



TC06909

**Appeal number: TC/2017/5846
TC/2017/6828**

*VAT – food – excepted items – confectionary – overriding item – cakes – healthy
brownie – sufficient characteristics to be classified as a cake – yes – appeal allowed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PULSIN' LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE AMANDA BROWN
DUNCAN MCBRIDE**

**Sitting in public at Taylor House, 80 Rosebury Ave, London on 14 December
2018**

**Philip Simpson QC (Scot), Counsel instructed by Grant Thornton for the
Appellant**

**Julian Hickey, Counsel instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

5 1. The dispute in the present appeals concerns the proper classification for VAT purposes of “Raw Choc Brownies” (“**Products**”) which are produced in four flavours: (i) Maca Bliss, (ii) Almond and Raisin, (iii) Superberry (raspberry and goji), and (iv) Peanut Choc Chip.

10 2. By an error correction notice (“**ECN**”) dated 7 October 2016 the Appellant, Pulsin’ Ltd (“**Pulsin**”) sought to claim repayment of output tax it considered to have been over paid in connection with the sale of the Maca variant over the period 1 September 2012 to 31 August 2016 in the sum of £49,273. Pulsin’ had, during that period, treated sales of the product as standard rated but subsequently considered such supplies to be properly taxed as zero rated cakes.

15 3. A further ECN was submitted on 6 June 2017 in respect of the other variants for the period 1 May 2013 to 31 May 2017 in the sum of £261,989.

20 4. The ECNs were both rejected by HM Revenue and Customs (“**HMRC**”) by letters dated 27 April 2017 and 2 August 2017 respectively. HMRC considered that the Products were not eligible to be zero rated on the basis, in summary, that they did not display enough characteristics of a cake to so qualify.

5. Pulsin’s claims in the present appeal are that:

(1) The Products were not sufficiently sweet to constitute confectionary

(2) By reference to an overall assessment the Products fall to be classified as cakes

25 (3) In the event that the Products are not classified as cakes the principle of fiscal neutrality requires them to be zero rated as essentially similar products in competition with the Products are eligible to be zero rated.

Brief overview of the Products and other items shown to the Tribunal

30 6. The detail of the Products is set out below in the Tribunal’s assessment of the liability of them.

7. However, in outline the Products are individually wrapped bars produced by cold compression of predominantly: dates, cashews, cacao, various syrups, concentrated grape juice and brown rice bran. All ingredients used are intended to be as natural, unprocessed, hypoallergenic and as nutritionally beneficial as possible.

35 8. Cacao is the predominant flavour of all four variants. The Peanut, Almond/Raisin and Superberry variants also have the flavours identified. Each bar is approximately 8cm long, 5.5cm wide and 1.5cm deep. They are all very dark brown

in colour. In all variants small white flecks from the cashews/peanuts are visible. In the variants other than the Maca Bliss the flavouring ingredients (berries, choc chips, almonds and raisins) are also visible. The pressed surfaces of them are smooth. The cut surface at either end are less smooth. They are of a dense texture.

5 9. The Tribunal was also shown a number of other products some of which were more closely examined than others.

10. Closely examined products: Morrisons bakery brownies, Mr Kipling brownies, Mr Kipling gluten free brownies, Pret brownie bar, Morrisons own gluten and dairy free brownies, Kent & Fraser double chocolate vegan brownie.

10 11. Other products available to the Tribunal: Mr Kipling French Fancies, whole Victoria sponge cake, Tunnock Tea Cakes, Mr Kipling Battenberg Bars.

12. Other products known to the Tribunal: tiffin, chocolate crispy cakes, snack packs of Jamaican Ginger Cake, Walkers Fruit Cake Slice, Cadburys Mini Rolls, and Soreen Malt loaf bars.

15 13. Attached as annex 1(a) and (b) is a comparative table of the known features of all the alternative products.

Legislation

14. So far as is relevant, Value Added Tax 1994 (“VATA”) section 30(2) provides:

20 “A supply of goods ... is zero rated by virtue of this subsection if the goods ... are of a description ... specified in Schedule 8 ...”

15. VATA Sch 8 is headed “Zero Rating” and Group 1 describes, and therefore specifies, items eligible to be zero rated under s30 within the category of food. The zero rating of food is complicated as the provision under Group 1 provides for a wide general description (qualifying for zero rating) subject to excepted items (which must therefore be standard rated) with exclusions and overriding items to those exceptions (which then requalify to be zero rated).

16. Item 1 to Group 1 provides for the zero rating of “Food of the kind used for human consumption”. Excepted item 2 excludes from zero rating “Confectionary, not including cakes or biscuits other than biscuits wholly or partly covered with chocolate or some products similar in taste or appearance”. Note 5 then provides “for the purposes of item 2 of the excepted items ‘confectionary’ includes chocolates, sweets and biscuits; drained glace or crystallised fruits; and any item of sweetened prepared food which is normally eaten with the fingers”.

