

Pump Court Tax Chambers – Tax Problem Question Competition 2022-23

First Prize – £750 and a Mini-pupillage
Runner up prizes of up to £500 at judges' discretion

Students at any stage of their education are invited to submit an answer to this problem question by no later than **Monday 23rd January 2023**. Entries must be 750 – 1000 words (and should state the number of words) and should be emailed to competitions@pumptax.com with the covering email stating the student's full name, university/college and contact details.

Entrants should read and refer to the case of *Innovative Bites Limited v HMRC* [2022] UKFTT 00352 (TC) decided by the First-tier Tribunal. Entrants can make references to the quotations from other cases that are contained in those decisions but there is no need to refer to any other cases or undertake any wider research. Note that First-tier Tribunal decisions are not binding on any other Tribunal but are persuasive; Upper Tribunal and High Court decisions are binding on the First-tier Tribunal.

Entrants should focus on the application of the principles from the *Innovative Bites* case to the facts set out below to advise the client – there is no need to recite the facts or to quote excessively from the case law. The answer can be structured/presented in any manner preferred (but diagrams and pictures are not permitted) and conciseness is encouraged.

Instructions

Pursuant to Group 1 of Schedule 8 Value Added Tax Act 1994, the rate of VAT generally applicable to food of a kind used for human consumption is 0% (referred to as 'zero-rating'). However, there are exceptions to the zero-rating of human food, and one such exception (excepted item 2) is "*Confectionery, not including cakes or biscuits other than biscuits wholly or partly covered with chocolate or some product similar in taste and appearance.*" Note (5) provides "*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*". Products within the exceptions are subject to VAT at the standard rate of 20%.

Creamy Chocs Ltd ("CC") sells a variety of sweets and cooking ingredients, in particular baking chocolate. In 2021, it launched a new product called 'choco-balls'. A choco-ball is a chocolate sphere about an inch in diameter. It has a hard dark chocolate outer layer and a soft chocolate centre. CC sells choco-balls throughout the year.

The company has become aware of a social media trend which began last Christmas which involved consumers heating choco-balls in/on/near a heat source (such as an oven or open fire) or heating them for a few seconds in a microwave so that the centre becomes warm and liquid at the point they are eaten (consumers would generally place the choco-ball on a utensil of some sort in order to heat and then eat it). Some customers also consume choco-balls by floating them in their hot chocolate or cocoa (waiting until it has partly melted in the warm drink). This way of eating a choco-ball appears unique to this product because of its soft centre (and there is no evidence that consumers heat up any other CC products before eating them (other than where this forms part of a cooking/baking process as with the baking chocolate)).

CC has noted that its sales of choco-balls increased in the lead up to Christmas 2021 and sales are increasing again in the run up to Christmas 2022 (at the same time as the social media trend is growing in popularity).

At present CC do not undertake any marketing relating to heating up choco-balls before they are consumed. The packaging of the product simply states the name of the product, the ingredients and the current marketing slogan "Melts in your mouth". On CC's website, choco-balls are in the section headed 'chocolates'. Most retailers place this product in their confectionery section.

CC will not be able to change the packaging of the product ready for Christmas 2022 but their initial research suggests that 60% of their customers have tried heating their choco-balls before consuming them and that 20% use this technique most times that they eat a choco-ball.

Advice Sought

At present, CC apply VAT at 20% when selling choco-balls on the basis that they understand that the product is 'confectionery' for VAT purposes. However, CC have heard about the recent decision of the First-tier Tribunal in *Innovative Bites Limited* and are seeking advice on whether they can begin to zero-rate the product. Looking to the future, CC are also willing to consider re-packaging (or even renaming) the product and commencing a specific marketing campaign in advance of Christmas 2023 (particularly if this will strengthen their argument in relation to the VAT treatment).

Based on the decision in *Innovative Bites*, you are asked to advise:

- (1) Whether choco-balls are currently 'confectionery' for VAT purposes?
- (2) Whether re-packaging and mounting a specific marketing campaign next year in the lead up to Christmas might strengthen any argument that choco-balls are not 'confectionery'? If so, CC seek guidance on the potential changes to the packaging and how they might market the product.