

Neutral Citation Number: [2007] EWHC 695 (Ch)

Case No: CH/2006/APP/0732

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM THE VAT & DUTIES TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2007

Before :

MR JUSTICE WARREN

Between :

KALRON FOODS LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondent

Michael Thomas (instructed by **Freeth Cartwright LLP**) appeared for the Appellant

James Puzey (instructed by the **Solicitor for Her Majesty's Revenue and Customs**) appeared for the Respondent

Hearing date: 15th February 2007

Judgment

Mr Justice Warren :

Introduction

1. This is an appeal by Kalron Foods Ltd (“Kalron”) against a decision of the Value Added Tax and Duties Tribunal, Manchester Tribunal Centre (Michael Johnson Chairman) and John Laphorne FCMA (“the Tribunal”). The decision was released on 24 August 2006. The Tribunal decided that Kalron’s product sold under the designation “Zumo Fresh Blend” (and which I shall refer to as “the Product”) is a “beverage” within Item No 4 of the Excepted items in Part 2 Group 1 Schedule 8 Value Added Tax Act 1994 (“VATA”) and thus standard rated.

The Legislation

2. Schedule 8 concerns zero-rating for VAT purpose. Group 1, Part 2 Schedule 8 is headed “Foods” which are accordingly usually zero-rated. We are concerned with Item 1 of the General items – “Food of a kind fit for human consumption”.
3. Following the General items is a list of Excepted items. Summarising, they are, following the item numbers set out:
 1. Ice cream, ice lollies frozen yoghurts and similar frozen products and prepared mixes and powders for making such products.
 2. Confectionery (with certain exceptions).
 3. “Beverages chargeable with any duty of excise specifically charged on spirits, beer, wine or made-wine and preparations thereof”.
 4. “Other beverages (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals and other products for the preparation of beverages”.
 5. Potato crisps and similar products, savoury foods obtained by the swelling of cereals; and salted or roasted nuts other than nuts in shell.
 6. Pet foods and certain other foods for birds.
 7. Goods in General items 1, 2 and 3 used for domestic brewing/making/production of beer, cider, perry, wine and wine-made.
4. Following the Excepted items appears a list of Items overriding the exceptions. Again summarising, they are, following the item numbers set out:
 1. Yoghurt unsuitable for immediate consumption when frozen.
 2. Drained cherries.
 3. Candied peels.

4. Tea, maté, herbal teas and similar products, and preparations and extracts thereof.
 5. Cocoa, coffee and chicory and other roasted coffee substitutes and preparations and extracts thereof.
 6. Milk and preparations and extracts thereof.
 7. Preparations and extracts of meat, yeast or egg.
5. The Notes at the end of these lists include the following:
- “Food” includes drink
 - Items 4 to 7 of the overriding exceptions relate to item 4 of the excepted items.
6. The first of those Notes is clearly an extension of the meaning of Food; it is not saying simply that liquid foods (which might also be called drinks) are included for the avoidance of doubt. But a particular item might in theory be both a liquid food and a drink: such an item is clearly included in “Food” since it is both a food and a drink; or, if it is argued that food ordinarily means solid food, liquid food comes in as a drink. However, if food in its ordinary meaning does include liquid food, as I think is the case, it is not necessarily the case that food and drink are mutually exclusive items which only come together as “Food” because of Note 1. It would be a question of the ordinary use of English words whether an item could at one and the same time be a liquid food and a drink.
7. I will consider the meaning of “beverage” later. At this point I merely observe that all beverages are drinks (although not necessarily *vice versa*). Unless food (including liquid) and drink are, as a matter of ordinary language, mutually exclusive classes, a similar point arises in relation to food (including liquid food) and beverages. It is a question of the ordinary use of English words whether an item could at one and the same time be a liquid food and a beverage. I raise this point now because some of Mr Thomas’ submissions seem to be based on the proposition that food and beverage are mutually exclusive classes.
8. I should also mention that item 4 of the Excepted items was worded differently in the earlier VAT legislation. It originally referred to “manufactured beverages” but the reference to “manufactured” was removed by the Value Added Tax (Beverages) Order 1993 (1993/2498). According to an HMRC Manual, this was apparently to end uncertainty in the fruit juice trade following contradictory tribunal decisions. At the same time, Excepted item 6 was added to remove any doubt about the zero-rated status of milk.

A preliminary point

9. It is difficult to detect any policy behind these detailed exceptions and overrides. Mr Thomas (who appears for Kalron) claims to identify a policy which is to exclude what he calls junk food: thus ice-cream, confectionary and crisps are excluded and become standard rated. He suggests that the paradigm beverages within Excepted item 4 are

branded fizzy drinks typically bought in cans or plastic bottles which can, again, be seen to be in the nature of junk drinks. On that basis, he says that healthy products such as the Product should, if there is a doubt about their status, be put the non-beverage side of the line.

10. I reject that line of reasoning. It is impossible, in my judgment, to spell out of the structure and content of Group 1 a policy such as Mr Thomas submits can be detected. There are plenty of “junk” foods which do not fall within the exceptions; and there are healthy drinks which are within the exception, for instance, freshly squeezed orange juice. The way in which Excepted item 4 deals with juices – that is to say describing beverages as including fruit juices (and bottled waters) – shows that the draftsman regards fruit juices (and bottled waters) as within the meaning of the word beverages as used in item 4: he did not draft the exception as “beverages, fruit juices and bottled waters”. It is also difficult to detect the policy which Mr Thomas refers to when it is noted that fruit juices are expressly included as beverages, but vegetable juices are not. Why orange juice should be expressly excluded but not carrot juice, I do not know. And although tomatoes are fruit, it is not really common to regard tomato juice as a fruit juice, but it is surely a beverage.
11. It is, of course, the case that Excepted items 1 and 2 are items which might be regarded as unhealthy: but that does not indicate a policy. Moreover, it is equally clear that Excepted item 4 includes fruit juices, many of which are healthy: there is no policy, therefore, in item 4 to exclude only “junk drinks”.

The Decision

The facts

12. The Tribunal described the Product in this way:

“[It] is the liquefaction of fresh raw fruit and/or vegetables into a thick drink, not unlike cold soup in consistency. This process is performed by a special machine, demonstrated to us at the tribunal hearing. The resultant product is retailed by [Kalron] to the general public at an increasing number of outlets in England. It is sold in disposable takeaway cups.”

13. The Tribunal made the following relevant findings of fact:

- a. The product is supplied at “Zumo Fresh Smoothie Bars”. These are retail outlets with counters in which are colourfully displayed different kinds of raw fruit and vegetables. Behind the counter is a menu of blends from which customers order. The blend could be 100% orange, 100% carrot etc or a blend constituting a mixture of different fruits or vegetables, or a mix of fruit and vegetable. The menu is not exclusive, customers being able to order any combination which they wish.
- b. The order is blended for the customer on the spot. The machine used resembles a large metal liquidiser into which the fruit and/or vegetables are fed, one by one and pulped by the machine. The process discards any parts of the fruit or vegetable that are unsuitable to be liquefied for consumption,

leaving a thick drink containing not just the juice of the fruit or vegetable, but also the rest of the fruit or vegetable itself, in drinkable form.

