



Neutral Citation: [2023] UKFTT 00371 (TC)

Case Number: TC08792

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2021/01359

VAT – food zero rating – whether a turmeric shot is standard rated as a beverage

Heard on: 24 June 2022

Judgment date: 17 April 2023

Before

**TRIBUNAL JUDGE GERAINT WILLIAMS
TRIBUNAL MEMBER MIKE BELL**

Between

**INNATE-ESSENCE LIMITED
(t/a THE TURMERIC CO)**

Appellant

and

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Max Schofield, of Counsel, instructed by Grant Thornton UK LLP

For the Respondents: Ms Farah Chaumoo, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal against the decision of HMRC dated 26 October 2020 which denied the Appellant's Error Correction for the periods 06/17 to 12/19 (inclusive) in the sum of £80,730.52 submitted under s 80 of the Value Added Tax Act 1994 ("VATA"). The Appellant contended that its supplies of turmeric shots were food falling within Group 1 of Schedule 8 VATA and subject to the zero rate of VAT. The decision was upheld on review with HMRC's conclusions set out in its letter dated 7 January 2021.

PRELIMINARY ISSUE

2. The Notice of Appeal dated 9 April 2021 included an application for permission to make a late appeal in accordance with HMRC's Covid-19 guidance, the guidance and extended timescale for making appeals was set out at the conclusion of the review letter dated 7 January 2021. HMRC's guidance confirmed that, in light of Covid-19, HMRC would not object to late appeals made to the Tribunal where the appeal has been made within three months of the end of the 30-day appeal period. The Notice of Appeal was lodged with the Tribunal within the three-month extension period. Accordingly, we accept that the appeal was made in time.

RELEVANT LEGISLATION AND CASE LAW

3. All references are to the VATA unless otherwise stated.

4. Section 30(2) VATA legislates for the zero-rating of supplies of good or services of a description specified in Schedule 8:

"(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified."

5. Group 1 of Schedule 8 VATA is titled "Food" and provides:

"Group 1 – Food

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

(a) a supply in the course of catering;

(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 related to that excepted item.

General items

Item No

1 Food of a kind used for human consumption.

...

Excepted Items

Item No

...

4 Other beverages (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages.

...

NOTES

(1) "Food" includes drink.

6. The scheme of the legislation is that food (including drinks) is zero-rated unless the food falls within one of the listed excepted items. If the food falls within an excepted item it is not zero rated but standard rated. However, if the food falls within the list of items overriding the exceptions, then it is excluded from the excepted items and will be zero rated.

7. The issue in dispute in this appeal is whether the Shots fall within the class of food under General Item 1 of Group 1, Sch 8 VATA, as the Appellant contends, or whether they are beverages within the meaning of item 4 of the Excepted items and standard rated, as HMRC contend.

8. The term “beverage” is not defined further in the legislation. The meaning of “beverage” has been considered in a number of cases considered below.

RELEVANT CASE LAW

9. The parties referred us to the following cases on the interpretation of beverages in Item No 4:

Bioconcepts Limited v The Commissioners of Customs v Excise [1993] Lexis Citation 1149 (“*Bioconcepts*”)

Grove Fresh Limited v HMRC [2005] Lexis Citation 825 (“*Grove Fresh*”)

Alpro Limited v HMRC [2006] Lexis Citation 968 (“*Alpro*”)

Unilever Bestfoods UK Limited v HMRC [2007] Lexis Citation 544 (“*Unilever*”)

Kalron Foods Ltd v HMRC [2007] EWHC 695 (Ch) (“*Kalron*”)

Ocean Grown Ltd v HMRC [2008] UKVAT V20562 (“*Ocean Grown*”)

Innocent Limited v HMRC [2010] UKFTT 516 (TC) (“*Innocent*”)

The Core (Swindon) Ltd v HMRC [2018] UKFTT 741 (TC) (“*The Core FTT*”)

HMRC v The Core (Swindon) Limited [2020] UKUT 0301(TCC) (“*The Core UT*”)

10. We have not discussed the cases in detail here as they are referred to in the parties’ submissions and the discussion below. We have; however, set out the relevant guidance that the cases provide on the interpretation of beverages and how the Tribunal should approach cases in which its application is in issue.

11. In *Bioconcepts* at page 7, Sir Stephen Oliver QC set out the well-known test of what constitutes a beverage stating:

“Its meaning in ordinary usage covers drinks or “liquors” that are commonly consumed. ... Liquids that are commonly consumed are those that are characteristically taken to increase bodily liquid levels, to slake the thirst, to fortify or to give pleasure.

12. Subsequent decisions have confirmed, if such confirmation were required, that the test in *Bioconcepts* is not an exhaustive test and that the word “beverage” is to be given its ordinary English language meaning.

13. In *Alpro* [55], the Tribunal stated:

“55. It is, firstly, a question of what the word “beverage” means as an ordinary word in the English language and we refer to the guidance already given in the *Bioconcepts* case.”

14. In *Unilever*, Sir Stephen Oliver QC stated:

“31. The UK Tribunal decisions show that the *Bioconcepts* test is workable and produces an intelligible set of results.”

15. In *Kalron* at [60], Warren J in the High Court confirmed that the test in *Bioconcepts* was not an exhaustive test:

“60. ... I would be surprised if the tribunal had thought that it was laying down an exhaustive definition of what a beverage is rather than listing common characteristics of a beverage not all of which needed to be present in any particular case. I do not consider that the tribunal can be taken to have ruled out other drinks not having any of those characteristics from being considered a beverage.”

At [78], he made it clear that the circumstances in which the product is consumed should be taken into account:

“However, what it does illustrate, and what the Tribunal were saying when they stated that “it is not in that context that the products are commonly sold”, is that it easy to envisage circumstances where the Product is not only consumed in the same way as one would drink a beverage – indeed, it is not disputed that the Product is consumed by drinking it - but is also consumed as a beverage that is to say in the same circumstance as one might consume a drink which is a beverage.”

