Neutral Citation: [2023] UKUT 00020 (TCC)

Case Number: UT/2021/000148

UPPER TRIBUNAL
(Tax and Chancery Chamber)

By remote video hearing

VAT – whether certain Organix and Nakd bar products fell within exception to zero-rating as "confectionery" in Item 2 of Group 1 of Schedule 8 of VATA 1994 - relevant test regarding error of law where allegation tribunal failed to take account of relevant factor – whether necessary to show FTT perverse in failing to take account of factor- no – whether FTT erred in ruling out of consideration healthiness, and comparison of ingredients in traditional confectionery on basis of case-law (High Court decisions in Kalron and *Premier Foods*) *– yes –whether errors material applying test set out by Court of Appeal in Degorce- yes- appeal remitted to FTT for new decision*

Heard on: 14 December 2022
Judgment date: 23 January 2023

Before

JUDGE SWAMI RAGHAVAN
JUDGE GUY BRANNAN

Between

WM MORRISON SUPERMARKETS PLC

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Valentina Sloane KC, Counsel, instructed by Deloitte LLP

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

DECISION

INTRODUCTION

1. The appellant, the well-known supermarket, Morrisons, ("**Morrisons**") appeals against a decision of the First-tier Tribunal ("**FTT Decision**") published as *WM Morrison Supermarkets PLC v HMRC* [2021] UKFTT 106 (TC). The FTT rejected Morrisons' argument that certain products it sold (Organix Bars and Nakd Bars) were zero-rated as "food of a kind used for human consumption" (under Group 1 Schedule 8 Value Added Tax Act 1994 ("**VATA 1994**"). Instead, the FTT agreed with HMRC that the products fell within the exception the legislation provided to the zero-rating of such food for "confectionery in Item 2 of Group 1 of Schedule 8 of VATA 1994.

2. Although Morrisons' position was that the Organix and Nakd bars were zero-rated, it had, when it sold the products on to customers, accounted to HMRC for standard rate VAT at 20%. It thus sought repayment of that output VAT (just over £1 million in relation to the Nakd bars in the period October 2014 to July 2018 and £97,000 in relation to Organix bars in the period October 2013 to July 2017).

3. The FTT upheld HMRC's decisions that the products bore standard rate VAT and also HMRC's refusal to repay the amounts in respect of output VAT Morrisons sought. With the permission of the Upper Tribunal, Morrisons now appeals to the Upper Tribunal against the FTT's Decision on the grounds the FTT, in analysing whether the products were "confectionery" wrongly treated certain factors as irrelevant, namely: (1) (i) the actual or perceived healthiness of the products and/or (ii) the products' marketing as such (2) the absence of cane sugar, butter and flour (being ingredients associated with traditional confectionery).

LEGISLATION

4. Section 30(2) VATA 1994 provides for zero-rating of goods described within Schedule 8, Group 1 of which includes "Food of a kind used for human consumption", along with a list of excepted items and interpretative notes. Item 2 is the relevant exception for the purposes of this appeal. This excepts from zero-rating:

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

5. Note 5 to the list of excepted items provides:

> "for the purposes of item 2 of the excepted items 'confectionery' includes chocolates, sweets and biscuits; drained, glacé or crystallised fruits; and any item of sweetened prepared food which is normally eaten with the fingers".

FTT DECISION

6. Unless otherwise stated paragraph references are to those in the FTT decision. The relevant products Morrisons sold were two different types of bars manufactured by Organix (Organix Carrot Cake Soft Oaty bar, Organix Banana Soft Oaty bar) and 18 types of bars manufactured by Nakd (listed in full at [12] to [15]) which could be broken down in the following three categories: (1) "Fruit and Nut bars" (such as "Nakd Cashew Cookie Wholefood Bar" and "Nakd Cocoa Orange Wholefood Bar", (2) "Oaties" (such as "Nakd Apple Pie Wholefood Bar" and "Nakd Banana Bread Wholefood Bar") and (3) "Crunchies" ("Nakd Banana Crunch Wholefood Bar" and "Nakd Strawberry Crunch Wholefood Bar").

7. The FTT concluded all were "confectionery". They therefore fell within the exception to zero-rating and thus were standard-rated for VAT purposes. The FTT went on to consider, and

reject, the appellants' argument, in respect of both the Organix and Nakd bar products, that even if they were confectionery, they were zero-rated because they were cakes. The appellants do not pursue any such alternative argument before us.

8. There is no dispute that the general approach the FTT adopted, as to whether the products were confectionery, was correct. That was to conduct a multi-factorial evaluation of the various attributes of the products, and to come to a view on whether the ordinary person on the street would regard a given product as confectionery. The FTT did not seek to define the term "confectionery" but on the basis of the wording in Note 5, and on the discussion of the meaning of "confectionery" in the case-law, it held that all confectionery had the characteristics of sweetness, and that it was "subject to a process" (any process of mixing or compounding would in principle be sufficient" ([171]). It held the ordinary person would also consider that confectionery had the characteristics that it was (1) normally eaten with the fingers and (2) held out to be eaten as a treat or snack ([172]). Again, neither party suggests the FTT's analysis was wrong in these respects.

9. There is also no challenge to the FTT's underlying findings of fact. The FTT made these findings from a variety of evidence before it: documentary evidence (including lists of ingredients, website marketing for certain products), the witness statements of the appellant's witnesses (a Food Developer at Organix, the appellant's buying manager for "Free from" products, and a customer manager for the appellant's "Customer Insights" team) ([78]). The tribunal was also provided with samples of some of the products and tasted them.

10. As mentioned in the introduction, the appellant's appeal is on the basis that the FTT wrongly failed to consider two particular factors ((1) healthiness, and the products' marketing with regard to healthiness (2) comparison with ingredients of cane sugar flour and butter in traditional confectionery) which were, in the appellant's submission relevant. As we look at in more detail below when discussing the grounds of appeal, the FTT considered the factors irrelevant given its view of the case-law principles.

11. Given that limited scope of the appeal, we can summarise the FTT Decision relatively briefly. Its overall structure was to make its findings of fact and then conduct a multi-factorial evaluation in relation to, first the two Organix products, and then to carry out the same exercise with the Nakd bar products. The FTT did not distinguish between the different Organix and Nakd Bar products. Neither party criticises that approach but the appellant points out that in principle it was open (and remains open should the matter be re-determined) for the products to be considered individually (so for example that a different outcome could be reached in respect of a particular individual type of Organix or Nakd bars within those product ranges).

Organix bars

12. The FTT made extensive findings of fact (at [110] to [131]) relating to the bars. These included the bars' ingredients (principally wholegrain oats and raisins), and the process by which the bars were made (mixing together, "sheeting out" and cutting into oblong bars" which were then baked and cooled). In relation to the target market and marketing, the target market was parents of toddlers and young children, and the bars were held out for sale with other baby snacks. Morrisons' website described the bars as "ideal toddler snack bars". The FTT set out, in detail, the wording and colouring of the packaging. It also inferred from the packaging that the purchasers were "health-conscious". Both bars' texture was described as soft. Regarding the banana bar's taste and texture, this was "sweet and crumbly with some banana flavour". The carrot cake bar was also sweet.

13. Having considered the parties' legal and factual submissions, the FTT went on to conduct its multi-factorial evaluation (at [177]) taking account of the following: as to sugar content although this was half of the sugar content of comparative confectionery, it was more than 25%

by weight. Both bars were sweet to taste, were subjected to a process, were normally eaten with fingers, and were held out for sale as snacks, when consumed. The FTT noted the bars were normally eaten between meals, the same as traditional confectionery. It noted the packaging which was bright and colourful, indicated the bars were held for sale as treats in the same way as confectionery. Regarding the ingredients, it rejected the appellant's submission that the absence of cane sugar, flour and/or butter was a factor pointing to the bars not being confectionery.

14. As for the physical positioning of the product when sold, the FTT was unable to make findings on whether the bars were positioned near traditional confectionery, but noted that even if they were not, that was insufficient to outweigh the other factors. It concluded "…Instead the multi-factorial test gives the clear answer the Organix Bars were confectionery ([178]).

Nakd Bars

15. The FTT made detailed findings of fact (at [185] to [202]) in relation to the Nakd bars under similar headings to those above in relation to the Organix bars.

16. In terms of the ingredients, it found the main ingredient in all was dates (between 37% to 58%), that the Fruit and Nut bars contained significant percentages of nuts and/or dried fruit. For the Oaties, the main ingredient, after dates, was oats. For the Crunch bars, the next main ingredient was "soya protein crunchies". The processing consisted of mixing the ingredients and then cutting the mix into rectangular shape bars.

17. The FTT made extensive findings on the wording on the packaging and colouring and set out extracts from the product descriptions on Nakd's website, customer comments on that website together with extracts from comments which appeared on Morrisons' website. The FTT accepted, on the basis of the packaging and marketing, that the purchasers of Nakd bars were health conscious. Regarding the physical positioning in store, this moved over time from the "free from" aisle, to healthy biscuits and cereals, to healthy snacks ending up by the time of the FTT hearing between protein flapjacks and Morrisons' own brand fibre bars. The bars were sold on the website under "Biscuits and crackers – cereal bars and breakfast biscuits – healthier cereal bars" and under "crips, snacks and nuts – healthier options". Regarding taste and texture, the FTT noted all the samples provided tasted sweet and it inferred the same of products in respect of which no sample had been provide. It noted all had a texture "similar to fudge with finally chopped nuts and/or fruit". The Cocoa Orange "tasted like the well-known product by another manufacturer known as chocolate orange" and the Cocoa Delight tasted "like liquid chocolate".

