Neutral Citation: [2025] UKUT 00155 (TCC)

Case Number: UT/2024/000041

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, 7 Rolls Buildings,
Fetter Lane, London, EC4A 1NL

Value Added Tax – excepted item 5 to item 1, Group 1, Part II, Schedule 8 Value Added Tax Act 1994 – whether First-tier Tribunal erred in law in finding Sensations Poppadoms were "made from the potato, or from potato flour, or from potato starch" and were "similar" to potato crisps – no – appeal dismissed

Heard on: 23 January 2025
Judgment date: 22 May 2025

Before

MR JUSTICE MEADE

JUDGE ASHLEY GREENBANK

Between

WALKERS SNACK FOODS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

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

For the Respondents: Giselle McGowan, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal by the appellant, Walkers Snack Foods Limited ("Walkers"), against a decision of the First-tier Tribunal (the "FTT") dated 15 March 2024 (the "FTT Decision")[1]. The Respondents are the Commissioners for His Majesty's Revenue and Customs ("HMRC").

2. In the FTT Decision, the FTT dismissed an appeal by Walkers against a decision of HMRC dated 4 June 2021 that sales of certain products, known as "Sensations Poppadoms", should be treated as standard-rated for value added tax ("VAT") purposes. The FTT found that supplies of Sensations Poppadoms did not fall within item 1 of Group 1 of Part II of Schedule 8 to the Value Added Tax Act 1994 ("VATA") ("food of a kind used for human consumption") – and so did not qualify to be treated as zero-rated for VAT purposes – because they fell within excepted item 5 in Group 1 ("potato crisps, potato sticks, potato puffs, and similar products").

3. Walkers appeal against the FTT Decision with the permission of the FTT.

4. At the hearing, Walkers were represented by Mr Max Schofield. HMRC were represented by Ms Giselle McGowan. We are grateful to counsel for their helpful submissions, both orally and in writing, and for their assistance during the hearing.

RELEVANT LAW

Relevant legislation

5. We will begin by setting out the relevant legislation.

6. Supplies of "food of a kind used for human consumption" are zero-rated for VAT purposes by general item 1, Group 1, Part II, Schedule 8 VATA unless they are supplies "in the course of catering" or they are supplies of "anything comprised in any of the excepted items".

7. The excepted items include, in excepted item 5:

> 5 Any of the following when packaged for human consumption without further preparation, namely, potato crisps, potato sticks, potato puffs, and similar products made from the potato, or from potato flour, or from potato starch, and savoury food products obtained by the swelling of cereals or cereal products; and salted or roasted nuts other than nuts in shell.

8. The only question before the FTT was whether Sensations Poppadoms fell within excepted item 5 of Group 1. (The excepted items in Group 1 are themselves subject to exceptions if the supplies in question are also comprised in any of the items overriding the relevant excepted item as set out in Group 1, but none of those overriding items is relevant to this appeal.)

Relevant case law

9. We will refer to some of the authorities to which we have been referred by the parties later in our discussion. There is one key authority on the application of excepted item 5 to which we should refer at this stage. It is the decision of the Court of Appeal in *Proctor & Gamble UK v HMRC* [2009] EWCA Civ 407 ("*P&G*").

10. That decision concerned the application of excepted item 5 to "Pringles", a manufactured savoury snack made from potato flour, corn flour, wheat starch and rice flour. The VAT and Duties Tribunal decided that Pringles fell within excepted item 5 and so supplies of Pringles

[1] In this decision notice, we refer to paragraphs in the FTT Decision in the format "FTT [xx]".

were standard rated for VAT purposes. The High Court allowed the company's appeal. However, the Court of Appeal allowed HMRC's appeal and reinstated the tribunal's decision.

11. The main judgment was given by Jacob LJ. The key points that we take from his judgment are as follows.

(1) The statutory question posed by excepted item 5 can be restated as whether the relevant products are "similar to potato crisps, potato sticks, or potato puffs and made from the potato, or from potato flour, or from potato starch"? (*P&G* [12]).

(2) It is a composite question. "So, although it is convenient to ask separately whether the [relevant products] are 'similar' to potato crisps etc. and whether they are 'made from potato', one must also take into account the composite nature of the question" (*P&G* [13]).

(3) That question involves a value judgment, which requires "a multifactorial assessment based on a number of primary facts". An appeal court or tribunal "should be slow to interfere" with such a value judgment made by the fact-finding tribunal (*P&G* [9]).

(4) The question is one of classification for VAT purposes, but it is "not one calling for or justifying over-elaborate, almost mind-numbing, legal analysis. It is a short practical question calling for a short practical answer" (*P&G* [14]).

(5) The first limb of the composite question – that is whether the products are "similar" to potato crisps, potato sticks, or potato puffs – requires a multifactorial assessment. However, it is not incumbent upon the fact-finding tribunal to set out and identify the weight given to each and every factor. All that is required is that the judgment of the tribunal enables the appellate court or tribunal to understand how the decision was reached. Jacob LJ said this at *P&G* [19]:

> … It was not incumbent on the Tribunal in making its multifactorial assessment not only to identify each and every aspect of similarity and dissimilarity (as this Tribunal so meticulously did) but to go on and spell out item by item how each was weighed as if it were using a real scientist's balance. In the end it was a matter of overall impression. All that is required is that "the judgment must enable the appellate court to understand why the judge reached his decision" (per Lord Phillips MR in *English v Emery* [2002] EWCA Civ 605, [2002] 1 WLR 2409 at 19]) and that the decision "must contain... a summary of the Tribunal's basic factual conclusion and statement of the reasons which have led them to reach the conclusion which they do on those basic facts" (per Thomas Bingham MR in *Meek v Birmingham City Council* [1987] IRLR 250).

