AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

12TACD2024

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against a Notice of Assessment to Value Added Taxation ("VAT"). That assessment which was issued by the Revenue Commissioners (hereinafter "the Respondent") on 13th December 2017 is as follows:

Period of Assessment	**Quantum**
1st November 2013 to 30th June 2014	€14,765
1st July 2014 to 30th June 2015	€24,286
1st July 2015 to 30th June 2016	€21,318
Total	**€60,369**

2. The Appellant makes its appeal in accordance with the provisions of section 119 Value-Added Tax Consolidation Act 2010 ("VATCA 2010").

Background

3. The Appellant commenced trading in [redacted] and ceased operating in [redacted]. Its trading activities were primarily the retail sale of juices, milkshakes and yoghurt based products known as "smoothies" which it sold from a kiosk on a take-away basis in a shopping centre.

4. In 2014, the Appellant sought a refund of VAT from the Respondent. This refund arose as the Appellant was applying the zero rate of VAT to the sale of its milkshake and smoothie products.

5. The Respondent queried the Appellant's eligibility to apply the zero rate of VAT to those products. By way of reply, on 6th May 2015, the Appellant's then tax advisor set out the reasons why he believed that the zero rate applied. That letter concluded as follows:

> "*I would like you to confirm that the zero rate of VAT applies to the sale of a Dairy Smoothie, in accordance with paragraph (c) of column 2 of Table 1 in paragraph 8 (1) of Schedule 2 to the Act, which provision is ratified by the entry entitled "Milk-Based Drinks" in the VAT rates section on the Revenue website*".

6. Subsequent correspondence ensued between the Appellant and the Respondent which resulted in the Appellant being selected for an audit for the periods 1st November 2013 to 30th June 2016. At the conclusion of the audit, the Respondent found that the sale of

milkshake and smoothie products, which the Appellant had been returning at the zero rate of VAT were more properly liable to VAT at the standard rate.

7. The Appellant was notified of this finding by way of email on 13th December 2017. That email stated:

"*I refer to our meeting of 27/11/17 & my ongoing audit in this case.*

Following my examination the computerised sales records for the year ended [redacted] *the total sales for that year amounts to €147,242. Further analysis of sales shows that 98% of all sales that year comprise sales of the following standard rates Vat items- smoothies, milk shakes & fruit juice drinks.*

In view of my findings for year ended [redacted] *& in the absence of information to the contrary I am concluding that the same percentage of 23% Vat sales would apply to other years.*

On this basis I am now raising Vat assessments in relation to the understated Vat in the returns for the following periods-

a) 8 months to 30/06/14

b) Year ended 30/06/15 &

c) Year ended 30/06/16.

See my computations attached showing how the Vat assessment figures are arrived at…"

8. Those referred to workings were as follows:

Period Ending	**30/06/2014 8 Months €**	**30/06/2015 12 Months €**	**30/06/2016 12 Months €**
Turnover per accounts	88,052	144,546	127,132
Vat remitted	1,676	2,696	2,423
Total Sales	89,728	147,242	129,555
Correct VAT on Sales			
98% Standard VAT Sales	87,935	144,297	126,964
23% VAT	16,443	26,982	23,741
Total VAT Due	16,443	26,982	23,741
Sales VAT Remitted In Returns	1,678	2,696	2,423
VAT Underpayment	14,765	24,286	21,318
Total VAT Underpayment		**60,369**	

9. On the same date, the Respondent proceeded to issue its notices of assessment in the sum of €60,369.

10. The Appellant, who was not in agreement with those assessments, lodged its appeal with the Commission on 12th January 2018. Following delay, which was caused in part by finalisation of the Experts' Reports, the hearing of the appeal took place on 12 h May 2023.

11. The Appellant was represented by its Director, [redacted] ("the Appellant Director") at the Appeal hearing. The Respondent was represented by Counsel, its solicitor, and three members of its staff. In addition, the Commissioner heard sworn testimony from the Appellant Director and the Respondent's Expert Witness, in addition to legal submissions from the parties.

Documentation presented to the Commission

12. Included within the documentation presented to the Commission was the following:

    12.1. An extract from the Respondent's VAT Rates Database [1] headed "Drink, Smoothies (Take-away)". This stated:

    "*Rate:*

    Zero, standard

    Section/Sch:

    Par (Xii) 1st Sch, S 11 (1) (A)

    Remarks:

    General term used to describe a range of blended fruit drinks. Standard rate normally applies. However, if it can verifiably demonstrated that more than 50% of the volume consists of milk or yoghurt, then zero rate applies."

    12.2. An extract from the Irish Independent dated 23rd January 2011[2]. Under an article entitled "Feeling Fruity", it stated:

    "*If you're fond of smoothies, buy your own fruit and blender and make your own. You don't pay VAT on any fresh fruit, such as bananas or strawberries. But if you buy that fruit in a smoothie, you pay 21 per cent on it… unless more*

[1] www.revenue.ie/en/tax/vat/rates/decision-detail-0294.isp
[2] https://www.independent.ie/business/personal-finance/how-you-can-get-one-over-the-taxman/26617025.html

than half of your smoothie is made up of milk or yoghurt, in which case no tax is charged."

12.3. Two internal emails between staff members of the Respondent. The first email, from one of the Respondent's local divisions, which was dated 7th April 2011 stated:

"*I have a query [redacted]. A supermarket was charging 21% VAT on smoothies but is now claiming that 65% of its smoothies contain more than 50% yoghurt and therefore must be zero rated. When the supermarket sent me the documentation of the ingredients and procedure for making the smoothies, I noticed that they use "frozen yoghurt" not yoghurt in their smoothies.*

Looking at the VAT rates database, frozen yoghurt (21%) is treated differently then [sic] yoghurt (0%) in the VAT Acts. For the purposes of making the smoothie and claiming that they should be zero rated, is yoghurt and frozen yoghurt treated the same in this instance or should the smoothie be treated as 21% regardless of the volume of frozen yoghurt in the smoothie."

By way of reply on 2nd June 2011, a member of staff from the Respondent's VAT interpretation branch stated:

"*…Smoothies is a general term used to describe a range of blended fruit drinks and therefore the rate of VAT applicable to such products is the standard rate, currently 21 per cent. The VAT Rates Database entry for "Smoothies" will shortly be amended by the deletion of the following remarks from the remarks box, namely "However, if it can verifiably demonstrated that more than 50% of the volume consists of milk or yoghurt, then zero rate applies".*

We are also amending the "Drink – Milk Based" entry on the VAT Rates Database to now read "Milk Based Drinks" – Rate-Zero – Remarks "Provided it is a preparation derived from milk where the milk element represents more than 50% of the volume of the drink. The ingredients quantities must be verifiable.

We are also deleting the entry Milk Shakes because they are/should be in reality a milk based drink. If a particular cold milk shake drink take away meets the above criteria then its supply is liable to VAT at the zero rate, otherwise 21 per cent applies.

Based on the above, the supply of the Smoothie in question which contains 65% yoghurt whether frozen or not is correctly liable to VAT at 21 per cent…"

12.4. A letter from the Respondent dated 19th July 2011. This letter which was not addressed to any entity was entitled "*Tax Reference [blank], Re: VAT treatment of Smoothies*". This letter stated:

"*It has come to our attention that some traders are not applying the correct amount of VAT on Smoothies.*

Revenue have accepted that "smoothies" which consist of mainly (50% or more) of milk and milk preparations and extracts derived from milk of [sic] could be zero rated for VAT purposes,

- *When sold by a caterer engaged in the provision of a catering service,*
- *Operating a take away element as part of his business, in accordance with the concession outlined in the food and drink leaflet.*
- *(Two concessions, the 50% volume and the take away aspect).*

In all other circumstances, "smoothies" sold by a caterer/juice bar, are taxable at the standard rate (21%).

