

# VAT CONSULTATION – FOOD SUPPLEMENTS

## INTRODUCTION

I [ ] am a partner in [ ] a specialist VAT agency which represents various suppliers of food and drink products in Ireland. Since November 2011, arising from new guidance that was published by Revenue at that time regarding the VAT treatment of food supplements, I have also represented many suppliers engaged in the supply of these products. [ ]

## EXECUTIVE SUMMARY

The Consultation Paper for the VAT treatment of food supplements is predicated on the premise that Revenue has always considered that all food supplements are properly chargeable to VAT at the Standard rate (currently 23%) but that they allowed certain vitamins, minerals and fish oils to be supplied at the Zero VAT rate, on a concessionary basis.

Pursuant to this premise, the Consultation Paper rules out the option of legislating for a Zero VAT rate in the future, on the grounds that, under the EU VAT Directive, *'it is not possible to apply the Zero rate to goods or services that did not apply at the Zero rate'*, on the 1<sup>st</sup> January 1991.

However, this premise is incorrect and therefore, the terms of reference of the Consultation Paper are fundamentally flawed inasmuch as they exclude the Zero VAT rate as a valid option for future legislation.

The contention that Revenue operated a limited Zero rate concession for vitamins, minerals and fish oils is factually incorrect, for a variety of reasons, as follows:

- 1) The EU VAT Directive does not allow member states to operate Zero VAT rate concessions.
- 2) Revenue's own published guidance in November 2011 provided for the potential Zero VAT rating of any type of food supplement, with the exception of those supplied for sports nutrition, muscle building and slimming purposes.
- 3) Prior to 2018, there was never any statement made, written or published by Revenue to indicate that they had operated a limited concession.
- 4) Freedom of Information requests to Revenue have failed to establish that any policy ever existed to operate a limited Zero VAT rate concession for vitamins, minerals and fish oils.

## 2.

- 5) Revenue's own on-line VAT Rates Index had entries until September 2017 that allowed the Zero VAT rate for diverse food supplements, other than certain vitamins, minerals and fish oils.
- 6) Revenue issued 100's of Zero VAT rate decisions for all types of food supplements during the five year period following the publication of their guidance in November 2011.
- 7) The previous Minister for Finance, Michael Noonan, stated in response to a Dáil question in October 2014 that Probiotic and Glucosamine food supplements, which are not vitamins, minerals and fish oils, could potentially avail of the Zero VAT rate.
- 8) Revenue advised the IHTA in 2013 that certain categories of food supplements, other than vitamin, minerals and fish oils, were properly chargeable at the Zero VAT rate.
- 9) The terms of reference for a Revenue VAT policy review instigated in 2016 show that there was never a policy to operate a Zero VAT rate concession for vitamins, minerals and fish oils.
- 10) Revenue are obliged to explain their VAT policy under their own Customer Service Charter and the existence of a limited Zero VAT rate concession for vitamins, minerals and fish oils was never communicated to any taxpayer or tax agent, as required.

The foregoing reasons are hereby supported by the following submission:

### **SUBMISSION**

#### **1. The EU VAT Directive does not allow member states to operate Zero VAT rate concessions.**

There is no provision within the EU VAT Directive to operate a Zero VAT rate for the supply of goods or services, unless the operation of that rate is applied under the provisions of Article 110 of the Directive, which states:

*'Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates.'*

*'The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer.'*

Article 110 is the legal provision of the EU VAT Directive under which Ireland is permitted to retain any Zero VAT rates that were already provided for in Irish VAT legislation on 1<sup>st</sup> January 1991.

Significantly, Article 110 (or any other Article of the Directive) does not provide for the operation of the Zero VAT rate at the discretion of the Revenue Commissioners.

### 3.

Therefore, the Revenue policy to apply the Zero VAT rate to certain food supplements could not have been implemented on a concessionary basis under Community law and those products could only have been supplied at the Zero VAT rate if Revenue was satisfied that they were a supply of Zero-rated food, in accordance with the provisions of VATCA 2010.

