



**TC06296**

Appeal number: TC/2014/06108

*VALUE ADDED TAX – whether bicarbonate of soda sold as baking ingredient is “food of a kind used for human consumption” and so zero-rated for VAT purposes – section 30(2) and item 1 Group 1 Schedule 8 Value Added Tax Act 1994 - appeals allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PHOENIX FOODS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ASHLEY GREENBANK  
MOHAMMED FAROOQ**

**Sitting in public at Leeds on 30 and 31 October 2017**

**Timothy Brown, counsel, instructed by Schofield Sweeney LLP for the Appellant**

**Lisa Linklater, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. This is a consolidated appeal comprising appeals made by the appellant, Phoenix Foods Limited (“Phoenix”) against two decisions of the respondents, the Commissioners for Her Majesty’s Revenue & Customs (“HMRC”).

(1) The first was a decision to refuse Phoenix’s application to treat its supplies of bicarbonate of soda as zero rated for Value Added Tax (“VAT”) purposes under item 1 Group 1 Schedule 8 Value Added Tax Act 1994 (“VATA”). This decision was made by way of a letter dated 14 May 2014 and upheld on review by way of a letter dated 13 October 2014.

(2) The second was a decision to raise an assessment for unpaid VAT in the amount of £291,526.00 together with interest in the amount of £13,568.98 (being in total £305,094.98) for the VAT periods 01/12 to 06/14. The notice of assessment was issued on 19 December 2014.

2. Both appeals raise the same issue: whether, as Phoenix contends, its supplies of bicarbonate of soda were “food of a kind used for human consumption” and so zero rated for VAT purposes under item 1 Group 1 Schedule 8 VATA or whether, as HMRC contends, those supplies attracted VAT at the standard rate.

### The hearing and the evidence

3. We were presented with agreed bundles of written evidence for the hearing. In addition, both parties sought to introduce new documentary evidence during the course of the hearing. These applications were not contested and we accepted the additional evidence. We were also provided by the appellant with some freshly baked soda bread to taste.

4. The bundles contained various witness statements. In particular, the bundles contained the statements of the following witnesses on behalf of Phoenix:

(1) a statement made by Mr Benjamin Taylor, an enquiry agent instructed by Schofield Sweeney LLP on behalf of Phoenix, whose statement contained evidence of the positioning of bicarbonate of soda in various supermarkets on dates in May 2015;

(2) a statement of Mr Andrew Southall, an employee of Kilo Limited (“Kilo”), suppliers of bulk bicarbonate of soda to Phoenix, whose statement contained evidence of the source of the supplies of bicarbonate of soda made by Kilo to Phoenix;

(3) a statement of Mr Robert Ascough, an employee of Wm Morrison Supermarkets PLC (“Morrison’s”), whose statement contained evidence of the location of bicarbonate of soda in supermarkets operated by Morrison’s in the period since October 2016;

(4) a statement of Ms Anastasia Duncanson, also an employee of Morrisons, whose statement contained evidence of the sourcing and purchasing of supplies of bicarbonate of soda for Wm Morrison Supermarkets PLC in the period after April 2015.

5 5. These witness statements were not challenged. The relevant witnesses did not appear to give evidence or to be cross-examined on their statements.

6. The bundles also contained witness statements of Mr Christopher Terry, a director of Phoenix at the time of HMRC's enquiries into its supplies of bicarbonate of soda, and Mrs Karen Dodson, an officer of HMRC, who made the decision to  
10 refuse Phoenix's application treat its supplies of bicarbonate of soda as zero-rated. Mr Terry and Mrs Dodson both gave evidence and were cross-examined on their statements.

7. Both parties also sought to rely on expert evidence.

(1) The expert who gave evidence on behalf of Phoenix was Mr Brian Smith  
15 of Booth Smith Food Technology Limited, a food technology consultant. The bundle contained a witness statement and report provided by Mr Smith. Mr Smith gave evidence and was cross-examined on his statement.

(2) HMRC's expert evidence was given by Mrs Louise Gearey of Campden  
20 BRI. The bundles contained written evidence provided by Mrs Gearey. At the hearing, HMRC applied for permission to introduce a further statement made by Mrs Gearey. This application was not contested and we accepted her further statement in evidence. Mrs Gearey gave evidence and was cross-examined on her written evidence.

8. We comment separately on the expert evidence below.

## 25 **The factual background**

9. From the evidence before us, we make the following findings of fact.

### *The supplies made by Phoenix in the period in question*

10. Phoenix registered for VAT with effect from 1 May 2009. It supplied dried powdered and granular products to food retailers.

30 11. Phoenix purchased supplies of bicarbonate of soda in bulk from Kilo. Kilo acquired the raw material for its own supplies from Brunner Mond (of Northwich in Cheshire), Tata Chemicals Europe Limited (also of Northwich in Cheshire) and Novacarb (of Nancy in France). All of the supplies made by Kilo met EU regulations for the requisite purity to be used as a food additive, in particular, EU Regulation  
35 231/2012.

12. Phoenix packaged the bicarbonate of soda for sale to supermarkets.

13. It provided 200g tubs of bicarbonate of soda to Tesco. The tubs were packaged as an own-brand product, “Tesco Bicarbonate of Soda”. It made its first supply of the own-brand product to Tesco on 2 January 2012.

