[2019] UKFTT 267 (TC)

TC07106

PROCEDURE – application to amend grounds of appeal five years after a previous application to amend refused and after hearing of preliminary issue called on basis that it had potential to resolve the dispute – no good reason given for delay– new ground of appeal has only weak prospects of resulting in no liability to duty - appeals should be conducted proportionately – application REFUSED

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2010/6103 and TC/2010/5088

BETWEEN

ASIANA LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 7 March 2019

Mr J White, Counsel, for the Appellant

Mr D Yates, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The substantive appeals, both lodged in 2010, concerned two assessments dated 16 December 2009 and 9 March 2010 for customs and excise duty in respect of imports of Shaoxing cooking wine. The amount of customs duty assessed was £21,758.04 and the amount of excise duty assessed was £852,902.89.

2. The appellant's case was that it was told by HMRC that the wine could be imported free from customs and excise duty. After numerous imports, HMRC then changed its mind, said the appellant, and made the assessments the subject of the appeal. Its original grounds of appeal were on the basis of misdirection by HMRC; these grounds were supplemented (with HMRC's agreement) in 2011 to be that the right under the Customs Code for customs duty to be remitted, in (a) cases of error by the taxing authority or (b) where there was no fraud or negligence, applied equally to excise duty assessments.

3. In 2013, the appellant sought to amend its grounds of appeal (to argue that it was not liable to the duty because it would, had it paid it, be entitled to have it repaid under a statutory relief). Its application was opposed, and, although it succeeded in front of the FTT, the FTT's decision was overturned by the Upper Tribunal. This was reported at [2014] UKUT 489 (TCC) and I shall refer to this decision as *Asiana I.* There was then a second Upper Tribunal decision in respect of the appeal, reported at [2015] UKUT 705 (TCC) (*Asiana II)*, concerning an application for costs, which I will not mention again as it has no relevance here.

4. In 2015, HMRC applied for a hearing of a preliminary issue in the excise duty appeal (which was, as I have said above, by value by far the most significant assessment). The proposed preliminary issue was whether the Tribunal had jurisdiction to entertain the appellant's grounds of appeal. HMRC's point was that the right in the customs duty code to remittance of duty in certain cases could not apply to *excise* duty. That being so, said HMRC, the preliminary issue hearing would dispose of the excise duty appeal.

5. After a disputed hearing, on 12 May 2017, the FTT (Judge Allatt), reported at [2017] UKFTT 393 (TC), ordered the preliminary hearing to take place. I shall refer to Judge Allatt's decision as *Asiana III.* It is clear that the Judge (see §21) considered that the preliminary issue raised a 'succinct, knock-out point' on excise duty but her hesitation in that paragraph centred on the fact that that was not the case for the *customs* duty element of the appeal.

6. The FTT's decision (Judge McGregor), reported at [2018] UKFTT 350 (TC), on the preliminary issue was issued on 26 June 2018. I shall refer to this as *Asiana IV.* It held that the customs duty code did not apply to excise duty assessments and could not be relied on by the appellant in its appeal against the excise duty assessments; it held also that the Tribunal could not consider matters of legitimate expectation in appeals against excise duty assessments.

7. On 31 July 2018, HMRC applied to have the appellant's appeal in so far as it related to excise duties struck out. The appellant opposed this on the basis (it said) it was not liable to excise duties. In November 2018, it set out new grounds of appeal which were, in summary, that the cooking wine was not subject to the duty at the rate charged by the assessments: it had been charged to duty as 'made-wine' but the appellant said that it was not made-wine.

PURPOSE OF HEARING BEFORE ME

8. The hearing before me was to decide if the appellant could amend its grounds of appeal (as it applied to do) or whether its appeal, in so far as it related to excise duty, should be struck out on the basis that it had no live grounds of appeal (in line with HMRC's application). There was really a single issue before the Tribunal: if the appellant was not permitted to amend its grounds of appeal, it would have no live grounds of appeal in the appeal in respect of the excise

duty assessment, and therefore it would follow that the appeal should be struck out in respect of excise duty as it would have no reasonable prospect of success.

9. I note in passing that the appellant's position was that it had never conceded that the imported wine was subject to the duty imposed; but in its skeleton argument for this hearing it accepted that it had never stated any grounds of appeal in respect of the rate of duty and that, therefore, unless its application to amend was allowed, it would have no grounds of appeal in respect of the excise assessments.