A practical example of the illegality of any Zero rate VAT concession under the EU VAT Directive is illustrated by the failed attempt of the British Government to provide for the supply of tampons at the Zero VAT rate. This issue became a major argument in the UK Brexit campaign in 2016. The UK Prime Minister, David Cameron, appealed to the EU for a derogation but this was not forthcoming. As tampons had not been Zero-rated in the UK before 1<sup>st</sup> January 1991, the introduction of the Zero VAT rate was prohibited under the EU VAT Directive and moreover, the Directive also precluded HMRC from applying the Zero VAT rate on a concessionary basis.

Therefore, it was never possible under Community law that Revenue could have operated a Zero VAT rate concession for certain food supplements. On the contrary, Revenue applied the Zero VAT rate to these products in accordance with their own interpretation of the Irish VAT legislation.

## **2. Revenue's own guidance, published in November 2011, provided for the potential Zero VAT rating of any type of food supplement, with the exception of those supplied for sports nutrition, muscle building and slimming purposes.**

Revenue publishes guidance on the VAT treatment of various goods and services, as deemed necessary by them, in the official Tax & Duty Manual. Prior to November 2011, Revenue had never published any guidance regarding the VAT treatment of food supplements. However, they had previously operated a *de facto* Zero VAT policy for all food supplements, from the time when the Zero VAT rate for food was first introduced in September 1973, by sole reference to the single criterion that these products were formulated with recognised food ingredients. This policy is reflected by Zero VAT entries that were published on Revenue's website for diverse food supplements (please refer to Section 5 below).

In November 2011, Revenue published enclosed guidance in the Tax & Duty Manual (**ENCL. 1**) which made certain changes to the previous *de facto* policy that permitted all food supplements to be supplied at the Zero VAT rate. It is understood that this guidance was prompted by an earlier, unpublished ruling by the former Appeal Commissioners to the effect that certain products supplied for sports performance and muscle building should be liable to Standard rate 23% VAT.

The Appeal Commissioners' ruling has never been published but Revenue has indicated that it served as the basis for the November 2011 guidance which stated that Zero VAT rated food supplements must provide similar sustenance to that which would be obtained from a normal healthy diet; that they should also be regarded as 'food' within the ordinary and everyday meaning of that word; and that they should form part of a person's normal diet for the purposes of sustenance, as opposed to enhancing a person's diet with a view to achieving a particular aim.

4.

The 'key consideration' for the VAT treatment of food supplements was identified in the November 2011 guidance as *'whether the food supplement is one that forms part of a person's normal diet for the purposes of sustenance as opposed to enhancing a person's diet with a view to achieving a particular aim'*.

The November 2011 guidance stated that food supplements being Vitamins, Minerals and Fish Oils, could generally avail of the Zero VAT rate but it did not provide any examples of other types of food supplements that could also avail of the Zero rate. In this regard, there are many types of other food supplements such as plant extracts, plant oils, amino acids and probiotics.

Similarly, apart from the products examined by the Appeal Commissioners – viz., sports performance and muscle building supplements – the November 2011 guidance did not specify which other types of food supplements might in future be excluded from the Zero VAT rate. However, slimming food supplements were included in the list of specified excluded products, due to their similarity to body building products.

Most importantly, the November 2011 guidance did not state that the Zero VAT rate for food supplements was applied by concession or that the Zero VAT rate was restricted to vitamins, minerals and fish oils by any such concession. On the contrary, the guidance provided that any type of food supplement could properly be supplied at the Zero VAT rate, if the stated criteria were fulfilled.

**3. Prior to 2018, there was never any statement made, written or published by Revenue to indicate that they had operated a limited concession.**

As stated in Section 2 above, prior to November 2011, there was no guidance published by Revenue regarding the VAT treatment of food supplements and therefore, there was no indication that the Revenue's policy to permit the supply of all food supplements at the Zero VAT rate was being conducted on a concessionary basis.

In my capacity  I have received 100's of both Zero and Standard rate VAT decisions from Revenue in respect of all types of food supplements, since the first and only official guidance for the VAT treatment of these products was published by them in November 2011.

