



Neutral Citation: [2026] UKUT 00194 (TCC)

Case Number: UT/2025/000046

**UPPER TRIBUNAL
(Tax and Chancery Chamber)**

Rolls Building, London

PROCEDURE – whether test of whether evidence “reasonably required to resolve proceedings” by analogy with CPR 35 correct starting point for deciding whether permission to adduce expert evidence should be given under Rule 15 FTT Rules – yes – FTT Decision set aside and remade so as to confine scope of expert evidence

Heard on: 27 January 2026
Judgment date: 15 May 2026

Before

**JUDGE SWAMI RAGHAVAN
JUDGE NICHOLAS PAINES KC**

Between

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Appellants

and

HEALTHSPAN LIMITED

Respondent

Representation:

For the Appellant: Howard Watkinson, Counsel, instructed by the General Counsel and Solicitor to His Majesty’s Revenue and Customs

For the Respondents: James Rivett KC and Joshua Stevens, instructed by Pricewaterhouse Coopers LLP

DECISION

INTRODUCTION

1. This is an appeal by HMRC against a case management decision of the First-tier Tribunal (Tax Chamber) (“FTT”) issued on 4 March 2025 (“FTT Decision”). The FTT Decision concerned the application of Healthspan Limited (“Healthspan”) under Rule 15(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the FTT Rules”) for permission to adduce expert evidence in the substantive appeal, which concerns VAT.

2. The underlying dispute concerns two claims for overpaid output VAT totalling £56,165,421.49 in relation to products broadly described as “food supplements” which Healthspan argues were zero-rated as “food of a kind used for human consumption” under Group 1 Item 1 of Schedule 8 to VATA 1994. The dispute in the substantive matter centres on the meaning of that provision, with HMRC arguing for a test based on the view that an ordinary person would take and Healthspan arguing for a definition based on a nutritional purpose or the nutritional content of the products.

3. The FTT was not required to determine which test was correct but only whether the expert evidence should be permitted in principle. It allowed Healthspan’s application, taking the view it was in the interests of justice to permit the evidence, on the grounds that the evidence would assist the tribunal if Healthspan’s interpretation of Item 1 is correct (an issue which the tribunal could not determine at that stage); to deny Healthspan the ability to adduce the evidence would prevent Healthspan from being able to argue the case it wished to advance and thus prevent it being able to participate fully in the proceedings. There was no material detriment to HMRC as it could argue about admissibility of the expert report at a later stage, and if it wished seek permission to adduce its own expert evidence.

4. HMRC now appeals, with the permission of the Upper Tribunal, on the grounds that the FTT erred in law in its identification and application of the test for admitting expert evidence. It is submitted that the relevant test, by analogy with CPR 35 of the Civil Procedure Rules applicable in the civil courts, required the FTT to consider whether the evidence was “reasonably required” to resolve the proceedings. It is argued that this entailed close analysis of the extent to which the suggested scope of evidence was relevant to the applicant’s pleaded case, and that if the FTT had done that the application ought not to have been allowed. HMRC also argue that the FTT failed to address HMRC’s case and that the reasoning in the FTT Decision was inadequate.

LAW

5. Rule 15 of the FTT Rules provides as follows:

“15.(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—

(a) issues on which it requires evidence or submissions;

(b) the nature of the evidence or submissions it requires;

(c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;

(d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;

(e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given—

(i) orally at a hearing; or

- (ii) by written submissions or witness statement; and
 - (f) the time at which any evidence or submissions are to be provided.
- (2) The Tribunal may -
- (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or
 - (b) exclude evidence that would otherwise be admissible where—
 - (i) the evidence was not provided within the time allowed by a direction or a practice direction;
 - (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
 - (iii) it would otherwise be unfair to admit the evidence.
 - (3) The Tribunal may consent to a witness giving, or require any witness to give, evidence on oath, and may administer an oath for that purpose.”

6. Rule 2 of the FTT Rules sets out the overriding objective of the Rules: to enable the Tribunal to deal with cases fairly and justly. The FTT must seek to give effect to that objective when it exercises any power under the FTT Rules, including its case management powers and its powers relating to evidence. As set out in Rule 2(2), dealing with a case fairly and justly relevantly includes (a) “dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties” and (c) “ensuring, so far as practicable, that the parties are able to participate fully in the proceedings”.

7. The Civil Procedure Rules do not apply to proceedings in the Tribunals. However, in considering the control of expert evidence, it is convenient to note that CPR 35 regulates the admission of expert evidence in some detail. CPR 35.1 requires expert evidence to be “restricted to that which is reasonably required to resolve the proceedings”. A question raised by this appeal is the extent to which a restriction of that kind applies to the FTT’s task under rule 15(1)(c) of the FTT Rules. Under CPR 35.4 a party requires the court’s permission to adduce expert evidence. The Rule is supplemented by a Practice Direction containing further detail.

8. In *JP Morgan Chase Bank v Springwell* [2006] EWHC 2755 (Comm), a substantial Commercial Court case concerning the sale of complex financial products, Aikens J explained the rationale for controlling expert evidence (at [23]) as follows:

“There is a tendency to think that a judge will be assisted by expert evidence in any area of fact that appears to be outside the ‘normal’ experience of a Commercial Court judge. The result is that, all too often, the judge is submerged in expert reports which are long, complicated and which stray far outside the particular issue that may be relevant to the case. Production of such expert reports is expensive, time-consuming and may ultimately be counter-productive. That is precisely why CPR Pt 35.1 exists. In my view it is the duty of parties, particularly those involved in large scale commercial litigation, to ensure that they adhere to both the letter and spirit of that rule. And it is the duty of the court, even if only for its own protection, to reject firmly all expert evidence that is not reasonably required to resolve the proceedings.”

9. These words were quoted (at [23]) by Warren J in *British Airways plc v Spencer* [2015] EWHC 2477 (Ch), an appeal against a decision refusing permission for expert evidence under the CPR. Warren J held (at [68]) that the court must

“ask itself the following important questions:

(a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.

(b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it (just as in *Mitchell* the court would have been able to resolve even the central issue without the expert evidence).

