TC03043

Appeal number: TC/2012/08705

Excise Duty - Importation of flavoured ciders from Lithuania - flavoured ciders ranked as "made-wine" rather than "cider" for excise duty purposes, so attracting duty at the rate of £107.36 per Hectolitre rather than £37.68 per Hectolitre - whether the Appellant had any legitimate ground for escaping the liability for the additional duty from £37.68 to £107.36 per Hectolitre when he had innocently but wrongly declared the importations as cider and HMRC had failed to notice that the flavoured ciders had been wrongly categorised - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SNACKWELL LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE HOWARD M. NOWLAN
ELIZABETH BRIDGE

Sitting in public at 45 Bedford Square in London on 5 November 2013

Gediminas Zelvaras, director of Snackwell Limited on behalf of the Appellant

Mark Fell, counsel, on behalf of the Respondents

DECISION

Introduction

1. This was a simple and indeed very unfortunate case. The Appellant had imported from Lithuania various quantities of flavoured cider on two different occasions. Prior to the importations he had been required to complete HMRC forms called HM4 forms in which he was required to disclose the type of goods imported, the alcohol strength, the duty rate, and the quantities imported. He was then required to calculate the duty owed, and to submit the forms with payment of the duty, whereupon the forms were returned to him, duly stamped by HMRC, and he was able to provide the receipted forms to his supplier who despatched the goods.

2. While we believe that Mr. Zelvaras, the owner and director of the Appellant company, genuinely believed that he had completed the forms and the disclosures correctly, it transpired that the flavoured cider had been wrongly classifed. HMRC officers had not spotted the error, notwithstanding in the case of the second importation that they had been notified by the shipper that the drink in question was being wrongly classifed, and that Mr. Zelvaras had indicated on the form that the drinks were strawberry, blueberry and cherry flavoured. Accordingly HMRC assessed the Appellant for the difference in duty.

3. We have no alternative but to dismiss the Appellant's appeal. We do, however, feel a very considerable sympathy for the Appellant, and consider that Mr. Zelvaras, as a non-native English speaker, handled his Appeal very well, and was entitled to express some considerable grievance that he had to pay the extra duty for a mistake that was entirely understandable. He particularly complained that if he was expected to understand the intricacies of the classifications himself, he might certainly have expected HMRC officers to have detected his errors before returning the stamped forms, and before therefore the Appellant took irretrievable steps in embarking on what inevitably became a loss-making venture.

The facts

4. The facts were simple but surprising.

5. Most of the alcoholic drinks being imported by the Appellant were flavoured cider. The ingredients of the drinks were almost entirely water and cider. The various drinks had then had a flavouring added, the amount of flavouring being, we were told, 0.02% of the total contents of the bottles. In the cases where the flavouring was either an apple or pear flavouring, designed presumably to marginally enhance the flavour of what would remain apple or pear cider, the flavouring did not change the excise duty classification of the cider. Where, however, the flavouring (albeit still only in that minute quantity of 0.02% of the contents of the bottles) was a strawberry, blueberry, cherry or cranberry flavouring, the drink was deemed no longer to be cider, but was then classified as "made-wine". The rate of duty then went up from £37.86 per Hectolitre to £107.36 per Hectolitre.

6. The Appellant imported the drink in question on two different occasions, submitting its HM4 forms on 10 May 2012 and 10 August 2012. The duty originally

accounted for, on the basis that the correct duty rate was that for cider, had been £325.55 and £1,627.80. When HMRC realised that the wrong duty rate had been used for all the drinks, save for those that had simply had pear flavouring added, additional duty was assessed in the amounts of £501.68 and £2,709.11 or £3,210.79 in total.

7. We never fully understood the role that a shipper had played in relation to the importation of the particular drinks, but it was certainly the case that a shipper, PJ Shipping Limited, had had some involvement. It was clear that around the date 3 August 2012 (i.e. shortly before the importation of the second consignment) the shipper had sent the Appellant an invoice that referred to the higher duty rate. The Appellant had replied to the shipper to the effect that the shipper had put the wrong duty amount on the invoice, and that the drink in question was basically cider, and that it was returned for excise duty purposes by all the Appellant's competitors as cider, with duty being paid therefore at the lower relevant rate. Following this exchange, the Appellant appeared to have remained convinced that the drink was cider, which is why he filled in the HM4 form with the lower duty rate, and dated the form 10 August 2012.

8. PJ Shipping Limited were doubtless concerned that they might be criticised if the wrong duty was volunteered by the Appellant, and accordingly on 2 August 2012 they emailed the division of HMRC that dealt with excise duty and the verification of HM4 forms, and indicated that it seemed to them that a new customer was reporting the duty on the flavoured ciders at the wrong rate. The invoice to the Appellant was attached to that email so that on 2 August, HMRC had been notified of the possible under-declaration of duty and the identity of the Appellant. On 3 August HMRC acknowledged the email to PJ Shipping, and said that they would look into it.

9. When HMRC received the second HM4 form, i.e. on 10 August, they had not only been notified 8 days before that PJ Shipping Limited had suggested that the form would declare the wrong amount of excise duty, but the form itself gave, not only the description of the drink as "cider", but it then gave the particular product names in a column that asked for details of the brand names. These names were names that indicated that, with the exception of the Fizz Pear, the drinks were all flavoured ciders in that their names were Fizz Strawberry, Fizz Blueberry, Kiss French, Kiss Strawberry, Kiss Cherry and Kiss Cranberry.