14. We were shown an example of the packaging of the product that was supplied to Tesco. That packaging referred to bicarbonate of soda as “a versatile raising agent for soda bread, cookies and gingerbread”. Ms Linklater pointed out that the example of the packaging that was provided in evidence was not from the period when the supplies, which are the subject of these appeals, were made. As we understood it, there was, however, no dispute that Phoenix supplied bicarbonate of soda as an own brand baking product to Tesco in this period and we infer from the evidence that the packaging was in similar form to that which was provided to us or contained wording similar to that used on the product supplied to Lidl to which we refer below.

15. Phoenix also provided 200g tubs of bicarbonate of soda to Lidl under the brand “Belbake” initially in the UK, but subsequently also in Ireland. The packaging on the tubs referred to bicarbonate of soda as “a gentle raising agent for use in sticky toffee pudding, cookies, gingerbread, soda bread and a wide range of recipes”. At the time, the packaging also referred to the fact that bicarbonate of soda “can also be used around the house as a cleaner, deodoriser and mild abrasive”. Phoenix made its first supply of bicarbonate of soda to Lidl on 8 October 2012.

16. Phoenix treated all of its supplies to Tesco and to Lidl as zero rated for VAT purposes on the grounds that they were “food of a kind used for human consumption” within item 1 Group 1 Schedule 8 VATA. Mr Terry gave evidence on the VAT treatment adopted by Phoenix. However, the decision to treat the products as zero rated was made by one of Mr Terry’s predecessors. We heard no direct evidence as to why Phoenix took the decision to treat its supplies as zero rated notwithstanding HMRC guidance to the contrary (see the section headed “HMRC guidance” which appears later in this decision).

17. On 27 June 2014, the business and undertaking of Phoenix was transferred to Knighton Foods Limited, an associated company.

### 30 *The background to this appeal*

18. On 30 April 2014, an HMRC officer, Mrs Karen Dodson, made a routine visit to Phoenix’s premises. Following her visit, on 14 May 2014, Mrs Dodson wrote to Phoenix to advise Phoenix that bicarbonate of soda should be treated as standard rated regardless of its usage. She asked for details of supplies made within the previous four years in order to calculate the arrears of VAT.

19. Phoenix sought a review of the decision. The decision was upheld on review in a letter dated 13 October 2014.

20. Phoenix appealed to the Tribunal by notice of appeal dated 11 November 2014. The appeal was assigned reference number TC/2014/06108.

21. On 19 December 2014, HMRC raised an assessment for arrears of VAT for the periods 01/12 to 01/14 to give effect to the decision.

22. Phoenix appealed against the assessment on 14 April 2015.

23. The appeal against the notice of assessment was given reference number  
5 TC/2015/02867.

24. The appeals were consolidated by the Tribunal under reference number TC/2014/06108.

*Other evidence regarding the marketing of bicarbonate of soda*

25. There was other evidence before us of the marketing of bicarbonate of soda.  
10 There was evidence from the enquiry agent, Mr Taylor, that bicarbonate of soda was found only in the home baking section of the various supermarkets that he visited in May 2015. The evidence of the two employees of Morrisons, Mr Ascough and Ms Duncan, supported that evidence. Ms Duncan also gave evidence regarding the quality standards that the product and its packaging would be required to meet if it  
15 were to be stocked in the home baking section as a culinary ingredient.

26. The content of this evidence was not challenged. However, counsel for HMRC, Ms Linklater, did point out that none of this evidence was contemporaneous with the supplies of bicarbonate of soda made by Phoenix, which are the subject matter of this case, and often related to other brands. That was clearly correct. However, there was  
20 no suggestion that the general marketing of bicarbonate of soda in supermarkets would have been any different in the period in question and that is the inference that we draw from this evidence.

27. There was also evidence before us of bicarbonate of soda being sold to retail customers in circumstances where it was clear that it was intended for other uses. In  
25 particular, we were referred to the sale of bicarbonate of soda in Wilko hardware stores. We were shown the packaging for this product. That packaging clearly identified the bicarbonate of soda as a cleaning product. It included warnings on the packaging that the product was to be kept out of the reach of children and was not to be taken internally. (Notwithstanding these warnings, Mr Smith, who gave expert  
30 evidence for Phoenix, confirmed that it was unlikely that this product was any different from the product sold by Phoenix to Tesco and Lidl as a culinary ingredient.)

28. From the evidence before us, it is clear to us, and we find as a fact, that the supplies of bicarbonate soda made by Phoenix, which are the subject of this appeal, were intended to be used primarily as a baking ingredient: the sales were made to  
35 leading supermarkets; although the packaging of the Belbake product sold to Lidl did suggest that there may be other uses for the product, the packaging was consistent with the primary intended use of the bicarbonate of soda being that of a culinary ingredient; and it was likely that the product would have purchased by those at the supermarket responsible for the purchase of home baking goods for sale in its home  
40 baking section.

### **The expert evidence**

29. The parties made a joint application to rely on expert evidence. By directions issued by the Tribunal on 23 March 2016, the Tribunal gave permission for the parties to rely on the proposed expert witnesses (Mr Smith and Mrs Gearey), set out a list of issues to be addressed by the experts and specified the dates by which the experts' reports were to be delivered.

30. In the course of the preparation of the evidence for the hearing, further case management directions were made and additional evidence provided. At the hearing, the written expert evidence before us comprised:

- (1) the witness statement and report of Mr Smith dated 12 April 2016;
- (2) the witness statement and report of Mrs Gearey dated 8 September 2016;
- (3) replies of Mrs Gearey dated 2 November 2016 to questions on her report raised by the appellant.

31. HMRC also made an application to introduce a further statement by Mrs Gearey in which she responded to certain technical issues arising from the other witness evidence provided by the appellant. This application was not opposed and we accepted the further statement in evidence.

