Neutral Citation: **[2024] UKUT 00095 (TCC)**

Case Number: UT/2023/000007

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing Venue: **The Rolls Building,**
Fetter Lane, London EC4A 1NL

Value Added Tax, Zero-Rating, Food, Confectionery, Note 5 Item 2 of Group 1 Schedule 8 Value Added Tax Act 1994. Whether Note 5 is a deeming provision – no. Multi-Factorial Assessment when considering Note 5. Whether FTT erred in concluding Mega Marshmallows are not confectionery – no.

Heard on: 21 November 2023
Judgment date: 04 April 2024

Before

JUDGE PHYLLIS RAMSHAW
JUDGE NICHOLAS ALEKSANDER

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Appellants

and

INNOVATIVE BITES LIMITED
Respondent

Representation:

For the Appellants: Ms Charlotte Brown, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Mr Tim Brown, Counsel, instructed by The VAT Consultancy

DECISION

INTRODUCTION

1. This is an appeal by HMRC against the decision of the First Tier Tribunal (Tax Chamber) ('the FTT') released on 21 September 2022 (TC/2019/06287). HMRC were the Respondents in the appeal before the FTT. In this decision we refer to the Appellants in this appeal as HMRC and the Respondent as the taxpayer to avoid confusion.

2. The FTT allowed the taxpayer's appeal against HMRC's decision that supplies of its food product 'Mega Marshmallows' are standard rated supplies of confectionery pursuant to Excepted Item 2 of Group 1 of Schedule 8 to the Value Added Tax Act 1994 ('VATA'). The conclusion reached by the FTT was that Mega Marshmallows are not confectionery and that the supply is therefore zero-rated. The conclusion was based on the findings that Mega Marshmallows are sold and purchased as a product specifically for roasting. The FTT considered the marketing, the packaging, the size of the product, the positioning in supermarkets and the seasonal fluctuation in sales when reaching its findings. Permission to appeal was granted by the Upper Tribunal.

3. References in this decision to paragraph numbers are to paragraphs in the FTT decision unless otherwise indicated. References to page numbers are to the hearing bundle prepared for the appeal before us.

BACKGROUND

4. The FTT set out the background very briefly at [2] (the 'product' being Mega Marshmallows):

> The appellant is a wholesaler of American sweets and treats, amongst other items. HMRC decided that the Product was confectionery and ought to have been standard rated. They issued assessments to the appellant on 14 August 2019, covering supplies of the Product in VAT periods between June 2015 and June 2019. The assessments total £472,928.

THE ISSUES TO BE DECIDED

5. The primary issue to be decided in this case is whether or not the product, Mega Marshmallows, falls within Excepted Item 2. This will involve consideration of the interrelationship between Note 5 and Item 2. As a preliminary issue we need to determine the legal status and effect of Note 5. This issue arose as a result of submissions made by HMRC that Note 5 is a deeming provision and the asserted consequences of that submission. Written submissions from the parties were invited. These were provided after the oral hearing in accordance with the Upper Tribunal's directions. We refer to these submissions and the issue as the 'legal status and effect of Note 5'.

RELEVANT LEGISLATIVE PROVISIONS

The European Context

6. In this appeal we are concerned with domestic legislative provisions. The supplies subject to this appeal were made before the United Kingdom left the European Union ('EU'). Nothing turns on this for the purpose of this appeal and there is no suggestion that the approach to interpretation of the relevant provisions has altered. Submissions were made in relation to the

background to zero-rating in the United Kingdom and the legislative history of the provisions we are concerned with. In our view the background potentially adds colour to our consideration of the legislation.

7. To provide the context for zero-rating of food and the supplies in the instant appeal, and very simply put[1], goods and services supplied by a taxable person, acting as such, are subject to the standard rate of VAT unless the goods or services (and/or the persons supplying them) fall within any exemptions, reduced rates, exceptions (e.g., special schemes) or derogations. 'Zero-rating' is a domestic term. Section 30(1) VATA provides for zero-rating of certain supplies and for those supplies to be 'treated' as taxable supplies with a nil rate of VAT. The EU term for zero-rated supplies is 'exemption with deductibility of VAT'.

8. The zero-rating provisions we are concerned with are implemented in the UK pursuant to a permitted derogation from the requirements of VAT Directive 2006/112/EEC ('PVD') There are other zero-rated provisions in the UK which were implemented in accordance with the PVD[2].

9. Prior to joining the EU (EEC) staple foods were not subject to tax in the UK in accordance with the Purchase Tax Act 1963 ('PTA63'). The UK preserved the tax-free treatment of those foods when VAT was introduced by the Finance Act 1972 ("FA72"). This was pursuant to a permitted derogation. At that time Article 17 of the Second Directive 67/228/EEC permitted, on a transitional basis, Member States to *'provide for reduced rates or even exemptions with refund'* where they were *'taken for clearly defined social reasons and for the benefit of the final consumer'* and provided that the scope of the reliefs did not exceed those already in place. Article 28 of the Sixth VAT Directive 77/388/EEC provided that only zero-rating provisions which were in force on 31 December 1975, and which satisfied the conditions in Article 17 of the Second Directive might be maintained. Thus, there was a freeze on the enactment of zero-rating provisions and a new constraint on those which were permitted to remain in force. This permitted derogation (still on a transitional basis) was subsequently provided for by Article 110 of the PVD in similar terms with the addition of such rates having been in place on 1 January 1991 and that they must be in accordance with community law. At the relevant time (i.e., when the amended provisions we are considering in this appeal were introduced) there could be no extension of the supplies that were zero-rated as permitted by Article 110. It was not open to the UK to extend zero-rating to foods that were not already zero-rated when VAT was introduced in the UK. Removal of zero-rating for particular foods/supplies was permitted. If such removal of the zero-rate was introduced, it was not open to the UK to subsequently re-instate the zero-rate on that particular food.

Historical provisions

10. The legislative history is relevant to considering the legal status and effect of Note 5.

11. A purposive interpretation of a statute requires that its words be construed in their context. We agree with HMRC that in this case in relation to determining the preliminary issue the context includes the legislative history. In *R (Quintavalle) v Secretary of State for Health*

[1] We acknowledge that such oversimplification will necessarily fail to reflect the many exceptions to the general rules that exist in the field of VAT.

[2] For example, section 30(8) and Regulation 134 (of the VAT Regulations 1995 (SI 1995/2518)) provide for certain removals of goods to be zero-rated)

[2003] UKHL 13, [2003] 2 AC 687 Lord Bingham of Cornhill described the court's task as follows:

> 8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed and a literal interpretation given to the particular provisions which give rise to difficulty... Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem …So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

12. Bennion, Bailey and Norbury on Statutory Interpretation (Eighth Edition) ('Bennion') at [24.5] states:

> In order to understand the meaning and effect of a provision in an Act it is essential to take into account the state of the previous law and, on occasion, its evolution…
>
> At its most basic level, the purpose of an Act is normally to make changes in the law. In order to understand the meaning and effect of a provision it is essential to understand the state of the law at the time the Act was passed. The court cannot soundly judge the mischief that a provision is intended to remedy unless it knows the previous state of the law, the defects found to exist in that law, and the facts that caused the legislature to pass the legislation. … The courts will often look to the previous law to support a particular construction.

13. As we set out above staple foods were not subject to purchase tax, whereas items that may have been considered to be luxuries were taxed. The wording of Excepted Item 2 (Group 1, Schedule 8, VATA) can be traced back to Schedule 1 to the PTA63 which specified 36 groups of items on which purchase tax was levied. Group 34 brought into the charge goods:

> comprising chocolates, sweets and similar confectionery (including drained, glacé or crystallized fruits); and chocolate biscuits and other confectionery having a case or coating of chocolate couverture, but not including cakes in such a case or coating.
>
> Articles not comprised below in this Group … 15%
>
> Exempt
>
> (1) Chocolate couverture not prepared or put up for retail sale.
>
> (2) Drained cherries.
>
> (3) Candied peels.

