Neutral Citation: [2024] UKFTT 00592 (TC)

Case Number: TC09231

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London (on 29 January) and by remote video hearing (on 30 January)

Appeal reference: TC/2022/11485

"Skinade" collagen drink product – whether "food of a kind used for human consumption" – Item 1, Group 1, Schedule 8, Value Added Tax Act 1994 – no – appeal dismissed.

Heard on: 29 and 30 January 2024
Judgment date: 4 July 2024

Before

TRIBUNAL JUDGE MARK BALDWIN
MR JULIAN STAFFORD

Between

BOTTLED SCIENCE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

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

For the Respondents: Howard Watkinson, of counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The sole issue for the Tribunal is whether the Appellant's collagen drink product "Skinade" is a "food of a kind used for human consumption" and therefore zero-rated within Item 1, Group 1, Schedule 8 to the Value Added Tax Act 1994 ("VATA").

2. In terms of procedural history, on 17 November 2020 the Appellant submitted an error correction notice for overdeclared output tax declared in VAT periods 12/16 – 09/20 inclusive in the sum of £1,250,840.06 on the basis that Skinade is properly zero-rated as food. On 6 May 2021 HMRC refused the claim for overdeclared output tax on the basis that Skinade was standard rated. On 4 November 2021 the Appellant requested a statutory review of the decision and on 1 April 2023 HMRC notified the Appellant that the statutory review had upheld the decision to treat Skinade as standard rated. On 27 April 2022 the Appellant filed a Notice of Appeal against HMRC's decision as upheld on review.

LEGAL FRAMEWORK

3. Section 30 VATA provides for the zero-rating of goods or services of a description specified in Schedule 8.

4. Group 1 of Schedule 8 to VATA, titled "Food", provides (so far as relevant):

> "General Items
>
> Item No.
>
> 1. Food of a kind used for human consumption.
>
> […]
>
> Excepted items
>
> Item No.
>
> 4. Other beverages (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverage.
>
> 4A. Sports drinks that are advertised or marketed as products designed to enhance physical performance, accelerate recovery after exercise or build bulk, and other similar drinks, including (in either case) syrups, concentrates, essences, powders, crystals or other products for the preparation of such drinks.
>
> […]
>
> Notes:
>
> 1. 'Food' includes drink."

5. Article 98 of the EU Principal VAT Directive 2006/112/EC (the "PVD") allows Member States to apply one or two reduced rates (not less than 5%) of VAT to supplies of certain goods and services (listed in Annex III). These include:

> "(1) Foodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs; products normally used to supplement foodstuffs or as a substitute for foodstuffs;"

6. Art 98 PVD is not the EU vires for the UK's food zero-rating. The zero-rating of food has been permitted under the various EU directives which have governed the EU VAT regime since the time the UK joined what was then the European Community in 1974.

Accordingly, there is an unusual dearth of EU authority on the interpretation of these provisions. So far as the rationale for food zero-rating is concerned, in *Nestlé UK Ltd v HMRC*, [2018] UKUT 29 (TCC), the Upper Tribunal described the purpose behind food zero-rating as follows:

> "[50] So far as we can discern, the legislation was exempting everyday items from tax, and preserving the tax on items of food which, broadly speaking, had previously been regarded as luxury; rather than promoting a particular drink or things to add to that drink.
>
> …
>
> [58] … Parliament has chosen to zero rate certain foods, generally because they were everyday foods, tax on which would be "particularly sensitive" for much of the population, and has chosen not to zero rate others."

THE EVIDENCE

7. We heard from three witnesses, whose evidence we summarise below. We also tasted Skinade during the hearing and were given a "tasting sample" bottle, a box of travel sachets and a box containing five 150ml bottles of Skinade.

8. The box containing five bottles is approximately 20 cm long, 17 cm high and 4 cm deep. The box is white and the front contains the word "Skinade", a logo and beneath it the words "better skin from within". The front of the box also contains the words "food supplement". One of the sides contains information under the heading "Precautions", which in particular state the food supplements should not be used as a substitute for a varied and balanced diet and a healthy lifestyle. It tells people who are pregnant, breastfeeding or suffer from food allergies to seek professional advice before using. The back of the box says that

> "We believe that better skin comes from within. Skinade is a uniquely formulated drink using advanced technology and high-quality ingredients for your skin. The unique patented formulation of Skinade has been designed to deliver essential nutrients in a liquid formulation promoting high absorption and bioavailability.
>
> Skinade offers a different approach to skin care – a professional product that works from the inside out."

9. The text explains how Skinade works and why it is considered to be superior to skin creams. The ingredients are listed, in particular hydrolysed marine collagen peptides. There are instructions on how to use Skinade, advising people to drink a bottle a day ideally after breakfast and the comment that "For lasting results we recommend continued use. Skinade should be a part of your daily skincare regime." Nutritional information is given and from the panel on the box we learn that Skinade provides 1.8% of a woman's energy needs, 15.3% of her protein requirements, 0.8% of her carbohydrate requirements and 1.5% of her recommended sodium intake. It contains no fat or fibre.

Piers Raper

10. We heard from Mr Piers Raper, the Chief Executive and founder of the Appellant. Mr. Raper explained that the concept of Skinade was created in the 2012. He involved a consultant (Mr Hollamby Jones, the second witness), an expert in nutrition and pharmacology, to refine the formula and dosage. Mr Hollamby Jones helped to develop the initial Skinade formulation into what Mr Raper described as a very well regarded drink.

11. Skinade has won many industry awards, such as the natural health award from Natural Health magazine. It was presented with two awards at the Aesthetic Everything Diamond Crystal Awards ceremony, earning the title of Top Breakout Company and Top

Nutraceutical. The Appellant sponsors the SkinadeMD Surgical Programme Award for the UK's best consultant plastic surgeon.

12. Mr. Raper said he was clear from the outset that Skinade needed to be a great tasting drink. To provide the desired nutritional benefits, consumers need to consume Skinade for 90 days, so the drink has to be pleasant and palatable. A drink provides superior absorption of the ingredients and is much easier to consume. Tablets and powders in water were not really options. Initial consumer surveys indicated that the customers were happy with the taste.

13. In cross-examination Mr Watkinson took Mr Raper to a customer review on the website where a staff member called Daniel commented to an unhappy customer as follows:

> "Skinade is not intended to provide any nutritional benefit, and is instead engineered to stimulate physiological responses in the body in order to promote better skin. In addition, the label "collagen" is a very broad term (i.e. not indicating if it's been properly hydrolysed, the molecular weight, the source, the delivery mechanism, the type of collagen, the bio-availability etc.). For these reasons, we deliberately do not describe ourselves as a collagen supplement, as to do so would be misrepresenting skinade to both the medical professionals we work with and our customers."

14. Mr Raper said that Daniel was very junior and he was not sure what he was thinking about at the time.

15. The 150 ml bottle is the original and most popular format, but the Appellant has developed a 15 ml liquid travel sachet, as people find it difficult to transport large numbers of bottles when going away on holiday or business.

16. The key ingredients of Skinade are fish collagen protein, organic flaxseed oil, vitamin C (which is crucial to collagen absorption), vitamin B, MSM (an organic sulphur compound required for collagen synthesis), L-Lysine (a specific amino acid) and natural grape juice.

17. Mr Raper said that, as the body ages past 22–23, its natural production of collagen falls. This can lead to dry skin and lost elasticity. A 90-day course of Skinade has been proven to reactivate the body's natural collagen production process and to replace up to 68% of the lost collagen in a 58-year-old female subject. The product is not suitable for individuals under the age of 18, as it produces no additional benefit until customers reach their early 20s.

18. Mr Raper said that Skinade is marketed and sold as a drink. The website explains that it is "a multi award winning natural peach and mangosteen flavoured anti-aging collagen drink… Skinade is a drink that works from the inside out… Just open and drink!"

