

UT Neutral citation number: **[2026] UKUT 00429 (TCC)**

UT (Tax & Chancery) Case Number: UT/2025/000037

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building
London EC4A 1NL

Heard on: 12-13 October 2026
Judgment date: 04 November 2026

VAT – 'Skinade' liquid collagen product – whether zero-rated as "food of a kind used for human consumption" under Item 1, Group 1, Schedule 8 to VATA – permission granted to Appellant to raise new point not taken before the FTT as ground of appeal before the UT – FTT erred by misinterpreting inclusive definition in Note 1, "food includes drink" as not being conclusive – see subsequent Court of Appeal decision in Innovative Bites – remitted to differently constituted FTT to determine whether product was "drink" and therefore "food" – appeal allowed

Before

MRS JUSTICE RUSHTON
JUDGE RUPERT JONES

Between

BOTTLED SCIENCE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Max Schofield, counsel instructed by Grant Thornton UK Advisory & Tax LLP

For the Respondents: Howard Watkinson, counsel instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal ("**FTT**") dated 4 July 2024 with neutral citation [2024] UKFTT 592 (TC) ("**the Decision**"). The FTT decided that the Appellant's liquid collagen product, "Skinade", did not fall within the description "food of a kind used for human consumption" under Item 1, Group 1, Schedule 8 to the Value Added Tax Act 1994 ("**VATA**"). It dismissed the Appellant's appeal against HMRC's decision, upholding their conclusion that supplies of the product were standard rated for VAT purposes as the product is not "food" as defined so were not zero-rated under Item 1.

2. On 18 September 2025 the Appellant was granted permission to appeal to the Upper Tribunal ("UT") on three grounds of appeal that the FTT erred in law in making the Decision:

> GROUND 1: "FOOD INCLUDES DRINK"
> 1. 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 [which provides that "Food includes drink"].
>
> GROUND 2: MULTIFACTORIAL ASSESSMENT: MARKETING
> 2. 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*.
>
> GROUND 3: CONFLATING NUTRITIONAL VALUE WITH THE PURPOSE OF CONSUMPTION
> 3. 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.

3. HMRC submit that the FTT made no material errors of law in making the Decision, and also that Ground 1 raises a point which could and should have been raised below and which it is too late to raise on this appeal. Its position is that the appeal should be dismissed.

4. We are very grateful to Mr Max Schofield of counsel, who appeared for the Appellant, and Mr Howard Watkinson of counsel, who appeared for HMRC, for the quality of their written and oral submissions.

5. For the reasons set out below, we have reluctantly concluded that the FTT did err in the

manner raised by Ground 1 although this was through absolutely no fault of its own but because the point was never raised by the Appellant in the proceedings before it. We have decided that this is one of those rare cases where the Appellant should be permitted to raise a new point of law on appeal to the UT, that it succeeds and the Decision should be set aside. The result is that the case will need to be remitted to a fresh FTT to determine, following a multi-factorial assessment, whether the product is "drink" for the purposes of Note 1, and hence "food" for the purposes of Item 1 of Group 1 to Schedule 8 of VATA. The terms of the remission are explained in more detail below.

6. We dismiss Grounds 2 and 3: the FTT did not err in law in conducting its multi-factorial assessment, did not elevate marketing and packaging of the product into any decisive test nor conflate the purpose of consumption with its nutritional value. Indeed, the FTT's assessment and analysis of the evidence and argument it received was exemplary.

Background and FTT Decision

7. References in square brackets [] are to paragraphs in the Decision unless otherwise stated.

8. The Appellant's appeal to the FTT arose in the circumstances described at [2]:

> "…on 17 November 2020 the Appellant submitted an error correction notice for overdeclared output tax declared in VAT periods 12/16 – 09/20 inclusive in the sum of £1,250,840.06 on the basis that Skinade is properly zero-rated as food. On 6 May 2021 HMRC refused the claim for overdeclared output tax on the basis that Skinade was standard rated. On 4 November 2021 the Appellant requested a statutory review of the decision and on 1 April 2023 HMRC notified the Appellant that the statutory review had upheld the decision to treat Skinade as standard rated. On 27 April 2022 the Appellant filed a Notice of Appeal against HMRC's decision as upheld on review."

9. Before the FTT, the Appellant contended that the product was "*food*" (there was no dispute that it was fit for human consumption). HMRC contended it was standard rated, primarily on the basis that it was a beauty or skincare product, but this was properly recognised by the FTT as not being a VAT category such that the question was simply whether the product was food or not (at [90]).

10. Over the course of a two-day hearing in January 2024 the FTT heard from three witnesses and tasted Skinade during the hearing. The panel were given a "tasting sample" bottle, a box of travel sachets and a box containing five 150ml bottles of the product (see [7]).

11. In its Decision, the FTT conducted a multi-factorial assessment (a "**MFA**") as to whether the product was food of a kind used for human consumption for the purposes of General Item 1, Group 1. It considered various factors relating to the product, such as its: Form at [93]; Name at [94]; Nutritional value at [95]-[97]; Ingredients at [98]; Palatability and taste at [99]; production processes / regulation by the Food Standards Agency or being subject to food labelling regulation at [100]; its packaging and consumption at [101]-[104], including route to market at [103]; and purpose of consumption at [97] and [105]-[107].

12. The FTT made findings of fact as to each of these relevant factors and assessed or evaluated the appropriate weight to be afforded to them respectively. In relation to virtually all of the factors, it did "not set a great deal of store" nor "place a great deal of weight" upon them or found them "neutral" or "relatively neutral". Having said that, it is quite clear from the

Decision that it did consider and weigh in the balance all those factors. However, in conclusion it indicated that it found one factor to be of significant importance, stating at [101] that, "the factor which weighs most heavily on us is the way in which Skinade is packaged and marketed".

13. The FTT reached a conclusion on the question "*What would a broad-minded VAT payer, who has heard the evidence and tasted the product, think?"* at [105] onwards, deciding at [108]:

> '108. We have not found this to be an easy issue to resolve at all, but in the round we consider that a well-informed, broad-minded VAT payer's answer to the question whether Skinade is a food would be "No; Skinade is not a food."'

14. The Decision is addressed in more detail below when considering Grounds 2 and 3.

The legal framework

15. Section 30 of VATA provides for the zero-rating of goods or services of a description specified in Schedule 8.

16. PART II of Schedule 8 to VATA specifies the zero-rated groups including Group 1, which is titled "Food":

> "GROUP 1— FOOD
> The supply of anything comprised in the general items set out below, except—
> (a) a supply in the course of catering; and
> (b) a supply of anything comprised in any of the excepted items set out below, unless it is also comprised in any of the items overriding the exceptions set out below which relates to that excepted item."

17. The general items of Group 1 of Schedule 8 – those which are zero-rated - include so far as relevant:

> "General Items
> Item No.
> 1. Food of a kind used for human consumption.
> […]"

18. The excepted items – those that are chargeable to VAT – include the following so far as relevant:

> "Item No.
> […]
> 2 Confectionery, not including cakes or biscuits other than biscuits wholly or partly covered with chocolate or some product similar in taste and appearance.
> 3. Beverages chargeable with alcohol duty under Part 2 of the Finance (No. 2) Act 2023 and preparations thereof.
> 4. Other beverages (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverage.
> 4A. Sports drinks that are advertised or marketed as products designed to enhance physical performance, accelerate recovery after exercise or build bulk, and other similar drinks, including (in either case) syrups, concentrates, essences, powders, crystals or other products for the preparation of such drinks."

[…]

19. There are then items overriding the exceptions, taking these items back into the zero-rate classification as "Food", for example:

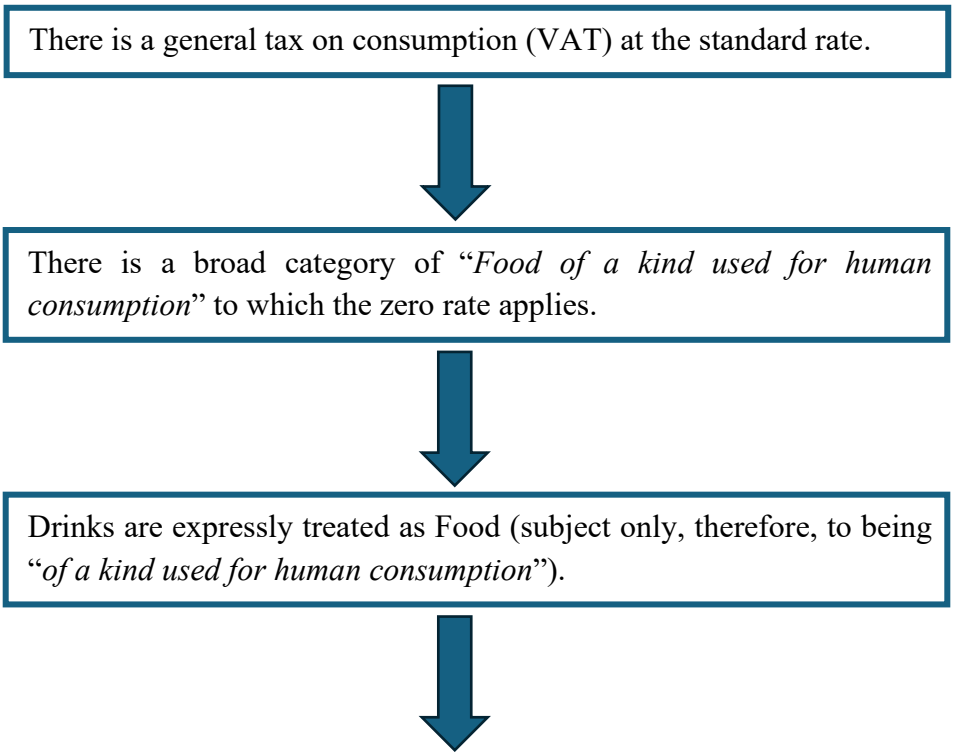
> "Items overriding the exceptions
> …
> 4 Tea, maté, herbal teas and similar products, and preparations and extracts thereof.
> 5 Cocoa, coffee and chicory and other roasted coffee substitutes, and preparations and extracts thereof."

20. There are a number of Notes to Group 1 provided within the Schedule. Notes 1 and 5 state:

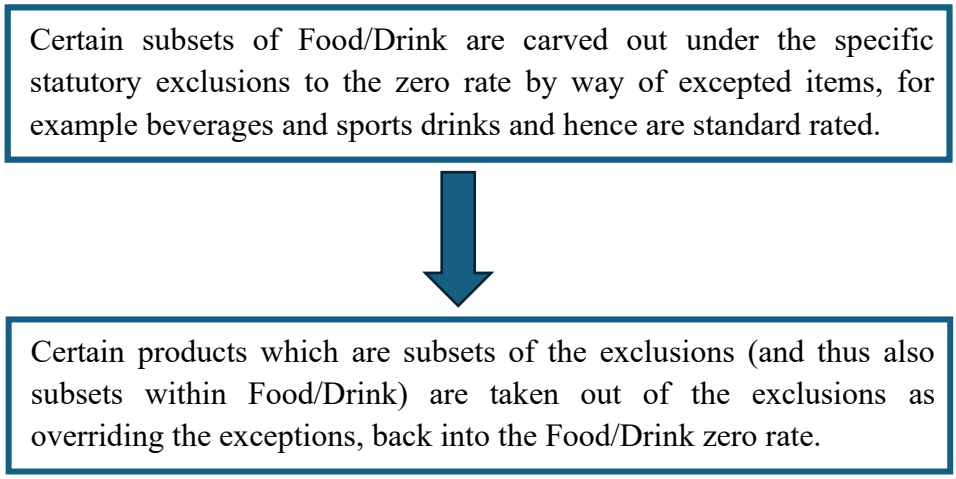
> "(1). '"Food" includes drink.'
> …
> (5) … for the purposes of item 2 of the excepted items "confectionery" includes chocolates, sweets and biscuits; … and any item of sweetened prepared food which is normally eaten with the fingers."