18. After setting out the parties' submissions, the FTT set out its multi- factorial evaluation (at [206]) by reference to the various factors it had taken into account: As to sugar content - this was between one third and one half of each bar, the product had more sugar than Green & Black's organic dark chocolate – this was consistent with confectionery. The FTT noted the product was sweet to the taste, subjected to a process (mixing together and pressing), and normally eaten with fingers. They were held out as snacks, normally eaten between meals, positioned as treats (despite being sold as healthy food), and held out as filling the same role as confectionery (despite being positioned as more healthy). Regarding the product names, the FTT rejected the appellant's argument that references to natural products pointed towards the general food classification. In relation to the packaging, it noted the cocoa-based products (which were brown – the colour of chocolate, others were brightly coloured) were similar to products which were clearly confectionery. As for the ingredients, the absence of sugar, flour, butter was not considered, as with the Organix bars, to be a relevant factor. The physical positioning of the product, which had changed over time, was at best a neutral factor.

19. The FTT concluded "having considered and balanced all the above factors" that it was clear all the Nakd Bars were confectionery.

GROUNDS OF APPEAL

20. The UT (Judge Richards) set out the scope of the permission to appeal as follows:

> (1) The FTT erred in law by excluding from its analysis of whether the Products were "confectionery" relevant considerations consisting of (i) the actual or perceived 'healthiness' of the Products and/or (ii) the marketing of the Products as 'healthy' products [96].
>
> (2) The FTT erred in law by wrongly treating the absence of cane sugar, butter and flour from the ingredients as irrelevant to their status as confectionery [103].

21. As will become apparent when we come on to discuss these grounds in more detail below, both errors are said to derive from the FTT's mis-reading of the case-law (*Kalron Foods Ltd v HMRC* [2007] EWHC 695 (Ch) in the case of Ground 1, and *HMRC v Premier Foods Ltd* [2007] EWHC 3134 (Ch) in the case of Ground 2).

HMRC's additional ground

22. HMRC argue that even if the appellant were successful on the grounds above, the FTT's decision should be upheld on an additional ground that the products fell within Note 5. The issue here is whether the reference to "sweetened" includes products that are already sweet. HMRC argue the FTT wrongly rejected HMRC's argument that case-law (*Premier Foods*) held that "sweetened" must be read in this way.

Error of law in context of multi-factorial assessment

23. The parties agree here that the FTT was to give the word "confectionery" its ordinary meaning and to ask what the view of the informed ordinary person was as to the nature of the product and whether or not it was one which fell within the relevant category.

24. As both parties acknowledge, this calls for a multi-factorial evaluation and accordingly appellate caution in interfering with that evaluation. They agree matters of weight are for the first-instance tribunal. Both parties also acknowledge the statutory jurisdiction on appeals to the Upper Tribunal (s12 Tribunal Courts and Enforcement Act ("TCEA 2007") requires that there is an error of law, but that even if an error of law is found, the decision as to whether the FTT decision should be set aside is a matter of Upper Tribunal discretion.

25. The parties disagree however on what constitutes an error of law where the particular allegation is that the FTT has omitted to consider a relevant factor. Central to HMRC's defence of the FTT's decision, is the argument that it is not enough simply to show the FTT omitted consideration of a relevant factor but that there is an additional threshold of perversity. HMRC thus argue that the omission only constitutes an error of law where a tribunal failed to take into account a matter which no tribunal properly instructed would have left out of account.

26. Furthermore, in assessing the materiality of the error of law (for the purpose of deciding whether the UT should set aside the FTT decision), HMRC argue it is not enough that the error of law *might have* made a difference (as the appellant argues). The appellant (HMRC submit) had to show the error *would have* made a difference.

Appellate caution in evaluation of multi-factorial matters

27. Before addressing the above disputed points of legal approach to appeals from the FTT to the UT, it is helpful to remind ourselves of the rationale and scope of the principles

surrounding the need for appellate caution when considering appeals against so-called multi-factorial evaluations. That an appeal court should accord due deference to the FTT's role in carrying out an evaluative multi-factorial exercise is not disputed. Nor is it disputed that the issue before the FTT of determining whether the products were "confectionery" involved precisely that kind of evaluation.

28. *Proctor and Gamble v HMRC* [2009] EWCA Civ 407 ("*Pringles*") concerned an appeal from a fact-finding tribunal on a similar type of classification question (whether Pringles fell within the exception to general zero-rating for food products for "potato crisps…and similar products…"). The High Court had overturned the fact-finding tribunal's conclusion, which had agreed with HMRC, that the product fell with the exception. The Court of Appeal, in allowing HMRC's appeal and finding the tribunal had not made any error of law, addressed the principles regarding the approach on appeal to "value judgments" of the primary decision maker. This was explained by Jacobs LJ as follows at [9]:

> "Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that is so, an appeal court (whether first or second) should be slow to interfere with that overall assessment—what is commonly called a value-judgment."

29. Jacobs LJ went on at ([10]) to refer to an earlier judgment in which he had gathered together various authorities on this topic from different subject areas including *Biogen v Medeva* [1997] RPC 1 where Lord Hoffman had explained the rationale for caution as follows:

> "…specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la verité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation….Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

30. At [11] Jacobs LJ also noted the House of Lords authority cited in Toulson LJ's judgment in *Pringles* (Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL (at [30])) concerning the deference to be given to specialist tribunals as the primary decision maker given their special expertise.

31. Toulson LJ explained at ([60]):

> "Where a Tribunal has taken into account all relevant factors, and has not been influenced by impermissible factors, a court will only exceptionally entertain a challenge based on the Tribunal's evaluation of those factors for the reasons given by Baroness Hale [in *AH (Sudan)*]. The challenger would have to show the decision was perverse and in this case there is simply no foundation for such a challenge. The tribunal was not obliged to accord a separate grading for each factor. It was entitled, as it did, to look at the matter in the round."

32. Another reason, as Lewison LJ pointed out in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5 (at [114]) for appellate caution in the evaluation of primary facts is the expertise of the trial judge in determining what facts are relevant to the legal issues to be decided.

33. As regards the scope of the principle that appellate caution should be exercised, returning to *Pringles*, Jacobs LJ explained the kind of issue to which the principle applied by reference

to what Lord Hoffman said in another case *Designers Guild* namely where "the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance".

34. Taking account of the above, we note the focus on appellate caution is directed towards to analysis of weight or matters of degree and, in the context of a multi-factorial evaluation the first-instance court or tribunal's overall evaluation. (The excerpt from *Pringles* at [9] refers for instance to the tribunal's "overall assessment"). None of that is controversial. However, the appellant points out there is nothing in these principles which suggests an appellate tribunal should defer where the fact-finding tribunal has taken account of an irrelevant factor, or as they say happened in the instant case, disregarded a relevant factor.

35. HMRC on the other hand referred to [22] of Jacob LJ's judgment. There he said*:*

> "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?"

36. It is important however to recognise the context in which the statement by Jacob LJ in the preceding paragraph was made. This makes clear the classification exercise Jacob LJ had mind concerned the issue: "what is the reasonable view on the basis of all the facts" (see [21]). In other words, the high threshold of perversity related to challenges to the tribunal's overall evaluation of the facts.

37. In support of the proposition that appellate caution does not apply where the criticism of the tribunal is that it took account of irrelevant factors, or disregarded relevant factors, the appellant emphasises the extract from Toulson LJ's judgment in *Pringles* (at [60] – see ([31] above). There, Toulson LJ specifically assumed (before addressing the need to show perversity) that the decision was not one where the tribunal had failed to take account of relevant considerations.

38. HMRC submit this passage does not however deal with the required *intensity* of scrutiny (in other words whether perversity is required to be shown where the challenge concerns disregard of relevant factors). That argument must be rejected simply in terms of the way the relevant paragraph of Toulson LJ's judgment ([60]) is expressed. The paragraph takes as given that the tribunal has considered the right factors and makes clear perversity needs to be shown where "evaluation of factors" i.e. the weighing up is challenged. The plain implication is that in cases where the criticism is that a relevant factor had not been considered, that would not require deference. The point is made clearer by the preceding paragraph which explains the scope of arguments the Court of Appeal was addressing:

> "59. On the question of similarity, Mr Cordara [*counsel for the* appellant] was critical of the Tribunal for saying that it did not regard the shape of Regular Pringles or the size of the packaging as particularly important factors. But those are classic examples of matters which were for the judgment of the Tribunal, and their view cannot be said to have been perverse. Otherwise, Mr Cordara did not suggest that the Tribunal either took into account any matters which it ought not to have taken into account or failed to take into account any matters which it ought to have taken into account. His primary criticisms are that the Tribunal failed properly to evaluate the various factors, because it failed to weight or grade them appropriately, and that it failed to give adequate reasons for its conclusion (emphasis added)"

Necessary to show additional hurdle of perversity?

39. HMRC relied on a number of authorities at Court of Appeal and Upper Tribunal level in support of their submission that it is only where a tribunal has failed to take into account a matter, which no tribunal properly instructed would have left out of account, is there an error of law (i.e. perversity). We consider however that, for the reasons we explain below, none of those authorities on closer analysis support that proposition. Rather the consistent message, in line with the Court of Appeal's approach in *Pringles*, is that, while a requirement to show the decision is perverse applies in relation to matters of weight /evaluation, failing to take account of a relevant factor or taking an irrelevant factor into account will constitute an error of law (albeit there will be subsequent issue of whether any such error is material to the decision in question).

40. We find it convenient to start with the Court of Appeal authorities as this will help to properly understand the subsequent Upper Tribunal decisions HMRC rely on.

