

THE HIGH COURT

[2022] IEHC 267

[Record No.2020/589 JR]

BETWEEN:

ARDERIN DISTILLERY LIMITED

APPLICANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 10th day of May, 2022.

INTRODUCTION

1. The Applicant is involved in the distillation of spirits (gin). Alcohol is subject to excise duty in the form of Alcohol Products Tax (“APT”). APT is normally paid when alcohol or alcohol products are released for consumption. In certain circumstances, Relief may be obtained from APT in circumstances where the alcohol is used in certain ways or for certain alcohol related products. Provision is made to permit the release of alcohol products without payment of APT if it is intended to be used for or has been used for medicinal purposes or for medical purposes in hospitals and pharmacies.

2. At the onset of the COVID-19 pandemic in March, 2020, at a time of national crisis, the Applicant was approached by a hospital with a request that it supply hand-sanitizer. The Applicant made contact with the Respondent (“the Revenue”) to make a claim for exemption from excise duty in respect of hand-sanitizer that the Applicant wished to produce. The Applicant also successfully applied to be registered with the Department of Agriculture, Food and the Marine (the “DAFM”).

3. Thereafter, joining in the national endeavour to respond to the COVID-19 health crisis, the Applicant proceeded to produce hand-sanitizer, for supply to the health services. The Applicant did so on the now disputed basis that it had been granted due authorisation by the

Revenue and was lawfully entitled to release hand-sanitizer to market without a charge to excise duty arising.

4. Hand-sanitizer was produced by the Applicant during the period between April-May, 2020, by which time the crisis in supply had passed. The Applicant ceased production as the demand for hand-sanitizer was met. It was only then, in June, 2020, the acute shortage of hand-sanitizer having passed, that the Applicant was contacted by the Revenue. Unaware that production had already ceased, the Revenue directed the Applicant to cease production.

5. The Applicant's fundamental position in these proceedings is that it had verbal confirmation from Revenue that its production of hand-sanitizer was approved as exempt from excise duty and that had approval not been provided, the Applicant would not have used alcohol to make hand-sanitizer. At current rates excise duty on spirits is fixed at €42.57 per litre of alcohol. The potential exposure to liability on excise duty on the quantity of alcohol used in the production of hand sanitizer is as high as approximately €2.1 million – a sum which far exceeds the revenue generated by the sale of hand-sanitizer.

6. Revenue neither dispute nor accept for the purpose of these proceedings that the alcohol in question was for medicinal purposes in the production of hand-sanitizer. Neither do they dispute or accept that the Applicant is qualified for relief from excise duty. Revenue's position is simply that the question of entitlement to relief remains under consideration. They say that no decision has been made. Revenue maintains this position despite the fact that some two years had passed by the date of hearing and notwithstanding the urgency with which the need for hand-sanitizer presented in March, 2020. They justify this delay by reference to the existence of these proceedings in which the relief sought includes an order of prohibition. The Applicant has approached other distilleries who have confirmed to him that they provided assistance in the same manner as the Applicant by producing hand sanitizer. However, in the case of other distilleries cited by the Applicant, confirmation that they were not liable for Excise was obtained without delay and whilst the requirement for urgent supply of hand-sanitizer subsisted. There is no direct affidavit evidence from any third-party distiller in this case.

FACTUAL BACKGROUND

7. The Applicant is a limited liability company, concerned in the distillation of spirits (gin) at Tullamore, County Offaly. As a manufacturer of distilled spirits, it is required to hold an excise licence. An excise licence is not required in respect of the manufacture of hand sanitizer.

8. On the 4th of November, 2016, the Applicant received a Tax Warehouse/Warehousekeeper (Proprietor) Approval Order [hereinafter “the warehousekeeper approval”) pursuant to s. 109(2) of the Finance Act, 2001. The Order was said to be effective from the 12th of October, 2016 and the premises approved were the Applicant’s premises at Cloncollig Business Park, Church Road, Tullamore in the County of Offaly. This Order was produced on my request and exhibited in a late affidavit.

9. The warehousekeeper approval was subject to acceptance in writing and compliance with specified conditions. Conditions specified in the Applicant’s case included that the Applicant was subject to a €20,000 penalty bond. The bond was specified as security for the duty on the goods removed to, deposited in or removed from the warehouse under duty suspension arrangements. The Applicant was required to enter into a deferred payment direct debit arrangement with Revenue in respect of duty liabilities. The parties confirm that warehousekeeper approval issued based on a then projected annual turnover of 5,000 litres of gin and an average stock on hands of 1,250 litres, however, documentation confirming this was not produced. The warehousekeeper approval does not on its face refer to projected turnover or levels of stock on hand, albeit it is stated that the Revenue may determine a higher bond “*from time to time*”.

10. During March, 2020 at the beginning of the COVID-19 pandemic the Applicant received an email with an urgent request from Our Lady’s Hospital for Sick Children Crumlin that the Applicant produce an ethanol based hand-sanitizer for supply to the HSE for use in the hospital in light of the COVID-19 pandemic. This email included details as to the necessary steps for distillers to take before producing a hand-sanitizer which included engaging with their Revenue Officer and registering with the DAFM (Pesticide Registration and Control Division) and obtaining a PCS number. The email asserted with regard to the approach of Revenue that:

“in most cases so far I’ve been told that they are providing time limited approval [duration of the crisis] to produce alcohol hand sanitizers.”

