



**TC02689**

**Appeal number: TC/2011/08442**

*EXCISE DUTIES – alcohol – excise duty points and payment of duty – whether goods released for consumption by warehousekeeper - champagne dispatched from one tax warehouse to another – recipient warehouse approved only for beer - whether recipient warehouse approved in relation to excise goods of the same class or description - no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

*(Champagne Appeal)*

**EDWARDS BEERS & MINERALS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: SIR STEPHEN OLIVER QC  
SONIA GABLE FCA**

**Sitting in public in London on 18 December 2012 and 25 March 2013**

**Timothy Brown, Counsel, for the Appellant**

**Michael Jones Counsel, instructed by the General Counsel for HMRC, for the Respondents**

## DECISION

1. Edwards Beers & Minerals Limited (“Edwards Beers”) appeals against an  
5 assessment for £27,027 excise duty. The assessment was made on the basis that  
Edwards Beers, an authorised warehouse in the UK, dispatched a duty suspended  
consignment of champagne to a tax warehouse in Belgium that was only authorised to  
receive beer.

2. The assessment was made because, according to the decision letter, Edwards  
10 Beers had contravened the relevant conditions of registration in that, on 11 August  
2010, it had dispatched the consignment of 2,084 cases of champagne (“the  
consignment”) with NV Brouwerij De Koninck (“BDK”), Antwerp, as its stated  
destination; BDK did not receive the consignment and, in any event (as noted above),  
15 was authorised only to receive and store beer. The consignment had therefore left a  
“tax warehouse” in the UK; the goods had not been dispatched to a warehouse  
approved in relation to the relevant “class or description” of excise goods.  
Consequently the goods had been released for consumption in the UK at the time  
when they left Edwards Beers’ warehouse.

### *The Facts*

3. Edwards Beers operates two registered excise warehouses. On 19 July 2010 it  
20 had carried out a “SEED” (System for Exchange of Excise Data) check on BDK to  
ascertain its status to receive duty suspended goods. HMRC’s response was to  
confirm that BDK “is authorised to receive excise duty suspended goods” and  
“approved for beer only”.

4. On 11 August 2010, Edwards Beers dispatched the consignment to BDK on the  
25 instructions of its customer (Tavern Supplies (Croydon) Limited). The transport  
company was Darcy Logistics Limited (“Darcy”) and the consignment was moved  
under AAD19334/1090. Ms Stacey Edwards, bond manager of Edwards Beers,  
accepted, in the course of her evidence, that the consignment had been dispatched in  
30 contravention of the SEED check.

5. Edwards Beers received a fax dated 23 August 2010. This purported to have  
come from BDK and it claimed to confirm that the consignment had arrived.  
Following enquiries made (we understand) at HMRC’s initiative, it transpired that  
BDK had neither received the consignment, nor had it expected one. Edwards Beers’  
35 contact, a Mr van der Weil, had never worked at BDK.

6. HMRC assessed both Edwards Beers and Darcy on a “joint and several  
liability” basis for the excise duty on the consignment. (Darcy was also assessed for  
excise duty on five other consignments of beer that had left Edwards Beers’  
warehouse at around the same time but had not arrived at BDK. Edwards Beers had  
40 not been assessed in respect of those consignments of beer. The total amount assessed  
on Darcy had been £156,540. HMRC recovered £30,000 against Darcy.)

### ***The 2010 Regulations***

7. The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (2010 No.5930) define “excise goods” as meaning “goods falling within Article 1(1) of the Directive and chewing tobacco”. (The “Directive” referred to is Council Directive 2008/118/EC to which we will refer later.) Regulation 5 of the 2010 Regulations provides that “there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom”. Regulation 6(1) provides that excise goods “are released for consumption in the United Kingdom at the time when the goods (a) leave a duty suspension arrangement ...” which will happen on the earliest of the occasions listed in (a) to (j) of regulation 7(1). By regulation 7(1)(a) this will happen “when they leave any tax warehouse in the United Kingdom ... unless (i) they dispatched to one of the destinations referred to in regulation 35(a); and (ii) are moved in accordance with the conditions specified in regulation 39”.

8. Regulation 35 states that excise goods “of a certain class or description may only be imported into or exported from the United Kingdom under a duty suspension arrangement if they are – (a) dispatched from a tax warehouse to – (i) another tax warehouse approved in relation to excise goods of that class or description.” Regulation 3(1) defines “tax warehouse” to mean, if situated in the UK, an “excise warehouse”: and, if situated in another Member State, “a place where excise goods are produced, held, received or dispatched under duty suspension arrangements by an authorised warehousekeeper in that Member State in the course of that person’s business”.

