Appeal number: FTC/06/2011
[2011] UKUT 432 (TCC)

VALUE ADDED TAX – Zero-rating – Whether product zero-rated as food or standard-rated as beverage – Value Added Tax Act 1994, Schedule 8, Group 1, excepted item 4

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

GLAXOSMITHKLINE SERVICES UNLIMITED **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE NEWEY

Sitting in public in London on 28 and 29 September 2011

Mr Roderick Cordara QC and Mr Edward Brown, instructed by KPMG LLP, for the Appellant

Mr Nicholas Paines QC and Mr Alan Bates, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This case concerns the treatment for VAT purposes of certain "Lucozade Sport" products. The Appellant, GlaxoSmithKline Services Unlimited ("GSK"), argues that the products in question are zero-rated as "food" within schedule 8 to the Value Added Tax Act 1994. However, the First-tier Tribunal (Sir Stephen Oliver QC and Mr John Coles) decided otherwise on the basis that each product is a "beverage" (or a powder for the preparation of a "beverage") falling within a list of "Excepted items" to be found in schedule 8. GSK now appeals against the Tribunal's decision ("the Decision").

Lucozade Sport

2. For relevant purposes (other products marketed under the "Lucozade Sport" brand, such as tablets and gels, not being at issue), Lucozade Sport comes in two forms: a ready-to-drink liquid and a powder which is mixed with water. The powder version is supplied through a website and specialist retailers. The liquid version is more widely available. It is predominantly purchased at supermarkets, local shops and petrol/service stations as compared with gyms. It frequently appears alongside beverages such as carbonated soft drinks, Ribena, bottled water and other Lucozade products (such as Lucozade Energy). Sometimes the powders for Lucozade Sport (and brands of other manufacturers) are placed on the higher shelves.

3. The ready-to-drink form of Lucozade Sport is usually sold in bottles displaying the name "Lucozade Sport" and, in smaller type, the words "Body Fuel". Text at the back of the bottles includes this:

> "At Lucozade Sport we push athletes to their limits to develop products that are proved to give you an Edge.
> Lucozade Sport Body Fuel has been scientifically formulated to deliver:
>
> > FUEL – Drink before and during your session to provide carbohydrate to fuel your muscle and maintain performance for longer.
>
> Whatever your sport we can make a difference."

On the outside of the bottle are images of people in sporting postures, and the bottle is designed in such a way that it can be opened and shut with the teeth (with the result that it can be consumed when exercising).

4. The main ingredients of Lucozade Sport are carbohydrates, electrolytes and, in the case of the ready-to-drink product, water. The carbohydrates are a source of energy, while electrolytes are included to aid glucose and water absorption in the small intestine, to replace salt lost in sweat, to stimulate thirst and to retain ingested fluids in the system. The product is designed in such a way that its "osmolality" ("osmolality" being a measure of the number of particles in a solution) is "isotonic" (i.e. similar to that of body fluids). This means that the carbohydrates can be absorbed without fluid being diverted to the gut from elsewhere in the body.

5. In the words of one of the experts called by GSK, "Water is an essential part of the functionality of the product, not just as a delivery mechanism but also to replace the water that has been lost during exercise". The Tribunal concluded that rehydration "is one of the main purposes for which Lucozade Sport is commonly consumed" (paragraph 55 of the Decision) and "is one of the primary purposes and ranks as such together with the provision of energy" (paragraph 66 of the Decision). As I read the Decision, the Tribunal also concluded that "consumers drink Lucozade Sport for hydration, refreshment and pleasure" (see paragraph 58 of the Decision), that Lucozade Sport is "drunk to assuage the thirst" (see paragraph 56 of the Decision) and that "the sugars in Lucozade Sport would fortify in the sense of giving a feeling of energy" (see paragraph 57 of the Decision).