10. A few months earlier, when submitting its application for new grounds of appeal, it claimed that its existing grounds of appeal should have a 'beneficial construction' and be found to already include the ground of appeal that the cooking wine was not chargeable to duty as made-wine, because HMRC's review letters (mid-2010) failed to mention the provisions under which HMRC considered the wine was subject to duty. This was not corrected by HMRC until 10/12/10 which was after the notices of appeal were submitted.

11. I do not agree that the appellant is to be treated as having raised the liability issue in its notice of appeal or amendments thereto. It is for the appellant to set out why it did not consider it should pay the excise duty assessments. It had never, until mid-2018, clearly stated that it was its case that cooking wine was not assessable to duty as made-wine. Moreover, early on, HMRC and the appellant agreed that the appellant would provide further and better particulars of its appeal and these were provided, settled by the QC then acting for the appellant, in 2011. These particulars made no mention of a challenge to the basis on which cooking wine was said to be chargeable with duty.

12. In conclusion, if the appellant is to challenge the liability of its cooking wine to excise duty as made-wine, it must do so by amending its grounds of appeal. If I do not give permission for it to amend its grounds of appeal, it will be left with no grounds of appeal and its appeals against the excise duty assessments should be struck out.

TEST FOR ADMITTING NEW GROUNDS OF APPEAL

13. I was referred by both parties to the Upper Tribunal's decision in *Denley* [2017] UKUT 340 (TCC) for the test on when the FTT should admit further grounds of appeal. In that case, the Upper Tribunal basically applied the same principles as considered under the CPR in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38] which were (in summary):

> (a) The Tribunal should consider the overriding objective and strike a balance of fairness between both parties;
>
> (b) and (c) A 'very late' application is one which would cause the trial date to be lost and carries a heavy burden of justification;
>
> (d) Lateness is not a measure of time so much as a measure of (i) the reason for the lateness (ii) the waste of work to date and (iii) the consequences of allowing the amendment;
>
> (e) the Tribunal must recognise that costs may not be an adequate compensation for a late amendment;
>
> (f) the applicant must provide a good explanation for the delay;
>
> (g) the Tribunal must respect the need for litigation to be conducted proportionately.

14. These principles do not expressly require the Tribunal to consider the merits of the new grounds of appeal but it is implicit: while the Tribunal must not conduct a mini-trial in an interim hearing, nevertheless, if, without doing so, it is apparent that the proposed new grounds are very weak, the balance of fairness between the parties is unlikely to favour them being

admitted; if it is apparent that the grounds are very strong, however, they may tilt the balance in favour of the appellant. If the strength of the grounds cannot be ascertained without a mini-trial or it is apparent that it is somewhere in between these two positions, the strength of the grounds is unlikely to affect the outcome of the application either way.

15. Moreover, it is implicit in these principles that a party must state its grounds of appeal (or defence). I think Mr White did accept that, although he reverted on occasions to stating that the appellant had never admitted that it was correctly charged to made-wine duty. But the law on pleadings is clear: the appellant must state what are its grounds of appeal. If it does not, it cannot rely on those grounds. And if it wants to rely on a new grounds of appeal, as it does here, it must apply for permission to amend. And *Quah* and *Denley* set out the principles the Tribunal will consider in determining such an application.

Was the application very late?

16. The first thing to consider is the lateness of the application. The appellant pointed out that its application was not made 'very late', as defined in *Denley* and *Quah,* as no hearing date was set and so could not be jeopardised. HMRC's response was that the application was beyond being 'very late': the hearing had already come and gone. They were referring to *Asiana IV.*

17. My understanding of what was meant at [38] (b) and (c) in *Quah* was that an amendment was classed as 'very late' if it would probably cause a hearing date to be lost, and for that reason was one which required very heavy justification. The proposed amendment in this case did not jeopardise a hearing date, as no date for the substantive hearing had been set, and so the proposed amendment could not be classed as 'very late'.

Asiana III and IV

18. Nevertheless, I did need to take into account that a significant amount of time and money will have been wasted by the fact that this ground of appeal was raised after the determination of the preliminary issue. It was obvious to me from what was said in her decision in *Asiana III* that Judge Allatt considered that the preliminary issue would determine the excise duty appeal in HMRC's favour if HMRC won it. If she had not thought that, it is clear she would not have ordered the preliminary issue hearing, as it would not have had the potential to resolve the appeal.

19. The appellant points out that it did oppose the preliminary issue: I do not consider this a point in its favour because it did not oppose it on the basis that it wanted to raise this new ground of appeal.