(6) The question for the tribunal is simply "what is a reasonable view on the basis of all of the facts". (The VAT and Duties Tribunal in *P&G* had invoked an "ordinary man in the street" test, but this had to be qualified by reference to knowledge of all the facts that were before the tribunal.) Jacob LJ said this at *P&G* [21]:

> 21. To my mind this approach is saying no more than "what is the reasonable view on the basis of all the facts" – it does not matter if some of the facts would not be known to the "man in the street." That is why the test accepted as proper in [*Customs & Excise Commissioners* v *Ferrero*] adds "who had been informed as we have been informed." The uninformed view of the man in the street is deliberately not being invoked.

(7) The test on an appeal is simply whether the fact-finding tribunal has reached a conclusion that no reasonable tribunal, properly construing the statute, could reach. Jacob LJ said this at *P&G* [22]:

> 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?

(8) As regards the second limb – that is whether the products are "made from" the potato, or potato flour, or potato starch – there is no particular level of potato content that is required (*P&G* [26]-[32]). On the facts of the case, the Tribunal found that Pringles, which had a potato flour content of over 40%, were "made from" potato flour. Jacob LJ expressed the view that there was "more than enough potato content" for it to be a reasonable view that Pringles were "made from the potato" (*P&G* [33]).

THE FACTUAL BACKGROUND

12. The FTT makes its findings of fact at various points in the FTT Decision. We will not attempt to compose a comprehensive list of those findings in this decision. However, we have set out below some of the main findings from the FTT Decision as they provide a useful background to the issues arising in this appeal.

13. Sensations Poppadoms are "mini-poppadoms". They are made by deep-frying a dough pellet (FTT [47]). The finished product is then seasoned and packed.

14. There are two flavours of Sensations Poppadoms: "lime & coriander chutney", and "mango & chilli chutney" (FTT [2]).

15. The ingredients of the two flavours of Sensations Poppadoms are slightly different (though nothing was said to turn on the differences, as Mr Schofield confirmed) and are as follows:

(1) lime & coriander chutney flavour: sunflower oil (22.09%), potato granules (17.98%), potato starch (17.98%), gram flour (14.38%), rice flour (14.38%), flavouring (6%), modified potato starch (4.31%);

(2) mango & chilli chutney flavour: sunflower oil (21.60%), potato granules (17.60%), potato starch (17.60%), gram flour (14.08%), rice flour (14.08%), flavouring (8%), modified potato starch (4.22%) (FTT [11]).

16. In broad terms, both flavours contain 17.5-18% potato granules, 17.5-18% potato starch and approximately 4.25% modified potato starch (FTT [12]).

17. Potato granules are made from potatoes which are cooked and then dehydrated. Potato starch, on the other hand, is produced by separating starch grains from destroyed potato cells and then drying the resulting starch (FTT [17]).

18. When cooked, Sensations Poppadoms are "small, generally round, bite-sized objects", which are "somewhat wavy, with small bubbles on the surface". Their colour is "a pale yellow or orange depending on the flavour". (FTT [42])

19. Sensations Poppadoms are sold in large "sharing" bags and not in smaller individual portion bags (FTT [37]). The packaging is consistent with other products in the same "Sensations" range produced by Walkers, which includes potato crisps (FTT [38]).

20. A traditional poppadom is made from gram flour (FTT [56]), but there was evidence before the FTT, which was not disputed, that poppadoms may be made with potato in some regions of India (FTT [55]-[56]).

21. The potato content in Sensations Poppadoms was included, in part, to provide a more neutral flavour and reduce the flavour of the gram flour (FTT [22], [50]). The potato granules and potato starch also supported the structure of Sensations Poppadoms in the pellet manufacturing process. The ratio of ingredients determined the texture of the finished product. The potato granules together with the gram flour provided the crunchy texture. Rice flour was added to provide a lighter texture to the finished product. (FTT [50]).

22. Potato was also included as an ingredient because it was cheaper than gram flour (FTT [50]).

23. Sensations Poppadoms taste principally of the flavouring added to them (FTT [22], [45]). Gram flour is not the most recognizable ingredient (FTT [22]). It is not possible to distinguish the taste of gram flour from the added flavouring (FTT [22]). There are no unflavoured versions of Sensations Poppadoms (FTT [45]).

24. In terms of texture, the FTT found that Sensations Poppadoms are crunchy at the first bite not dissimilar to potato crisps (FTT [46]).

25. Sensations Poppadoms are primarily sold in the snack food aisle of major retailers (FTT [40]). Neither the marketing material nor the packaging indicated that Sensations Poppadoms are primarily intended to be part of a meal rather than as a snack food (FTT [34], [41]).

THE FTT DECISION

26. Before the FTT, Walkers accepted that Sensations Poppadoms were "packaged for human consumption without further preparation" (FTT [8]-[10]).

27. The FTT then went on to address two questions:

> (1) first, whether Sensations Poppadoms were "made from the potato, or from potato flour, or from potato starch"; and
>
> (2) second, whether Sensations Poppadoms were "similar" to potato crisps, potato sticks or potato puffs.

28. As to the first question, the FTT found that Sensations Poppadoms were "made from the potato, or from potato flour, or from potato starch". The FTT's reasoning was as follows.

