



Neutral Citation: [2024] UKFTT 00181 (TC)

Case Number: TC09095

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Location: Taylor House, London

Appeal reference: TC/2018/05518

*VAT — zero-rating – whether Nakd and Organix bars are confectionery – meaning of confectionery - multi-factorial test including consideration of healthiness and comparison of ingredients in traditional confectionery - appeal dismissed*

**Heard on:** 4 and 5 December 2023

**Judgment date:** 4 March 2024

**Before**

**TRIBUNAL JUDGE GREG SINFIELD  
TRIBUNAL MEMBER DR CAROLINE SMALL**

**Between**

**WM MORRISON SUPERMARKETS PLC**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Valentina Sloane KC, instructed by Deloitte LLP

For the Respondents: Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to His Majesty’s Revenue and Customs

## DECISION

### INTRODUCTION

1. This appeal concerns the VAT treatment of bars made from fruit and nuts; fruit, oats and nuts; and oats and fruit ('the Products') which are listed in an annex to this decision. The Products are manufactured by Organix Brands Limited ('Organix') and Natural Balance Foods Limited ('Nakd') and sold by the Appellant ('Morrisons') in its stores. Although there are 20 varieties, the Products may be grouped into four categories, namely:

(1) Fruit and nut bars - Nakd Berry Delight Wholefood Bar, Nakd Berry Cheeky Wholefood Bar, Nakd Berry Bliss Breakfast Bar, Nakd Peanut Delight Wholefood Bar and Organix Banana Soft Oaty Bar;

(2) Bars that emulate desserts, biscuits or cakes - Nakd Blueberry Muffin Wholefood Bar, Nakd Cashew Cookie Wholefood Bar, Nakd Bakewell Tart Wholefood Bar, Nakd Lemon Drizzle Wholefood Bar, Nakd Gingerbread Wholefood Bar, Nakd Apple Pie Wholefood Bar, Nakd Banana Bread Breakfast Bar and Organix Carrot Cake Soft Oaty Bar;

(3) Crunch bars - Nakd Banana Crunch Wholefood Bar and Nakd Strawberry Crunch Wholefood Bar; and

(4) Bars that emulate sweets or chocolate products – Nakd Rhubarb & Custard Wholefood Bar, Nakd Cocoa Orange Wholefood Bar, Nakd Cocoa Delight Wholefood Bar, Nakd Cocoa Twist Breakfast Bar and Nakd Cocoa Loco Wholefood Bar.

2. The only issue in the appeal is whether the Products are 'confectionery' within item 2 of the excepted items in Group 1 of Schedule 8 to the Value Added Tax Act 1994 ('VATA') and thus chargeable to VAT at the standard rate. It is common ground that if the Products are not confectionery, they are zero rated for VAT purposes under general item 1 in Group 1 of Schedule 8 as "Food of a kind used for human consumption".

3. At the hearing, Ms Sloane KC appeared for Morrisons, and the Respondents ('HMRC') were represented by Mr Watkinson. We are grateful to both counsel for their assistance.

4. For the reasons set out below, we have decided that the Products are 'confectionery' for the purposes of VAT and, accordingly, Morrisons' appeal is dismissed.

### PROCEDURAL BACKGROUND

5. This is not the first decision in this appeal. Morrisons made three appeals to the First-tier Tribunal ('FTT') covering all the Products in 2018. The FTT directed that the appeals should be consolidated into a single appeal.

6. The consolidated appeal was heard by the FTT (Judge Redston) remotely on 9, 10 and 11 February 2021. On 13 April 2021, the FTT released its decision with neutral citation [2021] UKFTT 106 (TC) ('the First Decision'). In the First Decision, the FTT decided that the Products were confectionery and that none of them was a cake (which was and is Morrisons' alternative argument).

7. Morrisons appealed to the Upper Tribunal ('UT') against the First Decision on the grounds that the FTT, in analysing whether the Products were 'confectionery' wrongly treated certain factors, as irrelevant. In a decision released on 23 January 2023 with neutral citation [2023] UKUT 00020 (TCC), the UT allowed Morrisons' appeal and remitted the appeal to the FTT to be heard by a new panel.

8. In its decision, the UT held that the FTT should have considered:

- (1) the healthiness of the Products and their marketing as healthy; and
- (2) the fact that the Products do not contain ingredients associated with traditional confectionery (cane sugar, butter or flour)

as factors to be weighed in the balance with the other factors when considering whether the ordinary, but informed, person on the street would view the Products as ‘confectionery.’

9. In [143] of its decision, the UT made the following directions (re-worded as appropriate for this appeal and decision) for the determination of the issue:

- (1) We shall (subject to (3) below) make our determination on the basis solely of the evidence that was taken account of by the original FTT.
- (2) We shall accord Mr Galbraith’s evidence the same value as the original FTT on the basis explained at [131] of the First Decision.
- (3) We may, if we see fit, conduct our own test of taste and texture of the Products insofar as samples of these are still available (some were not available to the original FTT as they are no longer in production).
- (4) We may, if it remains possible, and if the parties reach agreement on bearing the cost, have recourse to the recording and/or transcript of the original FTT hearing.
- (5) We shall take as given the following primary findings of fact, but may as we see fit, make additional findings of fact on the basis of the evidence that was before the original FTT:
  - (a) Organix bars: Ingredients and Process [111] – [115], The market and marketing [116] – [121], The Packaging [122] – [126], The Purchasers [131].
  - (b) Nakd bars: Ingredients and Processing [186] to [191], Packaging [192] – [194], Positioning in store [195] – [196], On-line marketing [197] – [198], Purchasers [201] – [202].
- (6) We shall, having made any such additional findings of fact on the basis of the evidence that was before the original FTT (and if applicable our own taste test of the product samples) perform our own fresh evaluation of whether the products are ‘confectionery’.
- (7) We shall make whatever directions we see fit regarding the format of the hearing such as the manner and timing of submissions from the parties on the significance of the factors the original FTT omitted, the additional findings to be made, and the issues before the tribunal including, where appropriate issues concerning quantum.

10. In relation to the issue of quantum, the UT directed that we should deal with it after hearing the parties’ submissions either at the substantive hearing or subsequently in the event that Morrisons is successful, as we see fit.

#### **LEGISLATION**

11. Section 30(2) VATA provides that the goods or services of a description for the time being specified in Schedule 8 are zero rated. Group 1 of Schedule 8 provides that zero-rating applies to:

“The supply of anything comprised in the general items set out below, except... a supply of anything comprised in any of the excepted items set out below ...”

12. The first of the general items is “Food of a kind used for human consumption”.

13. Item 2 of the excepted items is:

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

14. Note 5 to Group 1 states:

“...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.”

15. In the hearing before the original FTT, HMRC had contended that the Products were items of sweetened prepared food which is normally eaten with the fingers and thus deemed to be confectionery by Note 5 to Group 1 of Schedule 8 VATA. In the First Decision, the FTT held that, in order to be deemed to be confectionery by Note 5, some sweetening must be added to an item and inherent sweetness is not enough. The UT held that the FTT had been correct to hold that “sweetened” in Note 5 does not include items that are inherently sweet but refers to products to which sweetness has been added. In the hearing before us, Mr Watkinson confirmed that HMRC no longer relied on Note 5.