21. Section 96(9) of VATA states, in relation to such Notes: "Schedules 7A, 8 and 9 shall be interpreted in accordance with the notes contained in those Schedules; and accordingly the powers conferred by this Act to vary those Schedules include a power to add to, delete or vary those notes."

22. We accept the architecture of Group 1 in classifying products as "food" for the purposes of General item 1 as explained by Mr Schofield in his Skeleton Argument:[1]



[1] See also: *Nestle UK Ltd v HMRC* [2016] UKFTT 158 (TC) at [122] and [123]; *Innate-Essence Ltd v HMRC* [2023] UKFTT 371 (TC) at [6]; and HMRC Manuals VFOOD6180 and VFOOD7520.



23. At [5]-[6] of the Decision, the FTT explained the domestic legislation by reference to its EU law provenance:

> "5. Article 98 of the EU Principal VAT Directive 2006/112/EC (the "PVD") allows Member States to apply one or two reduced rates (not less than 5%) of VAT to supplies of certain goods and services (listed in Annex III). These include:
>
> '(1) Foodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs; products normally used to supplement foodstuffs or as a substitute for foodstuffs;'
>
> 6. Art 98 PVD is not the EU vires for the UK's food zero-rating. The zero-rating of food has been permitted under the various EU directives which have governed the EU VAT regime since the time the UK joined what was then the European Community in 1974. Accordingly, there is an unusual dearth of EU authority on the interpretation of these provisions. So far as the rationale for food zero-rating is concerned, in *Nestlé UK Ltd v HMRC*, [2018] UKUT 29 (TCC), the Upper Tribunal described the purpose behind food zero-rating as follows:
>
> '[50] So far as we can discern, the legislation was exempting everyday items from tax, and preserving the tax on items of food which, broadly speaking, had previously been regarded as luxury; rather than promoting a particular drink or things to add to that drink.
>
> …
>
> [58] … Parliament has chosen to zero rate certain foods, generally because they were everyday foods, tax on which would be "particularly sensitive" for much of the population, and has chosen not to zero rate others.'"

24. The correct approach to VAT classification questions is common ground: where ordinary English words are used without further definition, such as "food" the FTT is to carry out an MFA and arrive at an evaluative judgment of the product, by identifying and considering the weight of relevant factors and coming to a short, practical and overall conclusion.

25. The Court of Appeal explained the correct approach in *HMRC v Proctor & Gamble UK* [2009] EWCA Civ 407 ("***P&G**") at* [14] and [19]:

> "[14] Before going further, I have this general observation. This sort of question - a matter of classification - 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. The tribunal did just that.
> …
> [19] I cannot see anything wrong, still less anything wrong in principle, with this. It was not incumbent on the tribunal in making its multi-factorial 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 Reimbold & Strick Ltd* [2002] EWCA Civ 605 at [19], [2002] All ER 385 at [19], [2002] 1 WLR 2409) and that the decision 'must contain a summary of the Tribunal's basic factual conclusion and a 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 City of Birmingham District Council* [1987] IRLR 250). It is quite clear how this tribunal reached its decision. In the words of Sir Thomas Bingham in *Meek* the parties have been told 'why they have won or lost' (see para 8)."

26. In coming to a reasonable view on all the facts as to whether goods and services fall within the zero-rated classification, the FTT must also pay careful attention to the actual language of the legislation including the description of the general item, the excepted items and notes. As the Upper Tribunal stated in *HMRC v The Core (Swindon) Limited* [2020] UKUT 0301 (TCC) ("***The Core***") in relation to Group 1 of Schedule 8 to VATA at [17]-[18]:

> "17. Statutory definitions are thin on the ground. Parliament has not supplied a definition of "catering," probably for the good reason that it did not need to do so. "Catering" is an ordinary English word, which lawyers unreasonably expect to have a more precise meaning than most words in everyday usage ever need to have. In most situations most people know what is and what is not catering and they know when something is done "in the course of catering." It is reasonable to assume that the parliamentary plan was to leave it to the tribunals and courts, as the constitutional bodies responsible for the authoritative interpretation of legislation, to do their best, on a pragmatic case by case basis, to adopt a reasonably consistent approach to deciding what is "in the course of catering."
>
> 18. The Tribunals, taxpayers and Customs have been supplied with some guidance in the legislation on the sort of thing that was to be an exception to the general rule of zero rating. The guidance is contained in Note (3) which I mentioned earlier. It states what "in the course of catering" includes. It is common ground that "includes" indicates that what follows is not meant to be an exhaustive definition, but is only illustrative of the general concept. The illustrative examples may have the effect of restricting or extending the generally accepted meaning of the expression."

Ground 1 – food includes drink by virtue of Note 1 to General Item 1

27. The first ground of appeal (or "**Ground 1**") is that the FTT erred in law at [93] of the Decision when it stated:

> "93. In form, Skinade is a liquid. The legislation tells us that food includes drink, but it does not follow from Skinade being a drink that it is automatically a food."

28. Mr Schofield argues that, in light of the Court of Appeal's decision in *Innovative Bites Limited v HMRC v DuelFuel Nutrition Limited* [2025] EWCA Civ 293 ("***Innovative Bites***"), the statutory formula or inclusive definition "Food includes drink" in the Notes to Group 1 is definitive: if a product falls within drink, it is conclusively food, absent absurdity. Therefore, the FTT erred in its approach at [93]. He accepts that this is a new point raised on appeal to the UT that was not argued by the Appellant before the FTT - thus there was no assessment as to whether the product was a "drink of a kind used for human consumption".

29. There are a number of procedural issues to be determined before we consider the merits of this ground.

<u>The scope of permission: Whether the grant of permission means that the ground may be raised and argued without further objection by HMRC during the hearing of the substantive appeal</u>

30. There was a disagreement by the parties as to whether HMRC were entitled to object to Ground 1 being raised on the substantive appeal, notwithstanding the fact that the UT (Judge Jones) had granted permission to appeal in respect of it on 18 September 2025. Neither party objected to Judge Jones hearing the appeal, having granted permission.

The permission decision

31. Judge Jones stated the following at [13]-[19] when granting permission on Ground 1, following a video hearing on 18 September 2025:

> "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.
> …
> 15. I also note that, as Mr Watkinson pointed out, the additional ground now 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.
> > 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]).
> 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."

The Appellant's position

32. Mr Schofield accepted that Ground 1 was a new argument not advanced before the FTT but raised when seeking permission to appeal. However, he submitted that the question of whether that new argument should be permitted to be pursued on the appeal before the UT has already been expressly determined by the UT in its permission decision. It was not available to HMRC to continue the objection at the substantive hearing of the appeal.

33. He noted that the permission decision at [15] – [18] explicitly considered this new ground in accordance with the case law such as *Singh v Dass* [2019] EWCA Civ 360 ("***Singh v Dass***") and *HMRC v BlueCrest* [2025] EWCA Civ 23 ("***Bluecrest***"), while "Taking into account all the circumstances of the case and the interests of justice" and considering HMRC's objection raised by Mr Watkinson at the time of that hearing.

34. Mr Schofield argued that HMRC were seeking to re-run the procedural and discretionary questions already decided. He submitted that the UT had already undertaken this analysis in the permission decision when a) exercising the case management power to permit a new ground to be raised or amended at [18]; and b) granting permission to appeal upon it as being arguable at [13]: the Judge specifically referenced the case law and the potential for remittal to the FTT, envisaging a substantive determination of the Ground by the UT.

35. He noted that HMRC sought to rely on *Prudential Assurance Company Limited v HMRC* [2016] EWCA Civ 376 ("***Prudential***") in support of the contention as follows: "The mere fact that permission to appeal has been granted on a particular point does not prevent the respondent from objecting that the point on which permission has been granted is a new point which the appellant ought not to be able to advance for the first time on appeal". However, he argued that *Prudential* concerned a failure of pleadings before the trial judge (see [22] and [28]), and provided important context at [27]:

> "Until very recently in deciding whether or not to grant permission to appeal the Court of Appeal heard only from the would-be appellant. Partly for that reason the mere fact that permission to appeal has been granted on a particular point does not prevent the respondent from objecting that the point on which permission has been granted is a new point which the appellant ought not to be able to advance for the first time on appeal".

36. Mr Schofield submitted that, unlike this passage in *Prudential*, there were pleaded grounds before the FTT and UT, and HMRC did attend the oral permission hearing and objected to permission being granted on Ground 1, making relevant submissions. The UT considered them and expressly determined the question of whether the new ground should be admitted and permitted to be pursued. He therefore contended that this is not a case where, for example, general permission has been granted and then a new, further argument is introduced before the appellate court, which then necessitates a separate decision on permission to admit that later ground (see for example, *HMRC v Wendy Carrington* [2021] EWCA Civ 174).

Discussion, analysis and decision

37. The UT made a case management decision on 18 September 2025 to admit Ground 1 as a new ground of appeal or to include it as an amendment to an existing ground, and thereafter to grant permission to appeal upon it. The operative reasoning for the permission decision is set out above. This was a case management decision made within the permission proceedings. It was not a case management decision made within the substantive appeal proceedings. It is to be contrasted with a case where permission to appeal has already been granted by the relevant appellate tribunal, the substantive appellate proceedings are underway or before the UT and a case management decision is then made in those proceedings either before or at the hearing of the substantive appeal.

38. In these circumstances we agree with Mr Watkinson that the law permits HMRC to object to Ground 1 being raised as a new point or being argued in the substantive appeal to the UT. The prior permission decision of Judge Jones does not bind the UT as to the scope of the appeal on Ground 1, it does not exclude any procedural objection by HMRC that may be taken nor require only a decision on the merits of the ground.

39. The ratio in *Prudential,* that the grant of permission on Ground 1 does not prevent HMRC objecting to it as a new point, is also supported by the earlier decision in *Mullarkey v Broad* [2009] EWCA Civ 2 ("***Mullarkey***"), where permission to appeal had been granted ahead of the substantive hearing, but the question nevertheless arose at the subsequent hearing of whether the appellant should be allowed to present its case on appeal on new points that had not been raised in the case below under appeal. Lloyd LJ explained that the grant of permission to appeal "does not amount to a grant of leave, binding on both parties, to rely on the new point. All it means is that the Appellant was given the right to argue in favour of this at a full hearing". In *Mullarkey*, the Court of Appeal refused to allow the new point to be relied on.

40. In a similar vein is the case of *Rehana Azhar v All Money Matters T/A TFC Home Loans* [2023] EWCA Civ 1341 ("***Rehana Azhar***"), to which we were understandably not referred by the parties. The case has very recently been cited by the UT in *Josoemag Services Ltd v Revenue and Customs* [2026] UKUT 394 (TCC) at [18]-[21] and [38] when dealing with the similar issue of whether, despite permission to appeal being granted for the ground, an appellant may rely on a ground which constitutes a new point of law in a substantive appeal to the UT.

