



TC06548

Appeal number: TC/2016/02583

VAT – zero-rating – allergen-free chocolate bar – whether cooking chocolate or confectionery – factors to be considered – how held out for sale – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KINNERTON CONFECTIONERY LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

TRIBUNAL: JUDGE ANNE REDSTON

**Sitting in public at Taylor House, Rosebery Avenue, London on 18 and 19 April
2018**

Mr David Southern QC, instructed by BDO LLP for the Appellant

**Ms Joanna Vicary of Counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

Introduction and summary

1. In 2003, Kinnerton Confectionery Limited (“Kinnerton”) began to manufacture and sell an allergen-free “Luxury Dark Chocolate” bar (“the Bar”), which it zero-rated on the basis that it was cooking chocolate.
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2. On 23 September 2015, HMRC decided that the Bar was confectionery and so standard rated for VAT purposes (“the HMRC Decision”), and issued an assessment (“the Assessment”) to recover VAT of £258,470 for periods 09/11 to 06/15 inclusive (“the relevant period”). Kinnerton appealed to the Tribunal against the HMRC
10 Decision and the Assessment.
3. Whether an item of food is zero rated or standard rated depends on how it was objectively “held out for sale” by the supplier, and the answer to that question is found via a multi-factorial assessment.
4. Having carried out that assessment, I decided the Bar was held out for sale as
15 confectionery, and is therefore standard rated. I upheld the HMRC Decision and confirmed the Assessment. I came to that conclusion because, during the relevant period:
 - (1) the Bar was held out for sale in supermarkets alongside other confectionery items and not alongside baking products;
 - 20 (2) it was sometimes sold together with an Easter egg as a single item of confectionery;
 - (3) although the front of the wrapper included the words “delicious for cakes and desserts”, it contained no explicit statement that the Bar was “cooking chocolate” or “for cooking”;
 - 25 (4) the back of the wrapper made no reference to cooking. It also stated that the portion size was one-quarter of a bar. Portion sizes are indicative of confectionery, not cooking chocolate;
 - (5) Kinnerton’s website positioned the Bar next to confectionery items, and did not say that it was cooking chocolate, or that it could be used for cooking;
 - 30 (6) neither the wrapper nor Kinnerton’s website contained any recipes, or any indication of where recipes could be found;
 - (7) the Kinnerton brand is known for its confectionery, not for its baking products. All other items sold by Kinnerton are confectionery, and the brand is reflected in the company’s name;
 - 35 (8) the single advertisement provided as evidence positioned the Bar next to confectionery Items, and did not say that the Bar was “cooking chocolate”; instead it made the more limited statement that it was “ideal for cooking”; and
 - (9) consumers generally saw the Bar as eating chocolate which could also be used for cooking.

5. Mr Southern submitted that, if the Tribunal were to rule in favour of HMRC, those who are allergic to normal chocolate would be unfairly disadvantaged, because they would have to pay VAT. I disagree. VAT law does not prevent Kinnerton (or any other manufacturer) from making an allergen-free chocolate and holding it out for sale as cooking chocolate, but that is not what has happened in this case.

Late appeal, late witness statement and further exhibits

6. Although the HMRC Decision was made on 23 September 2015, Kinnerton did not file its appeal with the Tribunal until 9 May 2016. The first part of that delay was because Kinnerton did not receive the original copy of the HMRC Decision; a further copy was sent on 7 January 2016. The remainder of the delay was caused by Kinnerton seeking legal advice on whether or not it had grounds to appeal. HMRC were informed of those discussions, and on 27 April 2016 Kinnerton appointed BDO to act as Kinnerton's agent. HMRC had no objection to Kinnerton's application to make a late appeal. Having considered the relevant case law, including *Denton v TH White Ltd* [2014] EWCA Civ 906; *BPP Holdings Ltd v HMRC* [2017] UKSC 55, and *Martland v HMRC* [2018] UKUT 0178, I gave permission for the late appeal.

7. On 16 April 2018, BDO applied on behalf of Kinnerton to admit a further witness statement and exhibits, including chocolate bars. HMRC did not object, and at the beginning of the hearing I accepted the witness statement and the exhibits into evidence. During the course of the hearing both parties subsequently sought to add further chocolate bars to the evidence. No exception was taken to their late submission and they too were admitted.

The legislation

8. The Value Added Tax Act 1994 ("VATA"), s 30(2) reads:
"A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified."

9. VATA Sch 8 is headed "Zero Rating", and Group 1 of that Schedule is headed "Food". It provides, so far as relevant to this appeal, that "the supply of anything comprised in the general items set out below" will be zero-rated, other than:

"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."

10. Item No 1 of the "General Items" is "Food of a kind used for human consumption", and Item No 2 of the "Excepted Items" is:

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

11. Note 5 to Group 1 reads, again so far as relevant to this appeal:

“for the purposes of item 2 of the excepted items ‘confectionery’ includes chocolates, sweets and biscuits; drained, glaze or crystallised fruits; and any item of sweetened prepared food which is normally eaten with the fingers.”

5 12. Mr Southern also handed up the Cocoa and Chocolate Products (England) Regulations 2003, which implement Directive 2000/36/EC.

13. I drew the parties’ attention to Regulation (EU) 1169/2011, headed “on the provision of food information to consumers”.

The evidence

10 14. The Tribunal was provided with a helpful Bundle of documents prepared by BDO, which included:

(1) correspondence between the parties, and between the parties and the Tribunal;

15 (2) various photographs of the Bar and of chocolate bars produced by other manufacturers (“Other Bars”);

(3) an advert published in the Anaphylaxis Campaign Newsletter, dated 2013;

(4) screenprints from Kinnerton’s website, both during the relevant period and subsequently;

20 (5) recipes and comments from other websites, and from social media, which refer to the Bar; and

(6) witness statements and attached exhibits.