Case law and relevant test

35 17. The approach to be taken by this Tribunal was not the subject of any significant dispute between the parties: in essence the Tribunal must undertake a multi-factorial assessment. The classification of the Products should, according to Jacob LJ in

Proctor & Gamble UK v HMRC [2009] EWCA Civ 407, be “a practical question calling for a practical answer” and not an “over-elaborate, almost mind-numbing, legal analysis”.

18. The role to be played by previous decisions of the courts and tribunals is therefore a complex one. There are many, many cases on the classification of food products but, of course there are none on the classification of the Products.

19. The case of *HMRC v Premier Foods Ltd* [2007] EWHC 3134, which is binding on this Tribunal, concluded that in order to be regarded as an item of confectionary it will be produced through some process such as mixing, compounding, cooking etc. (this distinguishes confectionary from single ingredient items). It also determined that confectionary is also sweet but sweetness may be inherent in the principal ingredient in its natural state or through the addition of an ingredient more commonly considered as a sweetener.

20. HMRC relied on the recent case of *Kinnerton Confectionary Limited v HMRC* [2018] UKFTT 0382 seeking to encourage this Tribunal to focus heavily on the manner in which the Product was held out for sale as determining the question of its liability.

21. That case concerned the liability of an allergen free chocolate bar. In that case Kinnerton sought to align their chocolate with cooking chocolate (which is zero rated). The FTT in that case determined [29] that it was not possible to decide whether the product in that case was cooking chocolate or eating chocolate from the recipe particularly given that the recipe of the chocolate in question was the same as other items which the taxpayer accepted were standard rated confectionary. The FTT therefore forensically considered the packaging, placement in supermarkets, website information, advertising and views of customers.

22. It is the Tribunal’s view that the approach taken by Judge Redston in that case is of little or no help in determining the answer in the present case. The case law referenced by Judge Redston (*Fluff Ltd (t/a Mag-it) v CEC* [2011] STC 674, concerning maggots, and *HMRC v Roger Skinner* [2014] UKUT 204, concerning dog food marketed for working dogs) assisted her in determining how a single product which has dual uses is to be taxed. In such situations only how it is held out for sale can determine its liability. The present case is not such a situation.

23. In this case essentially the Tribunal must determine whether the Products are cakes.

24. Both parties referred to the case of *Lees of Scotland Ltd & Thomas Tunnock Ltd v HMRC* [2014] UKFTT 630 (“Lees”). That case concerned the classification of items (snowballs) as either cakes or confectionary. In that case the parties were agreed that cakes are sweetened prepared foods normally eaten with the fingers and that the products in question were therefore confectionary the sole issue was whether they were to be categorised as cakes.

25. In Lees, Appendix 2 set out that it was agreed between the parties that:

5 “3. The issue is whether a snowball is “cake” as contemplated in item 2 of the excepted items to item 1 in Group 1 of Schedule 8 to the VATA 1994, and the test of whether a snowball is a cake is whether it displays “enough of the characteristics of a cake that it should be classified as such”.

4. The words in the statute must be given their ordinary meaning.

5. If a product has the characteristics of two statutory categories (e.g. cake, confectionary), then it should be placed in that category for which it has sufficient characteristics to qualify.

10 6. The test is the view of the ordinary person, informed as to:

- (6.1) Ingredients;
- (6.2) Process of manufacture
- (6.3) Unpackaged appearance (including size)
- (6.4) Taste and texture;
- 15 (6.5) Circumstances of consumption (including time, place and manner of consumption);
- (6.6) Packaging;
- (6.7) Marketing.”

20 26. In addition to the factors identified above the Tribunal also considered (1) shelf life, (2) name/description and (3) “how it behaves” after it is removed from packaging.

Analysis of the Products by reference to the above factors

Ingredients

27. The ingredients of the products are:

Maca Bliss	Almond & Raisin	Peanut Choc Chip	Superberry
Cashews, dates, chicory fibre, brown rice malt, raw cacao, brown rice bran, cacao butter, concentrated grape juice, rice starch, sea salt, green tea extract, Maca	Cashews, dates, chicory fibre, brown rice malt, raw cacao, brown rice bran, cacao butter, concentrated grape juice, rice starch, sea salt, green tea extract, almonds, raisins	Peanuts, dates, chicory fibre, brown rice malt, raw cacao, brown rice bran, cacao butter, concentrated grape juice, rice starch, sea salt, green tea extract, chocolate chips	Cashews, dates, chicory fibre, brown rice malt, raw cacao, brown rice bran, cacao butter, concentrated grape juice, rice starch, sea salt, green tea extract, goji berries, raspberries