41. In *Rehana Azhar* the Court of Appeal considered an appeal against a case management decision to refuse to allow a point to be advanced by the appellant, on the basis that it was a new point. In that case the point was, unlike this appeal, the only issue on which permission to appeal had been granted. Lewison LJ (with whom Nugee and Falk LJJ agreed) set out his conclusions as follows:

> "24. It is true that Mrs Azhar had been granted permission to appeal on this very point, but where an appellant has been given permission to appeal that does not preclude the respondent from objecting on the ground that it is a new point: *Mullarkey v Broad* [2009] EWCA Civ 2 at [29]; *Brent LBC v Johnson [2022] EWCA Civ 28* at [37]; *Gill v Lees News Ltd [2023] EWCA Civ 1178* at [63]. HHJ Lethem was thus fully entitled to consider the objection."

42. The same point has been reiterated with reference to tribunals and the UT Rules by the UT (Lands Chamber) in *Riverside CREM 3 Ltd v Unsdorfer & Ors* [2022] UKUT 98 (LC) ("***Crem***") at [35]-[37]:

> "35. The permission of the appellate court or tribunal is always required when an appellant wishes to withdraw a concession or raise a new point which was not relied on at the hearing below: *Jones v MBNA International Bank Ltd* [2000] EWCA Civ 514, at [38].
>
> 36. A respondent may object to the taking of a new point on procedural grounds even where permission to appeal has been given. That was explained by Lloyd LJ in *Mullarkey v Broad* [2009] EWCA Civ 2 at [29], where it was sought to challenge a trial judge's decision on grounds not previously raised:

> "Points of this kind more often arise at the stage of an application for permission to appeal or, if permission has been granted, on seeking to amend the grounds of appeal. Here, by contrast, permission to appeal has been given on grounds which include the new points. However, the grant of permission, on which the Respondent was not heard, only shows that there were thought to be reasonable prospects of success. It does not amount to a grant of leave, binding on both parties, to rely on the new point. All it means is that the Appellant was given the right to argue in favour of this at a full hearing."
>
> 37. The same principles are applied in this Tribunal, although rule 21(8), Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 requires that, before granting permission to appeal, the Tribunal must give the respondent the opportunity to make representations. The respondents did make representations in this case and the Tribunal was therefore aware that the single point on which permission was sought was new, but nevertheless granted permission to appeal. In doing so it did not form a view of the merits of the appeal other than that it was arguable, and the respondents are still entitled to object to the point being taken."

43. *Crem* also makes clear that a procedural objection may be taken by the respondent in the substantive appeal, whether or not they had the right to and did object to permission being granted at that earlier stage, such as HMRC did in this case.

44. We do not accept Mr Schofield's arguments that the ratio in *Prudential*, *Mullarkey* or *Crem* can properly be distinguished. Further, we accept Mr Watkinson's additional points that there are important differences in the safeguard of appeal rights from decisions made in permission proceedings before the UT, such as case management decisions whether to admit a new ground or amend an existing ground or decisions as to whether to grant permission to appeal. Decisions made in permission proceedings are to be contrasted with case management decisions made in the substantive appellate proceedings following the grant of permission. There are contrasting routes of challenge for each.

45. Decisions of the UT on permission to appeal applications from the FTT (whether or not to grant permission and any related case management decisions) are immune from appeal to the Court of Appeal as they are excluded decisions for the purpose of section 13(8)(c) of the Tribunals, Courts and Enforcement Act 2007 ("**the Act**"). They can only be challenged by way of judicial review on the very limited grounds set out in section 11A(4) of the Act and a successful challenge by any party is likely to be very rare. In circumstances where a party is unlikely to be able to challenge decisions made in permission proceedings, whether or not they were able to make submissions at that stage, it is all the more important that the procedural objection can still be taken in the substantive appeal.

46. In contrast, case management decisions within substantive appellate proceedings before the UT, like final decisions, are appealable to the Court of Appeal by either party (albeit such an appeal would still need to meet the criteria or conditions set out in s.13(6) of the Act and article 2 of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008).

47. Our conclusion therefore is that HMRC can raise this objection now, so we now turn to consider its merits.

<u>Whether the Appellant should be allowed to raise and argue Ground 1 or whether we should uphold HMRC's objection to the ground as a new point of law</u>

48. There is no dispute that Ground 1 involves a new point of law that was not argued before, considered nor determined by the FTT.

HMRC's objection

49. Mr Watkinson objected to the Appellant being permitted to argue Ground 1. He relied on the existing authorities that 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 - *Singh v Dass* at [17] (as set out in the permission decision quoted above).

50. In particular, he argued that where there has been a full trial involving live evidence before the FTT, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry, the potential prejudice to the opposing party, HMRC, is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. It has been said that it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances – see *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146 ("***Notting Hill***"), at [11] and [27].

51. Mr Watkinson contended that it is not usually profitable for an appellate tribunal such as the UT to speculate as to what other questions might have been asked of those who did give evidence, or what other evidence might have been adduced from other witnesses, or by way of other documents, if it had been made clear, at least before the evidence was called, that the point now sought to be relied on was one on which the judge had to rule (*Brent LBC v Johnson* [2022] EWCA Civ 28, [2022] 1 WLUK 139, at [47]).

52. He also contended that while the "venerable principle" - that there is a public interest in taxpayers paying the correct amount of tax - is also a consideration, this is subject to the requirement of fairness and proper case management. Thus, where there is only a forensic change of position by the adoption of an alternative fallback argument of construction on a pure question of law in a tax appeal, that is not the taking of a new point, and is more likely to be permitted - see *Bluecrest*, at [106-111], *Uflex Europe Ltd v HMRC* [2025] UKUT 57 (TCC), at [18-22].

53. Mr Watkinson made the point that in this case the Appellant deliberately chose to argue before the FTT that Skinade was "*food*" applying an MFA. It did not argue that Skinade was "*drink*" within Note 1 and therefore necessarily "*food*". The FTT therefore made no finding on that issue and cannot be criticised for failing to address it. The argument is not a pure point of law. Had it been advanced below, HMRC might have adduced different evidence and conducted the case differently. It should not be entertained for the first time on appeal. In any event he said, *Innovative Bites* does not establish that Note 1 operates in the manner for which the Appellant contends.

54. He also pointed out that the Appellant bore the burden of proof in its appeal. Neither its Grounds of Appeal, nor its Skeleton Argument before the FTT argued that Skinade is *"drink"* and therefore *"food"*. HMRC's Statement of Case, evidence, and Skeleton Argument, were aimed only at the Appellant's case as was being run, not a different case that Skinade was "*drink*" and therefore "*food*." At no point had HMRC prepared their

evidence and arguments to deal with such a case. Neither party addressed the FTT on the meaning of *"drink"*, what falls within *"drink"*, the factors or evidence to consider in conducting an MFA to address whether Skinade was *"drink"*, or the outcome of such an MFA. None of this is of course in dispute.

55. Mr Watkinson submitted that the Appellant now accepts, and it is common ground, that the FTT reached no conclusion on whether Skinade was *"drink"* for the purposes of Note 1. Instead, the Appellant argued before the FTT that the format and method of consumption of Skinade was a relevant factor to the enquiry as to whether Skinade was *"food"*. This explains the inclusion in the Appellant's initial Grounds of Appeal in its original application to the UT for permission to appeal of:

> "Ground 3, Format as Drink, Error of Law:
> [25] The Tribunal failed to give any weight or consideration to the format of the product. Skinade is drunk like a drink. Under the Notes to Group 1 of Schedule 8, "food includes drink". The format of the collagen drinks is that of a drink."

56. He argued that the case that Skinade was "*drink*" and therefore "*food*" was always open to the Appellant to run on the legislation, regardless of the decision in *Innovative Bites*, but the Appellant did not run it, as the UT has already found in the permission decision at [15].

57. Mr Watkinson noted that Ground 1 breaks down into two points: first, the Appellant argues that the FTT should have carried out an MFA of whether Skinade was *"drink"* and having done that, the FTT should have decided whether if Skinade was *"drink"*, it would be absurd for it to fall within *"food"*. Secondly, the Appellant argues that *Innovative Bites* applies directly to Note 1.

58. As to Point One, Mr Watkinson highlighted that the argument that Skinade was *"drink"* and therefore *"food"* was not run before the FTT and is a new point[2]. It could have been run regardless of the *Innovative Bites* case. There is no explanation why it was not, let alone a cogent one. The "absurdity" argument could only take place after the factual inquiry and MFA in relation to whether Skinade is *"drink",* which was not done. Ground 1 thus proceeds on the assumed basis that Skinade is *"drink"*, but that case has never been tested on the evidence, or answered. He said the FTT cannot be legitimately criticised for failing to address an argument that was not put to it, and which was contrary to the approach the Appellant was urging the FTT to adopt.

59. He also noted the Appellant's acceptance that the FTT therefore reached no conclusion on whether Skinade is *"drink*", and the Appellant's acceptance that it was therefore open to the UT to remit the matter to the FTT to decide whether Skinade is *"drink"*. This implicitly accepted that inadequate facts had been found for an MFA on its new case to be carried out. He said the fact that Skinade is described and marketed as a "drink", is in the format of a "drink" and was designed to be a "drink", is an inadequate basis on which to conclude that Skinade is *"drink"* for the purposes of Note 1. It ignores every other potentially relevant factor for the MFA, which still has to be carried out.

[2] By way of illustration, the FTT recognised in a recent case concerning a similar product, with the same counsel for the appellant, that the appellant in that case was not arguing that the product was "*drink*" and therefore "*food*" but was still taking the approach of asking the FTT to undertake an MFA to determine whether the product was *"food"* (*Minerva Research Labs Ltd v HMRC* [2026] UKFTT 1320 (TC)).

60. Therefore, Mr Watkinson emphasised that the new argument is not, and cannot be, a "pure question of law", because the FTT would first have to make the relevant findings of primary fact on evidence addressing the issue, and then evaluate them by way of an MFA, to determine whether Skinade was "*drink*" within the meaning of VATA. Neither party had prepared evidence or submissions on which to do so, and the FTT was not invited to and did not do so. In other words, *"drink"* itself remains a classification issue, that has never been litigated and which still has to be resolved by an MFA.

61. In summary, his objection consisted of four points.

62. First, it is a very rare case indeed in which an appeal court would permit such a point to be taken. This is no such case. There is no explanation for the failure to argue that Skinade is *"drink"* and therefore is *"food"*, let alone a cogent one. If the UT deals with the point for the first time, it is not a review of the legality of the Decision. Re-opening of the trial not only entails inevitable further delay, which is itself a reproach to the administration of justice, but is also wasteful of both the parties' and the court's resources and unfair to HMRC, who conducted a trial on what has turned out to be a false basis (*Prudential*).

63. Second, the Appellant should have put before the FTT the whole relevant case that it wished to advance. Having chosen to confine its appeal to only one of the theoretical ways in which the case might be put, the FTT decided the issue which was raised and not issues which were not. The Appellant should not be permitted to raise in subsequent proceedings issues which could and should have been raised in the first proceedings. It is unjust that HMRC, who successfully contested a case advanced on one basis, should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis.

64. Third, the UT cannot be satisfied that HMRC will not be at risk of prejudice if the new point is allowed, because they might have adduced other evidence at trial, or otherwise conducted the case differently. At the very least HMRC would have to have the opportunity to present a new MFA on *"drink"*, which would involve re-opening the trial to re-run the case below on a different basis. That might also have led to HMRC approaching the issue of whether Skinade was a *"beverage"* differently[3] (*Singh v Dass, Notting Hill*).

