powders for the preparation of drinks. In particular:

- (1) At all relevant times, the packaging included a section headed “suggested use”, and continued “mix, shake or blend 1 scoop with 300 ml of your favourite beverage”.
- (2) Before 2020 the packaging:
  - (a) described Classic (our emphases) as a “protein **drink mix** with sweetener”; and described Plus and Warrior as a “plant protein **drink mix**”; and
  - (b) offered a booklet with “over 50 free smoothie recipes” by accessing the website.

(3) The advertising and marketing for the Products contains numerous pictures of smoothies and other drinks containing the Products.

(4) Although Mr Schofield is right that there are examples of the Products being used in food recipes, these are relatively few.

71. We thus find as a fact that the Products are powders for the preparation of drinks, and so are “drinks” for the purposes of Item 4A.

### **Findings of fact about the Products’ ingredients**

72. The primary ingredient in all of the Products is plant protein derived from one or more of brown rice, pea protein, hemp, amaranth and/or quinoa. Other ingredients include chia seed, goji berry, ground coconut, sea salt, coconut oil, stevia extract and/or flavourings such as chocolate or vanilla. The protein content of the Products ranges from 71g per 100g to 81g. At all relevant times, the Products also contained between 0.1g and 2g of salts (sodium and potassium, taken together) per 100g, depending on the particular Product and the variety.

73. The packaging of the Products changed in or around the beginning of 2020, and at or about the same time, there were small changes to the ingredients. Before the change, Classic and Warrior contained 5% sugar per 100g, or 1g per serving; the chocolate version of Plus contained 1g of carbohydrate per serving, none of which was sugar, while the other versions of Plus had no carbohydrate. After the change, the carbohydrate/sugar content in all Products was less than 0.5g per serving.

### **Sports drinks?**

74. We have already found that “sports drinks” contain salts (such as sodium and potassium) and significant amounts of carbohydrate (usually sugar).

75. The maximum level of salts within the Products was 2%, but as we were not provided with any evidence as to the level of salts within a “sports drink”, we were not able to make a comparison.

76. However, before 2020 the Products contained no more than 1g of carbohydrate per serving; after that date, the level of carbohydrate was less than 0.5g per serving. On any view, this is not “high percentage” and it is way below the range given by the Canadian Paediatric Society of between 5g and 14g per serving, see §55. We find as a fact that the Products do not contain the significant levels of carbohydrate found in sports drinks, and are therefore not “sports drinks”.

77. Item 4A also includes “other similar drinks”. As we explained at §33, those words expand the statutory phrase so it encompasses those “sports drinks” which are not “advertised or marketed as products designed to enhance physical performance [etc]” but are similar to sports drinks which are so designed. In other words, to come within this part of Item 4A, a product must first be a “sports drink”. Since the Products are not “sports drinks”, there is no need to consider whether they are the sort of “sports drink” which is advertised or marketed in the way required to fall within Item 4A.

### **CONCLUSION**

78. In summary, we have decided that Item 4A sets out a two stage test, so that a product only falls within the exception if it is both a “sports drink” and either (a) advertised or marketed in the way prescribed by the provision, or (b) similar to other sports drinks which are so advertised or marketed.

79. We have found as facts that:

- (1) a “sports drink” is a drink designed for sports people which contain s significant amount of carbohydrate (usually sugar) and salts (such as sodium and potassium); and
- (2) although the Products do contain some salts, the quantity of carbohydrate before 2020 was no more than 1g per serving; this was subsequently reduced to almost nothing.

80. The Products are therefore not sports drinks, and so are not within Item 4A.

### **THE ALTERNATIVE VIEW**

81. Although we have agreed with Mr Schofield’s analysis of the statutory provision, we went on to consider whether the Products would be within Item 4A if Mr Hellier were to be correct, given that (a) this alternative view was fully argued with extensive reference to the evidence, and (b) this is the first case to be decided on the meaning of Item 4A.

82. As set out earlier in this judgment, Mr Hellier’s reading of the statutory phrase was that it encompassed:

- (1) a “drink” which was “advertised or marketed” as “designed” to do one or more of the following, in a sports context:
  - (a) enhance physical performance;
  - (b) accelerate recovery after exercise; or
  - (c) build bulk;
- (2) or was a “similar drink” to one which fell within the above statutory description.

83. In Mr Hellier’s submission, it is necessary to establish how a product is advertised and marketed in order to know whether it is a “sports drink” and so within Item 4A. We therefore begin by making findings of fact about the advertising and marketing of Sunwarrior products taken as a whole, followed by findings about each of the three specific Products in issue, Classic, Plus and Warrior.