16. Ms Sloane referred to Note 5 as a deeming provision which, for example, deemed “drained, glacé or crystallised fruits” to be confectionery. We do not think that it is entirely accurate to describe Note 5 as a deeming provision. The purpose of Note 5 is to clarify the meaning of ‘confectionery’ and to provide certainty where there might be some doubt about whether an item should be classified as confectionery (as in the case of “drained, glacé or crystallised fruits” – see *Candy Maid Confections Ltd v Customs and Excise* [1968] 3 All ER 773 at 777E). Note 5 only operates as a deeming provision insofar as an item which it states is included in the term would not ordinarily fall within ‘confectionery’. It is obviously incorrect to say that all the items listed in Note 5 would fall outside the term ‘confectionery’ without the note. We consider that it is clear, for example, that sweets and chocolates would be regarded as ‘confectionery’ even without Note 5.

17. This view of Note 5 is supported by the discussion by the authors of *Bennion, Bailey and Norbury on Statutory Interpretation* (8<sup>th</sup> edn) of inclusive and exclusive definitions at section 18.3 which they summarise as follows:

“(1) An inclusive definition modifies the natural meaning of the defined term by enlarging it or clarifying potential doubt about what is covered. This kind of definition typically takes the form ‘X includes.’

(2) An exclusive definition modifies the natural meaning of the defined term by narrowing it or clarifying potential doubt about what is excluded. This kind of definition typically takes the form ‘X does not include’.

(3) What inclusive and exclusive definitions have in common is that they specify matters that are, or are not, to be treated as caught by the defined term but otherwise leave the natural meaning of the term intact.”

18. The learned authors refer to *HMRC v Premier Foods Ltd* [2007] EWHC 3134 (Ch) (*‘Premier Foods’*), which concerned whether a fruit bar was ‘confectionery’ for the purposes of VAT. In [18] of the judgment, Sir Andrew Morritt C observed that:

“... note (5) provides for the specific inclusion of ‘sweets’. But such specific inclusion cannot lead to the inference that sweets would otherwise be excluded. They are the paradigm of confectionery. Second, it is contrary to the well recognised canon of construction that an enlarging definition does not normally affect the width of the term being enlarged.”

## MEANING OF CONFECTIONERY

19. The term ‘confectionery’ is not exhaustively defined in the VATA but the legislation specifically includes some items in the term and excludes others from it which gives a flavour of the intended meaning of the word for VAT purposes. As Lord Justice Mummery observed in relation to another food classification issue in *HMRC v Procter & Gamble UK* [2009] EWCA Civ 407 (*Procter & Gamble*), “the VAT legislation uses everyday English words, which ought to be interpreted in a sensible way according to their ordinary and natural meaning”. We respectfully agree. We start by construing the legislation and then consider how courts and tribunals have interpreted that legislation before looking at how confectionery is defined in dictionaries.

20. In *C&E Commrs v Ferrero Ltd* [1997] STC 881 (*Ferrero*), which concerned whether a product was a ‘biscuit’ or ‘confectionery’, Lord Woolf MR said “confectionery would include ... both cakes or biscuits but for the express terms to the contrary in item 2” which excluded them from being confectionery (unless the biscuits were wholly or partly covered with chocolate) and restored them to zero rating.

21. In *Premier Foods*, the Chancellor held that the VAT Tribunal in that case had misdirected themselves when they concluded that, for an item to be classified as confectionery its production must have involved (a) a process which can be recognised as cooking and (b) the addition to the primary ingredient of an extra element as sweetness. At [17], he held as follows:

“In my judgment, neither of those elements is a necessary condition for a product to be classified as confectionery. 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. So far as I know, a stick of barley sugar does not involve any addition of further sweetness over and above its principal ingredient yet no one would doubt that it should be categorised as confectionery.”

22. Ms Sloane invited us to consider what is the ordinary and natural meaning of ‘confectionery’ by looking at dictionary definitions. She referred us to *HMRC v SSE Generation Ltd* [2023] UKSC 17 (*SSE*) at [42] in which Lord Hamblen referred to a number of dictionary definitions in order to determine the ordinary or common meaning of a word. She submitted that dictionary definitions are an objective yardstick which can be used to ascertain the common or ordinary meaning of ‘confectionery’. She urged us to have regard to the most widespread definition in current UK usage, ie the common ordinary meaning of ‘confectionery’, rather than any single definition or isolated examples. In support of her submission that ‘confectionery’ denotes sweets and chocolates, Ms Sloane listed the following definitions of the word from some of the dictionaries used by Lord Hamblen in *SSE*:

- (1) Oxford Dictionary of English (3rd edition): “sweets and chocolates considered collectively”.
- (2) Google Dictionary online: “sweets and chocolate considered collectively”;
- (3) Cambridge Dictionary: “sweets or chocolate”;
- (4) Collins Dictionary: “Confectionery is sweets and chocolates”;
- (5) Oxford Learner’s Dictionaries: “sweets, chocolate etc”;

- (6) Chambers 21st Century Dictionary: “sweets, biscuits and cakes”.
23. Lord Hamblen in *SSE* also cited definitions from the Oxford English Dictionary (‘OED’) and the Shorter Oxford English Dictionary (6<sup>th</sup> edn) (‘SOED’). The OED provides the following definition of ‘confectionery’:
- “Things made or sold by a confectioner; a collective term for sweetmeats and confections.”
24. The term ‘sweetmeat’ is described by the OED as a now chiefly archaic collective plural (it has been replaced by ‘sweets’) and defined as:
- “Sweet food, as sugared cakes or pastry, confectionary (obsolete); preserved or candied fruits, sugared nuts, etc.; also, globules, lozenges, ‘drops,’ or ‘sticks’ made of sugar with fruit or other flavouring or filling”.
25. ‘Confection’ is principally defined by the OED as:
- “Making or preparation by mixture of ingredients; mixing, compounding; composition, preparation, making up, manufacture. Sometimes esp. the making of preserves or confectionery.”
26. The Collins English Dictionary (14th edn) defines ‘confectionery’ as:
- “1 sweets and other confections collectively 2 the art or business of a confectioner”.
27. It then defines ‘confection’ as:
- “1 the act or process of compounding or mixing 2 any sweet preparation of fruit, nuts, etc., such as a preserve or a sweet ...”
28. Chocolates, sweets, biscuits wholly or partly covered with chocolate (or some product similar in taste and appearance to chocolate), drained fruits, glacé fruits and crystallised fruits are all examples of ‘confectionery’ in the legislation. Other prepared foods that are sweet and have the characteristics of ‘confectionery’ are chocolate covered raisins or nuts and sugared nuts. Sweet biscuits (not covered with chocolate) and cakes would also be confectionery if they were not excluded from being confectionery by the legislation (see *Ferrero*).
29. Applying the legislation, the guidance in the cases and the dictionary definitions as well as considering the nature of items that are indisputably confectionery, we consider that ‘confectionery’ means items of food that:
- (1) have been produced by a process of mixing or compounding (but not necessarily cooking) the ingredients;
  - (2) taste sweet, either as a result of the inherent sweetness of one or more ingredients or as a result of the addition of sweetening, and whether or not they also taste bitter, salty, sour or spicy; and
  - (3) are normally eaten with the fingers in small quantities as a snack or a treat and not as a main meal or part of one.
30. Morrisons’ case was that the Products are not ‘confectionery’ according to the ordinary and natural meaning of that term. Ms Sloane for Morrisons submitted that the ordinary and natural meaning of ‘confectionery’, as illustrated by the dictionary definitions, was sweets and chocolates. In considering the different definitions, Ms Sloane urged us not to confuse a ‘sweet snack’ with a ‘sweet’.
31. Ms Sloane referred us to the Food (Promotion and Placement) (England) Regulations 2021 (the ‘Food Regulations 2021’) which regulate promotions and placement in retail stores