41. *Davis &Dann Ltd v HMRC* [2016] EWCA Civ 142 concerned an MTIC appeal requiring the fact-finding tribunal to make a determination on whether the trader ought to have known its transactions were connected to fraud; a classic situation where a number of factors fell to be considered in order to reach an overall conclusion. The particular context for the appeal was that the tribunal had to consider whether certain factors were firstly relevant and secondly whether they were probative (in that case to the "no other reasonable explanation" standard). At [77] Arden LJ, as she then was, dealt with various submissions (grouped under the heading dealing with the allegation that the tribunal had failing to take account of countervailing factors):

> "In my judgment, this submission goes to the weight to be attached by the primary decision-maker to certain matters in relation to others. While the categorisation of a fact as probative of a particular issue is a question of law, the question whether it is so probative is a question of fact. On an appeal on a question of law, it is well established that an appellate tribunal whose function is restricted to questions of law cannot revisit questions of fact unless no reasonable judge could have come to that conclusion. Mr Scorey [counsel for the taxpayer] has not contended that that test applied in relation to any of these countervailing factors: there is no cross appeal in this Court. Therefore, the existence of these countervailing factors cannot determine the outcome of this appeal." (emphasis added)

42. Arden LJ referred back to this paragraph (at [101]): (This passage, as will be seen, was referred to in a UT decision (*Northside Fleet Ltd v HMRC* [2022] UKUT 256 (TCC)) which HMRC rely on and which we address further below) :

> "I have no doubt that the categorisation of fact in the present case constitutes a question of law which founds this Court's jurisdiction and that of the UT (see paragraph 77 above). (Moreover, if the UT found an error of law, it had jurisdiction to substitute its own decision: see *Pendragon*). There are, however, as appears from paragraph 77 above, limits to this: how the tribunal applies any categorisation of the fact to the circumstances of a particular case is likely to be a question of fact and not of law. For the reasons given in this paragraph, this Court is entitled to ask whether the UT was correct to evaluate the facts in the way that it did, namely as indicating normal market transactions, or whether, as HMRC contend, that conclusion was itself in error."

43. While this decision confirms a perversity hurdle ("no reasonable judge…") must be surmounted where the challenge concerns the factual issue of whether a factor was probative on the facts of the case, it does not suggest the question of whether, a factor was relevant, as a

matter of principle, similarly faced such hurdle. Rather, Arden LJ confirmed the question of relevance was a question of law.

44. The next case relied on by HMRC is *Teinaz v London Borough of Wandsworth* [2002] EWCA Civ 1040, which concerned a discretionary decision by an employment tribunal of whether an adjournment to a hearing should be granted. HMRC rely on the following passages in the Court of Appeal's discussion regarding the limited bases on which an appellate court will intervene:

> 35…. The appellate tribunal only intervenes in a limited number of situations. It set aside the exercise of discretion by the inferior tribunal if the exercise of discretion is "outside the generous ambit within which reasonable disagreement is possible": see *G v G* [1985] 1 WLR 647, or, as this court put it in *Carter v Credit Change Ltd* [1981] All ER 252 at 258, the tribunal's decision is perverse or such that no reasonable tribunal could have come to. Other situations in which the appellate tribunal can intervene in the exercise of discretion by the inferior tribunal are where the tribunal has made a mistake in law, acted in disregard of principle, misunderstood the facts or failed to exercise the discretion. The other situation in which the appellate tribunal can intervene, and which is the relevant one in this case, is where the inferior tribunal took into account some irrelevant consideration or, alternatively, left out of account some relevant consideration.
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> 36.Two points flow from this last point. First, it is for the appellate tribunal to determine what considerations are relevant to the question at issue. It does not defer to the inferior tribunal in the selection or identification of these considerations. Second, unless permission is given for fresh evidence to be adduced on appeal, the appellate tribunal makes this determination on the factual material before the inferior tribunal. If the appellate tribunal finds that an irrelevant consideration has been taken into account or that a relevant consideration has been left out of account, the appellate tribunal must conclude that the exercise of discretion by the inferior tribunal is invalidated, unless it can be satisfied that the consideration did not play any significant role in the exercise of the discretion and thus constituted a harmless error involving no prejudice to the appellant.
>
> 37. It is to be noted that the standard of review as respects the exercise of discretion involves the grant of considerable deference to the inferior tribunal. In particular, where several factors going either way have to be balanced by the inferior tribunal, the appellate tribunal does not interfere with the balancing exercise performed by the inferior tribunal unless its conclusion was clearly wrong. (emphasis added).

45. The extracts do not, in our view, support (and indeed contradict) HMRC's argument that there is an additional hurdle of perversity where the allegation is that the tribunal omitted to consider a relevant factor. Rather, the Court of Appeal confirms that, even in the slightly different context of challenges to a discretionary decision of a first instance tribunal, consistent with the principles we have already discussed, determination of what is relevant or irrelevant is a matter for an appellate tribunal, determination of what weight a factor should bear is not, unless that evaluation or balancing of such factors reaches the threshold of perversity. (The proviso at the end of [36] concerns the *materiality* of the error, not whether there is an error of law in the first place).

46. HMRC also seek to link the additional perversity hurdle with the approach to relevance of factors in public law decision making where there is "no statutory lexicon of factors" per Laws LJ in *London Borough of Newham v Khatun & Ors* [2004] EWCA Civ 55. We did not however find the cases HMRC relied on to be on point to the kind of multi-factorial evaluation

at issue here. The passages relied on in the Supreme Court's decision *Samuel Smith Old Brewery (Tadcaster) & Ors, R (on the application of) v North Yorkshire County Council* [2020] UKSC 3, at [29] – 32] *per* Lord Carnwath JSC) concerned the meaning of what was a "material consideration" in a planning statute and related case law – including *Wednesbury* - on whether a factor had to be taken into account "as a matter of legal obligation" (i.e. as matter of statutory construction), or whether on the facts of case were "so obviously material". The public law context where Parliament has granted a discretion to a non-legal decision maker of deciding between competing policy factors is not necessarily comparable to the interpretative judicial task of determining whether something falls within a statute or not. There was, as far as we can see, no consideration in these public law cases of the case-law principles (from cases such as *Pringles*) as one might expect if it was envisaged a hurdle was being imposed where in case such as *Pringles* (for the reasons we have discussed) none was required.

47. Mr Watkinson relied, in addition, on a number of UT decisions. *Aria Technology Ltd v HMRC* [2018] UKUT 363 (TC) was another MTIC case concerning whether the trader knew or should have known its transactions were connected to fraud. The UT explained at [12] that the core of the appeal involved a challenge to "most of the FTT's findings of fact" which included [12(2)] that the FTT took into account irrelevant considerations in making its findings or failed to take into account relevant considerations.

48. HMRC rely in particular on the following passages:

> 28. In our judgment, while a failure to take into account relevant considerations or taking into account irrelevant considerations may be an error of law, it is not a free-standing basis of challenge to a factual conclusion falling outside the scope of *Edwards v Bairstow*. In so saying, we recognise that there is a danger in being over-concerned with the definition of conceptual categories: it is the governing approach to factual conclusions which is important. But it was clear in the present case that Aria was advancing this as a separate basis of challenge in an effort to avoid the high threshold for a successful *Edwards v Bairstow* appeal.
>
> 29. In reality, almost every overall conclusion of fact, such as here that Aria knew or should have known that the relevant transactions were linked to fraud, is based on **an evaluation of an assemblage of findings of primary fact**. The decision of what primary facts are relevant for the purpose of reaching the overall factual conclusion is essentially one for the fact-finding tribunal: it is part of the fact-finding process. Therefore, if an appellate body were simply to substitute its own assessment of what primary facts should be taken into account, it would itself be engaged in fact-finding and not restricting the appeal to a question of law. <u>It is only if the tribunal failed to take into account a matter which no tribunal properly instructed would have left out of account, or conversely took into account a matter which no tribunal properly instructed would have taken into account, that there is an error of law.</u> Indeed, the reference to taking into account irrelevant considerations or failing to take account of relevant considerations reflects the classic formulation of the test for judicial review expounded by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 229, and it is significant that Lord Greene there regarded these, along with a conclusion that was absurd, as aspects of unreasonableness. (underlined emphasis HMRC, bold emphasis ours)

49. *Northside Fleet* was another MTIC related appeal to the UT. Amongst the grounds of appeal were that the FTT wrongly ignored certain factors (submission 2 (at [32(2)]). The UT

recorded the parties' agreement that the UT had power to interfere if it identified fundamental flaws in the fact-finding process (for example if the FTT failed to take account relevant considerations); it continued:

> 34. At the margins, questions of some difficulty can arise as to whether the selection of which considerations are relevant, and which irrelevant, involves a question of fact or law. We tend to agree with Mr Watkinson's submission, based on the judgment of Arden LJ, as she then was, in *Davis v Dann Ltd v HMRC* [2016] EWCA Civ 1899 at [101] that the categorisation of matters as relevant or irrelevant involves a question of law**,** but that a superior court or tribunal should only interfere with the categorisation adopted by the fact-finding tribunal if that categorisation was perverse in the sense that it could not have been adopted by any reasonable tribunal. However, as will be seen from the next paragraph, we do not need to determine any question of categorisation in this case. (emphasis added)

50. In the end, as the UT indicated, it did not need to address the question of relevance/ irrelevance and the above comments were, therefore, *obiter*. The parties were agreed the factors were relevant; the issue was whether the FTT took those relevant factors into account or not.

