



TC06874

Appeal number: TC/2017/03979

VALUE ADDED TAX – whether or not fruit and vegetable juices sold as meal replacements were beverages and therefore standard rated – held not beverages and therefore zero-rated as food – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE CORE (SWINDON) LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE PHILIP GILLETT
MOHAMMED FAROOQ**

Sitting in public at Taylor House, London on 3 and 4 December 2018

Max Schofield, counsel, instructed by Grant Thornton LLP, for the Appellant

Joanna Vicary, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal against a decision of HMRC dated 26 October 2016 which denied the appellant's application to zero rate its supplies of juice cleanse programmes ("the JCPs") for the purposes of Value Added Tax and instead confirmed HMRC's view that they are standard rated pursuant to excepted item 4, Group 1, Schedule 8 to the Value Added Tax Act 1994 ("VATA"). This decision was upheld on both a reconsideration and a review, with conclusions being set out in letters dated 8 December 2016 and 27 February 2017 respectively.

10 **Background Facts**

2. The Appellant ("The Core") is a juice bar and health café located at 4 Devizes Road, Swindon, SN1 4BJ owned and managed by Mr Kris Talikowski who founded the café in November 2012 following a career involving the marketing and production of juice bars and diets globally.

15 3. The Core juice bar offers JCPs that consist of fresh drinkable products made from juicing raw fruits and vegetables. The JCPs are run over multiple days, eg, a customer might undertake a five-day JCP whereby meals are replaced by JCP juices and smoothies for five days with four servings per day.

4. The Core has at all times sold the JCPs as standard-rated for VAT purposes. Individual smoothies and juices, some of which are available on the JCP and some of which are fruit smoothies intended for taste as the primary attraction, are made and sold on the premises, but are consumed on and off the premises, but in different containers to the JCP. They are also treated as standard-rated, whether they are consumed on or off the premises.

25 **Preliminary Issues**

5. Prior to the main hearing two preliminary issues were raised, one by HMRC and one by the appellant.

Application by HMRC

6. The application by HMRC related to the question of whether or not the appellant had conceded in earlier correspondence that the juices and smoothies sold from its Juice Bar as individual products should be standard rated as beverages; and if so, whether the appellant should be able to resile from this position. It was common ground between the parties that the appellant does account for VAT on all sales of the individual items, whether consumed on or off the premises, thus effectively treating them as beverages.

7. However, at para 4 of the second witness statement of Kris Talikowski, dated 14 November 2018, it is stated that:

“...the single sale product is not and never has been a part of the appellant’s review or appeal.”

5 The statement goes on to say, para 5:

“Second, neither I nor my representatives intended there to be any admission on the treatment of any of my other supplies and did not intend for any admission to be a part of these proceedings. The Summary Grounds of Appeal filed by the [appellant] states at paragraph 2 that when sold individually at my juice bar, we prudently account for the VAT and that the liability of these supplies is not a subject of this appeal. This is not an admission. My company, the appellant, would expressly resile from any admission in any event.”

8. Miss Vicary, on behalf of HMRC, maintained that this was incorrect and that the appellant, or at least its representatives, Grant Thornton, had consistently admitted that it accounts for VAT on the individual juices and that this had always been stated to be for the reason that the appellant accepted that these items when sold individually were beverages. She said that this express admission had been repeatedly referred to by the parties, and therefore formed a key part of the appeal to date.

9. This is important because it had always been HMRC’s position that the JCPS could not be considered in isolation from the individual juices and smoothies sold by the appellant.

10. Miss Vicary had therefore served these preliminary submissions on the appellant prior to the hearing, with a request that the appellant should withdraw the statements set out within the second statement of Kris Talikowski and the appellant’s skeleton argument. Alternatively, if the appellant declined to do so, then she invited the tribunal to determine at the outset the basis upon which the appeal is to be heard: namely whether the appellant should be permitted to resile from their previous repeated admissions that the individual products are standard rated as beverages.

11. We considered the various statements made by Grant Thornton, on The Core’s behalf, during the negotiations with HMRC and it was clear that on a number of occasions they had accepted the proposition that the sales of the individual juices were standard rated, which was therefore at odds with the statements made by Mr Talikowski in his second witness statement.

12. However, the VAT treatment of the sales of the individual juices has never been the subject of this appeal and any such admission or resilement from such an admission should not therefore have a direct impact on this appeal, except to the extent that HMRC may have conflated the two issues, which we consider would have been wrong.

13. What is at issue here is the correct VAT treatment of the JCPs, nothing more.

14. In addition, although Mr Talikowski's second statement was made quite late in the day, this was because it was made in response to the witness statement of HMRC Officer Richard Pluck. This statement was itself served on 9 October 2018, more than
5 six weeks after the deadline of 23 August 2018 permitted under the tribunal's directions, and highlighted the extent to which HMRC would be relying on the VAT treatment of the individual juices.