20. So, by being made after the application for a preliminary issue was determined, the appellant's application to amend its ground of appeal was late and (if admitted) would cause the waste of a significant amount of the time and money spent in respect of the preliminary issue hearing. That is because, although those issues would have needed determinising in any event, had this new ground of appeal been always a part of the appellant's grounds, the other grounds would not have been decided in a separate hearing but could have been determined in the substantive hearing. That would have saved significant time and money (if the new ground had always been a ground of appeal).

Asiana II

21. Going back further in time to the earlier application to amend the appellant's grounds of appeal in 2013 illustrates how late this 2018 application is. The appellant sought in 2013 to argue that it was entitled to the exemption in Art 27 of the 92/83/EEC Directive for alcohol used in foodstuffs. But the directive provided that the exemption could be given effect by means of 'refund of duty' and that is what the UK legislation in s 4 FA 1995 did. It provided

that excise duty was repayable on duty which had been paid when certain conditions were satisfied.

22. As I have said, the FTT admitted the new ground of appeal but the Upper Tribunal overturned this, ruling that it was not 'remotely arguable' [47] that the appellant was entitled not to pay the duty: it was only entitled to the relief (if at all) after the duty had been paid. Even if the UK's conditions on the relief went further than permitted by the Directive, the only possible outcome would be that the conditions would be struck down: but the relief would remain one of 'refund of duty' as that was clearly permitted by EU law. The relief could not be a defence to liability to the duty in the first place.

23. But it follows that the hearing before the FTT in 2013 would have been the opportunity to raise the argument that the duty was not payable at all because the cooking wine was (alleged) not to be made-wine. The appeal was by this point already over two years old so the appellant would have had plenty of time to consider its grounds of appeal. The appellant would have been prompted again to think of its grounds of appeal when it appeared before the Upper Tribunal a year later, yet, instead, it appears that the appellant let the hearing proceed on the basis that the cooking wine was chargeable to duty.

24. I say this because it was an express finding made in the Upper Tribunal in *Asiana I* at [5]:

> Following the decision in *Repertoire Culinaire v HMRC* …it is clear that a product such as Shaoxing cooking wine is subject to excise duty, falling as it does within the definition of 'ethyl alcohol' in Art 20 of [Directive 92/83/EEC]…..

25. Therefore, I have had some concerns whether it might even be abusive to permit the appellant to bring in this new ground of appeal. Would that be permitting it to challenge a finding made by the Upper Tribunal in a hearing in its appeal but without seeking permission to appeal?

26. However, I accept that the appellant is right to say that what Warren J said in *Asiana I* reflected what was implicitly agreed by the parties, rather than being a finding by the Upper Tribunal on a matter in dispute; moreover, the finding does not specify under which section of ALDA (Alcoholic Liquor Duty Act 1979) the appellant's product is liable to duty. It would not, in these circumstances, be abusive for the appellant to make out a case (as it wishes to do) that it was not liable to duty under s 55 ALDA as made-wine, as it appears to accept that it might have been (but was not) assessed under s 5 (see below).

27. But my conclusion is that, while raising a new ground of appeal now is not 'very late' in the sense of jeopardising a hearing date, it is extremely late in all other senses as the appeal has been running many years and the appellant has had many opportunities to raise this ground before, both in general and in particular in the hearings in *Asiana I* and *III;* and, moreover, its failure to do so meant that (if admitted) much of the costs and time in *Asiana IV* would be wasted.

Reason the application was late?

28. I was given no real explanation of why the appellant did not raise its new ground at any time in the 8 years that the appeal was live prior to it first suggesting that its cooking wine was not made-wine.

29. The reason I was (impliedly) given for the lateness was that both HMRC and the appellant's previous representatives were under the (alleged) misapprehension that the product was subject to duty as made-wine. It did not consider itself responsible for these failures.

The appellant's representatives were to blame?

30. The appellant's case that it was not to be blamed for its representative's errors rested on the CPR and the Upper Tribunal decision in *O'Flaherty* [2013] UKUT 161 (TC) where the Upper Tribunal cited *Sayers v Clarke Walker* [2002] I WLR 3095 which pointed out that the CPR required the court to consider whether the failure to comply was caused by the party or its legal representative and that therefore it was a

> 'relevant factor that the failure to comply was caused by the party's legal representative and not by the party himself.

