



**TC01515**

**Appeal number: TC/2009/16451  
TC/2010/06928**

*Zero rating – food – savoury snacks made of a wheat and potato blend – Excepted Item 5 Group 1 Schedule 8 VAT Act 1994 – are they similar products to potato crisps - no – are they made from the potato – no – appeal allowed.*

**FIRST-TIER TRIBUNAL**

**TAX**

**UNITED BISCUITS (UK) LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: LADY MITTING (TRIBUNAL JUDGE)  
ALBAN HOLDEN (MEMBER)**

**Sitting in private in Manchester on 12 and 13 July and 31 August 2011**

**Nigel Gibbon of counsel for the Appellant**

**Raymond Hill of counsel for the Respondents**

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## DECISION

1. This appeal concerns the liability to VAT of two savoury snack food products manufactured by United Biscuits (UK) Ltd (“UB”), namely Discos and new recipe Frisps. UB maintain both should be zero rated whilst the Commissioners contend both should be standard rated.

### Legislation

2. Group 1 of Schedule 8 to the VAT Act 1994 zero-rates:

“The supply of anything comprised in the general items set out below, except –

- 10 (a) a supply in the course of catering: and  
(b) a supply of anything comprised in any of the excepted items set out below, unless it is also comprised in any of the items overriding the exceptions set out below which relates to that excepted item.

### General items

#### 15 Item No

1. Food of a kind used for human consumption.

.....

### Excepted items

#### Item No

20 .....

5. Any of the following when packaged for human consumption without further preparation, namely, potato crisps, potato sticks, potato puffs, and similar products made from the potato, or from potato flour, or from potato starch, and savoury food products obtained by the swelling of cereals or cereal products; and salted or roasted nuts other than nuts in shell.”

### Case Law

3. We were referred by the parties to the following cases:

*Customs & Excise Commissioners v Ferrero UK Ltd [1997] STC 881*

*Proctor & Gamble UK v HMRC [20205]*

30 *Proctor & Gamble UK v HMRC [2009] EWCA Civ 407*

For ease we will throughout this Decision refer to the Proctor & Gamble litigation as “Regular Pringles”.

4. The Commissioners accept that neither of the two products are “potato crisps, potato sticks or potato puffs” and that neither is “obtained by the swelling of cereals or cereal products” and that they are not “salted or roasted nuts”. UB accepts that both products are packaged for human consumption without further preparation. The issue before the tribunal is therefore whether either or both of the products are “similar products made from the potato or from potato flour or from potato starch”.

40 5. The Commissioners called no oral evidence. For UB, we heard oral evidence  
from Julian Ogden, UB's Indirect Tax Controller and Doctor Olivier Sevenou, UB's  
Ingredients Technology Manager. We also had before us on behalf of the Appellant,  
a witness statement from Catharine Hall, UB's Technical Legislation Manager, her  
witness statement being in the main unchallenged after two comments to which the  
Commissioners took exception were withdrawn. On behalf of the Commissioners we  
45 had before us two unchallenged witness statements from the decision making officer,  
Ms Peta Siddall.

### **The Evidence**

6. From the evidence both oral and documentary and from the array of products put  
before us, we find the following facts:

50 7. Both Discos and new recipe Frisps are savoury snacks, intended to be eaten on  
their own without dips or sauces. Both have been in production for some years and  
their recipes have changed over the years. Discos were originally an all potato  
product. In 2000 the recipe was re-formulated with a proportion of the potato flakes  
being replaced by wheat flour. A further reformulation to its current recipe took place  
55 in 2006. The current recipe is as follows:

Recipe for Discos (since 2006):

Wheat starch	31.17%
Dried Potato	27.87%
Sunflower Oil	25.65%
60 Wheat Flour	7.13%
Other Ingredients	8.18%

UB had been treating Discos as zero rated since 2006 but following the *Regular  
Pringles* judgment in the Court of Appeal, UB, in a review of its portfolio of  
65 products, sought a confirmatory ruling from the Commissioners who ruled that it  
should be standard rated, hence this appeal to the Tribunal.