65. Fourth, it is not a legitimate ground of appeal that the FTT failed to take matters into account when it was never asked to do so and when it has addressed fully the submissions that were made to it. Here the FTT looked at all the matters that the Appellant asked it to take into account and addressed fully the submissions that were made to it.

66. Mr Watkinson objected to Ground 1 being permitted to be taken in circumstances where the new argument was never before the FTT, without explanation, but it could have been, and it might require further evidence and findings of facts, and would clearly require a further evaluation of those facts, and thus a different approach to the evidence, and so the UT hearing this appeal should not permit the point to be taken.

[3] Based on the Appellant's pleaded case HMRC had accepted that Skinade was not a *"beverage"*. If instead it was being argued that Skinade was *"drink"* then it is more likely to have been a *"beverage"*

67. In response, Mr Schofield submitted that the case below was not presented on the basis that Skinade was a drink because at that time nobody considered that that was a legally relevant question to ask, to call evidence on or on which to carry out an MFA. Both parties considered that the only material question was whether Skinade was a "*food*"; whether it was a "*drink*" was not thought to assist in answering that question, at that time. He said that remained the position after the UT decision in *Innovative Bites* and only changed after the Court of Appeal decision in that case.

The law

68. The principles to be applied in deciding whether to allow reliance on a new point raised on appeal are set out most helpfully in *Singh v Dass*, as set out above in the permission decision, and in *Notting Hill*. In *Notting Hill*, Snowden J (as he then was) considered *Singh v Dass* and the earlier authorities and stated as follows:

> 26. These authorities show that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.
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> 27. At one end of the spectrum are cases such as *Jones v MBNA International Bank Limited* [2000] EWCA Civ 514 in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in the *Jones* case (at para 38), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at para 52), there might none the less be exceptional cases in which the appeal court could properly exercise its discretion to do so.
>
> 28. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e g *Preedy v Dunne* [2016] EWCA Civ 805 at [43]–[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime.

69. The Court of Appeal has provided binding authority as to the position in courts rather than in the tribunals, but the principles are accepted to be of general application, notwithstanding the differing procedural rules which apply in each. In practice, a tribunal such as the FTT may on occasions adopt a more inquisitorial approach to proceedings than a court, particularly where a party is unrepresented. However, that does not mean that the procedural safeguards which underlie an adversarial system somehow assume less importance in the tribunals. Furthermore, in this case the Appellant is a sophisticated and well represented party, and the appeal is more akin to a commercial case before the courts.

Discussion and Analysis

70. Notwithstanding the strength of the objection and the acceptance that Ground 1 is a new point taken on appeal, we have decided with some reluctance that we will exercise our discretion to permit it to be relied upon in the substantive appeal (we invited both counsel to put all their arguments to the tribunal, given the different potential outcomes on the procedural issue). We are in no way bound by the UT's permission decision and have considered matters afresh in light of full argument and the case as now presented.

71. We have considered the following factors.

72. First, there is a cogent reason why the ground that the product was a drink and therefore food was not raised and argued before the FTT. This is that until the Court of Appeal handed down its judgment in *Innovative Bites* in March 2025, some nine months after the Decision was made, it would not realistically have made sense for the Appellant to run the argument in the same form as it is now made in Ground 1.

73. The chronology of proceedings is relevant. On 17 November 2020 the Appellant submitted an error correction notice. HMRC issued their decision letter on the VAT liability of the products on 6 May 2021. The Appellant appealed to the FTT on 27 April 2022. The appeal was heard by the FTT on 29 and 30 January 2024. At that time only the decision of the FTT in *Innovative Bites* was available to the parties.

74. The UT released its decision in *Innovative Bites* on 4 April 2024 upholding the FTT and holding that Note 5 to the excepted item 2, confectionery, in Group 1 was still subject to an MFA, concluding from [39] and [49]: "In our view Note 5 is not a deeming provision for the following reasons… We conclude that Note 5 is not a deeming provision".

75. The Decision of the FTT in this case was released on 4 July 2024. Thereafter the Court of Appeal released its decision in *Innovative Bites* on 21 March 2025, holding that the UT was wrong, and that the inclusive definition in Note 5 ("confectionery includes… any item of sweetened prepared food normally eaten with the fingers") was *conclusive* as to whether that product was confectionery, see [46]

> "The Upper Tribunal was mistaken in thinking that Note (5) is just "akin to a presumption" and that "other factors might lead to a conclusion that the product is not confectionery". The "words which Parliament has chosen to enact as an expression of the purpose of the legislation" signify that products such as are described in Note (5) are "confectionery".

76. Analytically, any MFA therefore had to be carried out on the definition in Note 5, without there also being a separate MFA conducted by reference to whether the product was "confectionery". There was a remission to the FTT for that purpose.

77. Six months after the decision in *Innovative Bites*, on 17 September 2025, the Appellant sought to amend its Grounds of Appeal to introduce Ground 1 in light of the Court of Appeal's judgment, arguing that by parity of reasoning, any MFA should have been carried out on whether Skinade was a "drink", not whether it was a "food".

78. While we acknowledge Mr Watkinson's argument that it was always available for the Appellant to argue before the FTT that the product was a drink based on the existing legislation, the then current state of the law would not have meant that such a conclusion was determinative (or even helpful). We accept Mr Schofield's argument that even if the

Appellant had presented a case to the FTT that the product was a drink, the tribunal would still have been tasked with concluding whether it was also a food and performing an MFA similar to the one that it did carry out. Without the authority of *Innovative Bites*, the inclusive definition in Note 1 that "food includes drink" would not have been conclusive of the issue and would not have been the focus of the evidence.

79. Therefore, in pursuing Ground 1 the Appellant raises a new point of law in the appeal to the UT which was not available for it to present in materially the same way to the FTT as it now can. It is only available because of a change in the interpretation of the law, based upon Court of Appeal authority handed down subsequent to the Decision.

80. This is by no means a perfect explanation for the Appellant not taking the point at the first opportunity in its original grounds of appeal to the UT when seeking permission to appeal in April 2025, but even at that stage, it did raise a third ground of appeal which concerned the form or format of the product as a drink.

81. Second, the above explanations also go some way to meeting the objection that the raising of the ground will cause prejudice or detriment to HMRC in the UT proceedings as set out in *Singh v Dass* and *Notting Hill* and as applied in *Carrington* at [3]: "*The discretion to hear new points of law on appeal should not be exercised if it would be unfair to another party or would place the court in an untenable position*". While Ground 1 was raised at a late stage within the permission proceedings, HMRC have had more than one year's notice that Ground 1 may be argued in the substantive UT appeal, permission having been granted in September 2025. HMRC have the same counsel as appeared in the FTT and at the UT permission hearing. It is a point of law arising out of HMRC's own successful argument on the construction of inclusive definitions in the Notes to Group 1 of Schedule 8 to VATA in *Innovative Bites.* We do not consider therefore that there is any prejudice to HMRC, subject to the question of whether new evidence is required to resolve the new issue.

82. Third, we have taken into account that Ground 1 not only has arguable merit but does, if successful, give rise to a material error of law in the Decision. This is for the reasons we explain below, albeit this is through no fault of the FTT whatsoever. It is important for the coherence of the law that such errors are corrected. As is considered below, we also do not accept Mr Watkinson's point that it is not a legitimate ground of appeal to an appellate court that the FTT failed to take matters into account if it was never asked to do so. This ground of appeal would not strictly be a question of the FTT failing to take into account relevant facts or evidence but would involve a misinterpretation of a legislative provision as a result of a (mis)understanding at the time.

83. Fourth, and the point which weighs against the Appellant being permitted to pursue Ground 1, is that it is effectively conceded by the Appellant that this new ground is not simply a pure point of law but would also require the remission of the case to the FTT for further evidence and fact finding. The authorities such as *Singh v Dass* and *Notting Hill* are clear that it will be a rare case in which an appellant will be permitted to argue a new point on appeal that will involve a further trial or fact-finding hearing. Nonetheless, exceptions may be permitted to this general rule.

84. We take into account all the circumstances of the case, the overriding objective and the interests of justice – fairness to both parties in a further hearing potentially being required before the FTT and the Appellant being given a 'second bite' at running its case. There is

prejudice to HMRC, in being put to the time and expense of responding to a new point. There is also a strong public interest in the finality of litigation and parties to adversarial litigation being bound by the arguments and evidence they choose to present at first instance. This must be balanced against the fact that there is also prejudice to the Appellant in not being able to present an argument that was not fully available to present in previous proceedings. Furthermore, we take into account the venerable principle as explained in *Bluecrest*, that these are public law proceedings involving determining the correct amount of tax to be paid rather than private law proceedings. Furthermore, as previously acknowledged, there is a possibility of costs protection for HMRC both in relation to the costs of the UT proceedings but also potentially in the FTT if the case is remitted and if the case is allocated to a complex category.

85. Finally, on the question of permitting the Appellant to raise a new point of law to be argued that will potentially require remitting the case to the FTT, we note that this is similar to the ultimate position taken by the Court of Appeal in *Innovative Bites*. The court considered a similar point of law on inclusive definitions in Notes to Group 1, when it had not been taken by HMRC before the FTT, which also required further facts to be found. In that case the court decided the point of law on the construction of Note 5 before remitting the issue to the FTT for the discrete question of Note 5's application to the facts as they were before the FTT, as the tribunal had not made a finding on whether they were "*ordinarily eaten with the fingers*". See [49]:

> "In the circumstances, the right course must, I think, be to remit to the FTT the question whether "Mega Marshmallows" are "sweetened prepared food which is normally eaten with the fingers" within the meaning of Note (5). To avoid any risk of being perceived as anchored to the earlier decision, the remittal should, as it seems to me, be to a differently constituted FTT. Further, the hearing should be conducted on the basis of the existing written evidence but with the potential for cross-examination and re-examination of any witness who has given evidence relating to the way in which "Mega Marshmallows" are normally eaten".

86. We will be asked to perform a similar exercise to Court of Appeal, if Ground 1 has merit: to determine whether – if Skinade is a drink – Note 1 conclusively makes it food; if the existing findings do not permit the UT itself to determine the classification as a drink, whether that discrete question should be remitted, as anticipated when Ground 1 was given permission to be pursued.

87. We emphasise once more, that despite permitting the Appellant to argue Ground 1 before the UT on this occasion, this is an exceptional course based on the very particular facts and timeline in this case. The general rule is that appellants will not normally be permitted to raise and run new points on appeal which were not taken at first instance unless they are pure points of law that do not require further evidence to be called or facts to be found.

<u>The merits of Ground 1: did the FTT err in law in a material manner</u>

88. The Decision included a conclusion at [93] that "it does not follow from Skinade being a drink that it is automatically a food."

89. Through no fault whatsoever of the FTT, because it was not argued by the Appellant at the time, our determination is that the FTT erred in this conclusion by misinterpreting the law. In our view, applying the ratio in *Innovative Bites*, Note 1 provides an inclusive definition

that "food includes drink" which is conclusive that if a product is properly determined to be a "drink" (of a kind used for human consumption), then it is conclusively also food. It bears repetition that the Appellant did not argue before the FTT that the product was drink, and it cannot safely be assumed without further evidence that Skinade is (or is not) "drink". Given the way the case was presented, the FTT did not come to any conclusion whether the product was "drink" or perform any MFA focussed on that definition, as opposed to on the meaning of "food".

90. We accept the argument of Mr Schofield that Note 1 is analogous to Note 5 for these purposes and that the same approach should be applied as in *Innovative Bites*. For the reasons outlined below, we do not accept the argument of Mr Watkinson that Note 1 is to be treated differently because "drink" is a single ordinary English word, different from the tripartite definition in Note 5.