In regard to the many decisions to apply Standard rate VAT to diverse food supplements, other than vitamins, minerals and fish oils, I can confirm that contradictory Zero VAT rate decisions were also issued by Revenue, in the vast majority of these cases, in respect of similar products. Indeed, this unworkable situation led to the decision by the Chairman of the Revenue Commissioners in 2016 to instigate an expert policy review with a view to publishing improved guidance.

I can also confirm that the existence of a limited concession for vitamins, minerals and fish oils was never invoked by Revenue as grounds for disallowing the Zero VAT rate for any food supplement.

On the contrary, Revenue made decisions by reference to their November 2011 guidance and that guidance did not refer to the existence of any policy regarding a Zero VAT rate concession that was restricted to vitamins, minerals and fish oils.

I am enclosing two examples of decisions made by Revenue in April 2016 to illustrate the actual policy that pertained in Revenue's application of the November 2011 guidance.

On 14<sup>th</sup> March 2016 (**ENCL. 2**) a decision was made by Revenue to apply the Zero VAT rate to Cranberry Capsules in accordance with the longstanding *de facto* Revenue policy that this particular type of food supplement was formulated with a recognised food ingredient. Clearly, this decision would not have been possible if a concession existed to restrict the Zero VAT rate to vitamins, minerals and fish oils.

On 15<sup>th</sup> April 2016 (**ENCL. 3**) a decision was made by the same Revenue official to apply the Standard VAT rate to Lutein Capsules, on the grounds that they were supplied as a '*healthy eye aid*'. This reference is clearly based on the November 2011 guidance which applied Standard rate VAT to products that were supplied for the purpose of '*enhancing a person's diet with a view to achieving a particular aim*'. Significantly, the decision was not based on the existence of a concession to restrict the Zero VAT rate to vitamins, minerals and fish oils and again, this demonstrates that no such concession ever existed.

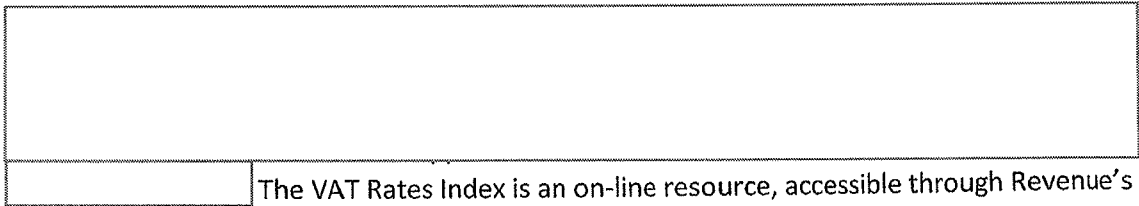
There is also correspondence from the Chairman of the Revenue Commissioners himself to demonstrate that Revenue policy was never based on a limited concession to restrict the Zero VAT rate to vitamins, minerals and fish oils. The 2011 guidance was both vague and ambiguous and on 7<sup>th</sup> January 2015, the Chairman sent the enclosed letter (**ENCL. 4**) to Mr Eamon Gilmore TD to clarify some of the issues that had led to contradictory VAT rate decisions being issued by Revenue for the same types of products.

In his letter, the Chairman made no reference to the existence of a concession that would restrict the Zero VAT rate to vitamins, minerals and fish oils. Indeed, the Chairman made no distinction between these substances and any other types of substances that could avail of the Zero VAT rate. As may be seen, the Chairman's clarification of the November 2011 guidance dealt solely with products that were supplied for the purpose of '*enhancing a person's diet with a view to achieving a particular aim*' and some further guidelines were provided in this regard.

I also wish to confirm that in the many years before the 2011 guidance was published, almost all of my clients were audited by Revenue for VAT compliance on several occasions and on no occasion was an assessment ever raised in respect of the sale of food supplements, notwithstanding the fact that all of my clients supplied every type of food supplement at the Zero rate of VAT.