19. He says that describing taste to customers does not give much reassurance. On the website Skinade is shown in glasses and there are photos of Skinade being enjoyed from the bottle or mixed with other fruit juices or smoothies. The Appellant has a taste sample programme to allow people to try before they buy.

20. Skinade is sold exclusively through the Appellant's website and professional aesthetic channels (skin/beauty clinics). It is not sold in retail shops, chemists, Amazon or similar. Mr Raper said this is because the Appellant aims to provide consumers with advice and recommendations.

21. Advertising is through professional media and targeted PR (social media aimed at both sexes – not print media since the pandemic) as well as trade shows, such as The Aesthetic Show. Skinade has been independently reviewed by publications such as Cosmopolitan and Vogue as well as peer reviewed professional journals.

22. Marketing takes the form of educating outlets on the powerful benefits of taste samples to reassure customers that they can drink the product daily and appreciate the taste. Mr Raper says that people are puzzled by the idea of a "drink for your skin" and need to try it to experience the benefits. One good way to market it is to serve it as a drink (instead of tea or coffee) while people are waiting for treatments.

23. The Appellant follows strictly the applicable food regulations and labelling rules. Skinade is produced in a facility that runs to the rigorous standards set by the Food Standards Agency and is regularly inspected by them.

24. Mr Raper disagrees with HMRC's characterisation of Skinade as a beauty product and not a drink or liquid food. In his view beauty products are applied externally, whereas Skinade is ingested. As he put it, Skinade is all about feeding the skin from within in the best possible way. People don't eat or drink beauty creams which only work on the surface of the skin.

25. He explained that marine collagen, a key ingredient, when sold on its own in powder form is zero rated. Marine collagen is a food ingredient, just like flour, but just like flour it is difficult to consume and not palatable on its own. Fish collagen protein is hydrolysed from freshwater fish skin in a similar way that chicken, bovine or porcine collagen peptides are produced. These ingredients are regularly found in food products.

26. Mr Raper referred to some marketing materials produced by Rousselot (the major producer of collagen and supplier to the Appellant). Mr Watkinson drew Mr Raper's attention to a passage in their material about marine collagen peptides (a key ingredient of Skinade) that reads:

> "In the arena of ingestible beauty products, collagen has long been recognized as the star player. Research shows that collagen is now the leading functional ingredient of beauty products in all regions of the world. Collagen peptides, in particular, have proven skin beauty benefits, contributing to a healthier, younger-looking skin and hair."

Fred Hollamby-Jones

27. Mr Hollamby-Jones has a long career in the food industry focused on product development. He set up a company (Drinkcreate) which develops food products with a particular emphasis on drinks.

28. Drinkcreate was approached by Mr Raper and some colleagues around mid-2012 for initial discussions on their concept and were later engaged to work on product formulations. Recipes were developed to test acceptability and stability of the drink base. Key ingredients in the recipe are fruit juice, to deliver sweetness and mouthfeel, protein / amino acid, vitamins, an intense sweetener, flavourings and preservative. A key challenge in delivering the final recipe was reconciling the high level of these ingredients with the need to mask the flavour profiles of the proteins. The proteins were an essential part of the recipe, as they are recognised as building blocks in the body and could potentially support repair. After functionality and initial stability tests were completed, the recipe was finalised on flavour profiles. Packaging was developed to be visually appealing.

29. Mr Hollamby Jones explained that marine collagen is simply a concentrated form of a part of a food, processed for ease of use later and delivered in a format that is more nutritious and beneficial. Skinade is not in tablet form for two main reasons. The first is the number of tablets that would be required to be consumed to ingest the same quantity of ingredients. The second is that all tablets require carrier materials. For maximum beneficial effect and to reduce the load of unnecessary carriers, it is always better to deliver any functional ingredient

in a pure and easily palatable way, which as a general rule is a drink. Mr Hollamby-Jones mentioned that it is misleading to call Skinade a "beauty drink". It can be helpful for old people whose skin is getting thinner.

Phil Hillier

30. Phil Hillier is a HMRC officer. He was not involved in the liability decisions or the review, but produced some evidence in support of the decision, with which he said he agreed.

31. Facts to which Mr Hillier drew our attention include the web page (https://skinade.com/). The website describes Skinade as:

> "a multi- award winning, natural peach and mangosteen flavoured anti-ageing collagen drink containing a patent pending formulation of active ingredients that aims to boost your body's natural production of collagen and hyaluronic acid. Skinade aims to improve the way your skin looks and feels in as little as 30 days"

32. The same web page says that:

> "Skinade has been developed by leading UK scientists and is designed to provide a perfect ratio of liquid to active ingredients to create one of the most advanced, effective and bio-available anti-ageing skincare products on the market today. Skinade is an alternative approach to your skincare regime – a drink that promotes better looking skin from the inside out."

33. He referred to the awards Skinade has won. He exhibited a map of Skinade stockists and observed that it seemed that most of the stockists were cosmetic clinics, beauty salons, dentists and private medical service providers. The websites through which Skinade is sold that he had seen are all focused on skincare and beauty.

34. He exhibited the Cosmopolitan review where the reviewer said:

> "It's apparently best for them to be drunk after breakfast. I was expecting them to taste vile, but actually they weren't too bad. They have a slightly peachy flavour that definitely smells worse than it tastes, so I suggest bypassing the sniffing and just drinking it as quickly as possible. Some people would probably say it's easier just to pop a pill, but there's around 7000mg of collagen in each bottle, which would amount to having to take 20 large pills a day and I for one definitely don't fancy doing that.
>
> …
>
> Overall, I would recommend giving Skinade a go if you want plumper, more hydrated skin with less lines and wrinkles – the results speak for themselves".

35. Mr Hillier had looked at TrustPilot reviews on the webpage. The reviews mention 'using' and 'taking' the Product. The reviews are positive and refer to the skin being improved following use. TrustPilot reviews on the TrustPilot website mention 'using' and 'taking' Skinade and comment on whether it has produced benefits to the skin.

CASELAW

36. We were referred to a number of decisions which have addressed whether particular products constitute "food". Before looking at these decisions, we remind ourselves of the comments made by Lord Woolf MR in *CCE v Ferrero UK Limited*, [1997] STC 881 at 884, about the approach to be taken to questions of classification in this area (he was concerned with whether a product was a biscuit). He said:

> "The tribunal went into this issue as to whether or not the two products in question were biscuits or not in great detail. It gave a lengthy and carefully

worded decision citing a number of authorities and tried to identify what are the characteristics of biscuits and also, because of certain of the authorities to which it was referred, other products.

I commend the tribunal for the care which it took over this matter, but I am bound to say that, no doubt because of the submissions which were made to it by the parties, the treatment of the issue which was before it, was far more elaborate than was necessary. I do urge tribunals, when considering issues of this sort, not to be misled by authorities which are no more than authorities of fact into elevating issues of fact into questions of principle when it is not appropriate to do so on an inquiry such as this. The tribunal had to answer one question and one question only: was each of these products properly described as biscuits or not? If it had confined itself to that issue which is, and has to be, one of fact and degree, then the problems which subsequently arose would have been avoided."