14. On the coming into force of FA72 purchase tax was abolished and VAT introduced. By enacting section 12 of, and Schedule 4 Group 1 to, FA72 the derogation discussed above was relied on to preserve the non-taxation of food as previously provided for in the PTA63. Schedule 4 of the 1972 Act contained the description of zero-rated supplies and Group 1 of that Schedule adopted the same structure of specifying general items, excepted items and overriding items which now appears in Schedule 8 VATA. Schedule 4 Group 1 FA72 zero-rated '*Food of a kind used for human consumption*'. Excepted Item 2 provided an exception to zero-rating in line with taxation under the PTA63:

> Chocolates, sweets and similar confectionery (including drained, glace or crystallized fruits); and chocolate biscuits and other confectionery having a case or coating of chocolate couverture, but not including cakes in such a case or coating.

Items overriding the exceptions

Item No.

1. Chocolate couverture not prepared or put up for retail sale.

2. Drained cherries.

3. Candied peels…

Notes :

…

(4) Items 1 to 3 of the items overriding the exceptions relate to item 2 of the excepted items…

15. Subsequently the Value Added Tax Act 1983 ('VATA83') was enacted. When VATA83 was first enacted Schedule 5, Group 1 (Food), Excepted Item 2 read:

> 2. Chocolates, sweets and similar confectionery (including drained, glace or crystallized fruits); and biscuits and other confectionery (not including cakes) wholly or partly covered with chocolate or some product similar in taste and appearance.
>
> Items overriding the exceptions
>
> …
>
> 2. Drained cherries.
>
> 3. Candied peels...
>
> Notes:
>
> …
>
> 5. Items 2 and 3 of the items overriding the exceptions relate to item 2 of the excepted items.

16. The Value Added Tax (Confectionery) Order 1988 (SI 1988/507) ('the 1988 Order') came into force on 1st May 1998. Paragraph 2 of the order varied Excepted Item 2 and Note 5 of Group 1 of Schedule 5 to VATA83 by substituting for Excepted Item 2:

> 2. Confectionery, not including cakes or biscuits other than biscuits wholly or partly covered with chocolate or with some product similar in taste and appearance.

and adding to the end of Note 5:

> , and for the purposes of item 2 of the excepted items "confectionery" includes chocolates, sweets and biscuits; drained, glacé or crystallized fruits; and any item of sweetened prepared food which is normally eaten with the fingers.

17. In 1994 VATA re-enacted the relevant provisions in VATA83 in identical terms. Section 30, subsection 2 VATA, provided for the zero-rating of the supply of goods or services

specified in Schedule 8. The same structure was adopted specifying general items, excepted items and overriding items:

> Group 1 – Food
>
> The supply of anything comprised in the general items set out below, except—
>
> (a) …
>
> (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.

18. It is accepted that Mega Marshmallows do not fall within any of the items overriding the exceptions. The general items include at Item 1 food of a kind used for human consumption.

19. The issue that arises in this appeal is whether Mega Marshmallows fall within Excepted Item No. 2 which provides:

> *Excepted Items*
>
> *Item No.*
>
> …
>
> 2. Confectionery, not including cakes or biscuits other than biscuits wholly or partly covered with chocolate or some product similar in taste and appearance.
>
> …

20. Note 5 relevantly provides:

> Notes
>
> …
>
> (5) …for the purposes of Item 2 of the excepted items, "confectionery" includes chocolates, sweets and biscuits; drained, glacé or crystallized fruits; and any item of sweetened prepared food which is normally eaten with the fingers.

21. Relevant to the issue of determining the legal status and effect of Note 5 is Section 96(9) VATA - other interpretative provisions –which provides:

> (9) Schedules…8 … shall be interpreted in accordance with the notes contained in those Schedules; and accordingly the powers conferred by this Act to vary those Schedules include a power to add to, delete or vary those notes.

APPROACH TO STATUTORY INTERPRETATION

22. The general approach to interpreting statutory provisions is not contentious in this appeal. There are many cases setting out the modern approach. We must identify the meaning borne by the words in the particular context and have regard to the purpose of the provision seeking to construe it, as far as is possible, in a way which best gives effect to that purpose. These principles have recently been confirmed by the Supreme Court in R *(on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28

('*PACCAR*'). In the judgment of Lord Sales (with whom Lord Reed, Lord Leggatt and Lord Stephens agreed, Lady Rose dissenting):

> 40. The basic task for the court in interpreting a statutory provision is clear. As Lord Nicholls put it in *Spath Holme*, at p 396, "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."

23. There have been many authorities concerning the way in which statutory deeming provisions ought to be interpreted and applied. Most authorities appear to deal with how to determine how far the hypothesis should be taken in any particular case. In *Fowler v HMRC* [2020] UKSC 22 ('*Fowler'*) Lord Briggs set out the following at [27]:

> (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
>
> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
>
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
>
> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, at 133:
>
> > "The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

24. In *Marshall (Inspector of Taxes) v Kerr* [1993] STC 360 at 366, which was approved by the Supreme Court in *HMRC v DCC Holdings (UK) Limited* [2010] UKSC 58 it was held:

> For my part, I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that, because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.

Preliminary Issue – The Legal Status and Effect of Note 5

HMRC's submissions

25. Ms Brown submitted that Note 5 is a deeming provision, if an item falls within a description in Note 5 it is automatically within the ambit of Item 2 and that is the end of the

matter - the item is deemed to be confectionery. It is only if an item does not fall within the description in Note 5 that a multi-factorial assessment is required to determine whether it falls within Excepted Item 2. Reliance is placed on *WM Morrison Supermarkets plc v HMRC* [2023] UKUT 20 (‘*Morrisons*’).

26. In oral submissions when referred to Section 96(9) VATA Ms Brown argued that Note 5 is more than an interpretative provision, it deems the examples set out in Note 5 to be confectionery. She submitted that the FTT was in error in undertaking a multi-factorial assessment as it is only after determining an item does not fall within Note 5 that a multi-factorial assessment may be undertaken. In answer to examples put to her by the UT she accepted that there may potentially be a need to undertake a multi-factorial assessment when considering the descriptions in Note 5 but that would relate only to factors in Note 5 itself.

27. In the written submissions on this issue HMRC’s position appears to have altered somewhat. Ms Brown refers not to the paragraph in Bennion on deeming provisions but to the paragraph on inclusive definitions. She refers to paragraph 18.3 in Bennion which sets out:

> (1) An inclusive definition modifies the natural meaning of the defined term by enlarging it or clarifying potential doubt about what is covered. This kind of definition typically takes the form 'X includes’.
>
> …
>
> Comment
>
> An inclusive definition is used to enlarge the meaning of the defined term to cover things that are not or might not otherwise be caught. It 'does not normally affect the width of the term being enlarged.' The term as used in the Act has its natural meaning (which is left undefined) and in addition has the special meaning given to it by the inclusive definition….
>
> An inclusive definition typically takes the form 'X includes…'. As Lord Watson explained in *Dilworth v Commissioner of Stamps* the word 'includes':
>
> > “… is used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include.”
>
> Similarly, in *Robinson v Local Board of Barton-Eccles* Lord Selborne LC said:
>
> > “An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable; but to enable the word as used in the Act, when there is nothing in the context or the subject matter to the contrary, to be applied to some things to which it would not ordinarily be applicable.”

28. Ms Brown argued that in the context of Note 5, the inclusive definition states something to be confectionery that may otherwise not have been and this enables the word, to be applied to some things to which it would not ordinarily be applicable - those notes enlarge the meaning of a provision so that products are treated as if they were something else, this has a deeming effect. She asserted that it is appropriate to also describe an inclusive definition as a type of deeming provision, but the label is irrelevant as they have the same legal effect- any item that falls within a description with Note 5 is automatically confectionery, without caveat or override.

Taxpayer's submissions

29. Mr Brown submitted that Note 5 is not a deeming provision in the sense that if a product falls within it at first glance, then the product must be deemed to be confectionery. Instead, it enlarges the definition of confectionery, which the court must take into account when considering in its multi-factorial assessment whether a product falls within Item 2 as expanded by Note 5.