15. The Tribunal was provided with the samples of the chocolate produced by Kinnerton:

(1) the Bar which is under appeal, which is 85g in weight;

25 (2) the same chocolate bar repackaged after the date of the HMRC Decision as “Kinnerton Just chocolate”, also 85g in weight; and

(3) two mini chocolate bars, each of 25g weight, manufactured by Kinnerton after the date of the HMRC Decision; these were standard rated.

30 16. Samples of Other Bars were also provided. For the avoidance of any possible doubt, I emphasise this decision does not apply to any Other Bars, and in setting out whether they are zero-rated or standard rated in the list below, I am not making any comment on whether or not that VAT status is correct. This decision applies only to the Bar:

35 (1) Green & Black’s “dark cooking chocolate” and “milk cooking chocolate”, both of which weigh 150g and were zero-rated;

(2) Green & Black’s “Dark 70%” chocolate, which weighed 100g and were standard rated;

(3) Menier’s Swiss dark chocolate and Menier’s Swiss milk chocolate, both of which weigh 100g and were zero-rated;

(4) Dr Oetker’s “Fine Cooks’ Dark Chocolate” and “Fine Cooks’ Milk Chocolate”, both of which weigh 150g and were zero-rated; and

5 (5) Lindt “Excellence” 90% cocoa “dark supreme” and 70% cocoa “dark” chocolate, both of which weigh 100g and were standard-rated.

17. As already noted, the Bundle also contained photographs of Other Bars. In this decision I have referred only to pictures of Other Bars sold by Menier and Lindt (see §35 and §51) because it was possible to read the wording on the packaging shown in those photographs, which was not the case with the other photographs.

18. The following individuals provided witness statements, gave oral evidence and were cross examined. I found them all to be honest witnesses:

15 (1) Mr Clive Beecham, who founded Kinnerton and remains a director of Kinnerton’s corporate group. Much of his evidence was purely factual and was unchallenged, but some parts of his witness statement set out his view of how the Bar was held out for sale. As that is the issue the Tribunal has to decide, I have not relied on those passages; instead I have come to my decision by considering all relevant evidence;

20 (2) Ms Julia Whiteside, who is Kinnerton’s research and development director. Her evidence addressed the “typical”, “general” and “usual” differences between cooking and eating chocolate. I accepted that evidence, while also agreeing with Ms Vicary that it does not assist in deciding the appeal, see further §§29-31;

25 (3) Ms Stoddart, who made the HMRC Decision. Mr Southern sought to challenge Ms Stoddart’s decision-making process in arriving at the HMRC Decision because she had relied on HMRC guidance rather than referring to case law. This is, however, a statutory appeal, not a judicial review, so how Ms Stoddart arrived at her conclusions is not a relevant consideration. My task is only to decide whether the HMRC Decision is correct as a matter of VAT law; and

30 (4) Ms Siddall, who is an HMRC officer whose role is to provide advice to her colleagues on the correct VAT status of products. She carried out research on Kinnerton’s products after the date of the HMRC Decision. Mr Southern submitted that her evidence should be “discounted in its entirety” because its purpose was “to provide *ex post facto* justification” for the HMRC Decision. However, as I have already emphasised, the issue before the Tribunal is whether the HMRC Decision is legally correct, given the facts in existence at the relevant time. Whether a fact was, or was not, known to the Officer who made the HMRC Decision is irrelevant. If evidence of facts is gathered after HMRC have made a decision, it is of course necessary to show that the situation was the same during the relevant period. That was the position here, see §54 and §56. I accept Ms Siddall’s evidence.

19. From the evidence summarised above, I make the findings of fact in the next following parts of this decision. All the findings relate to the relevant period, unless otherwise specified.

The facts about Kinnerton generally

5 20. Mr Beecham founded Kinnerton in 1978 to produce and supply confectionery and chocolate products aimed at children. The company specialises in “character branded” products, such as Thomas the Tank Engine and related children’s characters, and seasonal products such as Easter eggs and chocolate Santas.

10 21. In the late 1990s, Mr Beecham decided that Kinnerton would produce a nut-free milk chocolate which could be safely consumed by children with a nut allergy. This required significant financial investment to ensure that there was no contamination. The chocolate is provided by a Belgian company called Belcolade; no other chocolate producer has met the necessary standards, so Belcolade was (and remains) the only possible supplier for Kinnerton’s allergy-free chocolate. Kinnerton accepted that this
15 milk chocolate was confectionery and subjected it to VAT. Mr Beecham said “at that time all our products were aimed at parents buying a milk chocolate treat for their children”.

20 22. Kinnerton regularly exhibited at conferences and trade shows, such as the Olympia Allergy Show, to engage directly with the parents of children who suffered from allergies. It began to receive requests for a safe cooking chocolate. Mr Beecham decided to create a cooking chocolate which would not only be suitable for those with a nut allergy, but would also exclude dairy, egg and gluten.

25 23. Production of a plain chocolate bar suitable for cooking began in 2003, with the product being moulded into 100g bars. Because Kinnerton understood the product to be cooking chocolate, no VAT was added to the price. In 2010, under pressure from one of the main supermarkets, Kinnerton had either to reduce the price of the product or reduce the size; it decided to reduce it from 100g to 85g. That 85g product is the Bar at issue in this appeal.

30 24. In the period after 2003, Kinnerton used the same allergy-free plain chocolate in “free-from” lollipops and seasonal items such as Easter eggs. Kinnerton accepted these were confectionery and added VAT to the price.