37. In *Procter & Gamble UK v Revenue and Customs Commissioners*, [2009] EWCA Civ 407, a case concerned with whether "Pringles" fall within the phrase "potato crisps … and similar products made from the potato, or from potato flour, or from potato starch …", Jacob LJ made these helpful observations:

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

…

[19] I cannot see anything wrong, still less anything wrong in principle, with [the tribunal's approach]. It was not incumbent on the tribunal in making its multi-factorial assessment not only to identify each and every aspect of similarity and dissimilarity (as this tribunal so meticulously did) but to go on and spell out item by item how each was weighed as if it were using a real scientist's balance. In the end it was a matter of overall impression. All that is required is that 'the judgment must enable the appellate court to understand why the Judge reached his decision' (per Lord Phillips MR in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 at [19], [2002] All ER 385 at [19], [2002] 1 WLR 2409) and that the decision 'must contain … a summary of the Tribunal's basic factual conclusion and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts' (per Thomas Bingham MR in *Meek v City of Birmingham District Council* [1987] IRLR 250). It is quite clear how this tribunal reached its decision. In the words of Sir Thomas Bingham in *Meek* the parties have been told 'why they have won or lost' (see para 8).

[20] I should say a word about the tribunal's reference to the 'reasonable man'. It may come from this court's use of him in *Ferrero*. The issue was whether the product concerned was 'a biscuit' within the meaning of excepted item 2 of Sch 8 Group 1. The tribunal had used the test of 'what view would be taken by the ordinary man in the street, who had been informed as we have been informed' (see (1995) VAT Decision 13493 at para 8.50). This court accepted that approach.

[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. What we draw from these decisions is that we should determine the issue before us by asking "What is the reasonable view on the basis of all the facts?". As the Tribunal commented in *Phoenix Foods Ltd v HMRC*, [2018] UKFTT 018 (TC), in reaching our conclusion, based on all of the facts, we are not required to identify each relevant characteristic of the supply and assign to it a particular weight; to do so would be engage in the form of over-elaborate analysis discouraged by the Court of Appeal in *Ferrero* and in *Procter & Gamble*. Rather our job is to identify the relevant factors and to take them into account in an overall assessment.

39. Whilst being mindful of Lord Woolf's comments on the weight to be given to prior decisions in this area and the need to avoid over-elaborate analysis, we turn now to look at some of the cases we were referred to, which show how the Tribunal has approached this question.

40. In date order, first up is *Marfleet Refining Company Ltd v CCE*, [1974] VATTR 289, which held that natural cod liver oil and cod liver oil products were not "food of a kind used for human consumption". The Tribunal decided that " 'food' as it occurs in item 1 of Group 1 of [Schedule 8 VATA] is not used in any unusual sense, that it appears to be intended to have its ordinary meaning, and that it is relevant to consider what the ordinary man or woman or housewife understands it to mean.". Factors the tribunal took into account included "marketing and get-up" (which, so far cod liver oil was concerned appeared to have changed over time "as different currents of informed opinion have from time to time proclaimed it to be, by no means unanimously, a vitamin supplement, a dietary supplement, a nutrient or a food"), palatability (on which there was a divergence of views) and the reaction of witnesses to recipes using cod liver oil. The Commissioners called three ladies as witnesses and they "were critical of the suggestion that cod liver oil could be substituted for olive oil or some other recognised salad oil in making up these two dressings. They had all tried and had failed utterly or largely to make mayonnaise successfully. Mrs Patten succeeded in one attempt out of three but said that the result was unacceptable; the odour and overriding flavour spoiled the delicate flavour of salmon." . In reaching its conclusion, that the four types of cod liver oil were not food even though they are consumed by many human beings, the Tribunal commented,

> "The three ladies called by the Commissioners were unanimous in expressing a distaste for cod liver oil, and although palatability is only one factor to be considered in deciding whether anything is food or not, their views must be thrown into the scales against cod liver oil when a decision has to be made. We have decided with no difficulty that cod liver oil is a nutrient and a dietary supplement. It is taken by many human beings. The tribunal has followed the guidance given by Lord Reid in *Brutus v Cozens* and has applied it to each of the four types of cod liver oil."

41. *GR Soni v CCE*, [1980] VATTR 9, concerned paan. Paan is a preparation containing several ingredients, such as desiccated coconut, petal rose seeds, sliced betel nut, jintan, dried sweet leaves and honey, sugar and colouring matter blended according to the taste of the consumer. These are grated or powdered, mixed together and enclosed between betel leaves. The whole preparation is of such a size that it can be placed in the mouth where it is chewed: the evidence was conflicting as to whether the fibrous residue was swallowed or whether it was ultimately spat out, but the Tribunal thought the latter was more probable. Paan was consumed as an adjunct to a meal (to stimulate digestion) and had a measurable (albeit small) nutritional value. On that basis, the Tribunal held that it was a "food". In its analysis the Tribunal commented that it could "find no better guide" to the meaning of "food" than The Shorter Oxford English Dictionary", which gave the primary meaning of "food" as "'What

one takes into the system to maintain life and growth, and to supply waste; aliment, nourishment, victuals."

42. *Ayurveda Limited v CCE* (LON/88/1372X, VAT Decision number 3860) was concerned with whether a herbal fruit concentrate and some herbal tablets were "food". The products were prepared in accordance with the principles of a system of health known as Maharishi Ayurveda. The concentrate was described as a "dark, stiff, sticky fruit paste". It was sold with guidelines that suggested taking a full teaspoon of it twice a day and that it could be mixed with warm milk if preferred. It was not spread on bread as ordinary jam would be. The tablets, on the other hand, should be taken twice a day on an empty stomach. After considering "whether, in the whole circumstances of the case, the word 'food' as a matter of ordinary usage of the English language covers the two products in the light of the facts that have been proved", the Tribunal held that the concentrate was food but the tablets were not.

43. *Grosvenor Commodities Limited v CCE* (LON/90/1805X, VAT Decision Number 7221) addressed the VAT treatment of Royal Jelly capsules. In deciding whether they were "food" the Tribunal observed:

> "I have to consider whether an ordinary, educated Englishman, having seen and tasted the product and knowing what it is, would regard it as food. …. The capsules are of gelatins, which, if kept in the mouth long enough, dissolves; the contents include Royal Jelly and lactose; and there is somewhat unpleasant sweet flavour if one persists long enough and dissolves in the mouth the gelatins cover. Plainly the capsules are meant to be swallowed undissolved, with water. …. I find nutritive value unproven, I do not perceive a pleasant taste, and the qualities are far from food-like; and I regard a subjective belief of the consumer in goodness to be a very minor factor. The capsules do not satisfy hunger or please the palate. They do not look like food, taste like food, or fill the stomach like food; and, being swallowed normally with water, are not taken like food. In my view the capsules are clearly not food."

44. *Devro Ltd v CCE* (EDN/91/259 VAT Decision Number 7570) looked at sausage casings manufactured from reconstituted collagen from bovine skin. The Tribunal explained what bovine collagen is, as follows:

> "Collagen as a component of the connective tissues of meat is digested in the human alimentary tract and provides nutriment. The collagen is subjected by the manufacturers to various processes but the collagen casings are not synthetic or artificial because they are manufactured from the same chemical substance as traditional intestinal casings made from the gut of animals. These sausage casings are therefore manufactured products prepared by various chemical and physical treatments including the addition of permitted additive (E-460) designed to modify the texture. It is itself an edible substance and plays an important function in the functioning of the bowel. The collagen casings are used solely for the purpose of covering sausages, 75% of which are so treated in the United Kingdom market."

45. Although the sausage casings did not look, smell or taste like food, the Tribunal held that they constituted food as they were edible and designed to be consumed as part of another product although its nutritional value, while measurable, was minimal.

46. *Brewhurst Health Food Supplies v CCE* (LON/91/2488Z, VAT Decision Number 8928) concerned Ortisan fruit cubes which contained a mixture of dried fruits. They were sold mainly through health food outlets in packets of twelve. The front of each package had the words "ORTISAN" and "HELPS TO KEEP YOU REGULAR" printed prominently.