- c. The resultant product, a cold, uncarbonated drink, is allowed to “settle” for a short period, and is then handed over in a plastic cup, with a lid if required, with or without ice as the customer prefers, and with the option of taking a straw. The thickness of the product is such that it is not always suitable to be consumed through a straw. Typically the product is not consumed at the outlet - although some outlets have a small number of kiosks or tables and chairs to sit at – but is taken away by the customer for consumption elsewhere.
- d. The concept is advertised to be unique and the Tribunal considered it in their opinion to be clearly distinctive. The distinctiveness lies in the customer being offered a ready-to-consume drink, individually made for the customer on the spot, containing only the goodness of natural fruit and vegetables, with nothing added and nothing taken away, except what is inedible. The produce is prepared and sold at a “bar” that is unlike other bars in the marketplace. As the practical expression of a good idea, the Product has a fresh attractiveness, both in content and presentation.
- e. The Tribunal clearly enjoyed the Product, tasting both a fruit blend and a vegetable blend saying:

“Both were unlike anything we had previously experienced in flavour. Although quite thick, the products were not difficult to drink. The colour was not such as to be off-putting. The result was a refreshingly healthy drink.”
- f. There was nothing to show that the Products have been presented and purchased either as food or a beverage. They were presented in a unique way: neither as a meal replacement nor as a drink like a fruit juice or a cola.
- g. However, at least according to the Tribunal, although I am not clear about what evidence they based this on, the Products have been purchased by a special kind of customer, namely one who values the Product for its unique properties different from those of products one could ordinarily get in an ordinary bar, cafeteria or pub.

Arguments put to the Tribunal

14. For Kalron, it was submitted that the Product is a soft form of food (within the meaning of Item 1 of Group 8). This is distinct from a “beverage”, described in VAT Notice 701/14/02 (May 2002) as “a liquid commonly consumed to increase bodily liquid levels, to slake thirst, to fortify or to give pleasure”. It was submitted that the Product is not a beverage in that sense but is, rather, a product suited to eating, just as a cold soup is for eating, despite its liquid consistency. It was said that the contents of the Product are health-giving; it constitutes a portion of fruit and/or vegetables of the sort that the government urges all of us to consume five times per day. It was said that the Product may well be the preferred method of consumption for those having difficulty masticating, such as people with dental problems. There does not appear to have been any evidence to support that submission although one can readily accept that people

with problems of that sort might well seek out methods by which their food is prepared in a way which makes it easy to consume. The Products were all food within the meaning of Item 1 Group 1 and none were beverages such as a straightforward fruit juice.

15. For HMRC it was submitted that it was neither here nor there whether the Product constituted a healthy drink; it was also irrelevant that the Produce might amount to a meal replacement. Four factors were identified as relevant:
 - a. The ingredients of the Product – on that basis the Product could be either food or a beverage.
 - b. The manufacturing process – although it was submitted that it would be strange if that were to affect the VAT treatment since all that happened was that food was put through a machine.
 - c. Appearance and taste – applying those criteria, the Product was not soup.
 - d. Marketing and packaging – the Product was presented as a freshly squeezed drink/beverage.
16. It was further submitted on behalf of HMRC that the physical quality of the Product was not a defining factor. The question is whether, although it is a healthy product, it is a beverage. In support of the answer that it is a beverage, reliance was placed on the decision of the London tribunal in *Grove Fresh Ltd v HMRC* (2005) Tribunal Decision 19241. The decision there was that certain vegetable juices were beverages. They were not unlike tomato juice which is commonly used as a soft drink as an alternative to fruit juice or to an alcoholic drink. They would be used to increase bodily fluid levels, to slake the thirst and to fortify; they also give pleasure. The products were packaged and marketed as beverages.
17. The decision in *Grove Fresh*, although not directly in point in the present case, is nonetheless interesting in two respects. First, because the tribunal regarded a vegetable juice as a beverage in the same way as a fruit juice even though it is not expressly mentioned in Exempted item 4. Secondly, the tribunal did not regard gazpacho, or any other soup, as a beverage because gazpacho, like a soup, is intended to be eaten, by which I understand to the tribunal to have been drawing a contrast between something eaten from a bowl or plate and something being drunk from a glass or cup. They noted that “...almost any food could be eaten with a spoon from a soup plate but the intention is that the Appellant’s products should be drunk. They are beverages and not soups and are marketed as such”.
18. The Tribunal in the present case did not regard *Grove Fresh* as a helpful precedent because it concerned the supply of vegetable juices. The present case, the Tribunal observed, was not about juices since the Products are the whole of the fruit or vegetable in drinkable form save for the discarded inedible bits. Mr Puzey, for HMRC, takes issue with this view of the relevance of the decision; and it is, indeed, challenged in HMRC’s Respondent’s Notice. He says that the Tribunal was wrong not to take account of a product which, on the evidence, was the closest to Kalron’s drinks, namely fruit and vegetable juices. In *Grove Fresh*, the tribunal considered how the

blends were consumed and intended to be consumed. The Tribunal in the present case considered the same questions in reaching their conclusion, but held that *Grove Fresh* was not a valid precedent. Whilst it was not a binding precedent, it was, Mr Puzey submits, relevant and should not have been put aside in this way.

19. The position, we can see, is that Mr Thomas says that the Products are entirely different from fruit juices and vegetable juices but Mr Puzey says that such juices are the product closest to the Products themselves. I do not propose to dwell on that particular difference; there are similarities (both are the natural produce of fruit and vegetable without any additions in the case of pure fruit juice) and there are differences (one is a liquidised whole fruit, the other is the liquid produce of a fruit or vegetable). The fact that a fruit juice is a beverage does not necessarily lead to the conclusion that the Product must also be a beverage. But equally, in determining the correct classification of the Products, it is not right simply to ignore other products which clearly are beverages (such as fruit juices) to see what characteristics there may be in common and which might point to the Products being beverages.
20. After making some observations about the structure of Group1 (referring to the Note including drink as food), the Tribunal noted that one can have liquid products taken for nourishment, such as powders to which water is added, which amount to “food” when drunk and are not beverages, concluding that a food is not a beverage simply because it is presented in liquid form.
21. But the Tribunal recognised that there is a wide range of drinks which are beverages notwithstanding their nutritional effect. Nutritional value was not seen as determinative – but there is no suggestion that it should be ignored as a factor. They chose what might be thought to be an odd example of that, namely a range of alcoholic drinks. But the proposition is clearly correct and one need only look to pure orange juice to find an example.
22. The Tribunal rejected the physical quality of a product as the defining factor of a beverage. They may well be correct in saying, in support of that conclusion, that there must be many products which are capable of being both food and beverages, particularly as the boundary between food and drink is one which does not need to be drawn given that food includes drink pursuant to Note 1.
23. The Tribunal identify what they consider to be a breakdown in the logic of the submissions made on behalf of Kalron. Those submissions assumed, they considered, “that [the Products] are food and they are not beverages” (by which I read them as saying that therefore they are not beverages). The health-giving and feeding properties ascribed by those submissions to the Products were, they thought, correct, but that did not prevent the Products being **consumed** as beverages, the Tribunal saying that Kalron “...has the difficult task of demonstrating that the products are not beverages, when (as it seems to us) they may be drunk as such.”
24. Since much criticism is made of it by Mr Thomas, I should mention the example which the Tribunal give to illustrate the point just made.