32. As we have mentioned above, Mr Smith and Mrs Gearey also gave oral evidence and were cross-examined on their reports and statements. In their reports, the experts came to opposing answers on the VAT treatment of the product: Mrs Gearey came to the view that the product "is not a food but is a chemical that can be used as a food additive", whereas Mr Smith expressed the view that bicarbonate of soda "would meet the definition of food in that it is a food ingredient fit for human consumption which has nutritional content". In cross-examination, counsel also sought to concentrate on the areas of dispute between the two expert witnesses, particularly in relation to the treatment of various products for VAT purposes. Apart from highlighting some of the possible inconsistencies in the classification of different products for VAT purposes, we did not find that approach particularly helpful. The question of whether a particular product is "food of a kind used for human consumption" for VAT purposes is one for the Tribunal not for the expert witnesses. On the attributes of bicarbonate of soda, on which the technical expertise of the experts was in point, the expert witnesses were, perhaps not surprisingly, largely in agreement.

#### *Agreed points from the expert evidence*

33. The points of agreement that we took from the expert evidence are set out in the following paragraphs.

34. Bicarbonate of soda is a chemical compound. It is also known as sodium hydrogen carbonate, sodium bicarbonate, baking soda or sodium acid carbonate.

35. Bicarbonate of soda occurs in nature (nahcolite), but is generally unstable in its natural form. Most, if not all, bicarbonate of soda used in the production of food is manufactured in a chemical process known as the Solvay procedure.
36. Bicarbonate of soda is manufactured in various grades of purity. The level of  
5 purity depends upon its use.
37. There was some discussion of the meaning of “food grade” in this context. There is no fixed technical definition of “food grade”. However, the relevant EU and UK authorities issue various regulations governing the use of bicarbonate of soda in food, which specify the level of purity which is required. In this context, the term  
10 “food grade” is used simply to denote bicarbonate of soda that meets the relevant purity standards and which has been tested for that purpose.
38. The relevant EU regulation is Commission Regulation (EU) 231/2012. It specifies that bicarbonate of soda used as an ingredient in food must be 99% pure. It also sets out the maximum permitted levels of various impurities. These include  
15 arsenic, lead and mercury.
39. There is no requirement for any particular particle size for the use of bicarbonate of soda in food. The particle size will be determined by the application to which the bicarbonate of soda is put.
40. Commission Regulation (EU) 1169/2011 on Food Information to Consumers  
20 (the “2011 Regulation”) contains definitions for the purpose of food standard regulations of “food additives” and “ingredients”. The definition of “food additive” in Article 2 refers to the definition in Article 3(2) of Regulation (EC) 1333/2008 of the European Parliament and of the Council (the “2008 Regulation”). It states:
- 25 “(a) “food additive” shall mean any substance not normally consumed as a food in itself and not normally used as a characteristic ingredient of food, whether or not it has a nutritional value, the intentional addition of which to food for a technological purpose ... results ... in it or its by-products becoming directly or indirectly a component of such foods;”
- 30 41. An “ingredient” is defined by Article 2(2)(f) of the 2011 Regulation as:
- “any substance or product including, ... food additives..., used in the manufacture or preparation of a food and still present in the finished product, even if in an altered form...”
- 35 42. All food additives are ingredients by reference to these definitions provided that they or their by-products are present in the finished product, but not all ingredients are food additives. Food additives have an “E number”. Bicarbonate of soda is treated as a food additive. It has the E number E500.
- 40 43. Whether or not an ingredient is a food additive, as defined, does not determine its VAT treatment: some additives are standard rated (e.g. food colourings); some are zero rated (e.g. acetic acid, malic acid, cream of tartar).

44. Bicarbonate of soda contains sodium, which is an “essential nutrient”. This term refers to nutrients which the human body cannot synthesize on its own, but which are vital for the normal growth, maintenance and development of the body.
45. Sodium represents approximately 27% of any sample of bicarbonate of soda.  
5 One teaspoon of bicarbonate of soda provides approximately 16% of the recommended daily intake of sodium, which is 1600mg. The typical western diet contains more than the recommended daily intake of sodium.
46. Bicarbonate of soda is not normally consumed as a food itself. It is not usually consumed directly except as a medicine.
- 10 47. When it is used in baking, bicarbonate of soda is used primarily as a leavening agent rather than for any nutritional value that it may have. It reacts with moisture and acid in the mixture to produce carbon dioxide, which expands the mixture before it is baked. When the mixture is cooked, the carbon dioxide is replaced by air. In this way, bicarbonate of soda provides texture to food.
- 15 48. Bicarbonate of soda has various other medical, household and industrial uses. In particular, it is used as an antacid in treatments for indigestion and heartburn, and it has household uses as a cleaning agent, as a deodorizer, or for personal care. Bicarbonate of soda which meets the purity requirements for use in food could be used for these purposes and in industry for other (non-food) uses.
- 20 49. The expert witnesses made various comparisons with other food ingredients, which, in contrast to bicarbonate of soda, are treated by HMRC as zero rated for VAT purposes. We will only refer to a few of those comparisons here.
50. The first comparison was with baking powder. Baking powder is a mixture of bicarbonate of soda (approximately 30%), an acidifying agent (e.g. tartaric acid or  
25 cream of tartar) and a drying agent (e.g. corn starch). It is only used as a leavening agent for baking. In contrast to bicarbonate of soda, there are no other uses for which baking powder is commonly marketed. It is essentially pre-mixed bicarbonate of soda designed solely for baking: whereas bicarbonate of soda used on its own relies on  
30 other ingredients in the mixture in order to become active, in baking powder the relevant acid is in the mixture. There may be additional nutrients in the mixture (in addition to sodium) because of the presence of the other components, but those components are not added for their nutritional value.
51. There was some discussion of the treatment of table salt. As with bicarbonate of soda, table salt is not usually consumed as a food on its own. It contains an  
35 essential nutrient (sodium), but it is added to food not for its nutritional value but for its effect on taste. As with bicarbonate of soda, salt has many other uses, including use as a food preservative or as a water softener. From the evidence that we heard, there is little difference in the chemical composition of table salt, organic salt, sea salt or salt used in dishwashers, other than the particle size.
- 40 52. The final comparison to which we will refer is that flour. As with bicarbonate of soda, flour is not usually consumed as a food on its own and it is not recognizable