Clearly, VAT assessments would have been raised if the Zero VAT rate was limited by concession to vitamins, minerals and fish oils. Therefore, the fact that no such assessments were ever raised underscores the *de facto* Revenue policy since 1973 that all food supplements could be supplied at the Zero VAT.

4. Freedom of Information requests to Revenue have failed to establish that any policy ever existed to operate a limited Zero VAT rate concession for vitamins, minerals and fish oils.



The VAT Rates Index is an on-line resource, accessible through Revenue's website, to assist taxpayers in determining the correct VAT rates applicable to the supply of a wide variety of products and services, by reference to precedential decisions.

The most relevant previous entry is from 17<sup>th</sup> December 2014, which states the following:

**FOOD SUPPLEMENTS – ZERO**

*Applies to certain supplements such as vitamins, minerals and fish oils in sold or liquid form, provided they form part of a healthy person's normal diet. Supplements that do not form part of a healthy person's normal diet such as high-protein drinks, high-vitamin drinks or sports drinks, cannot benefit from the Zero rate and are subject to VAT at the Standard rate. Please read eBrief No. 70/11 [November 2011 guidance].*

Accordingly, it is clear from the above 2014 entry on Revenue's own VAT Rates Index, that the Zero VAT rate was not restricted, by concession, to vitamins, minerals and fish oils and, as was the case with the November 2011 guidance, these substances were merely cited as examples of the many different types of products that could avail of the Zero VAT rate.

Significantly, there has been a total of 8 entries on the VAT Rates Index since 2013 and not one of these refers to the existence of a Revenue concession that limited the Zero VAT rate to vitamins, minerals and fish oils.

A copy of the relevant Revenue FOI disclosure is enclosed (ENCL. 5).

5. Revenue's own on-line VAT Rates Index had entries until September 2017 that allowed the Zero VAT rate for diverse food supplements, other than certain vitamins, minerals and fish oils.

The absence of any Revenue policy to restrict the Zero VAT rate to vitamins, minerals and fish oils is further demonstrated by the enclosed Zero VAT entries from Revenue's on-line VAT Rates Index for products as diverse as Royal Jelly Capsules, Ginseng Tablets and Garlic Capsules (ENCLS. 6, 7 & 8).

Clearly, these substances are not vitamins, minerals or fish oils and therefore, the decision by Revenue to permit these products to be supplied at the Zero VAT rate shows that there was never any policy in place to restrict the Zero VAT rate, by concession, to vitamins, minerals and fish oils.

These entries remained on Revenue's website until 29<sup>th</sup> September 2017, when they were removed without explanation, as may be seen from the enclosed FOI disclosure (**ENCL. 9**).

For reference, Royal Jelly is a honeybee secretion that is used in the nutrition of larvae, as well as adult queens. It became very popular as a food supplement in the 1990's following extensive media reports that it would decelerate the ageing process. This was dismissed by all reputable health professionals at the time and the product soon fell out of favour with most consumers, although some Royal Jelly products are still supplied.

Ginseng remains a very popular food supplement and its main uses are to reduce stress and help relaxation.

Garlic supplements are mainly consumed to support cardiovascular health.

indeed, the aforementioned entries on Revenue's own VAT Rates Index reflect Revenue's historic policy to apply the Zero VAT rate to all food supplements, from the time when the Zero rate for food was first introduced in September 1973, by sole reference to the fact that these products were formulated with recognised food ingredients.

**6. Revenue issued 100's of Zero VAT rate decisions for all types of food supplements during the five years period following the publication of their guidance in November 2011.**

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As already referred to in Section 3 above, none of the decisions made by certain Tax Districts, to apply Standard rate VAT to particular food supplements, was based on the premise that the Zero VAT rate was restricted, by concession, to vitamins, minerals and fish oils. Rather, these decisions were made in accordance with these Districts' understanding of the November 2011 guidance and for the most part, Standard rate VAT was applied because they considered that the products were supplied for the purpose of *'enhancing a person's diet with a view to achieving a particular aim'*.