35 25. In 2015 Kinnerton began an exercise to brand, or rebrand, a number of products under the label “Just”. After the HMRC Decision the Bar was repackaged using new “Just” branding. At or around the same time, Kinnerton produced mini “Just” chocolate bars of 25g, using the same chocolate recipe as for the Bar. Kinnerton accepted that these mini chocolate bars were confectionery and added VAT to the price.

40 26. After having considered the HMRC Decision, Kinnerton decided to add VAT to the Bar in order to reduce the risk of financial exposure to irrecoverable VAT, were it to lose this appeal.

Facts about market positioning of the Kinnerton brand

27. All of Kinnerton's other products are confectionery, and its reputation was built on selling character branded confectionery products to children. Its name includes the word "confectionery".

- 5 28. Ms Vicary emphasised, and it was not in dispute, that the manufacturers of two of the Other Bars had a brand which was focused on cooking: Menier sold only baking products, and Dr Oetker manufactured only (a) cooking products and (b) ready-made pizzas.

Facts about recipe/ingredients

- 10 29. Ms Whiteside's witness evidence was that cooking and eating chocolate could be distinguished because eating chocolate typically contained around 30% cocoa solids and milk, whereas cooking chocolate typically contained more than 50% cocoa solids and no milk; the higher cocoa content and lack of milk made the chocolate suitable for cooking. However, under cross-examination Ms Whiteside accepted that
15 she was talking about "typical" chocolate, and that (a) it was possible for cooking chocolate to be made from milk chocolate (see Dr Oetker's and Menier's milk chocolate bars); and (b) many brands of eating chocolate contain a high cocoa content and no milk, such as Lindt Excellence 90%.

- 20 30. Although I accept Ms Whiteside's evidence that plain chocolate is generally used for cooking, and that more milk chocolate is more commonly sold as confectionery than plain chocolate, I find that it is not possible to decide whether a product is cooking chocolate or eating chocolate from the recipe.

31. In any event it was not disputed that:

- 25 (1) the recipe used to make the Bar was identical to that used to make some of Kinnerton's confectionery, such as plain chocolate Easter eggs; and
(2) it was not possible to have two separate recipes because (a) Kinnerton had identified only a single chocolate supplier which could reliably provide allergen-free chocolate, and (b) "it was not commercially viable" to use two different recipes, even had another supplier been identified.

Facts about the packaging of the Bar

32. As already noted, the Tribunal was provided with the Bar both in its original wrapper, and as repackaged following the "Just" rebranding in 2015.

The original packaging

- 35 33. The Bar was sold in a brown wrapper, with the words "Dairy Free", "Egg Free", "Gluten Free", and "Nut Free" in coloured circles approximately one inch in diameter across the centre. Mr Beecham's evidence was that this reflected Kinnerton's primary aim, which was to "emphasise the fact that the product was 'free from' the various allergies [sic] as this was our target market", and that this "traffic light" labelling was designed "to catch the eye of potential customers" and needed to be "a clear and
40 predominant feature" because it was the Bar's "unique selling point". In his oral

evidence he said “what the world needed was a free-from chocolate, not another cooking chocolate”.

34. Underneath the coloured circles, in large text, are the words “Luxury Dark Chocolate”, and at the bottom of the packet, in print which was roughly 1/3 smaller,
5 are the words “Delicious for cakes and desserts”.

35. Mr Beecham explained that he had designed the packaging in 2003 by reference to the wrapper used on Menier’s chocolate, which at that time read¹:

“chocolat patissier²

Menier

10

Swiss

dark chocolate

For fine cakes and desserts”

36. Mr Beecham understood Menier’s to be the only chocolate which was zero-rated for cooking purposes, and he told the Tribunal that he “used the same wording because it [Menier’s] was vat-free”. However, he did not include “patissier” – a French word for “pastry cook” – because he thought it might not be recognised by Kinnerton’s customer base. He saw the word “Swiss” as reflecting luxury, so added the word “luxury” in front of the words “dark chocolate”. The words “for cakes and desserts” were intended to mirror Menier’s “for fine cakes and deserts”, but he added the word “delicious” because in his experience people often expect “free-from” products to taste less good because so many ingredients had been removed. He said it was important for “free-from” manufacturers to emphasise taste by adding the word “delicious”, and that the labels on other free-from products sometimes use similar wording, such as “Heinz deliciously gluten-free macaroni”. I accept Mr Beecham’s
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25 evidence as to his reasons for selecting the wording used on the front of the Bar.

37. On the back of the Bar’s wrapper is this message:

“Kinnerton – the Careful Chocolate Company – became the first food company to separate its production facilities into Nut and Nut Free Zones, allowing millions of people to eat our chocolate with that special degree of reassurance. In response to consumer demand, we have created a bar of plain chocolate that adds Dairy-Free, Gluten-Free and Egg-Free to the list. This innovative bar has been designed to be acceptable to both children and adult taste. We hope you will enjoy this chocolate, secure in the knowledge that it is carefully manufactured in our Norfolk factory under strictly controlled conditions.”
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38. The back of the wrapper also contains specific statements that the Bar was “manufactured in a ‘nut-free zone’”, and is “nut free, dairy free, egg free, wheat free,

¹ In setting out the writing on the wrappers, I have made only a rough approximation to the relative print sizes.

² The word “patissier” was removed from the packaging after the relevant period.

gluten free, suitable for vegans, no artificial colours or flavours”. There is a list of ingredients in English and French, various addresses, the nutritional make up of the Bar in accordance with both EU law and Australian law, and the bar code. The EU nutritional information³ includes the words “Servings per package: 4” and “Serving size: ¼ bar”⁴. Mr Beecham’s unchallenged evidence was that he had incorporated serving sizes on the packaging because he had been relying on the format used by Menier, which also included portion information, see further §46.