15. In the circumstances we consider that it was inappropriate for HMRC to complain about this late change of approach. HMRC have had more than two weeks'
10 notice of this change, which should, we consider, have given them time to adapt their arguments accordingly.

16. We therefore decided to proceed with the hearing without making any specific ruling on this subject, thinking it better to consider the issue as part of the substantive hearing.

15 *Application by the Appellant*

17. On behalf of The Core, Mr Schofield, objected to the inclusion in papers introduced by Miss Vicary, in her own personal trial bundle, which included papers from the NHS and The British Heart Foundation on what might constitute a healthy diet. Miss Vicary explained that she was merely intending to rely on these as a basis
20 for cross-examining Mr Talikowski regarding the health benefits of the JCPs and that these papers were generally available and not therefore of any great import. She had therefore sent them to Mr Schofield "as a matter of professional courtesy", at 4:00pm the previous day, which was a Sunday. She did not consider that she should have made an application for the papers to be included in the hearing bundle.

25 18. For his part, Mr Schofield submitted that the papers were akin to expert witness evidence and to permit Miss Vicary to use them in cross-examination without adequate notice would permit "litigation by ambush".

19. Having considered the issue we decided that to permit these papers to be used by Miss Vicary in cross-examination would indeed amount to "litigation by ambush"
30 and we therefore decided that these papers should not be admitted.

The Law

20. Section 30 of the VAT Act 1994 ("VATA") legislates for the zero-rating of supplies of goods or services or of a description specified in Sch 8. We are here concerned with Group 1 of Sch 8, which, as far as is relevant, is set out below:

35 **"Group 1— Food**

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

- (a) a supply in the course of catering; and

(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

- 5 Item No.
- 1 Food of a kind used for human consumption.
 - 2 Animal feeding stuffs.
 - 3 Seeds or other means of propagation of plants comprised in item 1 or 2.
 - 4 Live animals of a kind generally used as, or yielding or producing, food
10 for human consumption.”
21. There are exceptions to the general rule as follows:
- “Excepted items
- Item No.
- 15 1 Ice cream, ice lollies, frozen yogurt, water ices and similar frozen products, and prepared mixes and powders for making such products.
 - 2 Confectionery, not including cakes or biscuits other than biscuits wholly or partly covered with chocolate or some product similar in taste and appearance.
 - 20 3 Beverages chargeable with any duty of excise specifically charged on spirits, beer, wine or made-wine and preparations thereof.
 - 4 Other beverages (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages.
- 4A ...”
- 25 22. There are certain items which are stated to override these exceptions but these are not relevant to this case.
23. There are also a number of Notes which, as far as is relevant, are as follows:
- “Notes:
- (1) “Food” includes drink.
 - 30 (2) “Animal” includes bird, fish, crustacean and mollusc.
 - (3) A supply of anything in the course of catering includes—

- (a) any supply of it for consumption on the premises on which it is supplied; and
- (b) any supply of hot food for consumption off those premises;

5 (3A) ...”

24. We were also referred to a number of cases as below:

HMRC v Procter & Gamble [2009] EWCA Civ 407

Kinnerton Confectionary Limited v HMRC [2018] UKFTT 0382 (TC)

Bioconcepts Ltd v HMRC [1993] Lexis Citation 1149

10 *Innocent Ltd v HMRC* [2010] UKFTT 516 (TC)

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

CCE v Ferrero UK Limited [1997] WL 1105709

Alpro Limited v HMRC [2007] STI 387, 19911

Unilever Bestfoods UK Limited v HMRC [2007] 3 WLUK 428

15 **The Facts**

25. We received two witness statements and heard oral evidence from Mr Talikowski, owner and manager of The Core, a witness statement and oral evidence from Richard Pluck, the HMRC officer who had carried out the reconsideration of the decision, and witness statements and oral evidence from two customers of the JCP,
20 Sophie MacGregor and Emma McLaughlin. There was also a witness statement from a third customer of The Core but the appellant had been unable to locate her in recent months and she did not appear at the hearing. We did not therefore take this witness statement into consideration.

26. We also received an admirably brief bundle of documents.

25 27. In addition we tasted a number of the products which were used in the JCP. We found them palatable and, in some cases, quite pleasant, but we would probably not chose to drink them as a casual drink for general refreshment. They were quite thick, and possibly difficult to drink through a straw.

