Neutral Citation: [2022] UKFTT 00352 (TC)

Case Number: TC08605

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: By remote video hearing

Appeal reference: TC/2019/06287

VALUE ADDED TAX – zero rating – food – Group 1 Schedule 8 VATA 1994 – large marshmallows intended to be roasted and marketed as such – supply of food which is not confectionery – appeal allowed

Heard on: 14 July 2022
Judgment date: 21 September 2022

Before

TRIBUNAL JUDGE JONATHAN CANNAN
MR MICHAEL BELL

Between

INNOVATIVE BITES LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Tim Brown of counsel, instructed by The VAT Consultancy

For the Respondents: David Wilson of HM Revenue and Customs Solicitor's Office and Legal Services

DECISION

INTRODUCTION

1. This appeal concerns the VAT treatment of a food product called "Mega Marshmallows" ("the Product"). As the name suggests, these are marshmallows which are larger than the regular size. The issue is whether the Product is standard rated as confectionery. It is common ground that if the Product does not fall within the description confectionery, then it should be zero-rated.

2. The appellant is a wholesaler of American sweets and treats, amongst other items. HMRC decided that the Product was confectionery and ought to have been standard rated. They issued assessments to the appellant on 14 August 2019, covering supplies of the Product in VAT periods between June 2015 and June 2019. The assessments total £472,928.

3. The appellant's case is that the Product is intended to be roasted over a campfire or barbecue and then eaten or used as an ingredient in what is called a "*s'more*". A s'more is a traditional American night-time campfire treat, consisting of a roasted marshmallow and a layer of chocolate between two digestive biscuits. The appellant says that the Product would not usually be consumed as a snack without being roasted. In brief, the appellant says that the Product is intended to be roasted before being eaten, or then used as an ingredient in preparing a s'more. As such, it does not fall within the term confectionery.

4. We heard evidence from Mr Stephen Foster, who was the chief operating officer of the appellant. More recently he has been the managing director of a sub-group within the appellant's business called World of Sweets. There is no real dispute in relation to Mr Foster's evidence and we set out below our findings of fact based on his evidence. Before doing so, we briefly set out the legal framework within which the issue arises.

LEGAL FRAMEWORK

5. Supplies of food of a kind used for human consumption are zero-rated for VAT, pursuant to Group 1 Schedule 8 Value Added Tax Act 1994 ("VATA 1994"). However, zero-rating does not apply to certain "excepted items". Excepted Item No 2 refers to:

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

6. In the circumstances, supplies of confectionery, subject to the exclusion of cakes and certain biscuits, are standard rated. There is no definition of "confectionery", but Note 5 Group 1 does provide as follows:

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

7. HMRC has also issued certain guidance as to what amounts to confectionery, but it does not have the force of law and there is no need for us to consider it further.

8. There are a number of helpful authorities in relation to the zero-rating of food pursuant to these provisions. The authorities concern the meaning of various terms used in the legislation and also the proper approach a tribunal should take when determining whether a particular product falls within a particular term used in the legislation.

9. First, in relation to the meaning of confectionery. This was considered by the Chancellor (Sir Andrew Morritt) in the context of fruit bars in *HM Revenue & Customs v Premier Foods Ltd* [2007] EWHC 3134 (Ch). It was held that the VAT Tribunal had wrongly construed

'confectionery' as requiring an element of cooking and the addition of an extra element of sweetness to the primary ingredient. The Chancellor stated:

> [17] … I accept the production of confectionery must involve some process applied to the ingredients in their natural state for that is necessarily implicit in the word. I do not consider that such process can only be one capable of being described as cooking. Any process of mixing or compounding is, in principle, sufficient. Similarly, I accept in its ordinary usage, confectionery is limited to products which can be described as sweet but I cannot see why such sweetness may not be inherent in the principal ingredient in its natural state but must be added by some further sweetener with which it is mixed or compounded…

10. The VAT Tribunal in *Premier Foods* had relied on the judgment of Lawson J in a Purchase Tax case called *Customs and Excise Commissioners v Popcorn House Ltd* [1968] 3 All ER 782. Lawson J had described confectionery as "any form of food normally eaten with the fingers and made by a cooking process other than baking which contains a substantial amount of sweetening matter". The Chancellor in *Premier Foods* held that the meaning of confectionery in that context was not the same as in the context of the VATA 1994. Having said that, the reference to confectionery being normally eaten with the fingers appears to have subsequently found its way into Note 5 Group 1 VATA 1994.

