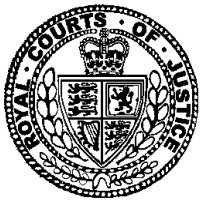

Neutral Citation Number: [2025] EWCA Civ 293

Case No: CA-2024-001418

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Upper Tribunal Judge Phyllis Ramshaw and Upper Tribunal Judge Nicholas Aleksander
[2024] UKUT 00095 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2025

Before:

LORD JUSTICE NEWEY
LORD JUSTICE MALES
and
LORD JUSTICE NUGEE

- -

Between:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and -	
INNOVATIVE BITES LIMITED	**Respondent**
- and -	
DUELFUEL NUTRITION LIMITED	**Intervener**

- -
- -

Howard Watkinson and Charlotte Brown (instructed by **The General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellants**
Tim Brown and Stephen Morse (instructed by **Jurit LLP**) for the **Respondent**
Max Schofield (instructed by **Dallas & Co Solicitors**) for the **Intervener** (written submissions only)

Hearing date: 11 March 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This case is concerned with whether a food product called "Mega Marshmallows", which is sold by the respondent, Innovative Bites Limited, is zero-rated under schedule 8 to the Value Added Tax Act 1994 ("VATA 1994"). The question turns on whether "Mega Marshmallows" are "confectionery" within the meaning of the schedule. The First-tier Tribunal ("the FTT") (Tribunal Judge Jonathan Cannan and Mr Michael Bell) held that they are not and, hence, are zero-rated as "Food of a kind for human consumption", and the Upper Tribunal (Upper Tribunal Judge Phyllis Ramshaw and Upper Tribunal Judge Nicholas Aleksander) dismissed an appeal by HM Revenue and Customs ("HMRC"). HMRC now, however, challenge the Upper Tribunal's decision in this Court.

Basic facts

2. This section of this judgment is largely derived from the decision of the FTT.

3. As their name suggests, "Mega Marshmallows" are larger than normal marshmallows and, as a result, are "more easily and more effectively roasted on a skewer over an open fire or flame": see paragraph 19 of the FTT's decision ([2022] UKFTT 00352 (TC)). The packaging in which the product was sold during the period relevant to these proceedings (viz. June 2015 to June 2019) varied somewhat. Up to March 2017, however, the packaging had the words "Mega Marshmallows" in large type and stated that they were "perfect for roasting, s'mores or just snacking". Underneath those words, there were representations of a marshmallow being roasted over a fire, of a s'more (i.e. a traditional American campfire treat consisting of a roasted marshmallow and a layer of chocolate between two digestive biscuits) and of a marshmallow with a bite taken out of it (to represent snacking). The same representations were repeated on the reverse of the packaging next to "Instructions for Use", which read:

> "1. Stick the marshmallows on a skewer.
>
> 2. Keep the stick approx. 20 cm above the heat. Do not hold the mallows in the flames, to avoid burning.
>
> 3. Keep on turning the stick, to obtain a caramelised outer skin with a liquid, molten layer underneath.
>
> 4. Let the marshmallows cool down.
>
> 5. Enjoy your snack."

4. The reverse of the packaging included, too, this warning:

> "ATTENTION!
>
> 1. Before eating, let the marshmallows cool down.
>
> 2. Do not hold them in the fire.

> 3. When you use a non-electric heating system (e.g. grill), make sure there is always a bottle of water available, to avoid any danger."

5. Also to be found on the reverse of the packaging was this reference to s'mores:

> "DO YOU WANT S'MORE?
>
> A s'more ('some more') is a traditional campfire treat, very popular in the United States and Canada, consisting of a roasted marshmallow and a piece of chocolate sandwiched between two pieces of graham crackers (biscuits). Try some more!"

6. Later packaging was very similar. The FTT explained in paragraph 27 of its decision that the principal differences were as follows:

> "(1) In the period April 2017 to February 2019, the front of the packaging includes a picture of a chef in the style of a cartoon character holding a wooden spoon alongside the words 'Baking Buddy'.
>
> (2) In the period from March 2019 onwards, the three diagrammatical representations of how the Product might be consumed appear only on the reverse of the packaging. The representation of a marshmallow with a bite taken out also includes the words 'Snack On Me'. On the front they are replaced with a diagrammatical representation of a marshmallow on a stick including the words 'Toast Me !!' with a flame beneath. The front also includes the words 'A Great American Tradition' prominently displayed."

