



Excise Duty – Import of cooking wine, cooking port and cooking cognac into the UK

October 2011

In *Repertoire Culinaire Ltd v. HMRC* (Case C-163/09) four questions were referred to the European Court of Justice relating to whether a shipment of cooking wine, port and cognac imported from France to the UK was subject to excise duty under directive 92/83/EEC on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages. The French authorities exempted the cooking wine, port and cognac from duty however when RC brought the products into the UK, HMRC seized the consignment and refused to release it until excise duty had been paid. RC appealed to the First-tier Tribunal. The ECJ gave its judgment on 9th December 2010.

Question One: Were the cooking wine and port subject to excise duty as ethyl alcohol?

The first question referred to the ECJ by the tribunal was whether the cooking wine, cognac or port fell within the definition of ethyl alcohol in the first indent of article 20 of directive 92/83.

Ethyl alcohol is defined in the directive as:

1. Wine, fortified wine, vermouth and other wine flavoured with plants or aromatics and other fermented beverages (falling within Combined Nomenclature¹ ('CN') codes 2204, 2205 and 2206) which have an actual alcoholic strength of more than 22% by volume. The percentage of alcohol in the cooking wine and port (but not the cooking cognac) was too low to fall within this category.
2. Potable spirits - since the cooking wine, cognac and port imported by RC were undrinkable (due to the addition of salt and pepper) they were not potable spirits.
3. Products with an actual alcoholic strength by volume of more than 1.2% falling within CN codes 2207 or 2208. Since the cooking wine and port contained more than 1.2% ABV, it was necessary to consider whether they fell under CN code 2207 or 2208.

Two categories of alcohol fall within CN 2207:

- (i) Liquid which is more than 80% alcohol by volume.

This condition was not met by the cooking wine or port.

- (ii) Liquid which is denatured alcohol of any strength.

The ECJ noted that denaturing is a process whereby alcohol is rendered toxic; the cooking wine and port were not toxic as it is possible to cook safely with them. Therefore, the cooking wine and port did not fall within CN 2207.

¹ See Appendix for background on the Combined Nomenclature



Excise Duty – Import of cooking wine, cooking port and cooking cognac into the UK - October 2011

Three categories of alcohol fall within CN 2208.

(i) Spirits, liquors and other beverages.

Since the referring tribunal had found the cooking wine and port to be undrinkable, they were not beverages and so could not fall within this category of CN 2208.

(ii) Liquids used in the preparation of alcoholic beverages.

This condition was not met as the cooking wine and port were not used for this purpose.

(iii) Undenatured ethyl alcohol.

A previous ECJ case (*Skatteverket v. Gourmet Classic Limited* (Case C-459/06)) had concluded that cooking wine was subject to excise duty on the grounds that it was undenatured ethyl alcohol. Although the Advocate-General in *Repertoire Culinaire* disagreed with the decision in *Gourmet Classic* on this point, the ECJ did not follow his Opinion and applied the *Gourmet Classic* decision, concluding that the cooking wine and cooking port imported by RC were ethyl alcohol.

The ECJ answered the third question posed by the referring tribunal next.

Question Three: Did any of the exemptions in article 27 of the directive apply to the cooking wine, cooking port or cooking cognac?

The cooking wine, port and cognac imported by RC were used either to flavour food or for other purposes, such as simmering and flambéing. This meant that the relevant exemption (set out in article 27(1)(f) of the directive) was whether the liquids would be used in producing foodstuffs which would have an alcohol content of less than 5%. To fall within this exemption two conditions had to be met:

1. The liquids had to be used in the production of foodstuffs (which they were).
2. The alcoholic content of the 'product' must not exceed 5%.

The ECJ considered that the second condition meant that the alcoholic content of the foodstuffs prepared using the liquids must not exceed 5% (and not that the alcoholic content of the liquids themselves must not exceed 5%). It had been agreed as a fact by the parties before the referring tribunal that when the liquids were used as an ingredient the resulting product would always have an alcoholic content of less than 5%. As a result, the cooking wine, port and cognac were not subject to excise duty.

Question Two: Is the UK permitted to charge duty on cooking wine, port and cognac and the refund it subject to conditions not found in the directive?

The actual question was:

**Excise Duty – Import of cooking wine, cooking port and cooking cognac into the UK - October 2011**

‘Was it consistent with the Member State’s obligation to give effect to the exemption contained in Article 27(1)(f) of Directive 92/83, when read with Article 27(6), and/or with Article 28 EC and/or with the direct effect of those obligations and/or with the principles of equal treatment and proportionality to restrict the exemption for cooking wine, cooking port and cooking cognac to cases where alcoholic beverages have been used as an ingredient and to restrict the applicants for exemption to those persons who have used the alcoholic beverages as an ingredient in products and/or those persons who carry on business as wholesalers of such products and/or they produced or manufactured such products for the purposes of that business and subject to the further conditions that claims be made within an overall period of four months from the payment of duty and that the amount of the repayment be not less than £250?’