51. In our judgment, neither of the extracts from *Aria* or *Northside Fleet*, properly analysed, supports HMRC's case that there is an additional perversity hurdle. Both passages in *Northside Fleet* [28] and *Aria* [34] relied on by HMRC must be read in the light of the contrast the Court of Appeal drew in *Davis & Dann* , that the question of what facts are relevant is a question of law (i.e. at level of principle) with the question of whether the fact is actually probative on the facts (which is question of fact). (We have some doubt therefore whether the statement in [29] of *Aria* "…The decision of what primary facts are relevant for the purpose of reaching the overall factual conclusion is essentially one for the fact-finding tribunal: it is part of the fact-finding process. …if an appellate body were simply to substitute its own assessment of what primary facts should be taken into account, it would itself be engaged in fact-finding and not restricting the appeal to a question of law" is correct as it seems to be at odds with the principles explained in *Davis & Dann* and also *Teinaz* at [35] and [36]).

52. Both decisions, read in the above context, were making the point that perversity needed to shown as regards a challenge to an evaluation of factors i.e. the weight to be given to factors given the particular facts of the case. Thus, in *Aria* it was noted the overall conclusion of fact was based "…on an evaluation of an assemblage of findings of primary fact" ([29]). In *Northside Fleet* [34] when the UT was referring to the categorisation adopted by the fact-finding tribunal having to be perverse, it was referring to the question of whether in the particular circumstances of the case, the fact was actually probative of the issue in question (that question being a question of fact). That question was to be contrasted with the question of legal relevance, namely whether the tribunal could be said to have been properly instructed as to what to take into account or leave out of account at level of principle.

53. The appellant's grounds in this case are firmly in the latter category. This is evident from the fact that in respect of both grounds, the conclusion the FTT came to that the particular matters were irrelevant and should not be taken into account was derived from examining the case-law (with the appellant arguing that the FTT erred in so doing).

54. Mr Watkinson also referred us to [50] of *Aria* where the UT noted the application of the proper approach to an appeal was critical*:*

> "…If each paragraph of a long judgment, involving the analysis of a wide range of facts following substantial evidence, is examined with a fine toothcomb, it may often be possible to find some factual error or lack of clarity, or to identify particular facts which were arguably relevant but are not

> referred to or assessed. If such flaws meant that the decision must be quashed as erroneous in law, little would be left of the cautionary words of Evans LJ in *Georgiou*. In our judgment, having regard to the wording of s12(2) of TCEA which we have emphasised and to the authorities we have discussed, even if we find some errors regarding any factual matter considered, or which should have been considered, in the decision below, such that any tribunal properly instructed would have taken that matter into account, or left it out of account, only if that matter is material to the overall factual conclusion is that a basis for setting the decision aside. The same approach applies if the reasoning expressed in support of a particular factual finding is unclear or deficient."

55. However, those observations are clearly directed to the separate question, which we come on to shortly, of whether once error of law is identified, the error is considered material. The UT was acknowledging there may be errors in the fact-finding process which do not justify setting aside decision.

56. Mr Watkinson also took as to passages in *Hargreaves v HMRC* [2022] UKUT 34 (TCC) at [17(2)]) and *Vital Nut Co Ltd v HMRC* [2017] UKUT 192 (TCC) at [43] making a link between challenges to the fact-finding process based on ignoring relevant considerations with having to meet the *Edwards v Bairstow* test. It is correct the UT in *Hargreaves UT* 17(2) – referred to *Edwards v Bairstow* applying but that included the situation where the fact-finding process was flawed because relevant considerations were omitted. Even if it is assumed the aspect of *Edwards v Bairstow* said to apply was that "no reasonable tribunal, properly directed in law, could have reached that finding" that would not necessarily mean imposing an extra perversity hurdle: a tribunal omitting to consider a relevant consideration would not be said to be a reasonable tribunal, properly directed in law. The UT in *Vital Nut* (at [43]) similarly confirmed the exclusion of legally relevant and probative evidence is "*Edwards v Bairstow* territory" – but there is nothing to suggest a requirement to show additionally that the exclusion of relevant and probative evidence was such that no reasonable tribunal properly instructed would have excluded it.

57. Mr Watkinson also relied on *Anna Cook* [2021] UKUT 15 (TCC) (at [19]) and *HMRC v Netbusters (UK) Ltd* [2022] UKUT 175 (TCC)) (at [23]) to say there is a high threshold / the bar is particularly high where the FTT has been called upon to make a multi-factorial assessment (at [23]). We agree, but it is important to recognise the areas in relation to which that high threshold applies. Both cases confirm what we have already discussed, that perversity needs to be shown in relation to challenges to findings of fact based on the weight of evidence, or regarding the particular weighting of factors, or matters of degree in making an overall assessment.

58. In conclusion, we agree with Ms Sloane's submissions that HMRC's case, that there is an additional perversity hurdle to surmount, must be rejected. If it is demonstrated that the FTT ignored a relevant factor that will be sufficient to constitute an error of law. We do not need therefore to deal with the other bases on which the appellant put its case regarding there being an error of law (which for instance included an alternative argument that the alleged errors were *ex facie* errors of law, which Mr Watkinson objected to as being out of scope of the permission to appeal).

Different test for materiality when looking at irrelevant considerations?

59. Under s12 TCEA 2007 where the Upper Tribunal finds that the making of the FTT decision "involved the making of an error on a point of law" the Upper Tribunal "may (but need not) set aside" the FTT decision.

60. As mentioned above, as regards the Upper Tribunal's discretion to set aside the decision, HMRC argue for in essence a more stringent test: that the FTT decision *would* have been different rather than that it *might* have been different.

61. The most recent higher authority in relation to the exercise of the Upper Tribunal's discretion to set aside is *Degorce v HMRC* [2017] EWCA Civ 1427. The issue was whether the taxpayer, Mr Degorce, who had participated in a film scheme, was carrying on a trade. It was admitted the FTT made an error (which the court described as an error of approach) in not taking account of the taxpayer's other film-related activities because no findings regarding them had been made by a court or tribunal because they were subject to an enquiry by HMRC ([96]). The UT nevertheless declined to exercise its discretion to set aside the decision. In the Court of Appeal the taxpayer argued the UT had misstated the test as requiring that if the evidence had been approached correctly "[The FTT's] doing so would, or at least might have affected the outcome":

62. Henderson LJ considered the test of materiality will have a (([95]):

> "…crucial, and usually decisive role to play in the decision of the Upper Tribunal whether or not to set aside the decision of the FTT".

63. He continued:

> "At least in case of the present type, I find it difficult to envisage circumstances in which the Upper Tribunal could properly leave the decision of the FTT to stand, once it is satisfied that the error of law might (not would) have made a difference to that decision. As a taxpayer, Mr Degorce is entitled to be taxed according to the law, and if an error of law is detected in the FTT's decision, which is material in the sense I have mentioned, justice will normally require nothing less than that the decision is set aside."

64. Applying the test to the facts, Henderson LJ went on to conclude the admitted error of approach was immaterial ([100]).

65. Mr Watkinson draws a distinction between the materiality test where the error of law is an error *of approach*. There, he accepts it is enough that the error might have produced a different conclusion. In contrast, where the error concerns a multi-factorial assessment, he submits, it needs to be shown the FTT's decision would have been different. That, he argues, would be extremely difficult as the factor wrongly ruled as irrelevant would have to be of such great weight that it outweighed the cumulative weight of all the relevant characteristics that were taken into account.

66. In our view, the facts of this case are such that we do not need to decide the scope of the materiality test and whether it varies, as HMRC submit, according to the type of legal error. That is because the error in issue in *Degorce* is directly analogous to the error here. The issue of whether Mr Degorce was carrying on a trade also required a multi-factorial analysis and the relevant error concerned the FTT's disregard of a relevant factor, which the FTT had mistakenly ruled out of account. Similarly, if the appellant's case here is made out, it rests on the FTT wrongly ruling out a factor as irrelevant. Moreover, both errors bear the same character of being said to stem from a misconception of the law. Thus, if the appellant successfully makes out its case, that the FTT made error(s) of law by disregarding one or more relevant factors, there is no reason to adopt a different test of materiality from that adopted in *Degorce*.

67. We in any case are sceptical of the distinction HMRC advance. As Ms Sloane pointed out, the underlying rationale – that justice will require the person is taxed according to the law – does not suggest the principle is limited depending on the type of error of law. (Against that we recognise however that by prefacing his views with "at least in the case of the present type" Henderson LJ was leaving scope for the argument a different test might apply).

68. Mr Watkinson also relied on the UT's decision in *Aria* at [50] (see [54] above) – but that simply highlights the significance of applying a materiality test – the UT was not referred to and therefore did not mention *Degorce* and it did not say anything about the particular test to be deployed.

69. Mr Watkinson referred us to the Supreme Court's decision *HMRC v BPP Holdings Ltd* [2017] UKSC 55 at [21]) in relation to a discretionary decision (whether to bar the Respondents from proceedings). The Supreme Court suggested an appellate court could interfere with the tribunal's decision if it could be shown that irrelevant material was taken into account or relevant material ignored "unless the appellate court was quite satisfied that the error made no difference to the decision". However that test is, we consider, entirely consistent with the "might have made a difference" test in *Degorce* for deciding whether to set aside.

70. That leaves the principal higher authority Mr Watkinson relies on which was the Court of Appeal's decision in *R v Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] QB 227, in particular an extract from the judgment of Griffiths LJ at 260. The case concerned a judicial review of the building society registrar's decision which the applicant sought to quash – Griffiths LJ explained (*42b All ER pg76 Auth*) the applicant had to either satisfy the court that the registrar misconstrued his powers or that he had abused them (which Griffiths LJ explained involved considering the reasons for the decision to see if they could be challenged on *Wednesbury* principles). He considered the court should not allow those principles "to be erected into immutable propositions of law":

> "Take as an example the proposition that the decision must take into account relevant considerations and leave out irrelevant considerations. In a decision involving the weighing of many complex factors it will always be possible to point to some factors which should arguably have been taken into account or left out of account; even if they should have been, the court should not intervene unless it is convinced that this would have resulted in the decision going the other way."