28. Based on the above we find the following as matters of fact.

30 29. As we have set out above and repeat here for convenience, the Core is a juice bar and health café located at 4 Devizes Road, Swindon, SN1 4BJ owned and managed by Mr Kris Talikowski who founded the café in November 2012 following a career involving the marketing and production of juice bars and diets. Specifically he

worked for a number of years for an individual named Jason Vale, who set up a chain of juice bars under the name “The Juice Master” in seven different countries.

30. The Core offers JCPs that consist of fresh drinkable products made from juicing raw fruits and vegetables. The JCPs are run over multiple days, eg, a customer might
5 undertake a five-day JCP whereby meals are replaced by JCP juices and smoothies for five days with four servings per day. The juices have to be made fresh on the day as they are unpasteurised, with a shelf life of only 12 hours. The batches of bottles are provided in a box, together with a menu plan as to when the products are to be consumed, and are collected from the bar, or sometimes delivered, fresh on the day of
10 production, at a time that suits the customer. For larger orders there is the possibility of receiving boxes of the fresh juices to be taken home and frozen.

31. The marketing material clearly shows that the JCPs are marketed as meal replacement programmes and not merely as healthy drinks.

32. Often personalised encouragement or advice is provided by Mr Talikowski via
15 text or telephone call. Customers use the JCPs to replace traditional meals with fruits and vegetables in liquid form but are encouraged to consume water and herbal teas in addition to the programme.

33. The Core has at all times sold the JCPs as standard-rated for VAT purposes. Individual smoothies and juices, some of which are available on the JCP and some of
20 which are fruit smoothies intended for taste as the primary attraction, are made and sold on the premises, but in different containers to the JCP. They are sold for consumption on or off the premises. They are also treated as standard-rated, whether they are consumed on or off the premises.

34. The juices are made by the extraction of the juice from raw fruits and
25 vegetables. The smoothies contain juiced fruits and vegetables together with blended avocado. The avocados therefore are effectively liquidised as a whole, but without the skin and the stone, whereas the juices leave behind any insoluble fibre in the fruits or vegetables. Soluble fibre, mostly in the form of pectin, does flow through into the juices.

30 35. The recipes were produced by Mr Talikowski based on the recipes used in his eight years working with Jason Vale as well as his own study and research. Mr Talikowski does not have any nutritional or dietetic qualifications.

36. The lack of pasteurisation, and therefore the short shelf life, means that the
35 products do not lend themselves to distribution in supermarkets or competition with more widely distributed juices and smoothies, which are mostly intended for consumption as a drink and not as a meal replacement.

37. Interestingly, the prices for the JCPs are higher than the price would be if the
40 individual items in the JCP were purchased separately. They are also considerably higher than the prices for the more widely distributed juices and smoothies which might be found in supermarkets.

38. The Core sells four main ‘juice cleanse’ programmes, which are based on the consumption of four 500 ml bottles of juices and smoothies per day, and which are described as follows:

“The Core Juice programme:

5 “You will get two delicious juices and two satisfying smoothies each day...We use 50% fruit and 50% vegetable...” The names of the individual products depicted as being included on the programme are – Amber Passion Smoothie, Mint Madness Juice, Love Roots Smoothie and Alkalizer Juice.

10 **The High-Veg programme:**

“...for people that like their juices even healthier...This follows the same recipes as our main Core Juice Programme but splits the vegetable content to 70% and fruit content to 30%.” The names of the individual products depicted as being included on the programme are – Revive Smoothie, Green Goddess Smoothie, Mint Madness Juice and Ruby Beats Juice.”

The Greens Juice programme:

“...recommended for anyone with a major health condition or anyone looking to alleviate particular health symptoms.” 90% veg/10% fruit.” The names of the individual products depicted as being included on the programme are - Alkalizer Juice, Green Goddess Smoothie, Sweet Detox Juice and Evergreens Smoothie.

The Core Protein programme:

“...recommended for anyone who does a lot of sport or physical training. People on the protein programme get: one juice, one smoothie with extra avocado, and 2 high calorie plant-based protein smoothies each day.” Names of the individual products depicted as being included on the programme are - Protein Power Smoothie, Revive Smoothie and Mint Madness.

39. The individual juices and smoothies that make up the JCPs are also sold by The Core from their Juice Bar. The “Programme Smoothies” appear on the menu under a separate heading, thus prompting the question from customers: “What is a programme?” There is therefore an element of combined marketing but not the extent that it might detract from the message that the JCPs are meal replacement programmes.

35 40. The other juices and smoothies appear on the menu as below:

The Smoothies - Amber Passion, Love Roots and Evergreens can be seen displayed individually on the menu at a cost of £3.70 for a regular size and

£4.70 for a large. The Green Goddess Smoothie is listed at £3.60/£4.60; whilst the Protein Power Smoothie is the most expensive at a single price of £5.80.