16. In *Innocent* HMRC advanced the “unexpected guest test” as a “good working description” of what a beverage would be and submitted that the tests in *Bioconcepts* were neither cumulative nor exhaustive. Judge Mosedale in *Innocent* stated:

“44. We therefore agree with Ms Mitrophanous that the *Bioconcepts* test is helpful but it is neither cumulative nor exhaustive. And indeed we do not think that Sir Stephen thought that it was.

45. What does the test mean? We note that the *Bioconcepts* test refers to whether the drink is “commonly consumed”. We understand this merely to mean whether a common reason for its consumption is one of the four reasons given by Sir Stephen. We do not understand it to mean that to be a beverage the drink must be consumed by a large section of the population of the country (and neither party did suggest that this is what it meant) nor do we find that this is part of the ordinary meaning of beverage.

49. We asked Ms Mitrophanous for HMRC if HMRC had a definition of beverage. They rely on the *Bioconcepts* test in their public notice but consider that it is not exhaustive. Ms Mitrophanous did not suggest that HMRC had an exhaustive test but said she considered that a “good working description” would be that a beverage is the kind of drink that one might commonly offer a guest. A soup would not be offered as a drink. Liquid medicine or a dietary supplement would not be offered to a guest as a drink. But she thinks, if the host had some in the house, he would offer a smoothie to a guest as a drink.

...

51. We think that it is not the definitive test for a beverage (and HMRC did not suggest it was) but that it is something that we would take into account. It is more likely that a smoothie is a beverage if it is the sort of thing that would be offered to an unexpected guest as a drink. Indeed, Warren J at paragraph 78 of *Kalron* indicates that the Tribunal must consider the circumstances in which the drink in question is drunk: is it drunk in the same circumstances as one might consume a beverage? So it is relevant but not conclusive whether it would be offered to a guest as a drink.”

17. In *The Core FTT* the Tribunal confirmed that in order to determine if a drinkable liquid was a beverage it was necessary to carry out a multi-factorial assessment. That multi-factorial assessment comprised the *Bioconcepts* tests, the unexpected guest test, how the product is marketed, why it is consumed by the customer and what is the use to which it is put:

“89. In this case therefore we are required to decide whether or not a drinkable liquid, which may be a beverage if purchased in some circumstances, can also not be a beverage when marketed and purchased in other circumstances. We would suggest that in this case the multi-factorial assessment which we are required to carry out means that we should consider:

- (1) How is the product marketed ...
 - (2) Why it is consumed by the customer ...
- and
- (3) What is the use to which it is put ...?”

18. That decision was upheld in *The Core UT*. At [28]-[29], the UT referred to the comments of the Court of Appeal in *Procter & Gamble (UK) v The Commissioners for HM Revenue & Customs v [2009] EWCA Civ 407* (“*Procter & Gamble*”) which considered the interpretation of Group 1 in respect of Regular Pringles:

“[29] At [9] Jacob LJ observed that statutory tests of this kind will require a multi-factorial assessment based on a number of primary facts ...

...

[31] At [79] Mummery LJ observed that the VAT legislation uses everyday English words, which ought to be interpreted in a sensible way according to their ordinary and natural meaning”.

19. We note, although not referred to in *The Core UT*, Jacob LJ at [14] in *Procter & Gamble* additionally observed:

“Before going further, I have this general observation. This sort of question – a matter of classification – is not one calling for or justifying over-elaborate, almost mind-numbing legal analysis. It is a short practical question calling for a short practical answer.”

20. At [62], the UT in *The Core UT* stated:

“[62] ... the FTT correctly directed itself at [86] that in order to decide whether an item of food is zero-rated or standard rated it must carry out a multi-factorial assessment. It then said that ‘in addition’ it would adopt the approach of answering the questions as to how the product was sold or supplied. It then went on to say at [87] that it had ‘also’ used the *Bioconcepts* tests recognising at [88] that the tests were not exhaustive.

...

[65] ... Furthermore, the FTT also considered the ‘unexpected guest’ test identified in *Innocent* ...

[66] Accordingly, we conclude (1) that the FTT considered all relevant factors in reaching its conclusions, (2) that the weight to be applied to the relevant factors on a multi-factorial assessment is a matter for the FTT”.

HMRC GUIDANCE

21. Whilst not determinative and without the force of law, HMRC’s Internal Manual VFOOD7520 provides the following explanation of the *Bioconcepts* test:

“HMRC have adopted the definition given by the tribunal in this case as a workable general definition of a beverage. The beverages test is in five parts:

- it must be a drinkable liquid that is commonly consumed; and it must be
- characteristically taken to increase bodily liquid levels; or
- taken to slake the thirst; or
- consumed to fortify; or
- consumed to give pleasure.”

EVIDENCE AND WITNESSES

22. We were provided with a Hearing Bundle comprised of 249 pages and a joint Authorities Bundle comprised of 178 pages. Included within the Hearing Bundle were various hyperlinks to the Appellant’s website and YouTube together with screenshots, the witness statement (together with extensive exhibits) of Mr Thomas Robson-Kanu dated 3 December 2021. HMRC did not rely upon any witness evidence. We found Mr Robson-Kanu to be a credible witness with detailed knowledge of the Appellant’s product who provided his evidence in a measured and considered manner and we accepted his evidence. He was cross-examined in considerable detail.

23. We were provided with three formulations of the Shots to taste: Raw Turmeric Original (“Original”), Raw Turmeric and Ginger (“Ginger”) and Raw Turmeric and Beetroot (“Beetroot”). The Raw Turmeric and Coconut (“Coconut”) was discontinued in March 2019 but its disputed VAT treatment formed part of the appeal.

Facts

24. The Appellant (Company No.: 10115324, VAT No.: 256 1593 91), with the registered address of Savoy House, Savoy Circus, London W3 7DA, manufactures, produces, and sells turmeric shots (“Shots”) under the brand “The Turmeric Co”.