> (1) Potato granules were a cooked and dried form of potato and should be regarded as being within the term "the potato" (as opposed to "a substance derived from potato") for the purposes of excepted item 5 (FTT [17]-[18]).
>
> (2) Having reached that conclusion, the FTT was not required to determine whether the phrase "made from the potato, or from potato flour, or from potato starch" in excepted item 5 should be given a restricted reading – as Walkers argued before the FTT – and so should extend only to the items listed in excepted item 5 and not to other ingredients that are derived from potatoes (FTT [19]). Nonetheless, the FTT expressed the view that that phrase was intended to catch products with "a significant potato content". It should not be read as precluding other ingredients made from items derived from potatoes (FTT [19]).
>
> (3) The use of the word "or" in the phrase "made from the potato, or from potato flour, or from potato starch" was "not intended to exclude products which contain more than one of the potential potato-related ingredients; the purpose of the legislation is clearly to include products which have one or more substantial potato-related elements" (FTT [24]).

(4) It was therefore necessary to consider the potato-based ingredients in the aggregate when determining whether a product was "made from the potato, or from potato flour, or from potato starch" for the purposes of excepted item 5 (FTT [25]).

(5) Sensations Poppadoms contained approximately 40% potato-derived ingredients (potato granules, potato starch and modified potato starch) (FTT [23]), which was "more than enough" potato-based content for it to be reasonable to conclude that they fell within excepted item 5 as being "made from the potato… or from potato starch" (FTT [26]).

29. As to the second question, the FTT took the view that an assessment of whether Sensations Poppadoms were "similar" to potato crisps required a multifactorial assessment (citing as authority the decision of the Court of Appeal in *P&G* per Jacob LJ at [24]) (FTT [30]-[31]).

30. The FTT proceeded to conduct a multifactorial assessment. It took into account the following factors:

(1) the marketing material, which showed Sensations Poppadoms being eaten in settings not dissimilar to those in which one would expect to find potato crisps (FTT [34]);

(2) the packaging - Sensations Poppadoms were sold in "sharing bags" similar to some potato crisps and the packaging was "consistent with" other products in the same range, which included potato crisps (FTT [37]-[38]);

(3) that the products were called "poppadoms" rather than crisps – although the FTT gave no weight to this factor (FTT [39]);

(4) that Sensations Poppadoms were sold in the snack food aisles of major retailers together with potato crisps (FTT [40]);

(5) the appearance of Sensations Poppadoms, which the FTT considered to be visually similar to potato crisps (FTT [42]);

(6) the flavour, which the FTT did not consider to be a distinguishing feature (FTT [45]);

(7) the texture, which the FTT found was not "significantly different" from potato crisps (FTT [46]);

(8) the manufacturing process – the FTT did not afford "any particular weight" to the fact that the process involved deep-frying a dough pellet rather than deep-frying sliced potatoes (FTT [47]); and

(9) the ingredients – the FTT found that the potato content (potato granules and potato starch) had an effect on texture. It was also included for commercial reasons because it was cheaper than gram flour. The addition of gram flour did not affect the flavour (FTT [48]-[51]).

31. The FTT also referred to the results of a survey carried out by PepsiCo (owners of Walkers), which asked respondents to the survey: to identify products that they would purchase instead of Sensations Poppadoms, if Sensations Poppadoms were not available; and whether respondents agreed that Sensations Poppadoms were "poppadoms" (FTT 52]-[54]). The FTT treated the results of this survey with some circumspection and did not regard them as "particularly helpful" (FTT [52]).

32. The FTT also noted, without making any finding in this respect, that poppadoms made to a traditional recipe from gram flour may be zero-rated for VAT purposes. However, this was because they did not contain potato not because they were poppadoms (FTT [56]).

33. Having completed its review, the FTT concluded that Sensations Poppadoms were similar to potato crisps. The FTT summarized its conclusion as follows (at FTT [57]-[59]):

> 57. Balancing all of the factors, on balance, we consider that the products are similar to potato crisps. They are packaged and sold in a manner similar to potato crisps. Removing them from their packaging, we consider that their appearance and texture is similar to potato crisps. Given the predominance of the flavouring, we consider that taste is not a distinguishing factor.
>
> 58. Whilst the manufacturing process is different, we note that the statute envisages similarity encompassing products made of potato starch and flour which cannot be made in the same way as sliced potato crisps and, as such, we give little weight to this distinction.
>
> 59. Noting the contention that the potato content was included to make the product cheaper and that this was not true of potato crisps, we do not consider that this is a sufficient distinction to outweigh the overall perception of the products as being similar to potato crisps, particularly given the witness evidence that the potato content was also used to provide a more neutral flavour in preference to the flavour of the gram flour.

34. The FTT also dismissed an argument on the part of Walkers that the principle of fiscal neutrality required Sensations Poppadoms to be treated for VAT purposes in the same manner as other poppadoms that were made from gram flour and were zero-rated. This conclusion was reached on the grounds that Walkers had not established that Sensations Poppadoms were objectively similar to other poppadoms that were zero-rated (FTT [60]-[64]).

35. The FTT then reminded itself of the principles set out by Jacob LJ in *P&G* (at *P&G* [13]-[14]) – that, although it had addressed the questions of potato content and similarity separately, this was a composite question, and that it was not a question calling for over-elaborate legal analysis – and concluded that Sensations Poppadoms were similar to potato crisps and made from potato and from potato starch. On that basis, the FTT dismissed the appeal.