The Juices - Sweet Detox, Alkalizer, Mint Madness and Ruby Beats are displayed individually on the menu at a cost of between £3.40 and £4.70.

5 41. Notably, the prices charged for the juices and smoothies purchased from the juice bar are the same whether the product is consumed on or off the premises, except that if a customer wants to take the product away they can have it in a recyclable plastic bottle, rather than the normal clear plastic beaker, for an additional 50p.

10 42. The JCPs are not sold in the same way as other products on the market. On collection, the customers are informed of a few key points by way of advice:

15 “(1) To treat and consume the juices and smoothies like meals and drink at least a litre of water alongside. Herbal teas are also allowed but nothing else. The juices are timed for consumption and labelled as 10am, 1pm, 3pm and 7pm, to spread the consumption over the day. The 10am is consumed instead of breakfast, two are split either side of lunchtime, and the last one is consumed at dinner-time instead of an evening meal.

20 (2) The programme contains everything the customer needs for the healthy nutritional cleanse, but can eat anything raw if they please, eg vegetables, fruits, nuts and seeds, although not in excess. This is fairly rare unless they are, say, an athlete with a high metabolism.

(3) They can expect headaches on days one to three, as the avoidance of particularly caffeine and refined sugars causes the body some adjustment, which can lead to a few small headaches. This is referred to customers as a natural part of the programme for the 72 hours after they begin.

25 (4) They are then sent friendly messages throughout their programme to ensure they are getting on OK with the juice cleanse, then, at the end, The Core team review their progress by asking them how they got on with their programme and, on occasion, collect their testimonials.

30 (5) Additionally, if someone has certain allergies or dietary needs, The Core will try, within limits, to tailor the programme to suit their most beneficial meal replacement profile.”

43. A large proportion of JCP customers will return and will repeat the programme several times a year, and the programme has grown in popularity through word of mouth.

35 44. Miss Vicary cross-examined Mr Talikowski on his statement in his second witness statement rejecting The Core’s earlier admissions that the individual products should be subject to VAT. He did say that he did not believe that the individual products should be standard rated but he could not really explain why. It was clear that he did not fully understand the complexity of the tax analysis regarding supplies
40 in the course of catering and products consumed off the premises. This was not

altogether surprising given Mr Talikowski's background, and this line of questioning was therefore of limited value to us.

45. Miss Vicary also questioned Mr Talikowski concerning the lack of nutritional or contents information on the bottles. They will provide the approximate breakdown of the ingredients but Mr Talikowski said that it would be too expensive to provide full nutritional and similar information.

46. Miss Vicary asked Mr Talikowski if he was aware of the Government view that consuming fruit juices would only provide the equivalent of one portion of the recommended five a day. He said that he was, but believed that this related to tests on other products, and not to the juices and smoothies which he was selling. Importantly, he said that it was very difficult to make specific health claims for his products because of the complexity of regulation surrounding this subject. He therefore only ever used testimonials from his customers. This accorded with our own observations from examining The Core's website. Such health claims as are on the website are very general and not specific.

47. In response to customer requests, The Core has started to provide "breakfast bowls" and soups as part of the JCPs but these developments were not in place at the time the relevant decisions were taken and do not form part of this appeal.

48. As stated above, we received witness statements and oral evidence from two customers of The Core, Sophie McGregor and Emma McLaughlin. They both made it clear that they purchased the JCPs as meal substitutes.

49. Ms McGregor had undertaken a programme on a number of occasions and stated that when she was on a programme she would consume the juices at the same time as her children were eating normal meals. She also consumed plenty of water throughout the day. She spoke positively of the benefits she considered that she obtained, more energised, cleansed and motivated to continue with a healthy eating plan. Weight loss was her initial motivation but she has come to realise that the other benefits are far more important than the initial weight loss.

50. Ms McGregor was unaware of the government statements re fruit juices only constituting only one of the recommended five a day or what the sugar content might be.

51. Ms McLaughlin explained that she too consumed the juices as meal replacements. Although her initial motivation was also to lose weight, she had now used the products for four years, and used them fairly continuously as a meal substitute during her very busy day. She is a magistrate and has three children and finds it much easier to consume juices instead of meals during the day. She then eats a normal meal with her children and husband in the evening.

52. She learned about the JCPs from a friend, as a weight loss programme, and had not received any advice from Mr Talikowski concerning weight loss. She felt much healthier after following the programme. In the past she had suffered from cancer and was therefore very health conscious, she had also been generally sickly, with

bronchitis, acne and other issues, but believed that she was now much better and suffered much less frequently from these ailments.