6. The Tribunal referred to evidence suggesting that "consumers of Lucozade Sport participating in high intensity sport or exercise account for a significant part of the total consumption" (paragraph 50 of the Decision). On the other hand, the Tribunal was not satisfied that Lucozade Sport was "either mainly purchased or mainly consumed on account of its nutritional ingredients" (paragraph 50). The Tribunal considered that "a significant proportion of consumption of Lucozade Sport is by armchair enthusiasts" and that "even those sports people who aspire to high intensity activities consume Lucozade Sport in the course of ordinary day-to-day activities" (paragraph 42 of the Decision). The Tribunal thought it a "reasonable inference … that Lucozade Sport's association with sport has the effect in marketing terms of getting through to consumers who drink it when not engaging in intensive exercise" (paragraph 49 of the Decision).

The legislative framework

7. Under section 30 of the Value Added Tax Act 1994, a supply of goods or services is zero-rated for VAT purposes if the goods or services are of a description specified in schedule 8 to the Act. Among the goods so specified, in Group 1 of schedule 8, is "Food of a kind used for human consumption", and "Food" is stated to include "drink". However, Group 1 includes a list of "Excepted items" which are standard-rated unless

contained in a list of "Items overriding the exceptions". The "excepted items" include "beverages" as follows:

> "3. Beverages chargeable with any duty of excise specifically charged on spirits, beer, wine or made-wine and preparations thereof.
>
> 4. Other beverages (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages."

Among the "Items overriding the exceptions" are:

> "4. Tea, maté, herbal teas and similar products, and preparations and extracts thereof.
>
> 5. Cocoa, coffee and chicory and other roasted coffee substitutes, and preparations and extracts thereof.
>
> 6. Milk and preparations and extracts thereof.
>
> 7. Preparations and extracts of meat, yeast or egg."

8. Plainly, not every liquid that is consumed is a "beverage"; gravy provides an example. Nor will a liquid that is drunk necessarily be a "beverage"; I should not have thought, for instance, that an aspirin solution would ordinarily be considered a "beverage". On the other hand, there can be few liquids which would be regarded as "drinks" but not "beverages". In *Kalron Foods Ltd v Revenue and Customs Commissioners* [2007] STC 1100, Warren J observed (in paragraph 58) that "[s]ome caution must be exercised in placing major reliance on any supposed distinction between drinks and beverages". I would agree.

9. The meaning of "beverage" was considered by the VAT and Duties Tribunal in *Bioconcepts Ltd v Customs and Excise Commissioners* (1993) VAT Decision 11287. Having noted an Oxford English Dictionary definition of "beverage" (viz. "Drink, liquor for drinking; [especially] a liquor which constitutes a common article of consumption"), the Tribunal (which there, as in the present case, included Sir Stephen Oliver QC) said this:

> "It seems to us that notwithstanding the Oxford English Dictionary [definition] of 'beverage' meaning drink, it is not used in the sense of meaning all drinkable liquids. Its meaning in ordinary usage covers drinks or 'liquors' that are commonly consumed. This is the primary meaning in the Oxford English Dictionary. Liquids that are commonly consumed are those that are characteristically taken

> to increase bodily liquid levels, to slake the thirst, to fortify or to give pleasure."

10. This passage usefully draws attention to characteristics which could tend to suggest that a liquid is a "beverage". As, however, the Tribunal confirmed in the present case (at paragraph 10 of the Decision), it was not attempting to lay down an exhaustive definition of what a "beverage" is.

11. In the *Kalron Foods* case, Warren J concluded (in paragraph 68) that "beverage" does not have "a special meaning in Group 1 different from its meaning as a matter of ordinary language". The key question is thus whether a liquid is a "beverage" as a matter of ordinary language.

The scope of the appeal

12. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 (which replaced section 11(1) of the Tribunals and Inquiries Act 1992) provides for a right of appeal to the Upper Tribunal on a "point of law arising from a decision made by the First-tier Tribunal".