THE GROUNDS OF APPEAL

36. The FTT granted permission to appeal on eight grounds. They were, in summary, as follows:

> (1) the FTT erred in its construction of excepted item 5 by applying a broad reading to excepted item 5 and treating products made from potato granules as falling within the item (Ground 1);
>
> (2) the FTT erred in its construction of excepted item 5 in finding that Sensations Poppadoms were made from "the potato" (Ground 2);
>
> (3) the FTT erred in its application of the test of whether Sensations Poppadoms were "similar products" by asking itself whether the products were "not dissimilar to" potato crisps (Ground 3);
>
> (4) the FTT fell into error by failing to give any weight in its multifactorial assessment to the fact that Sensations Poppadoms were called "poppadoms" (Ground 4);
>
> (5) the FTT fell into error by failing to give any weight in its multifactorial assessment to the specific flavours of Sensations Poppadoms (Ground 5);

(6) the FTT erred by failing to give any weight in its multifactorial assessment to the inclusion of gram flour as an ingredient (Ground 6);

(7) the FTT misapplied the legal test and failed to give any weight to the manufacturing process for Sensations Poppadoms which distinguished them from potato crisps (Ground 7); and

(8) the FTT fell into error by ignoring fundamental differences between poppadoms and crisps (Ground 8).

37. Walkers did not pursue Grounds 3 and 7 before us.

38. The remaining grounds fell into two categories: (i) those which rely on potential errors in the interpretation of the legislation (Grounds 1 and 2); and (ii) those which assert errors in the multifactorial assessment by which the FTT determined that Sensations Poppadoms are similar to potato crisps (Grounds 4, 5, 6, and 8). We will approach our discussion of the grounds and the parties' arguments in relation to them on that basis.

ISSUES OF INTERPRETATION

Ground 1 – does the term "the potato" include potato granules?

39. As we have mentioned above, the FTT found that products made from potato granules should be regarded as made from "the potato" for the purposes of excepted item 5 (FTT 18]). The FTT then went on to express its view that the phrase "made from the potato, or from potato flour, or from potato starch" should, in any event, be construed as including all products with a significant potato content (FTT [19]).

The parties' submissions in outline

40. We have summarized the parties' main arguments below.

41. Mr Schofield, for Walkers, says that the FTT fell into error.

(1) The expression "made from the potato, or from potato flour, or from potato starch" must be given a restricted meaning. The principle of construction encapsulated in the expression "expressio unius est exclusio alterius" applied. The effect was that excepted item 5 was restricted to products made from the specific ingredients referred to in the list in excepted item 5, that is, from the potato, potato flour or potato starch. It did not extend to products made from other ingredients derived from potato, such as potato granules.

(2) Furthermore, the FTT was wrong to find that "potato granules" were included within the words "the potato".

(a) The words "the potato" could not be intended to include every ingredient derived from potato – if so, the references to "potato flour" and "potato starch" in excepted item 5 would be redundant.

(b) The construction adopted by the FTT also ignored the use of the definite article, "the", before "potato" in excepted item 5. The words "the potato" properly extended to the use of sliced potato in the manufacture of potato crisps, but could not extend to products made from ingredients derived from potato, such as potato granules, which were pieces of potato that had been cooked and then dried, before being used to create dough pellets, which were then fried.

(3) On that basis, the only relevant "potato content" was potato starch which accounted for only 17%-18% of the ingredients for Sensations Poppadoms.

42. Ms McGowan, for HMRC, supported the FTT's construction.

(1) On the ordinary meaning of the words, the term "the potato" was wide enough to include potato granules. The FTT was correct to find that it did. There was no sensible distinction to be made between products made from slices of potato and products made from granules of potato in this regard. Walkers had failed to explain why the words "the potato" could extend to slices of potato, but not granules of potato.

(2) Ms McGowan also criticised Walkers' reliance on the "expressio unius" principle. That principle was only one canon of construction; it should only apply where it was not outweighed by other interpretative factors (*Bennion, Bailey and Norton on Statutory Interpretation* at 23.13). In the present case, there was no need for a specific reference to potato granules in excepted item 5 because they were already included by the term "the potato".

Discussion

43. On this issue, we agree with Ms McGowan.

44. The modern approach to statutory interpretation requires the courts and tribunals to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision (see, for example, *News Corp UK & Ireland Ltd v HMRC* [2024] UKSC 7 ("*News Corp*") per Lord Hamblen and Lord Burrows at [27]).

45. In the context of legislation relating to VAT, it is well-established that a zero-rating provision or an exemption from VAT should be interpreted strictly. This is because such provisions constitute exceptions to the general principle that all supplies of goods and services made by a taxable person for consideration should be subject to VAT. However, a zero-rating provision or an exemption should not be interpreted so strictly as to deprive the provision of its intended effect.

46. That principle – that zero-rating provisions and exemptions must be interpreted strictly – carries particular weight in the context of national law exceptions to standard-rating, which are tolerated by EU law under the so-called "standstill" provision in Article 28 of Directive 77/388 (see *Talacre Beach Caravan Sales Ltd v Customs & Excise Commissioners* (Case C-251/05) at [23], cited in *News Corp* at [39]). The zero-rating provisions for food contained in Group 1 Schedule 8 VATA are such an exception.

47. In the present case, the basic principle does not directly apply; excepted item 5 is an exception to the zero-rating provision. If the principle has any indirect effect, it might be to suggest that a broad view should be taken of excepted item 5 so as to narrow the exception from standard-rating afforded by Group 1 Schedule 8 VATA. We were not directed by the parties to any authority for such a proposition. The FTT did not refer to it and, it would appear, approached the construction of excepted item 5 applying ordinary principles. There is some support for that approach in the Court of Appeal decision in *P&G* (see *P&G* [5]).

48. Applying that approach, the FTT found that the words "the potato", given their ordinary meaning, should be read to include potato granules. In our view it was more than entitled to do so. Walkers accept that those words are not limited to products made from whole potatoes; they can extend to products made from slices of potato, such as potato crisps. In argument, Mr Schofield accepted that the words might also extend to products made from chopped potato. However, he says, the words "the potato" cannot extend to potato granules.