in the finished product of home baking. However, it is a natural product, has much greater nutritional value and is added to food because of its nutritional value.

*Other issues from the expert evidence*

53. There were differences between the experts on some points.

5 54. Mr Smith objected to some of the terminology used in Mrs Gearey’s written evidence, which was reiterated by Ms Linklater. In particular, he took exception to the reference to bicarbonate of soda as a “chemical” in Mrs Gearey’s report. He regarded the term as emotive, when in fact many of the substances which were discussed were chemical compounds (e.g. vinegar, lemon juice).

10 55. In a similar vein, Mr Smith took issue with the reference to bicarbonate of soda being used in baking “for technological purposes”. Whilst he did not disagree with the term if it was simply intended as a reference to the use of bicarbonate of soda to add texture to food, in his view, it was again an emotive term. He contrasted it with the reference to the uses of other ingredients for example, the use of sugar as a  
15 preservative in jam or the use of salt to cure meat – both of which were similar “technological” uses.

56. We took the reference to “technological purposes” as being a reference to the definition of a “food additive” in the 2008 Regulation and the 2011 Regulation in that bicarbonate of soda was not normally added to baking for nutrition or taste. As we  
20 understood it, Mr Smith agreed with the use of the term in that context in that the primary use of bicarbonate of soda in baking would be to add texture.

57. Mr Smith also took issue with the assertion in Mrs Gearey’s written evidence that bicarbonate of soda did not impart flavour to foods. He referred in particular to the use of bicarbonate of soda in soda bread. When questioned on this point, Mrs  
25 Gearey appeared to accept that her assertion was too categoric, but she considered the issue as a complex one. In her view, bicarbonate of soda adds texture and texture is an element of taste.

58. Both of the expert witnesses referred to *The Composition of Foods* by McCance and Widdowson (“*McCance*”). Mr Smith referred to this text as the “classic reference  
30 work” when giving evidence. He noted that in that publication bicarbonate of soda was referred to as a food ingredient with a significant dietary sodium content. Although Mrs Gearey used references to *McCance* as sources for much of the dietary information in her written report, she referred to *McCance* as “guidance” and considered the inclusion of bicarbonate of soda in *McCance* as little more than  
35 confirmation of its status as a food additive.

**The law**

59. Section 30(2) VATA provides that a supply of goods or services is zero-rated if the goods or services are “of a description for the time being specified in Schedule 8 [VATA]”.

60. Schedule 8 VATA provides, so far as relevant:

The supply of anything comprised in the general items set out below, except—

(a) a supply in the course of catering; and

(b) a supply of anything comprised in any of the excepted items set out below, unless it is also comprised in any of the items overriding the exceptions set out below which relates to that excepted item.

#### **General items**

Item No.

1. Food of a kind used for human consumption.

2. Animal feeding stuffs.

3. Seeds or other means of propagation of plants comprised in item 1 or 2.

4. Live animals of a kind generally used as, or yielding or producing, food for human consumption.

61. There follows a list of excepted items and then a list of items overriding those exceptions. The items in those lists are not relevant to these appeals.

62. In this case, the question is whether or not the supplies of bicarbonate of soda made by Phoenix fell within item 1 Group 1 Schedule 8 VATA as being “food of a kind used for human consumption”.

#### **HMRC guidance**

63. We were referred by both parties to the guidance produced by HMRC on the scope of item 1 Group 1 Schedule 8 VATA. Both parties acknowledged that none of this guidance was legally binding.

64. We were referred to various parts of the relevant HMRC VAT Notice, Notice 701/14, in the form that it was in in February 2014.

65. Paragraph 2.3 of that Notice set out some general guidance on the meaning of item 1. It stated:

#### **2.3 What does “food of a kind used for human consumption” mean?**

A product is “food of a kind used for human consumption” if:

- the average person, knowing what it is and how it is used, would consider it to be food or drink; and
- it is fit for human consumption.

The term includes:

- products eaten as part of a meal, or as a snack; and
- 5 - products like flour, which, although not eaten by themselves, are generally recognised food ingredients.

The term would not usually include:

- 10 - medicines and medicated preparations;
- dietary supplements, food additives and similar products, which, although edible, are not generally regarded as food.

15 66. Paragraph 3.2 contained more specific guidance in relation to items used in home cooking and baking. It stated:

### 3.2 Ingredients and additives used in home cooking and baking

20 As a general principle, you can zero-rate a product sold for use as an ingredient in home cooking or baking if it:

- has some measurable nutritional content;
- 25 - is used solely or predominantly, in the particular form in which it is supplied, in the manufacture of food; and
- is not one of the excepted items - see paragraph 2.2.