Yoghurt comes within the definition of milk and preparations and extracts derived from milk, however, frozen yoghurts, ice cream and prepared mixes and powders for making these products are excluded from the zero rate. If the smoothie is made using any of these products, the product will be taxable at the standard rate.

The only time a caterer may apply the reduced rate to this type of product (13.5%) is when the smoothie is provided in the course of a meal…"

12.5. A copy of the Appellant's menus of drinks sold. This was sub-divided as follows:

12.5.1. Juices, this was labelled "Appendix 1A". Included within that list was the various drink ingredients which were detailed as various fruits.

12.5.2. Yoghurt Drinks, this was labelled "Appendix 1B". Included within that list was various drink ingredients which were derived from fruits and frozen

yoghurt. All of those drinks contained a statement which said "Contains Milk [in Yoghurt]".

12.6. An email addressed to the Appellant Director dated 13th April 2015. This email was from a [redacted], described as "Site QMS Co-ordinator" for [redacted] and stated:

"*…I can confirm that our [redacted] Frozen Yoghurt is made of yoghurt, and having consulted with our technical team, confirm that the dairy content of frozen yoghurt is 84.7%...*"

12.7. A letter from [redacted] from [redacted], applied biotechnology Centre addressed to the Appellant Director. This letter which was unsigned and undated stated:

"[redacted] *is an applied research centre with expertise in food product development, characterisation and compositional analysis. As per your request I have reviewed the following:*

A. Recipe

I have reviewed the recipe that you provided for your Dairy Smoothie and calculated the milk derived content as a percentage by weight of the drink prior to sale.

Ingredient	**Weight**	**Weight %**	**% Milk Derived Content**
Thawed/Fresh Fruit	80g	20% w/w	
Fresh Banana	20g	5% w/w	
*Thawed Yoghurt	260g	65% w/w	55% w/w*
Thawed/Fresh Fruit Juice	40g	10% w/w	
Totals	**400g**	**100% w/w**	

***Note:** *Milk Based content of yoghurt is 84.7% w/w as per manufacturer ([redacted]). Please see App 1 from [redacted].*

*It is evident from the recipe tested that **greater than 55%** of the total weight of the dairy smoothie is **milk based.***

B. State of Matter

I would also like to clarify solid and liquid/viscous liquid states in the context of the yoghurt you use in your product. A substance of mixture, for example yoghurt, transitions from a solid state to a liquid state at a particular threshold.

The threshold for this transition in food varies. Once the core structure of the product changes from solid to liquid, it should no longer be considered frozen. This physiological state changes the principles of consumption. The orientation of the consumer towards the preferred drinking utensil of cups and straws, further separates the dairy smoothie from products such as ice-cream and frozen yoghurt served in eating utensils of bowls/tubs with spoons.

Frozen yoghurt is designed to be frozen but not consumed in that state of matter. It is designed to be thawed and converted into a liquid drink, which is a dairy smoothie in this case.

In conclusion, I can state that the dairy smoothie due to the ingredients, recipe and process, is a greater than 55% milk based product.

I trust this answers your query."

12.8. A letter from the Respondent to the Appellant's accountant dated 26th November 2015. This letter stated:

"*I note from your correspondence that you have enclosed a letter from* [redacted] *and a letter from* [redacted] *a research company. I also note from* [redacted] *letter his contention that these Smoothie products are akin to "Milk-Based Drinks" and pass the 50% test as referred to on the milk-based drinks entry on the VAT Rates Database.*

However, I note from your letter that you refer to these two products as "Yoghurt Based Drinks". I further note from [redacted] *letter that they refer to these two products as a "Dairy Smoothie" product and a "Strawberry Surprise Smoothie" product. I note that the Dairy Smoothie Product consists of thawed/fresh fruit, fresh banana, thawed/fresh fruit juice and thawed yoghurt and that the Strawberry Surprise Smoothie product contains strawberries, honey orange juice and frozen yoghurt.*

You will note from the VAT Rates Database an entry entitled "Smoothies" and in particular the "Remarks" therein. These remarks state the following "General

term used to describe a range of blended fruit drinks". You will also note that the VAT rate quoted therein is the standard rate.

I would be of the opinion that the two smoothie products referred to above are blended fruit drink products. Accordingly, I would be of the opinion that the supply of these two smoothie products is liable to VAT at the standard rate, currently 23%."

12.9. A letter from the Respondent to [redacted] dated 25th July 2016. This letter stated:

"*I understand that you are seeking a review of [the Respondent's] rating of the Dairy Smoothie and not the Strawberry Surprise Smoothie. Please let me know if this is incorrect.*

The VAT rating of goods and services is determined on the basis of what good or service is being supplied for VAT purposes. Food and drink must be given their ordinary meaning, a meaning that the ordinary man would understand food and drink to be; it is not a scientific test.

"Smoothie" is a generic term for a range of blended products containing, among other things, fruit juices and other products derived from fruit, frozen yoghurt and/or ice cream, although other ingredients may be added. It is a drinkable product derived from fruit and other products used for the preparation of beverages as set out in Part E (1) of Table 1 of paragraph 8 of Schedule 2 to the Value Added Tax Consolidation Act 2010. A smoothie is liable to VAT at the standard rate of VAT.

Dairy Smoothie

You state in your analysis that the Dairy Smoothie product is shown to be 50% from a preparation or extract of milk. This I understand is based on the "Remarks" section of the entry "milk based products" on the Revenue VAT Rates section of the website. Please be advised that the entry in fact specifically states that the milk itself must be greater than 50%. This conveys that the milk (rather than the milk preparation or milk extract element) must be more than 50%. This test does not apply to yoghurt.

I understand the ingredients of the product are as follows:

Ingredient

Thawed/Fresh Fruit

Fresh Banana

Frozen Yoghurt

Thawed/Fresh juice

I understand that the product is a liquid and is consumed as a drink.

A product that contains fruit or fruit juice mixed with yoghurt would not be considered a preparation or an extract derived from milk in the everyday and ordinary meaning of these words. In my view this product is a "beverage" in the everyday and ordinary meaning of the word and is supplied as such.

This product is excluded from the 0% rate as per Part E (1) (b) of Table 1 of Paragraph 8, Schedule 2 of the Value Added Tax Consolidation Act, 2010 and is therefore liable at the standard rate.

If you have any queries, please do not hesitate to contact me."

12.10. An extract from a Dáil Éireann debate dated [redacted]. In response to a question raised by Deputy [redacted] to the Minister for Finance as to why the standard rate of VAT applied to smoothies in contrast to the zero rate of VAT which applies to less healthy drinks, the Minister stated:

"*… The VAT rating of goods and services is subject to the requirements of EU VAT law with which Irish VAT law must comply. The EU VAT Directive generally provides that supplies of goods and services be chargeable to VAT at the standard rate. Member States can retain historical zero-rated VAT treatment under Article 110 of the EU VAT Directive, where a good or service was zero-rated on and from 1 January 1991. Ireland applies the zero rate to most food. In this context, it is not possible to apply the zero rate to any new food and drink items that have not already applied the zero rate.*"

12.11. A photograph of the Appellant's kiosk which detailed its composition and positioning in the shopping centre. This showed that the Appellant's business was operated from the foyer space of the shopping centre and that there were no provided facilities for customers to consume their purchased products at the kiosk.