The “Just” packaging

39. When the Bar was repackaged under the “Just” brand, the words “Kinnerton Just chocolate” cover around half of the front of the wrapper, with the word “Just” being very large and dominant. The other half of the wrapper says “Deliciously smooth and dark”, then “Ideal for cakes and desserts” and finally “free-from Dairy-Egg-Gluten-Nuts”.

40. On the back is this message:

15 “At Kinnerton we understand how important it is to make our Just Chocolate bars free from dairy, egg, gluten and nuts so that it can be enjoyed by everyone. Perfect for adults, children and chocolate-lovers with allergies.

20 We are passionate about making sure that our chocolate tastes absolutely delicious, has no artificial flavour additives and is manufactured in a nut free zone.

So, Just Chocolate is just that...real, delicious chocolate.”

41. Other information is similar to that on the Bar, but there is no “serving size” in the EU information, and under Kinnerton’s address are the words “For delicious cake and dessert recipe ideas, see website”.

Facts about the packaging of the Other Bars

42. The parties were keen to identify similarities and differences between the packaging of the Bar and that of Other Bars. In making findings about the Other Bars I emphasise that I have come to my decision by reference to how the Bar is held out for sale, and not on the basis that it is similar to, or different from, Other Bars. As already stated, this decision is not concerned with VAT status of Other Bars.

Dr Oetker

43. The two Dr Oetker bars are called “Fine Cooks’ Dark Chocolate” and “Fine Cooks’ Milk Chocolate”. The only other words on the front of the wrapper are the percentage of cocoa solids (54% and 35% respectively) and the words “perfect for home baking”. Behind the words, the Dark Chocolate bar has a picture of a chocolate

³ I have omitted the parts which are in French.

⁴ The Bar also contains Australian nutritional information. both on the original and the Just versions, and that information includes serving sizes. No evidence or law was provided about the reasons for this, and whether it was optional, and I have not taken it into account in making my findings.

cake and the Milk Chocolate bar has a picture of what appears to be a chocolate pudding.

44. The backs of the two Dr Oetker wrappers are identical, apart from slight differences in the list of ingredients. There is a section headed “A heritage of baking”, which says that Dr Oetker first began making baking products in 1893, and ends “today we are still a family business, famous for our baking passion and quality products which help you enjoy even better baking”. Underneath is a section headed “Directions”, which explains how to melt chocolate using (a) a bowl of hot water and (b) a microwave; that is followed a warning about taking care with very hot chocolate. At the bottom is the heading “Recipe Ideas” and the text reads “For inspiring recipe ideas for all occasions visit our website...”. There is no information about “serving size”.

Menier

45. The front of the Menier bar is described earlier in this decision at §35. On the back, in a frame which provides emphasis, are the words:

“The story of Menier dates back to 1816 when Jean Antoine Menier set up his company. Over the years the name Menier became renowned for the quality of its chocolate, winning many accolades and awards. Today Menier remains synonymous with chocolate of the highest quality.”

46. Also on the back of the packaging are the ingredients and nutritional information; the latter is set out as “per 100g” and “per portion” of 16.6 grams. The back of the wrapper also contains details of the bar’s manufacturer and distributor, and various logos, such as that of the vegetarian society.

Green & Black’s

47. The words “Dark Cooking Chocolate” and “Milk Cooking Chocolate” are in the centre of a one inch coloured band at the top of the wrapper. The centre of the wrapper has the words “Green & Black’s Organic” and the bottom 25% of the Dark Chocolate label contains these words (the different wording used on the Milk Chocolate label is shown in italics):

“Dark/*Milk* Chocolate
made with organic Trinitario cocoa beans
for a finely balanced cooking chocolate
70/37% cocoa
30 easy to use 5g pieces”

48. For both bars, the back of the wrapper begins with a section headed “Tasting notes”. This states that “our Dark/*Milk* Chocolate is ideal for chocolate recipes because of its high content of cocoa solids...which gives it a smooth consistency for easier melting”. It then sets out ingredients, nutritional information, details of the bar’s manufacturer and distributor and various logos, such as “suitable for vegetarians”.

49. A recipe is printed on the inside of the wrapper. The Dark Chocolate bar provided to the Tribunal had a chocolate tiffin recipe along with a picture of the baked tiffin and a note on the corner which says “to make measuring easier, each piece of Green & Black’s Cooking Chocolate weighs 5g”. Below the recipe is information about Green & Black’s Ultimate Chocolate Recipes cookbook, and where to find baking tips and recipes on the company’s website. The Milk Chocolate bar has a recipe for Chocolate Charlotte; the format and the comments around the edge of the recipe are the same as for the Dark Chocolate.

50. The layout of the wrapper for Green & Black’s Dark 70% chocolate is similar to that of the two bars already described, but the band at the top says “Dark 70%” with no reference to cooking. The message at the bottom says “Dark Chocolate made with the finest Trinitario cocoa beans *for an intense taste*”, in contrast to the wording on the cooking chocolate, which ends with the words “*for a finely balanced cooking chocolate*”. Portion information is on the front of the wrapper. The back makes no reference to cooking, but instead emphasises the taste of the chocolate in the mouth of the consumer. The inside of the wrapper is blank.

Lindt

51. Samples of two Lindt chocolate bars were exhibited, being “90% cocoa dark supreme” and “70% cocoa dark”. The front of the wrapper for each includes the words “luxuriously smooth” and “deliciously intense”. The Bundle included pictures of five further bars of Lindt chocolate, of which:

- (1) one was a bar with 99% cocoa, and no reference to cooking on the wrapper;
- (2) three had the words “cooking” in large print under the Lindt name; and
- (3) one had the word “dessert” in place of “cooking”, but stated that it was “speciality cooking chocolate” in smaller print.