### **FINDINGS OF FACT ABOUT APPROACH TO ADVERTISING AND MARKETING**

84. Under this heading we considered the following: the websites; the customer base; GBN’s catalogue and the Sunwarrior brand.

#### **Websites**

85. The Products are supplied to GBN by Sunwarrior in the US; its website Sunwarrior.com (“the US website”) is accessible to UK consumers. GBN also has its own websites, sunwarrior.co.uk (“the UK website”) and it controls another site, nutrimarket.co.uk (“the Nutrimarket site”). GBN does not have its own marketing team, and so “piggy backs” on the marketing provided by Sunwarrior in the US. As a result, much of the marketing on the UK website and on the Nutrimarket site is essentially copied from material on the US website.

86. The UK website states that Sunwarrior products provide:

“...vegan protein powder and vegetarian protein powder perfect for anyone and any lifestyle, not just vegans. Sunwarrior protein is clean and completely free of gluten, GMOs, radiation, artificial flavors, artificial preservatives, artificial colors, soy, yeast, wheat, or added sugar.”

87. The US website says that its mission is to “Guide Individuals on Their Path to Self-Actualization” and describes its vision as being to “Nourish & Transform the Planet, One Individual at a Time, by Providing Education and the Highest Quality Plant-Based Nutrition”.

88. The Sunwarrior mission statement can be found on both the US and the UK websites, and reads:

“Sunwarrior is here for every step as you take your nutritional journey to light, energy and love. We believe the answers to optimal health are found in nature. Our vision is to taste better and be healthier so that we can accomplish our mission to help you be your best self, performing at your optimum and living your best life. We do this by offering clear, high-quality plant-based ingredients from nature.”

89. The US website describes Sunwarrior products as “free of solvents, GMOs, radiation, artificial colors, preservatives, and assures a protein that is an easy-to-digest, nutrient-dense superfood”. That text is illustrated with pictures which include an elderly man with a child in a garden; a man running along a trail and a female runner.

90. The Nutrimarket site says:

“Lasting wellness and vitality shouldn’t be a privilege – it should be accessible to anyone who cares about their health and wants to live more naturally. Our passionately curated marketplace brings you the world’s healthiest nutrients, supported by expert advice, taking the guesswork out of healthy living.”

91. The US website has a section headed “sport”, which includes an “Active Protein” product, but this is not sold by GBN. The UK website has no section called “sport” and the Products are advertised on the UK website under the heading “plant protein”.

92. As noted at §10, Sunwarrior also created a promotional video entitled (*italics in original*) “Nutrition for *every body*”, and another video entitled “I am a Sunwarrior – we are all connected”. Stills downloaded from the videos show people engaged in a variety of activities including gardening, playing a guitar, drinking with friends, stretching, reading on a sun lounger and ice-skating. One picture entitled “for the love of the Outdoors” is of two people walking along a tree trunk, while others show elderly people with family members.

93. The Products are promoted by various ambassadors and influencers. These include plant-based chefs, vegan activists, nutritionists, musicians, doctors, and yoga practitioners. Their focus is on healthy living.

94. On the basis of the above, we find that the website marketing of Sunwarrior products generally, including the videos and the material shared by the influencers, is:

- (1) aimed at a wide range of customers, not at athletes or sportspeople; and
- (2) focused on facilitating a healthy active lifestyle.

95. We make further findings below about the website marketing which is specific to each of the Products.

### **Customer base**

96. GBN supplies health food wholesalers and distributors, and also sells to a number of health food stores. Some sales are made directly to consumers via the UK website and the Nutrimarket site, as well as through third parties such as Amazon.

97. Mr Lee said in his witness statement that GBN does not “partner with, distribute, or sell via gyms” and does not “advertise or market with (or target) gyms”. Mr Hellier drew his attention to GBN’s 2022 customer list for the Products. There were 64 customers on the list, including one gym, one personal trainer, a company called “Dolphin Fitness Limited” and another called “Kraftwerks Limited”. Mr Lee knew nothing about those customers, but his unchallenged evidence was that GBN did not market to gyms, or offer them any discount (such as might be available to volume customers).

98. Having assessed the relevant evidence, we find the following facts:

- (1) The Products' customer base included a small number of providers of fitness services, including one gym.
- (2) GBN did not direct any of its marketing to gyms, or give the sector any discounts.