7. Sales of all types of mallows are higher between May and October than at other times of year, but "Mega Marshmallows" show a greater percentage increase than other mallow products. The FTT inferred that they are "more likely to be consumed in warmer months than other mallow products", probably because they are "more likely to be purchased in order to be roasted over a flame": see paragraph 31 of the FTT's decision.

8. There is no reliable evidence that "Mega Marshmallows" are marketed on the website of the respondent, which is a wholesaler, as falling within the category of "sweets, candy and chocolate": see paragraph 32 of the FTT's decision. Retailers typically sell them separately from confectionery and other types of marshmallow. They are generally displayed in the "world foods" section of supermarket aisles and, during summer months, also in barbecue sections.

9. "Mega Marshmallows" are "equally palatable whether eaten as a snack or after roasting": see paragraph 34 of the FTT's decision. However, roasting the marshmallows gives them a different texture and flavour, it is easier to roast a larger marshmallow than a regular size marshmallow and "regular marshmallows would not be as effective to make a s'more because there would not be sufficient soft inner

mallow": see paragraph 34. "If a typical consumer wanted to purchase marshmallows for consumption as a sweet snack, then it is more likely that the consumer would purchase regular marshmallows": see paragraph 35.

10. The FTT concluded in paragraph 36 of its decision:

> "Overall, we infer that consumers purchasing the Product are more likely to do so in order to roast the marshmallows over an open flame rather than consume them as a snack without roasting. We cannot say to what extent consumers might go on to use the roasted marshmallow as an ingredient in a s'more, although some consumers will do so."

11. On 15 August 2019, HMRC assessed the respondent as liable for value added tax ("VAT") in sums totalling £472,928 in respect of supplies made between 15 June 2015 and 14 June 2019 on the basis that "Mega Marshmallows" were not zero-rated. The FTT allowed the respondent's appeal from that assessment in a decision dated 21 September 2022: [2022] UKFTT 00352 (TC). The Upper Tribunal dismissed HMRC's appeal in a decision released on 8 April 2024: [2024] UKUT 00095 (TCC). It is from that decision that HMRC now appeal to this Court.

The statutory framework

12. Under section 30 of VATA 1994, a supply of goods or services is zero-rated for VAT purposes if the goods or services are of a description specified in schedule 8 to the Act. Among the goods so specified, in Group 1 of schedule 8, is "Food of a kind for human consumption". However, Group 1 contains a list of "Excepted items" which are standard-rated unless also found in a list of "Items overriding the exceptions". The "Excepted items" include, as Item 2, this:

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

The "Items overriding the exceptions" include these:

> "2 Drained cherries
>
> 3 Candied peels"

13. Group 1 concludes with "Notes". Note (5) to Group 1 ("Note (5)") reads:

> "Items 2 and 3 of the items overriding the exceptions relate to item 2 of the excepted items; and for the purposes of item 2 of the excepted items 'confectionery' includes chocolates, sweets and biscuits; drained, glacé or crystallised fruits; and any item of sweetened prepared food which is normally eaten with the fingers."

14. Notes are also to be found elsewhere in schedule 8 to VATA 1994. For example, Note (1) to Group 10, which deals with certain supplies of "gold held in the United Kingdom", states that "'Gold' includes gold coins" and Notes to Group 16, which

zero-rates as Item 1 "Articles designed as clothing or footwear for young children and not suitable for older persons", say that "'Clothing' includes hats and other headgear" (Note (1)) but that, subject to some exceptions, "Item 1 does not include articles of clothing made wholly or partly of fur skin".

15. Section 96(9) of VATA 1994 states:

> "Schedules 7A, 8 and 9 shall be interpreted in accordance with the notes contained in those Schedules; and accordingly the powers conferred by this Act to vary those Schedules include a power to add to, delete or vary those notes."

The origins of the present legislation

16. In the years before the United Kingdom acceded to the European Economic Community, food was not generally subject to purchase tax but it was levied on what were considered to be luxuries. Under the Purchase Tax Act 1963, the goods listed in part I of schedule 1 to the Act were subject to purchase tax unless they were stated to be exempt. Amongst the goods specified in part I of schedule 1 were (as Group 34):

> "Chocolates, sweets and similar confectionery (including drained, glacé or crystallised fruits); and chocolate biscuits and other confectionery having a case or coating of chocolate couverture, but not including cakes in such a case or coating."

However, the following were exempt:

> "(1) Chocolate couverture not prepared or put up for retail sale.
>
> (2) Drained cherries.
>
> (3) Candied peels."