13. Guidance as to the grounds on which factual findings can be challenged on appeal is to be found in *Edwards v Bairstow* [1956] AC 14. Viscount Simonds there said (at 29) that a finding of fact should be set aside if it appeared that the finding had been made "without any evidence or upon a view of the facts which could not reasonably be entertained". Lord Radcliffe (at 35) quoted a passage from a judgment of Lord Normand in which the latter had said that an appellate Court could intervene if the lower tribunal had "misunderstood the statutory language" or had "made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it". Lord Radcliffe went on to say this (at 36) about the position where "the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal":

> "I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

14. The decision of the Court of Appeal in *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] STC 1990, where the question was whether "Pringles" were standard-rated rather than zero-rated because they fell within Item 5 of the "Excepted items" in Group 1, indicates other limits on the circumstances in which an appellate Court should intervene. Jacob LJ said (in paragraph 9):

15.

> "Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that it so, an appeal court (whether first or second) should be slow to interfere with that overall assessment—what is commonly called a value-judgment."

Further, Jacob LJ (like Mummery and Toulson LJJ – see paragraphs 48 and 73) drew attention to the fact that the appeal before the Court was from a specialist tribunal. Jacob LJ observed (in paragraph 11):

> "It is also important to bear in mind that this case is concerned with an appeal from a specialist tribunal. Particular deference is to be given to such tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker; see per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* …."

Jacob LJ described the issue for an appellate Court in these terms (in paragraph 22):

> "So one can put the test for an appeal court considering this sort of classification exercise as simply this: has the fact finding and evaluating tribunal reached a conclusion which is so unreasonable that no reasonable tribunal, properly construing the statute, could reach?"

For his part, Mummery LJ said (in paragraph 74):

> "I cannot emphasise too strongly that the issue on an appeal from the tribunal is not whether the appellate body agrees with its conclusions. It is this: *as a matter of law, was the tribunal entitled to reach its conclusions?*"

The Tribunal's approach in the present case

16. The Tribunal noted early in the Decision that "[t]he term 'beverage' as found in Schedule 1 Group 1 is used in its ordinary English sense" (paragraph 8).

17. The Tribunal proceeded to explain its approach in these terms:

> "**[12]** … [T]he right approach, we think, is to conduct an all-round examination of the particular product and then to address three questions. First, applying criteria of the sort recognised in *Bioconcepts*, we ask whether the products are within the scope of the expression 'beverage'. The second question is whether the product is a 'drink'. There are some products that are consumed in liquid form such as a chilled soup on a summer's day that may refresh, rehydrate and be a pleasure to consume and yet are not appropriately described by the noun 'drink'. There is, as already noted, no dispute that Lucozade Sport is a drink. Here we are invited by GSK to go one step further and determine whether the design and use of the present products as sources of nutrition in the course of exercise save those products from being classed as beverages because the features of refreshment, rehydration and the sense of pleasure are incidental to their nutritional properties.
>
> **[13]** GSK's case leads to the third question which we interpret, more specifically, as this. Given that the product is a 'drink', are its nutritional values of such significance as to outweigh and make incidental its other features, eg as a means of refreshment or rehydration or as a source of pleasure, that it falls into the category of food/drink to the exclusion of beverage? [HM Revenue and Customs] say that this is not a proper question, because once the product is found to be a beverage, applying the *Bioconcepts* tests, that is the end of the enquiry no matter how nutritious the product may be. Bearing in mind that the *Bioconcepts* tests are illustrative rather than exhaustive, the third question is, we think, a legitimate enquiry to pursue. Moreover, having regard to the amount of evidence presented to us by GSK (seven witnesses and 15 lever-arch files), we will address the third question as one of fact."

18. The Tribunal summarised its conclusions as follows (in paragraph 14 of the Decision):

> "Our findings … can be summarised as follows:
> (i) the noun 'drink' does properly describe the product in its liquid form;
> (ii) applying the *Bioconcepts* criteria, the drink is a beverage; and
> (iii) though the product (in both its liquid and its powder forms) has evident nutritional features, these do not re-characterise it as something other than a beverage such that it is to be classed (to use GSK's words) as 'functional food'."