8. The position of Frisps is somewhat different in that the product currently marketed  
is made from potato flakes but a new recipe has been formulated for the product but  
has not yet been launched and a pre-launch ruling as to its liability has been sought  
70 from the Commissioners. It is this new recipe which is the subject of the appeal and  
throughout this Decision we refer to the product under appeal as New Recipe Frisps.  
The product currently on the market, we refer to just as 'Frisps'. The recipe for New  
Recipe Frisps is as follows:

75 Recipe for New Recipe Frisps:

Wheat Flour	34.70%
Sunflower Oil	33.11%
Dried Potato	22.56%
80 Other Ingredients	9.63%

9. Discos are sold in salt and vinegar, cheese and onion and barbeque beef flavours  
and Frisps in ready salted, salt and vinegar and cheese and onion flavours. Frisps are

85 sold in 28 gram sealed foil bags and Discos in 28 and 64 gram packs. They are to be found in the same supermarket aisle as potato crisps and the vast array of other snack products both standard and zero rated, but would be in the section devoted to niche savoury snacks.

90 10. New Recipe Frisps are approximately 5cms in diameter. They are of a round ridged design and very slightly wavy. Their appearance throughout the pack is more or less uniform and they are of a consistent light golden brown colour. They are described as having a light melty texture. Discos are of a uniform thin round shape, again with a slight waviness and are approximately 4.5 cms in diameter. Their colouring in the pack produced to us was again of a light golden brown. Discos are described as having a thick dense texture with crunchy bite.

95 11. Potato crisps and sticks are produced from the raw potato which is peeled, sliced into its designated shape and fried, the moisture in the potato being replaced during the frying process by oil. The potato content of the crisp in its final form would be in the region of 60 to 70 percent. Discos and Frisps (and the manufacturing process will be identical for New Recipe Frisps), in common with all other dough based products  
100 whether made predominantly from potato or wheat or other cereals, are made from a dough produced by mixing the dry ingredients which is pushed through a series of rollers to reach the desired thickness. In the case of Frisps, in common with all other ridged products, one of the rollers will be ridged to produce that ridged shape. The resultant dough sheet is then cut into shapes which are briefly fried following which  
105 oil and flavouring are added before being packaged. It is the addition of the oil and flavouring which create the taste of the finished product. The base of Discos and Frisps are designed to remain as neutral as possible so as not to negatively impact on the external flavour. It was Dr Sevenou's evidence that it is not the potato which is the key to delivering the taste in either Discos or New Recipe Frisps but the  
110 predominance of the wheat flour which, unlike for example, maize flour, is sufficiently bland to bring out the strong flavouring. Dr. Sevenou's evidence, which we accept, is that it is the wheat content which is responsible for delivering the key characteristics of both products.

115 12. A by-product of reducing the potato content is to improve consistency in colour. Because the level of sugars in a potato varies from 0.3 percent in early season to 1.2 percent in late season, there is in potato based products a gradual deepening in colour over the calendar year. As the potato content reduces the variation in colour lessens and a more uniformly pale colour will result.

120 13. Dr Sevenou's aim in the creation of New Recipe Frisps was to retain as near a perfect match as possible to current Frisps so the consumer would notice as little difference as possible, ideally none and this he felt he had achieved. The use of the same manufacturing equipment maintains an identical shape, size and curvature (which, as Dr Sevenou says, are matters of commercial choice). The taste, texture and  
125 flavouring are a product of the blend of ingredients and again in New Recipe Frisps and the 2006 Discos recipe, Dr Sevenou feels that he has achieved a near perfect match. In the case of New Recipe Frisps, the consumer research to which we were referred all shows a near perfect match to the current product in the approximately one dozen elements which were tested including for example crispness and crunchiness.

130 14. Dr Sevenou was of the view that he would in due course be able to create a blend  
of ingredients which would create a similarly matched product but with an even  
smaller potato content. The potato content included within both Discos and New  
recipe Frisps was retained for a variety of commercial and economic reasons  
including, for instance, the equipment currently in use is not new and was designed to  
135 work with potato dehydrates. The impact of a larger quantity of the other ingredients  
would cause excessive damage to the equipment and thus colossal replacement  
expenditure. Given these factors Dr Sevenou explained that in terms of functionality  
the retention of potato was no more than incidental. It was not key in producing any  
of the key characteristics of the products.