49. Mr Schofield's argument suggests that there is a point in a manufacturing process at which ingredients derived from potato cease to fall within the term "the potato" and so fall outside excepted item 5 unless they are potato flour or potato starch. Even if that is correct (see below), the dividing line is primarily a question of fact and degree for the FTT as the fact-finding tribunal. Unless the FTT has adopted "an untenable interpretation of the legislation or

a plain misapplication of the law to the facts", its decision on that issue ought not to be disturbed on appeal (*P&G* [74], per Mummery LJ).

50. In the present case, we cannot see any basis on which the FTT's decision on this issue can be impugned. Its finding that the words "made from the potato" can extend to products made from potato granules is neither untenable nor a plain misapplication of the law to the facts. We note the FTT's reliance on the evidence it received that potato granules consist of whole potato cells or small aggregates of cells (FTT[17]) and consider it was an entirely adequate factual basis for the decision. Furthermore, we agree with Ms McGowan that a conclusion that excepted item 5 is limited to products made from slices of potato to the exclusion of products made from potato granules seems unlikely to be one that can have been the intention of Parliament.

51. If, as we have found, it was reasonable for the FTT to take the view that products made from potato granules meet this limb of the test in excepted item 5 because they are made from "the potato", the application of the "expressio unius" principle cannot affect our conclusion. That having been said, as we have mentioned above, Mr Schofield also argued that the words "the potato" could not be intended to include every ingredient derived from potato – if so, the references to "potato flour" and "potato starch" in excepted item 5 would be redundant. In contrast, we were invited by Ms McGowan to go further than our conclusion that the words the potato can include potato granules and to endorse the FTT's view that the phrase "made from the potato, or from potato flour or from potato starch" in excepted item 5 was "clearly intended to catch products with a significant potato content" (FTT [19]) and so should be taken to refer to all potato-based content of whatever description.

52. We heard full argument on this point. We acknowledge that some support for Ms McGowan's argument may be found in the manner in which the Court of Appeal in *P&G* at times appears to treat the reference to "the potato" as including potato flour (see, for example, Jacob LJ at *P&G* [33]). However, we will decline Ms McGowan's invitation. As the FTT itself recognized, it was sufficient for the purposes of its decision to conclude that the words "the potato" included potato granules. Its comments on the wider interpretation of the phrase were obiter. We do not need to address the point for the purposes of this appeal.

53. Before leaving this ground of appeal, we should acknowledge that we have only summarized the submissions made by the parties on the question of statutory construction, which went into some detail as to the canons of construction and interpretative factors that should be applied. We have considered those arguments, but, in our view, they fell too often into the type of forensic linguistic analysis against which the Court of Appeal counselled in *P&G*. As Jacob LJ said in *P&G*, the question for the tribunal is a short practical question calling for a short practical answer. For that reason, we have not addressed them further in this decision.

54. We dismiss Ground 1.

Ground 2 – were Sensations Poppadoms "made from" the potato… or from potato starch?

55. The FTT concluded that Sensations Poppadoms contained "more than enough potato content" for it to be reasonable to conclude that they were "made from the potato… or from potato starch" (FTT [26]).

56. As articulated by Mr Schofield, by the second ground of appeal, Walkers say that the level of potato content in Sensations Poppadoms did not support that conclusion.

The parties' submissions in outline

57. We have summarized the parties' main submissions on this ground below.

58. Mr Schofield pointed to the following factors.

(1) The level of "qualifying" potato content in Sensations Poppadoms was only 17-18%.

(2) That level of qualifying potato content was not sufficient to justify a conclusion that Sensations Poppadoms were made from the potato, potato flour, or potato starch. In *P&G*, the level of potato content (potato flour) in Pringles was approximately 42% (*P&G* [3]). Mr Schofield submitted that *P&G* was a "borderline" case. The level of qualifying potato content in Sensations Poppadoms was much lower than the potato content of Pringles in *P&G*. In *United Biscuits (UK) Limited v HMRC* [2011] UKFTT 673 (TC) ("*United Biscuits*"), the FTT had decided that products called "Discos" and "New Recipe Frisps", which had a potato content of approximately 27%, were not made "from the potato, or from potato flour, or from potato starch". The FTT had not referred to *United Biscuits* in its decision.

(3) There were five main ingredients in Sensations Poppadoms. None of those ingredients predominated. Potato starch was not the largest single ingredient. Nor was it the "defining and essential" ingredient (*United Biscuits* [30]).

(4) The evidence showed that the potato content in Sensations Poppadoms was added for commercial reasons – it was cheaper than gram flour – and to neutralize the flavour. It could not be the defining and essential ingredient in Sensations Poppadoms in such circumstances.

(5) The essential characteristics of Sensations Poppadoms were not provided by the potato content. The essential ingredient was gram flour. It was the ingredient that was most commonly associated with poppadoms. A typical consumer would not describe Sensations Poppadoms as being made from potato.

59. Taking into account all of these factors, Mr Schofield submitted that it was not reasonable for the FTT to reach the conclusion that Sensations Poppadoms were "made from the potato… or from potato starch".

60. In summary, on this issue, Ms McGowan made the following submissions.

(1) Walkers' argument was, in essence, that the FTT's conclusion ignored the presence of rice flour and, in particular, gram flour in the ingredients for Sensation Poppadoms. However, the FTT made no error of law in finding that Sensation Poppadoms were made from potato despite the rice flour and gram flour content.

(2) There was no particular level of potato content that was required in order for a product to be regarded as made from potato (referring to *P&G* [26]-[27], [30]-[31], [34], [55], [58], [78]-[79]).

(3) It was possible for a product which was made from two or more ingredients to be regarded as "made from" one of them (*United Biscuits* [30]). It was a question of fact and degree.