53. Her general practice was to buy the JCPs in seven day programme form, which she would store in her freezer until they were required.

5 54. We were also referred to pages from The Core's website which contained many testimonials, all of them clearly from customers who had bought the JCPs as a meal replacement programme.

55. In summary we find as a matter of fact that the JCP programmes were generally purchased as meal replacement programmes as not as beverages.

10 *Evidence of Richard Pluck*

56. Richard Pluck was the HMRC Officer who carried out the reconsideration of the original decision.

15 57. He explained that the starting point for his decision was that he understood that the appellant fully accepted that the individual juices were properly treated as standard rated, whether they were consumed on or off the premises. However he was asked if he would have taken a different view had he known that the appellant had not accepted this treatment as being correct, to which he replied: "No. They are beverages".

20 58. He has been with HMRC for 37 years but in VAT for only three and a half years.

59. He had clearly given no thought as to how the customer perceived the product or whether or not that might be relevant. His view was very clear that the individual products were beverages and that selling them in a pack of four did not change their nature or VAT treatment.

25 **HMRC Submissions**

60. Miss Vicary set out three reasons why these products should be treated as beverages:

(1) It accords with factual way in which the products have in practice been treated for VAT purposes by the appellant.

30 (2) This is the basis on which The Core has presented the products, throughout the discussions with HMRC, until Mr Talikowski's second witness statement.

35 (3) Even if the tribunal disagreed on the first two points there is no sensible basis for distinguishing these products from those considered in other appeals, some of which decisions are binding on this tribunal.

61. Miss Vicary said that the individual items were in practice treated as standard rated whether they were consumed on or off the premises, which meant that they were treated as standard rated not because they were supplied in the course of catering but because they were beverages. This was the way in which the appellant had presented the products throughout the period of the initial request for a ruling, the original decision, the reconsideration and then the review. There were repeated statements during negotiations that sales of the individual products were correctly treated as standard rated. She argued that the tribunal should not accept that the appellant could simply resile from these statements, especially at such a late stage in the proceedings.

62. Miss Vicary submitted that we could not consider the JCPs in isolation from the individual products. There was deliberate dual marketing of the products in that where the components of the JCPs were listed in the juice bar menu they were listed under a separate heading of "Programme Smoothies", thus prompting the question from customers: "What is a programme?"

63. She also stated that there were binding precedents covering fruit juices, which were specifically mentioned in Item 4 of the Excepted Items, vegetable juices, which had been considered by the High Court in *Kalron Foods*, and smoothies, which had been considered in great detail in *Innocent*.

64. Miss Vicary argued that the burden of proof is on the appellant to demonstrate that this product is not a beverage.

65. She also referred us to *Kinnerton Confectionary*, which, although only an FTT decision and not therefore technically binding on us, contains a very complete analysis of a number of cases in this area. The key element in that case was how the product was held out for sale. This is also an important part of the multi-factorial approach which we are required to adopt in accordance with the decision in *Procter & Gamble*.

66. She reminded us that, in *Procter & Gamble*, Jacob LJ also stated, 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."

67. On this basis, Miss Vicary suggested that these were the same products as the individual juices with the same contents. It was therefore very difficult to argue that they should be treated differently.

68. Miss Vicary then went on to argue that the JCPs could not be treated as meal replacements because they did not comply with SI 1997/2182 The Foods Intended for Use in Energy Restricted Diets for Weight Reduction Regulations 1997, which provide very specific criteria with which a product must comply before it is regarded as a meal replacement product.

69. She also referred us extensively to the food labelling requirements set out in Regulation (EC) No 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods and suggested that The Core was not in compliance with these regulations because it did not show nutritional or ingredients information on the labels on the bottles. We were not clear about the rationale behind this line of argument but Miss Vicary said it was to emphasise the importance of ingredient labelling, something with which we could not disagree, however this did not help us to understand its relevance to tax legislation. Mr Schofield subsequently stated that The Core was exempt from these regulations, presumably because the products were made and sold on the same premises, but we decided that we were not competent to make this judgement, based on such limited arguments, and that we could not see the relevance of it to this case. We therefore decided to ignore this line of argument.

70. Looking at the case law, Miss Vicary submitted that there was no special meaning to be attributed to the word “beverage” and that there was no complete prescriptive test. The “definition” set out in *Bioconcepts* has been referred to in a number of cases but it should not be treated as complete and definitive.

71. Miss Vicary also referred us to the test put forward on behalf of HMRC in *Innocent*, where it was suggested that a “good working description” would be to ask if it was the sort of thing which might be offered to an unexpected guest.

