[2017] UKFTT 0657 (TC)

TC06084

Appeal number: TC/2017/01635

EXCISE DUTY – Alcoholic Liquor Duty – exemption for denatured alcohol – request by licensed receiver and user to use particular formulation of denatured alcohol for use not previously permitted by HMRC – application to strike out appellant's case - whether decision of HMRC not to allow such use appealable – whether appellant has standing to appeal – strike out refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

WOODSTREAM EUROPE LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Alexandra House, Manchester on 15 August 2017

Dr Mark Briggs (Senior managing scientist Exponent International Ltd) for the Appellant

Ms Joanna Vicary, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This was an application by HMRC to strike out the appeal of the appellant against a decision made by HMRC on the grounds that:

(1) the decision was not appealable, despite HMRC having on several occasions explained that the appellant had the right to a review and to appeal to the Tribunal, and

(2) in any event, the appellant was not a person who could make an appeal.

2. The rather uncomfortable position that the first issue left HMRC in prompted Ms Vicary to apologise to the Tribunal on behalf of HMRC. I responded that I expected HMRC to apologise to the appellants and inform them of what right if any they had to compensation and whether there were other remedies available to them, all subject to the outcome of this hearing.

3. The change of position by HMRC is of course not a matter that I can take into account. I can and do decide the issues raised by reference only to the law.

Background information on denatured alcohol

4. I was informed by Ms Vicary that there is no previous case in the United Kingdom that she could find about the excise duty provisions relating to denatured alcohol. My own researches have come up with a case in the Court of Justice of the European Union ("CJEU") from Bulgaria, but no others. Some explanation is then called for as background for readers of this decision, who may be as unfamiliar with the territory as I was before the case.

5. Readers of this decision are however likely to be familiar with methylated spirits ("meths"), which is a form of denatured alcohol. Indeed the regulations in force before those which are the main law in issue in this appeal, the Denatured Alcohol Regulations 2005, were called Methylated Spirits Regulations.

6. It is EU law which provides for exemptions from the excise duty which applies to all forms of ethyl alcohol. Where alcohol is not intended for human consumption but for other uses it may be obtained duty free. To prevent its use for human consumption such pure ethyl alcohol has to be denatured with other chemicals which make it unpalatable. The most common way has been to add methyl alcohol and other chemicals which are extremely bitter such as denatonium. It may also be coloured with a marker (not unlike "red diesel") and traditionally the marker in the UK for denatured alcohol intended for general consumer use was a violet coloured dye familiar to purchasers of meths.

The law

7. As this appeal turns entirely on the law and not on the basis of any facts which need to be found I should first set out the applicable law, which is doubtless also unfamiliar to most readers of this decision.

8. Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages ("AEDD") provides relevantly:

> "THE COUNCIL OF THE EUROPEAN COMMUNITIES,
>
> Whereas Directive 92/12/EEC lays down provisions on the general arrangements for products subjects subject to excise duty (4);
>
> …
>
> Whereas it is necessary to provide for a system of notification of the denaturing requirements of each Member State for completely denatured alcohol, and for their acceptance by other Member States;
>
> Whereas Member States should not be deprived of the means of combating any evasion, avoidance or abuse which may arise in the field of exemptions;
>
> …
>
> HAS ADOPTED THIS DIRECTIVE:
>
> …
>
> SECTION VII EXEMPTIONS
>
> Article 27
>
> 1. Member States shall exempt the products covered by this Directive from the harmonized excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:
>
> > (a) when distributed in the form of alcohol which has been completely denatured in accordance with the requirements of any Member State, such requirements having been duly notified and accepted in accordance with paragraphs 3 and 4 of this Article. This exemption shall be conditional on the application of the provisions of Directive 92/12/EEC to commercial movements of completely denatured alcohol;
> >
> > (b) when both denatured in accordance with the requirements of any Member State and used for the manufacture of any product not for human consumption;
> >
> > …
>
> 2. Member States may exempt the products covered by this Directive from the harmonized excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse, when used:
>
> > (a) as samples for analysis, for necessary production tests, or for scientific purposes;
> >
> > (b) for scientific research;

(c) for medical purposes in hospitals and pharmacies;

(d) in a manufacturing process provided that the final product does not contain alcohol;

(e) in the manufacture of a component product which is not subject to excise duty under this Directive.

3. Before 1 January 1993 and three months before any intended subsequent change in national law, each Member State shall communicate to the Commission, together with all relevant information, the denaturants which it intends to employ for the purposes of paragraph 1(a). The Commission shall transmit the communications to the other Member States within one month of receipt.

4. If, within two months of the other Member States being informed, neither the Commission nor any Member State has requested that the matter be raised in the Council, the Council shall be deemed to have authorized the denaturing processes notified. If an objection is raised within the time limit, a decision shall be taken in accordance with the procedure laid down in Article 24 of Directive 92/12/EEC.

5. If a Member State finds that a product which has been exempted under paragraphs 1(a) or 1(b) above gives rise to evasion, avoidance or abuse, it may refuse to grant exemption or withdraw the relief already granted. The Member State shall advise the Commission forthwith. The Commission shall transmit the communication to the other Member States within one month of receipt. A final decision shall then be taken in accordance with the procedure laid down in Article 24 of Directive 92/12/EEC. Member States shall not be obliged to give retroactive effect to such a decision."

9. Commission Regulation (EC) No 3199/93 provides for the mutual recognition of procedures for denaturing alcohol for the purposes of exemption from excise duty. The Regulation applies only to "completely denatured" alcohol, which is not the type of denatured alcohol in this case.

10. The UK law giving effect to Part 7 of the AEDD is in Part 6 of the Alcoholic Liquor Duties Act 1979 ("ALDA"), the relevant sections of which are:

"**Denatured alcohol**

75 Licence or authority to manufacture and deal wholesale in denatured alcohol

(1) The Commissioners may authorise any distiller, rectifier or compounder to denature dutiable alcoholic liquor, and any person so authorised is referred to in this Act as an "authorised denaturer".