### **The Catalogue**

99. GBN issued a catalogue of all its products ("the Catalogue"); we infer from its language that it was aimed at wholesalers rather than retail customers.

100. The first page describes GBN as a "distributor of exclusive natural and organic products" and says it sells "delicious innovative products that make healthy living easy and accessible for everyone".

101. The second page sets out GBN's history, and says the company is:

"driven to empower people to live better with natural healthcare...we source authentic organic and natural products with integrity, containing only the purest raw ingredients"

102. The Catalogue also explains that the packaging of the Products changed from 2020; that the labels now "do a better job of focusing on the *lifestyles* of your customers" (emphasis in original), and that "each one remains everything you've come to expect from Sunwarrior, amazing proteins made with quality plant-based ingredients".

103. We find as facts that:

- (1) the emphasis in the Catalogue is on the Products providing healthy plant-based organic products to help customers lead better lives; and
- (2) it contains no marketing or advertising which refers to the Products being "designed to enhance physical performance, accelerate recovery after exercise or build bulk", or anything similar.

### **The brand**

104. Mr Hellier submitted that the Sunwarrior brand was itself a relevant factor in assessing whether or not the Products met the conditions within Item 4A. In his submission, the word "warrior" connoted "activity and action".

105. Mr Schofield invited us to reject this submission, pointing out that the meaning of the brand name was explained in a video called "Legend of the Nonwarrior", a link to which had been provided to HMRC. This said that:

"Sunwarriors through the diligence and faith conquer all darkness, sickness, disease and poverty through the lightening power of an ancient mystery path called agápe [sic]. Through the spirit, knowledge and power of agápe the Sunwarriors were transformed and transcended by pure light energy."

106. That passage is echoed in the Sunwarrior mission statement, see §88, which says "Sunwarrior is here for every step as you take your nutritional journey to light, energy and love"; it is also reflected in the post-2020 packaging (see the discussion later in this judgment), which says that Sunwarrior's mission is to "illuminate body, mind and planet".

107. We find as a fact that the brand name is used in the marketing by emphasising the "sun" part of the word "Sunwarrior" rather than by giving any specific meaning to the word "warrior".

### **Findings about overall approach**

108. On the basis of our findings of fact about the websites, the customer base, the Catalogue and the brand, we find that the overall focus of both Sunwarrior and GBN's advertising and



marketing is on selling vegan products to a wide range of customers to help them lead healthy active lives and is not targeted at those engaged in sport.

#### **FINDINGS OF FACT ABOUT OTHER PRODUCTS**

109. The Bundle contained examples of the advertising and marketing for other (non-Sunwarrior) products, and we find as facts that claims made by these other products include the following:

- (1) “supports muscle building & weight gain”;
- (2) “recovery powder...after intense sessions to replace energy and support muscle maintenance and growth”;
- (3) “super mass gainer...to support muscle growth, improve training performance and reduce fatigue”;
- (4) “Protein on its own will not build muscle...use this all-in-one gainer to repair your body after resistance training, calisthenics, or endurance training”, and
- (5) “Enhance muscle, strength & performance”.

#### **PACKAGING**

110. It was not in dispute that all three of the Products are sold in tubs, with wrap-around packaging designed as having four panels, or sides. At all relevant times, one side set out the ingredients and amino acid profile for the particular Product. The other three contained other information, some of which was marketing in nature. We next consider for each of the Products, the ingredients, the remaining three sides of the packaging, and other marketing.

#### **CLASSIC**

111. We begin with findings of fact, followed by submissions and our conclusions; these include further findings of fact.

#### **Classic – initial findings of fact**

112. Classic’s main ingredient is brown rice. It is sold in three varieties, natural (with nothing added), chocolate (with cocoa and flavouring as well as other minor ingredients), and vanilla (with flavouring and the same minor ingredients).

113. Before 2020, the front panel of the packaging described it as “classic protein” with the word “Protein” in very large font. Apart from “Sunwarrior”, the words next in size were “Sprouted and fermented” and “Raw vegan superfood”, followed by “Whole grain brown rice protein” and “Complete amino acid profile”. Below the writing was a picture of waving grass. On the back panel were the words “Illuminate body, mind and planet”. The remaining side included three small squares, one of which said “Pre and Post Workout” beneath a running figure. The other two squares read “Lysine and Leucine” and “Sustainable”. Each square takes about 1% of the total area covered by the packaging. Below the squares was the following passage:

“Classic Protein uses enzymes and low temperatures to transform the whole grain of raw, sprouted brown rice into a plant-based protein rich in all the amino acids your body craves. Simple, wholesome and natural, this is uncomplicated nutrition for your complicated life.”