72. She submitted that *Kalron*, which was binding on us, had already unequivocally decided the question as to how vegetable juices should be taxed. In that case, the question had been posed: “how was it taken?” and in this case there is no dispute between the parties that this product is consumed as a drink, or at least as a drinkable liquid.

73. There was therefore no evidence on which we could distinguish the fruit and vegetable juices in this case from those in *Kalron*, or the other relevant precedents.

Appellant’s Submissions

74. Mr Schofield, on behalf of The Core, set out his arguments as follows:

75. He emphasised that what was important was what the consumer sees, which he argued was more than just four drinks. They were marketed and sold totally differently. Customers were also provided with advice and encouragement as well as the menu plan. He noted that Mr Pluck had made no reference to how consumers perceived these products in his evidence.

76. Looking at the legislation he submitted that the products were undoubtedly a food, and indeed the legislation specifically states, at Note (1), that Food includes drink. The question therefore was whether or not it was a beverage, not whether it was a food or a beverage, and, even if it is a beverage, then it should be zero-rated as a meal replacement.

77. He accepted that The Core had treated all the products, both the individual products and the JCPs, as standard rated, but argued that this merely indicated a prudent taxpayer, treating the products on a prudent basis.

5 78. He also argued that the pricing was different, ie, the JCPs were more expensive than the individual products, which reflected the fact that something different was being provided.

10 79. A key issue was that HMRC were arguing that since this was the same product as those sold individually, and that the products sold individually were beverages, then the JCPs could not be distinguished. Mr Schofield submitted that this was not the correct test. The test was not whether the nature of the product could change but whether the VAT treatment of the product could change, and although it is unusual, Mr Schofield referred us to a number of products which were the same but which were treated differently for VAT purposes depending on the way in which they were sold and the customers' reasons for buying them, specifically salt, which was zero-rated when sold as a food ingredient but was standard rated when sold as dishwasher salt, and bicarbonate of soda, which was zero-rated when sold as baking powder but standard rated when sold for use in other applications.

20 80. Addressing the *Bioconcepts* definition, Mr Schofield submitted that these tests referred to the purpose for which the products were consumed, and that therefore these tests were not simply objective tests to be applied to the liquids in isolation but that we should consider the consumer's aims in buying the products.

25 81. He also referred to the "good working description" put forward by HMRC in *Innocent*, asking whether or not this is something which would be offered to an unexpected guest. He suggested that it was very unlikely that a host would offer such a guest the complete programme.

82. *Kalron* had decided that VAT treatment of a specific brand of vegetable juices but had not dealt with a product sold as a meal replacement. Mr Schofield suggested that *Kalron* was not binding on us if we could distinguish the products on the facts.

30 83. Mr Schofield also referred us to HMRC's internal manual VATFOOD2700, which explains that when deciding whether food products are zero-rated, one needs to examine how they are held out for sale and designed to be taken. This was confirmed in *Innocent*, [69] and [73], where it was held that that the Tribunal ought to take into account the circumstances in which the product is consumed.

35 84. As regards his separate argument that the products should in any case be treated as a meal replacement, Mr Schofield referred us to HMRC manual VFOOD7590, which explains that standard-rating does not apply to weight loss products and that meal replacement drinks for slimmers remain zero-rated. In addition, he said that VFOOD7780 states that complete meal replacements in liquid form, to be used as part of a slimmer's diet, are zero-rated, and that VFOOD2700 says complete meal replacements are zero-rated. We note that these are of course only HMRC internal guidance and that they clearly refer to the underlying case law, which is what we are

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required to consider. They do not therefore say that all meal replacement products should be zero-rated.

Discussion

5 85. As stated earlier, the question in this case is not whether the product in question is a food or a drink. Food is stated to include drink in the legislation. It is therefore a question of whether or not the product is a beverage for the purposes of Excepted Item 4:

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

86. It is common ground that to decide whether an item of food is zero-rated or standard rated the tribunal must conduct a multi-factorial assessment, as set out in *Procter & Gamble*. In addition, as regards our general approach to the question, we can do no better than to quote the words of Judge Anne Redston in *Kinnerton* at [76]:

15 “I agree with Ms Vicary that the relevant test for deciding whether the Bar is confectionery or is zero-rated is that set out in *Fluff Ltd (t/a Mag-it) v C&E Commissioners* [2001] STC 674, where Laddie J held at [14] that the issue as to whether an item of food was zero-rated was “in large part answered by the way in which it is sold or supplied”. Newey J endorsed that approach in *HMRC v Roger Skinner* [2014] UKUT 204 (TCC) at [23] and [34], when he said that the relevant test was how the product was objectively “held out for sale” by the supplier; in coming to that conclusion he endorsed the approach taken by the FTT (Judge Mosedale and Mr Collard) under reference [2012] UKFTT 525.”