25. The Turmeric Co was launched in 2018 by Mr Thomas Robson-Kanu (“Mr Robson-Kanu”) and his father, Mr Rechi Kanu. Mr Robson-Kanu is a professional football player and has played for teams including Reading F.C. and West Bromwich Albion F.C. as well as representing both England and Wales at international level.

26. Mr Robson-Kanu and his father had been using the home-made Shots for the past decade to support their personal health and wellness. The Appellant’s aim of launching The Turmeric Co was to deliver the UK’s most potent functional turmeric Shots and to capitalise on the growing consumer trend for natural, raw nutrition to support and aid optimum health. The quality of the raw, fresh organic turmeric is very important to the Mr Robson-Kanu, he did not want the Shots to taste “synthetic” like the mass-produced turmeric shots he had tasted.

27. The Turmeric Co is a family business with approximately 15 employees, each employee has a defined role variously in production, operations and logistics, customer services, digital and social marketing and sales. Sales are currently only made to the UK but the intention is to market the Shots internationally.

28. The Shots are produced in the Appellant’s facility in West London and are based on a homemade recipe.

29. The turmeric is sourced direct from farms in Peru and the turmeric roots are hand prepared, crushed and the pulp sieved to extract the liquid. No additional liquids such as apple juice, orange juice or water are added during the production process. The Ginger and Beetroot Shots also include high quality ginger root which is prepared in the same way as the turmeric

roots. The Shots include small quantities of crushed, whole fresh watermelon (skin and pips included) and lemons which act as a base and provides a natural preservative effect. The Shots also contain fresh pineapple juice which is added as it contains a digestive enzyme called bromelain which aids digestion by breaking down protein molecules into amino acids and peptides. Flax oil and black pepper (for its piperine content) are added for increased bioavailability of curcumin (the yellow pigment found in turmeric). All the ingredients are cold-pressed to retain the maximum nutritional value of the raw ingredients. The Shots are not pasteurised as this would negatively affect the nutritional content of the Shots. The effect of non-pasteurisation is that the Shots have a short shelf-life making them more expensive and requiring retailers to display them refrigerated cabinets and not displayed with common beverages. No sugar or sweeteners are added to the Shots as they add no value or utility to the purpose of consuming the Shots: the most efficacious method of absorbing curcumin. Each Shot contains 23 calories.

30. The Shots are sold in small 60ml plastic bottles with a screw top lid, the bottles are made from 75 per cent recycled plastic and 25 per cent biodegradable plastic made from sugar cane. The screw top lid is required because of the high-pressure process used when filling the bottles. The packaging is colourful and the colours used roughly correlate with and identify the main ingredient and flavour: orange for Original, purple for Beetroot and red for Ginger. The packaging, the Shots' labelling and the Appellant's website state that the each 60ml Shot contains 35mg of turmeric, no added water, no added sweeteners or sugar, are cold-pressed, vegan, are 100 per cent raw (unpasteurised), a source of vitamins, antioxidants, potassium, magnesium and support digestion. The Shots must be kept refrigerated to reduce and slow microbial growth and each order of Shots is delivered to the customer in a package containing a wool liner and an ice pack. The customer can return the packaging through a packaging returns scheme, the returned packaging is re-used.

31. The Shots are sold in 60ml bottles as this is the optimum volume recommended by the Appellant for the daily consumption of curcumin. No upper or lower consumption levels are recommended as the flavour and taste sensation of the Shots is very strong and sharp, consuming greater volumes of the Shots would probably not be enjoyable for consumers.

32. A further reason for the size of the Shot bottles is for portability in order that consumers can readily take the Shots with them when going to the gym, to work or when away from home. The Shots can be drunk direct from the bottle but are required to be shaken before opening to combine the ingredients. The liquid is of a consistency similar to orange juice. After drinking or pouring out the contents there is visible sediment remaining on the bottom and sides the bottle. We sampled the Shots and, whilst the Shots were an easily drinkable liquid, we did not find the Shots to be palatable and considered that they had a very strong taste which we found unpleasant. We could manage no more than a sip of each Shot before requiring a drink of water to remove the unpleasant taste. In cross-examination, Mr Robson-Kanu confirmed that raw turmeric is bitter to the taste and is an acquired taste.

33. Mr Robson-Kanu consumes one Shot per day and credited his pain-free return from injury and the longevity of his professional football career to his daily consumption of a Shot. He was clear in his evidence that, whilst he extolled the health and wellbeing benefits of the Shots, there was no conclusive medical or scientific evidence (despite the publication of numerous scientific papers on the benefits of taking turmeric and the use of black pepper to increase the bioavailability of curcumin) that supported the claimed long-term health and wellbeing benefits of consuming the Shots.

34. The Appellant offers a subscription service to enable customers to have their Shots delivered either every 14 or 28 days. The subscription service lowers the unit cost of the Shots

and is the most popular method for customers to purchase the Shots. Promotions and rewards are offered to regular customers via a points scheme to further reduce the cost of the Shots. If purchased from the Appellant's website the Shots cost between £2.50 each for a one-off purchase of 14 Shots (£4.17 per 100ml) and £1.99 per Shot if a subscription is taken out for 28 Shots per month (£3.32 per 100ml). The Shots are also sold through retailers including health-food stores and departments, sports facilities and Amazon.

35. The Shots are marketed on the Appellant's website as having "*been used extensively by elite athletes and non-athletes alike, to support daily performance whether on the field or at home and recovery from the activity of day-to-day life*". Customer reviews on the Appellant's website state that customers consume the Shots for the following reasons: energy boost, support immunity, pain relief, performance boost, recovery and general wellbeing. The customer reviews confirm that the Shots are consumed on a daily, long-term basis to help variously with knee pain, arthritis, joint pain, provide immune support, general wellbeing, exercise recovery and inflammation from physical activity. The Appellant's focus on health and wellness has enabled it to partner with a number of football and rugby teams and individual athletes that endorse the benefits of regular consumption of the Shots. Individual athletes endorsing the Shots include Adam Gemili (sprinter who represents Great Britain), Nigel Benn (former professional boxer and former World Champion), John Barclay (professional rugby player), Johnny Sexton (professional rugby player and Irish International), Jamaal Lascelles (professional football player and captain of Newcastle United F.C.), Johnny Nelson (former professional boxer and former WBO Champion) and Olly Murs (singer, songwriter and television presenter). None of the endorsements, written or video, are scripted by the Appellant and represent the individual's personal view and experience of taking the Shots.