30. It was argued by Mr Brown that HMRC's submission that determining whether a product is confectionery is a two-stage process is incorrect. Whilst HMRC appears to now accept that a multi-factorial assessment may be involved when considering Note 5, in *HMRC v. The Core (Swindon)* [2020] UKUT 0301 (TCC), the UT stated at paragraph 58:

> In all cases involving classifications for VAT purposes there needs to be a multifactorial assessment.

31. He submitted that the authorities concerned with the question of confectionery, have determined that in every case the Tribunal carries out a multi-factorial assessment. This area of law is not one where one can say without such an analysis, for example, "that is a sweet".

Analysis

32. We consider firstly if Note 5 is a deeming provision and then go on to determine the correct approach to construing Item 2 and Note 5.

Is Note 5 a deeming Provision?

33. In essence HMRC argued that Note 5 was a deeming provision or could be described as a type of deeming provision and that the consequence is that (if a product falls within a description in Note 5) there can be no further findings of fact hence no multi-factorial assessment is to be undertaken.

34. We consider firstly the effect or consequence of construing a provision as a deeming provision and then move to an analysis of Note 5 in the context of the legislation and its legislative history.

What is the effect/consequence of a deeming provision?

35. We turn firstly to [17.8] in Bennion where the following explanation is provided:

> [17.8] The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further.
>
> Comment
>
> Acts often deem things to be what they are not or deem something to be the case when it may or may not be the case…
>
> …
>
> … The language used to set up a statutory hypothesis varies. The traditional form of words 'shall be deemed' has generally given way to expressions such as 'treated as', 'regarded as' or 'taken to be'. Whatever form is used the effect is the same.

…

In *Jenks v Dickinson (Inspector of Taxes*), a case involving tax avoidance, Neuberger J said:

'It appears to me that the observations of Peter Gibson J, approved by Lord Browne-Wilkinson, in *Marshall* indicate that, when considering the extent to which one can "do some violence to the words" and whether one can "discard the ordinary meaning", one can, indeed one should, take into account the fact that one is construing a deeming provision…

36. As acknowledged by HMRC deeming provisions generally create what have been described as legal or statutory fictions. They will usually involve treating a situation as existing when it does not in fact exist – a fictional deemed world (see for example the descriptions in *Fowler)*. It generally involves requiring artificial assumptions to be made or to imagine a state of affairs and will generally preclude any further findings of fact. Even though the normal cannons of statutory interpretation are applied, the approach to construing a deeming provision, as set out above in *Jenks,* is coloured by the fact that the provision is a deeming one. It is therefore important to determine the correct legal status of the provision.

37. It appears that the driver behind the submission that Note 5 is a deeming provision is that it would preclude further enquiry if a product met any of the descriptions in Note 5 – as put by Ms Brown an item that falls within a description with Note 5 is automatically confectionery, without caveat or override. It would treat it as conclusive even if the product was not confectionery. As explained in *HMRC v Vermilion Holdings* [2023] UKSC 37 the deeming provision (section 471(3) of the Income Tax (Earnings and Pensions) Act 2003):

24… creates a bright line rule: if a person's employer (or a person connected to that person's employer) provides the employee the right or opportunity to acquire a securities option, that right or opportunity is **conclusively** treated as having been made available by reason of the employment of that person… (emphasis added)

38. The right to acquire a securities option, in reality, may **not** have been made by reason of the employment of the person but because it is a deeming provision no factual enquiry can be made into the reason. This analysis of the effect of a deeming provision would support HMRC's submission that if an item falls within a description in Note 5 that is the end of the matter.

Analysis of Note 5

39. In our view Note 5 is not a deeming provision for the following reasons.

40. Turning to the language used (although we accept it is not conclusive) we consider it is not indicative of a deeming provision – it does not use words such as 'treated as' or 'is taken to be'. Note 5 simply states that confectionery 'includes' followed by a list of items/descriptions.

41. We reject Ms Brown's submission that in the context of Note 5 the inclusive definition is a type of deeming provision by treating the products as if they were something else. The words used in Note 5 do not, in our view, create a legal fiction – see further below. There is a distinction between provisions that serve to clarify to avoid potential doubt (one aspect of an 'inclusive definition') and provisions that 'treat' something as if it were something that in reality it is not.

42. The history of the legislation fortifies our view that Note 5 is not a deeming provision. We were referred to the Explanatory Note to the 1988 Order. In *PACCAR*, Lord Sales at [42] said:

> 42. It is legitimate to refer to explanatory notes which accompanied a Bill in its passage through Parliament and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained.

43. Ms Brown submitted that the purpose behind the amendment made by the 1988 Order to Note 5 was to expand the meaning of confectionery to include modern products. The Explanatory Note set out:

> This Order amends Group 1 of Schedule 5 to the Value Added Tax Act 1983 in relation to confectionery. It removes certain uncertainties and, while maintaining relief for cakes, restricts the scope of the relief for other confectionery products which are not wholly or partly covered with chocolate or with some product similar in taste and appearance. The main immediate effect will be to tax all cereal bars at the standard rate.

44. We were also referred to the statement to Parliament in the Budget Statement by the Chancellor of the Exchequer on 15 March 1998 Hansard Vol.129

> I have one change to propose today affecting the coverage of value added tax, which will remain at 15 per cent. Confectionery was brought in to VAT by the right hon. Member for Leeds, East (Mr. Healey) in 1974, and the legal definition of confectionery goes back further still to the days of purchase tax. The emergence of new products has rendered this definition, rather like the right hon. Gentleman himself, somewhat obsolete. In particular, recent legal decisions mean that some cereal bars are subject to VAT, while others are not. I propose to clarify the law so that all cereal bars are taxed.

45. As can be seen from the historical legislative provisions set out above, sweets and chocolates were previously listed in Item 2. As stated in *HMRC v Premier Foods Ltd* [2007] EWHC 3134 (Ch) (*'Premier'*) at [18] sweets are the paradigm of confectionery. It cannot therefore be said that listing sweets and chocolates in Note 5 in any sense creates a legal fiction by deeming them to be confectionery when in reality they are not. It also cannot be said that Note 5 enables the word confectionery to be applied to sweets and chocolates to which it would not ordinarily be applicable.

46. It seems clear from the background materials that the relevant amendment made by the 1988 Order was to include the term 'sweetened prepared food normally eaten with the fingers'[3] to ensure that cereal bars that were not wholly or partly covered in chocolate were captured as well as other products that could be so described. Although an inclusive definition can enable the word as used in an Act to be applied to some things to which it would not ordinarily be applicable the inclusion of this description, in our view, falls more naturally within the aspect expressed in Bennion of an inclusive definition as clarifying potential doubt about what is covered. The Explanatory Note refers to removing uncertainties. We note that in HMRC's

[3] The description 'normally eaten with the fingers' was used in the description of confectionery set out as long ago as 1968 in *Commissioners of Customs and Excise v Popcorn House Ltd* [1968] All ER 782. We acknowledge that this case was concerned with different legislation prior to the introduction of VAT and that in *Premier* certain aspects of the description (cooking and sweetening) formulated were not approved.

skeleton argument before the FTT at [20] it was argued that 'The Notes section of the law contains a number of clarifications'.

47. The descriptions in Note 5 clearly do not refer to things that are in reality not confectionery requiring them to be taken to be confectionery in the face of something quite different being the case. An inclusive definition does not generally extend the width of the term being enlarged.

48. Further, section 96(9) of VATA provides that Schedule 8 is to be interpreted in accordance with the Notes. Note 5 is to be construed in the context of interpreting Item 2. That is consistent with Note 5 providing descriptions of items that are included to avoid doubt as to whether they are confectionery. It does not require that no further fact finding can be undertaken.

49. We conclude that Note 5 is not a deeming provision. We discuss further below the correct approach to Note 5.

50. We agree that Note 5 is an inclusive definition. As set out in Bennion an inclusive definition can modify the natural meaning of the defined term by clarifying potential doubt about what is covered. We agree with the description of the Chancellor in *HMRC v Premier Foods* [2007] EWHC 3134 (Ch) of Note 5 as "an enlarging definition" at [18].