71. We do not consider this case supports HMRC's submission. The context was weighing up of factors, and this decision pre-dates, or does not consider, the authorities which make clear that disputes over the weight a tribunal has given to a factor will not be regarded as an error of law, so it can be seen why a high threshold of the court being "convinced" the decision would have gone the other way was being set. The public law context of the decision is also different (see [46] above). The case was not referred to in *Degorce* which is more on point given it relates to the particular statutory discretion under s12 TCEA and which suggests a markedly lower hurdle for a decision to set-aside an FTT decision justified by a tax-based rationale.

72. Finally, Mr Watkinson took us to the Upper Tribunal's decision in *Ingenious Games LLP v HMRC* [2019] UKUT 0226 (TCC) at [66] – [74]. There the UT was dealing with the similar question of whether the taxpayers were carrying on a trade and whether the taxpayers were carrying on business with a view to profit.

73. At [74] the UT summarising the legal principles in relation to appellate interference said extreme caution was required before setting aside conclusions based on careful evaluative findings of fact made on the basis of extensive evidence in contrast to the position where an ex facie error of law is identified. Applying that to the facts the UT considered that none of the

challenged errors was so significant in itself that the FTT could not have reasonably reached the conclusion it did on the issue in question. The UT was aware of *Degorce* (it referred to a different point on it at [70]).

74. We do not read the UT's approach to materiality in *Ingenious Games* as being different from that of the Court of Appeal in *Degorce* and it would be surprising if it was given it was dealing with very similar kind issue. *Ingenious Games*, in this respect, is best understood as a case where the Upper Tribunal had to decide whether the impugned factual findings might have made a difference to the ultimate decision on the issues in question and decided that they did not. In *Degorce*, when it came to applying the materiality principle to the facts, the Court of Appeal similarly considered that the errors of approach in that case were immaterial.

75. In conclusion we consider the relevant principles in deciding whether or not to set aside the decision if Grounds 1 and/or 2 disclose an error of law are those set out in Degorce.

GROUNDS OF APPEAL

Ground 1 – omission of healthiness, perceived healthiness, marketing of product as "healthy" factor

76. Under this ground the appellant argues the FTT was wrong to consider the healthiness of the product, and its marketing as such, as irrelevant to the question of whether the products were "confectionery".

77. The FTT set out its reasoning, that healthiness was irrelevant as follows:

> "Healthy food?
>
> 174. Mr Simpson [*for the appellant*] said that the customers for the Organix Bars were health conscious, and that the Organix Bars were marketed as a healthy alternative to confectionery. Mr Watkinson said this was irrelevant. He relied on *Kalron*, which considered the VAT status of smoothies made from liquified fruit and vegetables. In that judgment, Warren J first set out the excepted items under the heading of "food" in Group 1 of Sch 8, followed by the overrides to the exceptions and the Notes, and then said:
>
> > "[9] It is difficult to detect any policy behind these detailed exceptions and overrides. Mr Thomas (who appears for Kalron) claims to identify a policy which is to exclude what he calls junk food…
> >
> > [10] It is impossible, in my judgment, to spell out of the structure and content of Group 1 a policy such as Mr Thomas submits can be detected. There are plenty of 'junk' foods which do not fall within the exceptions; and there are healthy drinks which are within the exception, for instance, freshly squeezed orange juice."
>
> 175. I respectfully agree. I also agree with the FTT in *Corte Diletto* when they said at [100]:
>
> > "The healthiness or otherwise of a product has no bearing on its VAT classification. Zero-rating depends solely on whether a product has sufficient characteristics to fall within one of the Groups in schedule 8 when applying the [statutory] tests…The most sugary, cream filled, chocolate covered cake will still be zero rated. The healthiest of low sugar, low fat confectionery will still be standard rated."
>
> 176. I therefore agree with Mr Watkinson that whether or not a product is healthy rather than "junk" food is irrelevant when carrying out the multi-factorial test necessary to decide a product's VAT status, and I have not taken it into account below".

78. The appellant argues the FTT:

(1) misapplied *Kalron*: that case dealt with the different question regarding the absence of any obvious policy behind Group 1 as a whole;

(2) wrongly excluded healthiness as a factor because it was not determinative – that it was not determinative did not mean it was not relevant (as the FTT accepted in relation to other factors such as packaging which were accepted to be relevant even if not determinative); and

(3) failed, in line with the case-law, to consider the relevance of how the product was marketed.

79. In response, HMRC highlight that the legislation, and in particular the deeming provision of Note 5, makes no reference to healthiness. Regarding *Kalron,* the FTT correctly interpreted that as holding that healthiness was irrelevant.

80. In *Kalron* the High Court (Warren J) considered the question of whether smoothies made from liquefied fresh fruit and vegetables fell within the term "beverage" within item 4 of the excepted items in Group 8 of Schedule 1 VATA 1994 and therefore standard-rated for VAT purposes, as HMRC argued, or, as the appellant argued, zero-rated as "food of a kind fit for human consumption" as referred to in Group 1(the same category as the appellant contends for in this case). The taxpayer lost before the VAT tribunal and appealed to the High Court. It is helpful to set out [9], which the FTT in the instant case quoted in part, in full.

> "It is difficult to detect any policy behind these detailed exceptions and overrides. Mr Thomas (who appears for Kalron) claims to identify a policy which is to exclude what he calls junk food: thus ice-cream, confectionary and crisps are excluded and become standard rated. He suggests that the paradigm beverages within Excepted item 4 are branded fizzy drinks typically bought in cans or plastic bottles which can, again, be seen to be in the nature of junk drinks. On that basis, he says that healthy products such as the Product should, if there is a doubt about their status, be put the non-beverage side of the line."

81. That paragraph came under the heading "A preliminary point" in a section which appeared in the part of the decision before the High Court went on to summarise the VAT tribunal decision and discuss the grounds of appeal.

82. In his discussion of the error alleged by the taxpayer that the tribunal was wrong to dismiss product's ingredients and nutritional effects as irrelevant, Warren J noted (at [40]) that the tribunal did not any case say those factors were irrelevant. Referring back to the "anti-junk food policy" argument described above he also said:

> "this aspect of the case takes on less significance, I think, given my rejection of Mr Thomas'[*counsel for the taxpayer*] submissions in relation to the policy of the inclusion and specification of the Excepted items in Group 1 for the reasons already given"

83. The argument was again referenced at [51] where Warren J set out:

> "Mr Thomas then submits that the meaning of beverage must be construed with regard to the purpose of the statutory provision in which it is contained. I agree with that insofar as a clear purpose can be ascertained. But I reject, for the reasons already given under the heading "A preliminary point", his submission that the exception is to exclude items of little or no nutritional value"

84. Ms Sloane argues the FTT mis-read *Kalron* in considering that healthiness was irrelevant. *Kalron* firstly was dealing with the different issue of what was a "beverage". Secondly, and more significantly, there was no argument about the ordinary meaning of that term from the point of view of the ordinary person on the street. The appellant was arguing that healthiness (although it was described in terms of a junk food/ non-junk food distinction) represented the underlying policy underpinning what items were respectively standard-rated and zero-rated. That was the argument which the High Court rejected. The court did not hold that healthiness was irrelevant to the "person in the street" test.

85. Regarding the appellant's first point of distinction, we agree with Mr Watkinson, the fact the case was about a "beverage" did not matter because the point the taxpayer sought to make was a more wide-ranging argument concerning the standard or zero rating of food and drink items more generally. We also agree with him, that the taxpayer's argument was not dealt with as some kind of interesting policy debate which took place in a vacuum; the argument was put forward to advance the taxpayer's case that the product in question, being healthy, was zero-rated.

86. The question remains whether, the case stood for the proposition, as the FTT held it did, that healthiness is irrelevant.

87. In our view, looking at the way the taxpayer put its argument in *Kalron*, it is clear it was not simply saying healthiness was relevant; it was saying it would, in a case of doubt, be a deciding factor in putting a drink which was healthy on the non-beverage side of the line. Ms Sloane suggested the appellant in *Kalron* was effectively using healthiness as a "trump card". We think their argument, being confined to cases of doubt, was slightly more nuanced and can better be described as seeking to place an interpretative gloss on the meaning of terms in Group 1 such that standard rated items were junk food/ junk drinks, and zero rated items were healthy. This was this argument that Warren J roundly rejected in his preliminary discussion. But, in agreement with Ms Sloane, we do not see the case stands for the proposition that when considering the issue of fact of whether something was a beverage, healthiness was irrelevant; rather he rejected the argument that healthiness was a determinative factor.

88. We therefore agree with the appellant, that *Kalron*, in rejecting the argument that there was an anti-junk food theme which coloured the interpretation of the VAT provisions dealing with food and drink items, did not rule out considerations of healthiness when considering whether a product fell within the ordinary meaning of the relevant item.

89. HMRC also relied on two FTT cases which it was submitted reached the conclusion that healthiness was an irrelevant factor. (Mr Watkinson originally advanced these to demonstrate that the FTT's disregard of the factor in the current case, could not be regarded as perverse, given other FTTs had also considered it irrelevant – however for the reasons explained that argument is no longer relevant given our conclusion that it is not necessary for the appellant to show an additional hurdle of perversity).