11. With regard to the approach of the DAFM, it is stated:

“DAFM/PRCD have said that all hand sanitizer applications are the number one priority for PCD at this time so there will be no delay in processing on our end...”

12. In an effort to assist the hospital in a time of crisis the appellant urgently contacted the Revenue via email on the 18th of March 2020 requesting approval for the Applicant to produce and sell ethanol hand-sanitizer without being liable for Excise. The email read:

“Hey Noreen, In light of the current situation, we’ve been asked to produce hand sanitizer from Ethanol. The email is below. I just need a mail from you that we have approval to produce alcohol hand sanitizer without duty.”

13. The Revenue official dealing with this correspondence (one Noreen Gilligan) was working from home due to the COVID-19 crisis. The Applicant spoke with her and was advised by her to complete and submit a Form No. APT1 to Revenue.

14. On Friday, the 20th of March, 2020, the Applicant sought authorisation to process 80,000 litres of 96%-strength ethanol, with a holding stock of 10,000 litres by submitting a completed Form No. APT1.

15. The Applicant asserts that in a phone call on the 24th of March, 2020, Revenue Control Officer, Noreen Gilligan, confirmed verbally that Revenue was satisfied that the Applicant intended to use alcohol for *“relieved purposes”* and it had approval from Revenue to use up to 80,000 litres of ethanol to produce hand sanitizer, subject to the condition that approval was obtained from the DAFM. The Applicant relies on the approval claimed to have been communicated during this telephone conversation.

16. The Applicant proceeded on the basis that it had obtained approval from the Respondents to use up to 80,000 litres of ethanol to produce hand-sanitizer subject to the condition that approval was obtained from the DAFM.

17. The Revenue denies any such conversation and denies the grant of any approval. The Revenue has no note of a call on the 24th of March, 2020 but has a note of a telephone call on

the 25th of March, 2020 wherein it is recorded that the Applicant then intimated a perceived need for an additional 400,000 litres of ethanol to meet anticipated demand and was consequently advised to submit a new Form No. APT1. It appears that there was a phone call on that date because the Applicant emailed Ms. Gilligan at 10.06 a.m. asking her to give him a call as *“am looking for ethanol producers in the area, do you know anyone?”*

18. Ms. Gilligan prepared a file note in respect of her call back to the Applicant in which she states:

“I told him that I could not provide him with that information even if I had it. He said that he was unable to source the ethanol from the UK but now he thinks he will be able to source it from Poland. He has orders for hand sanitizer from 14 Dublin Hospitals, Tullamore Hospital and Testing Centre, Tullamore. He reckons he will now need 400,000 litres of ethanol to supply all of these places. I told him to submit a new Form APT1”.

19. The Applicant contends that during his conversation with Noreen Gilligan when he referred to a need for more ethanol to meet demands, she made no indication that there was any difficulties with the earlier application for approval pursuant to s. 77 of the Finance Act 2003 (as amended by s. 43 of the Finance Act 2004) and Parts 7 and 8 of the Alcohol Products Tax Regulations 2004 (S.I. No. 379 of 2004). Indeed, it is not disputed by Ms. Gilligan that she never suggested any issue with the application for approval.

20. The Applicant received DAFM approval in the form of a document entitled *“Provisional Notification”* on the 30th of March 2020 on foot of its biocide application. In this notification, the Applicant was advised that the product could *“now be placed on the market immediately”*. The Applicant thereafter made and supplied an amount of hand sanitizer to the HSE at Midlands Regional Hospital Tullamore.

21. On the 1st of April, 2020, the Applicant submitted a fresh *“APT1”* application, wherein it sought authorisation for an annual quantity of 800,000 litres of ethanol and a holding stock of 60,000 litres. This represented a ten-fold increase on the 80,000 litres for which it had applied on the 20th of March, 2020 and it was double the perceived demand recorded in Ms. Gilligan’s file note as having been indicated on the 25th of March, 2020. The Applicant’s

updated application sought authorisation for 160 times more alcohol than its existing authority for 5,000 litres. From the Revenue's perspective this represented a very significant increase in the State's exposure to risk in terms of Excise duty payable on release of the alcohol product unless exempted.

22. The "APT" forms submitted on behalf of the Applicant on the 20th of March, 2020, seeking Revenue's authorisation to receive 80,000 litres of ethanol without the payment of APT, and the later form submitted on the 1st of April, 2020 seeking authorisation to receive 800,000 state (at the top) them to be an:

"application for authorisation to receive alcohol, without payment of Alcohol Products Tax, for a tax exempt purpose under section 77 Finance Act, 2003 or to receive denatured spirits for sale or distribution."

23. The form also contains an exhortation to the Applicant to read Public Notice No. 1887 prior to completion. It concludes with the following declaration:-

"I/We undertake to comply with the Laws and Regulations relating to alcohol products and with such conditions as the Revenue Commissioners may require under any authorisation granted on foot of this application."