(2) No person other than an authorised denaturer shall denature dutiable alcoholic liquor or deal wholesale in denatured alcohol unless he holds an excise licence as a denaturer under this section.

(5) Where any person, not being an authorised denaturer, denatures dutiable alcoholic liquor otherwise than under and in accordance with a

licence under this section his doing so shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties).

(6) The Commissioners may at any time revoke or suspend any authorisation or licence granted under this section.

(7) For the purposes of this section, dealing wholesale means the sale at any one time to any one person of a quantity of denatured alcohol of not less than 20 litres or such smaller quantity as the Commissioners may by regulations specify.

77 Power to make regulations relating to denatured alcohol

(1) The Commissioners may with a view to the protection of the revenue make regulations—

(a) regulating the denaturing of dutiable alcoholic liquor and the supply, storage, removal, sale, delivery, receipt, use and exportation or shipment as stores of denatured alcohol;

…

(2) Different regulations may be made under this section with respect to different classes of denatured alcohol or different kinds of denatured alcohol of any class and, without prejudice to the generality of subsection (1) above, regulations under this section may—

(a) provide for the imposition under the regulations of conditions and restrictions relating to the matters mentioned in that subsection; and

(aa) frame any provision of the regulations with respect to the supply, receipt or use of denatured alcohol by reference to matters to be contained from time to time in a notice published in accordance with the regulations by the Commissioners and having effect until withdrawn in accordance with the regulations;

..."

11. The UK law giving effect to Commission Regulation (EC) No 3199/93 is s 5 Finance Act ("FA") 1995:

"**5 Denatured alcohol**

(3) The power of the Commissioners to make regulations defining denatured alcohol for the purposes of this section shall include—

(a) power, in prescribing any substance or any manner of mixing a substance with a liquor, to do so by reference to such circumstances or other factors, or to the approval or opinion of such persons (including the authorities of another member State), as they may consider appropriate;

(b) power to make different provision for different cases; and

(c) power to make such supplemental, incidental, consequential and transitional provision as the Commissioners think fit;

and a statutory instrument containing any regulations under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(4) Sections 13A to 16 of the Finance Act 1994 (review and appeals) shall have effect in relation to any decision which—

(a) is made under or for the purposes of any regulations under this section, and

(b) is a decision given to any person as to whether a manner of mixing any substance with any liquor is to be, or to continue to be, approved in his case, or as to the conditions subject to which it is so approved,

as if that decision were a decision falling within section 13A(2)(j) of that Act."

12. The regulations referred to in s 77 ALDA and s 5 FA 1995 are the Denatured Alcohol Regulations 2005 (SI 2005/1524) ("DAR 2005"). The relevant regulations are:

"**2 Interpretation**

In these Regulations—

"the Act" means the Alcoholic Liquor Duties Act 1979;

"alcohol", except in regulation 10(3), means "dutiable alcoholic liquor";

"completely denatured alcohol" has the meaning given in regulation 4;

"formulation" means the recipe or list of substances and liquids, including any proportions, quantities, standards, or other criteria relating to those substances and liquids, that a producer is to use and follow when making the class of denatured alcohol or a batch of it to which the formulation relates;

"industrial denatured alcohol" has the meaning given in regulation 4;

"producer" means—

(a) a person who is a distiller, rectifier or compounder, and who is authorized by the Commissioners under section 75 of the Act to denature alcohol; or

(b) a person who holds an excise licence granted under that section, and who denatures or intends to denature alcohol at any premises;

"trade specific denatured alcohol" has the meaning given in regulation 4.

Part 2

Classes of Denatured Alcohol and Formulations

4 Classes of denatured alcohol

(1) For the purposes of the Act, section 5 of the Finance Act 1995 and these Regulations there are the following classes of denatured alcohol—

(a) completely denatured alcohol;

(b) industrial denatured alcohol; and

(c) trade specific denatured alcohol.

…

(5) Subject to paragraph (6), trade specific denatured alcohol is denatured alcohol that has been made in accordance with regulation 7.

(6) Denatured alcohol made outside the United Kingdom that has not been incorporated into a product that is not for human consumption is completely denatured alcohol, industrial denatured alcohol or trade specific denatured alcohol (as the case may be) if, in the opinion of the Commissioners, it has been made as nearly as is possible in accordance with one of the formulations described in the Schedule.

(7) Denatured alcohol made outside the United Kingdom and the European Union is completely denatured alcohol if, in the opinion of the Commissioners—

(a) the denaturants employed are described in the Annex to Commission Regulation (EC) No 3199/93, and

(b) it has been made as nearly as is possible in accordance with a formulation of a member State other than the United Kingdom.

7 Trade specific denatured alcohol

(1) Subject to paragraph (2), a producer making trade specific denatured alcohol must—

(a) make it in accordance with a formulation described in paragraph 3 of the Schedule, and

(b) comply with the standards and other requirements of paragraphs 4 to 6 and 11 of that Schedule (insofar as those paragraphs are applicable to the formulation he is following).

(2) Instead of following a formulation described in paragraph 3 of the Schedule, when making a batch of trade specific denatured alcohol a producer may make that batch in accordance with a formulation that is approved by the Commissioners under this regulation.

(3) The Commissioners may, if they think that in all the circumstances it is appropriate to do so, approve a formulation different from or as a variation on a trade specific denatured alcohol formulation described in paragraph 3 of the Schedule.

(4) The Commissioners' approval—

(a) may only be granted following a written application to them by a producer or other person ("the applicant"), and

(b) may be granted subject to such conditions as the Commissioners may reasonably impose,

and those conditions may be varied by the Commissioners for reasonable cause.