Manufacturing process

28. All four variants of the Product are produced using a very similar process which was taken from the evidence of Mr Ashburner on behalf of Pulsin’:

- (1) Ingredient preparation:
 - 5 (a) Ingredients are retrieved from storage and removed from packaging
 - (b) The cacao butter, solid at room temperature, is placed in a butter melter
 - 10 (c) The syrups (chicory fibre, brown rice malt, concentrated grape juice) are placed in the syrup heater, heated to a specific temperature and cooled
 - (d) All other ingredients, which consist of powders and pastes, are weighed out into separate batches, and placed in containers ready for mixing.
- (2) Mixing:
 - 15 (a) Liquid butter and syrups are weighed and poured into the mixer
 - (b) Powders and pastes are added to the mixer
 - (c) The product is mixed for a set time
- (3) Portioning
 - 20 (a) The mixed product is removed from the mixer and fed into the portioning machine
 - (b) The product is then cold pressed into the desired shape and carried onto the packaging machine on a conveyor belt
- (4) Packaging
 - 25 (a) The raw choc brownies enter the packaging machine in single file
 - (b) Protective film is wrapped around each brownie and sealed providing a barrier against oxygen, light and physical contamination
 - (c) The wrapped raw choc brownies are carried onto the metal detector by conveyor belt
- (5) Metal detection
 - 30 (a) The Product is carried through a metal detector and check weigher
 - (b) If metal is detected or the Product is underweight it is rejected to a separate area
 - (c) All other Product is carried to the next station by conveyor where it is put into cases.
- 35 (6) Outer packaging
 - (a) The Product is packed into cardboard display cases either by robot or hand

(b) When each display case is filled with product it is then closed and stamped with a best before date and a batch number

(c) Display cases are then placed by hand into corrugated cardboard boxes, sealed with packaging tape and palletised

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Unpackaged appearance

29. The unpackaged appearance of the Product is a rectangular very dark brown block showing flecks of nut and, in the case of all but Maca Bliss, the other added ingredients i.e. almonds, raisins, choc chips, raspberries and goji berries.

10 30. They were all of the same size and similar in shape to the Morrisons bakery brownie. All the other brownies tested were longer and narrower than the Product.

31. The greatest difference between the Product and the brownies examined was that all of them other than the Kent & Fraser vegan brownie had a flaky top.

Taste and texture

15 32. As indicated above for each of the flavour variants the predominant flavour was, in the subjective view of the Tribunal, a bitter and rich cocoa flavour, supplemented by other flavourings. The bars were of a similar sweetness to dark chocolate and therefore not overly sweet but unquestionably sweetened. Compared to the brownie products which were tasted it was the least sweet or certainly amongst the least sweet
20 in terms of taste. The Product has a sugar content of between 23.2% and 27.8%. This compares to sugar content (as per Annex 1(a)) of between 32.1% and 52.7% of the other products tasted by the Tribunal. Thus the flavour and sweetness profile experienced by the Tribunal on eating was consistent with the overall sugar content of the various products.

25 33. The texture was dense and similar to the majority of the other brownies tasted. On a spectrum the most aerated was the Morrisons gluten and dairy free brownie with the densest being the Kent & Fraser vegan brownie. The Pret Brownie Bar was also denser than the Product. Of the six products tasted the Product the third densest in texture.

30 34. The reviews provided to the Tribunal (see further below) from both the Ocado and Amazon websites indicate a range of views of customers as to taste and texture: “very like a brownie and a bit like a tiffin”; “rich taste of brownie” “taste like real chocolate brownies”; “chewy, chocolatey, nutty and not too sweet”; “not like a regular brownie”; “healthy chocolate bar”; “nothing like a brownie”; “moist and
35 lovely”; “grainy”; “fruity, chewy and chocolatey with a pleasant texture”.

Circumstances of consumption

35. The circumstances of consumption are somewhat difficult to determine. The Tribunal was shown a number of reviews from websites such as Ocado and Amazon together with Pulsin’s own website narrative.

5 36. In terms of circumstances of consumption Pulsin’s website provides “We like to think this [description of taste texture etc.] makes our brownies a super replacement for high sugar chocolate snacks and a healthy energising treat, which can be enjoyed at any time of day!”