19. As regards the last of these points, the Tribunal said this (in paragraph 60 of the Decision):

"Reverting to the question of whether the nutritional contents of Lucozade Sport have the effect of re-characterising the product as something other than 'beverage', eg as 'functional food', or 'liquid food' (to use GSK's expression), we think that the evidence shows that this is not the case. GSK has not established to our satisfaction that sales of the product to consumers result in Lucozade Sport being mainly consumed for the nutritional values in the circumstances identified by Professor Maughan. On any reckoning a significant portion of the sales are to armchair enthusiasts and, even where the product is consumed by dedicated sports people, they consume part of their purchases in circumstances when they are not performing high intensity sport or exercise. It follows that the nutritional values of the product do not outweigh its attributes as a source of pleasure or a means of rehydration or refreshment. Lucozade Sport consequently remains a beverage for the purposes of Group 1 of Sch 8."

GSK's case in outline

20. At the heart of GSK's submissions is the proposition that there is a group of sports drinks which is zero-rated. That that is so is, GSK argues, apparent from, in particular, the decision of the VAT and Duties Tribunal in *SiS (Science in Sport) Ltd v Revenue and Customs Commissioners* [2000] V&DR 195 ("the *SiS* case"), a notice (VAT Notice 701/14) published by HM Revenue and Customs ("HMRC") and certain European Union materials. What, GSK says, distinguishes zero-rated sports drinks from standard-rated ones is their nutritional function. The nutritional function of some sports drinks allows them to "plug into" the social reasons underlying the zero-rating of food generally. Lucozade Sport is said to be such a drink in both its forms (ready-to-drink and powder). When determining whether a product is zero-rated or standard-rated, it is (GSK contends) the product's objective characteristics which matter. Here, the Tribunal should, it is said, have held that Lucozade Sport is physically and chemically indistinguishable from the category of zero-rated sports drinks. The Tribunal's three-stage approach (as to which, see paragraph 17 above) was also the subject of criticism.

Discussion

21. The issues can be conveniently discussed under the following headings:

    (a) the *SiS* case;

    (b) VAT Notice 701/14;

    (c) European materials;

(d) nutrition;

(e) objective characteristics;

(f) the Tribunal's three-stage approach;

(g) overall conclusions.

The SiS case

22. Amongst the products with which the *SiS* case was concerned were carbohydrate-rich powders designed to be mixed with water and used by sportsmen and others engaged in energetic pursuits. The VAT and Duties Tribunal concluded that the powders were not for the preparation of "beverages" and thus that they were zero-rated.

23. GSK maintains that, if the *SiS* powders do not constitute "powders … for the preparation of beverages", neither can Lucozade Sport (or at least the powder version of Lucozade Sport) do so. The SiS products are, GSK says, in competition with the Lucozade Sport powder, being "chemically and functionally equivalent" (to quote from GSK's skeleton argument) and marketed in the same way.

24. The Tribunal, however, thought the *SiS* case distinguishable. It said this (in paragraph 52 of the Decision):

> "Our conclusion on the question of whether Lucozade Sport is purchased and consumed for its nutritional function of providing energy to sustain high intensity sport or exercise is that while a significant proportion of consumption may be for that purpose, the overall consumption fulfils a wider range of needs. That conclusion on the facts contrasts Lucozade Sport from the products considered in 1999 by the VAT and Duties Tribunal in *Science in Sport* …. In para 33 of that decision the tribunal makes a finding that the products, while commonly consumed, are only consumed 'by the athletes, sportspeople and others who characteristically take them for nutritional purposes'. That is evidently not the position as regards Lucozade Sport."

Earlier in the Decision (in paragraph 11), the Tribunal had said this about the *SiS* case:

> "the tribunal decided that the product, a powder, was excluded from being a beverage because it was not 'for the preparation of beverages' but for the preparation of food supplements and it was 'incidental' that they were consumed in liquid form."