12.12. A copy of the Respondent's Expert Report. This was dated November 2022 and stated:

*"**Question under consideration***

The key question is whether the products labelled Dairy smoothies fall, from my scientific perspective, under a definition of milk or 'milk and preparations and extracts derived from milk'.

Opinion

1. In my scientific view, having initially no regard to the question of levels of dairy present or definitions of such, a product such as that described here as Smoothie Products containing the level of yoghurt present would be regarded as what I would call a dairy product. Many conventional dairy products which would be described, for example, in dairy textbooks include a range of types and levels of non-dairy ingredients such as fruit, e.g., ice cream and yoghurt. The key consideration in this case is whether the character and properties of the product in question were dominated by the fact that dairy products or ingredients were included, which would appear to be the case here. I would certainly regard these products as being more of a "dairy drink" than a "fruit-derived drink".

2. However, the products do not scientifically fit the definition of 'milk and preparations and extracts prepared from milk', in that they do not strictly represent a 'preparation' or 'extract' made from milk.

3. Additional information provided on request by [redacted] *indicates that the dairy component comprises skim milk, low-fat yoghurt (which includes several milk components, such as skim milk powder, whole milk, skim milk and sodium caseinate) and skim milk powder, which add to 84.7% milk components. However, the key question of how much of the recipe consisted of actual (skim) milk is not answerable by the data provided, and the basis for the calculation of 84.7% milk components is not provided.*

4. The smoothies that are the subject matter of the appeal thus do not fall within the descriptions in (2) Part E of the Table at Schedule 2 Part 2 of the Value Added Tax Consolidation Act 2010, which references 'milk and preparations and extracts derived from milk' as being eligible for zero-rating for VAT purposes. Even should the frozen yoghurt contain a high level of skim milk, the

conversion of such milk into yoghurt which is then frozen transforms it into a state which, according to the Act, is not equivalent to milk or an extract or preparation thereof.

5. The report of [redacted] *is broadly correct in considering that the products in question represent dairy products, and I agree with this conclusion, as outlined in point 1 above. However, this is not the matter in question, but rather whether they are 'milk and preparations and extracts prepared from milk'. The conclusion that the products contain 55.4% milk weight is correct, and indeed the actual level of milk solids is likely even proportionately higher, due to fact that yoghurt is typically fortified with milk powder to higher levels of milk-derived solids than in fluid milk. However, being a dairy product, in this case, is not the same as being milk, an extract or preparation thereof, which is required for the Act to apply. The term used is 'milk-based', which is a fair description of yoghurt, but this is not the same as the required status of being milk or a preparation of extract thereof. Thus, while the products do contain more than 50% of dairy product (yoghurt), and milk-derived components, they critically do not specifically comprise either entirely or at a level greater than 50% liquid milk (to qualify for the 50% liquid milk concession).*

6. The point of whether the yoghurt was frozen or not is moot if yoghurt, in either form, does not meet the definition of being 'milk, or a preparation or extract of milk'.

Conclusion

I would regard the products in question, from a dairy science perspective, as dairy products, in that their sensory and other characteristics would be dominated by the contribution of a dairy product (i.e., yoghurt) at a level above 50%. However, they do not fit what I understand to be the requirement of being milk or an extract or preparation thereof. In addition, the product does not meet the requirements of the Revenue concession as it does not contain milk to a level above 50%."

Witness Evidence

Appellant

13. The Appellant Director advised the Commission that as the Appellant had ceased trading and was cash constrained, it was not producing its expert witness. In place, the Appellant

Director requested the Commission to admit the Report of [redacted] from [redacted] into evidence. The Commissioner agreed to this request for the provided reasons but advised the Appellant Director, as the Respondent had been deprived the benefit of cross examining [redacted] on his Report, that he would decide what weight, if any, should be attached to the Report.

14. As the Appellant Director presented evidence during the course of the Appellant's submissions, the Respondent's Counsel requested that the Appellant Director be sworn in by the Commissioner so that he could be cross examined on his tendered evidence by the Respondent's Counsel. In the interest of fairness, the Commissioner agreed to this request and having been sworn in, under cross examination the Appellant Director stated:

    14.1. The Appellant zero-rated all of its smoothie related sales on the grounds that they are a yoghurt based drink, and as such, according to the Respondent's own guidance are eligible for qualification to that rate.

    14.2. As the smoothies were yoghurt based this meant that they were also milk based and that is why they were eligible for VAT zero rating.

    14.3. That the Appellant's customers received their ordered smoothie in a cup with a lid and a straw, so that they could drink the product.

    14.4. That the sales price of a smoothie was typically €3.99 and that this was a multiple of the sales price of milk.

    14.5. Frozen yoghurt was offered for sale in that format from a fellow retailer adjacent to the Appellant's stand in the foyer and that retailer "properly" charged standard rate VAT on the sale of his frozen yoghurt.

    14.6. That the provided report from [redacted] stated that its frozen yoghurt product confirmed that it had "dairy content" of 84.7%. He further confirmed that [redacted] were the dominant supplier of frozen yoghurt to the Appellant's business during its operation.

    14.7. While [redacted] referred to "dairy content" in its provided letter, that [redacted] changed that wording in its report to "milk based content".

    14.8. That the comments provided by the Respondent's VAT Rates Database were for guidance purposes only and were not derived from Statute.

14.9. That the Respondent operated a concession in relation to the zero-rating of milkshakes and certain types of smoothies and that this concession was later amended by the Respondent.

Respondent - [redacted]

15. [redacted] having been sworn in by the Commissioner provided the Commission with a copy of his Curriculum Vitae. This document outlined that he was a dairy scientist at the [redacted], where he taught and researched the science and technology of dairy products for around 30 years. It further confirmed that he had published extensively in that regard, including papers and books, and that he works widely with the national and international dairy sector. He advised owing to his background, that he was requested by the Respondent to answer the question posed by it.

16. Under examination in chief, [redacted] advised the Respondent's Counsel:

16.1. The Report reproduced at sub-paragraph 12.12 was his Report and detailed his findings.

16.2. He had a copy of the Appellant's Expert Witness's Report provided to him in advance of preparing his report. He considered the Appellant's smoothie product a beverage.

16.3. The smoothie beverage was "*identifiably derived from the presence of frozen yoghurt and would have a thicker texture I guess and have the flavour of fruit, or the combined flavour of frozen yoghurt and fruit*[3]".

16.4. When asked what is milk, the witness replied[4]:

> "*Milk… is the secretion of, well any mammal as it were, but in this case we're talking about that and in this context in terms of products it largely refers to the secretion of cows. And milk to me is the product which cows secrete, which sometimes is produced, or processed into products, which are essentially very similar to milk except with minor treatments to make them safe, like liquid milk which we would consume, which we would buy in the supermarket.*
>
> *But then milk is also the starting point for a huge range of dairy products. So while I would say that milk is a dairy product and milk is essentially the origin*

[3] Transcript, 12th May 2023 at page 93, lines 10-14.
[4] *Ibid* at page 93, lines 20-29 and page 94 at lines 1-8.

of all dairy products, the two terms are not synonymous. I think that's an important clarification that milk and dairy are not synonymous; milk is dairy but not all dairy is milk if that makes sense. "

16.5. When asked whether the Appellant's smoothie products were milk and preparations and extracts derived from milk, the witness advised that they were not milk. On the question of whether they were preparations and extracts derived from milk, he stated[5]:

"*I will take those two terms separately. I think it is not an extract derived from milk. The dairy industry, and the Irish dairy industry in particular, is very good at extracting a whole range of things from milk to make ingredients, but this does not fall under the definition of an extract from milk.*

The term 'a preparation of milk' is less scientifically defined I think it would be fair to say, but it would not, on my interpretation of the product, be a preparation of milk due to the complexity of the product, which is in question."