51. The Upper Tribunal in *Morrisons* referred to Note 5 as a deeming provision on a number of occasions. It was not deciding the legal status of Note 5. In our view the discussion in *Morrisons* at [94] indicates that the Upper Tribunal did not have in mind 'deeming' in the legal context of the effect a deeming provision has otherwise it would not have considered whether other factors (such as packaging) not mentioned in Note 5 could outweigh the cumulative weight of the factors listed in Note 5 as depending on the facts of the case and how the matter is looked at in the round. We reject HMRC's submission that the Upper Tribunal was referring only to factors under consideration in relation to Item 2. If the Upper Tribunal did consider Note 5 to be a deeming provision, we depart from such a view for the reasons we have given above.

The Correct Approach to Construing Note 5 and Item 2

52. Ms Brown's submissions on the correct approach to Note 5 and Item 2 depended largely on the premise that Note 5 was a deeming provision. As she put it if an item falls within the description in Note 5 it is automatically within the ambit of Item 2 and that is the end of the matter - the item is deemed to be confectionery and there is no scope for a multi-factorial assessment. However, she accepted that there may potentially need to be a multi-factorial assessment when determining if an item falls within Note 5 but that appeared to be limited to determining the specific criteria in Note 5 (such as if a product is sweetened). Mr Brown submitted that in all cases a multi-factorial assessment is required.

53. We have found the arguments advanced on behalf of HMRC on the circumstances in which a multi-factorial assessment is permitted and the scope of such an assessment confusing and to some degree conflicting. In particular the argument that some items of confectionery are untaxed by concession is internally inconsistent and does not appear to be consistent with the explanation about cooking chocolate set out in the submission on the legal effect and status of Note 5. Whilst we do not need to decide in this case whether products that are used for baking or cooking are not confectionery or if they are confectionery but untaxed by concession the

classification of such products is relevant to the issue we do need to decide, namely, what is the correct approach to construing Note 5 and Item 2.

The concession arguments

54. Ms Brown argued that any item that falls within a description in Note 5 is automatically confectionery, without caveat or override. However, in contrast it was also submitted during the oral hearing that cooking chocolate and tiny marshmallows, whilst they are confectionery and fall within the descriptions in Note 5 and/or in Item 2, are untaxed by concession made in VAT Notice 701/14 as ingredients used in cooking. During the hearing Ms Brown indicated that in such circumstances a multi-factorial assessment is required to determine if the (confectionery) product is an ingredient used in cooking and if so, the concession applies. She indicated that the multi-factorial assessment would take place after it had been determined whether the item fell within Note 5. This is inconsistent with the arguments that if an item falls within Note 5 that is the end of the matter.

55. In the grounds of appeal, it is argued that **confectionery** is only zero-rated under VAT Notice 701/14 if three conditions are fulfilled as set out in paragraph 3.2 - the third condition being that the product is not one of the excepted items as per paragraph 2.2[4]. It was argued that Mega Marshmallows, being confectionery, do not satisfy that condition. This is internally inconsistent – a catch 22 situation. If a product is **confectionery,** it cannot ever satisfy the third condition so how can confectionery ever be zero-rated (as HMRC appeared to argue it is) in accordance with Notice 701/14?

56. As a result of these inconsistencies and also because of the restrictions, set out above, regarding the permitted derogation for these zero-rates we have some doubt that the correct approach is as argued for on behalf of HMRC. We could find no reference to concessionary treatment for baking or cooking ingredients in Notice 701/14 and no reference was made to a specific ESC. Zero-rates that were not already in place cannot be extended and that includes administratively. It may be the case that such items that HMRC appear to accept are confectionery but nevertheless are zero-rated were excluded from taxation under the PTA63 or by some form of concession. We have not had the benefit of specific arguments on this point, and we do not need to decide it, but it is relevant to the question as to the approach to be taken when determining whether or not a product falls within Note 5 and/or Item 2 as confectionery.

The arguments that cooking and baking ingredients are not confectionery

57. As mentioned above the treatment of tiny marshmallows was discussed during the oral hearing. The FTT had also asked for clarification on the treatment of mini marshmallows (we do not draw a distinction for present purposes between tiny and mini marshmallows):

> 44. Confectionery might not be expected to include a product which is intended to be used as an ingredient in making another product. In this respect it is instructive to consider the treatment of mini marshmallows. We invited the parties to agree the VAT treatment of mini marshmallows. Following the hearing, HMRC helpfully provided us with a statement of their policy in relation to mini marshmallows as follows:
>
> > The VAT liability of 'tiny' marshmallows will depend upon the basket of evidence which will determine whether they are to be treated as items of confectionery (taxable at the standard rate) or whether they are to be used for culinary purposes such as baking (in which case they will be zero rated). In line with HMRC's multifactorial approach VAT treatment would be

[4] Paragraph 2.2 includes confectionery

> determined by all relevant factors including where they were placed (such as in the baking section of a supermarket aisle) and the way in which they were held out for sale and that would include the marketing of the product and how it is labelled and packaged.

58. It is not clear from that explanation whether HMRC considered tiny marshmallows to be confectionery that is untaxed by concession or whether the basket of evidence determines if in fact they are '*to be treated as confectionery*' or not. From that explanation it seems clear that HMRC appears to accept that a product could potentially be either confectionery or used for culinary purposes and different tax treatments would be applied but the reason for this is unclear.

59. In the written submission on the legal effect and status of Note 5 HMRC's position appears to have changed (at least in relation to cooking chocolate) although no express clarification of the submissions made in the grounds of appeal or at the oral hearing in relation to concessionary treatment has been expressed. At paragraph 29 the following explanation was advanced in relation to cooking chocolate:

> …For completeness and clarification, it is clear from the above explanation on the historical background that prior to the introduction of Note 5 the legislation taxed "*chocolates, sweets and similar confectionery…*" In other words, the reference to chocolates was a reference to chocolate confectionery and not to chocolate used as an ingredient in baking. A distinction may be made between confectionery chocolate which is sweetened food normally eaten with the fingers, and cooking chocolate which is simply used as a baking ingredient rather than eaten as a sweet snack. As referred to during the hearing, as per the FTT decision in *Kinnerton Confectionery Limited v HMRC* [2018] UKFTT 382 (TC) cooking chocolate is taxed differently from confectionery chocolate, the former being zero rated and the latter being standard rated. On the facts of that case, an allergen free chocolate bar was held not to be zero-rated cooking chocolate. This was following a multi-factorial assessment ("MFA") where emphasis was placed upon the way in which the product was held out for sale.

60. From the above paragraph it appears that HMRC's position is that cooking chocolate is not confectionery rather than being untaxed by concession.

61. In HMRC's internal manual[5] (referred to in their skeleton argument before the FTT) it states, '*Chocolate confectionery is within excepted item 2 and standard-rated, but there are several types of chocolate product which are used in manufacturing or cooking processes, which are* ***not regarded as confectionery*** *and which are therefore zero-rated as food (*emphasis added)'. This also appears to amount to an argument that products used in cooking processes are not confectionery.

62. In summary we have no clear idea of what HMRC's position is on whether cooking/baking products/ingredients are untaxed by concession or if they are not confectionery and therefore zero-rated.

When is a multi-factorial assessment required/permitted?

63. As can be seen from the above arguments we have no clear idea as to the circumstances in which HMRC say a multi-factorial assessment is appropriate. The taxpayer's position is that a multi-factorial assessment is always required.