31. I am of course bound by what the Upper Tribunal said. Nevertheless, I would point out that where the fault lay with the representative it was only said to be a 'relevant' factor and not that it was necessarily an exonerating factor. It is difficult to see how it could be an exonerating factor save in exceptional circumstances: a party is responsible for how it conducts litigation; that includes responsibility for the actions of its representative whom it has chosen to appoint. Moreover, while the non-compliant party may well feel aggrieved if it is let down by its representative, it by no means follows that the errors of one party's representative should be visited upon the *other* party who had no choice over who its opponent appointed as representative and certainly has no rights to sue his opponent's representative in contract or negligence. The Tribunal is called upon to do justice between the parties and I struggle to see how it can be just to visit the errors of one party's representative on the other party, which is in practice may be the result if a party is forgiven its non-compliance arising from its own representative's failures.

32. In any event, in this case the appellant brought no evidence that its representatives were to blame. I think it wished me to infer this from the fact that it had not raised the issue of liability before mid-2018. However, without evidence, I make no such inferences. Its erstwhile representatives (which included tax advisers and a QC) might well vigorously deny that they were negligent: and I am in no position to assume any negligence or mistake on their part in the absence of any evidence as to what they were instructed to do and what they actually advised. So I make no inferences and therefore make no finding that its representatives were to blame.

HMRC were to blame?

33. In the hearing, Mr White suggested that HMRC as well as the appellant's erstwhile representatives were to blame for the failure to suggest that the cooking wine was not made-wine.

34. I entirely reject his case on this. HMRC defended the appeal on the basis that their assessments were correct and the product was liable to duty as made-wine. This is stated in their statement of case in 2011 and in their later application for a preliminary issue. HMRC made no error in the way they defended the appeal: in the circumstances that they believed that their assessments were correct, it was hardly for them to suggest to the appellant that the assessments might be wrong. It is for an appellant to set out its grounds of appeal.

Conclusion on cause of delay

35. In conclusion, the delay has not been satisfactorily explained. I simply do not know why it took the appellant over 8 years to raise a case that it might not be liable to made-wine duty on its cooking wine. The appellant has therefore failed to establish a good reason for its delay and that weakens its case for the amendment.

Consequences of allowing or refusing the application

36. I have to consider the consequences of allowing or refusing the application as part of my decision making process. And as a part of that, as mentioned above, I need to consider the

merits of the new ground of appeal in order to decide if it was a very strong or very weak case, or not.

The proposed new ground of appeal

37. As I have said, the cooking wine was assessed to duty as made-wine. The appellant's new ground of appeal, in summary, is that the cooking wine was not a beverage because it was, albeit used for cooking, not palatable as a drink. Its new position is that only *beverages* are liable to duty as made-wine.

38. Its case is that it was charged to duty under s 55 of ALDA which charges made-wine to duty, and made-wine is defined in s 1(5) of ALDA as:

> '…any liquor which is of a strength exceeding 1.2 per cent and which is obtained from the alcoholic fermentation of any substance…..'

Its case was that the word 'liquor' implied that it was a beverage. In any event, its case was that UK excise duty could not charge to duty anything other than that permitted to be charged under EU Directives 2008/118 and 92/83/EEC which were an exclusive code. And articles 11 and 12 of 92/83/EEC, said the appellant, which was the section which applied to 'fermented beverages other than wine and beer' effectively excluded cooking wine. And that was because, said the appellant, to be included as 'still fermented beverages' they had to be categorised under particular headings of CN code chapter 22, whereas chapter 22 excluded:

> products prepared for culinary purposes and thereby rendered unsuitable for consumption as beverages

39. Mr Yates for HMRC conceded that this was an arguable point of law. However, he did not accept it was any more than that. His position was that HMRC had not accepted that the product was not a beverage nor that the above was necessarily the correct analysis of the statutory code. But his main point was that cooking wine was clearly subject to duty of one kind or another.

40. His case was that the CJEU decision in *Repertoire Culinaire* C-163/09 clearly decided that cooking wine was subject to excise duty under EU law (albeit that there was a refund mechanism) because it contained ethyl alcohol ([30]) even if unsuitable for consumption as a beverage ([27]). This followed the CJEU's earlier decision to same effect in *Gourmet Classic* C-458/06.

41. If the appellant was right to say that the cooking wine was not a beverage and not chargeable to tax as made-wine, then it had to be chargeable, said HMRC, to excise duty under another provision, which was s 5 ALDA. That section charged 'spirits' to duty, where s 1(2) defined them as:

> spirits of any description with strength exceeding 1.2%.