11. That is as far as the authorities go in terms of defining what is meant by the term confectionery. However, there are authorities which assist in terms of the approach to be taken in determining whether a particular product falls within the meaning of the term.

12. In *Customs and Excise Commissioners v Ferrero UK Ltd* [1997] STC 881 the Court of Appeal was concerned with the meaning of the word "biscuit" for the purposes of Excepted Item No 2. The product in question had some characteristics of biscuits and some characteristics not normally associated with biscuits. Lord Woolfe MR urged tribunals faced with such questions not to adopt an over-elaborate analysis. The issue for the tribunal was described as "one of fact and degree". He went on to endorse the following principles:

> (1) If a product has the characteristics of two categories, then it can be placed in the category in which it has sufficient characteristics to qualify. A product can only be placed in a category when it has sufficient characteristics to qualify.
>
> (2) Where a product has sufficient characteristics of two categories, it can be placed in the category to which it is more akin.
>
> (3) The term must be given its ordinary meaning, and a product should be categorised by reference to the view of "the ordinary man in the street".

13. The description in that case as to the nature of the analysis was echoed in *Proctor & Gamble UK v HM Revenue & Customs* [2009] EWCA Civ 147 at [14] where what was involved was described as "a short practical question calling for a short practical answer". The question was described as requiring a multi-factorial assessment.

14. The Upper Tribunal in *HM Revenue & Customs v The Core (Swindon) Ltd* [2022] UKUT 0301 (TCC) has recently given authoritative guidance as to what characteristics of a product are relevant. The question in that case concerned supplies of "juice cleanse programmes". It was common ground that the product was a drink and therefore fell to be zero-rated as food, unless it was within the excepted item of "beverages". It was marketed and generally purchased as a meal replacement. The FTT held that the product was not a beverage. In doing so it gave prominence to the way in which the product was marketed and the way in which it was in fact used.

15. HMRC in *The Core* sought to distinguish what were described as single use products and dual use products. For example, the FTT in *Kinnerton Confectionery Ltd v HM Revenue & Customs* [2018] UKFTT 382 (TC) was concerned with a chocolate bar which could be purchased and consumed as confectionery or used as cooking chocolate. It took into account the marketing material and how the chocolate was held out for sale, deciding that it was held out for sale as confectionery and not as a baking product.

16. HMRC's case in *The Core* was that marketing would be a central consideration in the context of dual use products, but not in the context of single use products such as the juice in that case. The Upper Tribunal rejected any sharp distinction between single use products and dual use products. It described the significance of marketing material as follows:

> 58. In all cases involving classifications for VAT purposes there needs to be a multifactorial assessment. The way the product is marketed and sold is (as [HMRC] accepts) a potentially relevant factor in every case. In some cases it may carry little weight, and in others it may carry great, or even dominant, weight as in *Fluff* and *Kinnerton*.

17. The Upper Tribunal went on to reject HMRC's submission that the FTT in that case had attributed undue weight to the way in which the product was marketed. In doing so, it dealt with a submission by HMRC that a Mars bar or a cola drink cannot become a meal replacement where they are marketed as such:

> 61. …it clearly cannot be sufficient, to establish that a product (in the case of the Mars bar) is not confectionery or (in the case of a cola drink) is not a beverage, to rely on the fact that it is marketed for a particular purpose, if there is no evidence to show that customers in fact used the product for that purpose.

18. It is clear therefore, that the marketing of a product cannot in itself be determinative of a question of categorisation in this context. It is however a factor to be considered where there is evidence that consumers use the product for the marketed purpose.