114. After the change of packaging in 2020, the front panel described it as “Protein classic”, again with the word “Protein” in large print. It also included the words “clean and simple”, “organic plant-based”; “sprouted and fermented” and “natural”. In smaller type were the words “20g protein” in white, standing out against the green background; underneath was the word

“muscle” in small black type; both the print size and the colour makes it less easy to see. The previous picture of waving grass was replaced by one showing rice grains.

115. The back panel has a picture of a woman and child in a garden, underneath which is the following text; the eye is drawn to the emboldened words, including “Plant-based” and “Organic Ingredients”:

“SUNWARRIOR is committed to making THE BEST **plant-based** PROTEINS AND SUPPLEMENTS. Our mission to ILLUMINATE BODY MIND AND PLANET **Drives** EVERYTHING WE DO from sourcing THE FINEST **Organic Ingredients** ACROSS THE GLOBE. To recycled and recyclable IT’S WHO **WE ARE.**”

116. The remaining side panel is headed “for the conscious warrior” with the word “conscious” in large print; underneath are the words “simply whole grain brown rice”. In smaller print is the following text:

“Transformed by active enzymes. CLASSIC is gentle, eco-friendly, earthy yet strong. Relying on just one renewable protein source, this is allergen-friendly nutrition in its purest form, but don’t expect the gentle nature of brown rice to lead to meek results when applied to your active life. Being a connoisseur of simplicity doesn’t mean you don’t demand the absolute most from your body or your food. Classic won’t disappoint, delivering plenty of protein and balanced amino acids for Conscious Warriors with active lives!”

117. The US website describes Classic as “a simple protein...an ideal choice for those with food allergies, digestive disorders, chronic illness, or physical trauma”; that text is accompanied by a picture of an elderly man and a child in a garden. On another webpage is a photograph of a tub of Classic, with cartoon arms and legs in a yoga pose, together with this text:

“Classic Protein relies on the simple power of raw whole-grain brown rice, including the endosperm and bran, to create a gentle protein that still stacks up to the competition in the gym where it matters most. Brown Rice provides a complete and balanced protein, which is essential for muscle and tissue repair.”

118. The same wording is used on the UK website, but without the final sentence or the cartoon. That site also says:

“Rice protein is safe for vegans and vegetarians who want to avoid animal products including whey, casein, and egg. But they aren't the only ones to benefit. Rice protein isn't just for vegans, but supplies ample protein and complete amino acids for anyone at any activity level or with any lifestyle. Protein creates a thermic effect, heating up the body. As a complete protein, Sunwarrior's Classic Protein is ready to rebuild and repair muscle after workouts. Rice protein is a little slower to digest than whey, making it a good pre-workout supplement and a good protein for endurance athletes. Lean protein sources, like rice protein, can be incorporated into a healthy weight loss plan”

119. The UK website also describes Classic as:

“A great tasting smooth, plant-based protein for an unrivalled fitness lifestyle. The ultimate plant-based superfood protein designed for fitness and health enthusiasts. Ideal for those who want to build muscle, lose fat and increase athletic performance.”

## Classic – submissions

120. Mr Schofield submitted that the consumer would understand from the advertising and marketing that Classic had been designed to provide healthy nutrition to people generally. Mr Hellier relied on the points we have set out in italics below, followed by Mr Schofield's rebuttals:

(1) *The use of the word “muscle” on the packaging.* Mr Hellier submitted that this supported HMRC's case that Classic met the requirement in Item 4A that it be marketed as designed to “build bulk”. Mr Schofield responded by saying that the mere use of the word “muscle” did not satisfy the statutory requirement that a product be designed to “build bulk”, and he contrasted it with the marketing used for other products, see §109.

(2) *The reference to “delivering plenty of protein and balanced amino acids for Conscious Warriors with active lives”.* Mr Hellier relied on the use of the phrase “active lives”, but Mr Schofield submitted that this did not meet the statutory test, which refers to “enhancing physical performance”.

(3) *The square on the pre-2020 packaging entitled “Pre and Post Workout” beneath a running figure.* Mr Hellier said that this plainly showed that Classic was designed to enhance physical performance and/or accelerate recovery after exercise. Mr Schofield disagreed, saying the square was a tiny part of the packaging.