SUBMISSIONS

36. Mr Schofield's submissions on behalf of the Appellant are summarised as follows.

37. There is no definition of "beverage" in the legislation, notably, it is not used in the sense of meaning all drinkable liquids: it has a specific meaning in VAT law. The Tribunal has identified three non-exhaustive tests for determining whether a product falls to be excepted as falling outside a liquid food: the unexpected guest test (*Innocent*), the lunchtime substitute test (*Kalron*) and the *Bioconcepts* tests. Whilst the Tribunal in *The Core FTT* expounded a multifactorial test to determine the question "whether or not a drinkable liquid, which may be a beverage if purchased in some circumstances can also not be a beverage when marketed and purchased in other circumstances", that multifactorial test merely highlights the need to consider the marketing and circumstances of consumption.

38. The unexpected guest test overlaps with the requirement to consider the circumstances in which the product is consumed. HMRC, in the decision letter dated 26 October 2020, conceded that the Shots would not be classified as a beverage under this test. The lunchtime substitute test advanced in *Kalron* would not be satisfied by the Shots as they would not be consumed in place of a beer over a City lunch or in place of any beverage.

39. The test set out in *Bioconcepts* has been "widely used and generally approved in subsequent cases, *The Core FTT* at [88]. The repeated use of the word "to" in the four limbs means that "for the purpose of", as such the Tribunal will need to consider the intentions and purposes of those who buy and consume the Shots, *The Core FTT* at [91].

40. None of the four limbs in *Bioconcepts* are met in relation to the Shots. The Shots are not commonly consumed as they have a strong flavour and are subject to limited consumption as consuming larger volumes would be less enjoyable given the unfamiliar taste. They are consumed for their turmeric content, they are "used" and "tried" as part of a routine

supported by their sale by structured subscription and have a short shelf-life as they are unpasteurised.

41. The Shots are not characteristically taken to increase bodily liquid levels or to slake thirst as: the Shots are 60ml, there is no added water, 30% of the Shots comprises a thick turmeric suspension, some Shots comprise an additional 10% thick ginger suspension, the Shots contain flax oil and a consumer would likely only consume one Shot. The Shots are comparable to Tonic Attack in *Ocean Grown* which were consumed in doses of 56ml and were found not to be a beverage. Similarly, in *Unilever* the Tribunal said at [10] about the 100ml Vie Shots that “for our part we would not take more than one Vie shot at a time. If slaking our thirst were our reason for drinking, we would choose a different and less concentrated liquid.”

42. The Shots are not consumed to fortify as, in VAT law, fortify has been taken to mean “increase one’s vigour quickly” (*Alpro* at [55]) and applied to “products taken to enhance energy” (*Unilever* at [28]). In *Innocent*, the Tribunal agreed that fortify equated to instant gratification. In *The Core FTT*, the Tribunal at [94] stated “Clearly the word “fortify” should be taken to mean something more than just nourishing, implying a short-term boost rather than any longer-term benefits.” The Shots are consumed for their long-term health benefits with “prolonged use” over a period of months. The Shots do not contain caffeine, taurine [studies show that taurine can increase muscle function during strength exercise], sugar or alcohol.

43. The Shots are not consumed to give pleasure. Giving pleasure is to be distinguished from being palatable, *Bioconcepts*. The Shots are consumed principally for the potential long-term health benefits of turmeric not for pleasure, if they were drunk for the purpose of pleasure customers would want to consume more than 60ml daily.

44. There is a marked similarity with the Shots and the Tonic Attack wheatgrass in *Ocean Grown* which was found to be: “far more akin to a medicinal liquid, and indeed, the marketing is aimed at stressing its supposed health benefits, whilst not making specific claims”.

45. The Shots are marketed on the basis of the provision of specific nutrients to support wellbeing, the quality of the ingredients is paramount and the Shots are not pasteurised in order to maintain the nutritional content. The Shots do not compete in the same market as beverages and are not substitutes for common beverages.

46. Ms Chaumoo’s submissions on behalf of HMRC are summarised as follows.

47. It is accepted that Note 1 to Group 1 states that “Food includes drink”; however, HMRC submit that the Shots are excepted by Item 4. The Shots meet the beverage test set out by the Tribunal in *Bioconcepts*.

48. Taking each element of the *Bioconcepts* test in turn, HMRC submit that test is met.

49. The Shots are in liquid form and are intended to be and are consumed by being drunk. The meaning of “commonly consumed” as stated in *Innocent* at [45] should be applied. The manufacturing process transforms solids into a liquid which can in turn be drunk, that process changes the VAT treatment of the ingredients, *Kalron* at [75].

50. There is no legal test of how much bodily fluids need to be increased to satisfy “increase bodily liquid levels” per *Bioconcepts*, it is a matter of interpretation and consideration of the facts. Even if the sole intention or main aim of taking the Shots is not to increase bodily liquid levels, the Shots do increase bodily liquid levels. The Shots are marketed with no recommended daily dosage making them capable of increasing bodily liquid levels.

51. The quantity of liquid is an irrelevant factor when considering whether or not the products act to slake thirst. Slaking thirst is largely subjective and this appeal should be distinguished from *Ocean Grown*. HMRC submit that rehydration and slaking thirst are two different tests

and here we are concerned with the latter. The 60ml of liquid in the Shot is sufficient to slake thirst, this can be contrasted with *Ocean Growth* where the recommended dose was 28ml to 56ml daily. The Shot is capable of fulfilling the same role as any sports drink or water: to re-energise and to slake thirst.