(c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. In that case, the sort of questions I have identified in paragraph 63 above will fall to be taken into account. In addition, in the present case, there is the complication that a particular piece of expert evidence may go to more than one pleaded issue, or evidence necessary for one issue may need only slight expansion to cover another issue where it would be of assistance but not necessary.”

10. At paragraph 63 the judge had said

“... A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date).”

11. The case-law relevant to the interpretation of CPR 35.1 was helpfully summarised in *Declan Colgan Music Ltd v UMR Recordings, Inc.* [2023] EWHC 4 (Ch), a dispute concerning music exploitation and royalties. Like this case, *Declan Colgan* concerned the situation where permission was sought in principle to provide expert evidence (at the stage where no report had as yet been drafted). Deputy Master Henderson summarised the principles to be applied on an application for permission to admit expert evidence, at [132] as follows (so far as relevant to this case):

“132.6. In deciding whether permission should be granted under CPR 35.4 there is the overarching restriction under CPR 35.1 restricting the expert evidence to that which is reasonably required to resolve the proceedings. In deciding that question and in deciding whether to grant permission under CPR 35.4, the three questions listed by Warren J in *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) at para.68 need to be considered, in the case of the third, having regard to the factors mentioned by him at para.63.

Those 3 questions are:

132.6.1. (a) Whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it must be admitted.

132.6.2. (b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of

assistance, but not necessary, then the court would be able to determine the issue without it.

132.6.3. (c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings.

132.7. A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date).

132.8. There may be facts as to which evidence could be given by either or both of (i) lay evidence and (ii) expert evidence. The collation and presentation to the court in an efficient manner of the knowledge and experience of others in his or her field of expertise is an example. If, in a particular case the evidence might be able to be given by a large number of lay witnesses or by an expert or by both, the court can decide as a matter of case management which course or combination of courses would be in accordance with the overriding objective; which decision might involve restricting the number of lay witnesses.”

12. Although the CPR do not apply to the FTT, similar reasoning has been adopted in tribunal proceedings with an overriding objective in materially identical terms to that contained in the Tax Chamber Rules. In *The Royal Borough of Kensington and Chelsea v CD* [2015] UKUT 396 (AAC) (“*RBKC*”), UTJ Rowley was “mindful of the fact that the CPR do not apply to First-tier Special Educational Needs and Disability Tribunals, and that unnecessary formality in those tribunal proceedings must be avoided” but considered that CPR 35 provided “a useful backdrop to case management decisions concerning expert evidence in such tribunals”. She continued at [35] to say that “the starting point must be that expert evidence should be restricted to that which is reasonably required to resolve the appeal”, and (at [37]) that it would be helpful to all involved if the tribunal were to “identify precisely the issues which the experts are to address”.

13. Observations to the same effect have been made in the FTT (Tax Chamber). In *Sherrington v HMRC* [2020] UKFTT 0128 (TC) the FTT quoted and expressed agreement with paragraphs [33]-[35] of the decision in *RBKC*. They considered, given the similarity in the respective Chamber rules, that UTJ Rowley’s comments applied with equal force to proceedings in the Tax Chamber of the FTT.

14. In *Deloitte LLP v HMRC* [2016] UKFTT 479 (TC), an FTT Decision concerning admissibility of expert evidence, the FTT (Judge Raghavan) summarised various propositions derived from the authorities. These were preceded by the observation that it was:

“...relevant to take account of the case law based on that rule in the CPR given the overlap between the policy underlying the CPR rule and the Tribunal’s overriding objective. Given the extra time, cost and complexity involved in proceedings which involve expert evidence, the admission of expert evidence

which is not reasonably required to resolve the proceedings is unlikely to be consistent with the tribunal's overriding objective."

15. The propositions, which we set out because they were cited by the FTT in the present case, were that

“(a) Relevant evidence should be admitted unless there are compelling reasons not to. The prejudice to each party of respectively admitting/not admitting the evidence should be weighed. (*Mobile Export 365 and Atlantic Electronic*)

(b) An expert's evidence of opinion is admissible because it is the product of a special expertise which the tribunal does not possess, or even if it does, which is not its function to apply. (*Hoyle*)

(c) Expert reports are not rendered inadmissible because they refer to legislation, matters of law or indeed the very issue before the court or tribunal. Tribunal panels (who are not lay finders of fact) can be credited with the ability to distinguish between inadmissible/admissible matters in a report and to know that they have to reach their own view on the legal question before them. (*JP Morgan Chase Bank, and Kennedy*)

(d) Even if reports contain inadmissible expert evidence of fact they can be admitted and should be admitted without requiring excision particularly if the admissible/inadmissible evidence of fact is intertwined. (*Hoyle*)”

16. (The references are to *Mobile Export 365 v HMRC* [2007] EWHC 2664 (Admin), *Atlantic Electronics Ltd HMRC* [2013] EWCA Civ 651, *Hoyle v Rogers* [2014] EWCA Civ 257, *JP Morgan Chase Bank v Springwell* [2006] EWHC 2755 (Comm) and *Kennedy v Concordia (Services) LLP* [2016] UKSC 6.)

17. The summary in *Deloitte* was referred to in *CCLA Investment Management Limited v HMRC* [2022] UKFTT 195 (TC), though not the preceding statement regarding the application by analogy of the CPR approach. The issue in *CCLA* was whether CCLA's supplies of fund management services were entitled to exemption from VAT pursuant to a provision of the EU VAT Directive which exempted “the management of special investment funds as defined by Member States”. That depended on whether the fund was comparable to certain other funds and on whether it was subject to specific state supervision.

18. The FTT in *CCLA* adopted the approach that expert evidence on these issues had the potential to assist and would be admitted *de bene esse*, leaving its admissibility and weight to be tested later if challenged. This was on the ground that admitting the evidence would enable CCLA to argue its case, whereas if the application were refused CCLA would not be able to participate as fully as it should be enabled to do.

19. Against that background, the issue raised by HMRC's appeal is whether the FTT was required to approach the permission decision by applying a structured assessment directed to whether expert evidence was reasonably required to resolve the appeal, and whether it sufficiently identified the issues to which the proposed expert evidence was to be directed. HMRC contends that the FTT did neither. Healthspan contends that the FTT's focus on whether the Tribunal would derive assistance from the evidence, together with its reliance on fairness and participation, was a lawful exercise of discretion at the permission stage.