(4) The FTT did not err in law in not referring to the decision of the FTT in *United Biscuits*. That decision was not binding on the FTT in this case and was a decision on the facts of the case.

(5) In any event, to the extent that the decision of the FTT in *United Biscuits* suggested that Sensations Poppadoms could only be treated as made from the potato if potato was the "defining and essential ingredient", it was wrong and the approach of the FTT in this case was to be preferred.

(6) On the facts of this case, the FTT was entitled to conclude that Sensations Poppadoms were made from the potato and potato starch: the potato content of Sensation Poppadoms (potato granules and starch) was approximately 40%; and the potato content was substantially larger than the next largest ingredient (oil) or the next largest dry ingredient.

Discussion

61. We will begin our discussion of this second ground of appeal with Mr Schofield's analysis of the relevant potato content, which was the foundation of many of his submissions.

62. Mr Schofield asserted that the level of "qualifying potato content" in Sensations Poppadoms was 17%-18%. This assertion was based on the level of potato starch in Sensations Poppadoms. It ignored the potato granules – we assume on the assumption that his arguments on Ground 1 would be successful i.e. that potato granules were not included in the list in excepted item 5 and so were not "qualifying" potato content. It also ignored the amount of modified potato starch included in the list of ingredients of both flavours of Sensations Poppadoms.

63. For the reasons that we have given above in relation to Ground 1, in our view, the FTT was entitled to come to the view that "the potato" included potato granules. We can see no basis for excluding modified starch from any determination of the level of potato content that is relevant in terms of the list in excepted item 5. On that basis the level of "qualifying potato content" (to use Mr Schofield's phrase) would be 39%-40%.

64. This conclusion assumes that in determining what a particular product is "made from" for the purposes of the application of excepted item 5, it is appropriate to take into account all the ingredients that are listed in excepted item 5. The FTT decided that it was permissible to do so (FTT [24]-[25]). That conclusion was not challenged on this appeal.

65. That having been said, we agree with Ms McGowan, that, while there clearly has to be some potato content for a product to be properly described as "made from" the potato, potato flour or potato starch, there is no justification for a test that relies on a particular level of potato content. The Court of Appeal in *P&G* rejected assertions that to meet this limb of the test a product had to be made from nearly 100% potato (*P&G* [26]-[27]), or contain a minimum percentage of potato (*P&G* [33]), or have broadly the same level of potato content as a potato crisp (*P&G* [34]).

66. Mr Schofield's other arguments amount to an assertion that a product should be treated as "made from" its essential or characteristic ingredient; that potato was not an essential or characteristic ingredient in Sensations Poppadoms; but that gram flour was. In this respect, he referred in particular to the FTT decision in *United Biscuits* and the references in its decision to the "defining and essential ingredient".

67. Once again, we disagree. The Court of Appeal in *P&G* dismissed arguments that a product had to have an "essence of potato" or "quality of potatoness" (*P&G* [30]-[31]).

68. The test posed by excepted item 5 is part of a classification exercise for the purpose of VAT. It is a simple question framed in everyday English words. As Mummery LJ said in *P&G* (at [79]):

> … it is vital to recall why the Tribunal was required in the first place to answer the question whether the goods in question are "made from" the potato. It was not in answer to a scientific or technical question about the composition of Regular Pringles, or in response to a request for a recipe. It was for the purpose of deciding whether the goods are entitled to zero rating. On this point the VAT legislation uses everyday English words, which ought to be interpreted

> in a sensible way according to their ordinary and natural meaning. The "made from" question would probably be answered in a more relevant and sensible way by a child consumer of crisps than by a food scientist or a culinary pedant…

69. Sensations Poppadoms have a combined potato content (potato granules and potato starch) of 39%-40%. The potato content is significant. It is approximately double the proportion of the next largest ingredient (sunflower oil) and more than double the proportions of the other dry ingredients (rice flour and gram flour). On the basis of those facts, the FTT reached the conclusion that Sensations Poppadoms were made from "the potato… or from potato starch" (FTT [26]). The question for us, as we have mentioned above, is whether the FTT reached a conclusion which no reasonable tribunal properly construing the statute could have reached. The answer to that question must be "no". The FTT reached a conclusion that it was more than entitled to reach on the basis of the facts before it.

70. We dismiss Ground 2.

THE MULTIFACTORIAL ASSESSMENT

71. All of Grounds 4, 5, 6 and 8 relate to the multifactorial assessment made by the FTT in determining whether Sensations Poppadoms should be regarded as similar to potato crisps for the purposes of excepted item 5. In each case, Walkers' argument is that the multifactorial assessment performed by the FTT was flawed because it did not give adequate weight or, indeed, any weight to: the fact that Sensations Poppadoms are called poppadoms and not crisps (Ground 4); the specific distinctive flavours of Sensations Poppadoms (Ground 5); the inclusion of gram flour in Sensations Poppadoms (Ground 7); or the fundamental differences between poppadoms and crisps (Ground 8).

72. We will first set out the parties' submissions on each of the grounds. However, given that all of these grounds relate to different elements of the same multifactorial assessment, we will address these grounds together in our discussion below.

The parties' submissions in outline

Ground 4

73. The particular paragraph of the FTT Decision with which Walkers takes issue in relation to Ground 4 is FTT [39]. In that paragraph, the FTT decided that it was not appropriate to give any weight to the name given to the product "given the general freedom (within the constraints of trade mark law) for manufacturers to choose the name of their product". The FTT had referred, by way of example, to "Hula Hoops" and "Monster Munch" in support of its conclusion (at FTT [39]).

