



TC02158

Appeal number: TC/2010/03330

EXCISE DUTY – “Spirit gels” with significant alcohol content imported into UK from Sweden – Whether chargeable to excise duty – Yes – Whether exempt from excise duty under Article 27 of Directive 92/83/EEC – No – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GFT RETAIL UK LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JOHN BROOKS
ELIZABETH BRIDGE**

Sitting in public at 45 Bedford Square, London WC1 on 20 April 2012

Stephen Pezzack, director of GFT Retail UK Limited, for the Appellant

**David Bedenham, counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

5 1. This is an appeal, by GFT Retail UK Limited (“GFT”), against an assessment to excise duty in the sum of £25,240 was issued by HM Revenue and Customs (“HMRC”) on 29 January 2010.

2. The background and circumstances that gave rise to the assessment are not disputed.

10 3. GFT is sales and marketing agent which has worked for Liquids Limited (“Liquids”) for many years building up sales of cooking wine supplied to Liquids by Juvinum AB (“Juvinum”), a Swedish company. The cooking wine was imported into the United Kingdom and controlled by Liquids with finance being provided by Juvinum.

15 4. Having identified potential problems with the use of spirits in a professional kitchen, such as health and safety issues of glass in the kitchen, consumption by chefs during preparation and theft of un-opened bottles, Juvinum developed and manufactured “liquid spirit gels” (the “Gel”) of various types including rum, whisky, brandy, triple sec and calvados. Each Gel consists of a cooking spirit made from a traditional spirit (eg brandy) that has turned viscous using a natural stabiliser (E466
20 Carboxymethylcellulose) whilst retaining its alcoholic content.

5. The Gels are described in promotional literature as the “safest, most economical and tastiest way to add alcoholic ingredients in the professional kitchen”. Instructions for its use contained on the label of the plastic bottles in which it is sold explain that it:

25 ... is to be used in the exact same way as your normal liquid spirit, as it is made with REAL spirit

The label also explains that the Gel:

30 .. is made from traditionally distilled spirits and made into a flavoured gel with NO other ingredients added. This process allows it to retain the original ABV, flavours and characteristics of the spirits.

However, due to the presence of the natural stabiliser, the Gel, which when poured does not disperse, is neither suitable to drink on its own nor can it be mixed with normal liquids.

35 6. Due to the development costs of the Gels GFT was asked to purchase and hold stocks from Juvinum. It was intended that once the financial position of Juvinum improved it would finance the liquid sprit gels in the same way as it did the cooking wine. Therefore, between December 2007 and October 2008 GFT imported significant quantities of the Gels from Juvinum. Although these Gels had a significant alcohol content (between 15% and 40% ABV depending on the type) no excise duty
40 was paid by GFT.

7. GFT had intended to sell the Gel to wholesalers supplying the catering trade. However, sales did not reach the levels anticipated and a quantity of the Gel remained at the warehouse.

5 8. Following a visit by Andrew Cousins, an assurance officer on HMRC's Excise team, the Gel remaining at the warehouse was detained by HMRC and subsequently seized. On 29 January 2010 the assessment to excise duty, with which this appeal is concerned, was issued. It was calculated on the quantity of the Gel imported from Sweden less that held at the warehouse together with and any sold outside the UK (some had been sold to Dublin wholesalers).

10 9. On 26 February 2010 GFT appealed to the Tribunal on the grounds that the Gel is not liable to UK excise duty contending that it falls within Article 27 of EC Directive 92/93/EEC.

15 10. EC Directive 92/93/EEC (the "Directive"), which under Article 19 requires Member States to apply "an excise duty to ethyl alcohol", was implemented into domestic legislation by the Alcoholic Liquor Duties Act 1979 ("ALDA") and the Customs and Excise Management Act 1979 ("CEMA").

20 11. Section 5 ALDA provides that excise duty shall be charged on spirits imported into the United Kingdom and s 126(1) CEMA provides that excise duty shall be charged on imported goods if they contain "as a part of ingredient thereof any good chargeable with excise duty". Excise duty is payable on such goods on their importation by their importer under Regulations 4 and 5 of the Excise Good (Holding, Movement, Warehousing and REDS) Regulations 1992 (which are no longer in force but were at the time of the assessment).