140 15. The evidence on labelling was derived from Ms Hall's witness statement. The  
labelling requirements for all foods are derived from the requirements of Regulation 8  
of the Food Labelling Regulations 1996. Food to be delivered as such to the ultimate  
consumer or caterer – and which does not otherwise have a name prescribed by law or  
a customary name – must have a name which “shall be sufficiently precise to inform a  
145 purchaser of the true nature of the food and to enable the food to be distinguished  
from products with which it could be confused.” It was accepted by Dr Sevenou that  
there is a lot of leeway in compliance with the Regulation but Ms Hall's evidence was  
that Discos and New Recipe Frisps could not be described as potato snack products  
without misleading the consumer although they could both be described as “wheat  
150 and potato snacks.” This was a matter of commercial choice. The current packaging  
for Discos refers on the front to their being “big flavoured crunchy snacks” with no  
mention of the ingredients and in the statutory information given on the reverse they  
are referred to as “crunchy wheat snacks” with wheat starch being given as the first  
named ingredient given that it is the major ingredient in terms of quantity. The  
155 packaging and labelling for New Recipe Frisps has not yet been designed but in  
contrast to Discos, the current Frisps packaging and labelling describes the product as,  
on the front, “a potato snack” and on the reverse side as, a “reformed potato snack.”  
As the major ingredient, dried potato is named first in the listed ingredients.

### **The Approach to be taken by the Tribunal**

160 16. Both counsel addressed us on this point, expressing, in part, somewhat differing  
views. Both agreed that there was one single statutory test which posed a composite  
question, as set out by Jacob LJ in paragraph [13] of his judgment in *Regular  
Pringles*.

165 “[13] As Toulson LJ observed in oral argument, it is a composite question. So  
although it is convenient to ask separately whether Pringles are ‘similar’ to potato  
crisps etc and whether they are ‘made from potato’, one must also take into  
account the composite nature of the question. Moreover it is, to my mind  
precisely the sort of question calling for a value judgment of the sort to which the  
*Biogen* principle applies (see *Biogen v Medeva* [1997] RPC 1, 38 BMLR 149).”

170 Mr Hill's approach to the question was that so long as the Tribunal took into account  
the composite nature of the question then the two elements can be taken individually  
as sub issues.

175 17. Mr Gibbon saw a danger in this approach in that if the two sub questions were answered individually, a combined answer could be arrived at rather than a composite one and he therefore advocated that the Tribunal should answer the single composite question namely “are either of the products similar products made from the potato, or from potato flour or from potato starch.”

180 18. We prefer and will adopt Mr Hill’s approach but will take care once we have considered the two discreet elements, to draw the strands together to answer the composite question. This approach was considered to be acceptable expressly or implicitly by all three members of the Court of Appeal in *Regular Pringles*.

19. Both Mr Hill and Mr Gibbon stressed the comments of Jacob LJ at paragraphs [14] and [35] of his judgment, namely:

185 “[14] Before going further, I have this general observation. This sort of question—a matter of classification—is not one calling for or justifying over-elaborate, almost mind-numbing, legal analysis. It is a short practical question calling for a short practical answer. The tribunal did just that.

190 [35] To my mind the judge’s test (not advanced primarily by Mr Cordara before him or supported as his primary argument on this appeal) suffers from that wooliness objection, but the real objection is that it is just too elaborate. The statute is simply posing a kind of jury question ‘Is it similar to a potato crisp etc. and made of potato?’ The question is not capable of elaboration or complex analysis.”

195 20. As put to us by both counsel, we the Tribunal should take into account all of the facts of which we have been informed, and we should then take a reasonable view on the basis of those facts as to the nature of the products and whether or not either or both fall within the relevant statutory description.

### **Submissions**

200 21. It was common ground that, as stated by the Court of Appeal, similarity is a matter of overall impression and involves a question of degree and a multi-factorial assessment. The Tribunal is therefore entitled to take into account the products’ appearance; taste; ingredients; process of manufacture; marketing and packaging. Mr Hill however suggested, and this was accepted by Mr Gibbon, that certain factors should be excluded from consideration as having been found by the Tribunal in  
205 *Regular Pringles*, for varying reasons, to be of little assistance. To be excluded would be process of manufacture; packaging; added flavourings; placement and competition. Those factors remaining to be considered would therefore be shape; appearance; texture; taste; labelling and ingredients. Both Counsel stressed that from the whole range of savoury snack products, the comparison the Tribunal has to make  
210 is with potato crisps and not with other products which may be standard rated because they themselves were similar products. Mr Hill however believed that it was permissible to “keep in mind” other products which had been judged to be or accepted to be similar to potato crisps such as Regular Pringles and Hula Hoops. We see nothing wrong with this approach provided it is only used as a cross check to avoid  
215 inconsistency in assessment or in Mr Hill’s words as a means of “calibrating the level of generality”.