25. I agree with the Tribunal that the *SiS* case was distinguishable from the present one. In the *SiS* case, the VAT and Duties Tribunal was "satisfied that neither the flavoured nor the unflavoured varieties [of the products] would be consumed as a 'soft drink', i.e. as liquid refreshment to satisfy one's thirst" (paragraph 30), that the products were "not … primarily marketed as a drink" (paragraph 32), that "[a]lthough clearly they rehydrate the body in the sense that, as made up, they introduce water to the body … , the products are nevertheless offered for their nutritional value" (paragraph 32), that the products were commonly consumed "only by the athletes, sportspersons and others who characteristically take them for nutritional purposes" (paragraph 33), that the products were "for the preparation of food supplements (technically, 'dietary integrators')" and "[a]ny consequences of the fact that the products are taken in liquid form are incidental to this" (paragraph 37) and that the products were "not 'drinks', as that term is ordinarily understood" (paragraph 39). In contrast, the Tribunal found that Lucozade Sport is drunk, not only to provide energy, but for hydration (as one of its "main" or "primary" purposes), refreshment and pleasure, and to assuage the thirst. It was not satisfied, moreover, that Lucozade Sport was mainly purchased or consumed for its nutritional ingredients. On the facts found by the respective Tribunals, Lucozade Sport therefore differs significantly from the SiS products. That GSK may regard SiS's powders as equivalent to its own must be unimportant.

26. In any case, the *SiS* case was essentially a decision on the facts, and in *Customs and Excise Commissioners v Ferrero UK Ltd* [1997] STC 881 the Court of Appeal cautioned against attaching excessive weight to such decisions. Lord Woolf MR said this in *Ferrero* (at 884):

> "I do urge tribunals, when considering issues of this sort, not to be misled by authorities which are no more than authorities of fact into elevating issues of fact into questions of principle when it is not appropriate to do so on an inquiry such as this. The tribunal had to answer one question and one question only: was each of these products properly described as biscuits or not?"

In similar vein, Hutchison LJ said (at 888):

> "… I would wholeheartedly endorse all that Lord Woolf MR has said as to the vital importance of tribunals avoiding the error of allowing themselves to be persuaded to treat as binding in law decisions which are in truth no more than examples of the application of established principles to their own particular facts."

It seems to me that the *SiS* case is to be seen as an example of "the application of established principles to [a decision's] own particular facts" rather than laying down any principle.

27. Mr Roderick Cordara QC, who appeared with Mr Edward Brown for GSK, suggested that treating the Lucozade Sport powder differently from SiS's would involve a breach of the principle of fiscal neutrality (as to which, see e.g. *Revenue and Customs Commissioners v Rank Group plc* [2009] EWHC (Ch) 1244, [2009] STC 2304, at paragraph 6), in that competing goods would sometimes be taxable and sometimes not. However, it was not suggested that the *legislation* itself infringes the principle of fiscal neutrality. That being so, the Tribunal's task will have been to decide how that legislation applies to the facts of the case before it. I do not think that the principle of fiscal neutrality can have meant that the Tribunal was obliged to arrive at a contrary conclusion, inconsistent with its understanding of the legislation, merely because another Tribunal had decided that another product had fallen on the other side of the line. Further, if it can be said to be anomalous for SiS's powder to be zero-rated when the Lucozade Sport powder is not, it would be at least as anomalous (a) for Lucozade Sport powder to be zero-rated and the liquid form standard-rated or (b) for bottles of Lucozade Sport to be zero-rated when competing drinks (Red Bull, for example) are not.

28. In short, the Tribunal was, in my judgment, entitled to take the view that the *SiS* case did not require it to hold that Lucozade Sport (in either form) was zero-rated.

VAT Notice 701/14

29. HMRC's Notice 701/14, published in 2002, seeks to explain when food can be zero-rated. One section of the Notice is devoted to "Sports products". This states, among other things, that "sports energy drinks" are standard-rated beverages unless they meet each of five listed conditions. The first condition requires the product to be "aimed at supplying energy to enhance performance and/or accelerate recovery after exercise and both the packaging and advertising of the product reflect this". The second condition is that the product "is not primarily marketed for consumption as a soft drink". The fifth condition is expressed in these terms:

> "Its primary purpose is
> - the provision of energy; or
> - the provision of creatine; or
> - to build bulk; but
> - **not** rehydration"

30. The Tribunal said this about the Notice:

> "**[66]** We are not of course bound by the wording of the Public Notice. However, we note that the packaging of Lucozade Sport refers to the product as 'proven to give you an Edge' and says

> ‘Drink before and during your session to provide carbohydrate to fuel your muscles and maintain performance for longer’. Those words can fairly be said to satisfy Condition 1. Condition 2, which demands that it should not be primarily marketed as a soft drink is scarcely satisfied when, as we have already observed, Lucozade Sport is marketed alongside soft drinks of all varieties in retail outlets of all types. Regarding Condition 3, we have already found from the evidence … that rehydration is one of the primary purposes and ranks as such together with the provision of energy.”