25 87. We also have the widely used tests for establishing whether or not a drinkable liquid is a beverage or not which were set out by Sir Stephen Oliver in the case of *Bioconcepts* as follows:

“Liquids that are commonly consumed are those that are characteristically taken:

- To increase bodily fluid,
- 30 - To slake the thirst,
- To fortify, or
- To give pleasure.”

88. It has not been suggested that these are totally definitive or exhaustive tests, but they have been widely used and generally approved in subsequent cases.

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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, in accordance with *Fluff* and *Roger Skinner*,
- (2) Why it is consumed by the customer, considering the *Bioconcepts* tests, and
- (3) What is the use to which it is put, again considering *Bioconcepts*?

90. Miss Vicary submitted that we should interpret the *Bioconcepts* tests from a customer's perspective, but not in a blindly subjective manner, and that we should incorporate the approach used in *Ferrero*, originally set out by the tribunal, and approved by the Court of Appeal, of "the ordinary man in the street, who had been informed as we have been informed." We accept this as the correct approach.

91. Importantly, however, the word "to" in the *Bioconcepts* tests means "in order to", or "for the purpose of". We must therefore consider the intentions and purpose of those who buy and consume the product. Indeed, it is exactly this more subjective type of test, looking at a product by reference to the purpose for which it was purchased, which means that chocolate, salt and baking powder can be either zero-rated or standard rated, depending on their intended use.

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 ones 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.

95. Judging the JCPs by reference to these tests then we have found that the purchasers of the JCPs purchase them as meal replacements. They do not purchase them as beverages. They drink water in addition to consuming the products. They do not therefore purchase them in order to increase their bodily fluid, or to slake their thirst, or to fortify themselves or to give pleasure. The products are deliberately made

palatable, in order not to deter consumers from drinking them, and they are not unpleasant to drink, but they are not consumed for pleasure. Customers purchase and consume them as a meal replacement, not as a beverage.

5 96. The Core’s customers may have a number of different objectives as to why they purchase them as a meal replacement. They may wish to lose weight or they may believe that the products are good for their health, even though The Core does not make any specific claims in this respect. It does not matter why they wish to use them as a meal replacement. The simple fact is that that is why they purchase them. They do not purchase them for the purposes outlined in the *Bioconcepts* tests.

10 97. A second test was put forward by HMRC in *Innocent* as a “good working description” being “would you offer this product to an unexpected guest?” This was accepted by the tribunal in *Innocent* as being a reasonable question to ask and was also put to us by Miss Vicary. We therefore consider that it must have some value as providing, to paraphrase the words of Jacob LJ in *Procter & Gamble*, “a short
15 practical answer to a short practical question.”

98. If we ask ourselves whether or not we would offer this product as a beverage to an unexpected guest then the answer is clearly that we would not offer the complete JCP, per se, given that it is a collection of a number of different products, together with a menu plan. In much the same way one would not offer a “Slimfast” style,
20 weight reduction, milk shake as a beverage to an unexpected guest.

99. Alternatively we might ask ourselves if we would offer one of the individual products which make up the JCPs. These individual products are not of course the subject of this appeal but it is perhaps instructive to ask the question. In our view, unless the unexpected guest were known to be a very healthy conscious, healthy
25 eating enthusiast, then we think it unlikely that one would ordinarily offer the product to an unexpected guest. It is a very specialist product and most hosts would not assume that an unexpected guest would consider it normal to be offered as a general drink. This might not be the case as regards some of the more palatable juices and smoothies on offer at The Core but on the basis of the sample of the constituent
30 products of the JCPs which we tasted, we do not think they would be considered drinks which would normally be offered in a social situation.

100. We must also address *Kalron*. This is binding on us and concerned the VAT treatment of Zumo smoothies, which are mixed fruit and vegetable juices, in many ways a very similar product. The First-tier Tribunal in *Kalron* found that:

35 “there was nothing to show that the products have been presented and purchased as food or a beverage. They were presented in a unique way: neither as a meal replacement nor as a drink like a fruit juice or cola.”

101. In *Kalron* Warren J analysed the position with great care, but his final
40 conclusion was that he should not interfere with the decision of the tribunal which had first heard the appeal. *Kalron* is indeed binding on us but it is clear that the product considered in that case might well have passed the *Bioconcepts* tests, and might also

have passed the “unexpected guest” test suggested in *Innocent*. The key difference in this case is that the product is specifically sold by The Core, and bought by its customers, as a meal replacement, and not as a beverage, which takes it out of the *Bioconcepts* and “unexpected guest” tests, as discussed above.

5 102. We should now consider in more detail the submissions made on behalf of HMRC.