BACKGROUND, FTT DECISION AND GROUNDS OF APPEAL

20. The substantive overpayment dispute concerns 316 different products grouped into four categories: i) “Recognised Food Supplements” which include turmeric capsules, garlic tablets and peppermint capsules and are predominantly in the form of tablets or capsules; ii) “Recognised Food Extract Supplements” which include cod liver oil, fish collagen and edible

algae in either tablet, pill, capsule or oil forms; iii) “Supplements Providing Essential Nutrients” which include vitamin C, folic acid and multivitamin tablets and appear to be in tablet, capsule or oil forms; and iv) “Other items which possess a health or nutritional benefit” which include herbal and traditional medicines, probiotics and enzymes.

21. It is common ground that the substantive appeal raises a dispute of statutory interpretation and application, namely the correct approach to the phrase “food of a kind used for human consumption” in Item 1 of Group 1 of Schedule 8 to VATA 1994. In summary, Healthspan contends that HMRC’s reliance on an “ordinary man” multifactorial approach is erroneous, and that the correct approach should focus on nutritional purpose or nutritional content, having regard, among other things, to recent domestic and CJEU authority (in particular *Staatssecretaris van Financiën v X* (C-331/19)).

22. Healthspan’s Notice of Appeal to the FTT advances five related grounds of appeal against the decision to refuse it zero-rating, arguing that HMRC erred in

- (1) treating the appropriate means of determining whether a product is “food of a kind used for human consumption” as merely a multifactorial assessment of what the “ordinary man” would regard as food;
- (2) rejecting Healthspan’s proposed definition of “food of a kind used for human consumption”, namely “Edible substances that are commonly ingested orally for the predominant purpose of nutrition, or which contain nutrients which are necessary to keep the body alive and to enable it to function and develop”, which Healthspan says provides a clear and objective test for VAT purposes;
- (3) maintaining the “ordinary man” approach in a way which, Healthspan says, fails properly to take account of the legislative purpose underlying the zero-rating of “food of a kind used for human consumption”;
- (4) failing properly to apply the “always speaking” principle of statutory construction, HMRC’s criticism of Healthspan’s reliance on that principle being said to rest on a misunderstanding of Healthspan’s position; and
- (5) failing properly to take account of recent binding domestic and CJEU authority, in particular *X* (C-331/19), which (it is said) reinforces the relevance of nutritional benefit and the purpose for which the products are consumed.

23. As regards the procedural background, in March 2023, following service of HMRC’s statement of case, both parties sought a hearing of a preliminary issue framed as “What is the correct test for classification of a product as a ‘food of a kind used for human consumption’ under Group 1 of Schedule 8 to the Value Added Tax Act 1994?”, and for the issue to be heard in the Upper Tribunal. That application was refused by the FTT on 5 May 2023. Healthspan thereafter applied, on 24 October 2023, for permission to adduce expert evidence. The application included the following:

“...8. The approaches proposed by both parties include nutrition as one of/the core aspects to be considered.

9. Accordingly, in circumstances where the Tribunal is hearing the substantive appeal, and not simply a preliminary point on the legal issue, it is respectfully submitted that an expert is required to provide evidence of the nutrition/nutritional value of the products in question, and to therefore enable the Tribunal to apply the test it decides should be applied to determine whether a product is food for VAT purposes.

10. Further, the concept of nutrition is intertwined with other aspects of human wellbeing, and these also feed into the analysis that the parties are seeking the Tribunal's determination on.

11. In the light of the above, and given the significance of the scientific concepts that require detailed analysis and consideration, [Healthspan] respectfully reiterates that special expertise is required to assist the Tribunal in the legal determination it is being requested to make.”

24. The application explained that the identified expert would address the following areas
- “a. The scientific understanding of food;
 - b. The nutritional profile of the claim products; and
 - c. The extent to which the claim products fit in with the modern diet.”

The FTT's reasoning

25. In its summary of Healthspan's arguments (at [10(2) and (3) of its Decision) the FTT set out the following in relation to the *CCLA* case:

“(2) The tribunal has provided recent guidance as to the approach to be taken in relation to an application to admit expert evidence in *CCLA* ...: -

(a) At [19] of *CCLA*, the provisions in rules 2 were noted including that it must be ensured that parties are able to participate fully in the proceedings.

(b) At [20] of *CCLA*, the decision in *Deloitte LLP v HMRC* [2016] UKFTT 479 (TC), which set out the principles which should be considered in considering an application to admit expert evidence, was quoted [The propositions which we have set out in [15] above were set out.]:

(3) At [43] of *CCLA*, the tribunal held that, in that particular case, expert evidence should be lodged “de bene esse” – it was not necessary to decide on admissibility which the other party could contest at a later stage. By way of summary it was noted that: (i) the overriding objective requires dealing with the case in ways that are proportionate to its importance, complexity, and costs, (ii) the overriding objective requires ensuring that parties are fully able to participate, (iii) relevant evidence should be admitted unless there are compelling reasons not to, (iv) the prejudice to each party of admitting or not admitting the evidence should be weighed, and (v) there is no need to decide on admissibility at the stage of whether to grant permission to call expert evidence as that can be decided later (unless, presumably, it is obviously not admissible).”

26. At [11] the FTT recorded that HMRC considered the tribunal should follow the approach to admissibility of expert evidence taken in the courts and cited the main authorities that HMRC relied on, including *British Airways* and *Declan Colgan*. The FTT then set out a detailed summary of the parties' competing submissions (at 13(1)-(8), 14(1)-(11) and 15(1) to (5) (these in essence reflect those made before us and which we cover below). It granted the taxpayer's application on the following basis (at [16]) which it is convenient to reproduce in full.