(5) The Commissioners may require for the purposes of their consideration of the application made under paragraph (4)—

(a) a written statement containing the reasons why, in the applicant's opinion, completely denatured alcohol, industrial denatured alcohol, and a formulation of trade specific denatured alcohol described in paragraph 3 of the Schedule, would all be unsuitable or detrimental having regard to the use to which it is intended that the denatured alcohol will be put;

(b) samples of the proposed formulation of trade specific denatured alcohol and of the ingredients of that formulation; and

(c) any other information that the Commissioners determine to be material to their consideration of whether or not it would be appropriate for them to grant approval of the formulation in question.

Part 4

Receipt, Use and Supply of Denatured Alcohol

12 Application

This Part applies to industrial denatured alcohol and trade specific denatured alcohol that has not been incorporated into a product that is not for human consumption.

13 Receipt and use of industrial denatured alcohol and trade specific denatured alcohol

(1) No person may receive or use industrial denatured alcohol or trade specific denatured alcohol other than in accordance with the provisions of this Part.

(2) A person may receive industrial denatured alcohol or trade specific denatured alcohol only if he is authorized in writing by the Commissioners to receive that class of denatured alcohol.

(3) A person wishing to be authorized to receive industrial denatured alcohol or trade specific denatured alcohol must—

(a) apply to the Commissioners in the form and manner specified in a notice they publish that has not been withdrawn by a further notice; and

(b) if he wishes to receive trade specific denatured alcohol made in accordance with a formulation approved under regulation 7(2), describe the formulation in his application.

(4) The Commissioners may authorize a person to receive industrial denatured alcohol or trade specific denatured alcohol—

(a) subject to restrictions on the uses to which that denatured alcohol may be put;

(b) subject to restrictions on the formulations of denatured alcohol that may be received; and

(c) subject to such conditions as they see fit to impose.

(5) Where there has been a change in any of the particulars that were included in a person's application for authorization, before receiving any further supplies of industrial denatured alcohol or trade specific denatured alcohol, he must give the Commissioners notice of that change in such form and manner as they require.

(6) The Commissioners may at any time for reasonable cause vary or revoke any authorization granted or any condition or restriction imposed under this regulation.

(7) A person may receive industrial denatured alcohol or any formulation of trade specific denatured alcohol only if, before he is supplied with that denatured alcohol, he furnishes the supplier with a copy of his authorization.

(8) A person authorized under this regulation must keep and preserve such records relating to his use of denatured alcohol as the Commissioners may specify in a notice published by them and not withdrawn by a further notice.

(9) A person authorized under this regulation must comply with and ensure compliance with any conditions or restrictions imposed in accordance with this regulation.

SCHEDULE

Formulations for the Classes of Denatured Alcohol, Standards and other Related Provisions

Regulations 5, 6 and 7

Formulations for Trade Specific Denatured Alcohol

3 Except in cases where the Commissioners approve an alternative formulation, trade specific denatured alcohol must be made in accordance with one of the following formulations--

…

(b) with every 979 parts by volume of alcohol (of a strength of not less than 85 per cent alcohol by volume) mix not less than 20 parts by volume of cyclohexane and 1 part by volume of isopropyl alcohol;

…

(g) with every 950 parts by volume of alcohol (of a strength of not less than 85 per cent alcohol by volume) mix not less than 50 parts by volume of isopropyl alcohol;

…"

13. The law relating to appeals against decisions under ALDA is in FA 1994:

"**Customs and excise reviews and appeals**

13A Meaning of "relevant decision"

(1) This section applies for the purposes of the following provisions of this Chapter.

(2) A reference to a relevant decision is a reference to any of the following decisions—

…

(j) any decision by HMRC which is of a description specified in Schedule 5 to this Act … [*including any decision made under s 5(4)(a) or (b) FA 1995 – see §11*]

…

16 Appeals to a tribunal

…

(1B) … an appeal against a relevant decision … may be made to an appeal tribunal within the period of 30 days beginning with—

(a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates, or

(b) in a case where a person other than P is the appellant, the date the other person becomes aware of the decision,

…

…

(2A) An appeal under this section with respect to a relevant decision … shall not be entertained unless the appellant is—

…

(b) a person in relation to whom, or on whose application, the relevant decision has been made,

(c) a person on whom the conditions, limitations, restrictions, prohibitions or other requirements to which the relevant decision relates are or are to be imposed or applied.

…

(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

…

(6) On an appeal under this section … it shall … be for the appellant to show that the grounds on which any such appeal is brought have been established.

…

(8) Subject to subsection (9) below references in this section to a decision as to an ancillary matter are references to any decision of a description specified in Schedule 5 to this Act which is not comprised in a decision falling within section 13A(2)(a) to (h) above.

(9) References in this section to a decision as to an ancillary matter do not include a reference to a decision of a description specified in the following paragraphs of Schedule 5—

(a) paragraph 3(4);

SCHEDULE 5

…

The Alcoholic Liquor Duties Act 1979

3 (1) The following decisions under or for the purposes of the Alcoholic Liquor Duties Act 1979, that is to say—

…

(o) any decision as to whether or not an authorisation or licence for the purposes of section 75 (denatured alcohol) is to be granted to any person or as to the revocation or suspension of any such authorisation or licence;

(2) Any decision which is made under or for the purposes of any regulations under section 13 or 77 of the Alcoholic Liquor Duties Act 1979 (regulation of the manufacture of spirits, methylated spirits and denatured alcohol) and is a decision as to whether or not any premises, plant or process is to be, or to continue to be, approved for any purpose or as to the conditions subject to which any premises, plant or process is so approved.

Interpretation of Schedule

10(1) In this Schedule references to any decision as to the conditions subject to which any other decision (whether or not specified in this Schedule) is made include references to—

(a) any decision as to whether the other decision should be made subject to or to the imposition of any conditions, limitations, restrictions, prohibitions or other requirements, either from the time when the other decision takes effect or in exercise of any power to impose them subsequently;

(b) any decision as to the terms of any conditions, limitations, restrictions, prohibitions or other requirements imposed or applied in relation to that other decision;

(c) any decision as to the period for which any licence, approval, permission or other authorisation to which the other decision relates is to have effect or as to any variation of that period; and

(d) any decision as to whether any conditions, limitations, restrictions, prohibitions or other requirements so imposed or applied are to be revoked, suspended or cancelled or as to whether or in what respect their terms are at any time to be varied;

but those references do not include references to any decision as to the enforcement of any condition, restriction or prohibition in criminal proceedings, by the seizure or forfeiture of goods or, for purposes connected with any duty of excise, by any other means."