FINDINGS OF FACT

19. The Product is an oversized marshmallow which the appellant originally imported from the United States. It is now produced and imported from Belgium. The marshmallows are broadly cylindrical in shape, approximately 5cm in height with a diameter of 3.5 – 4.5 cm. In comparison, regular marshmallows are also cylindrical, 2cm in height with a diameter of 2.5cm. The size of the Product means that it is more easily and more effectively roasted on a skewer over an open fire or flame. It can then be either eaten as a roasted treat, once cooled, or used to create a s'more.

20. The Product is sold in various package sizes. We were provided with a 550g pack which contains approximately 27 marshmallows. The printed packaging has varied over the period we are concerned with, which is June 2015 to June 2019. The following is a description of the packaging in the period up to March 2017.

21. The front of the packaging has the words "Mega Marshmallows" in large type. The Product is said to be "made to a delicious American recipe" and is said to be "perfect for roasting, s'mores or just snacking". Below that narrative are three diagrammatical representations from left to right of a marshmallow being roasted over a fire, a s'more and a marshmallow with a bite taken out, representing snacking.

22. The reverse of the packaging repeats the diagrammatical representations of a marshmallow being roasted and of a s'more, alongside "Instructions for Use" which are as follows:

1. Stick the marshmallows on a skewer.
2. Keep the stick approx. 20 cm above the heat. Do not hold the mallows in the flames, to avoid burning.
3. Keep on turning the stick, to obtain a caramelised outer skin with a liquid, molten layer underneath.
4. Let the marshmallows cool down.
5. Enjoy your snack.

23. Alongside those instructions is the following warning:

> ATTENTION!
>
> 1. Before eating, let the marshmallows cool down.
> 2. Do not hold them in the fire.
> 3. When you use a non-electric heating system (e.g. grill), make sure there is always a bottle of water available, to avoid any danger.

24. The reverse of the packaging also includes a choking warning in small print which states as follows:

> Eat one at a time. For children under 6, cut marshmallows into bite sized pieces.

25. The reverse of the packaging also contains a description of how to make a s'more as follows:

> DO YOU WANT S'MORE?
>
> A s'more ("some more") is a traditional campfire treat, very popular in the United States and Canada, consisting of a roasted marshmallow and a piece of chocolate sandwiched between two pieces of graham crackers (biscuits). Try some more!

26. The instructions for use, the warnings, and the description of how to make a s'more are prominently displayed in English. The same instructions and warnings appear in various other languages. There is also other packaging information, such as the ingredients and nutritional information.

27. The later packaging is very similar in design. The principal differences are as follows:

(1) In the period April 2017 to February 2019, the front of the packaging includes a picture of a chef in the style of a cartoon character holding a wooden spoon alongside the words "Baking Buddy".

(2) In the period from March 2019 onwards, the three diagrammatical representations of how the Product might be consumed appear only on the reverse of the packaging. The representation of a marshmallow with a bite taken out also includes the words "Snack On Me". On the front they are replaced with a diagrammatical representation of a marshmallow on a stick including the words "Toast Me !!" with a flame beneath. The front also includes the words "A Great American Tradition" prominently displayed.

28. The reference to a great American tradition is to the tradition of roasting marshmallows over a campfire.

29. The appellant is a wholesaler, and sells the Product to UK retailers including Asda, Morrisons, Iceland and The Range. In the period covered by the assessments, the appellant also sold the Product by way of wholesale online and through cash and carry outlets. The Product is available all year round.

30. The appellant sells a large number of other mallow products which are held out for snacking and which are standard rated. Some are seasonally themed for sale at Christmas and

Easter. Products which are standard rated include mini marshmallows held out for snacking. These are much smaller than regular marshmallows. The appellant also sells mini marshmallows which are held out for sale as a baking product, including use as a cake decoration, which it has zero rated.

31. We were provided with evidence as to the seasonality of the appellant's sales of mallow products, excluding those which are seasonally themed. On the basis of that evidence, we find that sales of all types of mallows are higher in the period May to October than at other times of the year. However, sales of the Product show a greater percentage rise in this period than sales of other mallow products. In the years 2019 to 2021, 65% of sales of the Product occurred in the period May to October. In relation to other mallow products, 56% of sales occurred in that period. We infer from the evidence as a whole that the Product is more likely to be consumed in warmer months than other mallow products. This is because it is more likely to be purchased in order to be roasted over a flame.