42. While Mr White initially at least appeared to accept that the appellant's cooking wine would have been liable to this duty, his reply was that HMRC could not treat an assessment made under s 55 as made under s 5 and HMRC was now well out of time to raise an assessment afresh under s 5 ALDA. Mr Yates' response was to agree that that might be true, but that the Tribunal under s 16(5) Finance Act 1994 in an appeal against an excise duty assessment had:

> ….power to substitute their own decision for any decision quashed on appeal.

His position was that the Tribunal would be likely to substitute an assessment under s 5 in a case such as this where it was clear that the product was liable to duty: and as the duty on spirits exceeded that on made-wine, the appellant would be worse off.

43. Mr White did not entirely accept that the cooking wine was subject to duty under one heading or another: he thought the CJEU in *Repertoire Culinaire* was dealing with a product to which ethyl alcohol was added (unlike the product in this appeal) and in any event he thought it wrongly decided.

44. I do not need to reach a final conclusion on these points of law. While HMRC have conceded that the appellant's case on whether cooking wine is made-wine is arguable, I have not been satisfied that Mr White is correct to say that the appellant has a particularly strong case on this. On the contrary, faced with the CJEU decision in *Repertoire Culinaire*, it seems a weak argument to say that the cooking wine was not liable to any duty at all; and as s 16(5) does give a power to substitute a decision, there is a real possibility it would be exercisable against the appellant so that, even if it succeeded in its argument, it would still be liable to excise duty of the same or greater amount. Again, I think it is a weak argument to say that *Reportoire Culinaire* would not apply to a fermented product and a very weak argument to say that it was wrongly decided (as the CJEU never overrules its own decisions).

Effect of refusing the application

45. If the amendment is not allowed, this long running litigation will come to an end in respect of the excise duty assessment. No more time and costs need be spent on the resolution of the excise duty matter.

46. The appellant's case was that its new ground of appeal was straightforward and no new facts would need to be found. It implied that having a hearing to decide the new ground of appeal would not long delay the resolution of the appeal nor involve much expenditure for the parties.

47. It stated that the facts were not in dispute because it considered that it was accepted by HMRC that the product was made by fermenting rice to about 13.5% ABV, and then adultering it with the addition of salt and a few other ingredients. The appellant relies on HMRC's review decision of the assessments in this appeal where an HMRC officer stated that

> '….the wine was completely unpalatable…..
>
> …deemed completely unpalatable and very salty.'

48. However, it was not clear that HMRC did consider this statement to be correct and even the appellant accepted that HMRC did not agree that the cooking wine was not a beverage. So it was clear that evidence would have to be called if the new ground of appeal was accepted. The legal question of whether made-wine had to be a beverage was also clearly contested.

49. It seemed to me that if this new ground of appeal were to be admitted, it would take significant time to prepare the appeal for hearing (with exchange of evidence) and the hearing would be as costly as a normal hearing.

50. On the other hand, it is the case that even if the application to amend the grounds of appeal is refused, the much smaller customs duty matter will remain live and so a hearing of some sort is inevitable unless the parties are able to settle the customs duty matter.

51. Moreover, refusing the application would mean that the appellant would be immediately liable to pay a very substantial assessment together with interest; its liability by now must be close to £1million. While it is the case that it may be entitled to the relief it relied on in its original application to amend its grounds of appeal, that is only once the duty is paid, and while it may have a case in judicial review against HMRC for allegedly misleading advice, I cannot judge whether this would have any prospect of success and it may well be too late. So I will proceed on the basis that refusing the application is a financially extremely significant matter to the appellant.

Effect of allowing the application

52. If the amendment is allowed, the appeal will continue to hearing on the basis of this new ground of appeal, involving both parties in costs and time, which should have been saved had the application been more timely.

53. Moreover, while I accept that the appellant's case that cooking wine is not assessable as made-wine is an arguable case, its case that it could succeed in avoiding liability to any duty at all appears (in the light of *Repertoire Culinaire* and the Tribunal's discretion to substitute a different decision) to be much weaker. I do not accept that the appellant's chance of entirely beating an excise duty assessment under either of s 5 or 55 is more than borderline: it is certainly not a strong case. So the effect on the assessments of allowing the application may not be in the long run much different to refusing it.