On the other hand, other Tax Districts, as well as Revenue's own central VAT policy unit (VAT Interpretation Branch) issued 100's of Zero VAT rate decisions in respect of many different types of food supplements, that were not formulated with vitamins, minerals or fish oils.

Examples of Revenue's actual Zero VAT rate policy are supported by the enclosed letters dated 19<sup>th</sup> August 2015 (sent by email on 3<sup>rd</sup> September 2015) (**ENCL. 10**) and 5<sup>th</sup> April 2016 (**ENCL. 11**). These letters have been redacted to protect the identity of my clients.

The letter of 15<sup>th</sup> August 2015 was issued on the direction of Revenue's VAT Interpretation Branch (VIB) and it confirmed that the Zero VAT rate could apply to 17 different types of food supplements – none of which is formulated with vitamins, minerals or fish oils. VIB is the central Revenue unit for overall VAT policy and this Branch wrote the original November 2011 guidance.

Therefore, it is clear from VIB's interpretation of their own guidance that any substance could properly qualify for the Zero VAT rate; that substances other than vitamins, minerals and fish oils were never excluded from the benefit of the Zero VAT rate; and that there was never any concession that restricted the Zero VAT rate to vitamins, minerals and fish oils.

The letter of 5<sup>th</sup> April 2016 was issued by Revenue Dublin City Centre/North City Tax District and it confirmed that the Zero VAT rate could properly apply to many different types of food supplements, other than vitamins, minerals and fish oils. These substances include Red Rice Yeast, Coenzyme Q10, MSM, Oregano, L-Tyrosine, L-Glutamine, L-Carnitine, L- Arginine, L- Lysine, L-Theanine, Green Tea Extract, Cranberry, Glucosamine, Chondroitin, Evening Primrose Oil, Coconut Oil, Starflower Oil, Beta-carotene and Probiotics.

In the circumstances, it is clear from the decisions made by Revenue in the years following the publication of the November 2011 guidance that food supplements formulated with any food ingredient could be eligible for the Zero VAT rate and that there was never any policy in place to restrict the Zero VAT rate, by concession, to vitamins, minerals and fish oils.

**7. The previous Minister for Finance, Michael Noonan, stated in response to a Dáil question in October 2014 that Probiotic and Glucosamine food supplements, which are not vitamins, minerals and fish oils, could potentially avail of the Zero VAT rate.**

The fact that previous Revenue policy did not restrict the Zero VAT rate, by concession, to vitamins, minerals and fish oils was also confirmed by the former Minister for Finance, Michael Noonan, acting on Revenue advice, in his reply to a Dáil Question on 23<sup>rd</sup> October 2014, on the VAT treatment of two Probiotic and Glucosamine supplements, as follows:

*'As set out in eBrief 70/2011 a range of food supplements and vitamins that encourage the maintenance of health, through the sustenance derived from a normal, healthy diet, benefit from the zero rate. However, a food supplement taken for the purposes of muscle growth or body mass increase, or for the purposes of weight reduction or bodily sculpture, cannot benefit from the zero rate since such products would not meet the "clearly defined social reasons" criteria.*



*The two supplements mentioned by the Deputy could be a zero-rated food supplement or one liable at the standard rate but there is insufficient information provided to make such a determination. I would suggest that the Deputy provide details of the supplements to which he refers to the Revenue Commissioners who will advise on their correct VAT treatment as appropriate.' See <https://www.kildarestreet.com/wrans/?id=2014-10-23a.173>.*

As may be seen, the Minister's reply shows that Probiotics and Glucosamine supplements could be eligible to the Zero rate of VAT in accordance with the contemporaneous Revenue VAT policy as outlined in the November 2011 guidance (formerly known as eBrief 70/11).

Probiotics and Glucosamine are not vitamins, minerals or fish oils and clearly, the Minister could not have responded as he did, if Revenue were operating a policy that restricted the Zero VAT rate, by concession, to vitamins, minerals and fish oils.

A screenshot showing Minister Noonan's foregoing response is enclosed **(ENCL. 12)**.