9. (Regulation 39, which is not in point in this appeal, states that excise goods may not be moved under duty suspension arrangements unless the movement risks are covered by an approved guarantee.)

10. Regulation 7(1) further provides that “goods leave a duty suspension arrangement ... when ... (h) there is an irregularity in the course of a movement of the goods under a duty suspension arrangement which occurs, or is deemed to occur, in the United Kingdom”.

11. Liability to pay excise duty is dealt with in regulations 8 and 9. Where the excise goods have left a duty suspension arrangement (and so been released for consumption under regulation 6(1)(a)) liability falls, by regulation 8(1), on the “authorised warehousekeeper, the UK registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released ...”; and, by regulation 8(2), “in the case of an irregular departure from a tax warehouse any other person involved in that departure is jointly and severally liable to pay the duty with the persons specified under paragraph (1)”

### ***HMRC’s reasons for assessing Edwards Beers***

12. HMRC say that the champagne comprised in the consignment left a duty suspension arrangement, by reason of regulation 7(1)(a), when it left Edwards Beers’ warehouse on 11 August 2010 and was not dispatched to another warehouse falling

within the scope of regulation 35(a), i.e. one approved in relation to excise goods “*of that class or description*”. On that basis Edwards Beers, as warehousekeeper, became liable under regulation 8(1). Liability was, by virtue of regulation 8(2), joint and several with Darcy. Because liability arose at the time of that irregular departure from Edwards Beers’ warehouse, the question of whether “*an irregularity in the course of a movement of the goods under a duty suspension arrangement*” (either in or outside the UK) did not arise; the irregular departure happened first and, by virtue of regulation 7(1), it resulted in the liability to excise duty.

***Edwards Beers’ grounds for challenging the assessment.***

10 13. Edwards Beers say that the effect of the Directive is for BDK’s warehouse to be regarded as a “*tax warehouse*” on the strength of the definition of that term in article 4.11. BDK’s warehouse was “*a place where excise goods are produced, processed, held received or dispatched under duty suspension arrangements by an authorised warehousekeeper in the course of his business, subject to certain*  
15 *conditions laid down by the competent authorities of the Member State where the tax warehouse is located*”. Article 17 does not limit the receiving warehouse to receiving certain types of goods; it is either an authorised tax warehouse or not. The UK’s 2010 Regulations go further than permitted by the Directive. Thus, when applying article 17, which provides that goods may be moved under duty suspension from on tax  
20 warehouse to another, both Edwards Beers’ warehouse and that of BDK are within a duty suspension arrangement for the purposes of article 17.

14. Alternatively, says Edwards Beers, the expression “*excise goods of that class or description*” in regulation 35(a) is to be read as embracing alcoholic goods, as distinct from hydrocarbon oils. On that basis the champagne in the consignment and the beer  
25 in the BDK warehouse would belong to the same “*class or description*” with the result that the consignment will have been dispatched under duty suspension arrangements and no liability will have arisen under regulation 7(1).

15. On the basis that Edwards Beers is correct on either or both of the above two arguments, there will have been “*an irregularity in the course of a movement of the goods und a duty suspension arrangement*” and the person liable to the excise duty  
30 will, by virtue of regulation 9(1)(a) of the 2010 Regulations, have been the person who provided the guarantee, which was not Edwards Beers.

16. Further, if the goods did arrive at BDK’s warehouse but had been turned away, the duty point occurred in Belgium with the result that no UK excise duty became due  
35 at all. Reference was made to article 38.1.

***Is BDK’s warehouse “another tax warehouse”?***

17. The relevance of this issue is that, if article 17 of the Directive applies, the consignment of champagne will have moved under a duty suspension arrangement from one tax warehouse to another tax warehouse (both falling within the definition in  
40 article 4.11); on that basis no duty will have become payable under regulation 7(1)(a). BDK’s warehouse is, giving the expression “*tax warehouse*” an unrestricted meaning,

another tax warehouse in relation to that of Edwards Beers, just as a warehouse containing hydrocarbon products would be. Is there, however, an express provision or necessary implication that there can only be a movement of excise goods under a duty suspension arrangement from a tax warehouse to another tax warehouse, for the purposes of article 17.1, where the two warehouses are approved to produce, process or hold goods of the same class or description? And, if so, what classes or descriptions are there? This calls for an examination of Council Directive 92/83/EEC “on the harmonisation of the structures of excise duties on alcoholic and alcoholic beverages”. We refer to this as “the Harmonisation Directive”.