17. When the United Kingdom joined the European Economic Community, purchase tax was replaced by VAT. However, article 17 of Directive 67/228/EEC allowed Member States to "provide for reduced rates or even exemptions with refund" where "the total incidence of such measures does not exceed that of the reliefs applied under the present system" provided that the measures were "taken for clearly defined social reasons and for the benefit of the final consumer". On the strength of article 17, schedule 4 to the Finance Act 1972, which introduced VAT, provided for "Food of a kind used in human consumption" to be zero-rated subject to "Excepted items" and "Items overriding the exceptions". The list of "Excepted items" included as Item 2:

> "Chocolates, sweets and similar confectionery (including drained, glacé or crystallized fruits); and chocolate biscuits and other confectionery having a case or coating of chocolate couverture, but not including cakes in such a case or coating."

The "Items overriding the exceptions" included these:

> "1. Chocolate couverture not prepared or put up for retail sale.
>
> 2. Drained cherries.
>
> 3. Candied peels"

Note (2) stated:

> "Items 1 to 3 of the items overriding the exceptions relate to item 2 of the excepted items …."

The Finance Act 1972 thus precisely reflected the Purchase Tax Act 1963.

18. The zero-rating of food was continued under the Value Added Tax Act 1983 ("VATA 1983"). Under schedule 5 to the Act, "Food of a kind used for human consumption" was once again zero-rated subject to "Excepted items" and "Items overriding the exceptions". In its original form, Item 2 in the list of "Excepted items" was in these terms:

> "Chocolates, sweets and similar confectionery (including drained, glacé or crystallized fruits); and biscuits and other confectionery (not including cakes) wholly or partly covered with chocolate or some product similar in taste and appearance."

The "Items overriding the exceptions" included these:

> "2. Drained cherries
>
> 3. Candied peels"

Note (5) stated:

> "Items 2 and 3 of the items overriding the exceptions relate to item 2 of the excepted items."

19. Schedule 5 to VATA 1983 was amended by the Value Added Tax (Confectionery) Order 1988 ("the 1988 Order"). Pursuant to that Order, Item 2 of the "Excepted items" in respect of "Food of a kind used for human consumption" became:

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

Note (5) was also altered, by the addition of the following:

> ", and for the purposes of item 2 of the excepted items 'confectionery' includes chocolates, sweets and biscuits; drained, glacé or crystallized fruits; and any item of sweetened prepared food which is normally eaten with the fingers".

20. There were thus two main changes. First, "chocolates", "sweets" and "drained, glacé or crystallized fruits" were now referred to in Note (5) rather than in Item 2 itself. Secondly, there was added to Note (5) the tailpiece: "and any item of sweetened prepared food which is normally eaten with the fingers".

21. The explanatory note to the 1988 Order said this:

> "This Order amends Group 1 of Schedule 5 to the Value Added Tax Act 1983 in relation to confectionery. It removes certain uncertainties and, while maintaining relief for cakes, restricts the scope of the relief for other confectionery products which are not wholly or partly covered with chocolate or with some product similar in taste and appearance. The main immediate effect will be to tax all cereal bars at the standard rate."

22. VATA 1994 re-enacted the relevant provisions of VATA 1983, as amended by the 1988 Order, in identical terms.

The decisions below

The FTT

23. The FTT summarised its conclusion as follows in paragraph 49 of its decision:

> "On balance we accept that the Product [i.e. 'Mega Marshmallows'] does not fall to be described as confectionery. The fact that it is sold and purchased as a product specifically for roasting, the marketing on the packaging of the Product which confirms that purpose, the size of the Product which makes it particularly suitable for roasting and the fact that it is positioned in supermarket aisles in the barbecue section during the summer months when most sales are made and otherwise in the world foods section, leads us to that conclusion."

24. A little earlier, in paragraph 42, the FTT had said:

> "Clearly if the product is not roasted then it will be eaten with the fingers, perhaps having been cut up for children under 6. However, once roasted and cooled, the Product might be either eaten off the stick or with the fingers. In the circumstances of this product, we do not give particular weight to the means of eating."

25. The FTT also observed, in paragraph 44, that "[c]onfectionery might not be expected to include a product which is intended to be used as an ingredient in making another product". In paragraph 46, the FTT said:

> "The issue we must decide is whether the term confectionery includes an item which is intended to be subjected to another cooking process before being eaten, and to some extent intended to be used as an ingredient in making another product.

> That judgment must include reference to the circumstances in which the item is marketed and sold."