52. The ordinary definition of fortify - to strengthen (someone) physically or mentally - should be the basis for assessing whether the Shots do fortify. The explanation given by the Tribunal in *Unilever* at [28] is the most accurate description of “fortify”: “liquid products taken to enhance energy”. When determining whether the Shots enhance energy or whether they are stimulating (*Innocent* at [179]), regard should be had of how the Shots have been marketed and advertised to the public. The Shots have been marketed and advertised with physical and mental wellbeing in mind. The Appellant’s website refers to the energy boosting and stimulating effects felt by consumers of the Shots.

53. The Shots have been designed to taste good and not taste “synthetic”, as such the Appellant has gone further than its competitors by ensuring that the Shots are more palatable in texture and taste for the consumer.

54. If the Tribunal is not persuaded that the Shots satisfy the test in *Bioconcepts* it is readily apparent that the Shots are beverages when a more detailed multi-factorial assessment is conducted, per *The Core FTT*. In *The Core FTT*, upheld on appeal by the UT, the Tribunal stated that in all appeals involving classification or VAT purposes it is necessary to carry out a multi-factorial assessment considering how the product is marketed, why it is consumed by the customer and what is the use to which it is put. HMRC submit that when the Shots are considered from an all-round perspective (taste, texture, manufacturing technique, marketing and use) it is clear that the Shots are consistent with many of the beverage hallmarks and should be assessed for VAT on that basis.

DISCUSSION

55. It was common ground between the parties that in order for the Tribunal to determine whether the Shots are an item of food or a beverage it must conduct a multi-factorial assessment. We conducted that multi-factorial assessment by considering the widely used non-exhaustive *Bioconcepts* tests, the unexpected guest test, the marketing and the circumstances of consumption. Whilst conducting that multi-factorial assessment we had at the forefront of our minds LJ Jacobs comments at [19] above that:

“This sort of question – a matter of classification – is not one calling for or justifying over-elaborate, almost mind-numbing legal analysis. It is a short practical question calling for a short practical answer.”

DRINKABLE LIQUID COMMONLY CONSUMED

56. The parties were agreed that Shots are, and as we found, a drinkable liquid that are intended to be and are consumed by being drunk. Mr Schofield submitted that “commonly consumed” is a separate limb in the *Bioconcepts* test, the Shots did not satisfy this limb on the basis of the Shots were subject to limited consumption as opposed to unrestricted common consumption. HMRC submitted that the meaning of the phrase “commonly consumed” is as described by the Tribunal in *Innocent* at [45]. We agree with HMRC that “commonly consumed” has the meaning set out in *Innocent* and is not a separate limb in the *Bioconcepts* tests. In *Innocent* at [45], the Tribunal stated:

“45. What does the test mean? We note that the *Bioconcepts* test refers to whether the drink is “commonly consumed”. We understand this merely to mean whether a common reason for its consumption is one of the four reasons given by Sir Stephen. We do not understand it to mean that to be a beverage the drink must be consumed by a large section of the population of the country

(and neither party did suggest that this is what it meant) nor do we find that this is part of the ordinary meaning of beverage.”

57. We find that the Shots are a drinkable liquid commonly consumed.

INCREASE BODILY LIQUID LEVELS

58. HMRC submitted that there is no legal test for how much bodily liquid levels need to be increased in order to satisfy this test. Even if it is not the sole intention or main aim of consuming the Shots, the Shots do increase bodily liquid levels when taken first thing in the morning and during exercise and post-exercise. As the Shots are marketed with no maximum fixed dosage, they can be used to increase bodily liquid levels. The Appellant submitted that Shots are not characteristically taken to increase bodily liquid levels as the Shot bottle is only 60ml, there is no added water, 30 per cent of the Shots comprise a thick turmeric suspension with some Shots containing an additional 10 per cent thick ginger suspension, they contain flax oil and pepper and it is likely that a consumer would only consume one Shot per day.

59. We accept that there is no legal test for how much bodily liquid levels need to be increased in order to satisfy this limb. HMRC sought to distinguish the approach of the Tribunal in *Unilever* which held that the 100ml Vie vegetable shots would not increase bodily liquid levels as the evidence was that the Vie shots had a high sugar content which had the effect of slowing the rate of absorption whereas the Shots “only” have a sugar content of 4.5g. We note that in *Unilever* at [17], it was merely stated that: “*the high sugar content of the Vie shot has the affect of slowing the rate of absorption*”, no further details were provided of what quantity of sugar content per 100ml was considered “high”. Absent that detail, we do not accept that any meaningful comparison or distinction can be made between the sugar content of the Shots (60ml) and the Vie shots (100ml).

60. It is axiomatic that consuming a Shot first thing in the morning, during and post-exercise or, indeed, at any time of the day will increase bodily liquid levels but the test is whether they are *characteristically* taken for that purpose. We do not accept that the Shots are characteristically consumed for that purpose. The evidence is that Shots are marketed as suitable to take first thing in the morning and during exercise and post-exercise for the sole purpose of maximizing the bodies absorption of curcumin and not to increase bodily fluid levels. We consider that the size of the Shots (60ml) and the inclusion of flax oil and pepper mean that a consumer would choose an alternative liquid of greater volume with a lower unit cost if their purpose was to increase bodily liquid levels.

TAKEN TO SLAKE THIRST

61. HMRC submitted that the quantity of liquid is an irrelevant factor when considering whether or not the product acts to slake thirst as slaking thirst is largely subjective to the person consuming the drink and rehydration and slaking thirst are two different tests. The Appellant’s submissions in respect of “taken to slake thirst” repeated the submissions made in respect of “taken to increase bodily liquid levels”. HMRC urged us to distinguish this appeal from that in *Ocean Grown* on the basis of the volume of liquid. In *Ocean Grown* the recommended dose of Tonic Attack (28ml to 56ml daily) was found to be insufficient to quench thirst whereas here, the Shots contained 60ml of liquid with no recommended maximum daily dose and therefore they could be consumed to quench thirst. In addition, HMRC’s written submissions relied upon the statement on the Appellant’s website that “elite athletes can drink up to four shots per day” as confirmation that the Shots could slake thirst. We do not accept HMRC’s submissions. In *Ocean Grown* the Vat and Duties Tribunal stated at [22] and [39]:

“22. We share Professor Strain’s opinion that, whilst the product is technically capable of increasing bodily liquid levels and slaking thirst, it would be very

difficult to quench more than a minor thirst. The taste is very powerful and, in our opinion, not pleasant.