**8. Revenue advised the IHTA in 2013 that certain categories of food supplements, other than vitamin, minerals and fish oils, were properly chargeable at the Zero VAT rate.**

The IHTA (Irish Health Trade Association) is the main industry representative body for manufacturers, importers and distributors of food supplements, and the individual member companies engaged in this trade are all clients of mine.

The November 2011 Revenue guidance on the VAT treatment of food supplements excluded certain sports nutrition, muscle building and slimming supplements from the benefit of the Zero VAT rate. The guidance also specified that vitamins, minerals and fish oils could be automatically Zero VAT rated, without the necessity to submit such products to Revenue for individual VAT rate assessment.

All other types of food supplements could be either Zero VAT rated or Standard VAT rated under the guidance, and VIB advised me in April 2012 that such products should be submitted to Revenue for individual VAT rate assessment. As stated in Section 6 above, VIB is the Revenue unit for determination of overall VAT policy and this Branch wrote the original November 2011 guidance.

It soon became evident that VIB had vastly underestimated the number of products involved, at between 100 to 150, whereas the actual number was closer to 6,000. In the event, the Principal officer of VIB made contact with me in November 2012 to see if the VAT rate determination process could be streamlined by identifying some general product categories, in addition to vitamins, minerals and fish oils, that might be also be Zero VAT rated, without the necessity to submit products within those categories to Revenue for individual VAT rate assessment.



In this regard, a detailed product categorisation schema was sent by the IHTA to VIB to assist in the classification of such products by category.

Subsequently, on 26<sup>th</sup> February 2013, VIB issued the enclosed letter (**ENCL. 13**) to the IHTA to confirm that products falling within the categories of Lipids (Oils), Fats, Carbohydrates and Sugars could be Zero VAT rated, thereby removing the necessity to send individual VAT rate submissions to Revenue for products that fell within these new and additional categories.

The letter issued by VIB on 26<sup>th</sup> February 2013 has not been withdrawn and indeed, the agreed schema was referred to by the Chairman of the Revenue Commissioners himself, in his enclosed letter to the IHTA dated 27<sup>th</sup> January 2016, where he stated *'the IHTA schema for categorising products was the subject of discussions with Revenue in 2013 following which you provided guidance to your members in relation to some categories'* (**ENCL. 14**).

Significantly, the letter from VIB dated 26<sup>th</sup> February 2013 requested further information in respect of other general categories of food supplements, including Proteins and Amino Acids, with a view to defining additional types of products that could properly avail of the Zero VAT rate.

Therefore, it is clear from the VIB letter that Revenue policy did not in any way restrict the application of the Zero VAT rate, by concession, to vitamins, minerals and fish oils. As may be seen, the existence of any such concession was not even mentioned in the VIB correspondence.

On the contrary, Revenue was engaged in a process whereby they wished to categorise a wide variety of different types of food supplements that could be supplied at the Zero VAT rate, without the necessity for individual product assessment.

Unfortunately, VIB did not communicate the contents of their letter of 26<sup>th</sup> February 2013 to the various Revenue Tax Districts and in the event, the issue of contradictory Zero VAT rate and Standard VAT rate decisions, as outlined in Section 6 above, was not resolved.

**9. The terms of reference for a Revenue VAT policy review instigated in 2016 show that there was never a policy to operate a Zero VAT rate concession for vitamins, minerals and fish oils.**

The fact that food supplements, other than vitamins, minerals and fish oils could be either Zero or Standard rated under the November 2011 guidance was ambiguous and resulted in contradictory VAT rate decisions being issued by Revenue in respect of the same types of products, that competed directly with one another, as already referred to in Section 6 above.

In the event, Revenue undertook a review of the November 2011 guidance and engaged an expert for this purpose, in accordance with the enclosed terms of reference published by VIB on 16<sup>th</sup> December 2016 (**ENCL. 15**).