26. Although HMRC had placed in the forefront of their contentions both in their statement of case and in their skeleton argument for the FTT hearing the argument that "Mega Marshmallows" were "confectionery" because they "are an item of sweetened prepared food which is normally eaten with the fingers" (to quote from paragraph 34 of the statement of case and paragraph 17 of the skeleton argument), the FTT did not state a conclusion on that point.

The Upper Tribunal

27. The Upper Tribunal found there to be no error of law in the FTT's decision and so dismissed HMRC's appeal against it.

28. The Upper Tribunal drew a distinction between "provisions that serve to clarify to avoid potential doubt (one aspect of an 'inclusive definition')" and "provisions that 'treat' something as if it were something that in reality it is not": see paragraph 41 of its decision. The Upper Tribunal considered Note (5) to fall within the former category. It is not, the Upper Tribunal said, a "deeming provision" but an "inclusive definition" or (adapting words of Sir Andrew Morritt C in *Revenue and Customs Commissioners v Premier Foods Ltd* [2007] EWHC 3134 (Ch), [2008] STC 176, at paragraph 18) an "enlarging definition": see paragraphs 39, 49 and 50 of the Upper Tribunal's decision. In paragraph 65 of its decision, the Upper Tribunal expressed the view that "the point of Note 5 is that it saves time having to agonise over whether a product of that description falls within the meaning of confectionery" but that "[t]hat does not … preclude further fact finding". Note (5), the Upper Tribunal went on, is "akin to a rebuttable presumption" and "other factors may outweigh the presumption that a product thus defined is confectionery". In the same vein, the Upper Tribunal said this:

> "70. If a product falls within a description within Note 5 that is not the end of the matter. There may be other factors that would lead to a conclusion that the product is not confectionery (or is untaxed by concession).
>
> …
>
> 72. Although consideration of Note 5 is generally the starting point it is an interpretative provision as per section 96(9) VATA and therefore it does not stand alone – it is part of a process of construing the term confectionery in Item 2. Depending on what sort of factors a Tribunal is considering the multi-factorial assessment may be relevant to construing both the specific descriptions in Note 5 and the meaning of confectionery in Item 2 in which case it may be artificial to apply the analysis to the descriptions in Note 5 and then subsequently to the wider meaning of confectionery in Item 2. As we set out above even where a product might fall within a description in Note

> 5 other factors might lead to a conclusion that the product is not confectionery."

Accordingly, the Upper Tribunal said in paragraph 74(3) of its decision:

> "If the product falls within any of the descriptions in Note 5 but there are other relevant factors (e.g., it is a product used for other purposes) then a multi-factorial assessment should be undertaken to determine whether the product is confectionery (or, if HMRC is correct, if it is untaxed by concession)."

29. Turning to what the FTT had decided, the Upper Tribunal commented in paragraph 89 of its decision that "the FTT does not appear to have set out a conclusion as to whether Mega Marshmallows satisfy one of the descriptions in Note 5" although "on the facts of this case Mega Marshmallows did potentially fall within the descriptions in Note 5". The Upper Tribunal did not think this mattered, however. It explained in paragraph 91:

> "Although not explicit it is reasonably clear that by finding that there were different ways of eating the product (and in the context of its other findings that the product was sold and packaged as specifically for roasting) the FTT seemed unable to conclude what method was more usually or more often used to eat the product hence the, perhaps infelicitous, reference to the weight to be attached. Of course, the burden is on the taxpayer to demonstrate that the product is not normally eaten with the fingers. If the issue was simply whether the product fell within Note 5 as sweetened prepared food normally eaten with the fingers this may have been a deciding factor but in this case, it is not material given the other findings made by the FTT."

In paragraph 98, the Upper Tribunal said:

> "We can see no point of principle of legal proposition that suggests that the FTT could not take into account the fact that the product was intended to be subject to a cooking process before being eaten when considering if the typical consumer would view that as confectionery. It is not a view that can arguably be said that no reasonable Tribunal could have come to on the basis of the facts (assuming for the present that they are not impugned). Whether or not an appellate court may have arrived at a different conclusion is not relevant in such circumstances."

30. The Upper Tribunal concluded in paragraph 100 of its decision:

> "Although we accept that the FTT erred in its approach to construing Note 5 any such error is not material as we have found that there is no basis on which we should interfere with the FTT's approach to and evaluation of the evidence. There is

> no material error of law in the FTT's analysis and weighing of the relevant factors and the conclusion reached was one that was open to it on the facts."