...

39. In the present case, having both seen and consumed Tonic Attack, we have no hesitation in deciding that nobody would take it to increase bodily liquid levels or to slake thirst. It is simply not the type of product that anybody would drink in any quantity, and, of course, to slake thirst necessarily implies drinking a certain quantity of liquid. The recommended dose of one to two ounces (28-56 ml) daily indicates this, and although in the letters reproduced on Tonic Attack's website there is reference to people consuming larger quantities in a day, there is no question that that is abnormal and is not either how it is sold, or how anybody viewing the product on the shelf would consider purchasing it. It is also the case that the price of Tonic Attack is itself likely to inhibit people from drinking it in large quantities. For the same reason that one would not take it in sufficient quantities to slake thirst"

62. In our view, the comments above in *Ocean Grown* are equally applicable to the Shots. We do not consider it arguable that the 4ml difference between the maximum recommended 56ml daily dose of Tonic Attack and the 60ml Shots is sufficient basis to distinguish *Ocean Grown*. We consider it would be very difficult to quench more than a minor thirst with a 60ml Shot which we found to have a "a very strong taste which we found unpleasant". We consider that the size of the Shots (60ml), their taste and the inclusion of flax oil and pepper leads us to conclude that a consumer would choose a more pleasant tasting liquid of greater volume with a lower unit cost if the purpose of consumption were to slake thirst. Furthermore, there was no evidence before the Tribunal that the Shots are "characteristically taken to slake thirst".

63. The reference to "elite athletes" that HMRC relied upon is found on the Appellant's website under the heading: "Are these safe for athletes?" which states:

"Are these safe for athletes?"

Yes, our range of shots are made in a custom-built production facility in London which is SALSA certified. We can distribute worldwide, with a 5-star food production and standard rating and with its sole purpose to create the highest quality of turmeric-based shots. There is no risk of cross contamination with foreign substances as the only ingredients entering the production facility are fresh and natural.

Our products have been used by elite athletes all over the U.K. since launch. Our founder is an international footballer and has been consuming this range of shots for the last 10 years For elite athletes we recommend consuming a minimum of one to two shots per day, however, depending on their needs some have been consuming up to 4 shots per day."

64. We note that the Appellant recommends that elite athletes consume a "*minimum of one or two shots per day*" and that some have consumed "*up to 4 shots per day*"; however, in our view, those recommendations are made on the basis of the Mr Robson-Kanu's belief in the health and performance benefits of daily curcumin consumption. We consider it highly unlikely that elite athletes would consume Shots during or after training/a workout for the sole purpose of slaking their thirst, a far greater volume of liquid would be required.

CONSUMED TO FORTIFY

65. HMRC submitted that the ordinary definition of fortify, to strengthen (someone) physically or mentally, should be the basis of assessing whether the Shots fortify. In order to determine if the Shots enhance energy or whether they are stimulating, one should look to how the product is marketed and advertised. The Appellant submitted that "fortify" in the VAT

considerations of beverages has been taken to mean “*increase one’s vigour quickly*” (*Alpro*) and in *Innocent* was equated with instant gratification. Therefore, the sense of immediacy is the correct application of the word “fortify” in the context of beverages whereas, in contrast, the Shots are consumed for their long-term health benefits.

66. The Tribunal in *The Core FTT* at [92] to [96], considered the meaning of the word “fortify” concluding that it implied a “short term boost rather any longer-term benefits”:

“92. There has been some discussion of the meaning of the word “fortify” in the *Bioconcepts* tests. This was considered in *Unilever* and in *Alpro*. In *Unilever* it was discussed, at [28], as follows:

“In parenthesis, the purpose of the Tribunal in *Bioconcepts* of including “to fortify” as an example of a liquid characteristically consumed as a drink (and consequently a beverage) was to recognize as beverages liquid products taken to enhance energy.”

93. In *Alpro*, which concerned the VAT treatment of soya milk, the tribunal said, at [55]:

“It is less likely to fortify than a sugary drink if fortify means to increase one’s vigour quickly. Of course as soya milk is nutritious it will fortify someone in a longer time span.”

94. Clearly the word “fortify” should be taken to mean something more than just nourishing, implying a short term boost rather than any longer term benefits.”

We agree with the conclusion at [94] in *The Core FTT*.

67. Although not referred to by the Tribunal in *The Core FTT* in the context of “fortify”, the Tribunal in *Innocent* at [47] similarly held that “fortify” implied immediacy:

“47. There was dispute as to the meaning of “fortify”. Mr Cordara equated “fortify” with instant gratification: the sort of instant gratification, as he said, as one could find in a hip flask. We agree that fortification in this sense covers alcohol, which is commonly administered to revive after a shock or to give Dutch courage.”

68. We agree with Mr Schofield’s submission that “fortify” implies a sense of immediacy. In our view, consumption of a Shot does not provide an immediate or short-term physical or mental boost to the consumer. The Shots do not contain added ingredients such as caffeine, taurine, sugar or alcohol which provide an immediate boost. The evidence, which we accepted, was that the claimed benefits attributed to consumption of the Shots - “*giving a boost*”, “*support physical performance, by improving the efficiency of mitochondria responsible for producing energy*”, “*turmeric shots as energy-boosting supplements because they are specifically formulated to aid in supporting your immune system, everyday performance, recovery and health*” and “*traces of curcumin could be detected in the brain up to 96 hours after consumption*” - were all predicated on the regular, long-term consumption of the Shots. That requirement is stated on the Appellant’s website in the “Faq’s”:

“I am not sure I have felt a difference, how long does it take to experience benefits?

With most things natural, their positive impact increases over time. Results vary from person to person. The addition of implementing our shots regularly into your lifestyle will be one factor in supporting the improvement of any condition you may currently be experiencing.