25 12. Member States are required to exempt the products covered by the Directive under Article 27(1)(e):

when used for the production of flavours for the preparation of foodstuffs and non-alcoholic beverages with an alcoholic strength not exceeding 1.2% vol.

and under Article 27(1)(f):

30 when used directly or as a constituent of semi-finished products for the production of foodstuffs, filled or otherwise, provided that in each case the alcoholic content does exceed 8.5 litres of pure alcohol per 100 kg of the product for chocolates, and 5 litres of pure alcohol per 100 kg of the product for other products.

35 13. These exemptions have been implemented into domestic law by s 5A ALDA which provides that excise duty shall not be payable on any spirits contained in flavourings imported into the United Kingdom or used in the production of flavourings if used for the preparation of food for human consumption or the preparation of any beverage of an alcoholic strength not exceeding 1.2%.

14. Guidance on the application of the exemptions is given in HMRC's Notice 41 "Alcoholic Ingredients Relief". We were referred to Part 5 of this Notice, which is headed "Spirit-based essences and flavourings", by Mr Pezzack.

5 15. Paragraph 5.1 of the Notice states that Spirit-based essences and flavourings are "exempt from duty".

16. In answer to the question posed by paragraph 5.2 "is duty payable on spirit-based flavours and essences received from other EU Member States?", the Notice states:

10 No. any product classified under CN Code 3302 (flavourings and essences for soft drinks, etc.) should be exempt from spirits duty under the provisions of [the Directive]

Any product classified under CN Code 3302 will be treated as duty exempt, irrespective of the sprits content.

15 17. Mr Pezzack explained that the Gel was classified in Sweden under CN Code 3302. He also referred to a Binding Tariff Information ("BTI") that had been provided on 27 March 2009 by HMRC to Liquids which had classified cooking wine imported by Liquids to 2103 9090 80 (which was not subject to excise duty as it had an ABV of 5% or less) and contended that as the same classification (2103 9090 80) had been
20 given to various versions of the Gel imported by Liquid in BTIs issued by HMRC's Customs & International Tariff Classification Service the same treatment should be applied to the Gel which fell within the exemptions contained in the Directive.

25 18. However, Mr Bedenham, for HMRC, referred us to the notes attached to the BTI which clearly state that excise duty may apply to goods within the same classification "if they contain alcohol". He contended that the Gels, whose alcoholic content varied between 15% and 40% ABV, were spirits not flavourings or essences and, in the absence of any evidence that it was used in the circumstances prescribed by Article 27 of the Directive, were properly chargeable to excise duty.

30 19. Given the alcohol content of the Gels together with the information on the label that it "is made from traditionally distilled spirits" with "NO other ingredients added" and the process "allows it to retain the original ABV, flavours and characteristics of the spirits" we agree with Mr Bedenham that the Gels are "spirits". Therefore, unless they come within the exemptions contained in Article 27(1) of the Directive they are subject to excise duty.

35 20. Mr Pezzack contends that the exemptions do apply as the Gels are used for the production of foodstuffs. He emphasised that all marketing efforts were aimed at the professional chef and that as the Gels cannot be used in drinks and, as with any spirit used in the kitchen to enhance the flavour of the final dish, all alcohol is burned off. Mr Pezzack also argued that the Gels should not be treated differently from other household products, such as vanilla essence, which contained alcohol but were not
40 subject to excise duty.

21. However, it is the only Gels with which this appeal is concerned and although we accept that these are used in the production of foodstuffs they are not “used directly” for this purpose by GFT as required by Article 27(1)(f) of the Directive but used directly by a chef in a professional kitchen in the same manner as any other traditionally distilled spirits.

22. Also, having concluded that the Gels are “spirits” and not “flavours”, we find that the exemption in Article 27(1)(e) cannot apply as the Gels are not “used for the production of flavours” but used as a cooking ingredient in the same way as any other spirit.

23. Therefore, although we do understand and accept that as a result of its involvement with the importation of the Gels GFT faces genuine financial concerns, as the Gels do not fall within the exemption contained in the Directive we have no alternative but to uphold the assessment and dismiss the appeal.

24. 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.

**JOHN BROOKS
TRIBUNAL JUDGE**

RELEASE DATE: 1 August 2012