(4) *The website statement that Classic provided protein which was “essential for muscle and tissue repair”* Mr Hellier submitted that this showed that Classic was designed to “accelerate recovery after exercise”. Mr Schofield again disagreed, saying that to fall within Item 4A, a product had not only to be marketed as repairing body tissues, but be designed to “accelerate” recovery after exercise.

(5) *The statement in the same passage that Classic “stacks up to the competition in the gym where it matters most”.* Mr Hellier's position was that the Products were therefore being marketed as “designed to enhance performance”. Mr Schofield responded by saying that the statement simply describes the result of eating brown rice protein, and added that it would be wrong to place too much weight on this single reference to “competition in the gym”. In his submission, the overall impression from the packaging and websites was that Classic was advertised and marketed as an organic plant-based protein powder designed to provide nutrition to support an active lifestyle.

(6) *The website reference that “rice protein is a little slower to digest than whey, making it a good pre-workout supplement and a good protein for endurance athletes”.* Mr Schofield said that this sentence had to be seen in context: the passage as a whole refers to Classic as being suitable for “anyone at any activity level”, including but not limited to “vegans and vegetarians”.

(7) *The drawing showing a tub of Classic in a yoga pose.* Mr Hellier's position was that yoga was a sport, and that the use of this cartoon showed the Products was advertised or marketed as designed to enhance physical performance etc in a sports context. Mr Schofield did not accept that yoga was a sport, and submitted that in any event the use of a cartoon figure was insufficient to show that Classic was being marketed as designed to “enhance physical performance, aid recovery or build bulk”.

## The Tribunal's conclusions

121. We agree with Mr Schofield for the reasons he gave, and find the following facts:

(1) The packaging, including the pictures of waving grass and seeds taken together with the text read as a whole, gives the overall impression that Classic was designed to provide plant-based protein rich in amino-acids as a form of simple, organic nutrition.

(2) The typical consumer would not think, from the almost invisible word “muscle”; one tiny square with a running figure and the words “pre-and post workout”; the references to an active life and to rice protein being a good pre-workout supplement and a good protein for endurance athletes; the single mention of competition in the gym, and the cartoon yoga position, that Classic was designed to “enhance physical performance, accelerate recovery after exercise or build bulk”. Instead, the consumer would understand from the overall advertising and marketing that Classic had been designed to provide healthy nutrition to people generally. Going to the gym is simply one example of an activity.

(3) We find that Classic was marketed on the basis that it “supplies ample protein and complete amino acids for anyone at any activity level or with any lifestyle”, and not as designed to provide the outcomes listed in Item 4A.

## **PLUS**

122. We first make findings of fact about Plus from the evidence provided, followed by the parties’ submissions and our conclusions, some of which are findings of fact.

### **Plus – initial findings of fact**

123. Plus is made by blending brown rice, pea, quinoa, and amaranth. Like Classic, it is sold in three varieties, natural (with nothing added), chocolate (which contains cocoa and flavouring as well as other minor ingredients), and vanilla (with flavouring and the same minor ingredients).

124. Before 2020, the front panel of the packaging had the word “Plus” in very large letters,, followed by the words “Organic plant-based protein” and “Natural”. Underneath was a picture of various loose seeds and grains. The back panel had the same message as Classic: “Illuminate body, mind and planet”. The remaining side contained the same three small squares as on Classic, although the chocolate version did not have the one with a running figure. In all versions, the squares were followed by this text:

“You’ll love the way it tastes, but how it makes you feel is why we call it Plus. Plant-based and powerful, Classic Plus builds on the gentle nature of whole-grain brown rice with the strength of pea, chia, quinoa and amaranth protein. Your Plus is here. What will you make of it?”

125. From 2020, the front panel was similar to that for Classic, but with the words “Fit and lean” instead of “Clean and simple”, together with a picture of a pod of peas and two leaves. The back panel had the same wording as on Classic, see §115, together with a picture of a woman in a yoga pose at sunrise; this covers around 5% of the total space. The side panel was headed “for the discerning warrior” with the word “discerning” in large print; underneath are the words “5 powerful superfood sources”. In smaller typeface is the following text:

“Building on our original protein, CLASSIC PLUS kicks up the nutrition with brown rice, legumes, chia seeds, quinoa, and amaranth. This nutrient-dense protein powerhouse is gentle on digestion while packing plenty of potent BCAAs and essential amino acids in with the natural fiber, vitamins, and minerals. Sprouted, fermented, smooth, and delicious, this is enlightened nutrition for the Fit, Lean, Discerning Warrior who expects a protein to taste as amazing as it makes them feel.”