Based on consumers' experience, we believe you would feel an overall health and mood boost and boost to your general health after 3 months of drinking 2 shots a day.”

69. The Appellant’s website under the heading “When Will I Start to Notice the Benefits of Turmeric?” stated:

“For those looking for a quick fix like a caffeine boost, unfortunately that’s not what turmeric can provide - it’s a bit more of a slow burner. When it comes to taking turmeric, it takes a little while for the curcumin to build up in your system. However, once you’ve gone through a loading period, that’s when you will start to notice some of the proposed benefits.

Depending on your body mass and condition, it will usually take around 4-8 weeks for you to start noticing improvements to your body and mind.”

70. The “real customer reviews” contained on the Appellant’s website similarly refer to long-term consumption of the Shots:

““I’ve been using these turmeric shots for a few months now” Katherine A. 21/7/20

“I have been using these shots since March” Nicole P. 28/7/20

“I have been using the shots for a month so too early to assess the benefits but I think I feel less stiff. Am going to keep using for a few months” Patricia M. 7/8/20

“Long-term aching joints have definitely improved over the last couple of months” Brian W. 22/7/20

“I have been taking these now for two weeks and the pain in my knees has subsided considerably” Phillip L. 17/4/20””

CONSUMED TO GIVE PLEASURE

71. Ms Chaumoo submitted that one of the unique selling points of the Shots was their taste which Mr Robson-Kanu described as refreshing and not “synthetic”. As the Shots are manufactured to be more palatable in texture and taste the “giving pleasure” element of the *Bioconcepts* test is satisfied. Mr Schofield submitted that “pleasurable taste” is subjective and the test is whether the Tribunal considers that Shots are consumed specifically for the purpose of pleasure and enjoyment. The taste of the Shots is unfamiliar to most consumers and there are comments made by consumers that they do not like the taste. If the Shots were consumed for pleasure, consumers would more likely want to consume more than 60ml per day. We agree with Mr Schofield that the Shots are not consumed to give pleasure.

72. As recorded at [32] above, we found the Shots to have a very strong and unpleasant taste and we would not consume them for pleasure or enjoyment. The unfamiliar and strong taste of the Shots is anticipated by the Appellant and addressed in the Faqs section on the Appellant’s website titled “*I do not like the taste*”. Mr Robson-Kanu’s evidence was that the quality of the raw, fresh organic turmeric was very important to him and he did not want the Shots to taste “synthetic” like a mass-produced turmeric shot. We did not understand his evidence to be that he was trying to make the Shots taste pleasant but rather was trying to ensure that the manufacturing process ensured that the Shots’ taste reflected the freshness of the ingredients (not synthetic) and, in particular, the main ingredient: raw organic turmeric. We considered it of note that no sugar or sweeteners are added to make the Shots more pleasant tasting. Mr Robson-Kanu was clear in his evidence that no upper or lower consumption levels are recommended by the Appellant as the flavour and taste sensation of the Shots is very strong and sharp and consuming greater volumes of the Shots would probably not be enjoyable for

consumers. Mr Robson-Kanu confirmed in evidence (if such confirmation were required) that raw turmeric is bitter to the taste and is an acquired taste.

73. It is apparent from the “real customer reviews” on the Appellant’s website that consumer’s views on the taste of the Shots are mixed:

“tastes fresh” Amelia K.

“the taste takes a little time to get used to but all good now” Gillian B

“tastes good easy to take” Anthony W.

“this tasted as if I took a crap, put it in a blender with a plate of thirty year old rotten food and blended it then stuffed it into a tiny bottle. it also arrived two days late.” Jamie S.

“The Shots are tasty enough to drink on their own” Bootlebug

“They taste much better than I thought they would, they are strong but tasty” Helena B.”

74. In *Unilever* at [35], the Tribunal stated:

“35. Is the Vie shot characteristically consumed for pleasure? We recognize that the Vie shot is described on its packaging as “delicious”. But it is not, in contrast to the products in *Grove Fresh* and *Kalron*, sold or consumed as something to be drunk for pleasure. The “delicious” characteristic is an attribute but not the essential feature of the Vie shot.”

Here, no reference is made to taste on the Shot bottles.

75. In *Innocent* at [48], the Tribunal explained that it considered that the *Bioconcepts* test “consumed for pleasure” meant “drunk principally for pleasure”:

“48. The meaning of the last test from *Bioconcepts* is also not particularly clear. When are drinks commonly consumed to give pleasure? Clearly the consumption of many if not most foods and drinks will commonly give pleasure. It seems to us Sir Stephen had in mind the consumption of a drink that was drunk principally for pleasure. This might, for instance, encompass alcoholic and soft drinks.”

76. In our view, it is clear from the evidence that the Shots are not commonly or principally drunk for pleasure but for the claimed long-term health and wellbeing benefits.

UNEXPECTED GUEST

77. In *Innocent*, the Tribunal at [51] (set out at [16] above) accepted that the “unexpected guest” test was not definitive but was something that would be taken into account. HMRC accepted that the test was not a definitive but submitted that it was entirely subjective and depended upon who the guest was, per *The Core FTT* at [98-99]. If the guest was a healthy eating enthusiast, the Shot is small enough and suitable to offer to a guest. The Appellant submitted that HMRC had conceded in their letter dated 26 October 2021 that the Shots were viewed as “*specialist*” and “*a host would not assume that an unexpected guest would consider it normal to be offered as a general drink*”. We accept that HMRC are not bound by the view expressed in the letter dated 26 October 2021 and are entitled to advance a different view in their Statement of Case. However, in our view, the view expressed the HMRC officer in October 2021 was correct and we agree that a Shot would not be offered to an unexpected guest. The size and strong taste of the Shot renders it unsuitable to be offered as a general drink in a social situation. Even if the unexpected guest was very health conscious or a keen athlete, we still do not consider it would be offered as a drink as the host would be aware that the Shots

are intended to be consumed on a daily, long-term basis for their long-term health benefits and there would be no reason to offer a Shot as a one-off drink.