Advertising was limited to health food publications and the distribution of leaflets, including leaflet drops at old peoples' homes. It was accepted in evidence that Ortisan fruit cubes were neither sold nor bought as a form of nourishments nor were they consumed for pleasure. The principal reason for buying them was because the buyer experienced or expected to experience a lack of regularity in their bowel movements. The Tribunal noted the selling messages ("Helps to keep you regular" and "begin with half a cube at night", "sold as a remedial preparation"), directions for consumption ("specific and not, as the Tribunal sees it, characteristic of a food or even of the food supplement"), taste ("quite palatable and it has a distinct taste and texture of compressed fig"), cost ("at £2.29 a pack, it is likely to be regarded as something more special than a mere fig based food"), nutritional value ("of marginal significance" – energy and protein from the normal dose was less than a sixth of those from a bowl of cornflakes). Again, the Tribunal's conclusion was:

> "All in all the Tribunal cannot overlook the purpose for which Ortisan fruit cubes are sold and bought. Its intended effect is on the customer's bowel movements. The Tribunal has seen the cubes and tasted them and, putting itself in the position of the broad-minded VAT payer with the benefit of the same evidence as was present to it, the Tribunal has concluded that the Ortisan fruit cubes are not food of the kind used for human consumption. They are more a remedial preparation as opposed to a food."

47. *Nature's Balance Limited v CCE* (LON/93/2953A, VAT Decision Number 12295) analysed whether chlorella pyrenoidosa in tablet form was zero-rated as food of a kind used for human consumption. The Tribunal considered nutritional value (high), palatability ("I tasted a chlorella tablet and found it had a mild taste of seaweed. It is certainly palatable."), form (tablets – "some tablets must qualify as food"), and marketing ("Chlorella was marketed as a food product, a wholefood health supplement and the ultimate natural nutritional supplement."). Despite all this, the Tribunal's conclusion was:

> "The question I ask myself is whether an ordinary educated Englishman (or if one prefers, as in *Brewhurst*, a broad-minded VAT payer who has heard the evidence and tasted the product) would regard it as food. Applying this test as a matter of impression, I do not think that the tablets would be described as food…. I believe that an ordinary person would regard chlorella tablets in a similar way to vitamin tablets, no doubt good for you but not themselves food. I have been troubled about the logic that the Commissioners would regard the identical product in its natural form as food, but this follows from the form of the product being a relevant factor. If I am right, it would not be the only product to have a different VAT categorisation in different forms."

48. *Hunter Ridgeley Limited v CCE* (LON/94/2028, VAT Decision Number 13662) addressed whether Aphanizomenon Flos-Aquae in tablet or powdered form was eligible for zero-rating as a food for human consumption. The algae only grew in one place in the US. When harvested, they had the look and fresh smell of newly-cut grass. They were flash-frozen daily and stored at -20 degrees until processing. They were then marketed in powdered or tablet form. The tablets were taken in the normal way; the powder could be taken on its own (needing a liquid to wash it down) or it could be sprinkled on food or into a drink. Fifteen tablets of the product would provide 9% of a person's daily protein requirement, which the Tribunal said was something which could not be "summarily dismissed". It was suggested that certain holy men in India subsisted on the algae and nothing else. For more everyday cases, there was no recommended intake; the intake could vary with the physique, the state of mind and the state of health of the consumer. There is no maximum dosage. Nevertheless, the Tribunal held that the products were not food, commenting:

> "However, looking at the matter as a whole, we cannot find that the Algae fall within the zero-rating provisions. While sharing the reservations expressed in it, we adopt the reasoning in the extract from the *Nature's Balance Ltd* case quoted above. Even if the ordinary educated Englishman or broad-minded VAT payer had been instructed as Mr Perry would wish him to be instructed, we do not think that he would accept the Algae as food in the way in which he would accept sausage casings as food. A Californian Court might reach a different conclusion today. A UK Tribunal (not to mention Sainsburys) might reach a different conclusion in 50 or 100 years' time. Sitting here today, we must apply the natural and ordinary meaning of words as they are used here and now: on that basis, the appeal must fail."

49. *Dr Xu Hua v CCE* (LON/95/2069A, VAT Decision Number 13811) concerned bespoke preparations of substances comprised in herbal tea (not supplies of those substances in pre-packed preparations). The Commissioners accepted that the supplies of the substances, whether sold as pre-packed preparations or as bespoke preparations, were supplies of "herbal teas". However, they said that the bespoke preparations were not "food". This was because of the way in which the bespoke preparations were sold, for their medicinal and therapeutic qualities as treatments for ailments. The Tribunal considered that:

> "The central question for us is whether a substance of a kind used for human consumption which is food for VAT proposes if sold in the ordinary course of a food retail sales business loses that character where, as here, it is sold by the practitioner who has "prescribed" it to his or her "patient" for its medicinal or therapeutic qualities. That one substance can be a food when supplied in one manifestation but not food when supplied in another is well established."

50. The Tribunal considered that, leaving aside the fact that the substance sold in a bespoke preparation was supplied for a medical or therapeutic purpose, it would be food ("herbal tea made from the substance has some nutritive value in that it forms part of the normal diet and nourishment of the consumer and adds the necessary potassium to his diet"; "people drink herbal teas as part of their normal daily diet, in many cases as a substitute for what they would otherwise drink, and that all herbal teas provide the body with some form of nourishment."; "the ingredients of the bespoke preparations were substantially the same as the ingredients of sachets of herbal teas sold commercially"). The Tribunal held that the bespoke preparations were not to be re-characterised because of the manner of their supply, commenting:

> "There is nothing in the wording of Group 1 of Schedule 8 that expressly or by implication requires a substance of a kind used for human consumption to be classified or excluded from being classified as food by reason of the means of supply or the purpose for which the supply is made. This in our view is hardly surprising; a purposive test would lead to distortions and inconsistencies of which the present would be an example were we to follow the argument advanced by the Commissioners. The proper approach, in our view, is to determine whether as a matter of ordinary usage of the English language the substance is food. Approached that way the answer must be that it is."

51. *Arthro Vite Ltd v CCE* (MAN/96/1190 and MAN/95/2453, VAT Decision Number 14836) concerned a powder designed to be mixed with water and drunk. The powder was composed as to 85% of collagen hydrolysate (described as being "synonymous with edible gelatine"). The powder was marketed as a "a special health supplement drink, rich in the protein collagen required by your muscles, bones and joint cartilages" under the slogan "If pain stops play.....try new ArthroVite". The Tribunal considered marketing ("the presentation

of the product, if taken in complete isolation, would be strongly indicative of the product not being a food"), taste and form ("The taste of the product and the form in which it is taken would both weigh up on the side of the product being considered as a food although we believe the form to be little more than marginal") and nutritional value ("Finally there is the accepted nutritional value of the product and in particular the very high protein value. The significance of this cannot be over emphasised and, in our view, this would be entirely consistent with the product being viewed as a food within the dictionary definition of "aliment, nourishment, victuals""). Its conclusion was that:

> "We consider this case to be very finely balanced. The factors which weighed most heavily with us were the presentation of the product and its nutritional value and each pointed us in a different direction. However we believe that if we had to choose one single determinative factor it would have to be the nutritional value of the product and on balance therefore we believe the product to be a food. We have to say that had the product not had such a high nutritional value we would probably have come to a different conclusion. We come back to Mr Smith's evidence that, increasingly, medical research is being used to promote the benefits of certain foods and the general public are being educated that certain foods are beneficial to certain medical conditions. It may well be that the broad minded VAT payer would have been attracted to the product for its therapeutic qualities but we believe that once he had taken it, and being aware of its nutritive qualities, he would feel that what he had taken was a food."