14. HMRC has published a notice, "Notice 473: production, distribution and use of denatured alcohol". Apart from 3 paragraphs in it which are not relevant to this case it does not have the force of law. It does however contain a table which sets out the types of trade specific denatured alcohol ("TSDA") which are the formulations set out in Schedule 3 to the 2005 Regulations and against each type it sets out the uses to which TSDA of that formulation may be put. This case concerns the TSDAs in sub-paragraphs (b) and (g) of paragraph 3 of the Schedule (see §12) and the relevant approved uses shown in Notice 473 for those TSDAs (numbered 2 and 7 in the table) are:

Number.	TSDA formulation	Approved use
2.	97.9% Ethanol 2.0% Cyclohexane 0.1% Isopropanol	1. Manufacture of Printing inks (particularly for use on food wrappers). 2. Manufacture of Printing ink components 3. Manufacture of Coatings 4. Manufacture of Agrochemicals
7.	95% Ethanol 5.0% Isopropanol	1. Manufacture of Car screenwash. 2. Manufacture of Disinfectants specifically for use in sterile environments for example, places where pharmaceutical drugs are produced* *Note: this TSDA may not be used for the manufacture of more general household disinfectants

15. This table is in part 18 of Notice 473 and the text before the table is:

"18. List of formulations and uses for trade specific denatured alcohol

The following table lists the formulations of, and uses for, trade specific denatured alcohol which have been approved by the Commissioners of HMRC.

Although we will issue amendments to this notice when the following list is amended, please contact the Helpline to make sure this list is up to date."

16. Part 19 of Notice 473 contains an application form.

"19.2 Application for Authority to Receive and Use TSDA

Part A. We (name of company ….) apply for authority to receive and use TSDA (indicate formulation) .... for use at (address of premises): ....

Type of business/activity...

VAT Registration Number..

Part B The TSDA is to be used for the following purpose(s): ....

Part C (only for requests to use TSDA for a use not previously approved) CDA/IDA is unsuitable because: ....

Part D Our estimated annual requirement is: *Trade Specific Denatured Alcohol....... litres

Declaration

I declare that the information I have given on this form is complete and correct. I have read and understood Notice 473: Production, Distribution and Use of Denatured Alcohol.

…

*Delete as necessary"

17. Part 22 of Notice 473 is headed "Review and Appeal Procedures". It says:

"22.1 What if I disagree with any decision you make about my affairs

When we make a decision *that you can appeal against*, we will tell you and offer you a review. We will explain the decision and tell you what you need to do if you disagree. [My emphasis]

For example with:

- the amount of an assessment
- the issue of a civil penalty, or
- a decision specifically connected to the relevant duty

You will usually have 3 options. Within 30 days you can:

- send new information or arguments to the officer you have been dealing with
- have your case reviewed by a different officer, or
- have your case heard by an independent tribunal

A review will be handled by a different officer from the one who made the decision. If you prefer to have an independent tribunal hear your case, you must write directly to the Tribunals Service."

The application and the decision on it

18. On 23 November 2010 HMRC sent a notice to Grosvenor Chemicals Ltd of Huddersfield ("Grosvenor"). The notice was headed (in bold block capitals):

> "This is your user authorisation letter, which proves you are entitled to receive and use trade specific denatured alcohol (TSDA). Please keep it in a safe place".

19. The body of the letter stated:

> "The Commissioners for Her Majesty's Revenue and Customs authorise Grosvenor Chemicals Ltd to receive at your premises … 150,000 litres per annum of Trade Specific Denatured Alcohol"

There followed this table:

No.	TSDA Formulation ('Pure' ethanol + Ingredient specified below)	Approved use
7.	Isopropanol - 5.0% vol.	2. Disinfectants specifically for use in sterile environments eg areas where pharmaceutical products are produced, including for example, a surface cleaner for cleansing and disinfecting surfaces.

20. It will be noted that, compared with the relevant entry in the table in Notice 473, the words "manufacture of" have been omitted from the start of the text of the approved use (numbered 2). It can also be seen that the text in item 2 in the letter differs from the text of the second approved use for TSDA 7 in Notice 473, though not so as to make any appreciable difference to the meaning. It may be that the text in Notice 473 at the time of the letter was different from the current version on HMRC's website and included in the bundle.

21. On 8 September 2016 Woodstream Corporation (a US company) wrote to HMRC explaining that Woodstream Europe Ltd (its subsidiary, the appellant) requested authorisation for a new use of TSDA 7. This use, for agrochemicals, was to enable Woodstream to move production intended for Europe to the UK. Woodstream had chosen Grosvenor as its toll formulator, ie Grosvenor, as an authorised user of TSDA, would make the product using TSDA 7 for the appellant.

22. On 28 September 2016 HMRC (Fiona Renton) emailed the appellant to explain that the application should be made by Grosvenor.

23. On 28 September 2016 Grosvenor submitted a request for an amendment to its authorisation letter to allow them to use TSDA 7 in the manufacture of agrochemicals. The letter stated that that the application was made in conjunction with Woodstream's letter of 8 September 2016.

24. On 31 October 2016 HMRC (Alison Young) replied to Grosvenor turning down the application for an amendment.

25. The explanation given was that:

> "This particular use has not been allowed before. Following consultation with Policy they have established that TSDA 2 has been accepted for use by producers of similar items in the UK and we consider this is the appropriate denatured alcohol for this purpose".

26. This is a reference to entry in the table in §14 for TSDA 2 which includes agrochemicals.

27. HMRC's letter outlined 3 options where the applicant disagreed with the decision:

> "• send any further information you want me to consider;
>
> • have your case reviewed by a different officer; or
>
> • have your case heard by an independent tribunal."