10 37. The Tribunal were shown reviews from the Amazon website printed on 2 July 2018 for the Superberry Product (formerly raspberry and goji berry). There were 34 reviews in total covering the period 30 March 2014 through to the most recent on 20 September 2017. Of these 34 reviews the following circumstances of use can be identified (some reviews give more than one circumstance for use hence the table below adds to more than 34):

Circumstance of use	Number
Because the consumer is gluten/dairy intolerant or vegan	4
Packed lunch	2
Snack/treat	7
During or after exercise	1
No circumstance of use given	22

15 38. The Tribunal were shown reviews from the Amazon website printed on 2 July 2018 for the Peanut Choc Chip Product. There were 5 reviews in total covering the period 31 December 2016 through to the most recent on 28 March 2017. Of these 5 reviews the following circumstances of use can be identified:

Circumstance of use	Number
Because the consumer is gluten/dairy intolerant or vegan	2
No circumstance of use given	3

20 39. The Tribunal were shown reviews from the Amazon website printed on 2 July 2018 for the Maca Bliss Product. Again there were 34 reviews in total covering the period 9 February 2014 through to the most recent on 20 September 2017. It was apparent that the majority but not all of these reviews were identical to those provided for other variants. As above, of these 34 reviews the following circumstances of use

can be identified (some reviews give more than one circumstance for use hence the table below adds to more than 34):

Circumstance of use	Number
Because the consumer is gluten/dairy intolerant or vegan	4
Packed lunch	2
Snack/treat	9
During or after exercise	2
No circumstance of use given	22

40. The Tribunal were shown reviews from the Amazon website printed on 2 July
 5 2018 for the Almond and Raisin. The screen print indicates that there were 71 reviews in total covering the period 7 August 2012 through to the most recent on 4 March 2018. Of these 71 reviews the following circumstances of use can be identified (some reviews give more than one circumstance for use hence the table below adds to more than 71):

Circumstance of use	Number
Because the consumer is gluten/dairy intolerant or vegan	4
Packed lunch/dessert	1
Snack/treat	20
During or after exercise	5
No circumstance of use given	43

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41. The Ocado reviews were more limited than the Amazon reviews. For Superberry circumstances of use were evident from the 2 were that the product was seen as a treat like a brownie. As regards the Peanut variant again only 2 reviews of which one indicated it was consumed as a breakfast bar. The Maca Bliss reviews
 15 numbered 12 and revealed 2 customers considered them to be snacks, one as a meal replacement and one referenced them as a lifestyle choice.

42. In correspondence Pulsin' claimed that the circumstances for which the Product is aimed is as a dessert replacement or treat in a packed lunch, that they would normally be eaten as part of a meal as an alternative to a traditional brownie.

Packaging

43. The Product is packed in individual portions in plastic laminated foil. There have been two styles of printing on the packets. Originally the words “Pulsin” and “Raw Choc Brownie” dominated illustrating that the products were gluten free, dairy free, soya free, non GM and vegan. The packets were brown with accent colour dependant on variant. On behalf of Pulsin’ Mr Simon Ashburner explained that the packaging had been modernised to be more attractive. The new packets remain predominantly brown with accent colours but has now been designed to have a a logo “wheel” which is more attractive to its target audience. The packaging broadly provides the same information as the previous packaging.

Marketing

44. The Pulsin’ website describes the Product as “a delicious brownie packed full of cacao ... We only use natural products in all of our brownies to ensure there is plenty of goodness without sacrificing the brownie taste you expect.... A guilt free brownie may sound too good to be true, but it isn’t! ... Just one of these 50g bars and [sic] is full of energy to keep you powering through your day. They also make a great dessert option too”.

45. The Tribunal saw little more marketing.

46. HMRC however, placed significant focus on product placement.

(1) HMRC highlighted that on their own search on Amazon the product was placed in Health and Personal care. This was however because their search of Amazon was by department and then product. Searching generally reveals the product listed in both health and personal care and in grocery, the product is also available through Amazon Pantry.

(2) HMRC also produced a print of a search undertaken on Holland & Barratt, a health food chain. This print they contended placed the Products in Sports Nutrition. The print itself illustrates that the search undertaken was of Pulsin’ and not Raw Choc Brownies, though it cannot be doubted that the Almond & Raisin variant of the Product is listed in Sports Nutrition but they are also listed in Food & Drink. Mr Ashburner also explained that the relationship with Holland and Barrett for all the Pulsin’ products was through a single buyer and relationship manager, as some of Pulsin’s products are sports nutrition that was the single buyer. He considered that may explain why the products are so placed on the website.

(3) The Ocado print screen produced by HMRC indicates that Ocado categorise the Products in Health, Beauty and Clothing, sub category Dietary and Lifestyle.

47. Mr Ashburner gave evidence to the effect that Pulsin’ have little or no influence on where the products are placed with either online or bricks and mortar retailers. He explained that in his experience the larger supermarkets with “Free From” aisles will

usually stock the Products there along with other gluten/dairy free or vegan products including cakes, biscuits and bakery items which are targeted at vegans and those with food intolerances. However, he accepted that in such retailers it was unlikely that the Products would be placed within the mainstream bakery departments. With regard to smaller retailers, including petrol stations he expressed the view that it was more likely, if stocked at all, that they would be put with other snack cakes and treats.