16.6. That he produced a flowchart [**Appendix 1]** on how frozen yoghurt is made. The witness stressed that this flowchart was not from a textbook nor prepared with express knowledge of the processes which are applied by the Appellant's then dominant supplier, [redacted], but rather by application of his knowledge and experience.

16.7. He stated that the flowchart illustrated that frozen yoghurt comprises 15 ingredients and that those ingredients (highlighted in red on his chart), are non-dairy components. He stated it was important to note, while a strange thing to say, that frozen yoghurt is not the same as yoghurt that has been frozen. He explained that if one was to take yoghurt and freeze it, one would end up with a product that does not resemble frozen yoghurt of a type used by the Appellant and his competitors in the making of smoothies. In place, the effect of freezing pure yoghurt is that one would end up with "something" which is extremely icy, just as if you were to take milk and put it into a freezer, it wouldn't resemble ice cream.

16.8. The witness explained that he based his analysis on the photograph of the tub of frozen yoghurt provided by the Appellant which he understood the Appellant used as the "frozen yoghurt ingredient" of his smoothies. He noted from the

[5] Transcript, 12th May 2023 at page 94 lines 20-29, and page 95 at lines 1-2.

manufacturer of that product, [redacted] own provided report, that they stated it was "*84.7% dairy derived*". He stated that this was a very important distinction made by [redacted] as it contradicted the Appellant's submission that more than 50% of his smoothie product contained "dairy".

16.9. He further explained that the other 15.3% of the [redacted] product was largely sugar and other non-dairy ingredients or purely sugar. He stated that sugar was a necessary component in frozen yoghurt at it stopped the product from freezing into an unusable solid block in much the same way as grit on an icy road turns the ice into slush.

16.10. With reference to the "dairy derived" statement, he referred back to his provided flowchart and explained that while milk is an ingredient in frozen yoghurt, it undergoes a huge number of steps and additions to the extent that the "highly engineered end product" (the frozen yoghurt) only contains a small portion of milk. The witness further explained that when this frozen yoghurt was added to the other various ingredients depending upon the specific smoothie flavour ordered, that the end product contained a small concentration of milk to the extent that he agreed that smoothies were "dairy based" but that he did not agree they were "milk based".

16.11. Under cross examination by the Appellant Director, the witness stated:

16.11.1. The Appellant's product had its origins in milk and as such was a dairy product.

16.11.2. The term "preparation from milk" does not have a scientific definition.

16.11.3. Skimmed milk was considered "milk".

16.11.4. That the frozen yoghurt used by the Appellant contained skimmed milk.

16.11.5. That yoghurt is not milk but rather a transformed version of milk because of the process of fermentation it has gone through.

16.11.6. That the Appellant was not selling (with reference to the smoothies) a fruit product but rather a product that contained fruit.

Submissions

Appellant

17. The Appellant stated it was not disputing the applicable VAT rate on the fruit and vegetable drinks it sold (see the Appellant's drink menu in Appendix 1A at sub-paragraph 12.5.1 above) and that it had subjected those drinks to VAT at the standard rate.

18. However, the Appellant submitted that the Respondent had erred in its interpretation of VAT rules when it treated the fruit and yoghurt smoothies (see the Appellant's Appendix 1B at sub-paragraph 12.5.2 above) as being liable to the standard rate of VAT, rather than the zero rate of VAT it had applied to those sales.

19. The Appellant submitted that its fruit and yoghurt based smoothies (hereinafter "smoothies") were a drink and were primarily made of frozen yoghurt. The Appellant stated that it had invited two of the Respondent's staff to visit the Appellant's kiosk which they did. Upon attendance, the Appellant stated that they requested one of the Appellant's staff to make a "blueberry burst" smoothie and after observing the process of how the smoothie was made, they consumed it before agreeing that it consisted of more than 65% yoghurt content.

20. The Appellant submitted from the supplied letter from [redacted], it was evident that the frozen yoghurt it used in the making of its smoothies was made of yoghurt and that the dairy content of that product was 84.7%. The Appellant further submitted that it was also evident from his expert report prepared by [redacted] that its smoothies were made with 65% frozen yoghurt and 35% fruit juices and that the milk derived content of the smoothies was 55%.

21. The Appellant stated that it was aware that once a smoothie was made primarily of yoghurt or milk, then it was liable for VAT at the zero rate. The Appellant explained that it had difficulty in locating that information as it was removed from the Respondent's website but that it had successfully obtained the information following a Freedom of Information ("FOI") request.

22. The Appellant stated that the information obtained under the FOI request consisted of two key pieces of information. The first one of these is the extract from the Respondent's VAT rate database (see sub-paragraph 12.1 above) which stated "…*if it can verifiably demonstrated that more than 50% of the volume consists of milk or yoghurt, then zero rate applies."* The Appellant submitted as its smoothies were primarily made from frozen

yoghurt and had a milk derived content of 55%, then this confirmed its view that more than 50% of the volume of its smoothies consisted of milk or yoghurt.

23. The Appellant submitted that the email exchange between the Respondent's staff members (see sub-paragraph 12.3 above) in which it stated "…*the supply of the Smoothie in question which contains 65% yoghurt whether frozen or not is correctly liable to VAT at 21 per cent.."* was evidence that the Respondent itself was unsure of the VAT treatment of smoothies and that it had erred in its interpretation of the law. The Appellant further submitted that this position established the Respondent's "newfound intent" to subject smoothies to the standard rate of VAT without any legal foundation.

24. The Appellant submitted it was common knowledge from the provided extract obtained from the Irish Independent (see sub-paragraph 12.2 above), that where more than 50% of a drink comprised milk or yoghurt then it was liable to the zero rate of VAT. The Appellant submitted despite this position, the Respondent was insistent that smoothies were liable to VAT at the standard rate.

25. The Appellant submitted, despite no relevant changes to the governing legislation, the Respondent was firm in its belief that smoothies were liable to VAT at the standard rate and despite numerous letters from the Appellant's advisors over the years to the contrary, the Respondent's position remained unaltered.

26. The Appellant stated it was aware that the application of the zero rate of VAT was an exception to the general rule that standard VAT rating applies and under the terms of European Union ("EU") legislation that a defined list of goods and services liable to VAT at the zero rate existed. The Appellant further stated that it was further aware that this "list" could not be added to and hence, if a product or service was not on the "list", then it could not be added at a later stage.

27. In this regard, the Appellant referred the Commission to a Dáil discussion on the matter (see sub-paragraph 12.10 above which states that "*it is not possible to apply the zero rate to any new food and drink items that have not already applied the zero rate").* The Appellant stated that it was not requesting the Commission to "add a new item" to the "zero rate list" but in place was requesting that the zero rate which applied to similar type products, already in existence, be extended to it.

28. The Appellant stated that it had studied the evolution of yoghurt and that its origins began in the Middle East where it was blended predominately with fruit, before being made commercially available in America, owing to the advance in electrical goods which were desirable for its manufacture. The Appellant displayed a number of commercially

available yoghurt drinks and stated that one of them, sold by Yoplait under the brand name “Yop” had been made available to the Irish market since the 1970’s. Hence, the Appellant submitted that it was not looking for its smoothie to be added to the “VAT zero rate list” but rather treated in an identical manner for VAT purposes, to products such as Yop, which it submitted qualified for zero rating.