30 67. The reference to “excepted items” at the end of that paragraph is to the excepted items listed in Group 1 Schedule 8 to which we referred at [61] above and which are not relevant in this case. There then followed a table which listed various items and HMRC’s views of their expected VAT treatment. The following items are extracted from that table:

<b>Food item</b>	<b>Rate of VAT</b>	<b>Notes</b>
Salt for culinary use	ZR	Including fine salt, dendritic salt, and, in retail packs (12.5kg or less), rock and sea salt
Non-culinary salt	SR	Including compacted salt (pellets & tablets), granular salt, rock salt (other than retail packs), soiled salt, salt for dishwashers and salt of any type for non-food use
Other food additives such as baking powder, cream of tartar, rennet, lactase and pectin for culinary use	ZR	

Non-food additives such as bicarbonate of soda, saltpetre and other single chemicals for use in brining or other processing of meats or fish	SR	
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(In this table and the table in paragraph [68], the abbreviation “SR” means standard rated and the abbreviation “ZR” means zero rated.)

- 5 68. We were also referred to guidance taken from the relevant HMRC Manuals and, in particular a long list of food additives set out in HMRC internal manual VAT Food at paragraph VFOOD2600. It contained the following reference to bicarbonate of soda:

Name	Use	E No.	VAT
Sodium carbonate; bicarbonate of soda; sodium sesquicarbonate	Base, aerating agent, diluent	500	SR

- 10 69. The extract to which were referred was expressed to be in form taken from HMRC’s website on 8 April 2015, which is outside the period which is relevant for the purpose of these appeals. However, neither party suggested that the reference would have been any different at the relevant time.

### The parties’ submissions

15 *The appellant’s submissions*

70. We have summarized the submissions made by Mr Brown on behalf of Phoenix in the following paragraphs.

- 20 71. Mr Brown says that the relevant test is whether the ordinary person in the street, having learned what the Tribunal has learned from the evidence, would regard the product as “food of a kind used for human consumption”. In support of this proposition, he refers to the decisions of the Court of Appeal in *Customs and Excise Commissioners v Ferrero UK Limited* [1997] STC 881 (“*Ferrero*”) and *HMRC v Procter & Gamble UK Limited* [2009] EWCA Civ 407 (“*Procter & Gamble*”), in particular the judgment of Jacob LJ at [18], [19], and [21]. He also refers us to the decision of the VAT Tribunal in *Arthro Vite Limited* VAT Decision No. 14836, in particular at [49].

- 30 72. He says that the Tribunal should take into account all the facts of the case. In particular, the Tribunal should take into account how the product is marketed (see *Durwin Banks* (VAT Decision No. 20695) at [37]). Mr Brown points to the wording on the packaging and the location at which the product would be sold in supermarkets as evidence that the product was clearly intended to be sold as a food ingredient.

73. Mr Brown acknowledges that bicarbonate of soda can have other uses. He says, however, that it is necessary to look at the supplies actually made by the appellant.

They were clearly intended for use in the production of food. In contrast, the product sold by Wilko was clearly not intended to be sold as a food ingredient. Furthermore, there are many other products which are zero rated as food when supplied to consumers but may have other non-food uses, such as vinegar and lemon juice.

5 74. The product contains an essential nutrient, sodium. The fact that the nutritional value of the product may be small is not relevant (see the decision of the VAT Tribunal in *Devro Limited* (VAT Decision No. 7570)). The fact that there is an excess of sodium in a typical western diet is equally not relevant.

10 75. Bicarbonate of soda is an essential ingredient in many breads and cakes. It provides the texture which is essential to the food being palatable. It is not cosmetic. (In this respect Mr Brown distinguishes the decision of the VAT Tribunal in *Gas & Chemicals Limited* (VAT Decision No. 18160) concerning the addition of gases to beer.)

15 76. The classification of bicarbonate of soda as a food additive with an E number under the relevant EU regulations is irrelevant. The E number is simply an indicator that bicarbonate of soda is safe to ingest. Many other products with E numbers are zero rated as food.

20 77. Mr Brown also argues that the fact that the product is not normally consumed in its natural form is not a bar to its being zero rated as food. He refers to the decision of the Court of Session in *Customs and Excise Commissioners v Macphie & Co (Glenbervie) Ltd* [1992] STC 886 (“*Macphie*”) at page 890 to page 891 in support of this point.

25 78. Mr Brown also refers to the purpose of the zero rating of supplies. He says that the zero rating of food is intended to be a broad based exemption from VAT. It is not limited to food items that are consumed in their natural form. It can extend to items that contribute to the production of food (see the decision of the Court of Justice of the European Union in *EC Commission v UK* Case 416/85 [1988] STC 456 at [19] and [20]).

30 79. He also refers to some of the anomalies in the way in which other products are treated by HMRC for VAT purposes:

(1) table salt, is treated as food (and zero rated) when it is sold in retail packs, but standard rated when it is sold in larger quantities;

(2) baking powder, in which the main active ingredient is bicarbonate of soda, and which is essentially a pre-mixed leavening agent, is accepted as zero rated.

35 *HMRC’s submissions*

80. We have summarized the submissions made by Ms Linklater on behalf of HMRC in the following paragraphs.

81. Ms Linklater did not disagree fundamentally with the nature of the test that should be applied as described by Mr Brown on behalf of the appellant. She did,

however, disagree with the relevance of particular factors and the weight we should put on them.