126. The US website repeats much of that passage, and also describes Plus as “packed with 5 powerful superfood sources”, and as “a nutrient-dense protein that’s gentle on digestion and essential for a fit and lean lifestyle”. The benefits of each of the four main ingredients are set out, focusing on amino acids, digestive effects and fibre content, and saying that pea protein “helps to build and maintain lean muscle mass, which increases the metabolism and burns fat”.

127. Officer Shortland’s letter included another extract from either the US or UK website, which read:

“Brown Rice: Provides plenty of protein and fibre while being gentle on the digestive system and kind to those with allergies. This whole-grain superfood is sprouted and ready to take your workouts to new levels with all the amino acids a growing muscle needs. Complete and balanced protein for muscle, building, repair, and maintenance. Rich in Lysine, often missing in plant-based proteins.

Chia seeds are the tiny nutrient-dense powerhouses that the Aztecs used to feed their people, armies, hunting parties and runners.”

128. A Sunwarrior marketing brochure used by GBN describes Plus as follows:

“Classic Plus protein is packed with 5 powerful superfood sources. It is gentle on digestion and includes plenty of potent BCAAs [branched-chain amino acids] and essential amino acids, natural fiber, vitamins and minerals. This enlightened nutrition is a perfect fit for the discerning Warrior, who expects a protein to taste as amazing as it makes them feel.”

129. The accompanying picture is of a man meditating in a yoga pose. Essentially the same text (without the picture) is used on the GBN website. The US website also contains various customer reviews, including “it gives the energy we need in the morning”; “it does not spike my glucose levels”, and “it tastes like a decadent treat”.

### **Plus - submissions and conclusions**

130. Mr Hellier and Mr Schofield made the same submissions about the word “muscle” and the “Pre and Post Workout” square as they had done for Classic, and we came to the same conclusions. Mr Hellier also placed reliance on:

(1) the words “Fit” in the phrase “Fit and lean”, but we agreed with Mr Schofield that to fall within Item 4A a product must be marketed as designed to *enhance* physical performance, and it is not enough to say it is suitable for consumers who are “fit and lean”;

(2) the picture of the woman in a yoga pose on the basis that yoga was a sport. Mr Schofield did not agree, but we did not need to decide that issue, because we accepted his wider argument that the mere inclusion of this picture was insufficient to show that Plus was advertised or marketed as “designed to enhance physical performance, accelerate recovery after exercise or build bulk”;

(3) the reference to chia seeds being used by runners. However, we rejected this submission: the passage refers to the use of one single ingredient by a previous civilization, who are also described as using chia seeds to “feed their people”; and

(4) the phrase “complete and balanced protein for muscle, building, repair, and maintenance”; we considered in addition the preceding phrase, that “this whole-grain superfood is sprouted and ready to take your workouts to new levels with all the amino acids a growing muscle needs”. However, this is the only mention of workouts in a passage explaining the benefits of brown rice, which is positioned as a “superfood”. In addition, these two phrases follow other references to the Product’s digestive benefits

and its suitability for those with allergies. In related correspondence, Mr Daniel Rice of GT said “we consider that to determine the VAT treatment of Sunwarrior products, it is necessary to focus on the whole product rather than only one ingredient. The marketing strategy applies to the whole product and not to one ingredient. There is no doubt that Sunwarrior Classic Plus is marketed as a nutritious superfood rather than a sports drink”. We agree.

131. We find as a fact that Plus is marketed and advertised as suitable for people who are seeking healthy plant-based nutrition, and not as “designed to enhance physical performance, accelerate recovery after exercise or build bulk”.

#### **WARRIOR**

132. We again begin with findings of fact, followed by submissions and conclusions, some of which are findings of fact.

#### **Warrior – initial findings of fact**

133. Unlike the other two Products, Warrior contains no brown rice, being instead a blend of protein from peas, hemp and goji berries, together with ground coconut. It is sold in five varieties: natural (with nothing added); chocolate (with cocoa and flavouring and other minor ingredients); vanilla (with flavouring and minor ingredients), mocha (with cocoa, various other flavourings and the same minor ingredients) and berry (with different flavouring and minor ingredients).