74. In relation to this ground, Mr Schofield referred us to various decisions of the FTT (and one of its predecessors, the VAT and Duties Tribunal) in which the name or description of the relevant product had been relevant to the multifactorial assessment.[2] He argued that the FTT's approach – refusing to give any weight to the name given to the product – confused the brand name of a product with the "legal name", "customary name" or "descriptive name" of a product, one of which was required to be included on the packaging under food labelling rules. The fact that the products were correctly labelled and described under those rules as "poppadoms" and as a "potato and gram flour snack" should not have been given no weight under the multifactorial assessment.

[2] For example, *Torq Limited v Commissioners of Customs & Excise* (Decision 19389), *WM Morrison Supermarkets Limited v HMRC* [2021] UKFTT 0106 (TC), *DuelFuel Nutrition Limited v HMRC* [2024] UKFTT 0104 (TC)

75. Thus, he said, the FTT had ignored a relevant factor – that was an error of law.

76. Ms McGowan submitted that the FTT had not failed to take into account a relevant factor. It had considered the labelling and description of the product, and had decided to give it no weight. In any event, the question at which the multifactorial assessment was directed was not whether Sensations Poppadoms were poppadoms. The question was whether they were "similar" to potato crisps. It was irrelevant whether or not the product was labelled as a "poppadom".

Ground 5

77. Ground 5 relates to the flavours of Sensations Poppadoms. The FTT decided that Sensations Poppadoms tasted principally of the flavouring that was added to them (FTT [45]). The FTT was "not convinced" that those flavours (lime & coriander chutney and mango & chilli chutney) could be said to be distinct from the flavours used for potato crisps given the diverse range of flavours in which crisps were available (FTT [45]).

78. Mr Schofield submitted that the FTT had failed to apply the test correctly. By considering the diverse range of flavours of potato crisps – and, in particular, referring in the FTT Decision to some flavours for which there was no evidence before the FTT – the FTT failed to address the correct question which was whether the flavours of Sensations Poppadoms were similar to those of potato crisps. The FTT also failed to consider the similarity between the flavours of Sensations Poppadoms and the flavours of other mini-poppadoms that were on the market.

79. Ms McGowan pointed out that there was evidence before the FTT of potato crisps being available in flavours that were similar to some, but not all, of the flavours referred to in the FTT Decision. Furthermore, the relevant findings of the FTT (at FTT [45]) – that the range of flavours in which potato crisps were available was very diverse and that the flavours of Sensations Poppadoms could not therefore be a distinguishing feature – were firmly grounded in HMRC's submissions and in the evidence before the FTT. Against that background the FTT was entitled to reach a view that flavour was not of material weight in the multifactorial assessment.

Ground 6

80. In relation to Ground 6, Walkers takes issue with the FTT's conclusions at FTT [51], where, under the heading "Ingredients", the FTT accepted that the witness evidence showed that potato "was also used to reduce the taste of the gram flour and provide a more neutral flavour to the products", and dismissed Walkers' arguments that the use of gram flour as an ingredient distinguished Sensations Poppadoms from potato crisps on the grounds that the FTT "could not distinguish any such gram flour from the added flavouring".

81. Mr Schofield says that, in this paragraph, the FTT conflated the ingredients with their taste. In doing so, the FTT failed to appreciate the uniqueness of gram flour as an ingredient, and failed to take into account the inclusion of gram flour as an ingredient in the multifactorial assessment. He referred again to the labelling of the products as a "potato and gram flour snack" and to the decision of the FTT in *United Biscuits* in which Discos and New Recipe Frisps were labelled as a "wheat and potato snack" (*United Biscuits* [26], [51]).

82. Ms McGowan challenged these assertions. The FTT had taken into account the inclusion of gram flour as an ingredient (FTT [11]). Walkers' arguments before the FTT were that gram flour was an important ingredient as it provided a distinctive texture and a distinctive taste to poppadoms. Walkers advanced evidence on both of these issues. It was not therefore surprising that, when discussing the relevance of the ingredients of Sensations Poppadoms, the FTT chose to focus on these particular features. The FTT rejected both assertions (FTT [46],

[51], [57]). It was not the case that the FTT did not appreciate the uniqueness of gram flour as an ingredient. The FTT simply did not agree that its inclusion in this case prevented Sensations Poppadoms from being similar to potato crisps.

Ground 8

83. In relation to the final ground of appeal (Ground 8), Mr Schofield said that throughout the FTT Decision, the FTT failed to appreciate that poppadoms were a "conceptually distinct and recognized non-crisp product". The typical consumer would understand that a poppadom was a fundamentally different product from a potato crisp. In support of this assertion, Mr Schofield referred the tribunal to the results of the survey (referred to at FTT [52]-[54]) which he asserted showed that the majority of consumers would choose other poppadoms as a replacement product if Sensations Poppadoms were not available. He also referred the tribunal to HMRC's own website (at VFOOD8160) which shows poppadoms as a separate product from potato crisps (and as zero-rated).

84. Ms McGowan argued that Ground 8 was deeply flawed. The statutory question was not whether Sensations Poppadoms were poppadoms or similar to other products that were labelled as poppadoms. The question was whether they were "similar" to potato crisps. The FTT accepted that argument (FTT [31]) and was correct to do so. The reference to VFOOD8160 was disingenuous. The reference to poppadoms in that paragraph of HMRC's manuals was to products that were not made from potato and so did not fall into excepted item 5 for other reasons.

Discussion

85. This limb of the "composite question" posed by excepted item 5 is whether Sensations Poppadoms are "similar" to potato crisps, potato sticks, or potato puffs. The discussion before us focussed on a comparison of Sensations Poppadoms with potato crisps. We will adopt the same approach in our discussion below.