The first paragraph of the terms of reference for appointment of the Revenue expert states the following:

*'given the proliferation of food supplement products, we are seeking an expert report to establish clear principles to determine whether these products are food'.*

The terms of reference also state that Revenue;

*'intend to use this report to inform our policy on the definition of food and it will be used to provide guidance to Revenue and taxpayers on determining the VAT rate applicable to the wide range of products described as food supplements'.*

Clearly, the 'wide range of products described as food supplements' encompassed all products and there was no distinction made between vitamins, minerals and fish oil *vis-à-vis* other types of food supplements.

The terms of reference show that there was a fundamental uncertainty within Revenue regarding the correct VAT rate applicable to any food supplement and the object of the expert report was to inform Revenue policy on the development of new guidance, which would address the ambiguity and lack of clarity in the November 2011 guidance.

As noted in Section 2 above, there was nothing in the November 2011 guidance to indicate that the Zero VAT rate was restricted, by concession, to vitamins, minerals and fish oils, or that the Standard VAT rate should always apply to other types of products, apart from sports nutrition, muscle building and slimming products. In corroboration of this factual position, there is no mention of any such Zero VAT rate concession in the terms of reference for the appointment of the Revenue expert.

The November 2011 guidance was replaced by new guidance published by Revenue in the Tax & Duty Manual on 27<sup>th</sup> December 2018 (**ENCL. 16**).

The first part of the new guidance states the following:

*'Standard rate of VAT applies to food supplements. However, a Revenue concession allowed the zero rate to be applied to certain types of vitamins, minerals and fish oils. This concession no longer applies from 1 March 2019'.*

This statement presupposes that the November 2011 guidance published in the Tax & Duty Manual already applied the Standard VAT rate to all food supplements, other than certain types of vitamins, minerals and fish oils, which were allegedly permitted the Zero VAT rate, by concession. The new December 2018 guidance also presupposes an established Revenue policy that traders should have charged Standard rate VAT on sales of all food supplements, other than vitamins minerals and fish oils, since the introduction of the VAT system in 1972.

The new December 2018 guidance contains the very first reference that Revenue has ever made, in any of their published guidance or on-line resources, to the existence of an historical Zero VAT rate concession for vitamins, minerals and fish oils.

The report of the Revenue expert is central to the timing of the replacement of the November 2011 guidance with the new guidance.

In his response to a Dáil question on 23<sup>rd</sup> October 2018, the Minister for Finance stated:

*'The Revenue Commissioners has also advised me that to date they have not amended their guidance in relation to the VAT treatment of food supplement type products and has not published the report. Currently, the report is part of a deliberative process and the Revenue Commissioners will publish the report after this process has concluded'. See <https://www.oireachtas.ie/en/debates/question/2018-10-23/section/166/#pq-answers-203>.*

Accordingly, as recently as seven months ago, Revenue was still considering changes to their November 2011 guidance, which provided for the potential Zero VAT rating for any type of food supplement, other than sports nutrition, muscle building and slimming products.

Most importantly, the Minister's response also shows that the November 2011 guidance had not been amended or replaced in a way that would restrict the Zero VAT rate to vitamins, minerals and fish oils, or that all other types of food supplements would be liable to the Standard VAT rate.

Moreover, the Minister's response confirmed that the expert report was part of an ongoing '*deliberative process*'. Documents comprising part of a '*deliberative process*' are protected from disclosure under Section 29 of the Freedom of Information Act, 2014.

In these circumstances, neither I nor my clients could have had any possible knowledge of any decision taken by Revenue to restrict the Zero VAT rate to vitamins, minerals and fish oils, by concession, or to apply Standard rate VAT to everything else, while the November 2011 guidance was still in place.

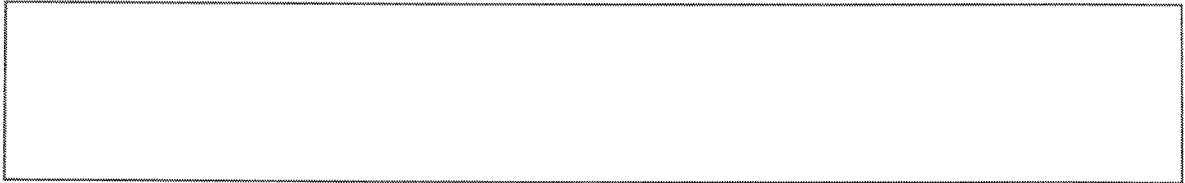
In view of the foregoing, it is evident that, prior to December 2018, Revenue never had any policy in place to restrict the Zero VAT rate, by concession, to vitamins, minerals and fish oils.