“Say it is lunchtime in the city, and one friend says to another, “Let’s go down to the pub for a beer”. The friend replies, “I’m off alcohol, I

would rather go down to the Smoothie bar and have a “Zumo””. So the first friend is persuaded to go non-alcoholic, and they both end up buying takeaway “Zumo Fresh Blends”, in effect as a beverage substitute.”

25. The example does, perhaps, indicate one circumstance in which the Product might be consumed in place of something (beer, in the example) which is clearly a beverage. But it would be easy to alter the example, with the first friend suggesting a visit to the local restaurant, and the second friend saying that he is on a strict diet and would prefer a “Zumo” in place of lunch. The Product is then taken, as the Tribunal might say, in effect as a food substitute. What might be more significant, however, in each example is not what the Products substitutes for, but how it is taken: in each case it is drunk and consumed as a drink.
26. The Tribunal say this immediately after the example which they give, in paragraph 35 of the Decision:

“In this appeal there is nothing to indicate that it is not in that context that the products are commonly sold. Equally there is nothing to indicate that the products are sold as a food substitute. What is, however, clear is that the products could constitute both food and beverages. As the burden of proof rests on [Kalron] to show that the products are not beverages, [Kalron] is in difficulties on the facts that the tribunal has been able to find.”

The arguments on this appeal

27. Mr Thomas puts his case on behalf of Kalron in a rather different, and fuller, way from the way in which it was presented to the Tribunal. He draws particular attention to the fact that the Product is not a fruit or vegetable juice but contains the whole of the edible parts although, like a pure juice, it has nothing added.
28. His principal submissions are (a) that the Tribunal failed to apply the proper test to determine whether the Product is a beverage: had it done so, it would (and could only) have concluded that it is not; and (b) even if it had identified the correct test, it failed to apply it correctly, with the same result.
29. Mr Thomas identifies what he says are three errors of law on the part of the Tribunal.
30. First, he points out that the Tribunal did not set out any definition of beverage or discuss whether the Product is a beverage according to such a definition. This, he submits was a failure to address the very heart of Kalron’s appeal. It is not surprising, to me at least, that they did not do so, given the nature of the submissions made to them. But if Mr Thomas is right as a matter of law that there is a test, such as he propounds, whether a substance is a beverage and if the Tribunal failed to address and apply that test, their decision may nonetheless be open to attack on appeal applying the well known *Edwards v Bairstow* principles. Mr Thomas complains that the Tribunal did not reach a conclusion whether the Product is a beverage or not; instead, they simply held that Kalron had failed to discharge the burden on it to show that HMRC were wrong in classifying the Product as a beverage. He says that that is not a proper basis for the Tribunal’s decision. He accepts that the burden of proof is on Kalron to

establish the facts on which it seeks to rely, but he does not accept that there is any burden beyond that.

31. In relation to the burden of proof and its nature, I need refer to the decisions of Forbes J in *Tynwydd Labour Working Men's Club v C&EC* [1979] STC 570 and Sir Nicolas Browne-Wilkinson V-C in *Brady v Group Lotus Car Companies plc* [1987] STC 184.
32. In the *Tynwydd Labour Working Men's Club* case, a VAT assessment had been made on the appellant. It was held that there was no principle of tax law that where a provision is a taxing provision the onus is on the tax gathering authority to show that the payment comes within that provision while, if it a mitigating provision, the onus is on the taxpayer to show that the case comes within that provision. But a taxpayer who appeals against an assessment takes on himself the burden of proving that the assessment is wrong because, unless he proves that, there is nothing on which the tribunal can find an error in the assessment. I see no reason to think that that position is any different in relation to a decision by HMRC in respect of which there is right of appeal to a tribunal, as in the present case.
33. *Brady* was a corporation tax case, not a VAT case, but similar principles apply. In explaining the basic burden of proof and what is sometimes called the evidential burden of proof, the Judge said this at p 183:

“According to well-known principles, the burden of proof lies normally on the person alleging the fact, but in the present case it is established on the person seeking to set aside the assessment. The burden of proof in technical terms stays throughout where it starts. If, on the other hand, evidence is given which in the absence of other evidence or other factors would be sufficient to discharge the burden, then as a matter of ordinary common sense and judicial method the tribunal will decide that the burden of proof has been discharged.”
34. So, we start with the position that HMRC have determined that the Product is a beverage. Although the true construction of the statutory provisions is a matter of law, the ordinary meaning of the word “beverage” is a matter of fact. HMRC determined that the Product is a beverage which was, or involved, a determination of fact. It was open to Kalron to argue before the Tribunal (a) that as a matter of ordinary language, the Product is not a beverage and (b) that even if it is, beverage has a special meaning for the purposes of Group 1. Issue (a) is a pure question of fact. Issue (b) is a matter of law but once it has been decided that a special meaning is to be attributed, it will again be a question of fact whether the Product is a beverage within that special meaning.
35. In relation to issue (a), the burden before the Tribunal was clearly on Kalron to establish the primary facts on which it relied to show that the Product is not a beverage; but, even after having proved those facts, it remained a question of fact, and not law, for the Tribunal whether the Product is a beverage. It being a question of fact, the onus remained on Kalron throughout to satisfy the Tribunal that the Product is not a beverage and thus to persuade it that the primary facts proved lead to the conclusion that the Product was not a beverage. This was, however, a decision of fact for the Tribunal; it was not necessary for Kalron to satisfy the Tribunal that no reasonable body of Commissioners of HMRC could have reached the conclusion that the Product was a beverage.

36. As in any litigation, it was possible in theory that the Tribunal would find the evidence so finely balanced that they would make their decision on Kalron's appeal on the basis of the burden of proof. Decisions based on the burden of proof are never entirely satisfactory and nearly always a court or tribunal will be able to decide, on the balance of probabilities where the truth lies.