“I decided that it is in the interests of justice and fairness to allow the appellant's application for expert evidence to be adduced in these proceedings on the basis that it remains open to HMRC later to raise arguments on the admissibility of any actual expert report served. In my view, in the circumstances of this case and having regard to the principles set out in rule 2 of the Rules, it is appropriate to follow a similar approach to that taken in the *CCLA* case, in particular, given that:

(1) The tribunal would derive assistance from expert scientific analysis of the type the appellant asserts is required if the appellant's view of how Item 1 is to be interpreted and applied is correct. I note that HMRC take a different view of how Item 1 is to be interpreted and applied and hence dispute that any such evidence is necessary or will provide assistance. However, the tribunal cannot at this point determine that issue; that will need to [be] considered with the benefit of full argument and evidence at the hearing of the substantive issues in this appeal. To deny the appellant the ability to produce expert evidence of the type it wishes to adduce would in effect prevent the appellant from being able to argue the case that the appellant wishes to advance as regards the interpretation and application of Item 1 and so prevent its ability fully to participate.

(2) There is no material detriment to HMRC in the appellant being permitted to adduce expert evidence given that (a) HMRC will have the opportunity to challenge the expert evidence in due course and to apply to adduce their own expert evidence should they wish to do so, and (b) if the expert evidence is successfully challenged that would be at a cost to the appellant as was noted at the hearing by the appellant's counsel. I do not accept that there has been any undue delay by the appellant in making this application or as regards dealing with it that has any bearing on whether the appellant should be permitted to adduce expert evidence."

27. HMRC's case, which we will address in turn, advances two grounds of appeal.

(1) **Ground 1** is that the FTT erred in principle as to the test to be applied for the admission of expert evidence.

(2) **Ground 2** is that the FTT erred in law by failing to address HMRC's case and give adequate reasons for the Decision.

GROUND 1

Parties' submissions in outline

28. HMRC submits that, although the CPR do not apply, the proper approach to permission for expert evidence should reflect the restriction in CPR 35.1. The Tribunal should ask whether the proposed expert evidence is reasonably required to resolve the appeal, assessed in the context of the proceedings as a whole and consistently with the overriding objective. HMRC says the FTT failed to apply that test, failed to identify with sufficient clarity what issues the expert would address and how those issues related to the pleaded case, and wrongly adopted a "de bene esse" approach which deferred control of expert evidence until a later stage.

29. Healthspan submits that the FTT was entitled to permit expert evidence in principle at a stage when the substantive legal test for zero-rating of its supplies had not been determined and no expert report yet existed. It says the FTT correctly focused on whether the Tribunal would derive assistance from expert scientific evidence if Healthspan's approach to interpretation were accepted, and it was entitled to take account of fairness and participation, while leaving the admissibility and weight to be tested later if required.

30. HMRC additionally criticises the FTT's conclusion that there was no material detriment to HMRC. Healthspan replies that the FTT's prejudice assessment fell within its discretionary case management judgment, given HMRC's ability to challenge the evidence and apply, if advised, for its own expert evidence.

Discussion Ground 1

31. There is no dispute that the FTT Decision was a case management decision. There is also no dispute as to the general principles governing appellate intervention in case management

decisions, or that the Upper Tribunal should not interfere unless an error of law is shown, and the error is material.

32. Mr Rivett KC submitted that there is, in substance, no material difference between asking whether expert evidence would assist the Tribunal and asking whether it is reasonably required to resolve the proceedings. The FTT’s reasoning proceeded on a similar footing, referring to whether it would “derive assistance”.

Is there any difference between an “assistance” test and a “reasonably required” test?

33. In our judgment the two concepts are not the same. The distinction is made clear in the structured approach described in *British Airways v Spencer* and adopted in *Declan Colgan*. Under that approach the Tribunal first asks whether expert evidence is necessary on an issue. If it is not necessary, the Tribunal asks whether it would nevertheless assist. If it would assist but is not necessary, the Tribunal then asks a further, distinct question: whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. That third question proceeds on the premise that the Tribunal can decide the issue without the evidence, and requires a holistic evaluative judgment, including proportionality.

34. That additional discipline matters in practice. Evidence may assist in the sense of being informative, but still not be reasonably required having regard to the scope of the dispute, the nature of the issues, the other evidence available, and the burden, cost and delay that expert evidence may bring. The rationale is the familiar one captured in the civil authorities: expert evidence, even when relevant and potentially helpful, is capable of producing expense and distraction out of proportion to its incremental value.

CPR Part 35 as a useful discipline: comity and consistency

35. The Civil Procedure Rules do not apply to proceedings in the FTT. Nonetheless, we accept Mr Watkinson’s submission that the discipline embodied in CPR 35.1 provides a useful backdrop to the exercise of the FTT’s discretion under rule 15. The policy concerns are not peculiar to the civil courts. They arise with particular force in large-scale tax appeals, including where the proposed expert evidence may be said to relate to a substantial portfolio of products.

36. The Upper Tribunal has adopted that approach in a tribunal context. In *RBKC UTJ Rowley* treated CPR Part 35 as a useful backdrop and stated that the starting point is that expert evidence should be restricted to that which is reasonably required to resolve the appeal. *RBKC* also emphasised the practical necessity of identifying precisely the issues which the expert is to address. We also attach weight to the fact that in *Sherrington* the same approach was endorsed in the Tax Chamber of the FTT by the then Chamber President.

37. There is a further reason to follow the Upper Tribunal’s guidance in *RBKC*. The provision considered in *RBKC* was in materially the same terms as rule 15(1)(c) in the FTT Rules, and the overriding objective is in materially identical terms. Out of comity, and in the interests of consistent and predictable case management under materially the same rules, we consider that the Tax Chamber should ordinarily adopt a similar structured approach.

38. Mr Rivett KC sought to distinguish *RBKC* on the basis that it did not refer to the provision now found in rule 15(2)(a), namely that the Tribunal may “admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom”. We do not accept that submission. Rule 15(2)(a) addresses the Tribunal’s freedom from the civil law rules of evidence. It does not dilute the separate control in rule 15(1)(c), which expressly contemplates the tribunal needing to give permission for expert evidence to be adduced, nor does it displace the need to exercise that control in accordance with the overriding objective. The fact that the Tribunal is not bound by civil admissibility rules does not entail that expert evidence should be

admitted whenever it is arguably relevant or arguably helpful. Expert evidence is controlled because it carries specific risks of cost, delay and diversion. Those risks are managed through the permission stage.