90. In *Corte Dilletto UK Limited v HMRC* [2020] UKFTT 75 (TC) (mentioned in the extract from the FTT Decision above) the FTT concluded the product was confectionery. The product, "Nouri Truffles" later called "Nouri health balls", were small balls made from dates, nuts and other natural ingredients with no added sugar. Amongst the submissions the FTT summarised (at [46]) was that "As [the products] are healthy they are fulfilling a social policy of encouraging people to cut down on sugar and should be zero-rated". Although Ms Sloane pointed out the section quoted by the FTT in the current case (at [77]) above appeared in the section of its decision under the hearing "Does social policy have an impact?" and after the multi-factorial evaluation where the FTT considered the product was confectionery, we do not consider anything significant can be drawn from that. The ordering was consistent with the

FTT considering healthiness to be entirely irrelevant to the multi-factorial evaluation: the FTT was not referred to *Kalron* but ruled (at [100]) "the healthiness or otherwise of product has no bearing on its VAT classification" and then went on to give the reasoning quoted in the FTT Decision extract above.

91. We agree with Ms Sloane the appellant was relying on healthiness as a "trump card". Not only did the FTT in *Corte Diletto* reject that, but it seemed to us go further in saying healthiness had no bearing, a proposition on which the FTT in this case relied. However, we note that although the examples provided of unhealthy zero-rated items, and relatively more healthy items which were nevertheless standard rated, could explain why healthiness could not be determinative, it would not explain why healthiness could not at least be relevant in a multi-factorial evaluation. As Ms Sloane submitted, many of the factors the FTT in this case relied on (e.g. packaging) as part of its multi-factorial evaluation were considered relevant even if they were not determinative.

92. The other FTT case HMRC rely on was *Innocent Ltd v HMRC* [2010] UKFTT 516 (TC) where the issue was whether the product – pure fruit smoothies made of 50% fruit juice and 50% fruit salad – were "beverages" under the same provisions as considered in *Kalron*. The FTT considered itself bound by *Kalron* in terms of that case establishing that the legislation did not bear out an anti-junk food policy, and stated that would in any event have come to the same view ([21]).

93. In our view, *Innocent* does not assist HMRC. Having found (at [26]) there was no consistent social policy behind the exception for certain beverages, the FTT went on to consider the ordinary meaning of beverage (which suggests that the FTT viewed the social policy argument put to it as an argument that the meaning of beverage should be legally glossed). In rejecting HMRC's argument that *Kalron* was binding on it for the proposition that fruit-smoothies were beverages, the FTT noted the evidence in relation to the products was not the same in particular (at [68]) the evidence on "marketing and on the nutritional effect of smoothies". At [69] the FTT noted Warren J had agreed with the taxpayer's counsel that the tribunal ought to consider questions which included "nutritional value". In that respect, the case is supportive of healthiness being relevant (even if not determinative). It is certainly not inconsistent with healthiness being at least a relevant factor.

94. In seeking to explain why the FTT's decision to disregard healthiness was not perverse (a hurdle which as we have discussed is not required) HMRC also argued healthiness could not be a relevant factor of any weight which would outweigh the other factors pointing towards confectionery as mentioned in Note 5. We had difficulty understanding this line of reasoning given Note 5 does not purport to be exhaustive of the criteria relevant to determining whether something is confectionery. The point of a deeming provision, such as Note 5, is that if the specified criteria are met, it saves having to agonise over whether a product is confectionery or not. However, we consider nothing of significance can be taken from the absence of a factor in the deeming provision's list as regards the relevance of that factor. One could equally put another factor, though not specifically mentioned in the legislation, such as packaging, and say that because that is not mentioned in Note 5 it would not outweigh the specific factors listed in the deeming provision. However, that would not preclude it being relevant on the question of whether the product was "confectionery". Moreover, as to the factor's weight, whether a particular factor would outweigh the cumulative weight of the factors listed in Note 5 will depend on the particular facts of the case and how the matter is looked at in the round. We reject any suggestion that, as a matter of legal principle, a factor which is not mentioned in Note 5 is presumed to be of less weight than the cumulative weight of factors which are so mentioned.

95. Regarding the appellant's allegation that the FTT conflated the issue of whether a factor was relevant with the factor being determinative, Mr Watkinson points out that this error is not made out because no such assumption is mentioned anywhere in the FTT Decision. While the FTT did not express its reasoning explicitly in those terms, the FTT did in essence rule out healthiness on this basis: it saw *Kalron* as saying healthiness was not determinative and therefore not relevant. As *Kalron* did, in our view, confirm that healthiness was not *determinative*, we do not however see this as a discrete error but part and parcel of the error the FTT made in holding that *Karlron* stood for healthiness being irrelevant.

96. HMRC further argue there is good reason not to import considerations of actual and purported healthiness into the assessment of whether something is confectionery. Healthiness, they argue, is a loose concept, the standards by which it is to be measured are unclear; it would make the multi-factorial assessment unworkable. We reject this submission. Many of the factors accepted to be relevant, for instance, whether packaging is brightly coloured are similarly not defined according to precise standards and rely on the subjective judgment of the fact-finding tribunal. Courts and tribunals have in practice made evaluations on healthiness without difficulty: in *Kalron* Warren J, in the course of his reasoning rejecting the appellant's "anti-junk food policy" argument gave an example of a healthy drink (freshly squeezed orange juice) (at [10]). In *Corte Diletto* the tribunal (although it did not regard healthiness as relevant) was able to reach a view (see [23]) on the product's healthiness by reference to the food "traffic light system" and information on fat and sugar content from the British Nutrition Foundation and NHS websites. Furthermore, as Ms Sloane pointed out, in *Premier Foods* ([2007] VAT Decision 20072) the FTT *did* place weight on the product marketing's healthiness in terms of the lack of added sugar, artificial ingredients and flavours and its low fat content, and to recommended portions of fruit, features it did not consider typical of confectionery (at [29]). That reasoning was not criticised on the subsequent appeal to the High Court (we come on to cover that decision under Ground 2 and in dealing with the arguments HMRC make in its response on the applicability of Note 5).

97. We conclude there is no reason in principle why healthiness was not a factor to be weighed up along with all the others in the balance when considering how the ordinary person on the street would view the product.

98. Mr Watkinson further suggested the appellant's reliance on the ordinary person the street test was misconceived. He emphasised the test was concerned with what an informed person on the street, in other words that the person would know, as the tribunal did, that there was no policy regarding healthiness which was relevant to the classification of the product. However, this argument is predicated on HMRC's view on the significance of *Kalron* being correct which, for the reasons we have already explained, is a view which we reject. We also bear in mind Toulson LJ's observation in *Pringles* about the test (at [63]) and his note of regret that it had led to "distracting argument about what knowledge should be attributed to [the] hypothetical person". In agreement with Jacobs LJ, he considered the test "…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." We respectfully agree. It does not seem that the case-law principles invite consideration of what knowledge of legal principles should be imputed to the informed person on the street, but even if that was what was required such person, would simply be taken to know that, while there was no rule of interpretation that healthy foods were presumed not to be standard rated, that did not mean that healthiness was irrelevant.

99. In relation to the appellant's criticism that the FTT failed to apply the case-law principles, which establish that how a product is marketed is a relevant factor, we are not persuaded the FTT made such error or at least any additional error. The FTT clearly did consider the product's

marketing, it just wrongly excluded healthiness aspects from that consideration in accordance with its self-direction that healthiness was irrelevant.

Did the FTT in fact omit to consider healthiness?

100. HMRC accepts the FTT did direct itself to exclude the factor of whether or not the product was healthy or junk food. However, Mr Watkinson took us to various excepts in the FTT's summary of evidence and in its multi-factorial evaluation for both the Organix and Nakd bar products, which in his submission, showed the FTT did not *actually* then exclude the products' marketing as healthy, or its perceived healthiness from consideration.

101. Regarding the Organix product, at [121], the FTT recorded evidence on behalf of appellant that these "… were held out for sale [by Morrison's] as healthy snacks", which it then referred back to in its multi-factorial evaluation (at [177](5)(e)). When describing the packaging it mentioned what was said about the products being organic and a "no junk promise" ([125][126]).

102. Similarly in relation to the Nakd bars, the FTT mentioned the words on the packaging "100% natural ingredients" ([194]), the positioning by the "healthy biscuits and cereals section" and then the "healthy snacks" section ([195]), the description on Morrisons' website mentioning "…healthier cereal bars" "…healthier options", ([196]) and further references to the product being healthy in Nakd's website marketing ([197]). In its multi-factorial assessment at [206] it mentioned customers referring to the product as "perfect for those moments when you want something sweet and healthy" (2), it acknowledged Nakd bars were positioned as "being more healthy than traditional products" (8) and the products' eventual placement with "healthy biscuits and cereals" ([13]). Mr Watkinson accordingly submits the FTT did take account of healthiness. That then meant, so the argument ran, that the appellant's challenge could only concern the lack of weight given to the factor, challenges in relation to which, it was agreed, would not constitute and error of law.

103. Regarding *perceived* healthiness Mr Watkinson took us to the passages in the FTT decision ([129] – [131]) where it accepted his submissions regarding the inadequacies of the evidence the appellant put forward (the "basket association analysis" advanced by a manger in the "customer insights" team) in showing how customers viewed the products. Mr Watkinson suggested the FTT would not have analysed the insufficiency of that evidence in this way if it regarded perceived healthiness as wholly irrelevant. In the end the FTT considered there was little that could be drawn from that evidence. However, the fact that findings were not thereby made on the issue, which was a failure on the part of the appellant, could not be described as the FTT failing to take something into account.

104. We reject HMRC's submission that the FTT did, despite its self-direction to the contrary, take into account healthiness and perceived healthiness in the way suggested. The first point is that the FTT's clear self-direction was that healthiness was irrelevant as a factor in its overall assessment. It ought, in our view to be presumed that the FTT will act in accordance with its own direction. We consider it did. We agree with Ms Sloane that the fact the word healthy or aspects of that concept appeared in the extracts HMRC refer to did not mean healthiness was (contrary to the FTT's self-direction) being considered.