52. *National Safety Associates of America (UK) Ltd v CCE* (VAT Decision Number 14241) dealt with concentrated fruit or vegetable tablets which could be taken to make up for lack of fresh fruit and vegetables in the user's diet. The products were not available to the public in retail outlets of any kind. They were sold by "direct selling" through a sales structure which, while not pyramidal in any illegal sense, did involve the payment of commission to those who introduce other users. The products came in two drums taped together - one drum of fruit tablets and one drum of vegetable tablets. The directions on each drum said, "Chew two tablets per day", but this was in no sense a maximum; the two witnesses who used the products took larger quantities - in one case much larger quantities. The directions included the warning "Excessive consumption may induce laxative effects".

53. The Tribunal considered taste (*"*The Tribunal found [the tablets] pleasant enough, without going so far as to endorse the Appellant's publicity material which refers to them as "delicious". In so far as they resembled anything else, they seemed to resemble certain types of crumbly fruit sweet"), nutritional value ("The products clearly have a nutritional value and are derived from items which, in their natural state, would undoubtedly be food"), marketing (marketed as "a unique high quality nutritional supplement providing support for your diet"), directions for consumption (inconclusive – "The warning about excessive consumption could apply to various foods. Prunes have already been mentioned; rhubarb falls into the same category; even lettuce has been considered soporific when taken in excess by certain types of consumer"), form ("tablets do not look like food or taste like food. They do not form part of a meal, in the way in which [stock cubes or powdered tomato] would do if reconstituted or incorporated in a dish in the usual way. If one went out for a meal, one would be a little taken aback to be served with these tablets."). Although the Tribunal thought it would be wrong to hold that, because they were a dietary supplement, the tablets could not be food, it nevertheless held that the "tablets are not food in the normal present-day meaning of the word".

54. *The Core (Swindon) Ltd v HMRC*, [2020] UKUT 0301 (TCC), addressed whether Juice Cleanse Programmes should be zero rated as food rather than standard rated as beverages.

The criticism made of the FTT decision was that it had allowed the marketing material to predominate in its multi-factorial assessment and that was the wrong approach in a pure classification, as opposed to dual use, case. The Upper Tribunal rejected that approach, commenting:

> "[58] In all cases involving classifications for VAT purposes there needs to be a multifactorial assessment. The way the product is marketed and sold is (as Ms Vicary accepts) a potentially relevant factor in every case. In some cases it may carry little weight, and in others it may carry great, or even dominant, weight as in *Fluff* and *Kinnerton*. The lack of clear distinction between "classification" cases and "dual use" cases is illustrated by the facts of this case: the items that make up the JCPs (i.e. fruit juices or smoothies) may be used as a beverage (for example for the reasons outlined in the *Bioconcepts* case) or they may be used as a meal replacement. While this is a classification issue, this involves a dual use in a similar way that the same underlying product (chocolate) could be eaten as a snack or as an ingredient in some other food."

55. *Phoenix Foods Ltd v HMRC*, [2018] UKFTT 018 (TC), concerned the VAT liability of bicarbonate of soda when sold as a baking ingredient. The FTT held that, when so sold, it was zero rated as food. Commenting on the relevance of marketing/packaging and use in the context of a product with a number of uses, the FTT said:

> "107. Ms Linklater suggested that we should concentrate on the nature of the product itself and not on the packaging and marketing. We have taken into account the nature of the product. We acknowledge that bicarbonate of soda can be purchased as a bulk chemical and that the product itself might have several uses. However, in a case where a product might have various uses, it seems to us that the intended use of the product - as determined from the form of the packaging and the manner in which it is to be sold - is part of the facts and circumstances surrounding the supply that we should take into account in determining its classification. Those circumstances demonstrate to us that in this case the bicarbonate of soda was being supplied as a baking ingredient. Although it is clearly possible that the product could be purchased by any given ultimate consumer for other uses, the objective facts surrounding this supply suggest that the typical consumer would purchase the product for baking.
>
> 108. Ms Linklater stated that there was no authority for the proposition that the classification of a product for VAT purposes can change depending on its intended use. The implication was that the classification of a supply cannot depend upon its intended use. We disagree with that conclusion. We acknowledge that legal certainty demands that the classification of a supply cannot turn on the subjective intentions of a particular consumer of the supply. However, in considering whether this particular supply meets the criteria for the classification in question, we are required to form "the reasonable view on the basis of all the facts". That test requires us to take into account all of the facts and circumstances surrounding the supply. In appropriate cases, one such factor, it seems to us, is the purpose to which the items that are supplied are likely to be put by a typical consumer of the supply judged by reference to objective factors such as how the product is packaged and marketed."

56. In *Staatssecretaris van Financiën v X* (Case C-331/19) the CJEU considered whether items sold by X in his sex shop, which included capsules, drops, powders and sprays presented as aphrodisiacs that stimulated libido, were "foodstuffs" within Annex III of the PVD. Those products, which were composed essentially of elements of animal or vegetable

origin, were intended for human consumption and were to be taken orally. The CJEU observed:

> " [25] … it should be observed that, as the Advocate General essentially observes in points 18, 19 and 27 of his Opinion, all products containing nutrients which serve as building blocks, generate energy and regulate its functions, which are necessary to keep the human body alive and enable it to function and develop, and which are consumed for the purposes of providing it with those nutrients, are in principle 'foodstuffs for human consumption'.
>
> [26] Since that nutritional role is a decisive factor for a product to be classed as a 'foodstuff for human consumption', according to the usual meaning of those words in everyday language, the question whether that product has health benefits, its ingestion entails a certain pleasure for the consumer or its use is part of a certain social context, is irrelevant. Consequently, the circumstance that consumption of that product has positive effects on the libido of the person ingesting it is irrelevant in that respect."

57. The points we draw from these cases are, first and most importantly, that the test to be applied is "what is the reasonable view on all the facts?" This has been articulated as asking whether a broad-minded VAT payer, who has heard the evidence and tasted the product, would regard Skinade as food. The appeal to the "broad-minded VAT payer" tells us that the question should not be over-analysed or be allowed to get bogged down in technical legal points. Factors our broad-minded VAT payer might consider could include form (tablets are generally not seen as constituting food), palatability, nutritional value, directions for use, cost, whether it is consumed as part of or an adjunct to a meal, its purpose (Is it consumed for the purposes of providing the body with the nutrients it needs to stay alive and function or develop or does it have another specific purpose?) and linked to that how it is marketed. As with all multi-factorial tests, factors will have different weight or value in particular cases, some may be irrelevant in a particular case and there may be factors not on this list which are relevant or helpful in a particular case.

BOTTLED SCIENCE'S SUBMISSIONS

58. In light of the above, Mr Schofield says that the following key principles are established:

(1) "Food" includes drink and liquid foods.

(2) A key determinant of food is its nutritional content / the provision of nutrients – this is found in all the definitions and relevant uses of the word;

(3) The format of the product and how it is consumed will be relevant;

(4) The objective nature and characteristics of the product are more important than its subjective end use;

(5) A product is not excluded from being food on the basis that it is marketed or understood to be healthy, have therapeutic qualities, or do you good (whether perceived or actual benefits);

(6) Food supplements are not a distinct category and can be food.

59. Looking at the multi-factorial test, Mr Schofield comments in relation to each of the factors he says are relevant, as follows:

60. Description/name: The packaging and website hold the product out to be "a uniquely formulated drink", "a scientifically formulated drink", and a "natural peach and mangosteen flavoured anti-ageing collagen drink". The product is clearly described as a drink. The name

Skinade is evocative of well-known drinks (lemonade, cherryade, Kool Aid), including those which also replace nutrients (Lucozade, Powerade, Gatorade).

61. Ingredients: All of the ingredients are food. The ingredient collagen is a common constituent of foods – it is fish. This protein found in meat and fish, is extracted from the meat or bones in broths, and is consumed every time someone eats many types of products: from a burger to a bouillabaisse. Hydrolysed marine collagen is produced from fish scales and cartilage. Collagen is very similar to (and breaks down into) gelatine.