48. HMRC also relied on the application made by Pulsin' to be registered for VAT purposes. The VAT 1 sought registration with effect from 5 February 2007 as a voluntary trader with a business description of Food Manufacturer and categorisation as "Cocoa and chocolate confectionary manufacture of". In cross examination Mr Ashburner on behalf of Pulsin' said that he could not remember why he had specifically chosen that category but that he recollected they were somewhat limited and he had to choose from a list. He also confirmed that when they registered the Raw Choco Brownies were not being made by Pulsin'. He confirmed that once registered he did not understand there to be an obligation to amend the categorisation but also expressed the view that with a range of products it would be difficult to identify any single categorisation which was appropriate.

Shelf life

49. The shelf life of the Products is considerably longer than any of the similar brownie products. Typically those products had a shelf life of up to a couple of months whereas for the Products shelf life is more than 12 months.

Name/description

50. The product is called a Raw Choc Brownie and is so described in the literature.

How it behaves when removed from packaging

51. HMRC contended that the product was inert on contact with the air or when left out and that it changed little in appearance or texture. Pulsin' accepted that the Product would not deteriorate in the same way as a traditional baked brownie largely due to the ingredients used which were more stable and less perishable in nature but they claimed that, like a brownie, the Product would go hard.

Discussion

52. As indicated above, Pulsin's first (though perhaps less robustly put) contention was that the Product did not meet the definition of confectionary in note 5 to Group 1 Schedule 8 VATA on the basis that the Product was not sweet enough to be considered to fall within the ordinary meaning of the word confectionary.

53. Note 5 provides that confectionary includes "sweetened prepared food normally eaten with the fingers". In a modern world in which a majority of processed foods are sweetened that definition cannot mean every sweetened prepared food eaten with the fingers comes within the definition of confectionary as to do so would include sweet

chilli chicken snack skewers which precisely meet that definition. There must therefore be an element of context provided by the word itself which is being defined.

54. It is correct that the Product was not overly sweet and was certainly less sweet than the other products which were tested however, there is no question that sweeteners are added and that there is a sweetness to the product. These features, in the Tribunal's view, brings the Products into the definition of confectionary subject to the statutory exception for cakes.

55. The line between what is taxed as confectionary and thereby standard rated and what is taxed as a cake and zero rated is a complex and finely balanced one not least of all because the original legislation was drafted in 1972 and closely followed the original purchase tax legislation and has only been amended once in 1988 to introduce the tail piece of the note concerning the sweetened prepared food normally eaten with the fingers – which clearly also applies to many cakes.

56. The idiosyncrasies of the legislation are plainly apparent when HMRC's guidance on its application is considered. HMRC Manual VFOOD9900 provides vis a vis flapjacks:

“It is our policy that there is a difference between flapjacks and cereal bars. This policy development arose because, at the inception of VAT, flapjacks were widely accepted as cakes, and cereal bars were not widely available, if at all. Flapjacks are accepted as being a cake of common perception and widespread home-baking, not because of any specific reasoning behind such factors as their recipe, ingredients or the manufacturing process.

However, since that time, the difference between flapjacks and cereal bars has narrowed to the development of cereal bars and their proliferation on the market. The amendment to the law in 1988 was made to bring products, particularly cereal bars, within the scope of the standard rate by defining confectionary as sweetened items of prepared food normally eaten with the fingers. As a result cereal bars were standard rated as only as they are sweetened.

The problem that has arisen is that a flapjack is, historically, accepted as a cake, but should probably bow be categorised as a cereal bar, and therefore standard rated, within the legislation.

... We therefore define flapjack narrowly, as it is intended to only apply to that product as it was at the inception of VAT. We allow the zero rating of standard flapjacks along with minor variations, for example when ingredients like dried fruit, raisins, chocolate chips etc. are added. We view the addition of toppings similarly such as a layer of chocolate or yoghurt.

We draw a line between flapjacks and cereal bars at any alteration to a flapjack that takes it into a cereal bar. We interpret this with our policy

that a traditional flapjack consists solely of oats. The addition of other cereals to the product turns it into a cereal bar, as it is no longer a traditional flapjack”

5 Thus it is apparent that a product made of oats, with chocolate chips in and a coating/topping of chocolate is a zero rated flapjack but a product made of oats, barley and seeds is a standard rated cereal bar. To most a somewhat arbitrary distinction.

10 57. The arguments in the case centred on the comparison between the Products and a “traditional” brownie, though other examples of cake were bought and available to the tribunal. Having decided that the Products are confectionary the question is whether the Products are to be treated and taxed as cakes.