of certain foods. The products which are subject to the regulations are foods which are listed in Schedule 1 and are ‘less healthy’ as defined in the regulations and are not ‘charity food sales’. Schedule 1 includes the following categories:

“Category 4: Confectionery including chocolates and sweets.

...

Category 6: Cakes and cupcakes.

Category 7: Sweet biscuits and bars based on one or more of nuts, seeds or cereal.”

32. Ms Sloane did not contend that Category 4 of Schedule 1 to the Food Regulations 2021 constituted a binding definition of ‘confectionery’ for VAT purposes but said that it confirms the impression that confectionery is a particular subset of sweet products, ie chocolates and sweets.

33. We did not find the Food Regulations 2021 of any assistance in determining the meaning of ‘confectionery’ in Item 2 of the excepted items to Group 1 of Schedule 8 VATA. The regulations are not concerned with VAT and are drafted quite differently. Note 5 to Group 1 provides an inclusive definition of ‘confectionery’ whereas Schedule 1 to the Food Regulations 2021 contains specific definitions and only food falling within a category can be considered Schedule 1 food (see regulation 2(1)). As Ms Sloane rightly accepted, Category 4 does not limit the meaning of confectionery to ‘chocolates and sweets’. Some of the products in the other categories, namely cakes and sweet biscuits, are accepted as being confectionery for VAT purposes according to the ordinary use of the term (see *Ferrero*) although they are separately categorised in the Food Regulations 2021. We consider that Category 7 of Schedule 1 is potentially unhelpful to Morrisons’ case as “bars based on one or more of nuts, seeds or cereal” are categorised with sweet biscuits which are confectionery for VAT purposes. The issue in this appeal, however, is not whether the Products are “bars based on one or more of nuts, seeds or cereal” but whether they are ‘confectionery’.

34. In our view, *Premier Foods* and *Ferrero* show that ‘confectionery’ is a broad term that extends beyond traditional sweets and chocolates to encompass cakes and biscuits (which are specifically brought within zero rating by item 2 of the excepted items in Group 1 of Schedule 8). We accept that it is possible that not all processed sweet snack foods are ‘confectionery’ but consider that all confectionery comes within the term ‘sweet snack’. In our view, there is a continuum of sweet snack foods running from items that are undoubtedly ‘confectionery’ at one end of the scale to items that are incontrovertibly not ‘confectionery’ at the other. For example, sweets and chocolates are obviously ‘confectionery’ while raisins and other dried fruits are not ‘confectionery’ notwithstanding that they fulfil a similar function as a sweet snack. In between the extremes, are items which have some of the attributes of ‘confectionery’ but lack others and so the classification is less obvious. However, as Jacob LJ said in *Procter & Gamble* at [32], “you do not have to know where the precise line is to decide whether something is one side or the other”.

35. We now turn to consider how we should determine on which side of the line the Products fall.

#### **APPROACH TO CLASSIFICATION**

36. In *Ferrero*, which concerned whether a product was a ‘biscuit’ or ‘confectionery’, at page 885, Lord Woolf MR said that the question the Tribunal should ask is:

“...what is the view of the ordinary person as to the nature of the product and whether or not the product is one which falls within the relevant category ...”

37. In *Proctor & Gamble* at [20], Jacob LJ 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.”

38. At [63] of *Proctor & Gamble*, Toulson LJ added:

“I agree with Jacob LJ that the approach approved in *Ferrero* really amounted to saying no more than that it was for the tribunal to decide what was the reasonable view on the basis of all the facts known to the tribunal; and it conveys that this is not a scientific question. In determining that question I do not see that any advantage is gained by referring to the hypothetical ordinary person in the street.”

39. It is therefore well-established that, in determining whether an item of food is ‘confectionery’, the proper approach is to consider whether the item would reasonably be considered to be ‘confectionery’ by the informed ‘ordinary person in the street’. For these purposes, ‘informed’ means informed as to the meaning of ‘confectionery’ for VAT purposes and aware of all the relevant facts in the particular case.

40. In this case, we consider that the most influential factors on the ordinary person in the street when asked whether an item of food is ‘confectionery’ are likely to be:

- (1) what are its ingredients?
- (2) how is it made?
- (3) what does it look, feel and taste like?
- (4) when, where and how is it consumed?

41. The third factor, in our view, carries the most weight as many people will recognise something as confectionery, eg a sweet or chocolate, simply by seeing and eating it and without knowing precisely what is in it or how it was made. That is not to say that the other factors are irrelevant. As the UT in this case said at [115]:

“A consideration of whether something is confectionery will inevitably involve comparison with products which are present in items commonly accepted to be confectionery. There will no doubt be examples of confectionery which do not contain such ingredients but which are nevertheless confectionery. But that does not mean consideration of the ingredients, and the absence of traditional ones, will not add to the overall picture of the product’s classification.”

42. In addition, there are other factors which although of less weight may, as the UT put it in this case, colour the impression of the ordinary person in the street as to whether something is confectionery without being determinative. Those factors are:

- (1) the healthiness or otherwise of the item;
- (2) how the item is packaged, marketed and sold; and
- (3) who consumes the item and how they view it.

43. Accordingly, we now consider the evidence in relation to the Products and how the informed ‘ordinary person in the street’ might view them.



## EVIDENCE TO BE TAKEN INTO ACCOUNT

44. As directed by the UT at [143] of its decision, we regard the following findings of primary facts by the FTT in the First Decision as established.

### **Organix bars:**

#### ***Ingredients and Process [111] – [115]***

“111. Both Organix Bars have two main ingredients, wholegrain oats and raisins. In the Banana bar, the oats are 46% and the raisins 27%; in the Carrot Cake bar the oats are 46.5% and the raisins 32.2%. The raisins contain sunflower oil, and further sunflower oil is added, at 12% and 12.1% respectively. The next main ingredient by weight is fruit juice: the Banana bar has 10% apple juice concentrate and the Carrot Cake bar has 7% carrot juice concentrate and 2% apple juice concentrate.