39. We also accept Mr Watkinson’s submission that the absence of an express equivalent to CPR 35.1 in the FTT Rules does not prevent the Upper Tribunal from giving structured guidance as to the manner in which the discretion should ordinarily be exercised. The function of such guidance is not to import the CPR wholesale, but to promote consistency and principled case management. In *HMRC v Medpro Healthcare Limited* [2026] EWCA Civ 14 the Court of Appeal recently explained (at [16] to [28]), by reference to previous authority, how the Upper Tribunal was entitled in principle to give guidance to support consistent decision-making in the FTT.

40. Mr Rivett KC relied on the way the admissibility principles were summarised in *Deloitte* (as quoted in *CCLA*), including the proposition that “relevant evidence should be admitted unless there are compelling reasons not to”, with prejudice to each party being weighed, and with reference to *Mobile Export 365* and *Atlantic Electronics*. We accept that, read in isolation from the introductory words in the paragraph that preceded them, the way those propositions are formulated in *Deloitte* could give the impression that the permission decision in relation to expert evidence is governed by a general presumption in favour of admission so long as the evidence is relevant, subject only to compelling countervailing reasons. In the light of what we have said above we do not consider that to be the appropriate framework to deal with expert evidence at the permission stage. The facts of *Mobile Export 365* and *Atlantic Electronics* were not concerned with permission for expert evidence under a specific rule controlling expert evidence. The policy considerations for expert evidence are distinct. Rule 15(1)(c) contemplates a permission stage precisely because expert evidence, even when relevant, has the potential to generate disproportionate cost and complexity.

41. The FTT’s overriding objective is indeed concerned with dealing with cases fairly and justly and with ensuring that the parties are able to participate fully, but it is also concerned with dealing with a case in ways that are proportionate. In this context there is force in the Tribunal’s observation in *Deloitte* that the admission of expert evidence which is not reasonably required to resolve the proceedings is unlikely to be consistent with the tribunal’s overriding objective. It follows that an important question in the context of the permission for expert evidence stage is not simply whether the evidence might assist in some sense, but whether it is reasonably required to resolve the proceedings, assessed holistically and by reference to the pleaded issues and proportionality. The specific approach taken to expert evidence of “reasonably required” can in any case, as Mr Watkinson submitted, be reconciled with any such wider propositions regarding the admission of evidence more generally in that if the expert evidence is not, despite being relevant, and following a holistic assessment, reasonably required to resolve the proceedings, then that would ordinarily be a compelling reason not to permit it.

The overriding objective and the possibility of exceptional cases

42. We accept, however, the broader caution expressed by Mr Rivett KC that the Tribunal should not treat CPR 35.1 as if it were a freestanding rule which rigidly displaces the tribunal’s own procedural framework. The ultimate control remains the discretion under FTT Rule 15 exercised in accordance with the overriding objective in Rule 2. For that reason we would not wish to be taken as ruling out the possibility that there may be exceptional cases where a tribunal, having applied the structured “reasonably required” approach, concludes that the overriding objective nonetheless justifies admitting expert evidence which might not satisfy that test in a strict sense. If such a case arises, the tribunal would need to explain why, by

reference to the overriding objective, it is fair and proportionate to do so notwithstanding the absence of the evidence being reasonably required. Such cases are likely to be rare. In the vast majority of cases the “reasonably required” approach will provide a workable and principled approach consistent with the overriding objective.

43. There is also nothing inconsistent between that approach and the overriding objective of ensuring that parties can fully participate in the proceedings. Participation in proceedings is not an absolute but something which needs to be ensured “so far as practicable” and must also be considered along with the need to deal with the case proportionately as regards the case’s importance and complexity and the parties’ anticipated costs and resources. The need for permission for expert evidence exists precisely because expert evidence carries particular risks of generating cost, complexity and diversion. Participation in the proceedings cannot therefore operate as a passport to expert evidence. If the evidence is not reasonably required, then admitting it will ordinarily be inconsistent with the overriding objective, not a means of fulfilling it.

The structured approach we consider FTT panels should adopt

44. Drawing these points together, we consider FTTs faced with applications for permission to adduce expert evidence should note the following.

45. First, the decision is a case management decision under Rule 15, to be exercised in accordance with the overriding objective. The Tribunal should treat the discipline reflected in CPR 35.1, and adopted as a useful backdrop in *RBKC* and endorsed in *Sherrington*, as the starting point. Expert evidence should be restricted to that which is reasonably required to resolve the appeal.

46. Second, whether expert evidence is reasonably required can only be assessed by reference to the issues the Tribunal must decide. The Tribunal should identify, with precision, the pleaded issues to which expert evidence is said to be directed and the specific questions on which expert assistance is sought. A general desire for expert material, or a description of broad topics, is unlikely to suffice. The Tribunal should be able to see how the proposed evidence bears on a live issue and what it is said to add.

47. Third, the Tribunal should adopt an issue by issue analysis of the kind described in *British Airways v Spencer* and applied in *Declan Colgan*. For each pleaded issue, the Tribunal should ask: (i) whether expert evidence is necessary for that issue to be resolved; if not, (ii) whether it would nevertheless assist the Tribunal in resolving that issue; and, if it would assist but is not necessary, (iii) whether, viewed in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the appeal.

48. Fourth, in addressing that third question, the Tribunal must make an evaluative judgment informed by proportionality and the overriding objective. Where the evidence is not necessary and is of marginal assistance, a balance must be struck, taking account of factors such as the scale and value of the dispute, the likely cost and burden of expert evidence (including the burden on the opposing party), and any consequential delay or disruption to the hearing. The Tribunal should also consider whether equivalent assistance can be obtained by narrower directions, including limiting scope, requiring a focused list of questions, or whether the point can be addressed by alternative types of evidence e.g. that of one or a combination of lay witnesses.