54. Mr Yates claimed that another consequence of allowing the amendment would by that HMRC would be procedurally prejudiced in more than just wasted time and costs: they say it is clear from *Repertoire Culinaire* that cooking wine is subject to duty: by not taking the point that it is not liable under s 55 in a timely fashion, HMRC are denied the opportunity of substituting an assessment for spirits duty under s 5, as such an assessment would now be clearly out of time.

55. Mr White did not accept that HMRC would ever have been in time to substitute an assessment as it was his view HMRC knew from the start that the wine was unpalatable. There was a factual dispute between the parties on this which I was unable to resolve without evidence on when HMRC first knew that. But I agree with HMRC that it is a very unattractive proposition by a taxpayer to seek to run an argument that they were charged under the wrong charging provision and then to rely on the fact it is too late to correct the error (if it was an error).

CONCLUSION ON APPLICATION

56. This is not a very late application in the sense it does not jeopardise a hearing. It is very late in any other sense. It is nearly a decade since the appeals were first lodged; while there was no suggestion that the delay was the fault of the appellant, the appellant has clearly had nearly ten years to think about its grounds of appeal. During that near decade, it has clearly had many opportunities to address its grounds of appeal: the application to amend in 2013, following release of the *Repertoire Culinaire* decision in 2011, would have been a much more appropriate time to apply to amend the grounds of appeal than 2018; the hearings in that application necessarily raised the question of liability (as the appellant sought relief from it) so it should have prompted the appellant to raise liability as a ground of appeal. Having missed that opportunity, the appellant then failed again to raise the issue in its objection to HMRC's application for a preliminary issue in 2015, yet it would clearly have been highly relevant as it would have been a complete answer to the application. It would have meant that, either way, the preliminary issue proposed could not have resolved the excise duty appeal. But the appellant did not raise it. If allowed to amend now, that preliminary hearing will have taken place on a false basis and necessarily significant time and costs will have been wasted.

57. But lateness should also be measured in the sense of the cause of it. And I was giving no clear sense of the cause of the delay. I rejected the appellant's case that liability had always been a ground of appeal and I rejected its case that it was the fault of its representatives as that was no more than an unproved assertion. Even if I had been satisfied on this, I see no good reason why I should visit on HMRC the failures of the appellant's representatives. I am prepared to accept that the failure to raise this ground of appeal earlier was due to nothing other than oversight: they would have raised it earlier if they had thought of it. So the reason for the lateness is simply that nearly 10 years into the appeal, the appellants have identified a new ground of appeal. That is not a good excuse: so the appeal is late measured on this basis too.

58. The consequences of refusing the application are that further time and costs in this long-running litigation will cease (save in respect of customs duty) but the appellant will be immediately liable to a very substantial sum of excise duty; but taking into account *Repertoire Culinaire* and s 16(5), it seems they have only weak prospects of entirely avoiding liability to duty under one section or another and, in any event, if they are so successful, by allowing them to take the point now rather than in 2010, the appellant might somewhat unfairly avoid an assessment under s 5 simply because it took the point on made-wine too late to enable HMRC to correct the assessment.

59. HMRC have indicated that if the amendment was allowed they would seek their costs of the preliminary hearing: as the application has not been made, I cannot decide it. But I do recognise that the answer to this application cannot simply be that HMRC can be compensated in costs.

60. For the above reasons, my view is that if I permit the grounds of appeal to be amended, the litigation will not be conducted proportionately and costs would not be an adequate remedy. I understand how significant this assessment is to the appellant but it has been professionally represented throughout and has had so many opportunities to raise this issue. Raising it for the first time in 2018 is, in my mind, too late. The balance is against the new ground of appeal being raised now and I refuse permission for it to do so. It follows that I strike out the appeals in so far as they relate to the excise duty assessments because there are no remaining grounds of appeal to determine and so there is no prospect of success on the excise duty part of the appeals.

61. It is of course still open to the appellant to rely on the relief referred to in *Repertoire Culinaire* if it meets the conditions and only once it has paid the assessments. Moreover, if (as it claims) the appellant was misled by HMRC to act to its detriment in importing the cooking wine in the first place, it can consider bringing a claim against HMRC in the administrative court by way of judicial review: it should have been clear to it at least since the FTT's decision in *Asiana IV* that this Tribunal has no jurisdiction in the matter of legitimate expectation. It may wish to think about initiating such proceedings now, albeit I cannot comment on whether it is in time or whether such proceedings would have any prospect of success.

62. The parties should make proposals no later than 56 days from the release date of this decision for the progression of the customs duty element of the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 24 APRIL 2019