Neutral Citation Number **[2025] UKUT 00313 (TCC)**

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

Applicant: Bottled Science Limited	Tribunal Ref: **UT-2025-000037**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

RECONSIDERATION OF APPLICATION FOR PERMISSION TO APPEAL FOLLOWING ORAL HEARING

DECISION NOTICE

JUDGE RUPERT JONES

Introduction

1. The Applicant, Bottled Science Ltd, applies to the Upper Tribunal (Tax and Chancery) ("UT") for permission to appeal the decision of the First-tier Tribunal (Tax Chamber) ("the FTT"), released on 4 July 2024 ("the Decision"). The Decision was made by the FTT following a hearing conducted on 29 and 30 January 2024.

2. The FTT dismissed the Applicant's appeal against HMRC's decision. HMRC had refused a claim for overdeclared output tax on the basis that the Applicant's collagen drink product "Skinade" was standard rated for the purposes of VAT. The FTT agreed with HMRC that Skinade does not fall within the zero-rating classification for "food of a kind used for human consumption" within Item 1, group 1, Schedule 8 to the Value Added Tax Act 1994 ("VATA").

3. References in square brackets [] are to paragraphs in the Decision.

4. By a decision dated 20 March 2025 ("the PTA Decision"), the FTT refused the Applicant permission to appeal the FTT's Decision to the Upper Tribunal ('UT') on the nine grounds of appeal pursued.

5. The Applicant renewed its application to the UT for permission to appeal in-time on 11 April 2025 within a month thereafter.

6. On 2 June 2025 the Applicant renewed its application for permission to appeal requesting reconsideration at an oral hearing of the nine grounds of appeal pursued.

7. On 17 September 2025 the Applicant filed written submissions in support of an additional ground of appeal to be pursued.

8. On 18 September 2025 I held a video hearing, by CVP, of the permission application. Mr Schofield appeared for the Applicant and Mr Watkinson appeared for HMRC. I am grateful to them both for their submissions.

UT's jurisdiction in relation to appeals from the FTT

9. An appeal to the Upper Tribunal from a decision of the FTT can only be made on a point of law (section 11 of the Tribunals, Courts and Enforcement Act 2007). The Upper Tribunal has a discretion whether to give permission to appeal. It will be exercised to grant permission if there is a realistic (as opposed to fanciful) prospect of an appeal succeeding, or if there is, exceptionally, some other good reason to do so: Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.

10. It is therefore the practice of this Chamber of the Upper Tribunal to grant permission to appeal where the grounds of appeal disclose an arguable error of law in the FTT's decision which is material to the outcome of the case or if there is some other compelling reason to do so.

Grounds of Appeal

11. At the hearing, Mr Schofield confirmed that he was relying on three consolidated grounds of appeal. He was no longer relying on grounds 2, 5, 7 and 9 from the original nine grounds of appeal set out in the application to the UT for permission to appeal dated 8 April 2025. The additional ground first raised on 17 September 2025 was an amended form of the original ground 3 and formed the new Ground 1. Ground 2 incorporated original grounds 1 and 8. Ground 3 incorporated original grounds 4 and 6.

12. At my request and following the hearing, Mr Schofield put his three grounds of appeal, as now pursued, in writing. The three consolidated grounds of appeal are as follows:

> GROUND 1: "FOOD INCLUDES DRINK"
> 1. It is arguable that the Tribunal erred in light of the subsequent judgment *in Innovative Bites Limited v HMRC v DuelFuel Nutrition Limited* [2025] EWCA Civ 293, such that a drink is a food absent absurdity, circumventing the need for a multifactorial assessment as to "food" if found to be a drink, in accordance with Note 1 to Group 1 of Schedule 8 of the VATA 1994.
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> (See: the Appellant's Additional Ground document for argument)
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> GROUND 2: MULTIFACTORIAL ASSESSMENT: MARKETING
> 2. It is arguable that the Tribunal erred in conducting its multifactorial assessment by placing the only weight and/or undue weight singularly on marketing – above the effectively neutral weighting given to name, nutritional value, ingredients, palatability, Food Standards Authority

regulated manufacturing, and food labelling requirements – effectively applying a test of marketing to whether a product is food, whilst also failing to distinguish *HMRC v The Core (Swindon) Ltd* [2020] UKUT 0301 (TCC) where marketing is more likely to be a dominant factor under the purpose of consumption test applied for beverages following *Bioconcepts*.