28. On 9 November 2016 the appellant emailed HMRC (Fiona Renton) asking for contact with Alison Young to get a clearer understanding of why the application was refused. The appellant offered to make further information available if required.

29. On 23 November 2016 following discussions with HMRC (Alison Young), the appellant submitted what it called an appeal against the decision given to Grosvenor. This explained that in order for the appellant's products manufactured in the UK to comply with the conditions of regulatory authorisation in the UK, there cannot be any significant changes in the ingredients present in the products. Specifically, the replacement for the denatured alcohol currently used must be equivalent to SDA-3C (a formulation approved by federal authorities in the USA, details of which were included in the letter). In the appellant's opinion, TSDA 7 is equivalent to SDA-3C but TSDA 2 is not. In particular, TSDA 2 contains cyclohexane and SDA-3C does not. Therefore the appellant Woodstream believed that the UK regulatory authorities (the Health & Safety Executive ("HSE"), not HMRC) would not accept the use of TSDA 2 in its products.

30. On 18 January 2017 HMRC (Alison Young), having been asked by the appellant to treat the "appeal" of 23 November 2016 as a request for reconsideration with further information, again refused the application in these terms:

> "I have considered the further information you have provided and consulted with our Policy Team. My decision to refuse your application has been upheld.

> If you do not agree with my decision, you have two options. Within 30 days you can:
>
> - have your case reviewed by a different officer; or
> - have your case heard by an independent tribunal."

31. On 19 January 2017 the appellant emailed HMRC to say that the letter did not explain why the application was rejected and it would be helpful to the appellant to know why HMRC does not like the use of TSDA 7 in the manufacture of agrochemicals.

32. On 20 January 2017 HMRC (Alison Young) replied repeating what was said in earlier rejection letters.

33. On 25 January 2017 Exponent International Ltd submitted notifications on behalf of the appellant to the Chemicals Regulation Division ("CRD") of the HSE for non-significant changes for two formulations. Requests were made to allow the replacement of the denatured alcohol, SDA-3C with either TSDA 2 or TSDA 7.

34. On 3 February 2017 CRD replied to Exponent:

> "CRD has accepted your notifications with regards to Ethanol TDSA-7 only and they have been recorded against each products folders in our records.
>
> With respect to TSDA-2,
>
> 'CRD cannot accept the notifications for the following reasons:
>
> Ethanol TDSA-2 triggers a hazard classification change and is therefore considered a significant formulation change'".

35. On 7 February 2017 the appellant emailed to HMRC (Alison Young):

> "I kindly ask that our appeal case be heard by an independent tribunal. If you have any questions, please do not hesitate to contact me".

36. On 8 February 2017 Alison Young replied:

> "I regret that at this moment I am unsure [*sic*] as to how you wish to proceed. Please allow me to explain the options open to you.
>
> If you do not agree with my conclusion you can ask an independent tribunal to decide on the matter. If you want to appeal to the tribunal, you must write to the tribunal within 30 days of the date of my letter directly. You can find out how to do this on the Tribunals Service website [address given] or you can phone them on … "

37. On 15 February 2017 the appellant submitted its appeal to the Tribunal.

HMRC's submissions

38. In relation to its claim that the Tribunal has no jurisdiction to hear the appeal it says:

(1) the decision was made in accordance with the provisions of ALDA and the 2005 Regulations made under that Act,

(2) the Tribunal's jurisdiction to determine appeals in relation to ALDA is given by Part 1 FA 1994 which refers to the decisions which may be appealed as "relevant decisions", and

(3) "relevant decisions" are listed in s 13A(2) and Schedule 5 FA 1994 and the disputed decision in this case is not included in the list of relevant decisions.

39. In relation to its claim that the appellant has no standing to bring the appeal HMRC says that:

(1) the rejected application was made by Grosvenor Chemicals Ltd, of whom the appellant is simply a customer,

(2) as a customer which only distributes the chemicals it does not hold any authorisation to use TSDA 7, and

(3) it does not fall within the description of people who are permitted to bring an appeal before the Tribunal in s 16(2A) FA 1994.

Appellant's submissions

40. In relation to the points of law raised in the striking out application, the appellant had nothing specific to say. Having heard the discussion between me and Ms Vicary on the law they said they agreed with the points I had made. These were of course literally debating points where I was testing HMRC's arguments, not my own views on the law.

41. They pointed out that in Grosvenor's application the word Woodstream is mentioned 8 times, and that the letter was said to have been written in conjunction with Woodstream.

42. In response to a question from me, Dr Briggs said Grosvenor would be happy to be joined in any appeal.

43. They complained of being misled by HMRC into thinking they could appeal and of the process generally, and said that, in view of the passage of time since the first approach to HMRC Woodstream Corporation would need to review its strategy which could involve any production being carried out in Europe.

Discussion

My approach to the application

44. This Tribunal is a creature of statute law and its jurisdiction is circumscribed by that law. This is reflected in Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("the Rules") which provides for how proceedings are started. It begins:

> "Where an enactment provides for a person to make or notify an appeal to the Tribunal, the appellant must start proceedings by …".

45. For an appeal to be entertained then there must be an enactment which provides not just for an appeal but for an appeal of the requisite character. In other words the appeal must be against an appealable decision, and a decision is only appealable if an enactment provides for it to be appealable to the Tribunal.

46. If the decision in this case is not appealable then the Tribunal has no option but to strike it out. But striking out is, as has been said, a nuclear option. It can be a merciful way of preventing time and resources being wasted in a hopeless cause; but it can also deprive a person of any chance of getting their arguments heard because it is a final disposition of the case.

47. There is a natural tendency in this case, where the prospect of an appeal has been dangled before the appellant and procedures gone through with that in mind only to be snatched away at the last minute, for a judge to strain to do what might be regarded as the just thing. This is the more so when by my quick calculation Schedule 5 to FA 1994 contains nearly 100 appealable decisions – surely this must be one is the thought.