18. The Harmonisation Directive starts with a Recital stating that the then current excise directive laid down the rates to be applied to alcohol and alcoholic beverages. It recites the importance to the proper functioning of the internal market of common definitions for all the products concerned and states the usefulness of those definitions being based on the definitions found in the combined nomenclature. The operative part of the Harmonisation Directive is divided into at least five “Sections”. Section 1 covers the duty on “Beer” which is formally defined in article 2. “Wine” is dealt with in Section 2. Article 8 defines “still wine” and “sparkling wine”. Further Sections cover “Fermented Beverages other than Wine and Beer”, “Intermediate Products” and “Ethyl Alcohol”. It follows that Beer, Wine and Sparkling Wine are dealt with separately and specifically for charging purposes and for the purposes of the functioning of the internal market. We note in this connection that the letter from HMRC responding to Edwards Beers’ SEED check lists the possible alcoholic products in the same categories as are specified in the Harmonisation Directive before confirming that BDK is “approved for beer only”.

19. The separate and specific treatment of beer as distinct from wine and sparkling wine is found in Commission Regulation (EC) No 684/2009. This deals with the machinery for movements of goods under suspension and for the recording of these movements. It requires that computerised forms are to be consistent with other aspects of data-keeping. Referring to excise products, it takes the definitions of beer, wine and sparkling wine from the Harmonisation Directive. Each is to be separately recorded. It will be recalled that regulation 35 of the 2010 Regulations is concerned with the movement of goods under duty suspension arrangements. It is the regulation that enables “*excise goods of a certain class or description to be ... imported or exported ... under duty suspension arrangements if they are ... dispatched from a tax warehouse to ... another tax warehouse approved in relation to excise goods of that class or description ...*”. The contents of Commission Regulation No 684/2009 can be seen as statutory evidence that beer falls into a difference class or description from the class or description applicable to champagne.

20. It follows from the points made in paragraphs 17 to 19 above that, when the consignment of champagne left Edwards Beers’ warehouse on 11 August 2010, it was not dispatched to one of the destinations specified in regulation 35. The consignment left a duty suspension arrangement at that time and an excise duty point arose by operation of regulation 7(1)(a). Further, even if there had been an irregularity in the course of the movement of the consignment (which might otherwise have been covered by regulation 7(1)(h)), that event would have happened later than the

regulation 7(1)(a) event; on that basis the movement irregularity would be disregarded.

***The significance of the fact that £30,000 of duty has been recovered from Darcy***

21. On 30 September 2010, Darcy was assessed for £156,540 of excise duty on the  
5 grounds that it had guaranteed six removals from Edwards Beers that had taken place  
between 9 and 11 August 2010. All the movements (five of which were of beer) had  
been consigned to BDK but had not been received by BDK. Regulation 9(1) makes  
Darcy, as guarantor, liable. Regulation 9(2) imposes joint and several liability on “any  
10 other person who participated in the irregularity and who was aware, or should  
reasonably have been aware, that it was an irregularity”. The amount of duty actually  
paid by Darcy was, we were informed, £30,000.

22. The liability of Edwards Beers is for £27,027 of duty which arises (as explained  
above) by operation of regulation 7(1)(a), and not by operation of regulation 9(2).

23. Edwards Beers contends that, because £30,000 has been recovered from Darcy,  
15 its liability should be reduced to an appropriate amount. Otherwise, it is contended,  
HMRC will have recovered more than 100% of the amount due and that is contrary to  
the principle found in section 12(3) of Finance Act 1994. That subsection applies  
where an amount has been assessed as due from a person; the subsection provides that  
it may be recovered accordingly, “*unless, or except to the extent that, the assessment*  
20 *has subsequently been withdrawn or reduced*”. The Tribunal should, therefore,  
exercise its powers in section 16 of that Act and make an appropriate direction.

24. We do not see that section 12(3) can apply to enable a reduction to be made to  
the assessment under appeal. There is no reason why Darcy’s assessment should be  
reduced; that is what the subsection is concerned with. There is no evidence that  
25 Darcy, when paying the £30,000 to HMRC, directed that it’s payment should be  
appropriated to the duty (of £27,027) on the consignment of champagne and Edwards  
Beers has no legal authority to do so.

***Conclusion***

25. For the reasons given, we are satisfied that Edwards Beers has been properly  
30 assessed to excise duty and we see no reason to reduce the assessment. We therefore  
dismiss the appeal.

26. 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  
35 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.

**SIR STEPHEN OLIVER QC  
TRIBUNAL JUDGE**

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**RELEASE DATE: 1 May 2013**