112. Those four ingredients form what Mr Howard described as the base “dough mixture” to which flavours are added. In the Banana bar this is dried banana (5%), and in the Carrot Cake bar it is cinnamon powder (0.4%) plus a touch of orange oil (less than 0.1%).

113. The principal reason for adding the fruit juices is to bind the other ingredients together. Concentrate is used because single strength fruit juice contains too much water and would be insufficiently sticky. Concentrate has, as Mr Howard said, a ‘syrup like’ quality. Sunflower oil is added to offset the stickiness of the fruit juice. In evidence-in-chief Mr Howard explained that the concentrate ‘is needed in the bars as a source of sugar to make the bars work’; when asked by Mr Simpson to expand, he added that what is required is ‘a relatively high sugar level – either fat based or sugar based – to hold the bars together’.

114. Each Banana bar contains 4.6g of fat and 18g of carbohydrate, including 8.1g of sugar; each Carrot Cake bar contains 4.7g of fat and 17g of carbohydrate, including 7.9g of sugar. On a percentage basis, the Banana bar is 27% sugar and the Carrot Cake bar 26% sugar. This is around half the sugar content of most of the confectionery provided by way of comparison: KitKats are 51% sugar; Maltesers are 51.7% sugar and a Mars bar is 59.9% sugar. The only comparator which is close to the Organix Bars is Green & Black’s organic dark chocolate, which is 28.5% sugar.

115. The above ingredients are mixed together, “sheeted out”, and cut into oblong bars, which are then baked, cooled and packed.”

#### ***The market and the marketing [116] – [121]***

“116. The target market for the Organix Bars is the parents of toddlers and young children; the bars are labelled as being for ‘12 months plus’. They are normally located in the baby/infant section of stores, and when working with large retailers, Organix only deals with buyers who represent the ‘baby food’ section.

117. In Morrison’s, Organix Bars have only ever been positioned in the baby food part of the stores. Ms Marston described Organix as ‘the number one player in the “baby dry food snacking area”’ and her unchallenged evidence was that customers ‘would expect to find them with toddler foods and snacks’. As noted at §22(2), although Ms Marston attached to her witness statement pictures of Morrison’s baby food aisles, the resolution of those images meant that it was not possible to see the names of adjacent and nearby products. I therefore find as a fact that the Organix Bars were held out for sale with other snacks for babies, and make no finding as to whether they were next to, or

close to, any form of traditional confectionery which was similarly aimed at very young children.

118. Morrison's also sell Organix bars online, where they are located by the following route: Baby and Toddler – Baby and Toddler Meals and Drinks – Toddler (12-36 months) – Snacks.

119. Organix's website states that their bars 'won the title of Best Toddler Snack at the Loved By Parents Award'. It also describes the Banana bar as 'deliciously yummy' and includes the following text:

"Soft, scrummy and deliciously fruity, our organic Banana Soft Oaty Bars are packed full of real fruit pieces, juicy raisins and wholegrain oats for toddlers on the go. These banana oat bars for babies make the perfect snack for toddlers and kids off on life's little adventures."

120. The description of the Carrot Cake bar is similar:

"Packed full of juicy raisins and wholegrain oats with flavour from real carrots for toddlers on the go. These carrot oat bars for babies make the perfect snack for toddlers, kids lunchboxes and life's little adventures."

121. Morrison's website describes both bars as 'ideal toddler snack bars'. In correspondence with HMRC on 17 April 2019, Mr Marshall said that 'the Organix Bars are held out for sale [by Morrison's] as healthy snacks'. Mr Howard agreed in cross-examination that the Organix Bars were not marketed as cakes."

### ***The Packaging [122] – [126]***

"122. The Bars are sold both singly and in boxes of six. The wrapper for each individual Banana bar is yellow, and that for each Carrot Cake bar is orange; the same colours predominate on the related boxes. The wrappers and the boxes have the word Organix in large letters, and in smaller letters, the name of the product: 'Banana Soft Oaty Bar(s)' and 'Carrot Cake Soft Oaty Bar(s)', so emphasising that the main ingredient by weight is oats. The Banana bar has three slices of banana on the front of the packaging for the single bar; the box has two slices of banana and two bananas, as well as a picture of the bar. The Carrot Cake bar and box are similar, but with pictures of carrots and raisins instead of bananas.

123. The front of the Carrot Cake box has the words 'perfect for lunch boxes' in clear white writing against an orange background in the top left hand corner; the box for the Banana bars has instead the words 'the UK's No 1 toddler oaty bar' in the same position in black against a yellow background. In the opposite corner are the words '12+ months – on the go' again in clear white writing against a green background. The words '12+ months' are repeated on the individual wrappers. The boxes for both bars have the following words in white on a brown background on the bottom of one of the side panels, and the same words are on the back of the wrappers, above the ingredients:

'SAFETY ADVICE: for little ones 12 months+. Please ensure they are sitting down and supervised when enjoying this food.'

124. On the basis of Mr Howard's evidence-in-chief, I find that this was a standard sentence on all Organix's food, because it is always safer if small children are sitting down when eating.

125. Both boxes have the words 'I'm organic – No Junk Promise – Nothing artificial' on the front. The side of the Banana bar box says (emphasis in original) 'We're here to create deliciously tasty, utterly organic foods that little ones love'; in the same place the Carrot Cake bar box similarly says 'We're

here to create deliciously tasty, utterly organic feel-good food to fuel your little ones' wonder'.

126. The colour contrast between the white writing and the backgrounds of the boxes means that the words which stand out are, in order: 'Organic'; '12+ months – on the go'; 'No junk promise'; and, in the case of the Carrot Cake bars, the words 'Perfect for lunch boxes'."

### ***The Purchasers [131]***

"131. I agree with Mr Watkinson that Mr Galbraith's evidence is of very limited value for the reasons set out above. I accept on the basis of the packaging that the purchasers of Organix Bars are likely to be parents of young children who are avoiding 'junk food' and who are positively selecting organic products, and that it is reasonable to infer from those facts that the purchasers are health-conscious. That inference is confirmed by Mr Galbraith's research. I make no further findings from his evidence."

### **Nakd bars**

#### ***Ingredients and Processing [186] to [191]***

"186. There are three types of Nakd Bars: Fruit and Nut bars, Oaties and Crunchies:

(1) the Fruit and Nut bars in issue are: Bakewell Tart; Berry Delight; Blueberry Muffin; Cashew Cookie; Cocoa Delight; Cocoa Orange; Gingerbread; Lemon Drizzle; Peanut Delight, and Rhubarb and Custard;

(2) the Oaties in issue are: Apple Pie; Banana Bread; Berry Bliss; Berry Cheeky; Cocoa Loco and Cocoa Twist; and

(3) the Crunchies in issue are: Banana Crunch and Strawberry Crunch.