37. The critical passages on this aspect of the Decision are to be found in paragraph 35 and 36 of the Decision. The Tribunal express the view that there is nothing to indicate that it is not in the context referred to [*ie* as in the example in paragraph 34 where the sale is effectively as a beverage substitute for consumption as a beverage] that the Products are commonly sold. Equally there is nothing, they say, to indicate that the Products are sold as food substitutes. Mr Thomas takes issue with that last statement, but for reasons I will come to, I do not share his criticism. They conclude that what is clear is that the Products sold could constitute both food and beverages. Then they say:

“As the burden of proof is on [Kalron] to show that the Products are not beverages, [Kalron] is in difficulties on the facts that the Tribunal has been able to find.

We therefore conclude that it was in order for HMRC to classify these products as beverages. [Kalron] has not been able to show that that classification was wrong, so it follows that the appeal is lost.”

38. These passages come after the Tribunal have looked at the various factors on which submissions had been made to them, effectively reaching the conclusion that those factors did not provide an answer to the correct classification, indeed reflecting their finding that Kalron itself presented the Product in a unique way, neither as a meal replacement, nor as a drink. Accordingly, the Tribunal regarded the manner of consumption as providing the touchstone by which the classification should be determined. It seems to me that there is only one fair reading of what the Tribunal have said in paragraph 34 and 35 of their Decision, namely that on the evidence before it, the Tribunal are not satisfied that the Product is a beverage and that, accordingly, the appeal fails because Kalron is unable to demonstrate that HMRC's decision was wrong. In my judgment, that is a proper approach. Accordingly, to succeed in its appeal before me, Kalron cannot say that the Tribunal decided the case on the basis of a wrong application of the burden of proof; instead, it has to succeed on the *Edwards v Bairstow* approach.

39. The second alleged error of law arises in this way. Mr Thomas identifies as the decisive point for the Tribunal the fact that the Product is capable of being consumed as a beverage and of being a “beverage substitute”. This, he says, is to attach too much importance to this single factor so as to make it, in effect, a decisive test. He further submits that the Tribunal were in no position to consider whether the Product is consumed as a beverage or is a beverage substitute because they failed to consider what a beverage actually is. I do not think that this is a fair criticism of the Tribunal. What the Tribunal decided was that the Products could constitute either a food or a beverage. They concluded in paragraph 35 that the position was, in effect, finely balanced and decided in favour of HMRC on the basis that Kalron had failed to discharge the burden of proof. It is a conclusion which they reached only after weighing up all the factors

which they had identified in earlier parts of the Decision, including the parts where they reviewed the submissions on behalf of the parties.

40. The third error of law identified by Mr Thomas is that the Tribunal were wrong to dismiss the Product's ingredients and nutritional effect as irrelevant; Mr Thomas says that these aspects of the Product are in fact highly relevant. He criticised (I think with some justification) the example of alcoholic drinks as beverages with nutritional effects which can be consumed in place of solid food, being a conclusion based on no evidence and one which runs counter to common knowledge that alcohol is a depressant with potentially harmful side effects. However, as I have said, the proposition which it was used to support, that there is a wide range of drinks which are beverages notwithstanding their nutritional effect, may well be correct. The Tribunal did not, in any case, say that the Product's ingredients and nutritional effects were irrelevant; they did say that they were not the defining factor. This aspect of the case takes on less significance, I think, given my rejection of Mr Thomas' submissions in relation to the policy of the inclusion and specification of the Excepted items in Group 1 for reasons already given.
41. In support of those criticisms of the Tribunal, Mr Thomas carried out an examination of the meaning of beverage. He referred both to dictionary definitions and to case law. Although it is possible – I leave the point open at the moment – that the word beverage has a special meaning in the VAT legislation, the starting point must be its meaning as a matter of ordinary language. Whether a product is or is not a beverage is a matter of fact, not a matter of law, for a tribunal to determine, just as the meaning of “insulting behaviour” in section 5 Public Order Act 1936 was a matter of fact for the justices, “insulting” to be given its ordinary meaning: see *Brutus v Cozens* [1973] AC 854. As Lord Reid said:

“The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word “insulting” being used in any unusual sense. It appears to me, for reasons which I shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved....”
42. So, in the present case, it was for the Tribunal to determine whether the Product is a beverage or not applying the ordinary meaning of that word as a matter of the English language unless the context of the VAT legislation requires a special meaning to be attributed to it. In saying that, I am aware that words often have slightly different meanings to different people. There may be no unique “ordinary” meaning of a word, particular of a word such as beverage which is not normally used at all in modern times in everyday speech. One might, I suppose, talk of alcoholic beverages, but my own experience (on which nothing turns in the context of this appeal) is that even the familiar railway buffet attendant no longer invites us to her counter with promises of a selection of hot and cold beverages.

43. Mr Thomas says that it is common ground and well established that not all drinks are beverages. The significance of this is that he seeks to attach a different, and narrower, meaning to the word beverage than to drinks *simpliciter* so that even if the Product is a drink, and is something which is consumed by drinking it, the Product is nonetheless not a beverage. As he points out, food, in Group 1, includes drink, so that, according to him, the search is for the criteria by which to distinguish those drinks which are beverages from those which are not. The distinction is not, he submits, one capable of a simple test: rather all the relevant factors must be considered in any case to decide which side of the line a particular product falls.
44. In that context, he refers to *C&EC v Quaker Oats Ltd* [1987] STC 683 and *C&EC v Ferrero UK Ltd* [1997] STC 881 (CA).
45. In *Quaker Oats*, four relevant criteria were identified which needed to be examined in the context of the product in that case, namely certain cereal bars; these were ingredients, process, appearance and manufacture. I do not derive assistance from this case other than noting that it is consistent with the need to identify and consider relevant criteria.
46. *Ferrero UK* is also consistent with that approach. There are, however, two passages which are of some more helpful guidance. First, at p 885, Lord Woolf MR considered the statement from the tribunal that where "...there is doubt as to which category a product belongs it can be placed in the category to which it is "more akin"". But that had to be understood as meaning that, where there is a product which has the characteristics of two products, as long as it has sufficient of the characteristics of the product to which the tribunal is going to classify it, it can be placed in the category to which it is more akin. In his example, the product might have characteristics of a cake and characteristics of a biscuit. If it has more characteristics of one than of the other, it is classified as the former, but it cannot be classified as one (or the other) if it lacks sufficient characteristics of that class.
47. Secondly, at p 884, Lord Woolf cautioned against over-elaboration:

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

"I am also entirely satisfied that the references to 'more akin' in the tribunal's decision are to be understood in the sense indicated by Lord Woolf MR, and that the tribunal was approaching its task in the correct manner by asking itself whether, given the characteristics it

identified, these products could properly be classed as biscuits. There is no ideal concept conformity with every aspect of which is necessary before an aspiring manufacturer can call his product a biscuit. It is a question of fact in each case whether the article in question can properly and sensibly be said to be a biscuit.

