Neutral Citation: [2023] UKFTT 00864 (TC)

Case Number: TC08941

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/09475

VALUE ADDED TAX – VATA 1994 Sch. 8 Group 1 Excepted Item 2 – zero rating – biscuits – whether "partly covered" with chocolate or similar product

Heard on: 5 June 2023
Judgment date: 16 August 2023

Before

TRIBUNAL JUDGE DEAN
DEREK ROBERTSON

Between

UNITED BISCUITS (UK) Ltd

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Nigel Gibbon of Nigel Gibbon & Co, solicitors instructed on behalf of the Appellant

For the Respondents: Mr Edward Hellier, Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The Appellant is an international food manufacturer specialising in baked snacks. It is the maker of McVitie's biscuits and is part of Pladis – a UK based global biscuit and confectionary group. The product with which we are concerned in this appeal is sold under the name "Blissfuls" ("the Product").

THE ISSUE

2. The issue which falls for determination is a narrow one: whether the Product is partly covered with chocolate or something similar in taste and appearance. We are grateful to Mr Gibbon for indicating that the issue relating to the principle of fiscal neutrality is no longer pursued.

3. It is common ground that:

   i) The Product is "food of a kind used for human consumption" for the purposes of VATA 1994 Sch. 8 Group 1.

   ii) The Product is a biscuit.

   iii) The chocolate cream filling in the Product is either chocolate or something similar in taste and appearance (for the purpose of this Decision we will refer to this as "chocolate").

   iv) The Product is not wholly covered by chocolate.

THE PRODUCT

4. The product consists of a biscuit cup with a flat bottom base, approximately 44mm in diameter and 9.5mm in height. It has a layer of chocolate hazelnut, a layer of chocolate and a a McVitie's logo made of biscuit on top, the circumference of which is smaller than the base.

THE LEGISLATION

5. There was no dispute as to the relevant legislation which is set out below. The issue in the appeal turns on our interpretation of that legislation.

6. VATA 1994 at section 30 provides:

> **Zero-rating.**
> (1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section—
>
> (a) no VAT shall be charged on the supply; but
> (b) it shall in all other respects be treated as a taxable supply;
>
> and accordingly the rate at which VAT is treated as charged on the supply shall be nil.
>
> (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.
> …

7. Sch. 8 Group 1, so far as relevant, provides as follows:

> "GROUP 1—FOOD
>
> The supply of anything comprised in the general items set out below, except –

…

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

General Items

Item No.

1. Food of a kind used for human consumption

…

Excepted items

Item No.

1 …

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

…

EVIDENCE

8. The Appellant led evidence from Mr Ogden, Director of Global Direct Tax who had sought confirmation from HMRC in July 2021 that the Product should be zero-rated. HMRC's view was that the Product should be standard rated for VAT and noted that as no sales had been made their decision as at 15 October 2021 was not an appealable decision. In December 2021 a zero-rated sale was made and declared. HMRC maintained its view and the Appellant appealed to the Tribunal on 18 February 2022.

9. In oral evidence Mr Ogden provided an average calculation of the measurements of the Product which indicated that approximately 80% of the biscuit was covered (calculating the "lid" as solid). He explained that the biscuit "lid" was not purely decorative but also served the function of keeping the structure of the Product in place and provided a "crunch" element before the consumer tasted the chocolate flavour. Mr Ogden highlighted that a consumer cannot bite into the biscuit without biting the biscuit "lid".

AUTHORITIES

10. We were referred to the following authorities, more about which we will say in due course:

- *R&C Commrs v Proctor & Gamble Ltd* [2009] EWCA 407
- *North Cheshire Foods Ltd* (1988 Decision 2709)
- *Customs and Excise Commissioners v Ferrero UK Ltd* [1997] STC 881
- *Ferrero UK Ltd* (LON/94/1149) (Decision 13493)

SUBMISSIONS

11. HMRC submit that the Appellant seeks to put a gloss on the words of the statute. The test is not whether the biscuit is a "sandwich" type of biscuit nor whether the chocolate can be bitten into first.

12. Furthermore, HMRC argue, the distinction drawn by the Appellant between a filling and a covering is not reflective of the legislation. The top layer, HMRC say, is part biscuit and part chocolate. The biscuit logo does not cover the whole of the biscuit, only part of it which begs the question what covers the remaining area. The answer is chocolate. Even on the Appellant's own figures the Product is not wholly covered by the biscuit logo.