58. From HMRC’s internal guidance states:

15 “Cakes includes sponge cakes, fruit cakes, pastries, eclairs, meringues and jaffa cakes. Though there is no accepted definition of the word cakes [sic] often made from a thick batter containing flour and eggs, and aerated in the process of cooking. They will normally be marketed as cakes, through bakeries and supermarkets rather than confectionary outlets, and will be displayed with cakes and biscuits rather than the confectionary section. The style of packaging used will also normally follow the pattern for bakery products, with a number of individual portions boxed and cellophane wrapped so the contents are revealed. They are usually eaten as part of a meal rather than between meals as confectionary.

25 ... in the case of Goodfellow and Steven Ltd ... the tribunal found there were no objective tests which can be applied to determine whether something is a cake and relied on the impression which would be made on the average man in the street. ...

The following products, described below, are all zero rated as cakes:

- Flapjacks
- Chocolate crisp cakes (‘crunch’ cakes)
- 30 • Caramel shortcake
- Marshmallow teacakes
- Lebkuchen
- Traditional Japanese sweetmeat”

35 59. This guidance is curious, particularly when considered in the light of the factors subsequently set out by the courts and tribunals. There is no similarity between the ingredients, manufacturing process, size, appearance, taste, texture, packaging or

marketing when looking across the whole class of products which are accepted by HMRC or have been ruled by the courts and tribunals to be properly classified and taxed as cakes. For instance a marshmallow and meringue are aerated as hot syrup or sugar is whipped through egg white but one is soft one is hard, neither are made through making a batter and do not have flour as an ingredient. Caramel shortcakes and crunch cakes involve no aeration at all. Crunch cakes are formed only by mixing and no baking. As set out in Annex 1(b) some or all of these products are sold in large packets or in individual packets and in many instances both.

60. The world moves on constantly, eating habits change. Fewer and fewer people sit down to meals and many more eat on the go with the consequence that an individually portioned cake may be eaten as a snack, with a packed lunch or as a dessert. With the rise in obesity the public look for cakes different in nature to those of the 1970s.

61. In the case of *United Biscuits* (LON/91/160) concerning jaffa cakes the tribunal determined that certain characteristics of the jaffa cake were cakelike: ingredients, that it was, friable like a cake and had the texture of a cake; however, a jaffa cake was also the size and shape of a biscuit, packaged and sold alongside biscuits and presented to be eaten with the fingers and not, as might be expected of a cake, eaten with a fork. The product was nevertheless determined to be a cake.

62. Whilst the present case looks at a different dividing line (between confectionary and cake) it is clear that the multi factorial exercise does not require even a predominance of cake like factors in order to conclude that any particular product is a cake. What is required, as per Woolfe LJ in *CEC v Ferrero UK Limited* [1997] STC 991, is that there are sufficient characteristics of a cake to be so characterised.

63. In *Lees* Judge Scott stated:

“43. We make no apology that this decision is largely concerned with extensive findings in fact. The issue is not one of law but one of fact albeit, of course, we have regard to the relevant law.

44. As we indicated above, we carefully considered the various factors, identified by the authorities, which come into play when looking at the characteristics of snowballs. ...

47. In summary we have taken from the authorities the numerous factors that fall to be weighed in the balance ... the fact that there are no objective tests and that our starting point is the view that will be taken by the ordinary man in the street who has been informed as we have been informed. ... we are asking, as was asked in *Goodfellow* whether the ordinary person would have concluded that (s)he had been offered a cake once (s)he had eaten it rather than being sold short by being offered a mere confection.

53. A snowball ... is not out of place on a plate of cakes”

64. The ‘test’ for whether the Products are to be classified as cakes is a matter of informed impression. Considering the factors identified in turn the Tribunal concludes:

5 (1) The ingredients used are not the same as a traditional sponge cake but by reference to the range of products that are treated as cakes, particularly allergen free/vegan cakes, the ingredients are consistent with those of a cake

(2) The process of manufacture is to mix press and cool, which is entirely consistent with the manufacture process of items uncontroversially cakes such as crunch cakes or tiffin.

10 (3) The unpackaged appearance was of a cake bar. HMRC assert in their public guidance that the liability of comparator products is not relevant (see below vis fiscal neutrality) however, comparison of the appearance to items accepted, or at least taxed, as cake must be relevant. The appearance was not
15 dissimilar to the Morrisons bakery brownie in terms of shape and whilst different to the other brownie products the Tribunal considered it would be a most odd outcome to decide that by cutting the Product in half it could become a brownie as it more resembled other manufactured brownies. In terms of surface appearance it was similar to slightly glossy Jamaican ginger cakes or the equivalent.

20 (4) The taste of the simpler Maca Bliss was as one would expect from any high quality chocolate brownie cake. A wide range of textures was apparent in brownies, as indeed there is in cakes (see list above). The taste and texture was consistent with a conclusion that the Products were cakes.