48. What is more the appellant cannot seek to get the Tribunal to actually overturn the decision of HMRC. If the decision is an appealable decision it will be an "ancillary decision" within the meaning of s 16 FA 1994, and that means that the Tribunal's jurisdiction is limited to requiring HMRC to review their decision, with if the Tribunal thinks fit, directions as to how it must do that. Again the initial thought is that there must be a provision allowing a person who is the subject of a decision with major economic consequences to at least get another review on perhaps a more informed basis.

49. I must however guard against allowing such natural tendencies to influence my decision. On the other hand a prospective appellant against an important decision with substantial economic consequences potentially at stake should not be deprived of a remedy on a technicality.

50. And my task here is, in my view, not to say whether there is definitely an appealable decision, but whether there is clearly not. The test I employ is that for applications to strike out on the grounds that there is no reasonable prospect of success, so that I am anxious to see if there is any non-fanciful argument that could be employed at any hearing of the case, especially given that the appellant is not legally represented.

51. I also take this approach in relation to the question of standing, but there are other considerations there.

The decision

52. The application by Grosvenor requested that HMRC authorise it to use TSDA 7 to manufacture agrochemicals, TSDA 7 being a formulation of denatured alcohol which it was only authorised by HMRC to use to manufacture disinfectants.

What are the appealable decisions in this area?

53. In relation to excise duty the Tribunal can only entertain a relevant decision (s 16(1B) FA 1994). Section 13A(2) FA 1994 lists the relevant decisions and it is clear to me, and I agree with HMRC, that the only relevant paragraph of that subsection is paragraph (j).

54. Paragraph (j) refers to the lengthy list of decisions set out in Schedule 5. In that Schedule only paragraph 3 applies to ALDA, and the only decisions listed in paragraph 3 that are relevant to denatured alcohol are sub-paragraphs (1)(o) and (2) which I repeat here:

> "**3**(1)
>
> …
>
> (o) any decision as to whether or not an authorisation or licence for the purposes of section 75 (denatured alcohol) is to be granted to any person or as to the revocation or suspension of any such authorisation or licence;
>
> (2) Any decision which is made under or for the purposes of any regulations under section 13 or 77 of the Alcoholic Liquor Duties Act 1979 (regulation of the manufacture of spirits, methylated spirits and denatured alcohol) and is a decision as to whether or not any premises, plant or process is to be, or to continue to be, approved for any purpose or as to the conditions subject to which any premises, plant or process is so approved."

55. Although not listed in the text of Schedule 5, a decision under s 5 FA 1995 is also appealable by virtue of s 5(4):

> "(4) Sections 13A to 16 of the Finance Act 1994 (review and appeals) shall have effect in relation to any decision which—
>
> (a) is made under or for the purposes of any regulations under this section, and
>
> (b) is a decision given to any person as to whether a manner of mixing any substance with any liquor is to be, or to continue to be, approved in his case, or as to the conditions subject to which it is so approved,
>
> as if that decision were a decision falling within section 13A(2)(j) of that Act."

Such a decision is therefore a relevant decision.

Are any of these appealable decisions relevant to this case?

56. I can disregard a decision under s 5 FA 1995 as s 5(4)(b) is clearly irrelevant to this case. Grosvenor is not seeking to vary or use a new method of mixing substances with alcohol.

57. I can also disregard paragraph 3(1)(o) as section 75 covers authorisation to denature alcohol (oddly only the heading to s 75 refers to "manufacturing", not the

text of the section). Grosvenor's authorisation is to receive and use denatured alcohol, not to denature it.

58. That leaves only paragraph 3(2) Schedule 5 FA 1994. To see if that applies I need to set out what decisions are made by HMRC that might fall within it.

What decisions are made by HMRC that might be within para 3(2)?

59. I have considered here only those regulations relating to TSDA and not to any other form of denatured alcohol.

60. Regulation 7 of DAR 2005 (headed "Trade Specific Denatured Alcohol") at paragraph (3) says:

> "The Commissioners may, if they think that in all the circumstances it is appropriate to do so, approve a formulation different from or as a variation on a trade specific denatured alcohol formulation described in paragraph 3 of the Schedule."

61. It seems to me that this is not in point here, as Grosvenor was not applying to have a different or varied formulation approved. In any event the regulation applies to "producers who make denatured alcohol" and Grosvenor does not make, or denature as s 75 ALDA puts it, denatured alcohol.

62. Regulation 13 of DAR 2005 (headed "Receipt and use of industrial denatured alcohol and trade specific denatured alcohol") includes:

> "(4) The Commissioners may authorize a person to receive industrial denatured alcohol or trade specific denatured alcohol—
>
> (a) subject to restrictions on the uses to which that denatured alcohol may be put;
>
> (b) subject to restrictions on the formulations of denatured alcohol that may be received; and
>
> (c) subject to such conditions as they see fit to impose."

63. This is in my view the statutory basis for Grosvenor's authorisation of 23 November 2010. It authorised Grosvenor to receive 150,000 litres per annum of TSDA 7 subject to it only being used to produce disinfectants.

64. Regulation 13(6) says:

> "(6) The Commissioners may at any time for reasonable cause vary or revoke any authorization granted or any condition or restriction imposed under this regulation."

Are either of the regulation 13 decisions arguably within paragraph 3(2)?

65. Paragraph 3(2) suitably comminuted reads:

> "Any decision which is made under or for the purposes of [DAR 2005] and is a decision as to whether or not any premises, plant or process is to be, or to continue to be, approved for any purpose or as to the

conditions subject to which any premises, plant or process is so approved".

66. In my view both paragraphs (4) and (6) of regulation 13 arguably fall within the description in paragraph 3(2). What Grosvenor does with denatured alcohol it receives is to process it by using it to manufacture various products as set out in the "Use" column in the table in Notice 473. Grosvenor is approved to use TSDA 7 in any process it employs to make disinfectant. It wishes to be approved to use TSDA 7 in a process to produce agrochemicals.