The present appeal

31. HMRC appeal on the grounds that the Upper Tribunal erred in its interpretation of Note (5) and in concluding that the FTT's (admittedly erroneous) approach to Note (5) was not a material error of law. As was explained by Mr Howard Watkinson, who appeared for HMRC with Ms Charlotte Brown, HMRC contend that the matter should be remitted to a differently constituted FTT for it to decide whether "Mega Marshmallows" fall within Note (5) as "sweetened prepared food which is normally eaten with the fingers".

32. For his part, Mr Tim Brown, who appeared for the respondent with Mr Stephen Morse, supported the Upper Tribunal's decision. So, too, do written submissions from Mr Max Schofield on behalf the intervener, DuelFuel Nutrition Limited ("DuelFuel"). In *DuelFuel Nutrition Ltd v Revenue and Customs Commissioners* [2024] UKFTT 104 (TC), [2024] SFTD 953, the FTT held that certain products sold by DuelFuel were not zero-rated for VAT purposes, in part on the basis that they were "deemed to be confectionery within Excepted Item 2 by virtue of Note 5 to Group 1": see paragraph 218. We were told that that decision is under appeal to the Upper Tribunal.

The interpretation of Note (5)

HMRC's case

33. It is HMRC's case that the Upper Tribunal was mistaken in viewing Note (5) as "akin to a rebuttable presumption" and in considering that "even where a product might fall within a description in Note 5 other factors might lead to a conclusion that the product is not confectionery". A product to which Note (5) appears to apply will nevertheless not be regarded as "confectionery", Mr Watkinson said, if that would be absurd or anomalous. For that reason, the "cooked sweet chilli flavoured chicken skewers" to which the FTT referred in *Corte Diletto UK Ltd v Revenue and Customs Commissioners* [2020] UKFTT 75 (TC), at paragraph 57, would not be considered "confectionery" even if they could be said to be "sweetened prepared food which is normally eaten with the fingers", reading those words literally. Such cases apart, however, everything described in Note (5) constitutes "confectionery" for the purposes of Item 2, Mr Watkinson argued. The proper limits on Note (5) are provided by applying the ordinary principles of statutory interpretation (e.g. that absurd and anomalous results should not be produced). Subject to that, any product such as is described in Note (5) is "confectionery", Mr Watkinson maintained.

Some principles of statutory interpretation

34. When considering how Note (5) is to be construed, the following principles are to be borne in mind:

    i) "The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid"

and the "primary source by which meaning is ascertained" is "the words which Parliament has chosen to enact as an expression of the purpose of the legislation": *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 ("*Project for the Registration of Children*"), at paragraph 29, per Lord Hodge;

ii) "Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions": *Project for the Registration of Children*, at paragraph 30, per Lord Hodge. However, "[e]xternal aids to interpretation … must play a secondary role" and they do not displace the meanings conveyed by the words of a statute that, after consideration of the context, are "clear and unambiguous and which do not produce absurdity": *Project for the Registration of Children*, at paragraph 30, per Lord Hodge;

iii) "[I]t is without question a legitimate method of purposive statutory construction that one should seek to avoid absurd or unlikely results": *Project Blue Ltd v Revenue and Customs Commissioners* [2018] UKSC 30, [2018] 1 WLR 3169, at paragraph 31, per Lord Hodge. In *R (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209, Lord Millett said in paragraphs 116 and 117 that the Courts "will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless" but that "the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result". That observation was quoted with approval by Lord Scott in *Gumbs v Attorney General of Anguilla* [2009] UKPC 27, at paragraph 44, and also cited by Lord Kerr in *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431, at paragraph 25;

iv) Identifying the purpose of legislation is of "central importance" in construing it: *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690 ("*Rossendale*"), at paragraph 10, per Lords Briggs and Leggatt. As this principle has been applied in the context of tax legislation, it involves "determin[ing] the nature of the transaction to which [the statutory provision] was intended to apply and then … decid[ing] whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description": *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684, at paragraph 32, per Lord Nicholls. "The ultimate question", Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, at paragraph 35, "is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically"; and

v) Parliament sometimes employs what are termed in *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed.) "inclusive definitions". *Bennion, Bailey and Norbury on Statutory Interpretation* explains in section 18.3 that an "inclusive definition" "modifies the natural meaning of the defined term by enlarging it or clarifying potential doubt about what is covered", "typically takes the form 'X includes'" and "is used to enlarge the meaning of the defined term to cover things that are not or might not otherwise be caught" so

> that "[t]he term as used in the Act has its natural meaning (which is left undefined) and in addition has the special meaning given to it by the inclusive definition". Such definitions, *Bennion, Bailey and Norbury on Statutory Interpretation* states, "are often adopted where the core meaning of a term is sufficiently clear to mean that it does not need definition but there is some doubt around the edges".