62. Nutritional content: Skinade has nutritional value. It contains proteins, carbohydrates, fats, and minerals. It contains collagen which is a protein – a macro-nutrient – and vitamins and minerals which are micro-nutrients. The protein provides nourishment and helps restore tissue and provide waste. The nutritional content is equivalent to, and synonymous with, food. Each bottle contains more calories that the turmeric shots in the case of *Innate-Essence Ltd v HMRC,* [2023] UKFTT 00371 (TC), and almost identical calories and protein to the *Arthro Vite* collagen powders. It is a high protein drink, consumed for its protein.

63. Packaging and labelling: The informed taxpayer or person on the street would be quick to recognise these labels, statements and formats, as being a food. HMRC's review conclusion agreed that the wording on the packaging is commonly used on food packaging. The small 150ml bottles and sachets are both similar to other foods. Yakult, Benecol, and turmeric or ginger shots, all come in smaller size "monodose" bottles. The size – 150ml – is the same as small cans of Coca Cola and other widely available soft drinks. The 15ml sachets are very similar in size, shape and appearance to sachets of sugar, ketchup, milk, honey, and coffee.

64. Format/method of consumption: Skinade is consumed by drinking the liquid, out of a bottle or glass. It is not in tablet form.

65. Palatability/taste: This was very important for Mr Raper. Skinade went through a lengthy development process to make sure the taste (and texture) was palatable to make the drinks easy to consume.

66. Customer perception: Customer reviews included comments such as "I found the taste strange to begin with, I am totally used to it now, I would even say I enjoy it", "I liked the taste of the drink which quickly became part of my morning routine" and "I find the taste really addictive".

67. Marketing: The marketing and the way the product is held out for sale is that of a drink (as food). The first paragraph on the Skinade website under the question "What is Skinade" describes the product as: "Skinade is a multi-award winning, natural peach and mangosteen flavoured anti-ageing collagen drink…" and "a drink that promotes better looking skin from the inside out".

68. Manufacturing: The Skinade drink is manufactured in a food processing facility which is compliant with, and regularly inspected by, the Food Standards Agency.

69. Shelf life: The products have a shelf life, commonly found on food given the ingredients will spoil and are consumed.

70. Mr Scofield says that HMRC's description of Skinade as a beauty/skincare product is to create a category of product that does not exist in VAT law. A product may enhance beauty as well as contribute to hair, nail, and skin strength and appearance and still be food. Looked at in the round, he submits that Skinade not only has "sufficient characteristics" for the Tribunal to find it may be described as food, but that it must be food.

HMRC'S SUBMISSIONS

71. For HMRC, Mr Watkinson submits that "food" is to be strictly interpreted as an exception to the general principle that all supplies of goods for consideration by a taxable person should be subject to VAT. That need for strict interpretation is particularly marked where what is in question, as here, is a national law exception tolerated within the constraints of a standstill provision; *News Corp UK & Ireland Ltd v HMRC*, [2023] UKSC 7. Applying a purposive interpretation to "food", Skinade, is a product intended to produce an aesthetic beauty effect, that happens to be taken in the format of a drink, and does not fall within it.

72. Applying the principle of fiscal neutrality (that VAT should not be imposed differentially so as to distort competition between supplies which are objectively similar from the viewpoint of the consumer as per *Rank Group Plc v Revenue and Customs Commissioners* (Joined Cases C-259/10 and C-260/10)) produces the same result. Just like the aphrodisiacs in *X*, there are other products that achieve, in the eyes of the consumer, similar or identical results to Skinade but by a different route e.g.: dermal fillers, Botox injections, thread lifts. If a product such as Skinade is zero-rated, that opens the door to the argument that these products should also be zero-rated to avoid a breach of fiscal neutrality. Looked at through the lens of fiscal neutrality, from the point of the consumer, Skinade is not food.

73. What the CJEU said in *X* does not define food for the purposes of the UK legislation. Even if it did, Skinade does not fall within what the CJEU said in *X*. Marine collagen peptides are not "necessary to keep the human body alive and enable it to function and develop", nor is Skinade consumed for that purpose. Skinade is a product taken for aesthetic beauty effects and does not fall within the purpose of the Annex III permitted reduced rates, which is reducing the consumer burden in relation those products that are particularly necessary, or "essential commodities".

74. On a multi-factorial assessment Skinade is not food either. Significant weight should be given to the manner in which Skinade is held out. Skinade is held out as a skincare and aesthetic beauty product, specifically aimed at women. Skinade's packaging looks more like that of an aesthetic beauty and skincare product than that of a food product. Skinade is not sold or distributed by food suppliers, it is mainly sold through cosmetic clinics, beauty salons, dentists and private medical service providers.

75. The fact that Skinade is liquid does not make it liquid food. Skinade is in liquid form to give it a better absorption rate.

76. Looking at relevant factors, Mr Watkinson's observations are:

77. Name: Skinade sounds like First Aid just as much as Lucozade.

78. Palatability: The main component of Skinade, hydrolysed marine collagen, is not food because it would be unpalatable. Bearing in mind the contents of the reviews, palatability of the final Skinade product is, at best, neutral.

79. Nutrition: In terms of macronutrients Skinade's only element of real weight is the protein component, being 15.3% of the guideline daily amount for women. Skinade is not marketed for its nutritional content. The fact that Skinade contains some nutrients in the form of protein and vitamins does not make it food. Vitamin and similar tablets and capsules contain such nutrients, but tribunals have consistently found that they are not food. Skinade's actual method of action on the human body is inadequately evidenced. Skinade has stated that it is not intended to provide any nutritional benefit, but is instead engineered to stimulate physiological responses in the body in order to promote better skin.

80. Marketing: Skinade's website for professionals shows (a) an image of someone receiving an injection to their face, and advertises training and education including Skinade University. (b) Skinade's presence at trade shows such as the Facial Aesthetic Conference and Exhibition, Aesthetics Conference and Exhibition, The Aesthetic Show, (c) the covers of peer review magazines including: Journal of Drugs in Dermatology, Journal of Cosmetic Dermatology, Dermoscopy, Aesthetic Medicine, and Journal of Aesthetic Nursing. The other websites that Skinade is sold through are all focussed solely on skincare and beauty.

81. Packaging: Skinade is packaged in individual "doses", is "taken" or "used" as part of a "course" and is only to be used by those over 18 years old. The packaging describes Skinade as "a uniquely formulated drink using advanced technology and high quality ingredients for your skin" and a "food supplement". The packaging shows "Directions for use: drink 1 bottle each day, ideally after breakfast. For lasting results we recommend continued use. Skinade should be a part of your daily skincare regime" and states "Do not exceed the recommended daily dose. Store out of reach of young children." The packaging warns of the risk of a "mild laxative de-tox effect when you start taking the product." All of this is not characteristic of food but is characteristic of a skincare or aesthetic beauty product.

82. Reviews and awards: Skinade has won a Natural Health International Beauty Awards award three years in a row. Skinade has not won any food awards. TrustPilot reviews on the website regularly refer to "taking" and "using" Skinade and refer to the effect on skin, nails, hair and joint pain. A constant theme of the more negative Skinade reviews is a palatability problem.

83. Use: Significant weight should also be given to the manner in which the product is used by the consumer. Skinade is used as a skincare and aesthetic beauty product, not food. As is shown by the Rousselot website, the hydrolysed marine collagen in Skinade is used as part of an "ingestible beauty product" or "nutricosmetic" in the "beauty market", not as food. The same source states that collagen is now "the leading functional ingredient of beauty products in all regions of the world" particularly in the form of collagen peptides and that Rousselot's "Peptan" product is "globally recognised as the preferred ingredient of leading nutri-cosmetic brands."