29. The Appellant stated that the main ingredient in its smoothies was frozen yoghurt but that the process of manufacture of that drink required the frozen yoghurt to be thawed into yoghurt format since it would not be consumable in its frozen state. The Appellant submitted that as its smoothies consisted of thawed frozen yoghurt, that it was therefore a yoghurt drink and as such, was eligible for the same VAT treatment as that of other yoghurt drinks.

30. In conclusion, the Appellant submitted that as its smoothie product consisted of more than 50% milk or yoghurt content, in line with similar products, its product should be eligible for the zero rate on its sale of smoothie products. In those circumstances, the Appellant submitted that the Commission should allow its appeal and find that the issued Notices of Assessment to VAT be reduced to nil.

Respondent

31. The Respondent submitted while the assessments under appeal concerned the appropriate rate of VAT chargeable on smoothies and milkshakes, that the Appellant had adduced no evidence and made no submissions to the Commission regarding the latter.

32. As such, the Respondent submitted in accordance with Part E (1) of the Food and Drink table in paragraph 8 of the Second Schedule, VATCA 2010 that the appropriate rate of VAT on the sale of milkshakes was the standard rate and the Commission should uphold the portion of the raised assessments in respect of those sales, in particular as those milkshakes were blended with confectionary items such as mars bars and smarties.

33. Turning to the smoothie product, the Respondent noted that Article 110 of Directive 2006/112/EC ("the Recast VAT Directive") provides that Member States which, at 1 January 1991, were granted exemptions from the default position (that standard rating applies to goods and services) were only granted those exemptions for clearly defined social reasons and for the benefit of the final consumer.

34. The Respondent submitted, in line with the Court of Justice of the European Union (“CJEU”) judgments in cases such as C-346/95 *Blasi v Finanzamt Munchen* at paragraph 18 of that judgment, that in interpreting the meaning or scope of such an exemption, or

derogation, the CJEU has consistently held that that terms used to specify the exemptions are to be interpreted strictly.

35. Furthermore, the Respondent submitted that Member States are not permitted, under Article 110 of the Recast VAT Directive, to introduce new derogations or extend the scope of the derogations existing as at 1st January 1991.

36. As such, the Respondent submitted that unless the Appellant's smoothie product was specifically included in the list of derogations as at 1st January 1991, then it was incumbent on the Commission to refuse the Appellant's appeal.

37. The Respondent noted that those derogations were essentially codified into Irish law under the VATCA 2010. The Respondent opened Part 2 of Schedule 2 VATCA 2010 which lists supplies that are taxable at the zero rate and includes the following relevant provisions:

    "Food and drink …

    8 (1) a *supply of food and drink used for human consumption, other than*

    - ... *(c) supplies specified in column (1) of Part E or F of [Table 1]."*

38. The Respondent proceeded to open the referred to "Part E of Table 1" and advised that this comprises two columns. The first of these columns, Counsel explained comprises a list of items not eligible for zero rating which include:

    "Drinking water, juice extracted from, and other drinkable products derived from, fruit or vegetables, and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages;…"

39. Counsel continued that Column (2) of Part E of Table 1 lists, in the included list of items which are entitled to avail of the zero rate, the following:

    "…Milk and preparations and extracts derived from milk…"

40. Counsel submitted, in interpreting the above provisions under the strict approach advocated by the CJEU, the net issue to be considered in the Appellant's appeal is whether the Appellant's smoothie products can be considered milk or whether they are preparations and extracts derived from milk.

41. The Respondent stated, to the best of its knowledge, that issue has not been considered by the Irish or UK Tribunals or Courts and as such was a novel consideration for the Commission.

42. That aside, the Respondent submitted that it might be of assistance to the Commission to note that the UK First-Tier Tribunal ("FTT") held in *Innocent Limited v The Commissioners for Her Majesty's Revenue and Customs* UK FTT 516 (TC) (First Tier Tribunal TC 00771) that a smoothie is to be regarded as a beverage. In coming to that finding, the Respondent stated that the FTT held that the word "beverage" was to be interpreted in giving the words used in the statute their "ordinary meaning". Counsel continued that further proposition that a smoothie was a drink was detailed in *Bioconcepts Limited Vat and Duties Tribunal Decision* 11287 in which Sir Stephen Oliver considered the meaning of "beverage" in the following terms:

    "*It seems to us that notwithstanding the Oxford English Dictionary of "beverage" meaning drink, it is not used in the sense of meaning of drinkable liquids. Its meaning in ordinary usage covers drinks or "liquors" that are commonly consumed. This is the primary meaning in the Oxford English Dictionary. Liquids that are commonly consumed are those that are characteristically taken to increase bodily liquid levels, to sate the thirst, to fortify, or to give pleasure. That meaning covers the liquids recognised [by Counsel] as beverages (e.g. alcoholic liquids, tea, coffee, cocoa, chocolate, and soft drinks and meat based preparations)*."

43. The Respondent submitted that further authority existed for the Commission to use the "ordinary meaning" of words in considering whether the Appellant's smoothie product was milk or a preparation and extract derived from milk. This authority derived from the UK case of *Ferrero UK Limited* [1997] STC 881 where the Court of Appeal held that, on the question of whether wafers were to be regarded as biscuits for the purposes of zero rating, "*the words in the statute must be given their ordinary meaning. What is relevant is the view of the ordinary reasonable man in the street*."

44. The Respondent submitted its position was that smoothies were not to be considered milk or a preparation or extract derived from milk. In coming to that position, the Respondent stated while the Appellant submitted that there was a "wholesale exemption for dairy products", and as his product was a dairy product then it was entitled to the benefit of zero rating, that was not the position. The Respondent submitted for this proposition to hold that all dairy products, which include ice cream and frozen yoghurt which are taxable at the standard rate, would be taxable at the zero rate.

45. The Respondent submitted that the provided exemption is for milk products and as its expert and his provided chart, which detailed the manufacture of frozen yoghurt, showed that the Appellant's smoothie product was very far removed from milk and as it does not

look nor taste like milk, then it failed to fulfil the conditions necessary to qualify for VAT exemption.

46. The Respondent further submitted that while the onus of proof is on the Appellant to prove its appeal, that it had failed on a balance of probabilities to discharge this burden. In this regard, the Respondent submitted that the failure of the Appellant to provide a verifiable composition of its smoothie ingredients or to produce the author of its relied on Expert Report were decisive factors for the Commission to consider.

47. In conclusion, the Respondent submitted that the Appellant had not satisfied the required burden of proof to establish that its smoothie product was eligible for inclusion on the list of products eligible for the zero rate of VAT and as such the portion of its raised VAT assessments referable to smoothie products sold by the Appellant should be upheld. In addition, as the Appellant failed to produce any evidence that its milkshake product was similarly eligible for inclusion at the zero rate of VAT, the Respondent submitted that the Appellant's appeal should be refused by the Commission.

Material Facts

48. The Commissioner finds the following material facts:

    48.1. The Appellant operated its business from a kiosk in a shopping centre. The Appellant's business activities consisted primarily of the retail sale on a take-away basis of juices, milkshakes and frozen yoghurt based products known as "smoothies" (hereinafter "smoothie products").