35. The authorities which *Bennion, Bailey and Norbury on Statutory Interpretation* cites in relation to "inclusive definitions" include *Dilworth v Commissioner of Stamps* [1899] AC 99 ("*Dilworth*") and *Thomas v Marshall* [1953] AC 543. In *Dilworth*, Lord Watson observed at 105-106:

> "The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include."

In *Thomas v Marshall*, the issue was whether certain absolute gifts were "settlements" within the meaning of section 21 of the Finance Act 1936, section 21(9) of which stated:

> "In this section … the expression 'settlement' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets …".

Concluding that the gifts were "settlements", Lord Morton said at 556:

> "The object of the subsection is, surely, to make it plain that in section 21 the word 'settlement' is to be enlarged to include other transactions which would not be regarded as 'settlements' within the meaning which that word ordinarily bears. Its effect is that wherever the word 'settlement' occurs in section 21 one must read it as 'settlement, disposition, trust, covenant, agreement, arrangement or transfer of assets,' and if 'by virtue or in consequence of' any of these transactions or deeds income is paid to or for the benefit of a child of the settlor, section 21 comes into operation.
>
> I can find no context here which should lead your Lordships to give, for instance, the words 'transfer of assets' any meaning other than that which they ordinarily bear, or to infuse into them some flavour of the meaning ordinarily given to the word 'settlement.'"

Discussion

36. Section 96(9) of VATA 1994 provides for schedules 7A, 8 and 9 to "be interpreted in accordance with the notes contained in those Schedules". Note (5) is one such note.

Schedule 8 is thus to "be interpreted" in accordance with it. On the face of it, therefore, Item 2 in Group 1 is to be interpreted on the basis that, as stated in Note (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".

37. The Upper Tribunal concluded that Note (5) is not a "deeming provision" but an "inclusive definition". Whether or not Note (5) is appropriately labelled a "deeming provision" is not in the end important, however. "Deeming provision" is not a technical term with a precise meaning. What matters is what Parliament has said about the significance of Note (5), and, to my mind, it has stated unambiguously that products of the types described in Note (5) are "confectionery" for the purposes of Item 2.

38. There might have been little or no room for debate as to whether certain of the items identified in Note (5) were "confectionery" even if they had not been mentioned in Note (5). In particular, it is hard to see how it could have been suggested that "chocolates" and "sweets" were not "confectionery". With such products, Note (5) may not serve the function of "deeming" something to be "confectionery" which would not otherwise be thought to be so. However, that is no reason to deny Note (5) the significance that its wording and that of section 96(9) of the VATA 1994 give it. On the plain wording of the statute, in my view, anything falling within Note (5) *is* "confectionery" within the meaning of Item 2 absent absurdity or the like. Such an item could also, without misuse of language, be said to be "deemed" to be "confectionery", but that would not depend on Note (5) being categorised as a "deeming provision".

39. A passage from the decision of the FTT (Tribunal Judge Greg Sinfield and Dr Caroline Small) in *Wm Morrison Supermarkets plc v Revenue and Customs Commissioners* [2024] UKFTT 181 (TC) ("*Wm Morrison*") is relevant in this context. Commenting on Note (5), the FTT said in paragraph 16:

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

40. I see the force of those observations. The FTT was not, however, suggesting that products such as are described in Note (5) are not necessarily to be regarded as "confectionery" for the purposes of Item 2. To the contrary, it saw the purpose of Note (5) as "clarify[ing] the meaning of 'confectionery' and … provid[ing] certainty where there might be some doubt about whether an item should be classified as confectionery". Note (5) would not achieve that objective if, as the Upper Tribunal considered to be the position, it were merely "akin to a rebuttable presumption" and "other factors might lead to a conclusion that the product is not confectionery".

41. In the next paragraph of its decision in *Wm Morrison*, the FTT referred to what is said in *Bennion, Bailey and Norbury on Statutory Interpretation* about "inclusive and exclusive definitions". In common, I think, with the FTT's view in *Wm Morrison*, it seems to me that Note (5) can be seen as an "inclusive definition". In the present case, the Upper Tribunal saw Note (5) as both an "inclusive definition" and "akin to a rebuttable presumption". In my view, however, regarding Note (5) as an "inclusive definition" does not make it any less definitive. In *Dilworth*, Lord Watson explained that, where the word "include" is used in an interpretation clause to enlarge the meaning of words or phrases found elsewhere in the statute, "these words and phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include". The position in the present case is, moreover, comparable to that in *Thomas v Marshall*. There, the relevant subsection provided for "settlement" to include both a "trust" (which would surely be understood to be a "settlement" anyway) and a "transfer of assets" (which would not). Lord Morton thought it "plain" that "the word 'settlement' is to be enlarged to include other transactions which would not be regarded as 'settlements' within the meaning which that word ordinarily bears".