49. Accordingly in considering whether an application for permission to adduce expert evidence (in advance, as in this case, of any report having been produced) is consistent with the overriding objective the Tribunal should ask:

- (1) What are the pleaded issues, and what precise question or questions is the proposed expert evidence said to answer on those issues?
- (2) For each pleaded issue, is expert evidence necessary to decide it, and if not would it nevertheless assist?
- (3) If it would assist but is not necessary, is it reasonably required when the case is viewed as a whole?
- (4) Is admitting the evidence proportionate, taking account of scale and value, cost and burden (including on the other party), delay or disruption, and whether the same assistance can be achieved more efficiently by other directions on evidence?

Did the FTT apply the correct approach?

50. In our judgment the FTT did not apply the approach we have described. Its reasoning focused on whether it was in the interests of justice and fairness to allow the application, whether the Tribunal would derive assistance if Healthspan’s interpretation were correct, and whether there was “no material detriment” to HMRC because HMRC could challenge admissibility later and could, if it wished, seek its own expert evidence. That reasoning did not address the overall question whether expert evidence was reasonably required to resolve the appeal, viewed in the context of the proceedings as a whole.

51. On the basis that the FTT considered matters of admissibility could be addressed at a later stage, the FTT did not identify, with the necessary precision, the pleaded issues to which the proposed expert evidence was directed and the questions the expert was to address. The application identified three broad areas for expert evidence, namely (i) the scientific understanding of food, (ii) the nutritional profile of the claim products and (iii) the extent to which those products fit within the modern diet. Those areas are set out expressly in the application (as quoted above).

52. However, the FTT’s description of Healthspan’s case was not confined to those three categories. In particular, in its summary of submissions at [15(4)] the FTT recorded that Healthspan sought to rely on expert evidence as to how the products in question are “regarded by the body of scientific opinion and why they are regulated in a given manner by the Government”. Those matters do not appear in the three categories identified in the application itself and go beyond a description of “scientific understanding of food” or “nutritional profile” in any straightforward sense. Nor were they clearly linked, in the FTT’s reasoning, to any pleaded issue in the underlying appeal. They therefore illustrate the difficulty, identified by Mr Watkinson, that the scope of the proposed expert evidence was not tied with precision to the pleaded case, and that the FTT did not identify with clarity what was being permitted.

53. The FTT also treated the possibility of later admissibility challenges as a reason to grant permission now. That is not a proper substitute for permission-stage control. The purpose of the permission stage under rule 15(1)(c) is to determine, in advance, whether expert evidence should be introduced at all and, if so, on what defined issues. Mr Watkinson was right to point out that it was hard to see how the Tribunal could revisit its admissibility at a later stage. If the scope of the expert evidence was not defined by reference to identified issues and a principled test at the permission stage, it was unclear upon what basis the tribunal would subsequently assess admissibility or relevance. In other words, the FTT’s approach did not identify any yardstick to be applied at the later stage. That absence illustrates the consequence of adopting the wrong approach at the permission stage.

54. We also accept HMRC’s submission that the FTT erred in its approach to prejudice. The FTT concluded that there was “no material detriment” to HMRC, essentially because HMRC could later challenge admissibility and because any successful challenge would be “at a cost to

the appellant”. That focused on cost risk to Healthspan, but did not address the corresponding and foreseeable cost burden on HMRC once permission is granted: the costs of analysing the evidence, deciding whether to challenge it, preparing to meet it, and potentially responding with its own expert evidence. Those costs and burdens are part of the proportionality and overriding objective assessment. In those circumstances, we do not accept, as Healthspan sought to argue, that this was simply an evaluative conclusion within the FTT’s discretion. The FTT did not take into account a relevant head of prejudice, which was an error of approach.

55. It follows that the FTT erred in principle in its identification and application of the relevant test when considering whether to grant permission and in the way it assessed the respective prejudice to the parties, and accordingly, that Ground 1 is made out.

56. The error was material. The grant of permission for expert evidence is a discretionary case management decision, but it is a decision which can have significant consequences for cost, scope and the conduct of the substantive appeal. Had the FTT applied the correct approach, which included the discipline of asking whether the proposed evidence was reasonably required and proportionate by reference to the pleaded issues, and had it taken proper account of the prejudice to HMRC in terms of cost and burden, it at least could have reached a different outcome.

GROUND 2 – INADEQUACY OF REASONING

57. The legal principles are not in dispute. Reasons “need not be elaborate” and there is “no duty ... to deal with every argument presented by counsel in support of his case” (*Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [115]). However, the tribunal must address the issues in contention which are determinative of its conclusion. In *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409 the Court of Appeal said that “the issues the resolution of which were vital to the Judge’s conclusion should be identified and the manner in which [the Judge] resolved them explained” (at [19]).

58. HMRC’s complaint was that the FTT did not engage with its core submissions, in particular: (i) the dispute about the correct permission-stage approach (whether the Tribunal was required to apply the “reasonably required” discipline, rather than a broader “assistance/fairness” approach); and (ii) the submission that the application was insufficiently precise and insufficiently tethered to the pleaded issues to permit a lawful permission decision. Healthspan relied on *Fage* and submitted that the reasons were adequate for an interlocutory case management decision, particularly given the detailed recording of submissions.

59. We accept HMRC’s principal points. The determinative dispute before the FTT concerned the approach to permission for expert evidence and its application to scope. The FTT’s reasons at [16] did not explain why it was adopting the “interests of justice and fairness / derive assistance” approach, nor why HMRC’s “reasonably required” discipline was rejected. Nor did the reasons engage with HMRC’s precision and pleaded-issue linkage objections, beyond stating that admissibility could be addressed later. Those were not peripheral points: they went to whether a proportionate and properly defined permission could be granted at all.

60. We do not, however, accept HMRC’s submission that the FTT failed to address the point that the primary matter was one of law. The FTT plainly appreciated that there was a substantive dispute as to the meaning and application of “food of a kind used for human consumption”, and its reasoning proceeded on the footing that there were competing views on the interpretation and application of Item 1 which it could not resolve at the permission stage. The difficulty lay not in failing to recognise a legal dispute in the substantive appeal, but in failing to engage with the distinct legal dispute about the correct permission-stage approach and its consequences for scope, precision and proportionality.