    48.2. The Appellant ceased its business activities in [redacted]

    48.3. On the sale of its products, the Appellant charged the standard rate of VAT on its juice base products and the zero rate of VAT on its milkshake and smoothie products.

    48.4. No evidence or submissions were presented to the Commission regarding the Appellant's milkshake products.

    48.5. The Commission were not presented with samples of the Appellant's smoothie products which illustrated their ingredients nor any scientific or other evidence which accurately detailed their composition.

    48.6. In place, the Commission were presented with two menus which detailed the names of the Appellant's products. The Appellant's provided menu at "1B" (see

sub-paragraph 12.5.2 above) contained a list of its smoothie products which detailed the contents of the various smoothies.

48.7. The smoothie products contained both fruit and frozen yoghurt.

48.8. The frozen yoghurt predominately used by the Appellant in the making of its smoothie product was supplied to it by an entity called "[redacted]".

48.9. The Commission were provided with an email from a representative of [redacted] which stated that the frozen yoghurt product supplied to the Appellant contained dairy content of 84.7%.

48.10. The Respondent's Expert Witness obtained further information from [redacted] which stated that the 84.7% dairy content detailed above at paragraph 48.9 consisted of skimmed milk, low fat yoghurt and skimmed milk powder.

48.11. No information was made available to the Commission which detailed how [redacted] percentile of 84.7% dairy content was derived nor was any information made available to the Commission which detailed the percentage of milk contained in either [redacted] product nor the Appellant's smoothie product.

48.12. The Commission was presented with an email from [redacted] This email stated based upon a provided recipe (which was not provided to the Commission) that the percentage of milk derived content in the Appellant's "dairy" smoothie product was 55%.

48.13. That email contained an error as it referred to the note in the [redacted] email as stating "the milk based content of yoghurt is 84.7%..." when it should have stated "the dairy based content of yoghurt is 84.7%..."

48.14. A "milk product" in scientific terms is different to a "dairy product".

48.15. The term "milk based product" is not scientifically defined.

48.16. A "milk based product" is taken as meaning any product which has its origins from milk.

48.17. Frozen yoghurt is different to yoghurt which has been frozen.

48.18. The manufacturing process in the production of frozen yoghurt is complex and includes the amalgamation of 15 non-dairy ingredients.

48.19. When produced, frozen yoghurt only contains an unquantified, but small portion, of milk.

48.20. The Appellant served its smoothie product in a cup with a lid and a straw.

48.21. The Appellant's smoothie product typically retailed for a price of €3.99.

48.22. The smoothie product is a food or drink of a type fit for human consumption.

Analysis

49. The appropriate starting point for analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in *Menolly Homes v The Appeal Commissioners & Anor* [2010] IEHC 49 ("*Menolly Homes")* where Charleton J held at paragraph 22:-

> "*The burden of proof in this appeal process is … on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable*."

50. This burden of proof was reiterated in the recent High Court case of *O'Sullivan v Revenue Commissioners* [2021] IEHC 118, ("*O'Sullivan*") where Sanfey J. held at paragraph 90:

> "*…The burden of proof is on the taxpayer to prove his case, and for good reason. Knowledge of the facts relevant to the assessment, and retention of appropriate documentation to corroborate the taxpayer's position, are solely matters for the taxpayer. The appellant knew, from the moment he submitted his return, that it could be challenged by Revenue and he would have to justify his position...*"

51. This appeal presented to the Commission as to whether the Appellant's milkshake products and smoothie products are included within the provisions of Part E (1) (b) of Table 1 of paragraph 8 of Schedule 2 to the VATCA 2010, and as such qualified for the zero rate of VAT on their sale.

52. As no evidence or submissions were presented to the Commission in relation to the Appellant's milkshake product, presumably owing to their high confectionery content, it follows that the Commissioner is required to uphold the portion of the Respondent's assessments referable to the VAT charged at the standard rate on the Appellant's sale of milkshake products.

53. Turning to the smoothie product, the Commissioner notes from the Appellant's submissions the purported entitlement to zero rating appears to be based on the narrative that was contained in the Respondent's VAT rates database (see above at paragraph 12.1 which states – "*if it can verifiably demonstrated that more than 50% of the volume [of the smoothie] consists of milk or yoghurt, then zero rate applies.*")

54. Under cross examination by the Respondent's Counsel, the Appellant acknowledged that the "50% volume" test was a concession[6] operated by the Respondent and as such did not have legislative force. This is confirmed in the Respondent's overview of the VAT rates database which states[7]:

> "*…The VAT treatment indicated in the VAT rates database is based on current practice. The information is updated regularly and may change, depending on revised practice. Do not view it as a statement of law or as a substitute for consulting the legislation.*
>
> *The Value-Added Tax Consolidation Act 2010 contains the legislation governing the VAT rating of goods and services.*"

55. The functions of an Appeal Commissioner are set out in section 6(2) of the Finance (Tax Appeals) Act 2015 and as the functions are confined to those provided under the Taxation Acts, it follows that the Commissioner is unable to consider concessions in adjudicating upon an appeal (as those concessions are not set out under the Taxation Acts) and in place must base his findings on the statutory provisions contained in the relevant Taxation Act.

56. In turning to the relevant statutory provisions, which are contained in Part E (1) (b) of Table 1 of paragraph 8 of Schedule 2 to the VATCA 2010, the Commissioner notes there is nothing therein to support the Appellant's submissions. In place, as noted, the Commissioner is required to consider the relevant provisions of the VATCA 2010.

57. The rules for statutory interpretation are set out in the judgment of McDonald J. in *Perrigo Pharma International DAC v John McNamara, the Revenue Commissioners and ors.* [2020] IEHC 552 ("*Perrigo*") where he summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

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[6] The provided narrative at 12.1 above was subsequently altered by the Respondent to read (under milk and milk based products) –"*As a concession, Revenue allow milk-based drinks to be zero rated provided it is a preparation derived from milk where the milk element itself represents more than 50% of the volume*."

[7] https://www.revenue.ie/en/vat/vat-rates/search-vat-rates/index.aspx

"*The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*

(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766: "Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under

consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible."

58. The Commissioner notes that the "special provisions" as provided under Article 110 of the Recast VAT Directive, which entitle certain goods and services to qualify for zero rating are fully transposed into Part E (1) (b) of Table 1 of paragraph 8 of Schedule 2 to the VATCA 2010, and as such conducts his analysis and reaches his findings based upon the provisions of the VATCA 2010.

59. Section 46 (1) of that Act sets out the "default position" which is that VAT is chargeable on all goods and services supplied within the State at the standard rate of VAT. Subsection (b) of that sub-section provides an entitlement for certain goods and services to be eligible for the zero rate of VAT "*in the circumstances specified in paragraphs 1(1) to (3), 3(1) and (3) and 7(1) to (4) and (6) of Schedule 2 or of goods or services of a kind specified in the other paragraphs of that Schedule…*"

60. As noted, the relevant exemption which the Appellant seeks to rely upon is contained in Part E (1) (b) of Table 1 of paragraph 8 of Schedule 2 to the VATCA 2010.

61. As that table applies to "Food and Drink", it follows for the Appellant's smoothie product to be eligible for inclusion, it must be considered to be either a food or a drink. The Commissioner notes from the Appellant Director's own evidence that he referred to the smoothie as a drink. In considering those comments and in noting that the smoothie product was served in a cup with a lid and a straw, the Commissioner finds that he does not need to consider the rules of statutory interpretation in establishing whether the Appellant's smoothie product is a "drink" and hence finds that the smoothie products of a type sold by the Appellant are properly considered a drink and, as such, are included within the specified Table 1.