22. In assessing similarity, Mr Hill proposed that the comparison in respect of New Recipe Frisps should be with McCoys crinkle cut crisps; Walkers Crinkles and Seabrook's crisps. In relation to Discos he believed the comparison should be with Walkers potato crisps. Mr Hill carried out a detailed analysis and comparison in respect of shape; appearance; texture and base taste and in summary found marked similarities. He conceded that in terms of labelling and ingredients the similarity was not nearly so marked and those two features would arguably support the Appellant. He did however believe that labelling was of minimal importance given the leeway which is open to a manufacturer in how it describes its products and the very different test which is applied to labelling, both in terms of purpose and effect.

23. In looking at the "made from" element, Mr Hill's contention was that both products could still be regarded as being made from the potato even though potato was not their principal ingredient. He highlighted the rejection by the Court of Appeal that to be "made from the potato" the product should be 100 percent potato and drew upon paragraph 27 when Jacob LJ pointed out that "if it were right a marmalade made using both oranges and grapefruit would be made of neither – a nonsense conclusion." His submission was that these two products, being made from wheat flour and potato could therefore be "made from the potato" in the sense required by the statutory test. Mr Hill stressed that both the Tribunal and the Court of Appeal in *Regular Pringles* had rejected the suggestion that a minimum percentage level could be set to determine whether or not something was made from the potato. He cited Jacob LJ at paragraph 32 that "you do not have to know where the precise line is to decide whether something is one side or the other."

24. In essence, Mr Hill's submission was that in all the circumstances, in presentation, appearance and impression, both Discos and New Recipe Frisps are products which are similar to potato crisps etc. and are both made from the potato, in the sense required by Excepted Item 5.

25. Mr Gibbon imposing his single and composite test drew on the evidence of Dr Sevenou seeking to highlight the differences between New Recipe Frisps/Discos and potato crisps in terms of shape, appearance, texture and taste but his principal submission in relation to these factors was that in focussing on these characteristics at the requisite level of generality, the same qualities and descriptions could be applied to a range of savoury snack products both standard rated and zero rated alike. He therefore saw these characteristics as being unhelpful and thought the focus should be on labelling and ingredients. The base comparator, the potato crisp, had a potato content, its principal ingredient, of some 70 percent as opposed to the 27.87 percent for Discos and 22.56 percent for New Recipe Frisps. Mr Gibbon highlighted that of all the standard rated savoury snacks to which we had been referred (and there were many) they all had potato as their principal and defining ingredient from which their essential characteristics were derived. This contrasted with Discos and New Recipe Frisps in which not only was wheat the major ingredient but it was also the defining ingredient in terms of characteristics. Mr Gibbon submitted that at its most basic and fundamental level, the ingredient content, neither Discos nor New Recipe Frisps could be described as similar products made from the potato because the principal and defining ingredient was wheat.

26. In terms of the labelling and presentation of the packaging, Mr Gibbon contended that this was an essential and important difference. His point was that both products

could legally be labelled as a wheat snack without including any reference to potato.  
265 They could be labelled as a wheat and potato snack but they could not legally be  
labelled as a potato snack. This contrasted with the potato crisp and all the other  
products on the standard rated side of the line which could properly and legally be  
labelled as potato snacks. Both were wheat products because wheat was their largest  
and defining ingredient and they could both properly and legally be labelled as a  
270 wheat snack.

### Conclusions

27. As reference throughout this hearing was made to the *Regular Pringles* litigation  
in both the Tribunal and the Court of Appeal, it may be useful to summarise the basic  
characteristics of that product. Its potato content was approximately 42 percent, other  
275 flours around 15 percent and the fat content approximately 33 percent. In considering  
similarity, the Tribunal concluded

“ standing back and taking all the factors of appearance; taste; ingredients;  
process of manufacture; marketing and packaging together...and applying the  
‘reasonable man’ test in test (a), we consider that while in many respects Regular  
280 Pringles are different from potato crisps and so they are near the borderline, they  
are sufficiently similar to satisfy that test.” In relation to test (b) (the ‘made from’  
test) the Tribunal’s conclusion was:

“17.

Here, the potato flour content is over 40 percent; it is the largest single  
285 ingredient by about 9 percentage points; and it is nearly three times larger  
than the other flours in the ingredients taken together. We have to give a yes  
or no answer to the question “are Regular Pringles [partly] made from the  
potato, from potato flour or from potato starch” and we are bound to say yes.  
There are other ingredients but it is made from potato flour in the sense that  
290 one cannot say that it is not made from potato flour, and the proportion of  
potato flour is significant being over 40 percent. The fact that it is also made  
from other things does not affect this. Accordingly we find that Regular  
Pringles are made from potato flour and satisfy test (b).”