32. Mr Foster accepted in cross-examination that a page from the appellant's wholesale website which included the Product was reached by a path from the home page which ended at "sweets, candy and chocolate". However, we accept that this could be a function of the algorithms used by the website. For example, the product may have been included on that page because customers who purchase other items shown on the page might also frequently purchase the Product. We do not consider that this is reliable evidence that the Product is marketed on the website as falling within the category of sweets, candy and chocolate.

33. The Product is typically sold by retailers separately from confectionery and other types of marshmallows. It is generally displayed in the "world foods" section of supermarket aisles, and during the summer months it is generally also displayed in the barbecue section.

34. Mr Foster's evidence was that roasting the product made it more palatable. That is Mr Foster's opinion, but we do not share it. Larger marshmallows are equally palatable whether eaten as a snack or after roasting. However, roasting the marshmallows gives them a different texture and flavour. It is easier to roast a larger marshmallow than a regular size marshmallow. Roasting larger marshmallows also gives a different result in terms of the ratio of crisp outer to soft inner mallow. Regular marshmallows would not be as effective to make a s'more because there would not be sufficient soft inner mallow.

35. If a typical consumer wanted to purchase marshmallows for consumption as a sweet snack, then it is more likely that the consumer would purchase regular marshmallows.

36. Overall, we infer that consumers purchasing the Product are more likely to do so in order to roast the marshmallows over an open flame rather than consume them as a snack without roasting. We cannot say to what extent consumers might go on to use the roasted marshmallow as an ingredient in a s'more, although some consumers will do so.

DISCUSSION

37. There is no doubt that the Product is a confection produced by mixing ingredients, and that it is sweet. It therefore bears the fundamental characteristics of confectionery. It is common ground that regular marshmallows are confectionery and therefore standard rated. However, confectionery is not generally used in cooking, or itself subject to cooking, in order to be enjoyed as intended.

38. There are a number of factors which tend to suggest that the Product should be categorised as confectionery. Mr Wilson on behalf of HMRC urged us to take into account in particular:

(1) The Product can be eaten as a snack from the bag, as with regular marshmallows.

(2) The packaging identifies it as a product which may be consumed as a snack.

(3) It is generally eaten with the fingers, either without roasting or once roasted and allowed to cool down.

(4) The Product may be eaten as a snack "on the go".

(5) There is a trend for outsized chocolate and sweets, of which the Product might be viewed as an example.

(6) Regular marshmallows, which are properly viewed as confectionery, can be roasted and enjoyed in the same way as the Product. They would have been enjoyed as such before the introduction of large marshmallows.

(7) The Product is found on the appellant's website in the category of "sweets, candy and chocolate".

39. There are also a number of factors which tend to suggest that the Product is not properly characterised as confectionery. Mr Brown urged us to take into account in particular:

(1) The Product is not normally eaten with the fingers in circumstances where it is roasted on a stick. Consumers would not normally use an implement to eat confectionery, in this case the stick on which the Product is roasted.

(2) Items which are intended to be subject to a further cooking process would not be expected to fall within the term confectionery.

(3) The Product is marketed as being intended for roasting. Hence it does not appear on the confectionery shelves of supermarkets but is placed in the world foods section and, more importantly, in the barbecue section during the summer months when most sales are made.

(4) The packaging of the Product holds it out as primarily intended to be roasted

(5) The size of the Product indicates that it is intended to be roasted, unlike regular marshmallows

(6) The fact that it is a seasonal product which is enjoyed more in the summer months than regular marshmallow products demonstrates that customers do tend to roast the Product.

(7) Customers wishing to purchase a marshmallow as a sweet snack would tend to choose a regular marshmallow.

(8) The depiction of a cartoon chef character with a reference to "Baking Buddy" marks it as an ingredient rather than an item of confectionery.

40. We accept that most of the factors identified by Mr Wilson and Mr Brown are factors that we should give weight to in characterising the Product and determining whether it is confectionery. For the reason given in our findings of fact, we do not consider that the path from the appellant's website homepage to the Product ending at "sweets, candy and chocolate" is evidence that it is marketed as such. Further, the size of the packaging and indeed the Product itself do not suggest to us that it is intended to be eaten on the go, like a packet of sweets or a smaller packet of regular marshmallows or some mini marshmallows.