42. With respect, I am not sure how Note (5) would operate on the basis of the Upper Tribunal's understanding of it. The Upper Tribunal spoke of the point of Note (5) being that "it saves time having to agonise over whether a product of that description falls within the meaning of confectionery". Were there, though, the potential for "other factors" to "lead to a conclusion that the product is not confectionery", Note (5) would not seem to have removed the need to "agonise" over whether a product is "confectionery". Further, I do not know what, if any, weight the Upper Tribunal thought should be attached to the fact that a product fell within Note (5). The Upper Tribunal referred to "the presumption that a product thus defined" was "confectionery" being "outweigh[ed]". I am not clear whether that meant that inclusion in Note (5) was considered to carry weight of itself or whether the Upper Tribunal saw such inclusion as merely providing a starting point.

43. Mr Watkinson argued that the tailpiece introduced by the 1988 Order reflected a deliberate decision to enlarge the meaning of "confectionery" to a significant extent. One thing which can be said with certainty, especially in the light of the explanatory note, is that the amendments effected by the 1988 Order were intended to ensure that all cereal bars were taxed at the standard rate. Were, however, the Upper Tribunal right about Note (5), that aim would not appear to have been achieved. The fact that a cereal bar is an "item of sweetened prepared food which is normally eaten with the fingers" would not be determinative. In fact, Mr Brown suggested in the course of his submissions to us that it would still be open to the manufacturer of a cereal bar to

argue for zero-rating on the basis that the question whether it constituted "confectionery" had not been settled by Note (5) but required a multi-factorial or factual assessment.

44. That said, I agree with Mr Watkinson that, having regard to the principles mentioned in paragraph 34(iii) and (iv) above, a product which can be said to fall within Note (5) if read literally will nevertheless not be "confectionery" for the purposes of Item 2 if that would be absurd or it is obvious that, in the light of their purpose, the provisions were not intended to apply to the product. "Cooked sweet chilli flavoured chicken skewers" would be excluded on this basis.

45. In his submissions on behalf of DuelFuel, Mr Schofield advanced an argument to the effect that the tailpiece to Note (5) "must be read as collared by the genus ('*confectionery*') and scope of [the] earlier words". Mr Schofield relied in support of this contention on the "principle … that, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified" (for which, see *R v Edmundson* (1859) 28 LJMC 213, at 215, per Lord Campbell CJ). However, I do not consider the *ejusdem generis* principle seen in that case to have any application in the context of Note (5). As Lord Watson observed in *Sun Fire Office v Hart* (1889) 14 App Cas 98, at 104, "[w]hether [the principle] applies at all, and if so, what effect should be given to it, must in every case depend upon the precise terms, subject-matter, and context of the clause under consideration". Note (5) does not appear to me to disclose a "genus" which could serve to limit the meaning of the tailpiece. It rather contains a list of specific items which are to be "confectionery" for the purposes of Item 2. As for Note (5) being "collared by the genus ('*confectionery*')", the fact that Note (5) is defining "confectionery" could support the conclusion that a product such as "cooked sweet chilli flavoured chicken skewers" must be excluded from Item 2 on the basis of absurdity. That sort of case apart, however, it does not seem to me to make sense to speak of Note (5) being "collared" by "confectionery". The position is rather that Note (5) explains what "confectionery" encompasses.

46. In short, I agree with Mr Watkinson that, absent absurdity or the like, Note (5) is conclusive. If, accordingly, a product is "sweetened prepared food which is normally eaten with the fingers", it is "confectionery" for the purposes of Item 2. The Upper Tribunal was mistaken in thinking that Note (5) is just "akin to a presumption" and that "other factors might lead to a conclusion that the product is not confectionery". The "words which Parliament has chosen to enact as an expression of the purpose of the legislation" signify that products such as are described in Note (5) *are* "confectionery".