25 (5) It is famously but incorrectly said that Marie Antoinette said “let them eat cake” purportedly in response to an assertion that there was no bread for the peasant population. The circumstances of consumption of cake in 2018 or, by reference to the period covered by Pulsin’s claim, from 2013 to 2018 are not what they were in 1972 or 1988. Eating habits have changed. All food
30 manufacturers including the manufacturers of traditional cakes have adapted their products to reflect those changing habits. The Tribunal was given approx. 100 different reviews of the Product but of those only 40 or so gave any indication of the circumstances of purchase. However, as part of a multi factorial exercise those reviews are relevant but what do they show? They show that most people saw the Product as a snack but reading all of those reviews (as
35 distinct from the selection referenced during the hearing) also gave the impression that the individuals giving the reason for consumption as “snack” may well have also consumed an individually wrapped cake bar in the same circumstances. However, the possibility cannot be excluded that confectionary would have been consumed as an alternative. It is all but impossible to
40 determine in which way this factor points particularly as the Tribunal does not understand that HMRC requires that for instance the 40g Jaffa Cake snack pack containing 3 Jaffa Cakes is taxed differently to the full box containing 10.

(6) The packaging of the Product points to convenience/hygiene. An individually wrapped item undoubtedly facilitates on the go eating but as above

snacking cakes are, the Tribunal understands, taxed as cakes and not confectionary with the consequence that the fact that the Product is individually wrapped is unlikely, in today's world, to offer much weight in the multi factorial exercise to be undertaken. The legends on the packaging may be more illustrative but in the case of the Product the information included on the packaging gives no indication that the Product is considered by Pulsin' to be anything other than a brownie. The Tribunal also formed the view that, in and of itself, packaging had to be a lesser factor as it is so easily changed. It would be astonishing if a decision to use an individual laminated foil packet changed the liability of the product inside.

(7) The marketing of the Products is as a healthy, vegan, egg, dairy and gluten free brownie. The marketing reinforces that it may be eaten as a snack but as indicated above the Tribunal considers that cakes too are frequently eaten as snacks.

(8) The shelf life of the product is certainly a contra-indicator that the product is a cake but mostly because the ingredients are less subject to deterioration over time. However, on the basis of this factor taken in isolation it indicates that the product may not be a cake.

(9) The name of the product is Raw Choc Brownie. Brownies are generally considered to be cakes and the name and description are indicative of the Products being cakes.

(10) The Products behave very differently to a sponge cake, less differently to a crunch cake, marshmallow tea cake and certainly similar to tiffin all of which will behave when exposed to the air in a way similar to more traditional confectionary.

65. As indicated above the Tribunal is required to undertake a multi factorial exercise. The Tribunal stands in the shoes of the suitably informed ordinary man and essentially asks whether the Product has sufficient characteristics to be considered as a cake. Judge Scott asked herself whether a snowball would look out of place on a plate of cakes.

66. Put alongside a slice of traditional Victoria sponge, a French Fancie and a vanilla slice or chocolate éclair the Products may look out of place. However, put alongside a plate of brownies, or, for instance, at a cricket or sporting tea where it is more likely that bought and individually wrapped cakes will be served on a plate the Products would absolutely not stand out as unusual.

67. It is the Tribunal's view that the current state of the law on the taxation of food items is not fit for purpose and will necessarily present apparently anomalous results as tastes and attitudes to eating change. The Tribunal fundamentally disagrees with HMRC's guidance that the borderline between cake and confectionary presents few problems. The lines set and perceived by HMRC in the application of this out of date provision (as recognised by them in their anguished consideration of flapjacks and cereal bars) drives anomalous outcomes. As the UK implements sugar tax to encourage consumption of healthier soft drinks the favourable taxation of cakes is

entirely anomalous. It is not however, the role of the Tribunal to unwarrantedly limit the scope of the law as it currently stands but to undertake the multi factorial exercise required of it and determine whether, on balance the Products possess sufficient characteristics of a cake to be categorised as such.

- 5 68. On balance the Tribunal forms the view that the Products do show enough characteristics of cakes to be so categorised.

Fiscal neutrality

69. As a consequence of this decision it is unnecessary to determine whether the principle of fiscal neutrality requires them to be zero rated.

- 10 70. The principle of fiscal neutrality requires that supplies of goods and services which are similar and therefore in competition with one another should not be taxed differently for VAT purposes. As set out in the CJEU judgment in *Rank Group v HMRC* [2012] STC 23, supplies will be treated as similar when they meet the same needs from the point of view of the customer and when the differences between them
15 do not have a significant influence on the decision of the average customer.

71. However, where the differences between the supplies in question justify different treatment the principle of fiscal neutrality will not require an elision in the VAT treatment. It is not simply a question of comparison of supply A to supply B and having concluded that B must be taxed in the same way as supply A to then move
20 on to supply C and assess it against supply B. Using fiscal neutrality in this way would have the consequence that supply C, D or E may end up being taxed by reference to supply A when the supply is not in fact similar to A at all.