105. The fact the FTT mentioned aspects of healthiness in its summary of the evidence, and its analysis of such evidence, does not mean it then regarded those points as relevant. It is also important to recognise, as Ms Sloane pointed out, the context in which the word "healthy" did get mentioned in the FTT's multi-factorial assessment. The reference regarding Organix bars being held out as healthy snacks at [177(5)(e)] was advanced to justify the FTT's finding there

that the bars were held out as snacks– the snack's healthiness was not considered. For the Nakd bars, the excerpt at 206(2) ("…something sweet but healthy") was referenced in the context of a discussion under the heading "sweet to taste", so the relevance lay in the reference to "sweet". While at (7) and (8) the FTT accepted the bars were sold as healthy and positioned as being more healthy than traditional products, the FTT considered this did not detract from them being held out as treats or held out as filling the same role as traditional confectionery. Regarding placement, the point the FTT took from the evidence was that the products were subsequently placed with "healthy biscuits and cereals", was that biscuits were with the normal meaning of confectionery.

Conclusion on Ground 1

106. In conclusion, we are satisfied Ground 1 discloses an error of law in the FTT Decision.

107. HMRC also rely on an argument that as there is "no ideal concept, conformity of every aspect of which is necessary, before a product can be called a certain description" (*Customs and Excise Commissioners v Ferrero UK Ltd* [1997] BVC 408 per Lord Woolf MR and Hutchison LJ) and that there is, therefore, even less scope to argue that a tribunal has ignored a relevant factor as part of its multi-factorial assessment. We do not consider this point, which in essence is that one should not expect there to be an exhaustive check-list of factors, as assisting in the circumstances of this case. This is not a situation where, after the FTT performed its evaluation the appellant sought to advance another factor said to be relevant, where the factors the FTT had already considered were sufficient. Where the FTT has specifically and incorrectly ruled a factor to be irrelevant that will not prevent the omission from constituting an error of law. The argument is really one about the materiality of the error, an issue we consider later.

Ground 2: Omission to consider traditional confectionery ingredients: cane sugar, butter or flour

108. Under this ground, the appellant argues the FTT erred in law in failing to consider that the absence of ingredients associated with traditional confectionery (cane sugar, butter or flour) was a relevant factor. The appellant raised this argument before the FTT in relation to both the Organix and Nakd bars.

109. In relation to the Organix bars the FTT explained (at [177(8)

> "As noted above, the products considered in *Premier* were "fruit bars" and the sugar content was derived from the dried fruit, but they were nevertheless confectionery. The absence of cane sugar, flour and/or butter is therefore not a factor pointing to the Organix Bars falling outside the meaning of confectionery"

110. In relation to the Nakd bars, the FTT dismissed the relevance of the absence of such ingredients for the same reasons ([206(12)]).

111. The FTT therefore relied on *Premier Foods* to justify the irrelevance of the point. We can deal with this point relatively briefly. The short point, which Mr Watkinson accepted, is that the litigation in *Premier Foods* did not decide the fruit bar products there were confectionery.

112. We will return to the case below in dealing with the Note 5 issue, but for present purposes it is sufficient to note the following. The High Court's decision was an appeal by HMRC against the VAT Tribunal's decision that the fruit bar product was not confectionery. Part of the Tribunal's reasoning concerned the lack of added sugar, and that the production process did not involve cooking. The High Court at [17] agreed with HMRC's case that neither cooking nor added sugar were necessary for something to be confectionery. It concluded that the

Tribunal had made errors of law and remitted the matter to a differently constituted Tribunal for a fresh assessment of whether the fruit bars were or were not confectionery (but there is no report of what that the new Tribunal ultimately decided). The FTT was therefore wrong to rely on *Premier Foods* as a basis for excluding the relevance of the point.

113. In line with their case that there was an additional perversity hurdle to surmount HMRC put their case in terms of the FTT's view the ingredients were irrelevant as not perverse. Given our decision above that there is no such hurdle, we only need to be satisfied that consideration of the absence of such ingredients was at least relevant.

114. Mr Watkinson pointed to a number of instances of items accepted to confectionery e.g. sweets, which lacked butter and flour. Also, he suggested, it would mean that if any accepted item of confectionery such a sweet had the cane sugar in it replaced by artificial sweetener then the result would be different which was obviously wrong. Mr Watkinson again sought to test the relevance by positing whether when weighed against the named factors in Note 5 it would lead to a different result. We reject that for similar reasons to those discussed above. HMRC's argument also assumes the nature of the ingredients needs to be determinative to be relevant. As with a number of factors the FTT *did* take into account (such as packaging or marketing), they were relevant even if they were not determinative.

115. We therefore find there was an error of law in the FTT rejecting the relevance of such ingredients. In agreeing with the appellant, that the FTT erred in law, it is important not to overstate the relevance of such traditional ingredients and to elevate their presence or absence into an essential characteristic. A consideration of whether something is confectionery will inevitably involve comparison with products which are present in items commonly accepted to be confectionery. There will no doubt be examples of confectionery which do not contain such ingredients but which are nevertheless confectionery. But that does not mean consideration of the ingredients, and the absence of traditional ones, will not add to the overall picture of the product's classification.

116. We will consider the materiality of the errors we have found under Grounds 1 and 2 once we have dealt with HMRC's argument in response on Note 5. That is because if they are correct in their case, it would mean the products would be deemed to be "confectionery" and the appellant's appeal would fail in any event.

HMRC Response: HMRC say FTT wrong in interpreting "sweetened" as not covering inherent sweetness- *Premier* is, contrary to what FTT found, authority for that.

117. Note 5 is set out above at [5]. It deems products with certain attributes: (1) prepared food (2) normally eaten with the fingers (3) sweetened to fall within the "confectionery" exception under Item 2 of Group 1 Schedule 8 VATA 1994. The appellant accepts both products meet (1) and (2), the issue relates to (3), viz the meaning of the word "sweetened". Does it cover products which are inherently sweet (as HMRC argue), or does it require that the sweetness is added (as the appellant submits)?

118. The FTT rejected HMRC's case (at [94]–[106]) that *Premier Foods* stood as authority in support of their interpretation. In their response, HMRC submit the FTT was wrong to do so and make further arguments not advanced before the FTT in support of their position.

119. As mentioned above, in *Premier Foods* the product was a fruit bar whose sugar content was derived from dried fruit. At first instance the VAT Tribunal decided the bars were not confectionery. In interpreting the term "confectionery" the Tribunal, taking account of a dictum of Lawton J in a decision, *Popcorn House Ltd* [1986] 3 All ER 782, suggested confectionery was made with a cooking process involving heating and involved the ingredients being made

sweeter than their natural state ([26] *Premier Foods VAT Tribunal*). The tribunal noted the primary ingredients, the fruits, were intrinsically sweet and that the heating process (pasteurisation of certain ingredients prior to their addition) was only in relation to a small proportion of the whole.

120. On their appeal to the High Court (Sir Andrew Morritt C), the Commissioners argued the Tribunal was wrong to apply Lawton J's dictum given it related to materially different legislation (Group 34 of the Purchase Tax Act 1963). The High Court agreed, (noting the Tribunal had also misread Lawton J's dictum as suggesting recourse was to be had to the ordinary meaning of the term). The Commissioners also argued (at [9]) the Tribunal "were wrong to conclude that confectionery, for the purposes of excepted item 2 and note (5), must include additional sweetening matter" (*HMRC emphasis*) and that the product must have been cooked in some way.

121. The Chancellor rejected the submissions at [17]:

> "… the Tribunal clearly directed themselves that for an item to be classified as confectionery for the purposes of excepted Item 2 and Note 5, its production must have involved (a) a process which can be recognised as cooking and (b) the addition to the primary ingredient of an extra element as sweetness. In my judgment, neither of those elements is a necessary condition for a product to be classified as confectionery…"(*HMRC emphasis*)

122. On the basis of the three errors, the appeal was allowed and the matter remitted to a differently constituted tribunal to determine the classification of the fruit bars afresh ([19])

123. HMRC rely on the reference, in the Commissioners' submission, to Note 5 as well as item 2 (at [9]) and repeated references to both "excepted Item 2 and Note 5" at [11], [16] and [17].

124. Mr Watkinson argues there would have been no need for the Chancellor to refer to Note 5 at all if all the High Court had been doing was addressing whether a product needed to be sweetened and cooked to be confectionery within the meaning of Item 2 (without recourse to the deeming provision in Note 5).

125. We reject that submission. Although HMRC rely on the Chancellor's conclusion at [17] that passage actually confirms that the Chancellor's focus was on the meaning of the word "confectionery", not "sweetened". This is reinforced by the Chancellor's elaboration of his reasoning later in the same paragraph where he accepted:

> "..in its ordinary usage, confectionery is limited to products which can be described as sweet but I cannot see why such sweetness may not be inherent in the principal ingredient in its natural state but must be added by some further sweetener with which it is mixed or compounded…it appears that…the Tribunal erred in law in considering those two elements [*cooking and addition of sweetener*] were essential to the categorisation of these fruit bars as confectionery"

126. It is clear all the references to Note 5 as well as Item 2 both in recording HMRC's submission before the High Court (at [9]), and in the following reasoning were included because Note 5 also includes the term "confectionery". The fact it was this term (not "sweetened") whose interpretation was in issue is all the more evident, as Ms Sloane points out, from the scope of the Tribunal's decision under appeal in that case where the Commissioners were arguing the normal meaning of the word "confectionery" ("in excepted item 2 without regard to Note (5)") covered "prepared food which [was] rich in sugar although not sweetened".

127. If the High Court were, in addition, intending to set forth an interpretation of the term "sweetened" in Note 5 we would have expected, as Ms Sloane argued, that it would address that issue explicitly. This is especially so, given the interpretation, which HMRC say the High Court judgment gave, does not accord with the normal meaning of "sweetened". The use of the past participle, when the legislation could simply have referred to "sweet" if that was what was intended, indicates Parliament had in mind products with added, rather than inherent sweetness.