134. Before 2020, the front panel had “Warrior Blend” in large letters, along with the words “natural”, “raw vegan protein” and “complete amino acid profile”; the picture at the bottom is of peas, coconut, berries and grains. The back panel has the same words “Illuminate body, mind and planet” as on the other Products, and the remaining side includes the same three small squares, followed by this passage:

“Warrior Blend combines three powerful raw protein sources, fusing the individual benefits of pea, hempseed, and cranberry seed into a smooth, delicious, and nutrient-dense superfood. Medium chain triglycerides from coconut oil then enhance this dynamic fusion to create a unique, raw, plant-based protein unlike any other”

135. From 2020, the largest word on the front of the packet was “protein”, followed by “Warrior Blend”, “High Performance” and “organic plant-based”. Like the other Products, the word “muscle” is present in tiny print. The back panel has the same wording as set out at §115, together with a picture of a person on a mountain bike, which takes up around 5% of the total space.

136. The remaining panel is headed “for the active warrior” with the word “active” in large print; underneath are the words “legumes · hempseed · goji berries · coconut MCTs [medium chain triglycerides]”. In smaller print is the following text:

“Synergy is the secret. Four powerful ingredients combine to make WARRIOR BLEND superior to any single ingredient alone. Want a complete, balanced amino acid profile full of BCAAs to help you build lean muscle? Want natural antioxidants and electrolytes to enhance your workouts? Want the energy, endurance and recovery found in MCTs to push you further and harder than ever? Demand more from what fuels your active life! Demand a protein designed for the Active Warrior in you.”

137. The US website has a photograph of a tub of Warrior with cartoon arms and legs, lifting weights, followed by this text (capitalisation and bolding in original):

“Warrior Blend is easily digestible, nutrient filled superfood perfect for anyone who wants to amplify their health and fitness. **FOUR POWERFUL INGREDIENT TO INVIGORATE AND FUEL ACTIVE LIFESTYLES. Warrior Blend fuses and multiplies the power of several rich protein sources into one smooth, great-tasting formula that’s overwhelmingly superior to the individual components alone.** Medium chain triglycerides from coconut then join this dynamic fusion to create a unique plant-based protein with a complete amino acid profile exceptionally rich in Arginine, Lysine, Leucine, and branched chain amino acids.”

138. In relation to three of the four key ingredients, it says that:

- (1) pea protein “helps to build and maintain lean muscle mass”;
- (2) hemp seed “absorbs quickly which provides quick energy”; and
- (3) coconut “enhance[s] muscle recovery after exercise

139. The UK website uses a similar passage to describe Warrior, and adds:

“Medium-chain triglycerides from coconut work synergistically with the other ingredients to create a unique vegan protein exceptionally rich in amino acids and BCAAs. Demand more from what fuels your active life! Demand a protein designed for the Active Warrior in you.”

140. The Nutrimarket website says that Warrior “is easy to digest so your body can quickly assimilate and use the protein”, but also that it is “great for Pre and Post-Workout” and provides “a full amino acid profile to build LEAN MUSCLE”.

141. A marketing brochure issued by Sunwarrior and used by GBN, under the heading “Warrior Blend” displays a picture of a heavily muscled man doing press-ups and of a woman in a gym; it explains that Warrior will “build and repair lean muscle...pre/post workout”, and gives the same information about the key ingredients as on the US website.

### **Warrior – submissions and conclusion**

142. Mr Hellier relied on the multiple references to the fact that Warrior had been “designed” to produce certain outcomes, pointing out that the Product is marketed on the basis that it:

- (1) “combines three powerful raw protein sources, fusing the individual benefits”;
- (2) contains “four powerful ingredients [which] combine to make [it] superior to any single ingredient alone”; and
- (3) “fuses the power of several rich protein sources into one smooth, great-tasting formula that is overwhelmingly superior to the individual components alone”.

143. Mr Hellier repeated his submissions about the word “muscle” and the “Pre and Post Workout” square, but also pointed out that the packaging for Warrior contained the words “High performance” together with a picture of a person on a mountain bike, and stressed in particular the wording of the following passage (his emphases):

“Want a complete, balanced amino acid profile full of BCAAs **to help you build lean muscle?** Want natural antioxidants and electrolytes **to enhance your workouts?** Want the energy, endurance and recovery found in MCTs **to push you further and harder than ever?**”

144. He also relied on the statement that Warrior was “perfect for anyone who wants to amplify their health”, and the photograph/cartoon of the tub lifting weights, together with the wording on the Nutrimarket website that Warrior was “great for Pre and Post-Workout” as well as providing “a full amino acid profile to build LEAN MUSCLE”.

145. Mr Schofield submitted that those passages had to be seen in the context of Sunwarrior’s and GBN’s overall marketing approach, which as we have found above, focused on the Products’ contribution to a healthy lifestyle.