82. Ms Linklater says that bicarbonate of soda is a generic item with multiple uses. The question of whether or not it should be regarded as “food of a kind used for human consumption” should be determined by nature of the product not how it is marketed.

83. Bicarbonate of soda is a bulk chemical. It is added to food for a technological purpose, as a raising agent. It is not added to food for its nutritional value. It was purchased by Phoenix from suppliers of bulk chemicals. There was no change in the nature of the product between the supply to Phoenix and the supply by Phoenix. The product was simply packaged into small tubs for sale to retail customers.

84. Ms Linklater refers to the wording of item 1 Group 1 Schedule 8 VATA and in particular the use of the words “of a kind used”. She points out that the wording is not “when used” or “when marketed as”. She says that there is no authority to support the submission that a product can be rated differently for VAT purposes depending on its intended use.

85. In addition to its use as a leavening agent in baking, bicarbonate of soda has important characteristics for neutralizing and buffering. As a result, it has multiple uses in the home and in industry. The average consumer is aware that bicarbonate of soda has multiple uses when he or she purchases the product.

86. Whilst there are purity requirements that need to be met for bicarbonate of soda to be used in food (referred to as “food grade”), bicarbonate of soda that meets those requirements has other uses, for example, in cosmetics or as a water additive.

87. Baking powder on the other hand is a specific product with a specific use. It is not sold for any purpose other than as a baking ingredient even if, in theory, it could be used for some other purposes, for example as a deodorizer, that is not the purpose for which a typical consumer purchases the product.

88. Ms Linklater accepts that VAT Notice 701/14 does not have the force of law. The guidance in HMRC Manuals (at VFOOD2600) is simply guidance; it is not binding and does not provide a legal test. However, she notes that the decisions which are the subject of these appeals are, at least, consistent with the guidance issued by HMRC in its Manuals and VAT Notice 701/14: bicarbonate of soda is listed as standard rated in paragraph 3.2 of VAT Notice 701/14 and in HMRC’s Manuals at paragraph VFOOD 2600. Paragraph 2.3 of VAT Notice 701/14 the term specifies that “food of a kind used for human consumption” does not usually include food additives.

89. Furthermore, she says that the supplies that qualify for zero rating are limited. The UK is entitled to retain zero rating for supplies that were zero rated as at 1 January 1991 (article 110 of Council Directive 2006/112/EC (the “Principal VAT Directive)). It is not open to the UK to extend the categories of supplies that qualify zero rating (articles 98 and 99 of the Principal VAT Directive). It is not open to

HMRC through guidance, in effect, to expand the categories of zero rated supplies by concession.

5 90. Ms Linklater referred us to various previous decisions of the courts and tribunals, but, when doing so noted that the Tribunal should be careful in referring to previous authorities not to “elevate issues of fact into questions of principle” (Lord Woolf MR in *Ferrero* [1997] STC 881 at page 884).

10 91. Nonetheless she relied on various VAT Tribunal decisions in support of a submission that the fact that a product is edible and has some nutritional value is not determinative of the question of whether or not it is “food of a kind used for human consumption” (notably, *National Safety Associates of America (UK) Ltd* (VAT Decision No. 14241), *Marfleet Refining Company Limited* [1974] VATTR 289 and *Gas & Chemicals Ltd* (VAT Decision No. 18160)).

15 92. She also sought to distinguish the decisions of the Court of Session in *Macphie* – on which Mr Brown relied in support of his submission that the product does not need to be capable of being consumed in the form that it is supplied - and the VAT Tribunal in *Devro Ltd* (VAT Decision No. 7570) - on which Mr Brown relied in support of his submission that the product need not have a material nutritional value: the former on the basis that 95% of the ingredients in the product (bread roll concentrate) were accepted as being “food”; the latter on the basis that the product  
20 (sausage casings) was a single use product that was integral to the food in which it was incorporated.

## Discussion

### *The application of the case law*

25 93. The question before us is whether bicarbonate of soda when supplied in the form in which it was supplied by Phoenix is “food of a kind used for human consumption” within item 1 Group 1 Schedule 8 VATA.

30 94. We were referred by the parties to certain case law authorities as to how we should approach that question. We did not discern much disagreement between the parties on the general approach. In summary, both parties agreed that we should determine that question from the perspective of the ordinary person in the street who has been informed as we have been informed about the product and the relevant surrounding circumstances (see Lord Woolf MR in *Ferrero* [1997] STC 881 at page 884a-c and page 885a) or as Jacob LJ put it in *Procter & Gamble* [2009] EWCA Civ 407 [2009] STC 1990 at [21] “what is the reasonable view on the basis of all the  
35 facts?”, a formulation which we prefer.

40 95. In reaching our conclusion, based on all of the facts, we are not required to identify each relevant characteristic of the supply and assign to it a particular weight; to do so would be engage in the form of over-elaborate analysis discouraged by the Court of Appeal in *Ferrero* and in *Procter & Gamble*. Rather our job is to identify the relevant factors and to take them into account in an overall assessment.

96. As Jacob LJ said in *Procter & Gamble* (at [19]):

5 “It was not incumbent on the Tribunal in making its multifactorial assessment not only to identify each and every aspect of similarity and dissimilarity (as this Tribunal so meticulously did) but to go on and spell out item by item how each was weighed as if it were using a real scientist’s balance. In the end it was a matter of overall impression. All that is required is that “the judgment must enable the appellate court to understand why the judge reached his decision” ( per Lord Phillips MR in *English v Emery* [2002] EWCA Civ 605, [2002] 1 WLR 2409 at [19]) and that the decision “must contain ... a summary of the Tribunal’s basic factual conclusion and statement of the reasons which have led them to reach the conclusion which they do on those basic facts” ( per Thomas Bingham MR in *Meek v Birmingham City Council* [1987] IRLR 250 ).”