Facts about product placement in supermarkets

52. The overwhelming majority of the Bars are sold from supermarkets. When the Bar was first produced, it was placed in the part of the supermarket which held cooking products. However, by the relevant period most supermarkets had a “free-from” section, and the Bar was placed in that section.

53. Ms Siddall visited three supermarkets to research where the Bar was placed for sale, but only Sainsbury’s stocked the Bar. Her evidence, which was supported by pictures, was that within the free-from section products were grouped by type, so that confectionery items were placed together, and baking products were placed together. The Bar was not with the baking products, but next to confectionery, including Sainsbury’s own “deliciously free from” orange chocolate bars and plain chocolate bars.

54. When this evidence was put to Mr Beecham in cross-examination, he accepted that the product placement observed by Ms Siddall was typical of supermarkets generally and that this was the position throughout the relevant period. He also said

that he had no influence on where the Bar was placed in supermarkets. However, during the relevant period he had made contact only with buyers who dealt with “free-from” products and had not approached or made contact with buyers who sourced baking products for supermarkets. Furthermore, he had not asked any “free-from” buyer to ensure that the Bar was placed with baking products rather than with confectionery items within the free-from section of a supermarket.

55. I find as a fact that the Bar was normally placed alongside other confectionery products within the free-from section of supermarkets, and not with free-from baking products, and that Mr Beecham knew this to be the position.

56. In addition to the Bar being sold with the confectionery products in the supermarket, Ms Siddall also noted that it was being sold together with an Easter egg, as a single item, with the Bar displayed below the Easter egg and within the same box. This combined product was also displayed on Kinnerton’s website. Mr Beecham agreed that the Bar was sold in this way during the relevant period. These sales were standard rated.

57. The chocolate manufactured by Dr Oetker and Menier, and the cooking chocolate manufactured by Green & Black’s, were all sold from the baking products section within supermarkets and not alongside confectionery.

Facts about website information and recipes

58. At the relevant time, Kinnerton’s website did not include any reference to using the Bar for cooking; it also contained no recipes. The Bar was instead displayed on the Kinnerton website alongside a “free-from” Easter egg and a chocolate Santa.

59. In or around October 2015, after the end of the relevant period, Kinnerton included a pdf of three recipes on its website, and more recipes were subsequently added.

60. The Tribunal was provided with a number of recipes from independent websites which recommended the Bar. Many came from a website which specialises in vegan and allergen-free foods, called “Lucy’s Friendly Foods”, but there were other examples, including a recipe from the BBC and one from Asda. The amount of chocolate used in many of these recipes was 100g or 150g; few required 85g, being the exact amount in the Bar. However, as one would expect, the amount of chocolate required in recipes using the Bar was highly variable, from “2 bars Kinnerton’s chocolate” to “two teaspoons of grated Kinnerton chocolate”.

Facts about advertising

61. The only advertisement provided as evidence had been printed in the Anaphylaxis Campaign Newsletter of Autumn 2013. The advert is headed (grammar as in original) “Kinnerton ‘The Kids choice that Mums trust!’” followed by four colour pictures: the Bar; a collection of lollipops, and two other confectionery items. Underneath is the following text, with the capitalised words in different colours:

“We go to extraordinary lengths to make our chocolate suitable for those who suffer from Allergies. With a range of NUT-FREE, DAIRY-

FREE, GLUTEN-FREE AND EGG-FREE products there is something for everyone.

5 From DAIRY, NUT, EGG and GLUTEN FREE treat-sized lollies to dark chocolate bars, which are ideal for cooking. There's also nut-safe chocolate bars and a variety of Easter eggs and gifts..."

62. The second paragraph is flanked by colour pictures of what Mr Beecham confirmed were samples of Kinnerton's milk chocolate novelty confectionery.

63. It was Mr Beecham's evidence that Kinnerton also advertised in the magazine for the British Allergy Society, but no advertisements were adduced in evidence and no information provided by the witnesses, so the Tribunal was unable to make any related findings.

Weight

64. Mr Southern pointed out that HMRC's Statement of Case had said "no conclusions in relation to the intended use of the product can be drawn from its weight". I asked whether he was submitting that the Tribunal was unable to make findings about the Bar's weight, but he said he was merely drawing attention to "the weight and authority of HMRC's evidence" and was not seeking to limit the Tribunal's obligation to find the facts from the evidence.

65. I find as follows: the Bar weighs 85g, less than all the Other Bars which were zero-rated as cooking chocolate: Menier is 100g, Dr Oetker 150g and Green & Black's 200g. Lindt's Cooking chocolate was not exhibited, but it was common ground that it was sold in 200g bars.

Views of consumers

66. HMRC provided the Tribunal with a selection of online consumer comments, the overwhelming majority of which referred to the quality of the chocolate as confectionery, such as:

"As you put each square of deliciousness into your mouth, you can tell straight away that this is good quality."

"This is the best 'free-from' chocolate I've tasted."

30 "Dairy free chocolate does not normally have the right melt in the mouth texture, but this does and it tastes good too."

67. Some reviewers referred to the reference on the packaging to cooking:

35 "the base of the bar is the product title 'Luxury Dark Chocolate', and the fact that this chocolate is 'Delicious for cakes and desserts'. I would like to state here that the chocolate is also Delicious For Eating By Itself."

"It claims to be 'delicious for cakes and desserts' which seems sacrilegious to me – what's wrong with just plain eating it?"

"I still don't get the 'cakes and desserts' thing."

68. HMRC provided three reviews which referred to using the Bar for cooking, and Mr Beecham's second witness statement also exhibited the first two of these:

“perfect for baking and enjoying as a treat.”

5 “although I am sure it is highly suitable for cooking, is in fact far too good to use just in cooking.”