61. For those reasons, we accept that the FTT's reasons were inadequate in certain respects that mattered. This is not a complaint that the FTT failed to rehearse every submission; it recorded the parties' submissions in careful detail. The difficulty is that the reasons at [16] did not address the core points in contention. That said, Ground 2 adds little to the result, because the misdirection identified under Ground 1 is sufficient to set aside the FTT Decision.

Should the decision be remitted to the FTT or remade in the UT?

62. We have considered whether the appropriate course is to remit the application to the FTT or to remake the decision in this Tribunal. Mr Rivett KC submitted that remittal is preferable because the FTT has day to day stewardship of the proceedings and is best placed to make case management decisions of this kind, and because remaking might be said to constrain the FTT's future management of the appeal.

63. We do not accept that submission. The application was for permission in principle on the material then available. No expert report yet exists and no further findings of primary fact are required. The error we have identified is one of approach, and the appropriate outcome can be reached by applying the correct framework to the existing material. In those circumstances, and in the interests of procedural efficiency, we remake the permission decision ourselves. We make no pronouncement on the merits of the parties' competing statutory interpretations. We also emphasise that it remains for the FTT to give any consequential directions, to control scope and timetable, and to manage any further applications as the case progresses.

Remaking of decision: application of "reasonably required" test to proposed expert evidence

64. We remake the FTT's decision on the expert evidence application by applying the structured approach set out above. That requires us to identify (a) the pleaded issues to which the proposed expert evidence is said to be directed, (b) the precise questions the expert is to answer, and then, issue by issue, to ask whether expert evidence is necessary; if not, whether it would assist; and, if it would assist but is not necessary, whether it is reasonably required to resolve the appeal, assessed proportionately in the context of the proceedings as a whole.

65. Healthspan submits that, even if the correct permission test is whether expert evidence is "reasonably required", that test is met because this is a very large, high-value appeal in which both parties' pleaded approaches make nutrition central or at least materially relevant. It says the tribunal will need a reliable evidential basis about the nutritional properties and significance of the products, and that evaluating those matters is scientific rather than a matter of ordinary fact-finding. It reinforces the point by relying on the CJEU's formulation in *X* that the relevant category comprises "all products containing nutrients which serve as building blocks, generate energy and regulate its functions, which are necessary to keep the human body alive and enable it to function and develop, and which are consumed in order to provide it with those nutrients" ([39]), and argues that focussing on nutrients and function requires expert scientific input. It further submits that refusing permission would prevent it from advancing its pleaded case fully, while granting permission causes no unfairness to HMRC because HMRC can challenge admissibility or weight once a report is served and can seek its own expert evidence if advised. Healthspan also relies on procedural safeguards, proposing that any expert be instructed to comply with CPR 35 and the usual guidance so that the evidence is properly focused, independent and testable, and contends that HMRC has not identified any compelling reason to exclude such evidence at the permission stage.

66. For HMRC, Mr Watkinson's response, in substance, was that Healthspan's general concerns did not justify admitting expert evidence on the broad topics proposed. The application was said to risk converting an expert into an "amplifier" of Healthspan's legal case, rather than providing permissible specialist assistance on a defined factual issue. In particular,

HMRC emphasised that the principal dispute is one of statutory meaning and application, on which an expert cannot assist; that, given the very large number of products, a broadly framed permission would invite an unfocused and disproportionate “avalanche” of material; that much of what was said to be required (for example, identifying vitamins, proteins or listed constituents) would be within the ordinary knowledge of the tribunal; and that Healthspan’s reliance on later admissibility challenges understated the immediate prejudice in cost and burden to the opposing party once permission is granted.

67. Those concerns illustrate why the structured approach matters. The “reasonably required” test necessarily requires the proposed topics to be linked to the pleaded issues, so that the tribunal can see (and control) what factual or evaluative dispute the expert evidence is intended to address, and can exclude evidence which in truth goes to justifying a legal definition or ranges beyond what is required to resolve the proceedings fairly and proportionately.

68. In his oral submissions Mr Rivett KC fairly confined the scope of the expert evidence to the matters raised in Healthspan’s written application. That identified three specific areas for expert evidence which we will address in turn: (i) the scientific understanding of food; (ii) the nutritional profile of the claim products; and (iii) the extent to which the claim products fit with the modern diet. HMRC objected to each area, contending (among other things) that the application was imprecise, insufficiently rooted in the pleaded issues, and that expert evidence was not reasonably required (particularly given the number of products).

69. It is understandable that Healthspan wishes to know what expert evidence is to be permitted before going to the expense of commissioning it. However, the application invites the tribunal to give advance clearance to a body of evidence only described in general terms. In considering it, we consider that we must be alert to the risk of opening the doors to evidence, and rebutting evidence, that turns out only to distract the FTT from its task of interpreting and applying the statutory provisions at issue in the case. Our conclusion on the application is that expert evidence is reasonably required in relation to the nutritional profile of the disputed products, and that this may reasonably extend to explaining the nutritional needs of the human body and how the products satisfy them. We are not persuaded, however, that the evidence would usefully extend further so as to include disquisitions upon “the scientific understanding of food” or upon “the modern diet”.

(i) Scientific understanding of food

70. Criticising this limb of the proposed evidence, Mr Watkinson noted it was not even limited to the products in issue or any branch of science and submitted that it represented the “broadest possible licence for abstract musings, opaque, ill-defined and a recipe for the production of unfocussed, lengthy and irrelevant evidence”. Mr Rivett KC maintained however that the topic would go to various questions such as “what do you need to constitute food?” “why do we eat” “what is the purpose of this?” “what’s the purpose of eating this?”. As clarified at the hearing, this was said to involve evidence as to how food is conceptualised in scientific or nutritional disciplines, including the role of food in sustaining human life and bodily function.

71. The scope and meaning of the statutory term “food of a kind used for human consumption” is a matter of statutory interpretation for the tribunal. There is no indication in the legislation that Parliament was using a technical term of art such that a specialist scientific meaning was intended. Evidence as to how food is conceptualised in nutritional science might be of some assistance to the tribunal but could not dictate the interpretation to be given to the statute. To admit it risks converting the expert witness into an advocate for one party’s preferred definition. It is not clear to us that there is a single, universally accepted “scientific understanding of food”; contradictory evidence from another expert called by the other party

would tend to distract the tribunal into deciding which expert to prefer without ultimately assisting the tribunal in its task of statutory interpretation. Healthspan's attempt to characterise the evidence as merely "contextual" does not remove the difficulty. Evidence which is deployed because it is said to demonstrate what food "really is", or what role food "ought" to be understood as fulfilling, necessarily bears on how the statute is to be understood.