DISCUSSION

84. Before setting out the reasoning which led us to our conclusion, we should make some comments on some more general points we considered.

Some points on our approach

85. We agree with Mr Watkinson that, to the extent this is relevant, we should construe the zero-rating provisions we are concerned with strictly. The reasons for this were explained by the Supreme Court in *News Corp* at [38]-[39], as follows:

> "38. It is well established that zero-rating provisions must be interpreted strictly because they constitute exemptions to the general principle that all supplies of goods and services for consideration by a taxable person should be subject to VAT. They should not, however, be interpreted so strictly as to deprive the exemption of its intended effect. As stated by Lord Kitchin in *SAE Education* at para 42:
>
> > "In accordance with well-established principles, the terms used in articles 131 to 133 to specify exemptions from VAT must be construed strictly. Nevertheless, they must also be construed in a manner which is consistent with the objectives which underpin them and not in such a way as to deprive them of their intended effects."

> See also *Werner Haderer v Finanzamt Wilmersdorf* Case C-445/05, [2008] STC 2171, para 18.
>
> 39. The need for strict interpretation is particularly marked where, as in this case, it does not involve mandated EU exemptions, but rather national law exceptions tolerated by EU law within the constraints of the EU standstill provision. As explained by the Advocate General in *Talacre Beach*, national exceptions must be "interpreted narrowly" (para 17) and, because they are not directed at the same objectives as EU mandated exemptions, "it is necessary to take particular care that the exceptions are not extended" (para 42). The need for a strict interpretation was endorsed by the CJEU (para 23)."

86. Similarly, the "always speaking" rule of statutory interpretation has to be applied having regard to the EU law constraints imposed by the standstill provision and the principle of strict interpretation of exemptions; *News Corp* at [48]. Whilst clearly correct, these points have not affected how we have reached our decision in this case. In particular, although we understand Mr Watkinson's appeal to the "standstill" nature of the preserved zero-rating provisions, we do not have any materials before us to suggest that "food" had any particular meaning when the UK joined the EU which it does not have now. We certainly do not understand HMRC to be suggesting that zero-rating is confined to products that could be purchased in the UK in the early 1970s and which would have been regarded as foods at that time.

87. We also agree that Art 98 and Annex III of the PVD are not strictly relevant to the interpretation of the preserved zero-rating, as the Article 98 reduced rates and preserved zero-rating are quite separate arrangements; the PVD vires for preserved zero-rating is Article 110. That notwithstanding, we have found the CJEU decision in *X* to be helpful. Although the CJEU focused on nutrition in its comments at [26], we do not understand the Court to be saying that anything with any nutritional value is food. We say this because, having commented on the purpose of Art 98 and Annex III in the overall VAT regime (which it described at [33] as making sure that "essential commodities, and goods and services serving social or cultural objectives, may be subject to a reduced rate of VAT, provided that they pose little or no risk of distortion to competition"), the Court went on to comment (at [35]-[36]) that:

> "Under those circumstances, any product intended for human consumption which provides the human body with the nutrients necessary to keep the human body alive and enable it to function and develop comes within the scope of the category set out in point 1 of Annex III to the VAT Directive, even if the consumption of that product also aims to produce other effects.
>
> By contrast, a product which does not contain nutrients or contains a negligible amount thereof, the consumption of which serves solely to produce effects other than those necessary to keep the human body alive and enable it to function and develop, cannot fall within the scope of that category."

For what it is worth (as the question was one for the referring court), the CJEU seemed to think that aphrodisiacs fell into the second category. The Court's observations on the purpose of Article 98 and Annex III clearly informed its conclusions, but it seems to us that those observations are not far (if at all) removed from the Upper Tribunal's analysis in *Nestlé* of the purpose of food zero-rating in the UK. For those reasons, and because "food" is an ordinary word, we have found the comments in *X* helpful.

88. There was some debate as to the importance we should place on dictionary definitions of "food". As Mr Schofield rightly pointed out, some tribunals have taken dictionary definitions into account in reaching their decisions in this area. Mr Watkinson, for his part, referred us to a fascinating (if rather long) article by Stephen Mouritsen entitled "The Dictionary is not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning" in the Brigham Young University Law Review (BYU L Rev 1915 (2010)). More succinctly, the authors of Bennion, Bailey and Norbury on Statutory Interpretation observe (at Section 22.1):

> "The question of a word's meaning is normally to be answered directly, not by rushing to dictionaries, or by searching the Internet for substitute words and expressions, or by the use of a non-statutory checklist; or by recourse to Hansard, or by working through a range of hypothetical situations.
>
> In the case of an ordinary word, where the legislature has chosen not to give it any special meaning, it is inappropriate for the courts to define it and lay down its meaning as a rule of construction. For example it has been said that a word like necessarily is a 'linguistically irreducible' word which judges should not replace with a synonym or paraphrase. As Lord Bingham put it in *Jennings v Crown Prosecution Service*:
>
> > "There is a real danger in judicial exegesis of an expression with a plain English meaning, since the exegesis may be substituted for the language of the legislation.'"

89. We agree with Mr Watkinson that simply using an abstract dictionary definition to inform our approach to the meaning of "food" is not the right approach. The dangers of a narrow, non-contextual approach to statutory interpretation in this area are vividly illustrated by *Fluff Ltd (t/a Magit) v CCE*, [2001] STC 674, where the question was whether maggots sold as bait for fishing could be zero rated as animal feeding stuffs. Laddie J said this at [17] and [18]:

> "[17] It seems to me that the meaning of the words must take colour from the context in which they are used and, in particular, what is at issue here is the supply of animal feeding stuffs. It seems to me whether or not an edible substance is animal feeding stuffs is in large part answered by the way in which it is sold or supplied. I put it to Mr Storey that if his approach is right a straw boater, which of course is edible, would itself be animal feeding stuffs and therefore the supply of boaters would be zero rated under this legislation. He accepts that that is the inevitable conclusion of his submission. I do not accept that is the right approach to these words: it is not what the words mean. It seems to me that what counts is whether what is being supplied can properly be described as animal feeding stuffs. In deciding that one must look not just at the nature of the material but the way in which it is supplied. These maggots are not supplied as a foodstuff for fish; that is to say, for the purpose of feeding and growing fish. These maggots are sold for use in enticing fish towards hooks.
>
> [18] In my view, on any reasonable basis, the supply of packets of maggots, in the way in which it is done by the appellant, is not the supply of animal feedstuffs at all. In my view the conclusion arrived at by the Tribunal is right. This does not come within General Items (2) and therefore the supply of these goods is not zero rated."

Factors we considered in reaching our conclusion

90. There was some discussion around whether Skinade is a beauty product. We have not found it particularly helpful to try to identify the characteristics of a beauty product. We agree

with Mr Schofield that to ask whether Skinade is a beauty product rather than a food is to set up a false dichotomy not to be found in the legislation. The question the legislation asks is whether Skinade is a food, not whether it could, better or additionally, be described as a beauty product.

91. We heard no evidence or argument on cost, although we note from the Skinade website that a 30-day supply (30 x 150ml = 4,500 or 4.5 litres) costs £128. The same quantity of semi-skimmed milk costs around £5.50.

92. Mr Watkinson trailed fiscal neutrality as an issue, but did not develop that avenue of thought. We have put out of our minds any consideration that Skinade may be a substitute for Botox or other standard-rated beauty products.

93. In form, Skinade is a liquid. The legislation tells us that food includes drink, but it does not follow from Skinade being a drink that it is automatically a food.

94. We do not set a great deal of store by Skinade's name. Whilst clearly it sounds like certain liquids which are regularly enjoyed, such as lemonade, it does as Mr Watkinson observed also sound rather like first aid. In a macabre way, the name might also suggest a drink with skin as a key ingredient.