[5] https://www.gov.uk/hmrc-internal-manuals/vat-food/vfood6180

64. The problem that we see is how would a Tribunal know the difference between, for example, a bar of confectionery chocolate that HMRC assert is sweetened food normally eaten with the fingers and cooking chocolate without undertaking a multi-factorial assessment. The same can be said of marshmallows. If they fall within Note 5 either as sweets or sweetened prepared food normally eaten with the fingers, how can a Tribunal classify tiny marshmallows as cooking ingredients without a multi-factorial assessment? Two bars of chocolate may be very similar in taste and appearance[6]. How should a Tribunal classify two apparently similar bars of chocolate? They would both (without any further analysis) seemingly fit the description HMRC suggests of sweetened prepared food normally eaten with the fingers - if HMRC are correct that firstly one must consider Note 5 and if a product satisfies a description in Note 5 that would be the end of the matter, no caveats or overrides, then that seems contrary to the apparent approval of the approach adopted in *Kinnerton* where the FTT undertook a multi-factorial assessment. It also seems contrary to the approach to tiny marshmallows that HMRC set out to the FTT and is contrary to the argument advanced regarding concessionary treatment of cooking chocolate and tiny marshmallows i.e., that a multi-factorial assessment is undertaken despite the product being confectionery to see if it falls within the concession. We note that in *Kinnerton* the FTT agreed with HMRC's submission that a bar of eating chocolate is an item of sweetened prepared food normally eaten with the fingers, but this conclusion appears to have been reached at the end of the process of undertaking a multi-factorial assessment. The approach in *Kinnerton* was that to decide whether an item of food is standard or zero-rated depended on how it was objectively held out for sale to be found via a multi-factorial assessment [3].

65. We have concluded, as set out below, that classification of food products is fact specific and that depending on the facts a multi-factorial assessment may be required in order to classify the product whether that is in relation to construing Note 5 or Item 2. This gives rise to a question as to the purpose of including descriptions in Note 5 that are included in the meaning of confectionery. We agree with our colleagues in *Morrisons* [94], as slightly modified, that that the point of Note 5 is that it saves time having to agonise over whether a product of that description falls within the meaning of confectionery. That does not, however, preclude further fact finding. It is, in our view, akin to a rebuttable presumption. For the reasons set out above it is not a deeming provision and therefore other factors may outweigh the presumption that a product thus defined is confectionery.

66. We move now to our conclusions on the correct approach to construing Note 5. We agree with HMRC that generally a Tribunal should commence with considering whether the product in issue falls within any of the descriptions in Note 5. For the taxpayer, Mr Brown relied on *HM Revenue & Customs v The Core (Swindon) Ltd* [2022] UKUT 0301 ('*The Core'*) it was said:

> 58. In **all** cases involving classifications for VAT purposes there needs to be a multifactorial assessment. The way the product is marketed and sold is (as [HMRC] accepts) a potentially relevant factor in every case. In some cases it may carry little weight, and in others it may carry great, or even dominant, weight as in *Fluff* and *Kinnerton* (emphasis added).

[6]It has not been suggested that cooking chocolate must have a different composition to confectionery chocolate and as found in *Kinnerton* (not, as far as we are aware, disputed by HMRC) it is not possible to decide whether a product is cooking chocolate or eating chocolate from the recipe [30].

67. Ms Brown sought to distinguish *The Core* as it concerned a different provision. She referred to the use of the term 'often' in *HMRC v Proctor & Gamble UK* [2009] EWCA 407 ('*Proctor')* (cited in *The Core*) at paragraph 9 where the Court of Appeal held that:

> Often a statutory test will require a multi-factorial assessment based on a number of primary facts.

68. We agree that there is no absolute requirement for a multi-factorial assessment in all cases. There may be no need for a multi-factorial assessment if a product can be readily classified as satisfying a description in Note 5– e.g., a packet of sweets or a box of milk chocolates. We do not agree with the taxpayer that one cannot say in any case without a multi-factorial assessment that a product is a sweet.

69. Where the answer is not readily ascertainable a multi-factorial assessment might simply involve consideration of very basic factors and need not involve overly technical or expert evidence. In other cases, a more extensive multi-factorial assessment may be required to determine issues directly relevant to the particular descriptions in Note 5 such as if the product is normally eaten with the fingers or is sweetened.

70. If a product falls within a description within Note 5 that is not the end of the matter. There may be other factors that would lead to a conclusion that the product is not confectionery (or is untaxed by concession).

71. If a product does not fall within any of the descriptions in Note 5 a Tribunal must consider whether the product falls within the wider description of confectionery in Item 2. This will usually require a multi-factorial assessment.

72. Although consideration of Note 5 is generally the starting point it is an interpretative provision as per section 96(9) VATA and therefore it does not standalone – it is part of a process of construing the term confectionery in Item 2. Depending on what sort of factors a Tribunal is considering the multi-factorial assessment may be relevant to construing both the specific descriptions in Note 5 and the meaning of confectionery in Item 2 in which case it may be artificial to apply the analysis to the descriptions in Note 5 and then subsequently to the wider meaning of confectionery in Item 2. As we set out above even where a product might fall within a description in Note 5 other factors might lead to a conclusion that the product is not confectionery. However, we consider that a Tribunal should adopt a reasonably structured approach in drawing together its conclusions even if the multi-factorial assessment covers both Item 2 and if relevant Note 5. It should make reference to any relevant description in Note 5 (because it is required to interpret confectionery in Item 2 in accordance with Note 5) and/or say why the product does/does not fall within any such descriptions. This does not need to be a lengthy explanation.

73. Although the statutory construction of the terms used in Note 5 and Item 2 are legal questions the descriptions in Note 5 and the term confectionery are ordinary words of the English language. The approach to determining the meaning of ordinary words in a statute is well rehearsed in the authorities and we do not need to repeat that here. Similarly with factors that are relevant to a multi-factorial assessment.

74. In summary:

(1) The starting point is to consider if the product falls within any of the descriptions in Note 5. This may, but need not, involve a multi-factorial assessment in relation to the descriptions, e.g., whether a product is normally eaten with the fingers.

(2) If the product falls within any of the descriptions in Note 5 then, absent any other relevant facts, the product can be classified as an Excepted item of confectionery and will be standard rated. There is no need to consider separately the term confectionery in Item 2.

(3) If the product falls within any of the descriptions in Note 5 but there are other relevant factors (e.g., it is a product used for other purposes) then a multi-factorial assessment should be undertaken to determine whether the product is confectionery (or, if HMRC is correct, if it is untaxed by concession).

(4) If the product does not fall within any of the descriptions in Note 5 then a Tribunal must determine if the product falls within Item 2 (usually requiring a multi-factorial assessment).

(5) The multi-factorial assessment in some cases may be relevant to determining the issues in (1), (3) and (4) above. It may (but need not) be artificial to apply the analysis to the descriptions in Note 5 and then subsequently to the wider meaning of confectionery in Item 2. In such cases an overall evaluation may be appropriate.

(6) In all cases a Tribunal should adopt a reasonably structured approach in drawing together its conclusions and make reference to any relevant description in Note 5 and say why the product does/does not fall within any such descriptions.

GROUNDS OF APPEAL

Ground 1 - The Tribunal erred in misapplying Note 5

HMRC's submissions

75. We have dealt with many of the submissions made by HMRC in relation to ground 1 concerning the deeming nature of Note 5 and the approach to a multi-factorial assessment. As we have rejected those arguments, we do not repeat them. We have drawn out the remaining submissions below.

76. Ms Brown submitted that the FTT, having concluded there was no doubt that Mega Marshmallows are a confection produced by mixing ingredients, that it is sweet, and it bears the fundamental characteristics of confectionery [37], erred in concluding that they did not fall to be described as confectionery because it was intended to be and may be roasted [49]. It is argued that an item for which there is 'no doubt' of it being a confection and which has all the characteristics of confectionery must be confectionery within the scope of Note 5. Classification is not a two-stage process whereby one determines first whether an item is confectionery and secondly whether there is something that then takes it outside of that meaning.

77. Mega Marshmallows fall within the scope of Excepted Item 2 because they fall within the non-exhaustive definition of Note 5. Specifically, they fall within the ordinary, everyday meaning of the provision from the view of the ordinary reasonable man in the street - reliance

is placed on *Customs and Excise Commissioners v Ferrero UK Ltd* [1979] STC 881 at [884] and [885] and *Proctor* at [79]).