Finally, I would wholeheartedly endorse all that Lord Woolf MR has said as to the vital importance of tribunals avoiding the error of allowing themselves to be persuaded to treat as binding in law decisions which are in truth no more than examples of the application of established principles to their own particular facts.”

49. I must bear those sensible observations in mind when considering Mr Thomas’ submissions about the appropriate, and highly prescriptive, test which he propounds for establishing whether a product is a beverage.
50. The starting point for discovering the ordinary meaning of the word beverage might be the dictionary. The Oxford English Dictionary defines a beverage as “Drink, liquor for drinking; esp. a liquor which creates a common article of consumption”. The Compact Oxford Dictionary gives “a drink other than water” and notes the origin: old French *beverage* from Latin *bibere* to drink. Mr Thomas says that the OED definition is of little help (and would no doubt say the same about the COD) because it essentially defines beverage as drink. To the extent that liquor suggests an alcoholic nature, it is clear that the ordinary use of beverage is not restricted to alcoholic beverages and clear also that beverage in Group 1 includes non-alcoholic beverages.
51. Mr Thomas then submits that the meaning of beverage must be construed with regard to the purpose of the statutory provision in which it is contained. I agree with that insofar as a clear purpose can be ascertained. But I reject, for the reasons already given under the heading “A preliminary point”, his submission that the exception is to exclude items of little or no nutritional value.
52. Then he suggests that Item 4 must be construed by reference to Item 3. Item 3 covers, essentially, alcoholic beverages. Item 4 covers “Other beverages....” which, Mr Thomas says, is intended to cover drinks which are sufficiently similar to alcoholic beverages but do not contain alcohol. I reject that approach. I see no reason at all to construe the meaning of “Other beverages...” by reference to some similarity with alcoholic beverages: and, indeed, I find the concept of similarity in this context inherently uncertain. Furthermore, the Items 4, 5 and possibly 6 of the items overriding the exceptions show that there is huge range of beverages which could not on any rational analysis be regarded as similar to alcoholic beverages.
53. Mr Thomas correctly says that the meaning of beverage must be determined in the context of the remainder of Item 4. He relies on the final words “syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages” which, he says, would be found in a standard-rated beverage. I do not accept that submission. A concentrate is not found in a standard-rated beverage: even if one buys a beverage made from a concentrate (as it the case with many fruit juices) it is not correct to say that the concentrate is found in the beverage: rather, the concentrate has been transformed by the addition of water into the beverage. A powder or crystal is clearly not a beverage: but it again is turned into one by the addition of (commonly) water.

There is no reason, so far as I can see, for construing beverage in a way which restricts it to products which are capable of being made from concentrates *etc.*

54. In relation to fruit juices, Mr Thomas says that the vast majority of fruit juice sold is made from concentrates with added water (which may be true but is not in evidence): this, together with its lack of sufficient nutritional value (as to which there is no evidence whatsoever) means that it is treated together with squash and cordials as confectionery. As regards bottled water, he says that it is excluded from zero-rating because it has no nutritional value. I think that these are extravagant submissions which derive more the need to fit the classification which one finds in Group 1 with the policy which Mr Thomas perceives (and which I have rejected) than with an objective approach to the meaning of the word beverage which is, so far as consistent with the statutory provisions, to be given its ordinary meaning as a matter of the English language.
55. It is relevant, Mr Thomas says, in determining the boundary of what is and is not a beverage, to consider the central case of that concept to look at its defining characteristics and then to consider whether these are present in a more difficult case: that is, I agree, the flavour of what Lord Woolf is saying in the passage at p 885 of *Ferrero* to which I have already referred. He picks as a classic example of a beverage a fizzy cola. It would, however, be wrong in my judgment to say that, just because a fizzy cola is clearly a beverage, its characteristics are therefore typical of beverages as a class. Herbal teas are also clearly beverages, but they may have few characteristics in terms of their ingredients and manufacture with colas. There is no reason to prefer one to the other as the paradigm beverage.
56. It is, of course, helpful to see what other tribunals or courts have said in deciding whether the items which they were considering were beverages or not. But tribunal decisions are not binding on other tribunals let alone on this court. Nonetheless, the way in which a reasonable tribunal has classified an item as a matter of ordinary language as a beverage or not is some indication of the ordinary meaning of the word.
57. It is helpful to start with the decision of (now Sir) Stephen Oliver QC in *Bioconcepts Ltd* (1993) Tribunal decision 11287. In that case, a dietary “food supplement which operates primarily to curb the consumer’s appetite” and which the tribunal held was “in essence...a liquid food” was held to be a zero-rated drink and not a manufactured beverage. The evidence was that if a glassful of the product was drunk straight away, it would operate as a violent laxative. But the product was not a medicine: it could neither cure nor prevent illness. Evidence was given by a food specialist, Mr Anderson, who adopted from a report on the product the conclusion that the product’s taste was too unpalatable to drink as a beverage even in diluted form and referred to its emetic effect if drunk by the glassful. A similar effect would be expected if Worcester Sauce or Tabasco were consumed as a beverage. The tribunal having tasted the product was of the view that it would not be expected that the product would be consumed for pleasure even in a diluted form. It was common ground, and the tribunal accepted, that the product was a food. It was easier to describe its attributes than to classify it. The tribunal described it as a food supplement which operates primarily to curb the appetite. It provided a small amount of nourishment and might detoxify the system. In essence it was a liquid food; but it could also be described as a drink particularly when mixed with water.

58. I think that it is on the basis of that last statement and other similar statements from tribunals that Mr Thomas says that there are drinks which are not beverages. I am not sure that what the tribunal said really supports that proposition. If the word drink as a noun is used in the sense that any liquid which is fit for human consumption (thus excluding petrol or liquid bleach) is a drink, then of course the product in *Bioconcepts* was a drink; but so too would be soup. But I venture to think that it is not an ordinary use of the noun drink (any more than of the word beverage) to describe soup or the product in *Bioconcepts* even though it is consumed by drinking. The tribunal was not focusing, and did not need to focus, on the meaning of drink in Group 1. Some caution must be exercised in placing major reliance on any supposed distinction between drinks and beverages.

59. The passage of most interest for present purposes is this:

“It seems to us that notwithstanding the Oxford English Dictionary [definition] of “beverage” meaning drink, it is not used in the sense of meaning all drinkable liquids.”

Pausing there, that is not controversial, but I comment that, for the reasons already stated, it may also be that not all drinkable liquids are properly to be classified as drinks giving that word its ordinary meaning. They go on:

“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 slake the thirst, to fortify or to give pleasure.....Here however, [the product] is not something that is commonly consumed. The reverse if anything is true. Still less does it have the characteristics of liquids that are commonly consumed. It is taken with together with the recommended diet.....If it were sold as part of a packaged meal, there would in our view be no doubt that it could not properly be described as a beverage: we do not consider that, viewed apart from the diet to which it relates, it should be regarded as such.”