67. The relevant decision of HMRC is, on this basis, capable of being characterised as either one not to authorise Grosvenor to use TSDA 7 for making agrochemicals within regulation 13(4) or not to vary its authorisation within regulation 13(6). Both would be decisions as to whether or not any process is to be approved or as to the conditions subject to which it is to be approved.

68. For HMRC Ms Vicary argued that paragraph 3(2) is only capable of applying to the approval of things not of persons, the things being the premises, plant and processes referred to. I think that this argument was a spur of the moment thing, in response to questions I asked Ms Vicary about paragraph 3(2) and suggested by the member of HMRC's Solicitor's Office behind her.

69. As stated I do not accept it. Things cannot get themselves approval or authorisation – the people who own or use them do that. But I can see an argument, which is maybe what was intended, that paragraph 3(2) applies only to decisions under regulation 8 DAR 2005.

> "**Producer's application for approval and entry of premises**
>
> **8**—(1) A producer must, in respect of each set of premises at which he intends to make a class of denatured alcohol, make written application to the Commissioners for approval of the process he intends to employ when making that denatured alcohol.
>
> (2) The application must include—
>
> (a) the class of denatured alcohol which the producer intends to make at the premises;
>
> (b) the formulation which the producer intends to follow in making a batch of that class;
>
> (c) the process which the producer intends to employ when mixing the alcohol with the other substances specified by the formulation being followed in making the denatured alcohol;
>
> (d) such other information as the Commissioners may require.
>
> (3) No person may begin to denature alcohol until—
>
> (a) the Commissioners have, in accordance with this regulation, approved the process to be employed, and
>
> (b) if so required by paragraph (7), entry has been made in accordance with section 108 of the Customs and Excise

> Management Act 1979 (of each set of premises at which it is intended to make denatured alcohol.
>
> (4) The Commissioners' approval of the process to be employed—
>
> (a) may be granted subject to such conditions as the Commissioners may reasonably impose, and
>
> (b) those conditions may be varied by the Commissioners for reasonable cause.
>
> (5) A producer who has received the Commissioners' approval of the process to be employed must ensure that no other process is used and that the approved process is not varied without first receiving the Commissioners' approval of that other process or of that variation.
>
> (6) Paragraph (4) applies to any approval given under paragraph (5).
>
> (7) Except in the case of premises that are an excise warehouse, a producer must make entry of each set of premises at which he intends to make a class of denatured alcohol."

70. This regulation refers to both "premises" and "process", though not "plant". It contains decisions which HMRC may make, but those decisions are made on the application of a person, "the producer". I am perfectly happy to accept that these decisions are appealable as falling within paragraph 3(2) and that the producer has a right of appeal. But I do not see why it necessarily follows from this that regulation 13 does not contain appealable decisions. Regulation 13 is cast in much the same terms - approval with conditions and variation of those conditions - as the equivalent paragraphs in regulation 8.

71. I accept that regulation 13 does not use the word "process", but HMRC cannot be under the illusion that a user of denatured alcohol who is approved to use it for specific purposes and is a toll manufacturer of chemicals is not involved in a process.

72. What is more art. 27(2)(d) of Council Directive 92/83/EEC uses the word "process" in the context of use of denatured alcohol in a manufacturing process provided the *end product* does not contain alcohol. The words emphasised here (by me) show that this is not a reference to the manufacture of denatured alcohol itself. Thus what Grosvenor does is to use a process.

73. The CJEU case from Bulgaria which I mentioned in §4, *Direktor na Agentsia 'Mitnitsi' v Biovet AD* [2015] EUECJ C-306/14, ECLI:EU:C:2015:689 is not directly in point but is useful in that it emphasises the recitals in the preamble to Directive 92/83/EEC, particularly the 20th:

> "... however, it is possible to permit Member States an option to apply exemptions tied to end-uses within their territory".

74. This is I assume what HMRC think they have done in the conditions and restrictions as to use that they include in authorisations. It is to my mind arguable that by restricting a particular end use to a particular formulation of TSDA they may have been too restrictive. The 20th preamble must be read in conjunction with the 22nd:

> "Whereas Member States should not be deprived of the means of combating any evasion, avoidance or abuse which may arise in the field of exemptions"

75. In the field of the exemption for denatured alcohol the evasion is of excise duty which would become payable were the denatured alcohol to be used in manufacturing potable beverages. It is very difficult to see why the restriction of one type of TSDA to a particular use and not any of the others serves to combat evasion or avoidance.

76. However I accept that consideration of the EU law (apart from its relevant use of the word "process") is something that would be primarily relevant were s 16(4) FA 1994 review ordered, rather than as a reason for finding that there is an appeal right.

77. I am also inclined to think that paragraph 10 Schedule 5 FA 1994 may be of some assistance in support of my view that paragraph 3(2) arguably applies to this situation, but I find it very difficult to interpret without the assistance of proper argument, and so I have not taken it into account.

78. However I continue to be worried by the reference to "plant" and to "methylated spirits" in paragraph 3(2) Schedule 5 FA 1994. Their presence there suggests that Schedule 5 FA 1994 may not have been properly updated since 1994. Examination of FA 1994 as originally enacted (ie the Queen's Printer's copy) shows that paragraph 3(2), unlike paragraph 3(1)(o), reads exactly as it did in 1994. But DAR 2005 only came into force in 2005.