78. Ms Brown argued that Mega Marshmallows are encompassed by the word 'sweets' in the ordinary sense in Note 5. In the permission to appeal application to the FTT, reliance was placed upon the Cambridge Dictionary definition which is, 'a small piece of sweet food, made with sugar.' The FTT found at [21] that the Mega Marshmallows are held out as snacks, without being roasted, the ordinary, everyday usage of "sweets" would encompass Mega Marshmallows.

79. Alternatively, it is argued that if an item does not fall to be confectionery within the ordinary, everyday usage of that word, it may still fall within Note 5 if it is a 'sweetened prepared food which is normally eaten with the fingers'. She submitted that the FTT hardly referred to Note 5. The FTT erred at [42] in not giving 'particular weight to the means of eating,' as that is a fundamental consideration in determining whether an item falls within Note 5. The Tribunal made a finding that unroasted marshmallows would be eaten with the fingers and roasted marshmallows might be eaten with the fingers. Normally means usually or more often than not.

80. Ms Brown submitted that a key flaw in the FTT's reasoning is that it erroneously considered that the fact that Mega Marshmallows could be roasted meant they were no longer confectionery. This was an error of law. The FTT rejected at [34] the taxpayer's evidence that roasting the marshmallows made them more palatable. Roasting them simply gave them a different texture and flavour, it did not alter them so that they were no longer marshmallows. There is no case law to suggest that simply heating a confectionery product changes its fundamental characteristics as confectionery– it does not make it into a different product or combine with other products as an ingredient. It was common ground that regular marshmallows were standard rated. The FTT therefore erred in law in reaching a different conclusion for the Mega Marshmallows, which are simply larger marshmallows.

81. It was argued that there is nothing in the legislation or case law to support the FTT's conclusion. Reference is made to HMRC's guidance in VN 701/14 (we do not repeat that here as we have discussed the submission above and it was not contended by the taxpayer that the guidance/concession applied and the FTT did not consider the guidance). The fact that they may be roasted neither precludes them from falling within the definition of confectionery, nor does it take them outside of that definition once they fall within it.

Taxpayer's Submissions

82. Mr Brown argued that in all cases involving classifications for VAT purposes there needs to be a multifactorial assessment which will be based on a number of primary facts and the appeal court will be slow to interfere with that overall assessment. The FTT correctly directed itself as to the question it was required to answer, namely whether the Product fell within the description of confectionery and that it should carry out a multifactorial assessment based on primary facts it found by reference to the viewpoint of a typical customer and giving the term confectionery its ordinary meaning.

83. He submitted that HMRC's argument is simply incorrect. The FTT stated Mega Marshmallows bore 'the fundamental characteristics of confectionery' (not all the characteristics) but then correctly went on to consider at paragraphs 38 and 39 the arguments put forward by both sides as part of its multi-factorial assessment. It then reached its conclusion. If HMRC's argument is correct, then the FTT would have reached its decision at

paragraph 37 based solely on ingredients of the product and without any further explanation, thereby not carrying out a multifactorial assessment, contrary to *Proctor*.

84. HMRC's point that a product intended for and used for roasting does not cause a product which would otherwise fall within the term confectionery to fall outside that term ignores the fact that the FTT is entitled to take all relevant factors into consideration as part of its multifactorial assessment before it reaches its decision.

Analysis

85. As we have decided that Note 5 is not a deeming provision and that a multi-factorial assessment may be undertaken the main thrust of HMRC's remaining arguments concern the FTT's approach to Note 5 and the findings about roasting.

86. The submission that Mega Marshmallows fall within the description sweets in Note 5 was not an argument that was advanced before the FTT and it was not argued that the FTT ought to have considered this of its own motion. The FTT does appear to have reached a finding without the benefit of specific arguments as discussed below.

87. We also note that it was not argued before the FTT that Note 5 ought to be considered first or that no multi-factorial assessment is permitted/required when considering Note 5.

88. The FTT made a number of findings of fact. The facts at [19-30] do not appear to be in dispute. Some of the findings from [31 -36] are disputed and relevant to ground 2. The FTT found at [37]:

> There is no doubt that the Product is a confection produced by mixing ingredients, and that it is sweet. It therefore bears the fundamental characteristics of confectionery. It is common ground that regular marshmallows are confectionery and therefore standard rated. However, confectionery is not generally used in cooking, or itself subject to cooking, in order to be enjoyed as intended.

89. This is not a finding that the product is confectionery – 'bearing the fundamental characteristics' of something suggests that there is more to be considered before a conclusion can be reached. The FTT then set out a number of factors identified by the parties for and against characterising the product as confectionery. We accept HMRC's submission that the FTT does not appear to have set out a conclusion as to whether Mega Marshmallows satisfy one of the descriptions in Note 5. Whilst there may be cases in which the product is obviously not within a description in Note 5 so a very short statement saying so is sufficient, on the facts of this case Mega Marshmallows did potentially fall within the descriptions in Note 5. In this case any error of law in that regard is not material for the reasons we give below – it does however highlight the benefit of structuring conclusions even if the multi-factorial assessment covers Note 5 and Item 2 in tandem.

90. We do not agree that the FTT did not consider the descriptions. It identified in [37] that the product was sweet and produced by mixing ingredients. It did make findings regarding 'eaten with the fingers'. Ms Brown argues that in not giving 'particular weight to the means of eating,' the FTT erred. The FTT found:

> 42. Clearly if the product is not roasted then it will be eaten with the fingers, perhaps having been cut up for children under 6. However, once roasted and cooled, the Product might be either eaten off the stick or with the fingers. In the circumstances of this product, we do not give particular weight to the means of eating.

91. This paragraph must be read in the context of the decision as a whole. At that point the Tribunal was in the process of weighing certain factors hence the expression as to giving weight to the means of eating. Although not explicit it is reasonably clear that by finding that there were different ways of eating the product (and in the context of its other findings that the product was sold and packaged as specifically for roasting) the FTT seemed unable to conclude what method was more usually or more often used to eat the product hence the, perhaps infelicitous, reference to the weight to be attached. Of course, the burden is on the taxpayer to demonstrate that the product is **not** normally eaten with the fingers. If the issue was simply whether the product fell within Note 5 as sweetened prepared food normally eaten with the fingers this may have been a deciding factor but in this case, it is not material given the other findings made by the FTT.

92. The FTT also found at [40]:

> …Further, the size of the packaging and indeed the Product itself do not suggest to us that it is intended to be eaten on the go, like a packet of sweets or a smaller packet of regular marshmallows or some mini marshmallow.

93. As we set out above the argument that Mega Marshmallows satisfied the description in Note 5 as sweets was not advanced before the FTT. The factors HMRC identified included consuming the product as a snack from the bag on the go. The FTT rejected that argument for the reasons set out in the above paragraph. We cannot discern any error of law in the FTT's conclusion on this issue on the basis of the non-specific arguments advanced before it.

94. With regard to the submission that Mega Marshmallow satisfy the ordinary everyday meaning of confectionery from the view of the ordinary reasonable man in the street, the FTT dealt with these arguments in the following paragraphs:

> 43. Subject to these points, we have taken all the factors described above into consideration. Both parties were agreed that we should categorise the Product by reference to the viewpoint of a typical consumer and giving the term confectionery its ordinary meaning. In carrying out that exercise we consider it appropriate to give particular weight to the nature of the Product, the way in which the Product is placed in supermarket aisles, the packaging and marketing of the Product and our finding that most consumers purchasing the Product would do so in order to roast the marshmallows. Whilst the text on the packaging has changed slightly over time, we do not consider that those changes affect the way in which a consumer would view the Product.
>
> 44…
>
> 45. It seems to us that HMRC's policy [on tiny marshmallows] is consistent with the principles derived from the various authorities discussed above. It is those principles which we must apply, although we have found it quite difficult to apply those principles to the Product in this case.
>
> 46. The issue we must decide is whether the term confectionery includes an item which is intended to be subjected to another cooking process before being eaten, and to some extent intended to be used as an ingredient in making another product. That judgment must include reference to the circumstances in which the item is marketed and sold.

95. We find no error of law in the FTT's approach, or in its identification of the issue as whether the term confectionery includes an item intended to be subject to another cooking process before being eaten. We discuss the findings of fact and inferences below in relation to ground 2.