Implications

47. As I have mentioned, it was part of HMRC's case before the FTT that "Mega Marshmallows" were "confectionery" for the purposes of Item 2 because they were "sweetened prepared food which is normally eaten with the fingers" within Note (5). In that connection, the Upper Tribunal noted in paragraph 91 of its decision that "the burden is on the taxpayer to demonstrate that the product is not normally eaten with the fingers". The conclusions I have arrived at earlier in this judgment mean that, had the FTT decided that the respondent had not discharged that burden, it should have dismissed the respondent's appeal to it. This is not a case in which it could be said to

be absurd for the product at issue to be regarded as "confectionery" or that it is obvious that Item 2 and Note (5) were not intended to apply to the product. Failure to persuade the FTT that "Mega Marshmallows" were not "sweetened prepared food which is normally eaten with the fingers" should thus have been determinative.

48. The Upper Tribunal said in paragraph 91 of its decision that the FTT "seemed unable to conclude what method was more usually or more often used to eat the product". I do not read the FTT's decision in that way myself. The FTT explained in paragraph 42 of its decision that it did "not give particular weight to the means of eating". It did not say that it could not reach a conclusion on how "Mega Marshmallows" are usually eaten or, in particular, whether they are "normally eaten with the fingers".

49. In the circumstances, the right course must, I think, be to remit to the FTT the question whether "Mega Marshmallows" are "sweetened prepared food which is normally eaten with the fingers" within the meaning of Note (5). To avoid any risk of being perceived as anchored to the earlier decision, the remittal should, as it seems to me, be to a differently constituted FTT. Further, the hearing should be conducted on the basis of the existing written evidence but with the potential for cross-examination and re-examination of any witness who has given evidence relating to the way in which "Mega Marshmallows" are normally eaten.

Conclusion

50. I would allow the appeal and remit to the FTT, on the basis indicated in the previous paragraph, the question whether "Mega Marshmallows" are "sweetened prepared food which is normally eaten with the fingers" within the meaning of Note (5).

Lord Justice Males:

51. I agree that the appeal should be allowed for the reasons given by Lord Justice Newey. I add the following comments.

52. In my judgment it is clear that, subject to absurdity (the sweet chilli chicken skewer example), if a product falls within the terms of Note (5), it is confectionery and is therefore standard rated for VAT purposes. But Note (5) is non-exhaustive. A product will still be confectionery, and therefore standard-rated, if it would be regarded as confectionery within the ordinary meaning of that term as understood by an ordinary person.

53. There were, therefore, two routes by which HMRC's case might have succeeded before the FTT. The first was to persuade the FTT that "Mega Marshmallows" are confectionery as that term would be understood by an ordinary person. The second was that "Mega Marshmallows" are sweetened prepared food which is normally eaten with the fingers. In this respect the position was summarised accurately by the FTT in *Corte Diletto UK Ltd v Revenue and Customs Commissioners* [2020] UKFTT 75 (TC):

> '68. The question before this Tribunal is whether the Appellant's products are to be classified as confectionery for VAT purposes. HMRC must succeed if they are confectionery in the ordinary sense or if they are "sweetened prepared food

> which is normally eaten with the fingers" in the context of Note 5.'

54. The FTT concluded that "Mega Marshmallows" are not confectionery as that term is ordinarily understood, principally because they are generally roasted after purchase and before consumption. Mr Watkinson accepts, in the light of that finding, that the first route is not open to HMRC in this court and we have therefore heard no argument about it. Speaking for myself, however, I would not endorse the FTT's conclusion on this issue. It is common ground that an ordinary person would regard ordinary marshmallows as confectionery, and it seems to me that such a person might well consider that it makes no difference that "Mega Marshmallows" are larger than ordinary marshmallows and that they are generally roasted before being eaten.

55. So far as the second route is concerned, it is common ground that "Mega Marshmallows" are a sweetened product. Accordingly the only issue is whether they are normally eaten with the fingers. That is a question of fact on which the FTT has not made a finding.

56. In some cases it will be obvious from the nature of the product whether it is normally eaten with the fingers or in some other way, but that is not the case with this particular product. No doubt "Mega Marshmallows" are sometimes eaten with the fingers and sometimes with a fork or skewer. It is not obvious what kind of evidence might be available – or may have been before the FTT – to prove on the balance of probabilities how they are 'normally' eaten. If there is a difficulty, however, that will be the taxpayer's problem as the burden lies on the taxpayer to prove that the product is not normally eaten with the fingers and therefore falls to be zero-rated.

57. As Lord Justice Newey has said, the case will have to be remitted so that the FTT can either make a finding one way or the other or, if appropriate, say that it is unable to do so.

Lord Justice Nugee:

58. I agree with both judgments.