128. We accordingly consider the FTT correct to reject HMRC's argument for the reasons it did. We were also not persuaded by HMRC's further arguments.

129. If we were wrong in our reading of *Premier Foods* and the decision is to be read as standing for the proposition for which HMRC argue , then we would, in any case, be convinced it is wrong for the reasons already outlined above (the ordinary meaning of the term "sweetened") such that we would not follow the decision (see discussion at [94] in *Gilchrist v HMRC* [2014] UKUT 0169(TCC) which considered the precedential effect of High Court decisions on the UT).

130. In so far as other tribunals (*H5 Ltd (t/a High Five) v HMRC* [2008] UKVAT V20821 at [24] – [26], *Corte Diletto* at [69] – [71]), interpreted *Premier Foods* as holding that the requirement "sweetened" in Note 5 was met if the product could be described as "sweet" then, in agreement with the FTT, we consider that those tribunals were wrong to so hold.

Should the FTT Decision be set aside: are errors of law material?

131. HMRC argue both errors alleged under the Grounds 1 and 2, even if made out, are immaterial. Under Ground 1 they submit there was no or insufficient evidence of objective healthiness and argue that in any case the omitted factor would not outweigh all the cumulative factors identified by the FTT which justified classifying them as "confectionery".

132. We reject HMRC's argument that there is no evidence regarding healthiness. As Ms Sloane explained, there was sufficient evidence which emerged from the evidence regarding the nature of the ingredients. As confirmed in the evidence on ingredients, these were wholly natural and did not contain any added sugars or syrups. As she pointed out, it was not necessary to present scientific evidence to a tribunal for it to reach a view on a product's healthiness. We have already mentioned above how the High Court in *Kalron* and the FTT in *Premier Foods* (see [96]) were able to take a view on healthiness without such evidence. We thus agree with Ms Sloane that there was sufficient evidence before the FTT for it to do so too.

133. For both errors HMRC argues neither outweighs the cumulative weight of all the other factors and submits the result would therefore be no different. We have already explained why a "would have been different" test is wrong. The test is whether the decision "might have" been different (in line with *Degorce*). We assume Mr Watkinson would say that even that "might have been different" test is not satisfied because of the cumulative weight of the other factors. However, we agree there are difficulties in that assumption for the reasons highlighted by Ms Sloane.

134. First, it must be recognised that the multi-factorial evaluation cannot be reduced to an exercise of counting up the numbers of factors which point in a particular direction. Rather, the exercise is qualitative and it is possible that because of the weight ascribed to a particular factor in forming an overall impression it outweighs a number of other factors which point in the other direction. We did not understand Mr Watkinson to disagree with that in principle. Healthiness could be of insignificant weight or could be of great significance, say for instance the tribunal were to accept the significance of the appellant's argument that because the bars were a healthy *alternative* to confectionery they were not thus confectionery. In relation to a

comparison with traditional ingredients, Ms Sloane illustrated this point with a hypothetical vegetable crisp product. By reference to the various criteria the FTT used there might well be a great number of factors which pointed to it being confectionery, for instance, a high sugar content because of naturally occurring sugars, its sweetness, that it was subjected to a process, that it was normally eaten with fingers, that it was consumed as a snack, that its packaging was bright and colourful. But if one left out the factor that its ingredients consisted mainly of vegetables, and that it did not contain ingredients traditionally associated with confectionery and went on to find that because of the other factors the product was therefore confectionery that would as Ms Sloane submitted, "untether" the term confectionery from its ordinary meaning.

135. Second, we agree healthiness is a factor which may have a pervasive effect in the sense that it colours the impression of other factors. For instance, as Ms Sloane pointed out the FTT's analysis of the packaging indicated that while the Nakd bars were sold as healthy food they were also positioned as treats ([206(7)]) did not mention all the various wording which highlighted the healthiness of the product to balance against the wording the FTT did refer to which was suggestive of the products being a treat. The FTT accordingly did not, grapple with the point that products, for example a raw date and nut bar, which are healthy, are not typically regarded as treats.

136. We can also see how, as Ms Sloane submitted, taking account of the nature of the ingredients and their healthiness or perceived healthiness (raw cold-pressed fruit and nuts) might colour the impression one gains from tasting the product and in particular whether its taste is like that of traditional confectionery (for instance sweetness).

137. We are satisfied that the errors (of failing to take account of healthiness and/or the nature of the ingredients by comparison with traditional confectionery) might have made a different to the decision if they had been taken into account.

138. While it is relevant, to consider whether the decision would be sustainable on the basis of the unchallenged findings made, we do not consider a decision the products were confectionery would be possible, on the basis of the findings which can be isolated, given the qualitative nature of the findings and the pervasive effect of the impugned factors on the other findings. The remaining findings on sugar content, that the ingredients were subjected to a process, were normally eaten with fingers, were held out as snacks, consumed between meals, and their names (placement being at best a neutral factor) would not, we consider, be sufficient by themselves to sustain a holding the products were confectionery. It would be necessary to reach conclusions on the impugned factors of taste, whether they were held out as treats, whether they were held out as filling same role as traditional confectionery, their packaging and ingredients too. Those factors would, in line with our discussion on pervasiveness above, also include considerations of the healthiness of the products and that they lacked the ingredients associated with traditional confectionery.

139. We therefore consider the decision should be set aside. It is worth emphasising that while the materiality of the errors is sufficient to set aside the decision on the basis we are satisfied that but for the errors the decision *might have* been different, that of course leaves open the possibility that a tribunal, whether us or the FTT who redecided the matter, might reach the same decision the FTT did even when the omitted factors are taken into account.

Should UT remake the decision or remit to the FTT?

140. Under s12(2) of the Tribunal Courts and Enforcement Act, where a decision of the FTT is set aside we must either remit the case to the FTT with directions for its reconsideration or re-make the decision ourselves. The appellant submits both options are open to us whereas. HMRC say it should be remitted to the FTT for a full fresh decision.

141. We consider, taking account that given the nature of the errors means that further detailed findings of fact may need to be made, that it is appropriate for that task to be undertaken by the FTT. However, acknowledging the effort and resource that has been expended in hearing the evidence, that the FTT addressed a number of issues regarding the scope of evidence before it, which were not challenged, and that a number of primary findings made by the FTT were not subject to challenge, we consider our directions should ensure the scope of the re-hearing is commensurate with rectifying the errors and should avoid the cost and expense of a full re-hearing.

142. We consider the matter should (as both parties acknowledged) take place before a new panel. This does not stem in any way from any criticism of the judge but is so as to avoid any concern that a dispassionate observer would consider the panel had been subconsciously influenced by its earlier decision (see *Revive Corporation Limited v HMRC* [2020] UKUT 320 (TCC) (at [42]).

143. We will therefore remit the matter back to the FTT with the following directions for determination.

(1) The remitted appeal must be heard by a differently constituted Tribunal (to be selected by the FTT President)

(2) The FTT shall (subject to (4)) make its determination on the basis solely of the evidence that was taken account of by the original FTT.

(3) The FTT shall accord Mr Galbraith's evidence the same value as the original FTT on the basis explained at [131].

(4) The new FTT may, as it sees fit, conduct its own test of taste and texture of the products insofar as samples of these are still available (it is understood that some are no longer in production).

(5) The FTT may, if it remains possible, and if the parties reach agreement on bearing the cost, have recourse to the recording and/or transcript of the original FTT hearing.

(6) The new FTT shall take as given the following primary findings of fact, but may as it sees fit make additional findings of fact on the basis of the evidence that was before the original FTT:

(a) Organix bars: *Ingredients and Process* [111] – [115], *The market and marketing* [116] – [121], *The Packaging* [122] – [126], *The Purchasers* [131].

(b) Nakd bars: *Ingredients and Processing* [186] to [191], *Packaging* [192] – [194], *Positioning in store* [195] – [196], *On-line marketing* [197] – [198], *Purchasers* [201] –[202].

(7) The FTT shall, having made any such additional findings of fact on the basis of the evidence that was before the original FTT (and if applicable its own taste test of the product samples) perform its own fresh evaluation of whether the products are "confectionery".

(8) The FTT shall make whatever directions it sees fit regarding the format of the hearing such as the manner and timing of submissions from the parties on the significance of the factors the original FTT omitted, the additional findings to be made, and the issues before the tribunal including, where appropriate issues concerning quantum.

Quantum

144. Before the FTT the parties raised the disputed issue regarding the quantum of the output tax to be repaid. The appellant contested HMRC's position that only the net amount should be

repaid (after deducting the input tax the appellant paid to the product manufacturers when it bought the products from them), arguing all of the output VAT should be repaid. The FTT did not deal with that argument as it only became relevant if the appellant were successful.

145. Pending a determination on remittal to the FTT, the issue is similarly academic before us. We decline HMRC's suggestion that we should deal with the legal issues raised by the dispute at this point. The issue may not even require resolution so any determination we would make would be on an *obiter* basis. If the issue does require resolution, because the appellant is successful before the FTT, we consider the quantum matter would best be resolved in tandem with the FTT's substantive decision, so that if there is any onward appeal both issues may be dealt with together.

146. The issue of quantum will accordingly be dealt with by the FTT upon hearing submissions either at the substantive hearing, or subsequently in the event the appellant is successful, as the FTT sees fit.

DECISION

147. The appellant's appeal is allowed. The appeal is remitted for a decision by a new FTT panel in accordance with our directions above at [143].

JUDGE SWAMI RAGHAVAN
JUDGE GUY BRANNAN

Release date: 23 January 2023