96. Although Ms Brown argued that there is no case law to support the contention that simply heating a confectionery product giving it a different texture and flavour causes it to lose its character as confectionery, the question the FTT was required to answer was whether the product was confectionery by reference to the viewpoint of a typical consumer giving the term confectionery its ordinary meaning. The question in this case was **not** whether a product that had been found to be confectionery changed its fundamental character as confectionery because it was intended to be subject to a cooking process before being consumed. It was a prior question deciding whether it was confectionery after an overall multi-factorial assessment of the product and what a typical consumer's view would be. As we set out above similar products can be classified differently depending on the facts. The FTT considered the arguments advanced by the parties as to the view of the typical consumer:

> 47. Mr Brown for the appellant invites us to find that the typical consumer or the ordinary person in the street would not regard the term confectionery as encompassing an item which is intended to be subjected to a cooking process before being eaten. Especially if it is not sold in the confectionery aisle of a supermarket. That is the case in relation to the Product, whether it is enjoyed by consumers having been roasted, or whether the roasted mallow is then used as an ingredient in making a s'more.
>
> 48. Mr Wilson for HMRC invites us to find that if an item otherwise has the characteristics of confectionery, the typical consumer or the ordinary person in the street would not regard the fact that it is purchased with a view to cooking it as causing it to lose its character as confectionery. He accepts that the position is different if the item is purchased for use as a culinary ingredient. As we have said, we have no evidence as to the extent to which consumers use the Product as an ingredient to make s'mores. It was implicit in Mr Wilson's submissions that an intention to simply roast the Product would not cause it to fall outside the term confectionery.
>
> 49. On balance we accept that the Product does not fall to be described as confectionery. The fact that it is sold and purchased as a product specifically for roasting, the marketing on the packaging of the Product which confirms that purpose, the size of the Product which makes it particularly suitable for roasting and the fact that it is positioned in supermarket aisles in the barbecue section during the summer months when most sales are made and otherwise in the world foods section, leads us to that conclusion.

97. The need for appellate caution in evaluation of multi-factorial matters is not contentious and has been explained and amplified in several cases. An example is *Proctor* which concerned an appeal from a fact-finding tribunal on a similar type of classification question. The Court of Appeal, in allowing HMRC's appeal and finding the tribunal had not made any error of law, addressed the principles regarding the approach on appeal to 'value judgments' of the primary decision maker. This was explained as follows at [9]:

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

98. We can see no point of principle of legal proposition that suggests that the FTT could not take into account the fact that the product was intended to be subject to a cooking process before being eaten when considering if the typical consumer would view that as confectionery. It is not a view that can arguably be said that no reasonable Tribunal could have come to on the basis of the facts (assuming for the present that they are not impugned). Whether or not an appellate court may have arrived at a different conclusion is not relevant in such circumstances.

99. For completeness, we would add that - if the point were to be relevant - we do not accept Ms Brown's submission that roasting a marshmallow is "simply heating" it. At [34] the FTT held that "roasting the marshmallows gives them a different texture and flavour. … Roasting larger marshmallows also gives a different result in terms of the ratio of crisp outer to soft inner mallow." Roasting a marshmallow gives rise to a physical change in the product, caramelising the outer skin and making the interior molten (see also the instructions on the packaging mentioned at [22]).

100. Although we accept that the FTT erred in its approach to construing Note 5 any such error is not material as we have found that there is no basis on which we should interfere with the FTT's approach to and evaluation of the evidence. There is no material error of law in the FTT's analysis and weighing of the relevant factors and the conclusion reached was one that was open to it on the facts.

Ground 2 – the *Edwards v Bairstow* Challenge

HMRC's submissions

101. Ms Brown submitted that the FTT erred in law and in fact by placing undue weight on the marketing of the Mega Marshmallows. Marketing is only a factor to be considered where there is evidence that consumers used Mega Marshmallows for the marketed purpose - *The Core* at [61] and it is not the conclusive criteria, it is one factor to be considered where there is evidence that the consumers used the marshmallows as intended. There was no direct evidence before the FTT that consumers did roast the product. Further evidence of seasonality of sales and the positioning in supermarket aisles do not assist as they do not provide direct evidence of how the marshmallows were used by consumers.

102. Ms Brown argued that the FTT made inferences of fact which were so perverse that they amount to an *Edwards v Bairstow* [1956] AC 14 error of law. It is asserted that the FTT was not entitled to make the findings it did based upon the evidence before it for the following reasons:

a) In relation to [31] the FTT made an inference of fact that higher sales between May to October meant that, 'as a whole that the Product is more likely to be consumed in warmer months than other mallow products. This is because it is more likely to be purchased in order to be roasted over a flame.

Ms Brown asserted that there was no evidence before the FTT that more consumers purchased Mega Marshmallows than other marshmallow products in the months in question, and increased sales in those months could have been for a number of reasons with no cogent evidence to suggest it was because consumers wanted to roast them. There is also a significant variance between average sales in the period May to October [page 154], which range from £65,574 to £147,080, so it is impossible to see any correlation between sales and the Mega Marshmallows being used to roast marshmallows on the basis of this evidence.

b) In relation to [33] it is submitted that this finding was perverse. The sole evidence before the FTT that the Product was displayed on the World Foods Aisle is an email from *Morrisons.* There was evidence of the Mega Marshmallows being in the confectionery section of other stores but this was not considered. Ms Brown referred us to the Waitrose screenshots [pages 130 – 131] where the product is under the entertaining section and consumers also viewed alternative branded marshmallows. We were referred to a

screenshot from Tescos where the Mega Marshmallows are found under 'Sweets, Mint and Chewing Gum – Chewy Sweets' with a button to 'View all Chewy Sweets' [page 129].

There was no supporting evidence before the FTT of the Mega Marshmallows being positioned in the barbeque aisle in the summer months, to support the assertion in Mr. Foster's witness evidence. The FTT's finding in this regard was not supported by the evidence and was unreasonable.

In any event, even if the Mega Marshmallows were to be generally found on the World Foods aisle or the barbeque aisle, these aisles host a number of different products and would not preclude the marshmallows from being classified as confectionery. It was therefore perverse to find that placement in these aisles led to an inference that the goods were used for roasting.

103. Ms Brown contended that taking into account all the evidence before the FTT, at its highest, the most it could be said to show is a) an increase in sales of the Mega Marshmallows during the Summer months and b) that some retailers positioned them in the World Food or barbeque section of the supermarket. None of the evidence before the FTT showed that consumers roasted the Mega Marshmallows before eating them. There was no direct evidence of the assertion that the marshmallows were used as intended and accordingly, as a matter of law the FTT erred in attributing weight to the marketing of the Product when it was not entitled to.

Taxpayer's submissions

104. Mr Brown agreed that marketing is only a factor to be considered by the FTT. However, he referred to *The Core* and submitted that HMRC's reliance on that case to support the complaint that too much weight was given by the FTT to marketing given the lack of direct evidence of the use of the product is misplaced. In *The Core* the proposition put was it would be possible for a retailer to claim zero-rating of a product purely on the marketing of it. The Upper Tribunal's comments at [61] addressed that proposition i.e., the way a product was marketed was the only factor relied upon by the retailer to support its claim to zero-rating. The Product in this case is very different from the example of a Mars bar in *The Core*, As identified by the FTT, in respect of the packaging of the Product and the instructions for roasting the Product, found as facts in [21 to 28]. the FTT was entitled to place whatever weight it chose to, on the marketing of the product. In some cases, it may carry little weight and in others great, or even dominant weight (*The Core* [58]).

105. In response to the challenge to various findings of fact based on *Edwards v Bairstow*, Mr Brown submitted that the FTT having heard evidence from Stephen Foster confirmed that its findings of fact were based on his evidence about which there was 'no real dispute' [4]. He submitted that there is a high hurdle before the Upper Tribunal can interfere with a decision which is based on findings of fact on the evidence of a witness where there was no question raised as to his reliability.