146. We agree with Mr Hellier for the reasons he gave that Warrior is marketed as a product “designed to enhance physical performance, accelerate recovery after exercise or build bulk”, and we find that to be a fact.

#### **SIMILAR PRODUCTS?**

147. Mr Hellier asked Mr Lee in cross-examination whether the Products were all “similar in content and advertising” and Mr Lee agreed. In reliance on his evidence, and the fact that the Products all contained plant proteins and essentially the same additional ingredients, Mr Hellier submitted that if we were to find that one of the Products was “designed to enhance physical performance, accelerate recovery after exercise or build bulk”, we should go on to conclude that the other two were “similar drinks”.

148. We disagree. Despite Mr Lee’s concession, and recognising that all the Products consist largely of plant proteins, it is clear from our findings of fact that the primary ingredients used in Warrior are significantly different from those in the other two Products. Both Classic and Plus are made essentially from brown rice, whereas Warrior is a blend of peas, hemp, goji berries and coconut. The advertising and marketing for Warrior focuses on the “dynamic fusion” of those ingredients, describing it as (our emphases) “a **unique**, raw, plant-based protein **unlike any other**”.

149. In so far as it is relevant (see our discussion about the meaning of the phrase “and other similar drinks” at §34), neither Classic nor Plus is marketed or advertised in a similar way to Warrior, see our findings of fact above.

150. We therefore reject Mr Hellier’s submission, and find that the other two Products are not “similar drinks” within the meaning of Item 4A.

#### **CONCLUSION**

151. If Mr Hellier were to be correct as to the statutory interpretation of Item 4A, neither Classic nor Plus would be within Item 4A. They are thus zero-rated whether or not his reading of the provision is correct.

152. However, Warrior **is** marketed as a product “designed to enhance physical performance, accelerate recovery after exercise or build bulk”, and so if Mr Hellier’s reading were to be correct, Warrior would be excluded from zero rating by Item 4A and be standard rated.

#### **FISCAL NEUTRALITY**

153. Mr Schofield submitted that if the Tribunal were to be uncertain as to the correct categorisation of the Products, we should decide the appeal in GBN’s favour in accordance with the principle of fiscal neutrality. The classic summary of that principle was set out in *HMRC v Rank Group plc* (2011) Cases C-259/10 and C-260/10 at [36]:

“...the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle.”

#### **THE PARTIES’ SUBMISSIONS**

154. As noted earlier in this decision, HMRC had decided that the Hemple products were outwith Item 4A, see §4. Mr Schofield submitted that the Products and the Hemple products were “patently similar” and met the same consumer needs, in particular both:



- (1) are protein powders, made from the same plant-based proteins;
- (2) have similar levels of protein and carbohydrates; and
- (3) are consumed as a drink and also added to food.

155. Mr Hellier submitted that for GBN to succeed in this argument, it would have had to file and serve relevant evidence, but this had not happened. Instead, the Tribunal had been provided with very little information about the Hemple products, including their advertising and marketing.

#### **THE TRIBUNAL'S VIEW**

156. We have been able to decide the appeal without needing to refer to the principle of fiscal equality, but had that been necessary we would have agreed with Mr Hellier that we have insufficient evidence about the Hemple products to decide this case on that basis. The burden rested on GBN, and had the case depended on its fiscal neutrality argument, HMRC would therefore have succeeded.

#### **OVERALL CONCLUSION AND APPEAL RIGHTS**

157. We allow GBN's appeal because we have found as follows:

- (1) Item 4A applies to certain "sports drinks" and a product which is not a sports drink as that term is normally understood, is not within the exception.
- (2) "Sports drinks" are drinks designed for sports people which contain significant levels of carbohydrate (usually sugar) and may contain salts (such as sodium and potassium).
- (3) The Products contain low to negligible levels of carbohydrate and so are not "sports drinks"; they thus do not come within Item 4A.

158. If our statutory interpretation of Item 4A were to be wrong, so that Item 4A applies to any drink advertised or marketed as "designed to enhance physical performance, accelerate recovery after exercise or build bulk" in a sporting context, then:

- (1) Classic and Plus do not satisfy those requirements;
- (2) Warrior does satisfy the requirements and so would be a "sports drink";
- (3) Neither Classic nor Plus are "similar drinks" to Warrior; and thus
- (4) Warrior would be standard rated, and the other two Products zero-rated.

159. Finally, GBN had not satisfied the evidential requirements necessary to make its case on its fiscal neutrality ground.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

160. 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.

**Release Date: 09<sup>th</sup> JANUARY 2025**