13. The Appellant highlighted HMRC's guidance in the form of VAT Notice 701/14 which gives examples of products which are zero-rated and which include chocolate chip cookies, bourbon biscuits and other biscuits where the chocolate forms a sandwich layer between two biscuit halves and is not continued onto the outer surface. The Appellant submits that the Product is a sandwich biscuit comprising three layers: a biscuit base, chocolate cream filling in the middle and a biscuit lid as the top layer. The Appellant distinguished the authorities on the basis that, for instance, the BN Tartlette had a column of biscuit surrounded by a moat of chocolate which was two layers as opposed to the three which comprise the Product. The Appellant argues that the chocolate filling sits below and underneath the lid and therefore does not cover the Product but is contained within it.

14. The covering must be first constituent part of a biscuit to be bitten into, argues the Appellant, because it is the topmost surface of the biscuit. If one cannot do that, as is the case with the Product, then the filling should be categorised as a filling and not a covering. The Product is comparable to a bourbon biscuit where a small proportion of cream filling can be seen but is a filling not a covering.

DECISION

15. We have approached our decision with the principles derived from the authorities set out above in mind. In *R&C Commrs v Proctor & Gamble Ltd* Jacob LJ said at [14]:

> "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."

16. At [20] he referred to the statement in *Ferrero* that the relevant test was the view of the "ordinary man", and continued at [21]:

> "To my mind this approach is saying no more than 'what is the reasonable view on the basis of all the facts' - it does not matter if some of the facts would not be known to the 'man in the street.' That is why the test accepted as proper in *Ferrero* adds 'who had been informed as we have been informed.' The uninformed view of the man in the street is deliberately not being invoked."

17. We also bear in mind the guidance from the Court of Appeal in *Ferrero* that the words in the legislation should be given their ordinary meaning and that we should not feel bound or constrained by other decisions.

18. It is clear from the authorities that each case is fact specific and that in reaching our decision we must consider the Product against the legislation. As Lord Woolf MR stated in *Ferrero* (at p884):

> "I do urge tribunals, when considering issues of this sort, not to be misled by authorities which are no more than authorities of fact into elevating issues of fact into questions of principle when it is not appropriate to do so on an inquiry such as this. The tribunal had to answer one question and one question only: was each of these products properly described as biscuits or not?"

19. Both parties agree that the Product is a biscuit. Both parties also agree that there is a biscuit cup base and, despite differences over calculations which neither party took any real issue over, there is a biscuit logo which does not wholly cover the chocolate layer.

20. The question therefore, it seems to us, is what, if anything, covers the remaining area which is not covered by the biscuit logo.

21. The Oxford English Dictionary defines "partly" as "to some extent" or "not completely". "Covered" is defined as "having a layer or amount of something on it". We found this a useful

starting point which appears consistent with the approach of the Tribunal in *North Cheshire Foods Ltd* (1988 Decision 2709) who considered whether thin lines of chocolate on top of a biscuit "partly covered" the biscuit. The Tribunal in that case held that:

> "the piping of even a small quantity of chocolate over a biscuit must have the result as a simple practical matter, that it becomes partly covered."

22. Although we are not bound to follow the same approach, we consider that it serves to emphasise the points made by the Court of Appeal in *Ferrero*.

23. In our view, there is no warrant for demarcating the term "partly" and we consider that it can apply to any part of the covering of the biscuit, so long as it is "to some extent".

24. Turning to whether the chocolate covers the biscuit, we were not persuaded by the Appellant's submission that the covering must be first constituent part of a biscuit to be bitten into, otherwise it is a filling not a covering. In our view, this is not the correct test to apply. We consider that this writes additional words into the legislation. Similarly, we did not find that the "sandwich biscuit" comparison assisted. In our view, it would be a mistake to try to put a gloss on the words of the statute, in what is an acutely fact sensitive exercise, by imposing additional categories of "filling" and "layers" as distinct from "covering". In our view, while a layer can be contained within the biscuit cup base as it is in this case, this does not prevent it being part of the covering; all will depend on the facts of a particular case. The legislation does not require one layer to be higher than another to be classed as covered and we consider that this would be inconsistent with applying the ordinary meaning of the words of the statute and amounts to writing in additional words.

25. We should note that we did not find issues relating to the packaging and marketing of the Product assisted, and indeed the parties did not focus their submissions on these features.

26. Returning to the test and applying a practical answer to a practical question, namely is the biscuit partly covered by chocolate, we consider that the area which is not covered by the biscuit logo has a layer of chocolate on its surface. We accept that the biscuit logo covers most of the biscuit, but the requirements of the legislation are satisfied even if the covering is only "to some extent". We asked ourselves, if the biscuit logo does not cover the whole, what covers the remaining area? We consider that the view of the ordinary man in the street informed as we are, would conclude that the biscuit is partly covered by a layer of chocolate.

27. We therefore conclude that the Product is brought within Excepted Item 2 by virtue of being partly covered with chocolate.

28. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. 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.

JENNIFER DEAN
TRIBUNAL JUDGE

Release date: 16 August 2023