Analysis

106. Ground 2, at points (a) and (b) challenge findings of fact made by the FTT. An appeal to this tribunal lies only on a point of law: section 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"). While there cannot be an appeal on a pure question of fact which is decided by the FTT, the FTT may arrive at a finding of fact in a way which discloses an error

of law generally referred to as *Edwards v Bairstow* challenges. In that case the court referred to making a finding without any evidence or upon a view of the facts which could not be reasonably entertained and where there was no evidence to support a finding, or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding. The bar to establishing an error of law based on challenges to findings of fact is deliberately set high, and that is particularly so where the FTT is called on to make a multi-factorial assessment – see for example *Ingenious Games LLP & Others v HMRC* [2019] UKUT 226 (TCC).

107. Regarding the assertion marketing is only a factor to be considered where there is evidence that consumers used Mega Marshmallows for the marketed purpose – in this case of roasting them. At [61] in *The Core* the Upper Tribunal held that:

> … it clearly cannot be sufficient, to establish that a product… is not confectionery…, to rely on the fact it is marketed for a particular purpose, if there is no evidence to show that customers in fact used the product for that purpose.

108. This passage from *The Core* must be read in context. We do not consider that the Upper Tribunal was laying down the general principle that HMRC appear to draw from this passage. HMRC appears to assert that marketing **cannot** be considered in the absence of direct evidence of consumer use. In *The Core* the Upper Tribunal was considering a proposition that had been put to it which was that it would be possible for a retailer to claim zero-rating of a product (a Mars bar and a cola drink) purely on the marketing of it. The comments at [61] addressed that proposition i.e., the way a product was marketed was the **only** factor relied upon by the retailer to support its claim to zero-rating. We note that at [58] the Upper Tribunal found that the way a product is marketed and sold is a potentially relevant factor in every case. In this case the FTT considered many factors. At [38 and 39] factors identified by the parties were set out. The FTT [43] stated it had (subject to some points it had considered in [40-42]) taken all those factors into consideration. The factors afforded particular weight [43] included the nature of the product, the way in which the product is placed in supermarket aisles, the packaging and marketing of the product and its finding that most consumers purchasing the product would do so in order to roast the marshmallow. The weight to be given to evidence is a matter for the FTT hearing and considering the evidence.

109. We do not accept that marketing is only a factor to be considered where there is evidence that consumers used Mega Marshmallows for the marketed purpose. It is potentially relevant in all cases. In this case there was a 'basket' of evidence from which the FTT drew inferences as to how consumers used the product.

110. With regard to point (a) the FTT considered:

> 31. We were provided with evidence as to the seasonality of the appellant's sales of mallow products, excluding those which are seasonally themed. On the basis of that evidence, we find that sales of all types of mallows are higher in the period May to October than at other times of the year. However, sales of the Product show a greater percentage rise in this period than sales of other mallow products. In the years 2019 to 2021, 65% of sales of the Product occurred in the period May to October. In relation to other mallow products, 56% of sales occurred in that period. We infer from the evidence as a whole that the Product is more likely to be consumed in warmer months than other mallow products. This is because it is more likely to be purchased in order to be roasted over a flame.

111. HMRC refers to page 154 of the bundle whereas the FTT referred to page 170. Different periods are covered by the two documents. Page 154 refers to calendar years 2015 - 2018 whilst

page 170 covers calendar years 2019-2021. HMRC have not raised an issue with regard to the different years covered and relevance to the fact that the supplies subject to the appeal were made in the VAT periods between June 2015 and June 2019. There are no comparison figures for seasonality of sales with standard marshmallows for the calendar years 2015 – 2018. Also, the percentage figures cover different months June – October at page 154 and May to October at page 170. We note that the percentage figures are given only for 2015 – 2017. In the document at page 154. No figures appear for 2018. We do not know the precise terms of the FTT's request for additional information made during the hearing. In the taxpayer's additional information (page 168) it is stated that additional information to be supplied included 'Seasonal sales information for other marshmallow products supplied by the Appellant'. What we do note is that there is a difference in the percentages. At page 154 the percentages are calculated by reference to each year and for the period June to October whereas at page 170 the percentages have been averaged over the three years. In 2015 the percentage of sales from June to October was 54.8% but this was for a 5-month period. In 2017 it was 61.1% and in 2017 it was 60.8%. These are not directly comparable to the later years taken into consideration by the FTT but it is clear that with the addition of May the percentage is higher, and the average is (around 65.2%) close to the 65% relied on by the FTT. The reason we have compared the percentages for the earlier years (which covered the years in which the supplies in issue were made) is to check whether or not the figures relied on by the FTT were significantly different to make the inferences and assumptions it drew unsafe – they are not significantly different.

112. Whilst we accept that the sales figures do not show sales directly to consumers, in our view, it is a reasonable inference that the seasonality in sales to retailers is reflective of the onward sales to consumers given that the figures were spread over a three-year period. We also accept that increase in sales in those months could have been for a number of reasons and that sales fluctuated during those months. The FTT has not addressed its mind to those issues. We are not satisfied that the failure to take the fluctuations and possibility of other explanations into account might have made a difference to the decision if they had been taken into account. We do not accept that it is impossible to see any correlation between sales and the Mega Marshmallows being used to roast marshmallows on the basis of the evidence. Averaged over the period a greater percentage of sales take place over those months than with the other 6 months so even if there were fluctuations the finding that more Mega Marshmallows were eaten during the warmer months is not unreasonable. The FTT particularly relied on the difference between the percentage rise in sales of standard marshmallow. It was a reasonable inference to draw from that difference that Mega Marshmallows are more likely to be consumed in warmer months than standard marshmallows which have a less significant increase in the same period. The inference that the reason for the increase is because it is more likely to be purchased in order to be reasted over a flame cannot be said to be irrational. On balance although the FTT's evaluation of the evidence was not as detailed as perhaps it ought to have been, the findings were based on evidence which supported the finding, and its view of the facts was not unreasonable.

113. In relation to point (b) the FTT found at [33]:

> The Product is typically sold by retailers separately from confectionery and other types of marshmallows. It is generally displayed in the "world foods" section of supermarket aisles, and during the summer months it is generally also displayed in the barbecue section.

114. We accept that the FTT did not refer to the other evidence cited by Ms Brown. We do not accept that the 'sole' evidence that was before the FTT that the Product was displayed on

the World Foods Aisle was an email from Morrisons. In his witness statement at [17] Mr Foster stated:

> We have approached a number of our customers and asked why and how they may on-sell the Baking Buddy Marshmallows. It is typically merchandised separately from other confectionery/marshmallows and is often in the BBQ section or the 'World foods' section.

115. Ms Brown did not indicate that his evidence had been undermined. In relation to the Waitrose screenshots (we have them at pages 125 and 130 in the bundle) there is nothing to cast doubt on his evidence as the product is listed under Groceries - Entertaining. It would be speculative for us to draw any conclusions as to whether or not this is suggestive that the product is not within a sweets and confectionery section, but we do consider that at its highest this is neutral rather than supportive of HMRC's assertion that there was evidence of the Mega Marshmallows being in the confectionery section. With regard to the Tesco's screenshot the product shown is Haribo Chamallows. This is not evidence of where the specific product subject to the appeal was placed. With regard to the Asda screenshots on pages 126 and 127 we are unable to ascertain where the products are placed as there appears to be no specific indication on those pages.

116. The failure to refer to this other evidence is not of significance on the facts of this case as, in our view, the evidence was not probative and therefore not relevant. As we set out above there is a high hurdle to overcome on an *Edwards v Bairstow* challenge. The conclusion reached was open to it on the evidence. Our analysis of the evidence is that it does not support HMRC's assertion that there was evidence of the Mega Marshmallows being in the confectionery section of other stores.

117. There is no material error of law in the FTT's analysis of the evidence and the weight it afforded to the evidence.

DISPOSITION

For the above reasons we find that there is no error of law in the FTT's decision. The appeal is dismissed.

JUDGE PHYLLIS RAMSHAW
JUDGE NICHOLAS ALEKSANDER

Release date: 08 April 2024