187. The main ingredient in all Nakd Bars is dates, at between 37% and 58%. All Fruit & Nut bars contain significant percentages of nuts and/or dried fruit, with the type of nut and/or fruit varying depending on the bar. For example, Blueberry Muffin contains cashews (15%); raisins (15%); almonds (10%) and blueberries (2%). All contain 'natural flavourings', and some also have additional flavouring, such as cocoa, ginger or lemon.

188. In the Oaties, the second main ingredient after dates is oats, at between 20% and 25%. All Oaties contain raisins (ranging from 13% to 21%), plus one or more types of nuts (ranging from 8% to 13%). Two Oaties contain apple juice concentrate at 8% and 9%; another two contain 'apple and carob extract' also at 8%, and the remaining two contain fruit extract (4% and 5%). The Banana bar is 25% banana, and the other Oaties contain small quantities of various different additional ingredients, plus in each case 'natural flavourings'.

189. Of the two Crunch bars, Banana Crunch contains soya protein crunchies (18%); cashews (15%); raisins (15%); dried banana (6%); apple juice concentrate (2%) and banana flavouring. Strawberry Crunch is similar but with strawberry replacing the banana.

190. The sugar content by weight of the Nakd Bars ranges from 33% for Ginger Bread through to 52% for Blueberry Muffin, Berry Delight and Rhubarb and Custard. The sugar content of all Nakd Bars is thus between one-third and half of their total weight. By way of comparison, KitKats are 51% sugar; Maltesers are 51.7% sugar and Mars bars are 59.9% sugar, while Green & Black's organic dark chocolate contains 28.5% sugar. In some Nakd Bars the sugar content is thus similar to that of other well-known

confectionery brands, and even the Bars with the lowest percentage contain more sugar than Green & Black's.

191. The above ingredients are not baked but mixed or (as the packaging tells us) 'swooshed' together, and then cut into rectangular bar shapes."

### ***Packaging [192] – [194]***

"Packaging

192. The findings in this part of the decision are based on the evidence provided for the Fruit & Nut bars and the Oaties. I can make no findings about the packaging for the Crunch bars, as no samples were provided; neither were there any pictures of the boxes or wrapping. There was also no sample evidence for three of the Oaties (Berry Cheeky, Cocoa Loco and Apple Pie) and the only evidence for Rhubarb and Custard was the picture of the front of the box. However, packaging for other Oaties and Fruit & Nut bars was supplied, and I have assumed that the findings below about the Fruit & Nut and the Oaties apply to all the products of that type which are under appeal.

193. The Fruit and Nut and Oaties are sold both singly and in boxes of four. The main part of the front of each bar has the name 'Nakd' in large letters, followed by the product's name. To the left, in slightly smaller letters, are the words 'gluten, wheat and dairy FREE'. The Fruit & Nut bars also contain the words 'raw fruit and nut bar'; the Oaties have instead 'raw fruit, oat and nut bar'. On all bars this is followed by the words 'simply yummy'. The back of the bars includes the messages 'guilt-free and delicious', 'no added sugar or syrup', 'nature is nice', and, depending on the percentage of dried fruits, also the words '1 of your 5 a day', or '100% yummy'. The background colour varies with the product: for example Cocoa Delight is brown; Cocoa Orange is brown and orange; Blueberry Muffin is royal blue and Lemon Drizzle in bright yellow.

194. For each bar, the colours of the boxes are the same as the wrappers, and the format is similar, with the same messages, together with the words '100% natural ingredients'. The Banana Bread box has the words 'breakfast bars' on the front, together with the message 'make your morning marvellous'. The back of all boxes has three pictures: a steaming cup, and the words 'with a cuppa'; a car or bicycle, with the words 'on the go' and a shoulder bag with the words 'just in case'."

### ***Positioning in store [195] – [196]***

"195. Ms Marston's unchallenged evidence was that between 2014 and May 2019, the Nakd Bars were positioned in Morrison's 'free from' aisle, and 'to a lesser extent' next to the checkouts. As the Bars became more popular, other stores moved them to 'a more mainstream section of the store', and Natural Balance asked Morrison's to do the same. Between May and August 2019, the Nakd Bars were moved to the 'healthy biscuits and cereals' section of Morrison's. Ms Marston said they are now located next to 'healthy snacks' such as Go Ahead yogurt breaks and Fibre One chocolate fudge brownies and are not located next to traditional chocolate biscuits. The pictures of the display provided as exhibits to her witness statement show that they are between Trek Bars, which are described as 'Protein Flapjacks' and Morrison's own brand 'Fibre Bars'. There was no other information about either of these bars and I am unable to make any findings about them.

196. On Morrison's website, Nakd Bars are sold both under 'Biscuits and crackers - cereal bars and breakfast biscuits - healthier cereal bars' and under 'crisps, snacks and nuts - healthier options'."

### ***On-line marketing [197] – [198]***

“197. Extracts from the Nakd website included the following product descriptions:

(1) Cocoa Orange: ‘the collision of sweet zesty orange and rich cocoa makes for an incredible and indulgent taste...a yummy combination of fruit and nuts, gently smoothed together into a handy bar shaped snack’. Under the heading ‘want guilt-free chocolateness’, purchasers are offered ‘a few weeks of happy snacking’.

(2) Cashew Cookie: ‘a snack that is simple and wholesome...stock up on these yummy bars today’ and ‘the ultimate healthy cookie snack you can eat anytime anywhere’.

(3) Bakewell Tart: ‘a healthy on the go snack bar’.

(4) Blueberry Muffin: ‘the perfect treat to indulge in when you’re looking for something a little sweet and easy to eat, not to mention super healthy as it counts as one of your five a day’.

(5) Berry Delight: ‘Give them a try next time you are looking for something to pop in your lunchbox’; ‘for grabbing on the run’ and “super healthy snacks for people who get peckish between meals’.

198. Extracts from the Morrison’s website included the following comments:

(1) Cocoa Orange: ‘the perfect alternative to chocolate’.

(2) Banana Bread: ‘bursting with awesome oats that will keep you going from breakfast to snack time...we want everyone to have the best start to their day’.

(3) Berry Bliss: ‘all that scrummy goodness in only 99 calories’.”

### ***Purchasers [201] – [202]***

“201. Customer comments on the Nakd website include the following:

(1) Cocoa Orange: ‘this more than satisfies my chocolate cravings. It’s so much healthier than my normal chocolate bar (and much more filling) but still so chocolatey and yummy and makes a perfect treat!!’ and ‘I think they will make a pleasant change from the chocolate and sugar bars you usually end up with if you are in a ‘snack-grabbing’ mood’.

(2) Cocoa Delight: ‘they are soft, sweet, but not overly sweet, and they leave this deep chocolate aftertaste in your mouth’.

(3) Carrot Cake: ‘Nakd bars are perfect between breakfast and lunch with a cup of tea’.

(4) Nakd Berry: ‘perfect for those moments when you want something sweet but healthy...I don’t always want to snack on unhealthy foods’.