79. When Schedule 5 FA 1994 was enacted the regulations in force made under the powers in s 77 ALDA were the Methylated Spirits Regulation 1987 (SI 1987/2009) ("MSR 1987"). They contained an equivalent to regulation 8 DAR 2005, namely regulations 3 and 4 to this effect:

> "**PART II**
>
> **PREMISES AND PLANT**
>
> **Approval of processes, premises and plant for methylation and storage**
>
> **3.**—(1) Any person intending to methylate spirits shall make written application to the proper officer for approval of the *processes, premises and plant* he intends to use for the methylation of spirits and the storage of denaturants, and any such application shall specify the classes of methylated spirits he intends to manufacture and which of those *processes, premises and plant* relate to which class or classes of methylated spirits.
>
> (2) Any application made under the preceding paragraph shall be accompanied by such information connected with the application as the proper officer may require.
>
> (3) No person shall begin to methylate spirits until he has received the proper officer's approval of the *processes, premises and plant* referred to in his application under paragraph (1) above and any such approval

may be made subject to conditions which may be varied by the Commissioners for reasonable cause.

(4) A person making application under this regulation shall ensure that the premises approved under this regulation for the methylation of spirits contain one or more mixing vats which must be fixed and no such vat shall have a capacity of less than 2,500 litres.

(5) Save as the proper officer may otherwise allow, no person shall use premises and plant approved under this regulation for the storage of denaturants for any other purpose.

Variation of approval

4.—(1) The person receiving the approval under regulation 3 above shall ensure that no variation, alteration or change is made to any of the approved *processes, premises or plant* without first receiving the proper officer's approval of the variation, alteration or change and the proper officer's approval may be given subject to conditions which may be varied by the Commissioners for reasonable cause.

(2) Any person making application for the approval of any variation, alteration or change to any *processes, premises or plant* shall do so in such form and manner and shall provide such information connected with the application as the proper officer may require. [My emphases throughout]

80. This approval and variation procedure, and the decisions made by the Commissioners (then of Customs & Excise) is surely what paragraph 3(2) was referring to, even though perversely it listed them as "premises, plant or process" in that order.

81. Nothing in MSR 1987 referred to "receipt" or "use" of meths. It was DAR 2005 which revoked MSR 1987 which introduced the regulation of receipt and use in Part 4. For some unaccountable reason there is no Explanatory Memorandum on the legislation.gov.uk website to explain why this further regulation was added and the Explanatory Notes give no clue as to what was behind the introduction of Part 4. I cannot however see any good reason why the Commissioners of HMRC who made the regulations, Dave Hartnett and Paul Gray, would not have expected that regulation 13 would not have appeal rights when regulation 8 would have, and I cannot see any good reason why those behind the drafting of the instrument would have intended regulation 13 decisions but not regulation 8 decisions to be unappealable.

82. The lack of amendment to paragraph 3(2) Schedule 5 FA 1994 in 2005 cuts several ways. It could show that civil servants in the former Customs and Excise part of HMRC did not realise that they needed to amend paragraph 3(2) to reflect the introduction of regulation 13. Or they took the view, possibly on legal advice, that the reference to "process" in paragraph 3(2) was sufficient to cover regulation 13. The third possibility is that they took the decision that regulation 13, unlike regulation 8, should not have appeal rights and that therefore they should not amend paragraph 3(2). Based on the fact that the reference to "plant" which had been omitted from regulation 8 DAR 2005 when that replaced MSR 1987 was not removed from paragraph 3(2) I think that neglect and possibly incompetence is the best answer.

83. I have no way of knowing because there was no evidence at the hearing from anyone involved with the making of DAR 2005. But even if it was the intention to deprive people like Grosvenor of any appeal rights, the question whether that intention was realised in legislation, or in not amending legislation, is one for the Tribunal.

84. Based on the discussion above I am not satisfied that the Tribunal clearly does not have jurisdiction, and so I refuse to strike the appeal out on that basis.

85. I must emphasise to the appellant that this decision does not mean that I think the interpretation of paragraph 3(2) Schedule 5 FA 1994 that I have suggested is correct and that they would win any appeal. What I have decided is that an interpretation of the sub-paragraph along the lines I have set out is arguable, and that the appellant should be allowed to put it at a hearing of the appeal.

Can Woodstream appeal?

86. HMRC argued that the appellant has no standing to appeal. They point to s 16 FA 1994 as providing the only basis for deciding who can appeal an excise duty decision.

87. Section 16(2A) provides:

> "(2A) An appeal under this section with respect to a relevant decision … shall not be entertained unless the appellant is—
>
> (a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,
>
> (b) a person in relation to whom, or on whose application, the relevant decision has been made,
>
> (c) a person on whom the conditions, limitations, restrictions, prohibitions or other requirements to which the relevant decision relates are or are to be imposed or applied."

88. I said to Ms Vicary that paragraph (b) provides for alternatives. In this case the applicant for the decision is Grosvenor. Why I asked her is the appellant not a person to whom the decision relates? Grosvenor's application refers 8 times to Woodstream and says the application is made in conjunction with Woodstream.

89. Ms Vicary's reply seemed to be that both parts of paragraph (b) refer to Grosvenor. She argued that the appellant would only have standing if the paragraph referred to a person affected by the decision.

90. I do not accept that it is clear that the appellant is not a person in relation to whom the decision was made. While it seems to me perfectly arguable that "a person affected" covers a wider category of people than "a person in relation to whom", even so I consider that the very close connection between the applications by Grosvenor and the interests of Woodstream makes it strongly arguable that the appellant has standing.

91. The words “person affected” do appear in paragraph (a). That paragraph applies to liability to pay duty, where the consideration as to who has an appeal right may be different. There may be many people who may be severally liable to pay excise duty in connection with the same transaction and a decision about duty on it, and some may be peripheral to the transaction but could nevertheless be affected by it.

92. I would add that the possibility that a person may be affected only in the future (“will be”) suggests that one cannot compare paragraphs (a) and (b) in the way Ms Vicary would wish.

93. I think it is properly arguable that the appellant has standing as a person related to the applicant, and I refuse to strike out the appeal on the basis that it does not.

94. I would add that even if the appellant did not have standing I would think it arguable that Grosvenor would be able to make an application under Rule 9 of the Rules to be substituted as a party. It may of course in any event seek to be added as a party, as Dr Briggs said it would be willing to do.

Decision

95. I refuse to strike out the appeal.

96. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 31 AUGUST 2017