Indeed, there would never have been any necessity for Revenue to instigate a policy review in 2016, or to engage an external expert, to determine whether food supplements were food, if they had always been satisfied that these products were not food and were properly chargeable to the Standard rate of VAT; notwithstanding the alleged existence of a limited concession that permitted vitamins, minerals and fish oils to be supplied at the Zero VAT rate.

The terms of reference of the policy review show that Revenue themselves did not know in 2016 whether any food supplement should be chargeable to VAT at the Zero VAT rate or Standard VAT rate.

Therefore, the inherent premise within the Department of Finance Consultation Paper that the Zero VAT rate was historically limited by concession to vitamins, minerals and fish oils has no foundation and this is underscored by the terms of reference for the appointment of the Revenue expert report, which clearly show that no such policy ever existed.

- 10. Revenue are obliged to explain their VAT policy under their own Customer Service Charter and the existence of a limited Zero VAT rate concession for vitamins, minerals and fish oils was never communicated to any taxpayer or tax agent, as required**



Since VAT is a self-assessment tax, the fundamental right to the '*necessary information*', as provided for in the Revenue Customer Service Charter, is essential for correct compliance.

Accordingly, the failure by Revenue to communicate this information supports the factual position that obtained prior to December 2018 – viz., that all food supplements were properly chargeable to VAT at the Zero rate prior to November 2011 and that any type of food supplement, other than sports nutrition, muscle building and slimming products, could potentially apply at the Zero VAT rate since November 2011.

## **CONCLUSION**

In view of the foregoing, it is clear that Revenue operated a universal Zero VAT rate policy for all food supplements from 1973 to 2011 and that the only specific changes to this policy were made in November 2011, when guidance was published to apply the Standard VAT rate to sports nutrition, muscle building and slimming products.

It is important to point out that this policy represented Revenue's informed interpretation of the Irish VAT legislation and, until November 2011, they had advised taxpayers that all food supplements were correctly chargeable to the Zero VAT rate on the basis that these products were formulated with recognised food ingredients that complied with the Zero VAT rate provisions of the legislation.

There was never any policy to restrict the Zero VAT rate, by concession, to vitamins, minerals and fish oils and the actual Revenue policy made no distinction between these substances and other types of food substances.

This factual position is of critical relevance in the context of the Department of Finance Consultation Paper for the VAT treatment of food supplements, as the option of legislating for a Zero VAT rate for these products has been ruled out on the erroneous grounds that Revenue has always applied the Standard VAT rate to food supplements, since the inception of the VAT system in 1972, and that they merely allowed a limited Zero VAT rate concession for vitamins, minerals and fish oils.

Finally, there is a recent parallel situation regarding the VAT treatment of herbal teas that is relevant to the legislative options regarding the VAT treatment of food supplements.

Herbal teas were supplied at the Zero rate of VAT since 1973. However, in 2012, Revenue reviewed the interpretation of the legislation and decided that Standard 23% rate of VAT should apply to these products.

The herbal tea industry then successfully campaigned for the introduction of a new Zero VAT rate for these products, on the basis that a *de facto* Zero VAT rate policy had applied to herbal teas for the previous 40 years.

New Zero VAT rate legislation for herbal teas was introduced by the Former Finance Minister, Michael Noonan, in Budget 2014, notwithstanding Revenue's previous 2012 decision to apply the Standard rate of VAT to these products.

Therefore, it is imperative that the historical VAT treatment of food supplements by Revenue is correctly represented, in order that there may be no impediment to the Minister for Finance in introducing new Zero VAT rate legislation for these products, if he chooses to do so, in the same way as this was done by his predecessor for herbal teas.



**22<sup>nd</sup> May 2019**