72. The challenge in the application of fiscal neutrality in the present case is to what would the appropriate comparison be made: to cakes generally or to brownies in particular or indeed to vegan/gluten, egg, dairy free brownies? The hearing was
25 essentially presented by both sides by reference first to the broad category of brownie and, by HMRC, to the wider category of cake. Applying the analysis in para [71] above the fiscal neutrality analysis should be undertaken to cake and thereby will produce precisely the same answer as the multi factorial exercise. However, as with
30 the multi factorial exercise the diversity of products which are considered to be cakes means that comparison to a general class is difficult.

Decision

73. The Tribunal considers that all variants of the Product are properly classified as cakes and are therefore eligible to be zero rated. As a consequence, and subject to
35 verification of the quantum, the claims to overpaid VAT are repayable.

74. The appeal is allowed.

75. 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.

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**AMANDA BROWN
TRIBUNAL JUDGE**

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RELEASE DATE: 28 DECEMBER 2018

ANNEX 1(a) – closely examined products

Product	Principal Ingredients	Description	Packaging	Placement
Morrisons Brownie	Sugar, milk chocolate, egg, wheat flour, dark chocolate, butter oil, vegetable oil, golden syrup, cocoa powder Sugar content: 52.7%	7cm x 7cm x 1cm Dark brown Semi flaky and uneven top Dense texture Chocolate flavour	Clear plastic box	Bakery
Morrisons Gluten/dairy free brownie	Sugar, egg, chocolate, rapeseed oil, ground almonds, rice flour, tapioca starch, concentrated grape juice, rice starch Sugar content: 41.2%	8cm x 3cm x 1.5cm Lighter brown Semi flaky and uneven top Dense texture on bottom more aerated towards top surface Less chocolatey flavour	Cardboard box with clear plastic window 4 pack Two brownie bars x2 wrapped in clear cellophane	“Free from” aisle or equivalent
Mr Kipling gluten free brownie	Sugar, dark chocolate, egg, rapeseed oil, ground almonds, rice flour, tapioca starch, concentrated grape juice Sugar content: 37.7%	8cm x 3cm x 1.5cm Lighter brown Semi flaky and uneven top Dense texture on bottom more aerated towards top surface Chocolatey flavour	Cardboard box 4 pack Two brownie bars x2 wrapped in clear cellophane	“Free from” aisle or equivalent
Pret Brownie Bar	Milk chocolate, dark chocolate, sugar, butter, egg, cocoa powder, wheat flour	10cm x 3cm x 1.5cm Dark brown Semi flaky top surface Very dense texture		With all other sweet products

	Sugar content: 45.8%	Chocolatey flavour		
Kent & Fraser vegan brownie	Chocolate, gluten free flours, cane sugar, chickpea water, coconut oil, rice syrup, cocoa power Sugar content: 32.1%	10cm x 3cm x 1.5cm Dark brown Smooth surface Very dense solid texture, almost pasty Bitter chocolate flavour	Individual bar cellophane wrapped	“Free from” aisle or equivalent

Annex 1(b) – other available or considered products

Product	Description	Packaging	Placement
Mr Kipling Victoria sponge	15cm diameter x 8cm Vanilla sponge with jam and butter cream filling	Cardboard box, cake inside cellophane wrapper	Cake/Bakery
Mr Kipling French Fancies	Cube of sponge cake with dome of soft vanilla topping covered in fondant icing and decorated (lemon, chocolate, strawberry)	Cardboard box containing 8 items in a cardboard tray covered in cellophane	Cake/Bakery Also petrol stations
Mr Kipling Battenberg Bars	Checked pink and yellow sponge, surrounded by yellow marzipan	Cardboard box containing 8 items in a cardboard tray covered in cellophane	Cake/Bakery Also petrol stations
Tunnocks Tea Cakes	Chocolate crumb base, marshmallow dome under chocolate shell	Cardboard box containing 10 individually foil wrapped items	Cake/Bakery Also petrol stations
Pret Choc Bar (tiffin)	Cold compressed bar of chocolate, biscuits fruit etc. topped with chocolate	Individually wrapped in cellophane	With all other sweet products
Jamaican Ginger Cake Bar	Dense ginger cake	Individually wrapped in plastic laminated foil	Meal deal/grab and go

		packaging	
Cadburys individual mini rolls	Mini chocolate swiss roll with vanilla buttercream filling covered in chocolate	Individually wrapped in opaque cellophane	Meal deal/grab and go
Walkers fruit cake slice	Individual slice of light fruit cake	Individually wrapped in opaque cellophane	Meal deal/grab and go
Rice Krispie Squares	Rice Krispie or corn flake in chocolate usually mixed with butter/syrup	Individually wrapped in plastic laminated foil	Meal deal/grab and go