41. Mr Wilson also submitted that dual use products such as chocolate would also fall within the term confectionery. We accept that was the result in *Kinnerton*, however categorisation must depend on the evidence relevant to the particular product. Mr Wilson's submission overlooks the guidance given in *The Core* which rejected the distinction between dual use products and single use products in determining the relevance of marketing material.

42. Clearly if the product is not roasted then it will be eaten with the fingers, perhaps having been cut up for children under 6. However, once roasted and cooled, the Product might be either eaten off the stick or with the fingers. In the circumstances of this product, we do not give particular weight to the means of eating.

43. Subject to these points, we have taken all the factors described above into consideration. Both parties were agreed that we should categorise the Product by reference to the viewpoint of a typical consumer and giving the term confectionery its ordinary meaning. In carrying out that exercise we consider it appropriate to give particular weight to the nature of the Product, the way in which the Product is placed in supermarket aisles, the packaging and marketing of the Product and our finding that most consumers purchasing the Product would do so in order to roast the marshmallows. Whilst the text on the packaging has changed slightly over time, we do not consider that those changes affect the way in which a consumer would view the Product.

44. Confectionery might not be expected to include a product which is intended to be used as an ingredient in making another product. In this respect it is instructive to consider the treatment of mini marshmallows. We invited the parties to agree the VAT treatment of mini marshmallows. Following the hearing, HMRC helpfully provided us with a statement of their policy in relation to mini marshmallows as follows:

> The VAT liability of 'tiny' marshmallows will depend upon the basket of evidence which will determine whether they are to be treated as items of confectionary (taxable at the standard rate) or whether they are to be used for culinary purposes such as baking (in which case they will be zero rated). In line with HMRC's multifactorial approach VAT treatment would be determined by all relevant factors including where they were placed (such as in the baking section of a supermarket aisle) and the way in which they were held out for sale and that would include the marketing of the product and how it is labelled and packaged.

45. It seems to us that HMRC's policy is consistent with the principles derived from the various authorities discussed above. It is those principles which we must apply, although we have found it quite difficult to apply those principles to the Product in this case.

46. The issue we must decide is whether the term confectionery includes an item which is intended to be subjected to another cooking process before being eaten, and to some extent intended to be used as an ingredient in making another product. That judgment must include reference to the circumstances in which the item is marketed and sold.

47. Mr Brown for the appellant invites us to find that the typical consumer or the ordinary person in the street would not regard the term confectionery as encompassing an item which is intended to be subjected to a cooking process before being eaten. Especially if it is not sold in the confectionery aisle of a supermarket. That is the case in relation to the Product, whether it is enjoyed by consumers having been roasted, or whether the roasted mallow is then used as an ingredient in making a s'more.

48. Mr Wilson for HMRC invites us to find that if an item otherwise has the characteristics of confectionery, the typical consumer or the ordinary person in the street would not regard the fact that it is purchased with a view to cooking it as causing it to lose its character as confectionery. He accepts that the position is different if the item is purchased for use as a culinary ingredient. As we have said, we have no evidence as to the extent to which consumers use the Product as an ingredient to make s'mores. It was implicit in Mr Wilson's submissions that an intention to simply roast the Product would not cause it to fall outside the term confectionery.

49. On balance we accept that the Product does not fall to be described as confectionery. The fact that it is sold and purchased as a product specifically for roasting, the marketing on the

packaging of the Product which confirms that purpose, the size of the Product which makes it particularly suitable for roasting and the fact that it is positioned in supermarket aisles in the barbecue section during the summer months when most sales are made and otherwise in the world foods section, leads us to that conclusion.

50. We therefore find that the Product is not "confectionery" for the purposes of Excepted Item 2 Group 1 Schedule 8 VATA 1994. As a result, it must be zero rated.

CONCLUSION

51. For the reasons given above, we allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

52. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

Release date: 21ST SEPTEMBER 2022