91. In *Innovative Bites* the Court of Appeal considered whether Mega Marshmallows were "*confectionery*" in accordance with Excepted Item 2 read with Note 5, also in Group 1 of Sch.8 to the VATA. The relevant wording in Note 5 is that, "confectionery includes… any item of sweetened prepared food normally eaten with the fingers".

92. Both the FTT and UT had previously held that Note 5 was not conclusive: even if the products were "sweetened prepared food normally eaten with the fingers" the taxpayers could still rebut that presumption, and the tribunals were still required to perform an MFA as to whether they were properly "*confectionery*". HMRC appealed successfully. The Court of Appeal disagreed with the tribunals and the taxpayers, finding the inclusive definition, "confectionery includes", within Note 5 to be conclusive as to whether a product fell to be an excepted item of confectionery (standard rated for VAT purposes). It explained at [37]-[38] and [41]:

> "37. The Upper Tribunal concluded that Note (5) is not a "deeming provision" but an "inclusive definition". Whether or not Note (5) is appropriately labelled a "deeming provision" is not in the end important, however. "Deeming provision" is not a technical term with a precise meaning. What matters is what Parliament has said about the significance of Note (5), and, to my mind, it has stated unambiguously that products of the types described in Note (5) are "confectionery" for the purposes of Item 2.
>
> 38…. However, that is no reason to deny Note (5) the significance that its wording and that of section 96(9) of the VATA 1994 give it. On the plain wording of the statute, in my view, anything falling within Note (5) *is "*confectionery" within the meaning of Item 2 absent absurdity or the like. Such an item could also, without misuse of language, be said to be "deemed" to be "confectionery", but that would not depend on Note (5) being categorised as a "deeming provision".
>
> …
>
> 41.In the next paragraph of its decision in Wm Morrison, the FTT referred to what is said in *Bennion, Bailey and Norbury* on Statutory Interpretation about "inclusive and exclusive definitions". In common, I think, with the FTT's view in *Wm Morrison*, it seems to me that Note (5) can be seen as an 'inclusive definition'. In the present case, the Upper Tribunal saw Note (5) as both an "inclusive definition" and "akin to a rebuttable presumption". In my view, however, regarding Note (5) as an "inclusive definition" does not make it any less definitive. In *Dilworth*, Lord Watson explained that, where the word "include" is used in an interpretation clause to

enlarge the meaning of words or phrases found elsewhere in the statute, 'these words and phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include'…"

93. The Court of Appeal concluded at [46]:

> "46. I agree with Mr Watkinson that, absent absurdity or the like, Note (5) is conclusive. If, accordingly, a product is "sweetened prepared food which is normally eaten with the fingers", it is "confectionery" for the purposes of Item 2. The Upper Tribunal was mistaken in thinking that Note (5) is just "akin to a presumption" and that "other factors might lead to a conclusion that the product is not confectionery". The "words which Parliament has chosen to enact as an expression of the purpose of the legislation" signify that products such as are described in Note (5) are "confectionery"".

94. Having interpreted the law thus, the Court of Appeal noted at [48] that the FTT had not given particular weight to the means of eating in conducting the MFA and had not made any definitive finding on that issue. Therefore, the court remitted to the FTT the question of whether "Mega Marshmallows" are "sweetened prepared food which is normally eaten with the fingers". At [49] it remitted this question to be determined by a differently constituted FTT with the potential for cross-examination of any witness who had given evidence relating to the way in which the product was normally eaten.

95. In light of the ratio of *Innovative Bites* at [37]-[41], the statutory formulae "X includes Y" in the Notes to Group 1 are definitive or conclusive. Therefore if the product is a drink, then it is conclusively food, absent absurdity. Accordingly, it was an error for the FTT to state at [93]: "The legislation tells us that food includes drink, but it does not follow from Skinade being a drink that it is automatically a food". It renders the note ineffective as a defining provision in law. If the product is a drink, then the only questions thereafter are whether the product is subsequently excluded under a specific excepted item for food (including drink), e.g. excepted item 4 "other beverages" or excepted item 4A "sports drinks", or whether it would be absurd or lead to an absurd result for the product to be categorised as a food notwithstanding that it is a drink.

96. We can see no meaningful distinction between the inclusive definition provided in Note (5) and that in Note (1), for the purposes of distinguishing the ratio in *Innovative Bites*. It is of course right that the inclusive definition in Note 5 provides a further tripartite test for the FTT to apply in determining whether a product is confectionery ((1) sweetened (2) prepared food (3) which is normally eaten with the fingers) whereas Note 1 merely substitutes the ordinary English word "food" for the ordinary English word "drink". In our view that supports rather than undermines the conclusion that the tribunal must therefore apply an MFA to the subsidiary term "drink" instead (subject to the question of whether there is a further subsidiary term to which the MFA must be applied, such as "beverage"). Inclusive definitions may lead to differing exercises to be conducted, as we address below, but we consider that the application of each inclusive definition will be definitive, subject to absurdity, following the ratio in *Innovative Bites*.

97. We also reject Mr Watkinson's submission that there was no error of law made by the FTT. He argued that without the point that the product may be a drink for the purposes of the legislation having been expressly raised, it could only be an error of law for the FTT to fail

to deal with it if it leapt from the evidence as an obviously significant point (*Pawar v HMRC* [2025] UKUT 309 (TCC) ("***Pawar***"), [51]. He contended that it was not obviously a significant point before the FTT, and therefore there was no error of law in any event. He argued that it is not a legitimate ground of appeal to an appellate court that the lower tribunal failed to take matters into account when it was never asked to, when it has addressed fully the submissions that were made to it (*Akhtar v Secretary of State for the Home Department* [2024] EWCA Civ 354 ("***Akhtar***"), at [81-82]).

98. We disagree with these submissions for three reasons. First, the FTT did consider the point as to whether the product was a drink and the legislative consequences of such a finding at [93] although it went no further because the point was not in issue. Nonetheless, it did express a view as to the requirements of the law, unfortunately mistaken in its interpretation, because it was based upon the then current state of the law. Second, as a matter of form, the product was described as a drink casually throughout the evidence and throughout the Decision – although no finding was made about this as it was not required. The issue of whether the product was a "drink" clearly would have been relevant but for the way in which the parties and so the FTT approached the law.

99. Third and in any event, *Akhtar* and *Pawar* are not authorities for the proposition that failure to consider a point of law is only an error if it is obvious from the evidence or the case before the FTT. *Pawar* concerned the FTT's refusal to admit a late appeal when the FTT did not take into account an argument as to whether there was a deliberate inaccuracy in the taxpayers' returns, when considering the underlying merits of the case and as part of the overall discretion as to whether to admit the appeal. The UT decided that there was no error of law in the FTT failing to take into account this argument as to the merits of the case because the argument was not presented to it. Although both *Pawar* and the present case share the point that the UT is asked to decide whether the FTT erred based upon an argument not raised before it, *Pawar* concerned failure to consider an argument not raised primarily concerning evidence and fact, whereas the present case primarily concerns a misinterpretation of a statutory provision (the meaning of Note 1). Similarly in *Akhtar*, the Court of Appeal rejected an argument that the UT had failed to consider a factor that had not been put before it in relation to a proportionality assessment. These are rather different cases from the instant one where the new ground turns on the misinterpretation of legislation.

100. We consider that the FTT's error of law was material, because the FTT heard no argument and came to no conclusion on whether the product was "drink of a kind used for human consumption" and hence zero-rated under Item 1 (subject to any exceptions, and absurdity). If it had done so, there is a possibility that it might have come to a different conclusion to the one it did reach, having conducted an MFA as to whether Skinade was a "food". Certainly it is very likely that the parties would have presented different evidence and arguments. As we outline below, it appears there is very little existing authority on the meaning of "drink" within VATA, presumably because it has not until recently appeared to be a significant defining term.

101. Therefore, we will reluctantly set aside the Decision on this basis. We set aside the conclusion that the product was not zero-rated but standard rated because it did not fall within general item 1 as being food.

Whether the Decision should be remitted or remade

102. Having heard all the submissions, we have also reluctantly come to the conclusion that it would not be just and fair, in accordance with the overriding objective, for us to re-make the decision as to whether the product is drink and hence food for the purposes of general item 1. We follow a similar approach to that applied by the Court of Appeal in *Innovative Bites*.

103. We have already recognised, in permitting Ground 1 to be pursued, that it will be a rare case in which a new point on appeal should give rise to further evidence being heard or a case being remitted. Nonetheless, we consider that it is necessary in this case.

104. On the premise that we might be able to re-make the Decision, we gave both parties the opportunity to address us orally at the hearing as to whether the product was drink by conducting an MFA. There were no written submissions on the issue of any substance. They did so based upon an overview of the existing findings of the FTT in the Decision, together with reference to a selection of the primary written evidence that was before it. It became increasingly obvious to us as a result of this exercise that it would be neither practical nor fair for us to re-make the decision and conduct our own assessment as to whether the product is drink.

105. It was not practical for us to do so in circumstances where we did not have any transcripts of the cross examination of the witnesses from the FTT hearing. Further, counsel for the parties were able only to address us in summary form as to the potential arguments and relevant evidence they would rely upon in an MFA concerning drink given the limited time available to consider this in addition to all the other arguments in the UT appeal.

106. Further, it would not be fair for us to re-make the Decision based upon what we did hear. First, the parties did not have sufficient time within the hearing to make all the submissions that they should reasonably be permitted to make nor notice in advance. Their primary positions had always been that the point would require remission if it arose. Second, it is clear – as was effectively conceded by both parties, that there would be other evidence and arguments that they might wish to present that were not available on the current state of the evidence that was before the FTT. We accept that both parties would be likely to have presented their cases differently before the FTT had they been arguing whether the product was a drink. They may have wished to call different or additional evidence and cross examine accordingly. In addition, HMRC may well have wished to argue that even if the product was a drink, it was nonetheless also an excepted (standard rated) item because it was also an "other beverage" for the purpose of excepted item 4.

107. We therefore remit the case to the FTT to determine whether the product is drink used for human consumption based upon fresh evidence and legal argument the parties may wish to present.

<u>How the FTT should approach its determination as to whether the product is drink</u>

108. Mr Schofield submitted that the FTT would have a limited task to decide in determining whether the product was a drink. It should simply apply the dictionary definition of drink such as "a liquid suitable for swallowing" (Merriam Webster dictionary) or "liquid that is taken into the body through the mouth" (Cambridge dictionary). He argued that it should

make findings of fact and evaluate whether the product satisfied such a narrow definition, and if so conclude that it was a food, so long as it was satisfied that this outcome was not absurd, following the approach in *Innovative Bites*.

109. We do not agree. There is no principled reason why the approach to determining whether the product is drink should differ from any other VAT classification exercise undertaken by the tribunals. There is no further definition or guidance on the meaning of the word "drink" in either the legislation or any case law. All that can be inferred is that it is of a broader nature than "beverage" because alcoholic and other beverages and sports drinks are excepted items from food which includes drink. As we touch upon when considering Ground 2, there is some guidance from the VAT tribunal as to how a beverage might be defined for classification purposes in *Bioconcepts Ltd v Customs and Excise Commissioners [1993] VAT Decision 11287, Lexis Citation 1149 ("**Bioconcepts**"),* namely: "Liquids that are commonly consumed are those that are characteristically taken: - To increase bodily fluid, - To slake the thirst, - To fortify, or - To give pleasure."