(See: Ground 1 of the Appellant's original Application for Permission to Appeal for argument.)

GROUND 3: CONFLATING NUTRITIONAL VALUE WITH THE PURPOSE OF CONSUMPTION

3. It is arguable that the Tribunal erred in conflating nutritional content – simply containing nutrients, which will to a greater or lesser extent contribute to the maintenance of bodily functions – with food being consumed for the purpose of keeping the body alive. It is arguably a mistake to impose a test of whether foods have to be consumed or sold for the purpose of keeping the body alive or functioning rather than merely having nutrients capable of keeping the body functioning. Foods may be sold and consumed for all manner of purposes (see also Excepted Items 4 and 4A), rather than being for the purpose of maintenance of bodily functions.

(See: Ground 4 of the Appellant's original Application for Permission to Appeal for argument.)

Discussion, Analysis and Decision

13. Despite the powerful submissions of Mr Watkinson in opposition, I grant permission to appeal in respect of each of the Applicant's three consolidated grounds of appeal as they hold realistic prospects of success and raise arguably material errors of law in the FTT's Decision.

14. I repeat my observation as to the length of the original application and number of grounds of appeal then pursued.

15. I also note that, as Mr Watkinson pointed out, the additional ground new pursued (new Ground 1) was not pursued in the April nor June 2025 applications made by the Applicant and was only raised a day before the hearing. The argument was available to the Applicant since 21 March 2025 when the Court of Appeal handed down judgment in *Innovative Bites*, although I accept it was not available to run in its current form before the FTT at the hearing in 2024. I also take into account that no good reason was given for the late raising of the ground. I finally take into account that the Applicant pursued its case before the FTT on a different basis – that the product was a food based on a multi-factorial analysis ("MFA") rather than it was a food based upon it being a drink in accordance with Note 1 that would therefore render it to be a food. At all times before the FTT it was available for the Applicant to argue that the product was a drink, based upon a MFA, and by virtue of Note 1 that meant it was also a food.

16. On the basis that Ground 1 is a new point not raised before the FTT, and it is raised at a late stage of the permission applications, I have considered *Singh v Dass* [2019] EWCA Civ 360 at [15]-[18]:

> 15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.
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> 16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).
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> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24 at [29]).

17. I also note the guidance at [107-[111] of *Revenue And Customs v Bluecrest Capital Management (UK) LLP [2025] EWCA Civ 23* , beginning at [107]:

> 107.Salutary though these principles are, they are not in my judgment engaged to any significant extent in the present case. On a tax appeal to the FTT brought within normal time limits, the burden lies on the taxpayer to displace the assessment or determination under appeal. Furthermore, it should always be remembered on both sides that there is a public interest in taxpayers paying the correct amount of tax, such that fresh arguments may be advanced by either side, or by the tribunal of its own motion, subject always to the requirements of fairness and proper case management: see the observations of Lord Walker of Gestingthorpe in *Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2011] UKSC 19

18. Taking into account all the circumstances of the case and the interests of justice, I permit the Applicant to amend its original ground 3 / introduce the new ground of appeal as Ground 1. The following matters have weighed in favour of permitting this ground to be pursued: it has arguable merit; it is a pure point of law so the prejudice to HMRC is minimal because it was raised at the permission stage so HMRC will be able to respond with ample notice; it was not available to run before the FTT in the same form as now pursued as the Court of Appeal only gave guidance in March 2025; and a form of the argument was set out in the original third ground of appeal to the UT in April 2025. It remains to be seen, whether if the ground is ultimately found to have merit, it would require remittal to the FTT as to whether the product was a drink or whether the FTT has already made sufficient findings on whether the product was a drink so that if the appeal was allowed on this basis, the decision could be remade. I am therefore satisfied it is in accordance with the overriding objective of justice and fairness to permit the ground to be argued.

19. Nonetheless, in light of the above, I do consider that the UT which ultimately hears the appeal should consider whether HMRC should have costs protection on this ground – whether, to the extent that Ground 1 might be successful, HMRC should not have to pay the costs of the Applicant in pursuing this ground of appeal. This is for the reasons set out above.

Conclusion

20. Permission to appeal to the Upper Tribunal is **granted on all three grounds of appeal now pursued.**

Signed:	**Date: 18 September 2025**
JUDGE RUPERT JONES	

JUDGE OF THE UPPER TRIBUNAL