97. As can be seen from our summary of the submissions made by the parties, we were referred to various decisions of the courts and other tribunals on the question of whether various other products should be regarded as “food of a kind for human consumption” for VAT purposes. We were also referred to several other decisions to which we have not specifically referred. We are mindful of the need not to elevate the decisions in any of those cases on issues of fact into questions of principle (to follow Lord Woolf MR’s instruction in *Ferrero*) and so, while we have taken note of the decisions in those cases as useful illustrations of the application of the test, we have not sought to derive any particular governing principles from them.

98. We do, however, take some points from the decided cases.

25 (1) First, the term “food of a kind used for human consumption” does not require that the product must be sold in a form that could be consumed without any preparation by the consumer before it can qualify for zero rating (see the decision of the Court of Session in *Macphie* [1992] STC 886 at page 890a-b).

30 (2) Second, items that contribute to the production of substances for human consumption can qualify for zero rating (*EC Commission v UK* Case 416/85 [1988] STC 456 at [19] and [20]) and so ingredients for food can themselves, in appropriate circumstances, qualify for zero rating.

(3) Third, it is not necessary that the recipient of the supply should be the final consumer of the product in order for the supply to qualify for zero rating (see also *Macphie* at page 890a-b).

#### *Our conclusion*

35 99. As we have mentioned above, the question before us is whether bicarbonate of soda when supplied in the form in which it was supplied by Phoenix is “food of a kind for human consumption” within item 1 Group 1 Schedule 8 VATA?

40 100. Jacob LJ referred in *Procter & Gamble* (at [14]) to this sort of question being “a short practical question calling for a short practical answer”. Our short answer to the question is that bicarbonate of soda which is supplied in a form in which it is primarily intended for use as a baking ingredient is a supply of “food of a kind used for human consumption” and so the supplies of bicarbonate of soda made Phoenix fell within item 1 Group 1 Schedule 8 VATA.



*The reasons for our conclusion*

101. The factors that we have taken into account in reaching our conclusion are set out in the paragraphs below.

102. Bicarbonate of soda is an essential ingredient in some bread and cakes.  
5 Bicarbonate of soda is critical to the texture of such foods and texture, alongside taste, is an important attribute of food.

103. We have found as a fact that bicarbonate of soda, when it is used as a baking ingredient, is added purely as a leavening agent in most recipes. However, we agree with Mr Brown that the addition of bicarbonate of soda to such foods is not purely  
10 cosmetic. It is not the same as adding a preservative, colouring or a vitamin. It is essential to those foods being in the form in which we expect them to be and so being palatable.

104. There was some dispute between the experts as to whether or not bicarbonate of soda had an effect on taste. Although bicarbonate of soda may impart some flavour to  
15 some foods (e.g. soda bread), bicarbonate of soda is not often added to food primarily for its effect on taste. However, it is critical to the texture of foods to which it is added and, as Mrs Gearey accepted, texture is often an important element in taste.

105. The supplies of bicarbonate of soda made by the appellant in this case were clearly intended to be used primarily as a baking ingredient: they were packaged in  
20 small tubs, the packaging was consistent with the principal use of the product being for home baking and it was sold to retailers for sale in their home baking sections. A typical customer of the retailer purchasing that product could have had little doubt that he or she was purchasing an ingredient for home baking and the same would be true of the supermarket purchasing the product from the appellant.

25 106. We accept the evidence that bicarbonate of soda has many uses. However, there are many other food products which have other uses (for example, lemon juice and vinegar). Furthermore, when it is sold for other uses in the retail context, bicarbonate of soda will be packaged very differently (for example, the Wilko product to which we referred earlier, which had a very different package size and contained warnings  
30 concerning its use).

107. Ms Linklater suggested that we should concentrate on the nature of the product itself and not on the packaging and marketing. We have taken into account the nature of the product. We acknowledge that bicarbonate of soda can be purchased as a bulk  
35 chemical and that the product itself might have several uses. However, in a case where a product might have various uses, it seems to us that the intended use of the product - as determined from the form of the packaging and the manner in which it is to be sold - is part of the facts and circumstances surrounding the supply that we should take into account in determining its classification. Those circumstances demonstrate to us that in this case the bicarbonate of soda was being supplied as a  
40 baking ingredient. Although it is clearly possible that the product could be purchased by any given ultimate consumer for other uses, the objective facts surrounding this supply suggest that the typical consumer would purchase the product for baking.

108. Ms Linklater stated that there was no authority for the proposition that the classification of a product for VAT purposes can change depending on its intended use. The implication was that the classification of a supply cannot depend upon its intended use. We disagree with that conclusion. We acknowledge that legal certainty  
5 demands that the classification of a supply cannot turn on the subjective intentions of a particular consumer of the supply. However, in considering whether this particular supply meets the criteria for the classification in question, we are required to form “the reasonable view on the basis of all the facts”. That test requires us to take into account all of the facts and circumstances surrounding the supply. In appropriate  
10 cases, one such factor, it seems to us, is the purpose to which the items that are supplied are likely to be put by a typical consumer of the supply judged by reference to objective factors such as how the product is packaged and marketed.

109. There was some discussion before us of the nutritional value of bicarbonate of soda. Bicarbonate of soda has some albeit limited nutritional value. It contains an  
15 essential nutrient, sodium, which is retained in the bread or cake after it has been baked. It is little different from salt in this respect.