95. Mr. Scofield said that, as long as a product has some measurable level of nutritional value, that is all that is needed. We agree that the cases indicate that food needs to have some nutritional value and so, to the extent a product with no nutritional value cannot be food, the possession of any nutritional value is sufficient to jump this hurdle. However, we do not accept that the level of nutritional value is unimportant. *Artro Vite* shows the tribunal being swayed by a product's high nutritional value. The CJEU in *X* drew a distinction between what might be described as "high nutrition" products on the one hand and products with a relatively low nutritional value and a primary purpose, which might be described as not being a purpose one would normally associate with food, on the other. It seems to us that the overall level of a product's nutritional value (not just the binary question whether it has any level of nutritional value at all) is relevant in the multi-factorial assessment.

96. As far as nutritional value is concerned, the recommended daily dose provides just over 15% of a woman's recommended protein intake. It only provides very small percentages (less than 2%) of the required sodium, carbohydrate and energy. These are the only nutrients it provides. Mr. Watkinson said that we have no nutritional information about Skinade. That is not the case; we have the information we have just set out. What we do not have is any information about the nutritional value of typical portions of commonly consumed foods and how Skinade "measures up" in comparison. Mr Schofield (on whom the burden of proof lies) has not demonstrated how Skinade's nutritional content compares with that of typical servings of other foodstuffs or what level of nutritional value Skinade has for the purposes of the multi-factorial assessment.

97. Mr Schofield did point out that each bottle of Skinade contains almost identical calories and protein to the *Arthro Vite* collagen powders. In *Arthro Vite* at [56] the Tribunal described the nutritional value as being "accepted" (which is not the case here) and referred to the "very high protein value". The product in that case provided 10-15% of an individual's daily protein requirements (as is the case here) but it is not apparent from the decision why the Tribunal thought that the protein value of the product was "very high". As we observed earlier, it is (of course) wrong to appeal to decisions on other products in order to categorise the product in question. In any event, the powders in *Arthro Vite* were consumed to help the body function and marketed with that in mind *(*as a remedy for stiff joints, aches and pains - "If pain stops play.... try new ArthroVite"), which is one of the core purposes of food consumption. This is not the case here. Skinade is a product the consumption of which has a

singular purpose, that of keeping users' skin looking young. We do not regard that as concerned with keeping the body alive or its development or functioning. An older person's skin which no longer looks young still performs the functions of skin. We have not overlooked Mr Hollamby Jones' comment that Skinade can be helpful for old people whose skin is getting thinner. That was advanced as a reason why it is misleading to call Skinade a "beauty drink" but there was no suggestion that Skinade performed any particular additional function for old people; it is certainly not marketed on that basis and, beyond saying that Skinade was "helpful" for old people, Mr Hollamby Jones did not elaborate on its properties or effects. Overall, we consider Skinade's nutritional value (whilst clearly present to some degree) to be neutral as we have no means of measuring its nutritional value in comparison with foodstuffs generally.

98. All the ingredients of Skinade are themselves food or, if not, are ingredients regularly used in food, in the same way that bicarbonate of soda is not a foodstuff on its own, but is, or at least can be, an important ingredient in food. Again, we consider this relatively neutral. The question is whether the finished product Skinade is a food, not whether its ingredients individually are food or food ingredients.

99. As far as palatability and taste concerned, we both tasted Skinade during the hearing and, having been left with some samples (although not enough to discover whether it improved our skin quality), afterwards. We found it to be palatable, in the sense that, if we had to drink 150 ml of it every day, the taste would not put us off. That said, neither of us would rush to drink Skinade for its own sake or, to borrow an expression from the caselaw in a different area of the VAT legislation, to serve it to an unexpected guest. Our perception of the palatability of Skinade seems to chime with the customer reviews that we were shown. We consider palatability to be relatively neutral in our assessment.

100. We do not place a great deal of weight on the fact that Skinade is produced in factories supervised by the Food Standards Authority or subject to food labelling regulations. The concept of "food" in such regimes can be very different from the meaning of "food" as an ordinary English word and can be driven by considerations which are not presented when looking at the ordinary meaning of the word. For example, Regulation (EC) No 178/2002 (the European Food Safety Regulation) defines "food" as follows:

> "For the purposes of this Regulation, 'food' (or 'foodstuff') means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans."

Whilst it is entirely understandable that someone wanting to regulate food safety would want as broad a definition of "food" as possible, even the most cursory review of the cases on UK food zero-rating would tell us that this is not what "food" means for our purposes.

101. The factor which weighs most heavily on us is the way in which Skinade is packaged and marketed.

102. Although HMRC's review conclusion letter noted that the wording on the Skinade packaging is similar to that used on food packaging, on looking at the packaging it did not appear to us to look like the sort of product one would find in the food aisle of a supermarket. The overall appearance of the packaging is quite clinical. It is white with scientic-looking logos and designs. Whilst some of the wording, for example nutritional information, might be found on food packaging, its overall appearance reminded us much more of something one might find in a chemist's shop than a grocer's.

103. In the same way that its packaging is not what one would expect of a food stuff, its overall presentation and route to market are very different from what one would expect of a

foodstuff. We have seen that Skinade is not available in places foodstuffs generally are. The description on the website of Skinade as a multi award-winning, natural peach and mangosteen flavoured anti-ageing collagen drink is not a description that one would expect of a foodstuff. The same web page goes onto to describe it as an "effective and bioavailable anti-ageing skincare product" and an alternative approach to a person's skincare regime. Skinade is marketed at trade shows aimed at the beauty industry rather than food retailers. Skinade has won cosmetic awards, rather than food industry awards, and the Appellant sponsors an annual prize for plastic surgeons.

104. The Skinade website for professionals shows an image of someone having an injection in their face, advertises training and education at the Skinade University, refers to Skinade's presence at aesthetic trade shows and shows the covers of peer reviewed magazines in the dermatology and anaesthetic medicine fields. None of this is how we would expect to see food marketed.

What would a broad-minded VAT payer, who has heard the evidence and tasted the product, think?

105. We think that such a broad-minded person would conclude that Skinade is a product with some (but it is unclear how much, when compared with foodstuffs generally) nutritional value, which is not consumed in order to keep the body alive or to enable it to function and develop. Rather, it is a product distributed and marketed, in ways which are very different from those one would ordinarily expect of food, for a very particular purpose (helping people keep their skin looking young).

106. The directions for use rather reflect this. Users are told to drink a bottle of Skinade every day "ideally after breakfast". The instructions are not to consume Skinade as part of a meal. They go on to counsel that, for lasting results, Skinade should be "a part of your daily skincare regime". None of that, to our mind, is language redolent of food.

107. The answer to the question whether Skinade is a food does not change because it is ingested rather than rubbed into the skin and has some nutritional value. The maggots in *Fluff* were ingested by the fish, but they were not supplied as foodstuffs for the fish (that is to say, for the purposes of feeding and growing them). The maggots were sold to be used in enticing fish onto hooks. The aphrodisiacs in *X* had some nutritional value and were ingested, but not (the CJEU appeared to think) for the purpose of keeping the body alive and helping it to function and develop. Similarly, Skinade is sold not for the general purposes of keeping the body alive or its development or functioning, but for the very specific, limited purpose of keeping skin looking young.

108. We have not found this to be an easy issue to resolve at all, but in the round we consider that a well-informed, broad-minded VAT payer's answer to the question whether Skinade is a food would be "No; Skinade is not a food."

DISPOSITION

109. For the reasons set out above, we have concluded that Skinade is not a "food of a kind used for human consumption" within Item 1, Group 1, Schedule 8, VATA.

110. This appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

111. 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.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 04th JULY 2024