Indirect Tax Case Alert

Court of Appeal fails to decide whether giant marshmallows are standard rated confectionery or zero-rated food [2025] EWCA Civ 293

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We've all heard the one about how many lawyers does it take to change a lightbulb?

Well, how about how many lawyers does it take decide on the VAT treatment of a big marshmallow?

By our reckoning we're up to at least ten so far, but we're no closer to a definitive answer.

The Cout of Appeal is the third court to consider the VAT treatment of Innovative Bites' "mega marshmallows", and despite making some interesting observations, hasn't given any hints on the actual VAT treatment. Instead, the matter has been remitted back to the First-tier Tribunal for it to have another attempt at finding the elusive answer.

There's a problem: if either party doesn't approve of the next decision of the First-tier Tribunal, there's potential for a further appeal to the Upper Tribunal. That decision could be appealed to the Court of Appeal, again.

Eventually, Innovative Bites, other marshmallow manufacturers and retailers, and much of the rest of the food industry are going to need some certainty – not just on the VAT treatment of marshmallows, but the interpretation of "Note 5" as well.

The VAT Act 1994 isn't the most exciting read, but it contains all sorts of hidden intricacies for those inclined (or required) to read it anyway.

Schedule 8, Group 1, Note 5 of the VAT Act includes the following:

> (5) …"confectionery" includes chocolates, sweets and biscuits; drained, glacé or crystallised fruits; and any item of sweetened prepared food which is normally eaten with the fingers.

The stated purpose of Note 5 was to ensure cereal bars were subject to VAT at the standard rate. Unfortunately, the wording of Note 5 didn't mention this intention, or cereal bars at all for that matter – this means HMRC, taxpayers and the court system have spent many years trying to interpret Note 5.

Often notes added to the legislation are for clarification purposes, ie to stop or avoid any uncertainty. But other clarifications within the legislation are considered deeming provisions, and these have the potential to expand the scope of the legislation beyond the wording that existed before the note was introduced.

The Court of Appeal in Innovative Bites hasn't opined on whether Note 5 is a deeming provision but instead has taken the view that the words must be taken at face value, unless that result leads to absurdity.

The judgment concludes that all items of sweetened prepared food normally eaten with the fingers should be standard rated as confectionery – with the one caveat that absurdity should be avoided. The example of absurdity given was sweet chilli chicken skewers: they are clearly sweetened food, and probably normally eaten with the fingers, but to tax them as confectionery would be absurd.

On first reading, this could be seen as providing more certainty for taxpayers, but dig a little deeper and it looks like uncertainty continues to reign supreme, it's just that the goalposts have moved:

- We still have the question mark over what 'normally' means: is it that more than 50% of consumers would eat the product with their fingers? Is a lower proportion still 'normal'? Or does it just need to be 'not abnormal' to consume the product using fingers? All these questions will be looked at if and when the case goes back before the First-tier Tribunal.
- What is the benchmark for absurdity?
- Who polices absurdity?
- Ever since the infamous/famous/ jaffa cakes case, a key method for ascertaining whether a product is confectionery or not has been the 'multi factorial assessment'. This judgment could be seen as removing this entirely – is this progress, or is this wiping out 30+ years of case law and HMRC rulings that have been based on multi factorial assessments?

As ever with VAT, a decision from a court is often just the start of more questions and further litigation.

The next steps could be a further hearing at the First-tier Tribunal or even an appeal to the Supreme Court if the Court of Appeal's decision to send the case back to the FTT is wrong.

One day, we will know the VAT treatment of marshmallows, but it isn't today. With spring in the air and the barbeque season not far away the big question for the typical consumer must be whether they should eat their giant roasted marshmallows with their fingers, or straight from a stick.

And if you sell any food products that are sweetened and eaten with the fingers, but that you treat as zero-rated – it would be worth a conversation with us to see if there's any risk that your products could be argued to be confectionery

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