28. The Tribunal’s approach was approved and upheld by the Court of Appeal, Jacob  
295 LJ commenting in regard to paragraph 17. that

“I cannot begin to see anything wrong with that, still less that that was not a  
conclusion which any reasonable Tribunal could reach. There is more than  
enough potato content for it to be a reasonable view that it is made from the  
potato. “

29. Looking first at “similarity”, this comes down to, as pointed out by the Court of  
Appeal, a matter of overall impression. In matters of shape, appearance and texture,  
we see clear similarities with potato crisps but accept Mr Gibbon’s argument that  
similar characteristics are shared by a number of zero rated and non potato products.  
To consider shape, appearance and texture does not greatly assist in answering the  
305 question. Labelling is a clear distinction between the two but we accept Mr Hill’s  
submission that it is of minimal importance. As far as taste is concerned, we found it

difficult to identify a base taste, so strong was the flavouring and this strength and taste of flavouring would almost certainly be found in any number of products. This leaves a comparison of the ingredients. Clear approval for taking the potato content into account in this consideration is to be found in paragraph 24 of Jacob LJ's judgment. A potato crisp has some 70 percent potato content and Regular Pringles has some 42 percent. In each case the potato is the only significant ingredient other than the cooking medium. Discos and New Recipe Frisps have a potato content of 27.87 percent and 22.52 percent respectively. Further, the potato content is not the only significant ingredient. Each contain to a significant degree wheat starch (in the case of Discos) and wheat flour (in the case of New Recipe Frisps). Despite the similarities which clearly exist in shape, appearance and texture between the potato crisp and these products, the difference in potato content is so great that we find that Discos and New Recipe Frisps are not similar products to the potato crisp.

30. Although this finding would be sufficient to conclude that the statutory test is not met, we will go on to consider the "made from" point. It is clear that the potato content does not have to be the same or about the same as that of a potato crisp and that it is possible for a product to be "made from the potato" even if it has a substantially lower proportion of potato than a standard potato crisp – as in Regular Pringles. We accept that it is possible for a product which is made from two or even more ingredients to, in certain circumstances, be reasonably said to be made from one of them but that does not follow inevitably and has to be a matter of degree and a matter of fact. The proportions of wheat and potato in these products are by no means equal, the potato content being considerably lower. In terms of function, based on Dr Sevenou's evidence, the defining and essential ingredient is the wheat. If one asks what New Recipe Frisps and Discos are made of the answer is that, excluding the cooking oil, they are made from a blend of wheat and potato, the potato element being of considerably less significance than the wheat in terms of both quantity and function. Given this, in answer to the question are New Recipe Frisps and Discos made from the potato, the answer has to be no.

31. Interestingly, Mr Gibbon's approach is largely that which is advocated in the Commissioners' Internal Guidance notes, the current version of which, in Chapter 10.3, looks at the meaning of "made from potato". The Guidance begins by saying:

"We interpret the term 'made from' as meaning that potato must be the main ingredient: A product will not fall under this heading if potato appears as a minor addition, for example, to wheat flour, so a biscuit containing a small amount of potato flour remains zero rated,"

the Guidance goes on to say:

"made from potato" etc. means that potato, or potato flour or potato starch must be the main ingredient of the product that gives the product its essential characteristics. The fact that another ingredient other than potato may comprise the largest percentage of the total weight of the product will not necessarily determine the matter. If potato is the significant ingredient and clearly gives the product its essential characteristics, we would regard that product as being made from potato."

32. Mr Gibbon made the reference to the Guidance not as an argument in itself as he clearly recognised that it had no legal authority but to support the approach which he was taking to his consideration. It must be right, that the answer cannot be based solely on the amount of the respective ingredients but regard has to be given to their function, to their significance in the final product.

33. Drawing the two strands together, and asking the single composite question, are New Recipe Frisps and Discos similar to potato crisps and made from the potato, the answer has to be no. Equally, if we were to have adopted Mr Gibbon's approach and asked ourselves the question "can Discos and/or New Recipe Frisps be classified as similar products to potato crisps, potato sticks or potato puffs, made from the potato or from potato flour or from potato starch?", the answer again is no.

34. The appeal is therefore allowed. Mr Gibbon made no application for costs but as asked, we give the Appellant liberty to apply if it so wishes within 21 days of the release of this decision.

35. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**TRIBUNAL JUDGE**

**RELEASE DATE: 22 September 2011**