31. Before me, Mr Cordara did not dissent from the proposition that Lucozade Sport has as its purpose rehydration as well as the provision of energy. That being so, Lucozade Sport would not appear to meet the third of the conditions specified in the Notice. In any case, the Tribunal was obviously correct in its observation that it was not bound by the Notice. The relevant part of the Notice, which represents an attempt to summarise the law in the light of the *SiS* case, has no statutory force. The important question for the Tribunal was how the Value Added Tax Act 1994 applies to Lucozade Sport, not how the Notice does so.

European materials

32. Mr Cordara made reference to European materials, including in particular a draft Commission Directive dating from 2004. The draft Directive includes recitals in the following terms:

> “(1) Foods intended to meet the expenditure of intense muscular effort should meet the particular nutritional requirements of people who participate in activities that involve intense muscular effort, in particular professional sports people but also other people for example those in the armed forces, mountaineers, and manual workers such as miners. Such products may be used by individuals who participate in activities that involve intense muscular expenditure during their leisure time ….
>
> (4) Given the nature of these products it is appropriate to lay down detailed compositional rules for foods with nutrient adaptation to meet the particular requirements associated with expenditure of intense muscular effort, especially for sports people ….”

33. It was submitted on behalf of GSK that the draft Directive is important as recognising the existence of a distinct category of foods (both liquid and solid) which are related to meeting the specific nutritional needs associated with exercise. The Tribunal, however, said this:

> "**[16]** We were referred to European directives relating to food. We see these as irrelevant to the question of whether Lucozade Sport is a food or a beverage. This is because as a matter of EC law the terms 'food' or 'foodstuff' are treated as including beverages and we note in this connection that the term foodstuffs includes rehydration drinks. Consequently drinks with possibly no nutritional value are treated as foodstuffs. The European classification is not therefore of any assistance in determining whether or not Lucozade Sport is to be classed as a beverage."

34. It seems to me that the Tribunal was justified in taking this view. It is also to be noted, as was pointed out by Mr Nicholas Paines QC (who appeared for HMRC with Mr Alan Bates), that the draft Directive extends to products which are accepted to be standard-rated (notably, hypotonic and hypertonic drinks).

Nutrition

35. As mentioned above, it is GSK's case that Lucozade Sport falls to be zero-rated because of its nutritional function.

36. However, it is apparent from the terms of schedule 8 to the Value Added Tax Act 1994 that the word "beverages" is capable of extending to nutritional drinks. The fourth of the "Excepted items" specifically includes "fruit juices" even though fruit juices can be expected to contain nutrition. The fact that preparations and extracts of milk, meat, yeast or egg are listed as "Items overriding the exceptions" indicates that, despite their nutritional content, they too are capable of being "beverages".

37. Case law tends to confirm that nutritional drinks can be standard-rated. In the *Kalron Foods* case, Warren J noted (in paragraph 10):

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

In *Innocent Limited* [2010] UKFTT 516 (TC), fruit "smoothies" were held to be standard-rated even though a single smoothie counted towards two of the recommended five portions of fruit and vegetables a day (see paragraph 134), and I was told by Mr Cordara (who was one of the counsel in the case) that that decision has not been appealed.

38. That is not to say that nutritional content is necessarily irrelevant to whether a liquid is a "beverage". The nutrients in a liquid may explain why it is consumed. Cod liver oil, for example, is plainly consumed for the nutrition it provides rather than for pleasure or hydration. If, on the

other hand, a liquid is drunk for hydration and pleasure, it is unlikely to matter whether it is nutritional.