60. One sees the phrase “taken to increase bodily liquid level, to slake the thirst, to fortify or to give pleasure” repeated in other cases and it appears also in paragraph 3.7 of VAT Notice 701/14/02 (May 2002) already referred to. It is, however, important to see how that meaning was adopted and applied in the context of the facts of *Bioconcepts* to understand just why the liquid in that case was not a beverage. I would be surprised if the tribunal had thought that it was laying down an exhaustive definition of what a beverage is rather than listing common characteristics of a beverage not all of which needed to be present in any particular case. I do not consider that the tribunal can be taken to have ruled out other drinks not having any of those characteristics from being considered a beverage.

61. *Science in Sport v HMRC* (200) Tribunal Decision 16555 (“*SiS*”) was a tribunal decision concerning sports drinks. These were held to be not beverages but were zero-rated as food. This is another example of what Mr Thomas would describe as a drink which is not a beverage. The question as the tribunal saw it was whether the products were for the preparation of beverages. In the view of the tribunal they clearly were not:

they were for the preparation of food supplements (technically “dietary supplements”). Any consequences of the fact that the products were taken in liquid form was incidental to that. It is worth quoting one short passage from the decision, at paragraph 39:

“As we see it, it is wrong to regard the products that we are considering this appeal as beverages, because the products are not “drinks”, as that term is ordinarily understood....it might be helpful for us to record that, in our view, the policy [of HMRC in relation to “sports drinks”] is flawed in failing to distinguish between “sports drinks” that are in reality drinks, and “dietary integrators” which happen to be made up as drinks. In our judgment, the latter will seldom if ever amount to beverages or products for the preparation of beverages.”

62. That passage is interesting because it articulates clearly the distinction between a drink, as that word is ordinarily understood, and a product made up as a drink, that is to say a product which is consumed as a liquid by drinking it.
63. More recently, Sir Stephen Oliver has again had to consider whether a product is a beverage in the case of *Unilever Bestfoods UK Ltd v HMRC*, a case heard by him and Lynne Salisbury on 22 January 2007. The case concerned a product sold by Unilever called Knorr Vie shots (“Vie shots”). HMRC considered that a Vie shot should be standard rated as a beverage. Unilever contended that it is not a beverage. The tribunal held that the Vie shot is not a beverage. In their decision, the tribunal describe the product which is a thick juice made, in four descriptions, from a variety of fruit and vegetables. The tribunal considered the purchase tax legislation dating back to 1962, concluding that, as long ago as that, the legislation indicated that Parliament regarded “beverage” as having a fairly narrow meaning.
64. The tribunal detected in the use of the phrase “manufactured beverages, including fruit juices and bottled waters,....” an indication that fruit juices and bottled water were not, in Parliament’s mind, regarded as beverages and were consequently brought into the category of manufactured beverages. I rather doubt that line of reasoning. By using the word “including” I would have thought that the draftsman was recognising that manufactured beverages were already potentially included but that there may have been a doubt. If he had thought that fruit juices and bottled waters were not beverages, the word “including” would sensibly have been omitted so that fruit juices and bottled waters would be excepted items in their own right. Subsequent tribunal decisions (identified in paragraph 9.7.1 of the HMRC Manual) produced contradictory decisions on what constituted “manufactured” so that a fruit juice which a tribunal held was not manufactured would remain zero-rated – not because it was not a beverage, but because it was not a manufactured beverage. I therefore approach with a degree of caution any suggestion which might be derived from this decision that the noun “beverage” in Group 1 has a restricted meaning.
65. The tribunal, after considering the dictionary definitions of beverage and the criteria laid down in *Bioconcepts*, referred to the guidance given in three cases as to the meaning of beverage: *Grove Fresh*, the decision of the Tribunal in the present case, and *Alpro v HMRC* (2006) Tribunal Decision 19911. In *Alpro*, it was decided that certain flavoured varieties of soya milk were not beverages. The crux of the decision is found in some paragraphs at the end of the decision:

“It is, firstly, a question of what the word “beverage” means as a matter of an ordinary word in the English language and we refer to the guidance already given in the *Bioconcepts* case. In the light of that, soya milk, including the flavoured varieties, is not apt to slake the thirst and although it does increase bodily liquid levels that is not likely to be the reason it is consumed. It is less likely to fortify that a sugary drink if fortify means to increase one’s vigour quickly. Of course as soya milk is nutritious it will fortify someone in a longer time span. It presumably gives pleasure to the consumer in much the same way as flavoured milk does though not in the same way that alcoholic beverages and sugary drinks might.

The flavoured soya drink is not marketed in the way beverages like alcoholic drinks and sugary soft drinks are marketed.

They can be used in cooking and we were shown recipes for such use though in the case of the flavoured drinks we assume they are not much used in cooking.”

66. It is not necessary or appropriate for me to say much about the *Alpro* decision, especially given that the tribunal saw the question as one very much of impression. I have to say, however, that I do not find the decision of any assistance in answering the question whether the Product is a beverage
67. In relation to *Unilever*, I observe that the tribunal passed no adverse comment on *Kalron*. Indeed, it is fair to say that they regard it as an example of the proposition which they state in these words: “The UK Tribunal decisions show that the *Bioconcepts* test is workable and produces an intelligible set of results”. It is precisely by contrasting the product in *Kalron* with the product in *Unilever* that a different conclusion is reached.
68. It is at this point that I wish to say more about whether “beverage” is to be given a special meaning in the VAT legislation. None of the tribunals which have looked at the meaning of the word in the past have done so: they all regarded themselves as applying the ordinary meaning of the word. Mr Thomas says that it must have a special meaning because the dictionary definition equates it with “drink” but there are drinks which are clearly not beverages for VAT purpose. That argument is, I consider, based on confusing two different meanings of the word drink. The contrast which I would draw, and which I have mentioned already and which is referred to in *SiS*, is between a drink within the ordinary meaning of that word and a drinkable liquid, that is to say a liquid which is fit for human consumption and which, being liquid, is consumed by drinking it. The dictionary definition is looking at the ordinary meaning of the word drink whereas the cases which appear to identify drinks which are not beverages are dealing with liquids which would probably not be called drinks, within the ordinary meaning of that word, either. But even if that is wrong, so that there are drinks ordinarily so called which are not beverages, that will be so, in my view, only if the ordinary meaning of the word beverage excludes that drink. As to that, it may be that milk, for example, would not, ordinarily speaking, be regarded as a beverage even if it is a drink. Accordingly, I reject Mr Thomas’ submission that beverage has a special meaning in Group 1 different from its meaning as a matter of ordinary language.