The UK’s rules in section 4 Finance Act 1995 (purportedly implementing the exemption in article 27(1)(f) of the directive) work by imposing duty and then allowing a refund in a narrow range of circumstances. The rules relieve from duty by this mechanism dutiable alcoholic liquor used as an ingredient in the production or manufacture of any food for human consumption which contains alcohol such that 100 kilos of the food would not contain more than five litres of alcohol. The repayment is made on a claim, which must be made by a wholesale supplier being the producer or manufacturer of the food (section 4(3) FA 1995). In addition claims for repayment of amounts of less than £250 in a quarter (a limit which may be increased by the Commissioners) will not be met by HMRC.

As explained under Question Two above, HMRC’s argument that in article 27.1(f) the ‘product’ referred to was the cooking wine, cooking port or cooking cognac, and that exemption only applied if the alcoholic content of these products did not exceed 5% was rejected.

HMRC had argued before the referring tribunal that RC was not entitled to repayment under section 4 FA 1995 because it did not use the cooking liquors as an ingredient in food products but instead acted as wholesaler of the cooking liquors themselves. The UK’s justification for imposing this additional condition was that by restricting the exemption to, amongst others, those persons who used cooking liquors as an ingredient in a product or acted as wholesalers of the product in which the cooking liquors had been used as an ingredient, the UK promoted the correct and straightforward application of the exemption in article 27(1)(f), because, in these cases, the product could be readily inspected to ensure that 100 kilos of it did not contain more than five litres of alcohol. An interpretation of the exemption which relied on the cooking liquors being used in the production of foodstuffs after the exemption had been applied made it impossible to check that the five litres per 100 kilos condition was satisfied and thereby encouraged abuse.

The ECJ observed that while it was permissible for a Member State to give effect to the exemption in article 27(1)(f) by refunding the excise duty paid, any additional UK restrictions on refunding would only be acceptable if there was concrete, objective and verifiable evidence that they were needed to prevent tax avoidance. The ECJ went on to give quite a strong steer on this (at paragraph 53):

‘The evidence submitted to the Court seems to indicate that the conditions laid down by the national legislation at issue in the main proceedings, that is to say, a restriction of the persons authorised to make a claim for recovery, a four-month period for bringing



Excise Duty – Import of cooking wine, cooking port and cooking cognac into the UK - October 2011

such a claim and the establishment of a minimum amount of repayment, are not necessary either to ensure the correct and straightforward application of the exemption under Article 27(1)(f) of Directive 92/83 or to prevent any evasion, avoidance or abuse.’

It will now be for the UK court to determine whether there is ‘concrete, objective and verifiable evidence’ that the additional conditions in the UK’s duty reclaim procedure are ‘necessary to ensure the correct and straight forward application of the exemption in article 27(1)(f) and to prevent any evasion, avoidance or abuse.’

Question Four: Does the fact that the cooking wine, cooking port and cooking cognac have been treated as not being subject to excise duty or as being exempted from duty under directive 92/83 and released for consumption in the Member State of manufacture have an effect on any application of the provisions of the directive to those products by another Member State in which the products are intended to be sold?.

RC had argued that, since France (the place where the cooking wine, port and cognac were manufactured) did not impose excise duty, the UK could not impose excise duty on the import of the same product. The ECJ agreed in principle - the only exception to this was where there was ‘concrete objective and verifiable evidence’ that either Member State of manufacture was wrong not to subject the liquids to excise duty or that it was justifiable for the Member State of import to adopt measures to combat evasion, avoidance or abuse of the exemption and to ensure its correct and straightforward application.



Appendix - The Combined Nomenclature

When declared to Customs in the EU, goods must generally be classified according to the Combined Nomenclature or CN. Imported and exported goods have to be declared stating under which subheading of the Nomenclature they fall. This declaration determines which rate of customs duty applies and how the goods are treated for statistical purposes.

The CN is a method for designating goods and merchandise which was established to meet, at one and the same time, the requirements both of the Common Customs Tariff and of the external trade statistics of the Community. The CN is also used in intra-Community trade statistics.

The CN comprises the Harmonized System or HS nomenclature with further EU subdivisions. The HS is run by the World Customs Organisation. This systematic list of commodities forms the basis for international trade negotiations, and is applied by most trading nations. The CN also includes preliminary provisions, additional section or chapter notes and footnotes relating to CN subdivisions. Each CN subdivision has an eight digit code number, the CN code, followed by a description.

The basic regulation is Regulation 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff. An updated version of the Annex I to the Combined Nomenclature Regulation is published as a Commission Regulation every year in the L-series of the Official Journal. Such updates take into account any changes that have been agreed at international level, either at the World Customs Organisation with regard to the nomenclature at HS level or within the framework of the WTO with regard to conventional rates of duty. Other changes may be required to reflect the evolution of, for example, commercial policy, technology or statistical requirements.

The Explanatory Notes to the CN are considered to be an important aid for interpreting the scope of the various tariff headings but do not have legal force. The Explanatory Notes were established by Regulation 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff. The latest version is now available from EU Official Journal C 137 of 6th May 2011.