(5) Bakewell Tart: ‘tastes just like the real thing...definitely recommended for the sweet-toothed out there’.

202. Mr Galbraith’s evidence related to both the Organix Bars and the Nakd Bars and has been considered earlier in this decision. I accept on the basis of the packaging and the marketing that the purchasers of Nakd Bars are health-conscious, and that inference is confirmed by Mr Galbraith’s research. I make no further findings from that evidence.”

#### ADDITIONAL FINDINGS OF FACT

45. We examined and tasted a variety of the Products and, without regard to the original FTT's views on such matters. Having done so, we make the following findings as to the appearance, texture and taste of the samples which were provided to us. The various Products differ in appearance and texture depending on the principal ingredient in the particular bar or the item on which it is based which is reflected in the Product's name. Overall, however, there are more similarities in appearance (but not texture and taste) than differences.

46. Our views on the appearance of the samples which were provided to us are as follows:

(1) All the Products are in the form of rectangular bars of a similar size, roughly 10 x 4 cm. The size is similar to small chocolate bars and filled chocolate and wafer bars.

(2) The Nakd Berry Delight Wholefood Bar, Nakd Cashew Cookie Wholefood Bar, Nakd Bakewell Tart Wholefood Bar, Nakd Blueberry Muffin Wholefood Bar, Nakd Lemon Drizzle Wholefood Bar, Nakd Bakewell Tart Wholefood Bar, Nakd Gingerbread Wholefood Bar and Nakd Banana Bread Breakfast Bar are all brown. Most are a dark but not quite chocolate brown. The bars look smooth and are uniform in colour or nearly so except for the Nakd Peanut Delight Wholefood Bar which has pieces of peanut clearly visible on its surface.

(3) The Nakd Cocoa bars are all dark chocolate brown. The colour is uniform and slightly glossy.

(4) The Organix Carrot Cake and Banana Soft Oaty Bars are golden brown. They are slightly textured and appear to be made of compressed crumbs which is perhaps due to the high percentage of oats in the ingredients.

47. On the basis of their appearance, we find that the Products are clearly intended to be eaten with the fingers by an adult or with the hands in the case of a small child.

48. As to texture and mouthfeel, we find as follows:

(1) All the Nakd bars are smooth, sticky and squidgy to the touch. The Organix bars are less sticky and slightly rougher to the touch than the Nakd bars but still soft when squeezed.

(2) The Nakd Berry Delight Wholefood Bar, Nakd Cashew Cookie Wholefood Bar, Nakd Blueberry Muffin Wholefood Bar, Nakd Lemon Drizzle Wholefood Bar, Nakd Gingerbread Wholefood Bar, Nakd Banana Bread Breakfast Bar, Nakd Cocoa Orange Wholefood Bar, Nakd Cocoa Delight Wholefood Bar and Nakd Cocoa Twist Breakfast Bar are not smooth on the tongue like chocolate or crumbly in the mouth like a cake but chewy like fudge with fine pieces of nut, seeds or pips giving a slightly gritty texture. The Nakd Berry Bliss Breakfast Bar and Nakd Banana Bread Breakfast Bar are similarly chewy but with a slightly less gritty texture perhaps because of the oats. The Nakd Peanut Delight Wholefood Bar has a nutty fudgy texture but is less smooth due to the large pieces of peanut in the bar. We considered that the cashews in the Nakd Bakewell Tart Wholefood Bar give some of the texture of almonds in the traditional Bakewell tart.

(3) The Organix Carrot Cake Soft Oaty Bar and Banana Soft Oaty Bar are crumblier than the Nakd bars but not as crumbly or moist as a cake. They are not smooth or creamy in the mouth but dry perhaps due to oats.

(4) The Products have an energy density that is similar to many confectionery bars. By energy density, we mean that the Products have high calorific values derived from the naturally sweet dried fruits combined with nuts and/or oats in a small compressed and

chewy bar which is very similar to energy dense bars such as traditional nougat or fudge nut bars.

49. As to the taste of the Products, there was no dispute that all of them taste sweet which is unsurprising given the levels of natural sugars they contain (varying from 26% to 52%). Ms Sloane submitted that, in the First Decision, the original FTT failed to mention that the high levels of sugar are derived from dried fruit and that this was an important point in relation to ingredients and marketing of the Products as healthy which in turn showed how the Products were perceived by consumers. We find as a fact that the sugars in the Products are natural unrefined sugars derived from dried fruit, fruit juices and fruit juice concentrates. However, we consider that the source of the sugar is irrelevant to the question of whether the Products taste like confectionery. The natural sugars make the Products taste sweet just as refined sugars would do. We deal with the relevance of issues of healthiness and the perception of healthiness below.

50. The Products taste of their principal ingredients and/or flavourings. Our assessment of the taste of the sample Products provided to us is as set out below.

(1) The Nakd Berry Delight Wholefood Bar tastes predominantly of raspberry. The Nakd Berry Bliss Breakfast Bar tastes of fruit and berries. The Nakd Peanut Delight Wholefood Bar unsurprisingly tastes mainly of peanuts.

(2) The Nakd bars that emulate cakes have flavours similar to the items on which they are based. For example, the Blueberry Muffin Wholefood Bar tastes strongly of blueberry, the Nakd Lemon Drizzle Wholefood Bar tastes lemony, the Nakd Gingerbread Wholefood Bar has a slightly gingery and slightly nutty taste and the Nakd Banana Bread Breakfast Bar tastes of banana and oat. The taste of the Nakd Bakewell Tart Wholefood Bar bears a remarkable resemblance to the original despite not containing any of the principal ingredients (almonds and raspberries) of a traditional Bakewell tart. The Nakd Cashew Cookie Wholefood Bar did not taste to us like a nut cookie but had flavours of dates and perhaps apple with some nut.

(3) The Nakd Cocoa Delight Wholefood Bar tastes of dates, raisins and dark chocolate while the Nakd Cocoa Orange Wholefood Bar tastes the same but with the addition of orange. The Nakd Cocoa Twist Breakfast Bar has a very similar taste to the Cocoa Delight.

(4) The Organix Banana Soft Oaty Bar tastes of oats with some banana flavouring. The Organix Carrot Cake Soft Oaty Bar smells like gingerbread with a scent of cinnamon and orange flavour.

We find that the Products taste mainly of fruit, nuts or chocolate or a combination of two or more of those flavours. They also have the appearance and mouthfeel of high energy density bars.

51. No samples were provided of the Nakd Berry Cheeky Wholefood Bar (which was replaced by the Nakd Berry Bliss Breakfast Bar), Nakd Apple Pie Wholefood Bar, Nakd Banana Crunch Wholefood Bar, Nakd Strawberry Crunch Wholefood Bar, Nakd Rhubarb & Custard Wholefood Bar and the Nakd Cocoa Loco Wholefood Bar (although the Nakd Cocoa Twist Breakfast Bar was accepted as similar). As no samples were provided, we were unable to form a view on those bars individually but conclude that they shared many of the same properties in terms of appearance, texture and taste as those bars which we sampled and there were no grounds to treat them differently.