110. We also agree with Mr Watkinson that while Note 5 and Note 1 to Group 1 are both "inclusive definitions", having the same label does not mean that they function in exactly the same manner. The enquiry under Note 5 involves asking whether a product answers to a specific tripartite statutory description of confectionery namely, sweetened prepared food which is normally eaten with the fingers, to produce a classification result. Those three limbs circumscribe the initial enquiry. Note 5 and Note 1 are not *"…the same statutory formula, the same wording…"* Rather, under Note 1 the enquiry instead involves an MFA being applied to another, different, single ordinary English word: *"drink"*. A product that answers the tripartite test in Note 5 is, absent absurdity, confectionery. There is no equivalent approach under Note 1 to the effect that simply because a liquid is drunk by humans it is *"drink"* and therefore food: examples potentially contradicting this conclusion readily spring to mind, such as liquid medicines.

111. The FTT must therefore perform an MFA, as indicated by the Authorities such as *P&G*, as to whether the product is "drink" within Note 1. This means it must consider all relevant factors presented by the parties and follow a similar approach to the one the FTT did when conducting its MFA into whether the product is food. Although "drink" is an ordinary English word, VAT classification cannot and should not be limited to applying dictionary definitions, as the FTT considered at [88] and rightly stated at [89] of the Decision:

> "89. We agree with Mr Watkinson that simply using an abstract dictionary definition to inform our approach to the meaning of "food" is not the right approach. The dangers of a narrow, non-contextual approach to statutory interpretation in this area are vividly illustrated by *Fluff Ltd (t/a Magit) v CCE*, [2001] STC 674, where the question was whether maggots sold as bait for fishing could be zero rated as animal feeding stuffs. Laddie J said this at [17] and [18]:
>
> > "[17] It seems to me that the meaning of the words must take colour from the context in which they are used and, in particular, what is at issue here is the supply of animal feeding stuffs. It seems to me whether or not an edible substance is animal feeding stuffs is in large part answered by the way in which it is sold or supplied. I put it to Mr Storey that if his approach is right a straw boater, which of course is edible, would itself be animal feeding stuffs and therefore the supply of boaters would be zero rated under this legislation. He accepts that that is the inevitable conclusion of his submission. I do not accept that is the right approach to these words: it is not what the words mean. It seems to me that what counts is whether what is being supplied can properly be described as animal feeding stuffs….""

Whether HMRC may raise beverage as an excepted item

112. It is only just and fair that, as the Appellant has been permitted the ability to argue its case differently on appeal to the UT and on remission to the FTT, HMRC must in turn be given the ability to respond in kind to the new argument. This represents fairness to both parties. Mr Watkinson submitted that based on the Appellant's pleaded case before the FTT, HMRC had accepted that Skinade was not a *"beverage"*. If instead it was being argued that Skinade was *"drink"* then it was more likely to have been a *"beverage"* and HMRC should be permitted to reconsider how they approach their case on any remittal.

113. We agree that, irrespective of contesting whether the product is a drink, HMRC should be permitted to reconsider whether they wish to argue that if the product is a drink, it is also a beverage for the purpose of excepted item 4 and hence standard rated. This is just and fair – if the Appellant is permitted to change a fundamental plank of its case then, in principle HMRC should be entitled to consider their response to that new case. Mr Schofield objected on the basis that HMRC had made clear their position throughout proceedings and consistently disavowed any suggestion that the product was a beverage. This was not simply in the FTT proceedings but in HMRC's original and review decisions in which they classified the product as not a food. He submitted that the Appellant should be entitled to argue that HMRC are estopped from changing their position on any remitted proceedings.

114. We are satisfied that it would be just and fair for HMRC to reconsider their response to the remitted case. We make no determination on any consequential legal arguments such as estoppel, if it is raised, as they and any other case management decisions will be a matter for the FTT to decide after the parties' respective cases on whether the product is a drink are pleaded.

Whether the case should be heard by the same or different FTT

115. Mr Watkinson was neutral as to whether the case should be remitted to the same or a differently constituted FTT. The parties accepted that, on balance, there was no significant advantage to the case being remitted to the same FTT because there is likely to be different evidence and argument to that previously received and if it is remitted to a differently constituted panel then there is no danger of any perception that the FTT may be anchored to the outcome of its previous determination.

116. We therefore remit the case to be heard by a differently constituted FTT. The parties should seek any further procedural directions as to the pleadings, evidence, progress and hearing in the case from the FTT.

Ground 2 – the FTT erred in law in carrying out the MFA: placing singular weight upon the marketing of the product, elevating it to the sole test of classification as a food

The Appellant's submissions

117. In this ground of appeal Mr Schofield argued that the FTT erred in law in the Decision by placing the only and/or undue weight singularly on marketing, effectively applying a test

of marketing to whether the product could properly be categorised as a food of a kind used for human consumption.

118. Mr Schofield submitted that the MFA conducted by the FTT at [93]-[105] of the Decision, to ascertain whether the product could properly be categorised as food, was fundamentally flawed. He relied on the fact that the FTT found the appropriate weight to be afforded to all of the following relevant factors was effectively neutral: name; nutritional value; ingredients; palatability and taste, Food Standards Agency regulation; and food labelling regulations. He argued that the only factor which was not effectively neutral and which weighed *"most heavily on*" the FTT was "*the way in which Skinade is packaged and marketed*" (see [101]).

119. He contended that this was an error of law as it effectively transformed the test of whether there was a supply under General Item 1 of "Food of a kind used for human consumption", into one of marketing and presentation. This fettered the proper application of an MFA. The FTT's misapplication of the MFA was not merely a question of degree as to undue or relative weight, which he accepts would require appellate caution, but the imposition of a proxy test on marketing, failing to conduct the cumulative overall assessment. It was an "error of approach".

120. Mr Schofield noted in particular that there is no such specific wording in the legislation, nothing in the Item nor Notes to restrict food to that which is marketed or held out for any certain purpose. This is in contrast to excepted Item 4A, Group 1 of Schedule 8 which was drafted with the specific wording: "Sports drinks that are advertised or marketed as products designed to enhance physical performance, accelerate recovery after exercise or build bulk…". He argued that the Decision implicitly legislates a new and more restrictive legal test into the statutory wording, rather than being an overall assessment.

121. He submitted that this constituted an error of law, not a perversity challenge as to what should be given weight for the term "*food*". The effect of the Decision's error is significant as it denied the Appellant a just and balanced evaluation the effect of which rendered factors that have been held to be the most important, essentially redundant. For example, in *Arthro Vite* [1996] Lexis Citation 952 (Decision 14836) ("***Arthro Vite***") the VAT Tribunal held that when deciding whether the collagen drink mix was food "The factors which weighed most heavily with us were the presentation of the product and its nutritional value and each pointed us in a different direction. However we believe that if we had to choose one single determinative factor it would have been the nutritional value of the product". He also noted that HMRC's Manual VFOOD2020, which states that HMRC's policy is to accept that powdered food supplements – including collagen – can be zero rated if the product "*has a nutritional content*" and is consumed in a manner associated with food for example is mixed with water and drink.

122. Mr Schofield also relied upon *WM Morrison Supermarkets Plc* [2024] UKFTT 181 (TC) in which the FTT considered the ingredients, how it is made, its taste, and its method of consumption to be "*the most influential factors*", and how the item is packaged, marketed and sold as factors of less weight.

123. He argued that the FTT failed to properly undertake an MFA, placing weight on only one factor, and ignoring the relationship between the factors. This is an error in the legal approach to determining the VAT liability of the product under Item 1. He did not challenge

the weighting as perverse: he did not say X factor should be given 8 of out 10, and Y factor should be 1 out of 10. Rather, he submitted the entire MFA was mis-conducted: it provided for one determinative factor, considered in isolation, and misunderstood the statutory question of the relevant factors for "*food*" (such that marketing should not be determinative).

HMRC's submissions

124. Mr Watkinson submitted that the FTT did not err in its approach to marketing. The FTT did not transform the test into one of marketing and packaging only, as argued for by the Appellant. The FTT undertook an MFA and came to conclusions as to the weight to be attributed to a variety of factors. Absent perversity, weight was an issue for the FTT, and there was no perversity in the Decision.

The FTT Decision

125. In carrying out the MFA as to whether the product was food of a kind used for human consumption, the FTT considered various factors, as summarised at [11]-[12] above. It did not conclude that any of the particular factors discussed at [93]-[96] and [98]-[100] of the Decision pointed towards or away from the product being classified as a food.

126. In addition, the FTT also addressed both a) the purpose of consumption of the product, and b) the nutritional content at [97], finding the former to be significant:

> "97. Mr Schofield did point out that each bottle of Skinade contains almost identical calories and protein to the Arthro Vite collagen powders. In *Arthro Vite* at [56] the Tribunal described the nutritional value as being "accepted" (which is not the case here) and referred to the "very high protein value". The product in that case provided 10-15% of an individual's daily protein requirements (as is the case here) but it is not apparent from the decision why the Tribunal thought that the protein value of the product was "very high". As we observed earlier, it is (of course) wrong to appeal to decisions on other products in order to categorise the product in question. In any event, the powders in *Arthro Vite* were consumed to help the body function and marketed with that in mind (as a remedy for stiff joints, aches and pains - "If pain stops play.... try new ArthroVite"), which is one of the core purposes of food consumption. This is not the case here. Skinade is a product the consumption of which has a singular purpose, that of keeping users' skin looking young. We do not regard that as concerned with keeping the body alive or its development or functioning. An older person's skin which no longer looks young still performs the functions of skin. We have not overlooked Mr Hollamby Jones' comment that Skinade can be helpful for old people whose skin is getting thinner. That was advanced as a reason why it is misleading to call Skinade a "beauty drink" but there was no suggestion that Skinade performed any particular additional function for old people; it is certainly not marketed on that basis and, beyond saying that Skinade was "helpful" for old people, Mr Hollamby Jones did not elaborate on its properties or effects. Overall, we consider Skinade's nutritional value (whilst clearly present to some degree) to be neutral as we have no means of measuring its nutritional value in comparison with foodstuffs generally." (emphasis added)

127. The FTT addressed packaging, marketing and route to market at [101]-[104], concluding that these matters pointed away from the product being a food:

> "101. The factor which weighs most heavily on us is the way in which Skinade is packaged and marketed.

102. Although HMRC's review conclusion letter noted that the wording on the Skinade packaging is similar to that used on food packaging, on looking at the packaging it did not appear to us to look like the sort of product one would find in the food aisle of a supermarket. The overall appearance of the packaging is quite clinical. It is white with scientific-looking logos and designs. Whilst some of the wording, for example nutritional information, might be found on food packaging, its overall appearance reminded us much more of something one might find in a chemist's shop than a grocer's.

103. In the same way that its packaging is not what one would expect of a food stuff, its overall presentation and route to market are very different from what one would expect of a foodstuff. We have seen that Skinade is not available in places foodstuffs generally are. The description on the website of Skinade as a multi award-winning, natural peach and mangosteen flavoured anti-ageing collagen drink is not a description that one would expect of a foodstuff. The same web page goes onto to describe it as an "effective and bioavailable anti-ageing skincare product" and an alternative approach to a person's skincare regime. Skinade is marketed at trade shows aimed at the beauty industry rather than food retailers. Skinade has won cosmetic awards, rather than food industry awards, and the Appellant sponsors an annual prize for plastic surgeons.

104. The Skinade website for professionals shows an image of someone having an injection in their face, advertises training and education at the Skinade University, refers to Skinade's presence at aesthetic trade shows and shows the covers of peer reviewed magazines in the dermatology and anaesthetic medicine fields. None of this is how we would expect to see food marketed."