72. Applying the correct approach: this evidence is not necessary to resolve any pleaded factual issue; it is unlikely to assist in a permissible way with the tribunal's task; and, in any event, the risks that we have referred to lead us to the conclusion that the evidence is not reasonably required in the context of the proceedings as a whole.

(ii) Nutritional profile of the products

73. As to this limb, Mr Rivett KC submitted that there may be agreement as to the ingredients of the products but not as to whether particular ingredients are nutrients, nor as to their nutritional significance, individually or cumulatively, and that expert assistance is needed to understand what role (if any) the products play in nutrition and bodily function. Mr Watkinson submitted that much of this is discernible from labels and that, in any event, nutrition is only one factor in HMRC's multifactorial approach and it would be disproportionate to generate extensive expert material across 316 products.

74. We are satisfied that permission for expert evidence should be granted on this particular limb. Unlike limbs (i) and (iii), this limb is directed to matters of fact and evaluation which arise on the pleaded cases. If Healthspan's definition is adopted, the tribunal will need to determine whether the products contain nutrients of the kind relied upon, and whether those nutrients are capable of contributing to keeping the body alive and enabling it to function and develop. Even if HMRC's approach is adopted, nutritional characteristics are capable of being relevant factors in the evaluative exercise. The tribunal is not obliged to accept that nutrition is determinative, but it may still need a reliable evidential basis to assess what, if anything, the products contribute nutritionally. For the avoidance of doubt, permission is granted only for evidence directed to the nutritional composition and nutritional significance of the disputed products, in the sense of identifying whether particular ingredients are properly characterised as nutrients, and explaining, where relevant, their physiological role in supporting life and bodily function. Permission is not granted for evidence directed to the meaning of the statutory term "food", for evidence which seeks to justify one party's preferred legal definition, for evidence about how the products are regulated or regarded by government or scientific bodies or for an opinion on the ultimate VAT classification.

75. We accept Mr Watkinson's observation that labelling and product specifications may identify ingredients and quantities. But there is a material distinction between identifying constituents and evaluating nutritional significance and physiological role. Whether a substance is properly characterised as a nutrient, and what nutritional function it performs, is not necessarily a matter within ordinary knowledge. This is particularly so given the range of products and ingredients said to be in dispute. On that basis, expert evidence is capable of assisting the tribunal on a pleaded factual issue.

76. Applying the structured approach: (a) this evidence is not shown to be strictly necessary to resolve the appeal; but (b) it would assist the tribunal on pleaded factual issues concerning nutrition and nutritional significance; and (c) given the scale and value of the dispute, and the centrality of nutritional content and purpose to the parties' competing approaches, expert evidence is reasonably required to resolve the proceedings.

77. Admission of expert evidence directed to nutritional profile is not without precedent in VAT "food" classification disputes. In *Arthro Vite Ltd v HMCE* (1996) VAT Decision Number 14836, concerning a "health food supplement" in powder form, the VAT Tribunal treated

nutritional value as a key factor. More recently in *Telemara Limited v HMRC* [2025] UKFTT 01123 (TC), where the product in issue was nitrous oxide for culinary use, expert evidence was used on nutritional matters. In *Bottled Science Ltd v HMRC*, which concerned a collagen drink product, the FTT noted that the evidential difficulty lay in the absence of adequate evidence on nutritional value. (While Mr Watkinson submitted that *Arthro Vite* in fact illustrated that some aspects of nutrition may be derived from publicly available material (the tribunal there being able to undertake its own calculations from Department of Health reference values), that does not meet the separate point that expert assistance may still be required to evaluate nutritional significance and physiological function). In any event, we emphasise that in permitting Healthspan’s application to the extent we have, we are not laying down any general rule that VAT “food” cases will always require expert evidence. Our conclusion is specific to the way this appeal has been pleaded and has the confined scope described above.

(iii) Fit with the modern diet

78. As clarified by Mr Rivett KC at the hearing, this element is advanced in support of the taxpayer’s reliance on the “always speaking” principle, and is intended to demonstrate that consumption patterns and dietary practices have evolved – presumably, with the result that things are recognised as food nowadays that would not have been so recognised in the past. Mr Rivett KC submitted that the tribunal should not be left to rely on its own subjective understanding of contemporary dietary practices. Again, Mr Watkinson submitted that the limb was opaque, not rooted in the pleadings, and disproportionate.

79. We refuse permission for this limb. To the extent that the proposed evidence is said to concern current dietary practices, it is not clear to us that in a society made up of diverse ages, cultures and socio-economic groups there is necessarily a single pattern of consumption of food that can be described as “the modern diet”. The connection between this element and the pleaded issues is not clear. Introducing the topic therefore risks distracting the tribunal into adjudicating upon the contents of a “modern diet” without assisting it in deciding upon the applicability of the zero rate to the disputed products. The pleadings, as drafted, advance a specific definition of food which focusses on nutrition. It is not at all clear to us what consideration of the “modern diet” will add over and above the evidence which is already contemplated in respect of nutritional profile.

80. In terms of applying the correct structured approach: the evidence is not necessary; it is not shown to assist the tribunal on a pleaded factual issue; and it is not reasonably required to resolve the proceedings in the context of the case as a whole.

Conclusion and Disposition

81. For the reasons above, we remake the decision by granting Healthspan permission to adduce expert evidence only in relation to the nutritional profile of the products, in the limited sense described above. Permission is refused in relation to “the scientific understanding of food” and “the extent to which the claim products fit with the modern diet”.

82. The appeal is allowed. The FTT Decision is set aside. We remake it by granting permission only on the topic of the nutritional profile limb as we have defined it above, and refusing permission on the other limbs.

**JUDGE SWAMI RAGHAVAN
JUDGE NICHOLAS PAINES KC**

Release date: 18 May 2026