52. The original FTT recorded the evidence adduced by Morrisons that the Products are held out for sale and extensively marketed as healthy snacks and found that the purchasers of the

Products are health conscious. Ms Sloane submitted that nevertheless the FTT had not recorded all the relevant facts in relation to the marketing of the Products as healthy snacks or the attitudes of the purchasers to the Products. Ms Sloane drew our attention to statements on the Nakd, Organix and Morrisons websites which are not referred to in the First Decision (although it refers to other passages from those websites). The statements are descriptions of the Products by the manufacturers and Morrisons and comments or reviews left by customers on the manufacturers' websites or those of retailers such as Amazon.

53. In our view, the statements on the websites do not assist us in determining whether the Products should be characterised as confectionery. The statements by the manufacturers and retailers emphasise that the Products are (in the view of those making and selling them) 'healthy snacks' made from natural rather than artificial ingredients. That is entirely understandable from a marketing point of view in that it reassures potential purchasers that the Products are more beneficial or, at least, less harmful than other fruit, nut and cereal bars. That evidence must be tempered by the fact that the primary aim of the authors of the marketing material is to maximise sales rather than to inform, and marketing cannot determine where these Products fall on the confectionery/non-confectionery sweet snack continuum.

54. The evidence of how the Products are perceived by purchasers may indicate how the informed 'ordinary person in the street' might view them. We consider that some caution is required, however, as the purchasers of the Products are not necessarily proxies for the informed 'ordinary person in the street' as explained in [39] above. Another reason for caution is that the UK Government has recognised that public perception is not always an accurate guide to the healthiness of a food product. That is why the Government has introduced measures such as the 'traffic light system', which is designed to help the 'ordinary person in the street' make healthy choices. If these products were to have 'traffic lights' on them they would all be red as would all confectionery. Ms Sloane accepted that we may not accord the selected customer reviews very much weight.

55. In relation to the marketing of the Products, the original FTT recorded at [121] of the First Decision that a witness for Morrisons agreed that the Organix Bars were not marketed as 'cakes'. Ms Sloane pointed out by reference to the transcript that the witness also confirmed that they were not marketed as 'flapjacks'. She also asked us to note that the Products were not marketed as 'confectionery'.

#### **CONCLUSION ON THE FACTS**

56. The only issue in this case is whether the Products are 'confectionery' for the purposes of VAT. Determining whether a particular product is 'confectionery' requires consideration of different aspects of its manufacture, supply and consumption. In *Proctor & Gamble*, Jacob, LJ giving the first judgment of the Court of Appeal, said of the type of task facing a tribunal determining the outcome of a similar multi-factorial assessment 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.”

57. We respectfully agree. The multi-factorial evaluation is a qualitative exercise rather than a purely numerical assessment. Some factors carry more weight than others. Having considered all the relevant evidence and applied the correct test, whether the Products (or any of them) are confectionery is ultimately a matter of impression. In our view, the Products are 'confectionery' because they have the appearance, texture, mouthfeel, density and taste of confectionery, as that term is explained in [29] above, and they would be so regarded by the informed ordinary person in the street. We consider that the importance of the look, feel and taste of the Products outweighs any other factors that might suggest that they are not



confectionery. That view is reinforced by the way that the Products are marketed as sweet snacks and treats and perceived as such by purchasers (eg “the perfect treat to indulge in when you’re looking for something a little sweet”; “healthy snacks for people who get peckish between meals”; and “a pleasant change from the chocolate and sugar bars you usually end up with if you are in a ‘snack-grabbing’ mood”). There is an obvious distinction between sweet snacks to eat between meals, such as apples or oranges, which are clearly not confectionery (they are not manufactured for one reason) and the Products. The apples and oranges are high in fibre which allows the body to digest and absorb the sugar at a slower rate. The Products are very high in sugars. For example, a Nakd Berry Bliss Breakfast Bar contains 48.2g of sugar per 100g which is higher than the amount typically found in apples and oranges.

58. Although we feel that, having recorded the facts found by the original FTT and our own additional findings of fact, little more need be said by way of elaboration in a case such as this, we summarise below our findings on the individual factors that have led us to our conclusion.

59. The Products all look, feel and taste like confectionery products. They are small bars of a similar size to chocolate or candy bars and are clearly intended to be eaten with the hands. The Products are all slightly sticky to the touch and soft when squeezed. The Products share a soft, moist and chewy mouthfeel although some have a cereal like texture while others are denser and more fudgy. The energy density and mouth feel are also similar to energy dense nougat and fudge. All the Products taste sweet with predominant flavours that are either fruity, chocolatey or nutty (or a mixture of them). We find that flavours of fruit, chocolate and peanuts or other nuts are commonly found in confectionery of different types and the use of them in the Products supports our view that they are confectionery.

60. The main ingredients of the Products are dried fruits (principally dates and raisins), nuts (cashews, peanuts and almonds) and oats. We accept that these are not the usual ingredients of sweets and chocolates but, as we have explained, ‘confectionery’ is not limited to sweets and chocolates. For example, the term ‘confectionery’ includes items such as cakes and biscuits which are only zero rated because they are specifically excluded from being considered as ‘confectionery’ for VAT purposes by the legislation. We also consider that the term ‘confectionery’ encompasses items that are not made from and do not include ingredients associated with traditional confectionery such as cane sugar, butter or wheat flour but alternatives to or substitutes for those items such as fruit sugars (glucose, fructose), margarine or coconut oil and oat or nut flours. If simply substituting all or some of those for traditional sugar, butter and flour changed the classification of a product as confectionery then that would lead to a breach of the principle of fiscal neutrality which precludes treating similar goods differently for VAT purposes (see Joined Cases C-259/10 and C-260/10 *HMRC v The Rank Group plc* [2012] STC 420). As the UT held in this case at [115]

“... it is important not to overstate the relevance of such traditional ingredients and to elevate their presence or absence into an essential characteristic. A consideration of whether something is confectionery will inevitably involve comparison with products which are present in items commonly accepted to be confectionery. There will no doubt be examples of confectionery which do not contain such ingredients but which are nevertheless confectionery. But that does not mean consideration of the ingredients, and the absence of traditional ones, will not add to the overall picture of the product’s classification.”

61. We did not understand Ms Sloane to go so far as to contend that an item of food must contain cane sugar, butter or flour in order to be characterised as confectionery. Her submission was that the Products are made of raw fruit, nuts and oats, which are not commonly found in confectionery, without any added sugar. She stated that the ordinary person in the street would

not consider a product made of just fruit, nuts and oats to be confectionery. We do not agree. The dried fruit provides the sweetness associated with confectionery and we doubt the ordinary person in the street would consider where the sugar came from as a relevant characteristic. In our view, the absence of traditional confectionery ingredients does not outweigh the fact that the Products have the most important characteristics of confectionery, namely they appear, feel and taste like confectionery.