128. In the concluding paragraphs of the Decision, at [105]-[107], the FTT returned to the way the product was distributed and marketed and the purpose of its consumption. It concluded that the product was distributed and marketed differently from food ([105]); its directions or instructions for use were not redolent of food ([106]); and its limited purpose was "keeping skin looking young" ([107]) which also pointed away from it being food:

"105. We think that such a broad-minded person would conclude that Skinade is a product with some (but it is unclear how much, when compared with foodstuffs generally) nutritional value, which is not consumed in order to keep the body alive or to enable it to function and develop. Rather, it is a product distributed and marketed, in ways which are very different from those one would ordinarily expect of food, for a very particular purpose (helping people keep their skin looking young).

106. The directions for use rather reflect this. Users are told to drink a bottle of Skinade every day "ideally after breakfast". The instructions are not to consume Skinade as part of a meal. They go on to counsel that, for lasting results, Skinade should be "a part of your daily skincare regime". None of that, to our mind, is language redolent of food.

107. The answer to the question whether Skinade is a food does not change because it is ingested rather than rubbed into the skin and has some nutritional value. The maggots in *Fluff* were ingested by the fish, but they were not supplied as foodstuffs for the fish (that is to say, for the purposes of feeding and growing them). The maggots were sold to be used in enticing fish onto hooks. The aphrodisiacs in *X* had some nutritional value and were ingested, but not (the CJEU appeared to think) for the purpose of keeping the body alive and helping it to function and develop. Similarly, Skinade is sold not for the general purposes of keeping the body alive or its development or functioning, but for the very specific, limited purpose of keeping skin looking young."

Relevant law: the approach of appellate courts or tribunals to MFAs performed by the FTT

129. The UT's jurisdiction on appeal is to determine whether the FTT made a material error of law, in which case it may, but need not, set aside the Decision (see s.11(1) and s.12(1)-(2) of the Act).

130. Where the FTT has correctly stated the correct legal principles, even in the absence of their explicit application, there is a presumption that it applied those principles correctly (*Northside Fleet Ltd v HMRC* [2022] UKUT 256 (TCC), [2022] BVC 509, at [36-37]). As Popplewell, LJ. said in *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672, at [36]

> "Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day-to-day judicial workload."

131. The law is clear that particular caution is required when considering whether there is any error of law in the FTT's findings of primary facts and its evaluation of them: see for example the high threshold to be applied as in *Edwards v Bairstow* [1956] AC 14 (HL) – "the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal".

132. Where a statutory test requires an MFA, or "value-judgment", based on a number of primary facts, an appeal court should be slow to interfere with that overall assessment, and particular deference is to be given to the first-instance tribunal as primary decision maker. Unless there is an error of law in coming to the value judgment, and absent perversity, the FTT's decision should stand, see *P&G*, at [9]-[11], [22]:

> "[9] Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that it so, an appeal court (whether first or second) should be slow to interfere with that overall assessment what is commonly called a value-judgment.
> …
> [11] It is also important to bear in mind that this case is concerned with an appeal from a specialist tribunal. Particular deference is to be given to such tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker; see per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 at [30], [2008] 4 All ER 190 at [30], [2008] 1 AC 678 cited by Toulson LJ.
> …
> [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?"

133. Lewison, LJ. summarised the position relation to appeals which involve challenges to factual findings in *Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 48, at [2] stating that: "An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong", a conclusion "… that no reasonable

judge could have reached" ([2(i)&(ii)]); that the weight given to a finding of fact is pre-eminently a matter for the trial judge ([2(iv)]); and a judgment should not be subjected to narrow textual analysis ([2(vi)]); nor should it be picked over or construed as though it was a piece of legislation or a contract ([2(vi)]).

134. The UT, drawing on *P&G*, restated the position in relation to appeals which involve challenges to factual findings by the FTT and also applied the same standard in relation to their evaluative judgments in *HMRC v Netbusters (UK) Ltd* [2022] UKUT 175 (TCC) at [20]-[23]:

a. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them [21];

b. The question before an appellate tribunal or court exercising an "error of law" jurisdiction is not whether it would have made the same decision as the first-instance tribunal. The test is whether the FTT's factual finding or evaluative judgment was within a reasonable range of conclusions that a properly directed tribunal could have made on the evidence before it [22]; and,

c. The threshold for establishing an error of law based on challenges to findings of fact is deliberately set high, particularly where the FTT is called on to make an MFA including factual findings or evaluative judgments [23].

Discussion and Analysis

135. Despite the attractive way in which submissions were made by Mr Schofield on behalf of the Appellant, we are satisfied that the FTT made no error of law as alleged.

136. The Decision is to be read fairly and as a whole. The FTT clearly had in mind the correct principles in carrying out an MFA, weighing each factor, and coming to a conclusion in the round. For example, it cited relevant passages from *P&G* on carrying out an MFA, see [37]-[38] of the Decision, and summarised its task correctly at [57], as we endorse when considering Ground 3.

137. In any event, the FTT expressly applied these principles as well as stating them. At [93]-[107], the FTT demonstrated the fact that it properly carried out an MFA as required by the authorities. The FTT undertook the MFA according to the correct legal principles and came to conclusions as to the varying weight to be attributed to the various factors, at [93] – [104]. Following its analysis of each individual factor, at [105]-[108] of the Decision it considered the matter in the round and expressly concluding: *"…in the round we consider…"*.

138. As Mr Watkinson submits, the FTT did not "consider the individual factors in a vacuum". Had the FTT made the error as alleged it would not have weighed factors other than marketing and packaging at all; it would have instead said that they were irrelevant. We agree that the FTT did not take into account irrelevant factors nor fail to take into account relevant factors in conducting its assessment as to whether the product was a food. It gave rational and sufficient reasons for its conclusion. The weight that the FTT decided

to give each factor was a matter for it, subject to absurdity. There is no suggestion that its findings of fact or evaluation of the weight given to the factors was perverse.

139. The fact that the FTT said at [101] that packaging and marketing weighed most heavily on it, does not mean it was the only factor or determinative factor relied upon. Even if packaging and marketing were the determinative factor, this would not necessarily reveal any error because the FTT had considered all the relevant factors – see our discussion of *The Core* below.

140. The extent of the weight the FTT chooses to place on any one factor cannot be interfered with unless the weight ascribed to them is perverse: see *WM Morrison Supermarkets PLC v HMRC* [2023] UKUT 20 (TCC) at [45]. The fact that other FTTs considering the classification of the same or other products, may have come to different conclusions on the weight to be given to certain factors is neither here, nor there. The weight given by the FTT to the packaging and marketing of the product was well within the ambit of rationality.

141. The FTT was entitled to attach substantial significance to how Skinade was held out on the facts that it had found, as it addressed at [101]-[104]. We accept Mr Watkinson's submission that although the Appellant asserts that Ground 2 is not a perversity challenge as to weighting, in substance that is what Ground 2 is.

142. Further, the FTT did not transform the test for deciding whether the product was food of a kind used for human consumption into one of marketing and presentation only, or impose a "proxy test on marketing" or "isolate and elevate" marketing into a "sub-test", as argued for by the Appellant. The FTT did not rely on packaging and marketing as the sole factor pointing away from the product being a food. Indeed, the Appellant's Ground 3 is that the FTT also applied a "test" of the purpose for which the product was being consumed, thus recognising that more than one factor was weighed against it being food.

143. As is clear from [105]-[107], set out above, the FTT in fact relied on at least three factors as positive support for its conclusion: that the product was distributed and marketed differently from food ([105]); its directions or instructions for use were not redolent of food ([106]); and its limited purpose was 'keeping skin looking young' ([107]) which also pointed away from it being food. The basis for these factors was found in its earlier findings and reasoning at [97] and [101]-[104].

144. In relation to the other factors considered by the FTT, they were rationally evaluated even if given little weight, or found to be neutral or relatively neutral. The FTT did not in fact describe the other factors as only 'neutral' but it is right that it found that these did not point towards or away from the product being food. An assessment as to their weight was still made. The FTT evaluated the weight of each of the multiple factors and did not apply some mechanistic calculation of positive, negative or neutral factors.

145. Therefore, it is not a fair characterisation of the Decision to paint a careful weighing or balancing exercise that results in the FTT considering some factors to point away from the product being a food and none of the others pointing in either direction**,** as instead being the imposition of a test solely relying on the factor on which the FTT placed the most weight. The latter is not the process that the FTT actually undertook.

146. In any event, even if the FTT had decided that marketing and packaging was the sole or decisive factor sufficient to tip the scales and weigh against the product being classified as food, this would not have been an error of law on the facts of this case, the FTT having considered all the factors in the round. The FTT did not err in its approach to marketing.

147. This much is apparent from *The Core* in which the UT upheld the FTT's approach of carrying out an MFA as to whether the juice cleanse programmes ("**JCPs**") of the taxpayer should be zero-rated as supplies of food rather than standard rated as supplies of beverages. The UT dismissed the appeal by HMRC against the FTT's conclusion that they were not "beverages" for the purposes of excepted Item 4 of Group 1, sch. 8 to VATA and should therefore be zero-rated. The UT considered how the FTT had approached each factor and primarily concentrated upon: how the product was marketed, why it was consumed by the consumer, and the use to which it was put, at [19]-[20] and [22].

148. At [58]-[61] of *The Core*, the UT said:

> "58. In all cases involving classifications for VAT purposes there needs to be a multifactorial assessment. The way the product is marketed and sold is (as Ms Vicary accepts) a potentially relevant factor in every case. In some cases it may carry little weight, and in others it may carry great, or even dominant, weight as in *Fluff* and *Kinnerton*….
>
> 59. In any event, we reject the submission that the FTT attributed undue weight to the way in which the JCPs were marketed.
>
> 60. In the first place, the FTT gave equal prominence to the way in which (1) the JCPs were marketed and (2) the way they were in fact used.
>
> 61. This readily distinguishes the examples advanced by Ms Vicary of a retailer marketing a Mars bar or a cola drink as a meal replacement. She submitted that the FTT's conclusion would enable a retailer, by doing this, to claim that their products should be zero-rated. We disagree, because it clearly cannot be sufficient, to establish that a product (in the case of the Mars bar) is not confectionery or (in the case of a cola drink) is not a beverage, to rely on the fact that it is marketed for a particular purpose, if there is no evidence to show that customers in fact used the product for that purpose."

149. The ratio of *The Core* includes what is stated at [58] – that an MFA must be conducted, the way the product is marketed and sold will be a potentially relevant factor and "it may carry great, or even dominant, weight". That would accord with the FTT's Decision even if it had placed dominant weight alone upon packaging and marketing having conducted its MFA.

150. Mr Schofield argued that the UT's decision in *The Core* in fact supported his ground of appeal. Simply put, marketing should not be the sole criterion under a multifactorial assessment, and *The Core* supports this. In that case HMRC had appealed on the basis that the FTT had erred in allowing marketing to predominate and dictate the classification. The UT held that the FTT had not done so as it gave equal prominence to other factors, and held that clearly marketing alone would <u>not</u> be sufficient to establish a product's categorisation. We consider there is no useful distinction to be drawn from the application of the law in *The Core* and in the Decision. As above, the FTT was entitled to place significant weight on packaging and marketing as part of its MFA, but in any event expressly took into account other factors in support of its final conclusion.