69. Mr Thomas draws attention to the fact that HMRC accept that fruit and vegetable pulps are zero-rated: see paragraph 3.1 VAT Notice 701/14/02 (May 2002). The ordinary meaning of the noun pulp is the soft fleshy part of a fruit; it is really what is left once most of the juice or water has been extracted. Mr Thomas has emphasised more than once the fact that the Product with which we are concerned is the whole fruit or vegetable less its inedible parts. I do not consider that it would be correct to describe the Product as a pulp. It is not the sort of pulp to which paragraph 3.7 must be taken as referring which would not be for drinking. It is, however, to be noted that the Tribunal in the present case describe the fruit and vegetables as being “pulped” by the machine. Used as a verb, pulp means to crush into a pulp. I do not think that, in using that word, the Tribunal was indicating that the Product (which results from this “pulping”) is a pulp as that word is ordinarily understood. Indeed, the Tribunal might equally well have used the word “liquidised” to describe the process effected by the machine; it is incontrovertible that the Product is a liquid.
70. Mr Thomas also relies on HMRC’s treatment of puréed fruit as zero-rated: see paragraph 9.7.3 of the HMRC Manual. What HMRC are referring to is a sachet of puréed fruit. This is a thick fruit purée squeezed through a nozzle intended as a convenient way to put a portion of fruit in lunchboxes and for similar snacking. It is not a fruit juice and does not fall, in HMRC’s view, within the *Bioconcepts* criteria and for those reasons is accepted as zero-rated. The consistency is described as “thick” in the Manual. I have no idea whether the product is the whole fruit (as the Product in the present case) or whether some of the juice has been taken out. Whatever the true position, it seems that the Manual is focusing on a product which is eaten rather than drunk. I do not gain any assistance from what is said in the Manual in deciding whether the Product is a beverage.
71. Mr Thomas then seeks to distil from the material to which he has referred what he calls a test for deciding whether or not a product is a beverage. The test he puts forward is that whether a drink, or rather I would say a drinkable liquid, is also a beverage should be determined by reference to the following seven factors:
- a. Ingredients: if the ingredients are food, this points away from the product being a beverage.
 - b. Nutritional value: if a product has nutritional value over and above re-hydration, then that points away from its being a beverage. Products used as food supplements or substitutes are unlikely to be beverages.
 - c. Manufacturing process: the greater the degree of processing, the more likely that the drink is a beverage. In contrast, where food is put through a machine and liquefied with nothing added or removed (other than inedible parts) the resulting drink will not be a beverage.
 - d. Place of sale: drinks typically sold alongside alcoholic beverages and fizzy drinks in public houses, confectionery stores and off licences are likely to be beverages.
 - e. Reasons for purchase: drinks which are likely to be purchased to increase hydration levels, to slake the thirst or to fortify are more likely to be

beverages. In contrast, drinks which are purchased as “dietary integrators” as food substitutes or as “liquid food” are more likely to be foods.

- f. Appearance and texture: light sweet drinks will typically be beverages. If the drink is thicker with a consistency more similar to soup, that points the other way.
 - g. Marketing and packaging: this is said to be relevant but is much reduced by the fact that any liquid must be sold in a container with both sides and a bottom.
72. It is then, Mr Thomas submits, a matter of weighing, in any particular case, these various factors.
73. It may very well be that consideration of the factors which Mr Thomas identifies may assist a tribunal in deciding whether a product is a beverage or not. However, it may not, in any given case, be necessary to consider all the factors because it is clear, without detailed analysis, that a product either is or is not a beverage. Further, the criteria which Mr Thomas puts forward may not be exhaustive: there may be a case where some other criterion is of importance too. It is not possible to be prescriptive in the way which he suggests. Indeed, it seems to me that his criteria are very much directed as reaching the conclusion which he wishes to reach. I would add this. Whatever the correct criteria in any particular case are, a tribunal can only act on the evidence before it: if material evidence is not put before the tribunal, it must make its decision on the evidence which is put forward. Further, if a tribunal is not invited to make particular findings on the evidence which is put before it, a party may have difficulties in persuading an appellate court to interfere with the decision of the tribunal which was justifiable on the facts which it did find.
74. Applying his criteria, Mr Thomas submits that the only proper conclusion which the Tribunal could have reached is that the Product is not a beverage. He relies on these factors:
- a. The Product contains the whole of the fruit or vegetable (excluding inedible parts). The contents of the Product could have been sold as a fruit salad rather than being liquefied. This points away from the Product being a beverage.
 - b. The Product has the same nutritional value as the ingredients, pointing to the same conclusion. I am not sure that this is really a separate point from a.: at least, it follows on from it.
 - c. The Product is not sold in licensed premises or confectionery outlets. They are sold only at Zumo Fresh Smoothie Bars which are “unlike other bar in the marketplace”. Mr Thomas says that this points away from the Product being a beverage.
 - d. The Product is a “thick drink not unlike cold soup in consistency” and because of its consistency “it is not always suitable to be consumed through a straw”.

- e. The Products are “presented in a unique way: neither as a meal replacement, nor as a drink”. This is neutral. But as customers are asked to choose from a menu which lists items of fruit and vegetables (clearly food and not a beverage if sold as such: query whether, being sold to make a liquid for consumption, they could be “other products for the preparation of beverages” within the closing words of Item 4) which, according to Mr Thomas, points towards the Product not being a beverage. The Products are sold in takeaway cups with lids and straws; according to Mr Thomas this points only slightly in favour of their being beverages since any drink needs to be sold in a container with sides.
75. In order to illustrate the absurdity of the conclusion of the Tribunal, Mr Thomas asks me to consider a fruit salad such as one can buy in many take-away food bars or supermarkets. That is clearly food; it is clearly not a beverage. It is zero-rated. Can it really be the case, he asks, that the result of putting the fruit salad through a blender and selling the blend in a cup changes its VAT status? Clearly Mr Thomas regards the answer as self-evident. I am afraid I do not. The blending clearly transforms a solid, albeit soft, food into a liquid which can be drunk. It is not obvious that the process cannot change the VAT treatment of the ingredients. After all, squeezing the juice from an orange produces a beverage; part of the fruit can therefore constitute a standard-rated item. Why should not the same be at least possible, without causing raised eye-brows, in relation to the whole of the fruit in a different, liquid, form?
76. As any sort of formal test, Mr Thomas’ approach is, I think, just the sort of over-elaboration which Lord Woolf cautioned against in *Ferrero UK*. That is not to say that the factors which he identified are not ones which should ordinarily be drawn to the attention of the tribunal or which they should have in mind. But the ultimate question is always the question of fact: is the product under consideration a beverage?
77. It is not fair to criticise the Tribunal, as Mr Thomas does, for failing to give any consideration to the definition of beverage since the Tribunal clearly noted the definition in VAT Notice 701/14/02 a definition derived from *Bioconcepts* which Mr Thomas himself describes as the leading decision. I notice that the Tribunal tasted the Products: they found it to be a refreshingly healthy drink. They were clearly aware of the factors which were identified in *Bioconcepts*. The Tribunal appear to have considered fully and fairly the submission of both parties and in particular the four factors identified on behalf of HMRC: see paragraph 15 above. They did not consider Mr Thomas’ proposed test because it was not put to them.
78. I have already dealt with Mr Thomas’ criticisms of the example given in paragraph 34 of the Decision. If the Tribunal were saying that this example shows that the Product is a beverage, I would see great force in the criticism and, indeed, I said in the course of argument that it was not a helpful example. However, what it does illustrate, and what the Tribunal were saying when they stated that “it is not in that context that the products are commonly sold”, is that it is easy to envisage circumstances where the Product is not only consumed in the same way as one would drink a beverage – indeed, it is not disputed that the Product is consumed by drinking it - but is also consumed as a beverage that is to say in the same circumstance as one might consume a drink which is a beverage. The Tribunal also state that there is nothing to indicate that the Products are sold as food substitutes. I have already dealt with Mr Thomas’ criticism of that