“lovely all free from dairy gluten etc. Not to[o] bitter and can be used for baking. Just great to find a bar that is smooth and nice to taste in the free from ingredients”.

69. Mr Beecham's second witness statement also exhibited reviews of Other Bars, and pointed out that these included references to being eaten as confectionery, including:

“I know this is baking chocolate – but in our house it never makes it to bake.” [Menier]

15 “this is my ultimate favourite for baking, icing and the occasional snack.” [Menier]

“there is no better cooking chocolate. Great for cakes, brownies, mousse, chopped in chunks for muffins and for emergency nibbles at night.” [Green & Black's]

“Good to cook with or just eat.” [Green & Black's]

20 “I have to buy this just before I need it otherwise it all gets eaten.” [Green & Black's]

70. Mr Beecham also exhibited three emails from customers, one of which says “I have been using your chocolate for cooking cakes”; a second complains that the Bar contained less than 85g and this caused problems when following a recipe, and the third said “delicious for cakes or desserts or just eat it as it is yummo”.

71. Both parties provided extracts from social media and from other websites, including:

30 “this chocolate is fantastic! one of my sons has multiple allergies and this is his alternative. It is such a brilliant product that my other two children love eating it too. I have melted it onto a home made free from cake.” [Sainsbury's web app]

“I buy lots of this. Yummy yummy yummy.” [Morrisons webshop]

“first time I've had chocolate in nearly 40 years and what a treat absolutely fantastic chocolate...” [Holland and Barratt]

35 “Great for baking or just eating straight from the pack.” [Holland and Barratt]

“Kinnerton...I'm after the nut safe dark one for cooking.” [mumsnet]

72. Finally, there were also a small number of consumer comments on the recipe sites, including “by far the best dairyfree choc for melting/cooking” on Lucy's Friendly Foods.

Award

73. In 2015, the Bar was awarded “commended” in the FreeFrom Food Awards in the “confectionery and chocolate” category. There was no evidence before the Tribunal as to the criteria for entering that category.

5 74. Kinnerton’s website refers to that award, and cites the comments which were made by the competition judges that the Bar was “simple, flavourful, just like normal chocolate”.

The case law and the relevant test

10 75. It was common ground that to decide whether an item of food is zero-rated or standard rated, the Tribunal must conduct a multi-factorial assessment, see *Procter & Gamble UK v HMRC* [2009] EWCA Civ 147 (“*Procter & Gamble*”).

15 76. I agree with Ms Vicary that the relevant test for deciding whether the Bar is confectionery or is zero-rated is that set out in *Fluff Ltd (t/a Mag-it) v C&E Comrs* [2001] STC 674, where Laddie J held at [14] that the issue as to whether an item of food was zero-rated was “in large part answered by the way in which it is sold or supplied”. Newey J endorsed that approach in *HMRC v Roger Skinner* [2014] UKUT 204 (TCC) (“*Skinner UT*”) at [23] and [34], when he said that the relevant test was how the product was objectively “held out for sale” by the supplier; in coming to that conclusion he endorsed the approach taken by the FTT (Judge Mosedale and Mr Collard) under reference [2012] UKFTT 525 (“*Skinner FTT*”).

77. My aim in conducting the multi-factorial assessment is therefore to establish how the Bar was objectively held out for sale. In carrying out that exercise, I am mindful of the warning given by Jacob LJ in *Procter & Gamble* at [14]:

25 “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.”

How the Bar is held out for sale

30 78. Almost all sales of the Bar are made from the “free-from” aisles in supermarkets. The two primary factors are therefore (a) placement in the supermarket and (b) packaging, and I consider these first.

Placement in the supermarkets

35 79. The Bar is not placed alongside other baking items, unlike Menier, Dr Oetker and Green & Black’s cooking chocolate. It is instead found in the free-from section, where it is placed alongside other confectionery items, not with baking items. Thus, by its placement in supermarkets the Bar is being held out as confectionery rather than as a cooking chocolate.

40 80. The Bar was also sold packaged together with an Easter egg as a single item. Mr Southern said that this was irrelevant because Kinnerton was making a composite supply of a standard rated Easter egg to which the Bar was ancillary. But the issue here is the VAT status of the Bar taken alone. The question of single/composite

supply only arises if the Bar is zero-rated. I agree with Ms Vicary's submission that, by packaging the Bar with an Easter egg, Kinnerton was holding it out to be a bar of eating chocolate.

Packaging

5 81. It was not in dispute that the primary aim of the Bar's wrapper was to emphasise its "free-from" status. The secondary message on the front of the packaging is "Luxury Dark Chocolate", followed by the words "delicious for cakes and desserts" in smaller print. I find that that the words "delicious for cakes and desserts" was less important than the other two messages on the front of the Bar.

10 82. Mr Southern submitted that the words "delicious for cakes and desserts" on the Bar was no different from Menier's "for fine cakes and desserts". Ms Vicary distinguished the two, saying that the word "for" used by Menier describes the purpose of the chocolate: it is "for" cakes and desserts. In contrast, the wording on the Bar stressed taste, not purpose. She also pointed out that Green & Black's, Dr
15 Oetker and Lindt bars all contain clear messages that they are, respectively, "for cooking", "fine cooks' chocolate", "cooking" or "speciality cooking chocolate". Kinnerton does not include the words "cooking" or "cook" anywhere on the packaging. Instead, it contains a single mention of "cakes and desserts" which emphasises the taste of the chocolate.

20 83. I agree with Ms Vicary (a) that the wording on the Bar stresses the taste of the chocolate when used for cooking; (b) omits any direct reference to "cook" or "cooking", and therefore (c) does not expressly state that the Bar is cooking chocolate.