151. Mr Schofield also sought to distinguish the significant relevance placed on packaging and marketing in *The Core* because the statutory question under consideration was whether the product was a "*beverage*", as defined in excepted item 4. The meaning of "beverages" has been interpreted by the VAT tribunal in *Bioconcepts* with the guidance given above.

152. Mr Schofield argued that the "beverage" statutory test is focussed on the purpose of consumption, which is why marketing and how it is held out for sale will be of significance – how is it described for use. In contrast in this case, there is no established purpose of consumption test for food as there is for beverages, so seeing how it is marketed for use and held out for sale is not a useful analogue. He also returned to this in Ground 3 below alleging the FTT made an error on suggesting there is some permitted "purpose of consumption".

153. We reject this distinction. What was said in *The Core* was not limited to "beverage" cases and applies to a "food" case such as this. The UT in the *Core* made clear at [61] that actual use of the product in a *"food"* classification case was highly relevant, and gave non-beverage examples. Its reasoning was not specific to beverages – which are merely an excepted item within food. Further, there is no statutory purpose test for beverages in any event – the purpose or use definition for beverages comes from the case law and not the legislation.

154. At [58] of *The Core,* the UT cited *Fluff Ltd (t/a Mag-it) v CEC* [2001] STC 674 ("***Fluff***"), as an example of a case in which dominant weight had been placed on the manner of marketing and sale of the product. Laddie, J. considered whether supplies of maggots to coarse fishermen were "*Animal feeding stuffs"* within General Item 2 of Group 1 Sch.8 to VATA. There is an exception to General Item 2 at Excepted Item 6: *"Pet foods, canned, packaged or prepared; packaged foods (not being pet foods) for birds other than poultry or game; and biscuits and meal for cats and dogs."* Laddie, J. said, at [17], that whether or not an edible substance is animal feeding stuffs is in large part answered by the way in which it is sold or supplied. In deciding that, one must look not just at the nature of the material but the way in which it is supplied. The maggots were not supplied as a foodstuff for fish, for feeding and growing fish, rather they were sold for use in enticing fish towards hooks.

155. *Fluff* supports the proposition that in considering whether a product falls within a General Item of Gp.1 Sch.8 to VATA, the answer may in large part depend on the way in which it is sold and supplied, including for what purpose it was supplied. Further, as *Fluff* shows, in determining whether a product falls within a General Item (not just an Excepted Item) in Gp.1 Sch.8 to VATA, the manner in which the product is sold and supplied, including for what purpose it was supplied, may *"in large part"* provide an answer. Hence why the UT in *The Core* said that the way the product is marketed and sold may carry great, or even dominant weight. There was no misapplication of the relevant principles when the FTT placed significant weight on how the products were held out for sale in this case and it did not elevate this factor to becoming the sole or decisive test. It merely considered it a highly relevant factor within the MFA it conducted, which it was perfectly entitled to do.

156. This ground is accordingly dismissed.

Ground 3 – conflating nutritional value with the purpose of consumption

Appellant's submissions

157. Mr Schofield relied upon the fact that the statutory test of classification concerns "food of a kind used for human consumption". He submitted that the meaning of "food" is often defined with reference to containing nutrients which help keep the body alive and functioning. However, containing nutrients capable of bodily maintenance is not the same as saying food must be consumed for the purpose of keeping the body alive or functioning. Neither the ordinary meaning, nor General Item 1 and Note 1 impose a requirement that food must be consumed for the purpose of keeping one alive. In summary, he argued that: keeping the body functioning and alive by replenishing nutrients is the effect of eating food, it is not necessarily the purpose of eating food.

158. He noted that at [57], after reviewing the case law, the Decision sets out the principles drawn from the cases to the test that needs to be applied and particularised the following factor for consideration: "Its purpose (Is it consumed for the purposes of providing the body with the nutrients it needs to stay alive and function or develop or does it have another specific purpose?)". This, he argued, is where the error which percolates the Decision is clearly encapsulated.

159. Mr Schofield also relied upon the Decision at [105] which states: "it is a product distributed and marketed, in ways which are very different from those one would ordinarily expect of food, for a very particular purpose (helping people keep their skin looking young)". He noted that under the discussion for nutritional value, comparing the products to the zero-rated collagen protein powder in *Arthro Vite*, the Decision records:

> "In any event, the powders in *Arthro Vite* were consumed to help the body function and marketed with that in mind (as a remedy for stiff joints, aches and pains – 'If pain stops play.... try new ArthroVite'), which is one of the core purposes of food consumption. This is not the case here. Skinade is a product the consumption of which has a singular purpose, that of keeping users' skin looking young. We do not regard that as concerned with keeping the body alive or its development or functioning".[4]

It concluded:

> "Skinade is sold not for the general purposes of keeping the body alive or its development or functioning, but for the very specific, limited purpose of keeping skin looking young".[5]

160. Mr Schofield contended that the FTT's approach here demonstrates an erroneous imposition of a nutritional purpose of consumption test: "Is it consumed for the purposes of providing the body with the nutrients it needs to stay alive and function or develop or does it have another specific purpose?" (at [57]). Thus, he said, because Skinade is not "sold for the general purposes of keeping the body alive" – however that applies – it is not food. He argued that the Decision misapplies the ordinary meaning of food, conflating nutritional content (with the effect of bodily maintenance) with being consumed for the purpose of providing nutrients for bodily maintenance.

161. Furthermore, Mr Schofield submitted, even if there was a requirement that food had to be consumed for that purely functional purpose of bodily maintenance – rather than, say, a

[4] At [97]
[5] At [107]

drink for pleasure, a hot mint tea to help digestion, or a coffee to wake up – the Tribunal had found that consuming Skinade to provide collagen protein to support skin health did not qualify under this purposive test of consumption. This was despite acknowledging that in other cases it had been held that collagen protein for joints, hair and nails did qualify, as would other food products like a protein bar aimed at replenishing muscle. This, he said, was an irrational and ambiguous distinction to draw: feeding the hair, nails, joints, and muscles is the body; and so is skin which is part thereof.

HMRC's submissions

162. Mr Watkinson submitted that the FTT neither conflated nutritional content with the purpose of consumption, nor did it "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." The FTT merely took purpose of consumption into account as a factor, as both parties had encouraged it to.

The FTT Decision

163. Following a review of the case law at [36]-[56] of the Decision, the FTT summarised its approach to the VAT classification decision it was required to make at [57]:

> "57. The points we draw from these cases are, first and most importantly, that the test to be applied is "what is the reasonable view on all the facts?" This has been articulated as asking whether a broad-minded VAT payer, who has heard the evidence and tasted the product, would regard Skinade as food. The appeal to the "broad-minded VAT payer" tells us that the question should not be over-analysed or be allowed to get bogged down in technical legal points. Factors our broad-minded VAT payer might consider could include form (tablets are generally not seen as constituting food), palatability, nutritional value, directions for use, cost, whether it is consumed as part of or an adjunct to a meal, its purpose (Is it consumed for the purposes of providing the body with the nutrients it needs to stay alive and function or develop or does it have another specific purpose?) and linked to that how it is marketed. As with all multi-factorial tests, factors will have different weight or value in particular cases, some may be irrelevant in a particular case and there may be factors not on this list which are relevant or helpful in a particular case."

Discussion and Analysis

164. Again, despite Mr Schofield's submissions, we are not persuaded that the FTT made any error of law. It neither conflated nutritional content with the purpose of consumption, nor did it "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."

165. As we have already found, the FTT went about its task with conspicuous care, taking into account the relevant factors identified by the parties as part of an MFA, giving them relative weight and coming to a reasoned conclusion in the round. Its reasoning and conclusions were more than sufficient and rational, they were a model of their kind.

166. The FTT took into account the purpose of consumption of the product as a relevant factor in coming to a conclusion at [57], [97] and [105]-[107] of the Decision**.** As Mr Watkinson pointed out, the Appellant does not argue that the purpose of consumption of

the product is irrelevant; indeed, based on *The Core* and *Fluff* it was obviously relevant. The FTT was bound by *The Core* to conclude that the purpose of consumption was a relevant factor to be taken into account and both parties had asked it to do so.

167. At [57] the FTT simply stated that factors the hypothetical broad-minded VAT payer might consider could include: *"*nutritional value…, its purpose (Is it consumed for the purposes of providing the body with the nutrients it needs to stay alive and function or develop or does it have another specific purpose?) and linked to that how it is marketed." It is abundantly clear from reading the paragraph as a whole that the FTT was not suggesting it was limited to this, or any specific factor, in coming to its conclusion.

168. The FTT applied the law in the same correct way that it explained it. In its MFA, the FTT addressed (i) nutritional value, and (ii) the purpose of consumption at [96] and [97]. The FTT's conclusion was (i) that it had no means of measuring Skinade's nutritional value in comparison with foodstuffs generally, and (ii) that the purpose of consuming Skinade was to keep users' skin looking young, which it did not regard as concerned with keeping the body alive or its development or functioning. The FTT therefore did not conflate purpose of consumption with actual nutritional content as argued for by Ground 3. The purpose of consumption was relevant, as *per The Core* and *Fluff,* addressed above. The FTT then returned to that issue, at [105]-[107] dealing with nutritional value and purpose of consumption as discrete issues.

169. It would be unfair to characterise the FTT's reference to the purpose of consumption in any of the impugned paragraphs of the Decision as a "test" when it did not elevate that "factor" in such a way. On a fair reading of the Decision, it is manifest that it did not impose any such "test". Ground 3 falls away in the same way that Ground 2 did.

170. As Mr Watkinson submitted in relation to the "Skin is Part of the Body" argument, the FTT was not seeking to draw some anatomical distinction with the product in *Arthro Vite*, it was making the sensible point that Skinade was both marketed and consumed for a different purpose. In any event, as the FTT correctly noted at [97] *"*...it is (of course) wrong to appeal to decisions on other products in order to categorise the product in question."

171. It is worth reiterating that findings of fact and evaluative judgments made by the FTT should not be interfered with by the UT unless they are perverse. The FTT's conclusion, as merely one factor in the MFA, that Skinade was consumed to keep users' skin looking young, which it did not regard as concerned with keeping the body alive or its development of functioning, was (i) relevant, (ii) reasonably open to it on the facts, and (iii) well within the ambit of rationality.

172. Mr Watkinson was also right to note that the Appellant proceeds on the assumed basis that the FTT concluded that Skinade was consumed for the purpose of contributing to the function and health of skin, when the FTT made no such conclusion: it conducted an MFA as to whether or not the product was food for the purposes of the legislation. As but one factor among others the FTT took into account, and placed some weight upon, a finding that the purpose of consumption was to keep skin looking young. It had already made clear at [90] that it was deciding whether or not the product was "food" rather than applying any classification, which does not exist, for "beauty products":

> "90. There was some discussion around whether Skinade is a beauty product. We have not found it particularly helpful to try to identify the characteristics of a beauty product. We agree with Mr Schofield that to ask whether Skinade is a beauty product rather than a food is to set up a false dichotomy not to be found in the legislation. The question the legislation asks is whether Skinade is a food, not whether it could, better or additionally, be described as a beauty product."

173. This ground is dismissed.

Conclusion on the appeal and disposition

174. For the reasons set out above, we have dismissed Grounds 2 and 3 but allowed the appeal on Ground 1. We have found there to be a material error of law in the Decision which we therefore set aside. We remit the case to a differently constituted FTT to determine whether the product is drink of a kind used for human consumption in accordance with the directions we have set out above.

UPPER TRIBUNAL JUDGES

MRS JUSTICE RUSHTON

JUDGE RUPERT JONES

RELEASE DATE: 04 November 2026