MARKETING

78. HMRC submitted that the marketing of the Shots confirmed that they compete in the same market as many other beverages, can be consumed on the “the go” and be drunk by sports and non-sports people alike. The Appellant submitted that, unlike many beverages, the Shots are sold in seven-day sample boxes and by repeated subscriptions. The focus of the marketing is on claimed physical and wellbeing benefits of the nutrients contained in the Shots. The Shots do not compete in the same market as beverages and are entirely different from the consumer’s perspective and are consumed over prolonged periods for the nutritional content and potential long-term health benefits and not marketed as a food substitute.

79. We find that the Shots are not marketed as beverages for the following reasons.

80. The Shots are marketed on the basis of the nutritional content of the high-quality ingredients (primarily raw turmeric) that are stated to support health and wellbeing. The Shots contain black pepper and flax oil, two ingredients that are not commonly found in beverages. The Shots are marketed as requiring regular daily consumption over a long period of time (at least three months) to provide the consumer with the claimed long-term health and wellbeing benefits. A one-off purchase of a Shot would not achieve the stated benefits of drinking a Shot.

81. The most popular method of purchasing the Shots, unlike most common beverages, is direct from the Appellant via a subscription service with Shots delivered either every 14 or 28 days. The availability and popularity of the subscription service accords with the marketing of the Shots and the requirement for the long-term, regular consumption of the Shots in order to obtain the claimed health benefits. The Shots are expensive in comparison to common beverages sold in supermarkets, Mr Robson-Kanu’s price comparisons exhibited to his witness statement stated: a multipack of 24 cans of Coca-Cola in a supermarket is £0.14 per 100ml, a 1.75L carton of Tropicana Smooth Orange Juice is £0.17 per 100ml and 750ml Innocent Energise Super Smoothie is £0.27 per 100ml. The Shots are £2.50 each if purchased as a one-time purchase of 14 Shots (£4.17 per 100ml) or £1.99 per Shot if subscribed to 28 Shots a month (£3.32 per 100ml). When sold by third-party retailers, the price is about £2.29 per Shot (£3.82 per 100ml).

82. The Shots are marketed as unpasteurised (to maintain and emphasise the “freshness” of the curcumin and efficacy and percentage levels of antioxidants and vitamins C and B6) and must be refrigerated to maintain their nutritional content and slow microbial growth. The Shots have a shelf life of six weeks if refrigerated and three days if stored at ambient temperature. The non-pasteurisation of the Shots necessitates that they are placed in a wool liner with an ice pack before being packaged and despatched to the consumer. Similarly, any retailer stocking the Shots must display the Shots in a refrigerated cabinet and not alongside common beverages; this reduces distribution in supermarkets or other retail outlets leading us to conclude that they are not competing in the same market as common beverages.

Reason for consumption

83. HRMC submitted that the main reason for consumption of the Shots is to fortify and give pleasure either physical through taste and/or via a mental boost. HMRC accept that Shots have vast amounts of nutritional value but do not consider that to be a significant determinative factor. The Appellant submitted that the Shots are specifically consumed for their potential long-term health benefits and is more akin to a “medicinal liquid”, per see *Ocean Grown* at [45].

84. As stated above, we found that the Shots are not commonly consumed to fortify or to give pleasure but consumed daily on a long-term regular basis for their potential health benefits. Mr Robson-Kanu was clear in his evidence on the claimed health benefits of the long-term consumption of the Shots: whilst he extolled the health and wellbeing benefits of regular consumption of the Shots, he was at pains to make clear that there was no conclusive medical or scientific evidence that supported the claimed benefits of consuming the Shots. Similarly, in *Ocean Grown* at [43], the Tonic attack wheatgrass juice was found to be:

“far more akin to medicinal liquid, and indeed, the marketing is aimed at stressing its supposed health benefits, whilst not making specific claims”.

We consider that statement is equally applicable to the Shots: they are more akin to a medicinal liquid which, despite the strong and unfamiliar taste, are taken on a regular, long-term basis for their health and wellbeing benefits.

Use to which it is put

85. HMRC submitted that, regardless of the contents or nutritional value of the Shots, what matters is that they are drunk and the product is purposively designed to be a liquid rather than a solid. The liquidity of the Shots makes for faster absorption into the bloodstream and is purposively designed to be a drink rather than a solid. The Shots are consistent with many of the beverage hallmarks and should be treated as such. The Appellant submitted that the Shots are marketed for prolonged use and purchased by consumers for that reason. The Shots are commonly consumed in one go at a regular time or a convenient time of day rather than savoured and would not be a suitable “*lunchtime substitute*” (*Kalron*).

86. In *Kalron*, the High Court considered the “*lunchtime substitute*” test that had been given as an example by the VAT and Duties Tribunal where, rather than having a beer in a pub at lunchtime, two City acquaintances agree to have “Zumo Fresh Blends” smoothies. At [25], Warren J stated:

“The example does, perhaps, indicate one circumstance in which the Product might be consumed in place of something (beer, in the example) which is clearly a beverage.”

87. We can deal with deal “*lunchtime substitute*” test in short order. We agree with the Appellant that the Shots would not be consumed in place of a beer over a City lunch nor indeed substituted in place of any beverage.

88. In our view, the marketing and customer reviews demonstrate clear consistency in the use to which the Shots are put. The Shots are consumed in one go on a regular, long-term basis for the sole purpose of the claimed health and wellbeing benefits. The purpose of the Shots is entirely functional: to maximise the consumers daily ingestion of curcumin which is achieved by cold-pressing the raw ingredients into a liquid. We consider it highly unlikely that a consumer would attempt to ingest the same quantity of raw turmeric in solid form.

DECISION

89. For the above reasons we decided that the Shots should properly be zero-rated for VAT purposes as being a food but not a beverage. Accordingly, the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

90. 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.

**GERAINT WILLIAMS
TRIBUNAL JUDGE**

Release date: 17th APRIL 2023