statement. Taking the Tribunal's two statements together, they reached the conclusion in paragraph 35 of the Decision that the Product could constitute both food and a beverage. I do not think that that conclusion is open to serious challenge. It is not one, in any event, which falls foul of the *Edwards v Bairstow* test.

79. It is to be noted that the Tribunal did, in any case, refer to a greater or lesser extent to the factors which Mr Thomas identifies:
- a. The ingredients were clearly in the mind of the Tribunal. The Tribunal referred to the consistency of the Products and compared it with other products such as soup.
 - b. Nutritional value was a factor expressly mentioned by the Tribunal. In any case, fruit juice has nutritional value as do some fruit squashes and cordials. The Tribunal declined to find that Kalron's products were sold as food substitutes which Mr Puzey says, and I agree, is not an unreasonable approach.
 - c. Manufacturing process was also something clearly the Tribunal knew about and stated. That they did not refer to it expressly as a factor which they took into account may have something to do with the fact that they were not addressed on the point. As I have already observed, squeezing an orange is as much a process as liquidising a carrot. The former clearly produces a beverage and, if anything, points to the Product being a beverage also.
 - d. The place of sale was also in the mind of the Tribunal, as was its unique *ambiance*. I gain no assistance from Mr Thomas' observation that drinks typically sold alongside alcoholic beverages and fizzy drinks in public houses, confectionery stores and off licences are likely to be beverages. Beverages are sold in many other types of outlet and alongside many different sorts of products.
 - e. The Tribunal found that a purchaser could well be purchasing the Products as beverages and not as a food substitute. There was no reason for the Tribunal to reject that as a real and typical possibility.
 - f. Appearance and texture are fairly unhelpful criteria to put forward. Beverages come with all sorts of colours and textures. As Mr Puzey points out, yoghurt drinks and thick milkshakes are beverages, although zero-rated by virtue of the override of the exceptions.
 - g. As to packaging and marketing, there is nothing to suggest that the Tribunal did not take account of such evidence as was before it on those matters. It is surely swept up in paragraph 35 of the Decision where it is said that there is nothing to suggest that the Product is sold as a food substitute.
80. What the Tribunal did not expressly consider is whether the Product is commonly consumed. Again, it is clear from their reference to the *Bioconcepts* criteria as set out in VAT Notice 701/14/02 that the Tribunal was aware of this aspect. It is hard to see how they could have to come to any conclusion other than that the Product was commonly consumed. Kalron may be the leading or even sole commercial supplier of

the Product, but the Product is produced from everyday ingredients subjected to the simplest of processes; it is not a specialist product, such as the products in *SiS*. Indeed, Kalron's presentation of the Product, and its invitation to the public to purchase, is entirely consistent with the Product being one of the vast range of foods and drinks which people consume as part of their everyday diet.

81. Mr Thomas' fall-back submission is that the Tribunal did not correctly apply the test which it actually adopted to its own findings of fact. In particular, he says that the Tribunal's finding that the Products might be *consumed* as beverages or as "*beverage substitutes*" is based on faulty reasoning and is contrary to its own findings of fact. He submits as follows:
- a. The Tribunal's findings were that the Products are purchased by customers who value their "unique properties" being the ability to consume large amounts of fresh fruit very quickly. That is not quite what the Tribunal say. I have set out what they do say at paragraph 13g above, although, as there stated, I do not know the evidence on which they said what they did say (and is something which does not appear in that part of the Decision dealing with the facts *ie* paragraphs 10 to 16). Be that as it may, the Tribunal does not identify the unique properties in the way which Mr Thomas describes them. So far as speed of consumption is concerned, it is no doubt correct that this fresh product is usually consumed very soon after purchase, but there is nothing to suggest that its purchase was for the quick consumption of fresh fruit and vegetables.
 - b. The Tribunal appears to have agreed with the submission made about the health-giving properties of the Products and their feeding properties. Accordingly, they appear to agree with the submission that that the Products may be the preferred method of fruit and vegetable consumption for those who have difficulty masticating such as people with dental problems (but my observations concerning the lack of evidence in support of that proposition at paragraph 14 above should be remembered). It was found that the Products have the consistency of cold soup. Mr Thomas says that these findings are inconsistent with the Tribunal's statement that "there is nothing to indicate that the products are sold as a food substitute". I disagree. The person who has difficulty masticating or who has dental problems is hardly the paradigm purchaser or target customer. It is quite wrong to take an atypical customer who may have a special reason of that sort for purchasing the Product in order to classify the Product as a food substitute. The fact that the Product has the consistency of cold soup is, I consider, no indication whatsoever that the Product is a food substitute.
 - c. Finally, Mr Thomas criticises the example which I have already mentioned at paragraph 24 above, saying that a beer would be bought for pleasure whereas the Product would be bought in order to enable the purchaser to consume fruit or vegetables. There is no evidence of that. It is, in any case, something of a "bootstraps" argument. Having identified the purpose in that way, the conclusion might follow. However, I would have thought that the Product was purchased in order to enable the purchaser to consume a unique liquefied

product; if he or she had wanted to consume fruit or vegetables, a purchase of a fruit salad or a vegetable salad (or both) is what one might expect.

Conclusion

82. In my judgment, the Tribunal did not apply an incorrect approach to the burden of proof. They were entitled to decide the case by concluding that they were not satisfied that Kalron had not met the burden of proof on it to show that the Products are not beverages. Further, in my judgment, Kalron cannot bring this case within the principles of *Edwards v Bairstow* to establish that no tribunal, properly directed and acting in accordance with its proper functions, could have reached the conclusion that the burden of proof was not satisfied. I would add that, if I am wrong on the first of those conclusions, I would not remit the matter to the Tribunal. There are sufficient findings of fact for me, on appeal, to decide whether or not the Products are beverages. I would conclude, taking into account all of the factors which Mr Thomas submits are relevant, that they are.