110. In the course of the hearing, it was suggested that we should not consider the fact that bicarbonate of soda contains sodium as a relevant factor on the grounds that there is already too much sodium in a typical western diet. We dismissed this  
20 argument. There is arguably already too much of many things in a typical western diet, but it does not prevent the components of that diet from being classified as food for VAT purposes.

111. That having been said, although there will be cases in which the nutritional value of an item is important in determining whether a particular product is or is not  
25 “food of a kind used for human consumption”, in our view, this is not one of them. It is clear to us that bicarbonate of soda is not incorporated in a recipe for its nutritional content. But, equally, the fact the nutritional content of bicarbonate of soda may be limited does not in our view prevent it from being properly treated an ingredient in food. Its role in providing texture to baking products is too important. In that sense,  
30 bicarbonate of soda is similar to the sausage casings in the case of *Devro Ltd*.

112. Bicarbonate of soda is not, of course, usually consumed in the form in which it is sold. Nor, when it is used as a baking ingredient, is it recognizable in the final product of home baking. However, that is the case for a number of items that are  
35 important ingredients in food, such as flour. It does not prevent them, in appropriate cases, from being classified as “food of a kind used for human consumption” (see for example, *Devro Ltd* and *Macphie*). Ms Linklater sought to distinguish these cases on the grounds that we have described at [92] above. However, as we have mentioned, we view these cases more as illustrations of the result of the overall assessment that we are required to make. In making that overall assessment in this case, it seems to us  
40 that bicarbonate of soda, when it is used as a baking ingredient, contributes significantly to the final product of baking being palatable by imparting texture to the food. It is an essential ingredient and so should fall within the classification.

113. There was some discussion before us of the categorization of bicarbonate of soda as a food additive under the relevant regulations. Bicarbonate of soda meets the definition of an additive in the 2008 Regulation and the 2011 Regulation. It has an “E number”, which demonstrates that a particular product is safe for human consumption. However, that categorization did not take us very far. It is not a criterion that is used in VAT legislation. The term “additive” does not appear in Group 1 Schedule 8 VATA. The relevant VAT Notice (VAT Notice 701/14) appears to treat some additives as falling within the scope of zero rating and others as not, with little explanation of the distinction between the two categories.

114. In *Macphie*, the Court of Session reserved its position on whether the distinction between food additives and ingredients was relevant for VAT purposes (see page 891f). We too would not wish to make any statement of more general application about that distinction.

*The VAT treatment of other products*

115. There was considerable discussion about the treatment for VAT purposes of various other products in argument before us. We will not comment on them all. They are not the subject of this decision. However, we will comment on two comparisons which were made with the treatment of bicarbonate of soda – namely the comparisons with table salt and with baking powder – as the distinctions made by HMRC in its treatment of those items for VAT purposes in order to justify its differential treatment of bicarbonate of soda seemed to us to be particularly difficult to maintain.

116. A supply of salt is treated by HMRC as falling within item 1 Group 1 Schedule 8 VATA, and so as zero rated, when it is sold for culinary use but not otherwise (see VAT Notice 701/14 paragraph 3.2). As with bicarbonate of soda, salt is not normally consumed as food in the form in which it is sold; it has some but little nutritional value; but it is not added to food for its nutritional value, it is added for another purpose (for its effect on taste). As with bicarbonate of soda, salt has various uses and from the evidence before us there is little difference, other than in terms of purity and particle size, between table salt and salt used for other purposes (e.g. dishwasher salt).

117. The only significant difference between salt and bicarbonate of soda when it is used as a baking ingredient is that bicarbonate of soda is usually added to food to provide texture rather than taste. As we have discussed, texture and taste are both important attributes in making food palatable. To our minds, the difference in the VAT treatment of salt sold for culinary purposes and bicarbonate of soda sold for culinary purposes is difficult to justify. The different treatment of salt for VAT purposes by reference to its intended use also rather undermined Ms Linklater’s argument that the treatment of the supply of a product could not be different depending upon its intended use.

118. Baking powder is treated by HMRC as falling within item 1 Group 1 Schedule 8 VATA, and so as zero rated (see VAT Notice 701/14 paragraph 3.2). As we have described, baking powder is simply bicarbonate of soda (approximately 30%) which

5 has been premixed with an acid and a drying agent. It may have some additional nutritional value (usually from the drying agent) over and above the nutritional value derived from the bicarbonate of soda but it is not added to food for its nutritional value. It is used as a leavening agent just like bicarbonate of soda and is sold in the baking section of supermarkets just like bicarbonate of soda.

10 119. Ms Linklater sought to distinguish the treatment of baking powder on the grounds that it is only used for one purpose. We found that distinction difficult to support in cases where bicarbonate of soda is being supplied for the same purpose; that is, for use as baking ingredient. For the reasons that we have given, in our view, it is possible for the intended purpose of a typical consumer of the supply to be a factor in the classification of the supply. And so, we see no reason for distinguishing between the VAT treatment of bicarbonate of soda sold for culinary purposes and baking powder.

### 15 **Decision**

120. For the reasons that we have given above, in our view, the supply by Phoenix of bicarbonate of soda in a form that was intended for use primarily as a baking ingredient was a supply of “food of a kind used for human consumption” and falls within item 1 Group 1 Schedule 8 VATA.

121. We allow these appeals.

### 20 **Rights of appeal**

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

30 **ASHLEY GREENBANK**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 9 January 2018**

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