86. As we have mentioned above, it is clear from the decision of the Court of Appeal in *P&G* that this limb of the composite question is a "question of degree" (*P&G* [24]). It requires a "multifactorial assessment based on a number of primary facts" by the fact-finding tribunal (*P&G* [9]). The FTT is required to reach "a reasonable view on the basis of all of the facts" (*P&G* [21]).

87. In the present case, after reviewing a range of factors, the FTT reached the view that Sensations Poppadoms were "similar" to potato crisps. The FTT's reasons for its conclusion are summarized at FTT [57]-[59]. We have set out those paragraphs below once again for ease of reference.

> 57. Balancing all of the factors, on balance, we consider that the products are similar to potato crisps. They are packaged and sold in a manner similar to potato crisps. Removing them from their packaging, we consider that their appearance and texture is similar to potato crisps. Given the predominance of the flavouring, we consider that taste is not a distinguishing factor.
>
> 58. Whilst the manufacturing process is different, we note that the statute envisages similarity encompassing products made of potato starch and flour which cannot be made in the same way as sliced potato crisps and, as such, we give little weight to this distinction.
>
> 59. Noting the contention that the potato content was included to make the product cheaper and that this was not true of potato crisps, we do not consider that this is a sufficient distinction to outweigh the overall perception of the products as being similar to potato crisps, particularly given the witness

> evidence that the potato content was also used to provide a more neutral flavour in preference to the flavour of the gram flour.

88. On appeal, the question for this tribunal is whether the FTT reached a conclusion which is so unreasonable that no reasonable tribunal, properly construing the statute, could reach (*P&G* [22]). The Court of Appeal's guidance is that, on appeal, this tribunal should be "slow to interfere" with the overall assessment of the FTT (*P&G* [9]).

89. We will address the specific challenges raised by Walkers below. However, we should say at the outset that, in our view, the FTT's overall conclusion was a reasonable view on the basis of all of the facts. And while it may be possible to disagree with the weight given by the FTT to individual elements of its multifactorial assessment, that overall assessment was well within the bounds of reasonable decisions that the FTT, as the fact-finding tribunal, was entitled to reach on the basis of the evidence before it.

90. We will turn to the specific points raised by Mr Schofield in his grounds of appeal.

(1) Ground 4: As regards the weight to be given to the name or description given to the product as part of the multifactorial assessment, we acknowledge Mr Schofield's criticisms of the FTT's references to "Hula Hoops" and "Monster Munch" (at FTT [39]). They are brand names and clearly of no relevance to the multifactorial assessment. We agree with him that the FTT appears to have treated the reference to "Poppadoms" in the labelling of the product as a brand or trade name rather than as a customary name.

That having been said, the question for the FTT was whether Sensations Poppadoms are similar to potato crisps; not whether they are poppadoms. In that context, the customary name of a product is of limited relevance. The fact that a product might customarily be called a "poppadom" does not in principle prevent it from also being similar to a potato crisp.

(2) Ground 5: In relation to the flavours of Sensations Poppadoms, we again acknowledge Mr Schofield's points that some of the flavours to which the FTT referred in the FTT Decision were not in evidence before the FTT. However, as Ms McGowan pointed out, the essential point was that the range of flavours in which potato crisps were available was very diverse. On that basis, the FTT concluded that flavours of Sensations Poppadoms were not a distinguishing feature. In our view, that was not an unreasonable conclusion for the FTT to reach.

(3) Ground 6: As regards the submission that the FTT conflated the ingredients with their taste and so failed to give appropriate weight to the inclusion of gram flour as an ingredient in Sensations Poppadoms, once again, we agree with Ms McGowan. The FTT considered arguments concerning the addition of gram flour and its effect on the taste and texture as part of the multifactorial assessment (FTT [50]-[51]). In the context of a multifactorial assessment of the similarity of the products to potato crisps, in our view, that was not an unreasonable approach as those were the features most likely to distinguish the products from crisps.

(4) Ground 8: As to the final ground of appeal, as with the FTT, we were not convinced of the relevance of the survey evidence. We accept that poppadoms may be a distinct product from potato crisps; that they may be viewed as such by some consumers, and that a typical consumer may regard Sensations Poppadoms as poppadoms and not crisps. However, as the FTT identified (FTT [54]), the question is not whether the products are similar to poppadoms, it is whether they are similar to potato crisps. The

products may be similar to poppadoms, but that does not prevent them from being similar to potato crisps.

We also acknowledge that the HMRC website (VFOOD8160) shows poppadoms as a separate product from potato crisps and as zero-rated. However, we agree with Ms McGowan, that this is likely to be a reference to traditional poppadoms made for the purpose of eating with a meal and made to a traditional recipe (i.e. primarily from gram flour). It does not affect the question as to whether Sensations Poppadoms should be treated as similar to potato crisps.

91. We have expressed some reservations about the FTT's approach to some aspects of the multifactorial assessment – in particular, the reasons that it gave for not affording any weight to the name or description of the products (Ground 4). However, the question for us, as directed by the Court of Appeal in *P&G*, is whether the FTT reached a conclusion, which is so unreasonable that no reasonable tribunal, properly construing the statute, could reach. The FTT failed to recognize that the descriptions of the products as "poppadoms" and "potato and gram flour snacks" were not at an equivalent level to the brand names and trade names to which it referred. However, even if it had done so, it would not, for the reasons that we have given, have materially affected the overall assessment; it was a very minor part of the overall picture.

92. We dismiss Grounds 4, 5, 6 and 8.

DISPOSITION

93. For the reasons that we have given, we dismiss this appeal.

COSTS

94. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE MEADE
JUDGE ASHLEY GREENBANK

UPPER TRIBUNAL JUDGES

Release date: 23 May 2025