25 84. The back of the packaging makes no reference at all to cooking, either explicitly or by inference. Ms Vicary contrasted this with Dr Oetker's chocolate, where the wrapper describes the historic roots of that business as a producer of baking products, and also explains how to cook with chocolate. The Bar not only has no recipes (unlike Green & Black's, which uses the inside of the wrapper for that purpose), but also has no information about where recipes can be obtained (unlike both Dr Oetker
30 and Green & Black's).

85. It is clear that there is no holding out via the back of the wrapper that the Bar is cooking chocolate. The written message instead emphasises that the Bar is (a) allergen free and (b) has "been designed to be acceptable to both children and adult taste".

35 86. Ms Vicary also drew attention to the reference on the Bar to "Servings per package: 4" and "Serving size: ¼ bar". The parties accepted that the inclusion of "serving size" information was optional under EU law (see Recital 35 and Article 33 of Regulation 1169/2011). There is no reference to serving sizes on Green & Black's "cooking" chocolate, on Dr Oetker's chocolate or even on the two bars of Lindt eating
40 chocolate. Mr Beecham decided to include this information on the Bar because he was using Menier as a model, but that is irrelevant. The test is how the Bar was objectively held out for sale, not the supplier's subjective reason for including a

particular element on the wrapper. By informing prospective purchasers that an 85g product contains four servings of chocolate, the Bar is being held out as confectionery.

5 87. Taking into account both the back and the front of the Bar, and giving some weight to the words “delicious for cakes and desserts”, I find that the Bar is held out as an item of confectionery which can also be used for cooking.

Kinnerton’s website

10 88. Although Kinnerton did not sell Bars via its website, the information it contained is relevant to holding out, because it is a way in which the company’s products are displayed to potential customers.

15 89. At the relevant time, Kinnerton’s website contained no reference to using the Bar for cooking. Instead, it displayed the Bar alongside confectionery items such as Easter eggs and chocolate Santas, and packaged together with an Easter egg as a single item. It was only later that the website was changed to include recipes. I find that, during the relevant period, Kinnerton’s website held out the Bar as confectionery.

Overall branding

20 90. All Kinnerton’s other products are confectionery, and the word “confectionery” is in the company’s name. It produces no other products which are targeted at home baking.

91. Taken alone, this factor would be insufficient to decide the case: it would of course be possible for a company to produce a product which differed from its main product lines. But there is no doubt that Kinnerton’s overall branding is consistent with the Bar being held out as confectionery.

25 *Consumer perception*

92. In *Skinner FTT* the Tribunal said at [163]:

30 “...the intentions of any particular purchaser must be irrelevant: but if the evidence is that all or virtually all customers bought the product for a particular purpose, that is evidence (albeit not conclusive) that the product was held out for sale for that particular purpose. And that is objectively determined evidence of the supplier's intention.”

35 93. That approach was challenged at the UT, but Newey J held at [42] that there was no error of law; the FTT had been entitled to consider customer perceptions for the limited purpose of showing “the light it might cast on how the products in dispute had been held out for sale”.

94. I have found as a fact that the overwhelming majority of these referred to the quality of the chocolate as confectionery. Although some of the customer reviews and other online comments (see §§66ff) refer to using the Bar for cooking, some express surprise at this, and many included a wider comment (my emphases):

“perfect for baking and enjoying as a treat.”

“although I am sure it is highly suitable for cooking, is in fact far too good to use just in cooking.”

5 “lovely all free from dairy gluten etc. Not to[o] bitter and can be used for baking. Just great to find a bar that is smooth and nice to taste in the free from ingredients.”

“delicious for cakes or desserts or just eat it as it is yummo.”

“Great for baking or just eating straight from the pack.”

10 “this chocolate is fantastic! one of my sons has multiple allergies and this is his alternative. It is such a brilliant product that my other two children love eating it too. I have melted it onto a home made free from cake.”

95. Comments made by consumers about the taste of Other Bars is not a relevant factor in my decision: as I have already said, I am not deciding the VAT status of the Other Bars. But I also note that the comments about the Other Bars set out at §69 generally recognise that the Other Bars are cooking chocolate which can also be eaten (emphases added):

“I know this is baking chocolate – but in our house it never makes it to bake” [Menier]

20 “this is my ultimate favourite for baking, icing and the occasional snack” [Menier]

“there is no better cooking chocolate. Great for cakes, brownies, mousse, chopped in chunks for muffins and for emergency nibbles at night” [Green & Black’s]

25 “Good to cook with or just eat” [Green & Black’s]

“I have to buy this just before I need it otherwise it all gets eaten” [Green & Black’s]”

96. In contrast, the majority of the comments about the Bar describe a bar of eating chocolate which can be also be used for cooking. They are therefore consistent with my findings that the Bar was held out for sale as confectionery via its placement in supermarkets, by the packaging, by the website and by its overall corporate branding.

Adverts

97. In the single advert provided in evidence the Bar was next to, and not distinguished from, confectionery items, and the sentence about the Bar did not say that it was “cooking chocolate” but that it was “ideal for cooking”.

98. That is consistent with my other findings, that the Bar was held out as confectionery which could also be used for cooking.

The award?

99. I place no weight on the fact that the Bar was won a prize in the FreeFrom Food Awards, because there was insufficient evidence as to the scope of the category. I

also place no weight on the citation included on Kinnerton’s website: it simply sets out what the judges thought of the Bar.

Size?

100. Unlike Green & Black’s cooking chocolate, the Bar is not formed into
5 conveniently sized 5g pieces to make it easier to use in recipes. It is also a smaller
size than all the Other Bars which were identified by their wrappers as “for cooking”
or similar. Ms Vicary submitted that

10 “...each square weighs some 3.54g. This is not an amount which is
readily broken for use in cooking recipes involving chocolate. For
example, a recipe requiring 100g of chocolate would require a
customer to purchase two bars of the Product, to then use the entirety
of the first and some 4 and a ¼ (4.24) squares of the second.”