39. In the present case, the Tribunal found that Lucozade Sport is consumed for hydration and pleasure. Far from concluding that Lucozade Sport is drunk only for its nutritional content, it was not satisfied that "sales of the product to consumers result in Lucozade Sport being mainly consumed for the nutritional values in the circumstances identified by Professor Maughan [which I take to mean within the context of high intensity athletics or sport]" (paragraph 60 of the Decision). In the circumstances, it seems to me that the Tribunal was amply justified in taking the view that "the nutritional values of the product do not outweigh its attributes as a source of pleasure or a means of rehydration or refreshment" (paragraph 60).

Objective characteristics

40. Mr Cordara submitted that VAT is to be levied on goods only by reference to their *objective* nature. Attention should thus, it was argued, be focused on "physical and chemical composition and (in the case of a foodstuff) its effects on the human consumer".

41. In the course of argument, Mr Cordara retreated somewhat from this position. He said that he was not suggesting that anything should be shut out from consideration. In particular, he accepted that it was appropriate to look at such matters as advertising and the market in which a product sits.

42. In my view, this concession was rightly made. So far as I am aware, there is no authority for the proposition that "objective characteristics" are all-important, and it seems to me that marketing and consumption can be relevant. Suppose, to take an extreme example, GSK discovered that Lucozade Sport could be used as (say) a lubricant and marketed it as such, it could hardly be said that it should be zero-rated because, objectively, its physical and chemical consumption was such that it could be consumed as a food.

43. In any case, I do not think that reference to Lucozade Sport's "objective characteristics" would prevent it from being considered a "beverage". Rehydration is not merely one of the purposes for which consumers purchase Lucozade Sport, but, objectively, a consequence of consumption: water is "an essential part of the functionality of the product, not just as a delivery mechanism but also to replace the water that has been lost during exercise". Lucozade Sport's "effects on the human consumer" are, moreover, such that drinking it is, on the Tribunal's findings, refreshing and pleasurable.

The Tribunal's three-stage approach

44. As already mentioned (paragraph 17), the Tribunal addressed three questions in arriving at its overall conclusion. Mr Cordara criticised this approach. As he put the point in oral argument, it meant that the "beverage camp was implicitly 15 or 30 love up, as it were, before there [was] any service from the overall nutritional camp".

45. The Tribunal's approach involved asking, first, whether Lucozade Sport was a "beverage" according to the criteria identified in the *Bioconcepts* case and, afterwards, whether Lucozade Sport was nonetheless not a "beverage" because of its nutritional values. I can see nothing wrong with this. That there may have been other ways in which the Tribunal could have approached its task is not to say that this was not a permissible one.

Overall conclusions

46. The Tribunal concluded by stating (in paragraph 67 of the Decision) that GSK had "not satisfied [it] that Lucozade Sport falls outside the scope of the expression 'beverage' in Group 1 of Schedule 8".

47. Given its factual findings, the Tribunal was, in my judgment, fully entitled to arrive at this conclusion. The ready-to-drink version of Lucozade Sport is, of course, a liquid that is drunk. Further, on the Tribunal's findings, rehydration is both something that Lucozade Sport achieves and one of the main purposes for which it is drunk. It is also drunk for refreshment and pleasure and to assuage the thirst. While drunk for energy as well, it is not mainly purchased or consumed on account of its nutritional ingredients. In the circumstances, the Tribunal's conclusion was, to my mind, a reasonable one. In fact, I find it hard to see how the Tribunal could have arrived at any other conclusion.

48. It was suggested by Mr Cordara that the Tribunal ought to have undertaken a separate analysis of the powder version of Lucozade Sport. However, the powder product is (in the words of GSK's skeleton argument) "chemically equivalent [to the ready-to-drink product] when water is added". If, therefore, Lucozade Sport is a "beverage" in its ready-to-drink form, the powder variant must come within schedule 8's reference to "powders … for the preparation of beverages" and so likewise be standard-rated for VAT purposes.

Conclusion

49. In all the circumstances, the Tribunal was, in my judgment, entitled to arrive at the conclusion it did. I shall accordingly dismiss the appeal.

MR JUSTICE NEWEY
TRIBUNAL JUDGE

RELEASE DATE: 24 October 2011