10. Notwithstanding the warning that the HMRC officers had received that we referred to in paragraph 8 above, and the disclosure of the names just mentioned that would have enabled anyone who knew that flavoured ciders attracted duty at a much higher rate to detect the under-declaration of duty, HMRC receipted the form HM4 and returned it to the Appellant. The drinks were then imported, Mr. Zelvaras claiming that he thought that HMRC were thereby confirming his own expectation that the drinks were simply ciders.

11. In due course, on 20 August 2012, the HMRC officer visited Mr. Zelvaras and explained that, with the exception of the pear cider, the higher rate of duty applicable to made-wine should have been paid, and four days later an assessment was made for the additional duty.

The law

12. There was no doubt during the hearing, and indeed the Appellant accepted this, that with the exception of the pear cider, the drinks had in fact ranked as "made-wine". Whilst this was clear, a Lithuanian individual might have found it quite difficult to detect that a drink that was almost entirely cider failed to rank as cider because of the addition of the minute percentage of flavouring added to it. The drafting that achieved this result was not particularly clear either in that it defined "made-wine" to mean "any liquor which is of a strength exceeding 1.2% and which is obtained from the alcoholic fermentation of any substance, …… but does not include wine, beer, black beer, spirits or cider." Since in a general sense the drinks in question included a great deal of cider, it was slightly surprising that they ranked as "made-wine". The reason why they did was that the definition of "cider" excluded any flavoured cider, so that reverting to the definition of "made-wine", the flavoured drinks were deemed not to include cider, and therefore they did rank as "made-wine".

13. We accept that the excise duty in question is a self-assessed tax, and that it is the duty of the person declaring the drink on the HM4 form to calculate the correct amount of duty. Seemingly, HMRC's principal responsibility in relation to processing the HM4 forms is to see that the calculations are correct and that the declared duty has been paid. In many cases, we imagine that there is insufficient information on the forms to enable HMRC actually to decide, at least by looking at the forms, whether the drinks have been correctly classified or not. In the present case, anyone who appreciated that flavoured ciders ranked as made-wine rather than cider would have been likely to have spotted that the wrong amount of duty had been declared, but as a general rule, this would often not be evident from the content of the forms.

The Appellant's contentions

14. The Appellant contended that he could not be expected to read the many pages of guidance that indicated how drinks should be classified. He also contended that as HMRC had seen his HM4 form at least prior to the importation of the second consignment, and indeed HMRC had been notified of the potential under-declaration of excise duty 8 days before the form was even submitted, that it was extraordinary that he should be liable for the additional duty, when HMRC had certified or receipted his HM4 form and failed to spot the under-declaration. Had they drawn it to his attention, he would at least have had the opportunity to decide whether or not to proceed with the importation, and had he chosen to do so, he could at least have sought to increase his own pricing to customers. As it was, he had certainly traded in relation to the May consignment, and perhaps in relation to much of the August consignment as if he had paid the correct duty rate, and the late assessment for additional duty presented the Appellant company with a bill that it would very likely not be able to pay.

15. The Appellant indicated that any later importations had been subjected to the correct higher amount of duty but that the company had ceased to operate because it proved not to be viable to market the drinks in question when the higher duty cost had to be absorbed.

The Respondents' contentions

16. The Respondents contended that, once the Appellant had accepted, as he had done, that the drink in question (ignoring the pear cider) was made-wine, there was no defence to the assessment. The higher amount of duty was plainly owed and had not been paid. The tax was a self-assessed tax, and the assessment made to collect the under-paid tax was plainly correct.

17. As a strict legal matter, therefore, the duty was owed, and the Appellant had no defence to the assessment. We, as the First-tier Tribunal, had no jurisdiction to entertain a judicial review, or legitimate expectation, claim by the taxpayer. In any event, no actual representation had been made to the Appellant by HMRC to the effect that he would be liable for no additional duty if he declared the drinks in question as cider. Admittedly, HMRC had not spotted the error when they might have done but they had certainly made no representation, on which the Appellant had relied, and of course relied to his detriment.

Our decision

18. It is with considerable regret that we must decide that the assessments are both confirmed. It is clear that the drinks in question were made-wine; that the Appellant had made the wrong declarations of duty rate on his HM4 forms, and that the balance of the excise duty is now owed.

19. We also accept that we have no jurisdiction to hear any legitimate expectation contention, and we also understand the Respondents' counsel's contention that, in the absence of a clear representation by HMRC, the Appellant might have found it difficult to sustain a judicial review claim in any event.

20. We would, however, like to record how embarrassed we feel in having to reject the Appellant's appeal when, as a struggling start-up trader and as a non-native English speaker, he has (we believe honestly) failed to understand a very obscure bit of drafting that turns cider into made-wine by the addition of a flavouring comprising no more than 0.02% of the contents of the bottle, and when HMRC failed to spot the errors notwithstanding that they were notified of them 8 days before the second HM4 form was filed, and notwithstanding that the very forms made it reasonably evident that the drinks had been wrongly classified.

Right of Appeal

21. 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.

HOWARD M. NOWLAN

TRIBUNAL JUDGE

RELEASE DATE: 13 November 2013