101. In the context of recipes which specify 100g or 150g of chocolate, I agree that
15 the Bar is less easy to use than Other Bars which weigh exactly those exact amounts.
I also accept that if the Bar had been divided into “easy to use 5g pieces”, that would
be a factor in favour of it being held out as cooking chocolate. However, the amount
of chocolate required in recipes is highly variable and I decided to place no weight on
this factor.

Purpose of the supplier?

102. Mr Southern submitted that “the purpose of the supplier is pre-eminent”. If by
20 this he meant that the *objective* purpose of the supplier is pre-eminent, and that this is
to be determined by how a product is held out for sale, I agree. In *Skinner UT* Newey
J confirmed at [23] that the FTT had been correct to find at [165] that it was ‘the
objectively determined intentions of the supplier that matters’. However, if by his
25 submission he meant Mr Beecham’s subjective intention, that is not a relevant factor.

Purpose of the consumer?

103. Mr Southern also submitted that the “purpose of the consumer” and the “typical
consumer” was a relevant factor. He relied on *Rank Group plc v R & C Comrs* (Case
30 C-259/10) [2012] STC 23 (“*Rank*”); *Asda Stores Ltd v R & C* [2010] SFTD 175
 (“*Asda*”) and *Ferrero v HMRC* [1997] STC 881 (“*Ferrero*”).

104. The issue in *Rank* was the principle of fiscal neutrality in the context of two
gaming machines. The CJEU said at [43] that in determining whether two supplies of
services were “similar” when considering that the principle of fiscal neutrality
“account must be taken of the point of view of a typical consumer”. I did not find
35 *Rank* to be a relevant authority in the context of this appeal.

105. In *Asda* the FTT followed the Court of Appeal’s judgment in *Ferrero*. In
relation to that judgment, I have instead followed the later guidance of that Court in
Procter and Gamble where Toulson LJ said at [63]:

40 “Mr Cordara [Counsel for P&G] was also critical of the way in which
the tribunal applied the ‘ordinary man in the street’ test, which received
the blessing of this court in *Ferrero UK Ltd* [1997] STC 881. I rather

5 regret the introduction of the ordinary man in the street into this area, because I do not regard it as necessary and it has led on to a distracting argument about what knowledge should be attributed to that hypothetical person. I agree with Jacob LJ that the approach approved in *Ferrero* really amounted to saying no more than that it was for the tribunal to decide what was the reasonable view on the basis of all the facts known to the tribunal; and it conveys that this is not a scientific question. In determining that question I do not see that any advantage is gained by referring to the hypothetical ordinary person in the street.”

10 *The precise line?*

106. In *Procter & Gamble* Jacob LJ said at [32] that “you do not have to know where the precise line is to decide whether something is one side or the other”. It is clear from the analysis of the factors set out above that the Bar falls on the confectionery side of the line.

15 **Other submissions on behalf of the Appellant**

107. In addition to addressing the “holding out for sale” test, Mr Southern also made two other submissions.

Public interest

20 108. Mr Southern submitted that it would be in the wider public interest to decide this appeal in Kinnerton’s favour, because deciding for HMRC would disadvantage those who are allergic to normal chocolate: they would have to pay an extra 20% to purchase chocolate for cooking.

25 109. I reject this argument. The Tribunal is a statutory body, and my task is to apply VAT law, not to decide cases by applying a wider “public interest” test. Even were I to have that wider jurisdiction, it is clear that VAT law does not prevent Kinnerton (or any other manufacturer) from making an allergen-free cooking chocolate. However, for that chocolate to be zero-rated it must be held out for sale as cooking chocolate, not as confectionery. That is not the position here.

The list of excepted Items

30 110. Mr Southern also drew attention to the use of the word “chocolates” rather than “chocolate” in the list of excepted items at Note 5 to Group 1:

35 “for the purposes of item 2 of the excepted items ‘confectionery’ includes chocolates, sweets and biscuits; drained, glace or crystallised fruits; and any item of sweetened prepared food which is normally eaten with the fingers.”

111. In his skeleton argument he said:

40 “‘Chocolates’, in this context, must include not only boxes of chocolates (which, of course, may be described as food eaten with the fingers), but also different forms of chocolate (e.g. dark, milk, white, diabetic etc.) in various forms. In Sch 8, Group 1 Note (5) says: ‘confectionery includes chocolates’. It does not say: ‘confectionery includes chocolate’. The addition of the words ‘normally eaten with

5 the fingers' indicates that what is being referred to in this context is products which can be eaten like crisps, popcorn or sweets. 'Chocolate' is something broader...Bars of chocolate, whether cooking or eating, are designed to be broken into pieces. It does not follow that all bars of chocolate are confectionery. Bars of chocolate may accordingly be food or confectionery, depending upon the multi-factorial test."

10 112. I did not find this easy to follow, and asked Mr Southern to clarify his position. Mr Southern said that he accepted that chocolate came within Note 5 to Group 1 "but only if it was broken up". Ms Vicary responded by saying that eating chocolate is clearly an "item of sweetened prepared food which is normally eaten with the fingers". I agree with Ms Vicary that a bar of eating chocolate falls within the list of excepted items.

Decision and appeal rights

15 113. For the reasons set out above, I find that the Bar is standard rated as confectionery.

20 114. This document contains full findings of fact and reasons for the decision. If Kinnerton is dissatisfied with this decision, it has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

25 **ANNE REDSTON**
TRIBUNAL JUDGE

RELEASE DATE: 21 JUNE 2018

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