62. The Commissioner further notes the specific exemption that the Appellant seeks to rely on under the specified Table 1 is whether its smoothie drink is considered under Part E, section 2 (c) of that table to be "milk" or "preparations and extracts derived from milk".

63. Based on the presented evidence, that the Appellant's smoothie drink contained fruits and frozen yoghurt, and having regard to the Respondent's Expert's Witness's definition of milk (the "secretion of cows" in this context), the Commissioner finds it is evident that the Appellant's smoothie drink is not "milk".

64. In considering whether the Appellant's smoothie drink is "*preparations and extracts derived from milk*", in accordance with the principles in *Perrigo*, the Commissioner is firstly required to give those words their ordinary, basic and natural meaning.

65. The Cambridge English Dictionary defines the word "preparations[8]" as "*a mixture of substances, often for use as a medicine*". It further defines "extracts[9]" as "*to remove or take out something*" and "derived" as "*coming from or caused by something else*[10]".

66. In taking the combined meaning of those words, in the instant context, it equates to an ordinary, basic and natural meaning as "a mixture of substances and something removed from milk". While the Appellant's smoothie drink originates from milk and contains an element of milk within it, the Commissioner does not consider it to be a "preparation and extract derived from milk".

67. In coming to that finding the Commissioner referred to Table 1, Part 1 of paragraph 8 of Schedule 2 to the VATCA 2010. This lists those items of food and drink not eligible for zero rating and includes "…syrups, concentrates, essences, powders, crystals and other products for the preparation of beverages". Thus, while the Appellant's smoothie drink contains an element of milk in it, as that element is contained within the frozen yoghurt ingredient of the final product (the smoothie), the milk component of the smoothie originates from a product used for the preparation of the smoothie, and not the smoothie itself, and by definition is ineligible for entitlement to zero rating.

68. The Commissioner is reassured of this finding in considering the position that other products which originate from milk or contain elements of milk within them, such as frozen yoghurt, milk chocolate and ice cream, are standard rated items. Furthermore, if the Appellant's submissions succeeded, this would lead to unworkable situations arising such

[8] https://dictionary.cambridge.org/dictionary/english/preparation
[9] https://dictionary.cambridge.org/dictionary/english/extract?q=extracts
[10] https://dictionary.cambridge.org/dictictionary/english/derived

as black coffee being liable to VAT and white coffee being exempt from VAT (as it contains an element of milk in it).

69. If the Commissioner is incorrect or unclear in his analysis, the Commissioner is further reassured of his finding in applying a "purposive interpretation" as promulgated in *Perrigo* in discerning the meaning of "*preparations and extracts derived from milk*".

70. In applying a purposive interpretation, the Commissioner is required to consider the purpose of why certain goods and services are eligible for zero rating. The Commissioner is assisted in this regard by Directive 2006/112 EC ("the Directive) which states that exemptions and reduced rates (of VAT) "*must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer."*

71. In interpreting the latter, the Commissioner is further assisted by *Bookfinders Ltd. v Revenue Commissioners* [2020] IESC 60 ("*Bookfinders*"). In *Bookfinders*, the Appellant who trades as a "Subway" franchise made an unsuccessful claim to the Respondent for a VAT repayment. A dispute arose which concerned whether tea and coffee, served hot, was liable to VAT at the zero or 13.5% rate and whether Subway's bread qualified as "bread" for zero-rating purposes. The case commenced in the Commission and progressed to the Supreme Court who gave its judgment on 29th September 2020.

72. Within that judgment, the then, Mr Justice O'Donnell delivering the majority verdict on behalf of the Supreme Court, stated:

> "*64. In this regard, it is also useful to look at the provisions in a slightly broader context. It seems clear that the objective of the Second Schedule in this regard is to provide that certain staples are to be included at the 0% rate. The object of the Sixth Schedule is, it appears, to apply a reduced rate in certain cases, most obviously, in this context, the supply of hot food and beverages. It is permissible to take into account the consequences of inclusion of an item in each Schedule, and also to have regard to what other items are clearly included in each Schedule in order to gain some understanding of the likely scope and objective of the respective Schedules. One would not, for example, expect luxury goods to be included in the Second Schedule and thus be zero-rated, and any interpretation leading to that conclusion is one that would require close scrutiny before it was accepted.*
>
> *65. The Second Schedule to the Act is particularly complex. While the end position is either the inclusion or exclusion of certain items, it is perhaps best approached sequentially. At the outset, included in the Second Schedule, and therefore in the 0%*

rate, is the broad category of "food and drink of a kind used for human consumption". These are general words apt to capture all food and drink, subject only to the qualification that it must be of a kind used for human consumption.

66. From this class of goods, however, there is then subtracted, or excluded, certain specified items, with the consequence that they fall to be rated at the general VAT rate, unless either specifically exempted, or included, in the Schedule containing items to be rated at the intermediate rate. There is no doubt that beverages of a type chargeable with any excise duty are so excluded, (because subpara. (a) says so in terms) and even within the somewhat rarefied and artificial world of taxation, there is an obvious logic to that conclusion. Subparagraph (b) also excludes a category of "other beverages" defined as including "mineral waters, syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages". It follows that the class of beverage thus excluded from the Second Schedule (and, therefore, the 0% rate) is quite broad.

67. However, from that class, there is in turn excluded a further category with the effect that the matters contained within the subparas. (I) – (IV) remain within the Second Schedule and the general category of "food and drink of a kind used for human consumption", and entitled to the 0% rate. The logic of this provision becomes more apparent both from the items included in these subparagraphs (and thus retaining the 0% rate), which are items such as tea, coffee, cocoa, milk and preparations or extracts of meat or eggs, for example, and when compared with the extensive exclusions contained from subparas. (c) – (e) of para. (xii), and which do not get the benefit of the 0% rate. Items excluded by these subparagraphs range from ice cream to chocolate, pastries, potato crisps, popcorn and including roasted nuts. Apart from the fact that a clear distinction is made by the Act, the logic of the distinction appears to attempt to distinguish between food and drink items which can be described as staples, and therefore appropriate for the 0% rate, and those which are more discretionary indulgences.

81. In the broader context of the approach to statutory interpretation, it is useful to note that, while this conclusion can be reached by a close reading of the words alone, and without foreknowledge, the interpretation is consistent with both the structure and purpose of the Act, insofar as it can be discerned. Conversely, the interpretation advanced by Bookfinders would seem to make little sense. The effect of the Second Schedule is to provide that a wide range of food and drink, broadly speaking staples, will be subject to the 0% rate. The effect of the exclusion of the large number of

products identified in the Second Schedule from the category of food and drink covered by the Second Schedule is that they would remain taxable at the standard rate…"

73. In applying a purposive interpretation, as to whether the Appellant's smoothie drink is included within the specified Second Schedule, and in having regard to the Directive and *Bookfinders,* it follows that its inclusion can only be warranted if a number of conditions are fulfilled.

74. The Commissioner notes from paragraph 64 of *Bookfinders*, that the exclusion of beverages from the Second Schedule is quite broad and that certain "staples" are only included therein. That paragraph concludes that luxury goods or "discretionary indulgences", as they are later referred to in that judgment (at paragraph 67), are unlikely to be included within the classification of products eligible for zero rating.

75. The Commissioner further notes from paragraph 67 that ice cream and chocolate, while originating from milk and containing an element of milk, are similarly excluded from zero rating.