103. Miss Vicary’s first contention was that the appellant had consistently treated the products as standard rated in the past. With due respect to Miss Vicary this argument seems to be somewhat circular. The appellant had indeed treated these products as
10 standard rated, but this has been explained as being a cautious approach, and it has now applied to HMRC for a ruling that they should be zero-rated. In the circumstances, the appellant’s prior treatment of the JCPs would seem to be irrelevant.

104. Her second argument was that throughout the negotiations, until two weeks
15 prior to the hearing, the appellant had accepted that sales of the individual products were correctly treated as standard rated. She was somewhat unsettled therefore when the appellant decided to resile from this position two weeks before the hearing, although this was to some extent provoked by HMRC’s heavy reliance on this fact, as revealed by Mr Pluck’s witness statement, which was also provided very late in the
20 day. In the circumstances Miss Vicary asked that either the appellant should withdraw their statements resiling from their earlier agreement or that the tribunal should forbid the appellant from resiling from their earlier agreement. We declined to address this issue in such a stark manner, preferring instead to consider the full arguments as part of the substantive appeal.

25 105. We can understand that the appellant’s acceptance of the position regarding the individual products had been used by HMRC as a part of their original decision and, especially, of the reconsideration decision. However this was in our view unclear thinking on behalf of HMRC. The VAT treatment of the individual products was not and is not the subject of this appeal. We are considering a different product in that it
30 is sold in a different way and, as we have found, Mr Pluck did not really look at the possibly different position of the JCPs by reference to the tests in *Bioconcepts* or *Innocent*, he simply looked at the individual products and decided that since they were the constituent parts of the JCPs, and since they were in his view beverages, then the JCPs should be treated as beverages.

35 106. Most importantly however he confirmed that even if the appellant had not accepted that the individual products should be standard rated, he would have come to the same conclusion. This confirms our view that the appellant’s acceptance of, and then resilement from, their agreement that the individual products should be standard rated had no impact on HMRC’s position.

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107. Miss Vicary’s third argument was that there was no basis for distinguishing between the JCPs and the products considered in earlier cases, such as *Kalron*, which were binding on us. However, as we have explained above, in *Kalron*, the tribunal made a specific finding of fact that:

5 “there was nothing to show that the products have been presented and purchased as food or a beverage. They were presented in a unique way: neither as a meal replacement nor as a drink like a fruit juice or cola.”

108. We have made a very different finding, which was that the JCPs were specifically sold, and purchased, as a meal replacement programme, and not as a
10 beverage.

109. Miss Vicary also spoke at some length about labelling requirements and suggested that The Core was in breach of a number of these regulations because it did not provide full nutritional information to support the various claims it made for the JCPs. Unfortunately however, it was not clear to us that these various regulations
15 actually applied to The Core. In addition, as we have found as a matter of fact, Mr Talikowski did not make any specific health claims for his products because of the complexity of regulation surrounding this subject. He therefore only ever used testimonials from his customers. This accorded with our own observations from examining The Core’s website. Such health claims as are on the website are very
20 general and not specific.

110. We did not therefore find this line of argument particularly helpful.

111. In support of his position, Mr Schofield, for The Core, submitted that if we had difficulty with his basic proposition that the JCP products were not beverages then we should consider the various references in HMRC’s manuals which state that meal
25 replacement products are food.

112. He referred us to HMRC manual VFOOD7590, which explains that standard-rating does not apply to weight loss products and that meal replacement drinks for slimmers remain zero-rated. In addition, he said that VFOOD7780 states that complete meal replacements in liquid form, to be used as part of a slimmer’s diet, are
30 zero-rated, and that VFOOD2700 says complete meal replacements are zero-rated.

113. These statements in HMRC’s manuals do not however refer to any specific tax legislation which might assist the appellant. They are in fact only HMRC’s views on the state of the case law governing such products, but, importantly, they show that HMRC acknowledge that there are a number of products sold which are “complete
35 meal replacements in liquid form” and that such products can be zero-rated even though they can be drunk.

114. In summary therefore we decided that the JCPs were not marketed as beverages. They were marketed as meal replacements in liquid form, but not as beverages.

115. In addition, when applying the tests for beverages set out in *Bioconcepts*, we
40 found that the JCPs did not satisfy those tests and were not therefore beverages.

Decision

116. For the above reasons therefore we decided that the Juice Cleanse Programmes should properly be zero-rated for VAT purposes as being a food but not a beverage.

117. We therefore decided that this appeal by The Core should be ALLOWED.

5 118. 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
10 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.

15 **PHILIP GILLETT**
TRIBUNAL JUDGE

RELEASE DATE: 17 DECEMBER 2018