62. We do not consider that the manufacturing process indicates that the Products should not be regarded as confectionery. As far as manufacture is concerned, all that is required in order to be confectionery is that the item is produced by a process of mixing or compounding (but not necessarily cooking) the ingredients. There is no question in this case that the Products are mixed or compounded.

63. Similarly, there is no doubt that the Products were eaten by purchasers or their children in the same way as confectionery, that is to say eaten with fingers as snacks or treats between meals. We note that some of the Products may be placed in a lunchbox and thus be consumed as part of the midday meal. However, we consider that such Products are still principally a snack item and no less confectionery than a bar of chocolate or a chocolate covered biscuit which is slipped into a lunchbox as a treat.

64. The UT in this case held in [97] that “there is no reason in principle why healthiness was not a factor to be weighed up along with all the others in the balance when considering how the ordinary person on the street would view the product.” We accept that the products are marketed as healthy although, in our view, they might better be described as ‘healthier’ than some other sweet snacks or treats. All the Products fall within Category 7 of Schedule 1 to the Food Regulations 2021 as foods which are ‘less healthy’ and their placement in stores is regulated. For the reasons discussed at [53] above, we give very little weight to the marketing of the Products as healthy. We also disregard the fact that purchasers perceive the Products to be healthy save insofar as that perception is consistent with the informed person on the street.

65. We did not find that the packaging of the Products was very helpful in determining whether they are confectionery. Many snack foods which are clearly not confectionery, eg mini salamis and individual cheese portions, are packaged attractively using bright colours which resemble wrapped sweets and some confectionery is plainly packaged eg loose sweets in paper bags. The particular style of packaging in this case was not as informative as the text on the wrappers and boxes which indicates that the products were marketed as snacks or treats.

66. In an age where sweet shops are an endangered species and supermarkets sell all manner of products under one roof or on the same website, and place items within that space to maximise their sales, we found placement was also of very limited assistance in classifying the Products. The evidence in the First Decision was that the Nakd Bars were historically located in the ‘Free From’ section of the stores and are now placed in the ‘biscuits’ aisle in the ‘healthy biscuits and cereal bars’ section. A retailer’s decision about product placement cannot determine the VAT liability of the product as it does not affect the nature of the product itself only its presentation. That might be evidence of how the retailer views the product but it might also show how the retailer would like customers to view the product. As the UT said at [138] of its decision in this case, placement is a neutral factor at best and we do not consider that the location of the products in a shop or on a website carries any weight in this appeal.

#### **ALTERNATIVE GROUND**

67. We can deal with Morrisons’ alternative argument that the Products are ‘cakes’ as it was dealt with before us, ie very shortly.

68. The test to be applied in deciding whether a product is a ‘cake’ for VAT purposes is whether the ordinary informed person in the street would consider the product to be a cake.

69. Ms Sloane rightly accepted that none of the Products that emulate desserts, biscuits or cakes are presented as cakes, biscuits or puddings. She did not attempt to say that the Nakd Blueberry Muffin Wholefood Bar, for example, is a blueberry muffin. Ms Sloane contended that the ‘lexicon’ of confectionery-related terms used in marketing the Products, which were relied on by HMRC as indicating that the Products are confectionery, in fact suggested that they were ‘cakes’.

70. We have discussed the significance of marketing above and, in doing so, have not referred to HMRC’s ‘lexicon’ because we do not find it helpful in this case. In relation to the words and descriptions used to market the Products, we agree with the comments of Judge Fairpo in *Walkers Snack Foods Ltd v HMRC* [2024] UKFTT 31 (TC) at [39]:

“Nominative determinism is not a characteristic of snack foods: calling a snack food ‘Hula Hoops’ does not mean that one could twirl that product around one’s midriff, nor is ‘Monster Munch’ generally reserved as a food for monsters. For the avoidance of doubt, neither of these has been used as a comparator for the products – we refer only to their names in this context. We do not consider that it is appropriate to give any weight to the name of the products in considering whether the products are similar to potato crisps, given the general freedom (within the constraints of trademark law) for manufacturers to choose the name of their product.”

We agree. Simply calling something a cake does not make it a cake.

71. The original First-tier Tribunal concluded that the Products are not cakes and we agree for all the reasons given in the First Decision. In our view none of the Products can be classified as a cake because they do not have enough of the characteristics of a cake as we understand that term and they are not marketed as cakes.

72. We acknowledge that some cakes, eg dark fruit cakes such as are eaten at Christmas, contain large quantities of dried fruit and nuts. Such cakes are also sweet, sticky and energy dense. However, they are made of a batter made from flour, egg and sugar into which the ingredients are mixed and then baked to produce a moist, firm sponge cake which breaks down into crumbs and pieces of fruit or nuts when eaten. The taste, texture, mouthfeel and appearance of the Products is thus wholly different from that of a dark fruit cake which is the nearest cake comparator.

73. Ms Sloane contended that the Organix bars share the appearance and some of the ingredients of flapjacks, which are defined variously in the dictionaries as cakes or biscuits. Leaving aside the question of whether a flapjack is a cake or a biscuit, we agree that the oats found in the Organix bars are also the main constituents of flapjacks and that both flapjacks and the Organix bars are baked. However, that is as far as the similarity goes. Although some flapjack recipes may add raisins or other dried fruit, a typical flapjack does not contain ingredients such as carrot juice, apple juice, dried banana or orange oil. Traditional flapjacks are baked to a crisper texture than the softer Organix bars. More fundamentally, the appearance, taste, texture and mouthfeel of the Organix bars bear no resemblance to a traditional flapjack.

74. In conclusion, we find that the Products are not cakes or flapjacks.

#### **DISPOSITION**

75. For the reasons set out above, the appeal is dismissed.

**QUANTUM**

76. In view of our decision, it is not necessary for us to deal with the issue of quantum.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

77. 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.

**JUDGE GREG SINFIELD  
CHAMBER PRESIDENT**

**Release date: 04<sup>th</sup> MARCH 2024**

**ANNEX  
THE PRODUCTS**

Organix Carrot Cake Soft Oaty bar  
Organix Banana Soft Oaty bar  
Nakd Berry Delight Wholefood Bar  
Nakd Cashew Cookie Wholefood Bar  
Nakd Cocoa Orange Wholefood Bar  
Nakd Apple Pie Wholefood Bar  
Nakd Bakewell Tart  
Nakd Banana Bread Wholefood Bar  
Nakd Banana Crunch Wholefood Bar  
Nakd Berry Bliss Breakfast Bar  
Nakd Berry Cheeky Wholefood Bar  
Nakd Blueberry Muffin Wholefood Bar  
Nakd Cocoa Delight Wholefood Bar  
Nakd Cocoa Loco Wholefood Bar  
Nakd Cocoa Twist Wholefood Bar  
Nakd Ginger Bread Wholefood Bar  
Nakd Lemon Drizzle Wholefood Bar  
Nakd Peanut Delight Wholefood Bar  
Nakd Rhubarb and Custard Wholefood Bar  
Nakd Strawberry Crunch Wholefood Bar