76. By virtue of the foregoing and the Appellant's price point for its product (€3.99 in 2019), the Commissioner finds the Appellant's smoothie drink to be more of a "discretionary indulgence" than part of a person's "staple diet". Furthermore, as the Commissioner can see no justification "for social reasons which would benefit the final consumer" that would warrant the Appellant's smoothie drinks being liable to VAT at the zero rate, the Commissioner finds that the Appellant's smoothie products are not included within the provided exemptions.

77. The effect of exclusion of the Appellant's smoothie product from the category of food and drink covered by the Second Schedule, as noted in paragraph 81 of *Bookfinders*, is that it is liable to VAT at the standard rate.

78. As the Respondent based its calculations on the Appellant's milkshakes and smoothie being liable to VAT at the standard rate, and having examined those calculations, the Commissioner is required to uphold those Respondent's assessment in their entirety. Therefore the Commissioner finds that the Respondent's Notices of Assessment dated 13th December 2017 for the periods 1st November 2013 to 30th June 2016 in the sum of €60,369 are upheld.

79. As noted, the burden of proof lies with the Appellant. As confirmed in *Menolly Homes*, "*the burden of proof …is on the taxpayer"*. As confirmed in that case by Charleton J at paragraph 22:-

"*This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the tax is not payable.*"

80. The burden of proof has not been discharged to satisfy the Commissioner that the taxation liabilities sought by the Respondent are not due.

Determination

81. As such and for the reasons set out above, the Commissioner determines that the Appellant has not succeeded in showing that the tax is not payable.

82. Therefore, the Notice of Assessments dated 13th December 2017, in the sum of €60,369 for the periods 1st November 2013 to 30th June 2016 are upheld.

83. The Commissioner appreciates that the Appellant will be disappointed with this determination but it was correct to seek legal clarity on its appeal.

84. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular section 949AK TCA 1997. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ (6) of the TCA 1997.

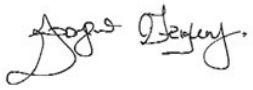
Notification

85. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ (5) and section 949AJ (6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ (6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication only (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

86. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The

Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

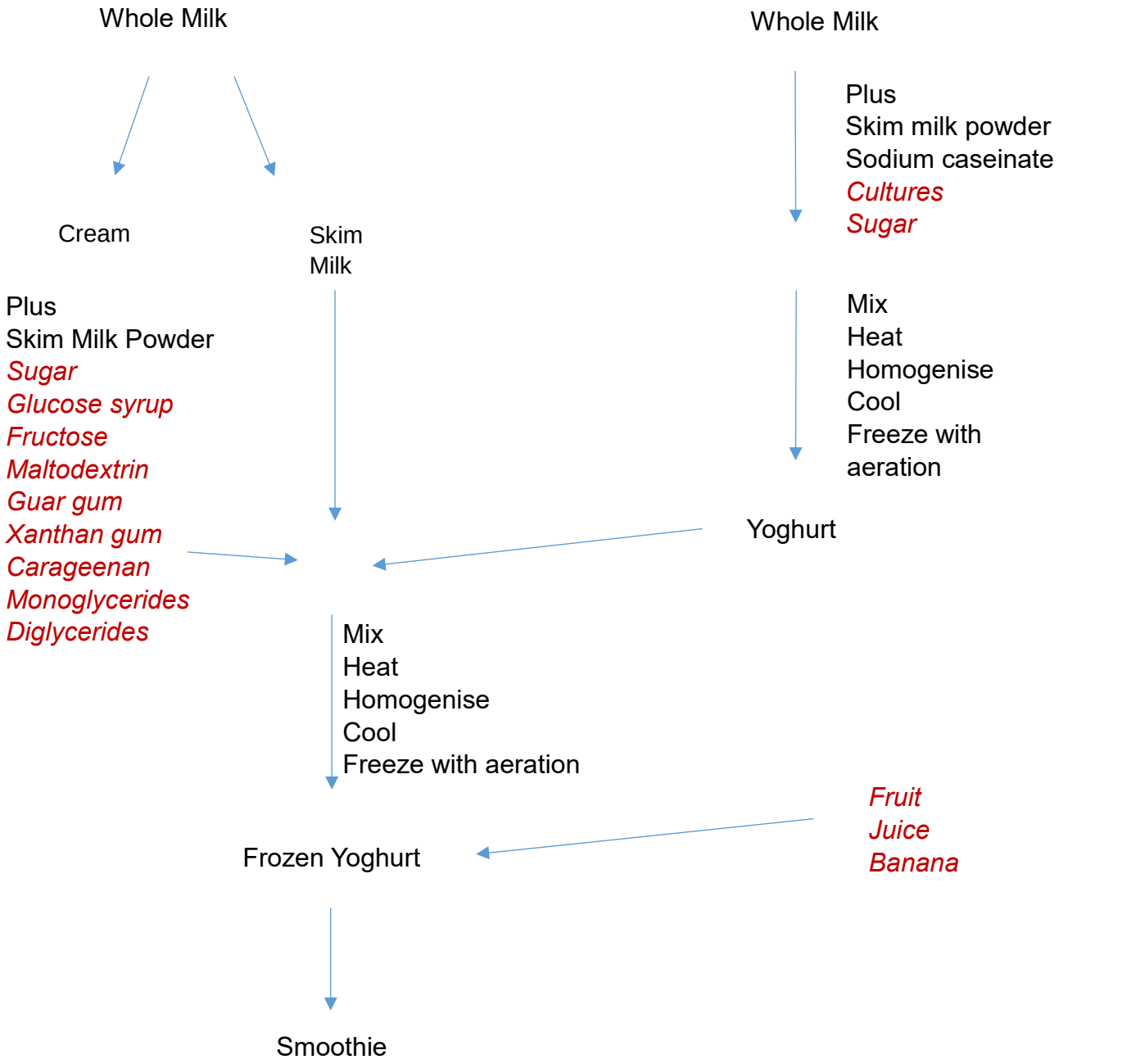


Andrew Feighery

Appeal Commissioner

3rd November 2023

Appendix 1



Key – Red – Non-dairy component

Appendix 2 – Legislation

Directive 2006/112/EC – Value Added Tax Directive (VAT) – (as at January 2013)

Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates.

The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer.

Value Added Tax Consolidation Act 2010 (as at January 2013 to January 2016)

Schedule 2, Part 2, Supplies within the State

Section 46

This Part sets out special provisions as provided by Article 109 of the VAT Directive.

Food and drink.

(8) (1) A supply of food and drink of a kind used for human consumption, other than –

(a) a supply to which paragraph 3(3) of Schedule 3 relates,

(b) supplies specified in Part A, B, C or D of Table 1 to this paragraph, and

(c) supplies specified in column (1) of Part E or F of that table.

Table 1 Food and Drink

…

Part E

(1)	(2)
Any of the following items not being items specified in column (2) of this Part:	
(a) drinking water, juice extracted from, and other drinkable products derived from, fruit or vegetables, and syrups, concentrates, essences, powders,	(a) Tea and preparations derived from tea when

crystals or other products for the preparation of beverages; (b) beverages other than those specified in Part A or B.	supplied in non-drinkable form. (b) Cocoa, coffee and chicory and other roasted coffee substitutes, and preparations and extracts derived from any of them, when supplied in non-drinkable form. (c) Milk and preparations and extracts derived from milk. (d) Preparations and extracts derived from meat, yeast or eggs.

Treaty on the Functioning of the European Union

Article 110

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.