24. Separately, the Guidance Note issued by Revenue to case-workers in respect of applications to use undenatured alcohol to produce hand sanitizer provides that operators should be required as a part of the conditions of authorisation to make evidence of such approval available for inspection by Revenue "if needed".

25. By email dated the 2nd of April, 2020 the Revenue noted that a substantial increase in the Applicant's bond "will be required" to cover the duty at risk in the alcohol used in the manufacture of hand sanitizer. The Revenue further requested the Applicant to respond to a number of questions as follows:-

- 1) Where is the alcohol going to be sourced?
- 2) How is it going to be financed?

- 3) List of potential customers, amounts requested by them and over what period of time;
- 4) Quantities of individual units to be used to pack sanitizer in litres;
- 5) Mode of delivery of finished product.

26. These queries were not raised by the Revenue on receipt of the first application and were seemingly prompted by the scale of production envisaged by the second application. As matters unfolded, the HSE additional requirements did not materialise, and no increase in the supply of alcohol was required to produce hand-sanitizer. Instead, the Applicant produced hand-sanitizer on the basis of the original application, understood by it to have been approved, for up to 80,000 litres only. The Applicant did not reply to the queries raised by Revenue on the 2nd of April, 2020 because it no longer required the authorisation for the increased amount as the demand for hand sanitiser had dissipated.

27. Some time later in June, 2020 it came to Revenue's attention that the Applicant had been openly advertising the sale of hand sanitizer. Further investigation established that the Applicant had already imported 15,000 litres of ethanol from Holland and 30,010 litres of ethanol from Poland. These imports had been electronically notified to Revenue and Revenue were able to confirm the fact of import by simply checking their own computer system.

28. The Revenue (Noreen Gilligan) contacted the Applicant by telephone on the 12th of June, 2020, and instructed it to cease production. In a follow-up email it was outlined that this decision was predicated on the fact that the Applicant's existing authority only permitted it to bring in alcohol for the distillation of spirits. The parties construe this email differently. The email stated:

"I refer to our telephone conversation earlier and please note you should cease immediately to manufacture Hand Sanitizer as you do not hold an Authorisation to do so. You are only allowed to bring in alcohol for the purpose of distillation of spirits as outlined on your Authorisation and covered by your Bond. The matter of excise duty owed on the alcohol already used in manufacture of hand sanitizer will be dealt with later. Please let me have a copy of your Department of Agriculture Authorisation for the manufacture of Hand Sanitizer."

29. The Applicant understood from the telephone call and the email that Ms. Gilligan was denying the Relief and reversing and/or denying her earlier approval for the Relief. The Applicant understood Ms. Gilligan to convey that it did not have approval and was liable for Excise.

30. So while the Applicant contends that this email represents a finding of a liability to Excise, the Revenue maintain that the email clearly states that the question of excise liability was left over to be determined on another day.

31. The Applicant's director, Mr. Baratizadeh, confirmed to the Revenue that the Applicant had by that time (12th of June, 2020) used up all of the alcohol and that it had ceased making hand-sanitizer. The Applicant's director emailed the Revenue reiterating that it had been given a verbal "go ahead" and expressed confusion as to why after "3 months from the point of telling you we would start producing hand sanitizer, and the initial APT1 Form being submitted, that we are now being told we are non-compliant."

32. In an internal email dated the 15th of June, 2020, the Revenue summarized the position with regard to the Applicant's application for an authorisation from its perspective. In this email it is stated:

"the company failed to respond to questions from Noreen Gilligan, Control Officer, which were promoted by me and asked as part of the application processing procedure. No replies were ever received and so no authorisations was every issued. It was discovered on 14/06/2020 that the company had proceeded without authorisation to purchase ethanol and sell hand sanitizer. The precise amount of duty on the ethanol has not yet been calculated, but it is likely to be substantial at the current rate of €42.57/litre....The company has already stated that it does not have the funds to pay any excise duty. There is no excise duty payable on hand sanitizer. The company had received approval from the Department of Agriculture, Food and the Marine to manufacture and sell hand sanitizer."

33. A compliance intervention from Revenue was issued to the Applicant on the 26th of June, 2020 requesting receipts, delivery records and bank statements which were duly delivered to Revenue on the 17th of July, 2020.

34. Leave to proceed by way of judicial review was granted by the High Court (Barrett J.) on foot of an *ex parte* application moved on the 27th of August, 2020.

RELEVANT LEGISLATIVE PROVISIONS

35. Council Directive 2008/118/EC of 16th of December 2008 [“The Directive”], lays down general arrangements in relation to the excise duty to be levied on ‘*excise goods*’, including alcohol and alcoholic beverages, at the time of their release for consumption in a Member State. The Directive provides *inter alia*, that:-

“Article 9 ... Excise duty shall be levied and collected and, where appropriate, reimbursed or remitted according to the procedure laid down by each Member State ...

Article 15 1. Each Member State shall determine its rules concerning the production, processing and holding of excise goods, subject to this Directive ...

Article 16 1. The opening and operation of a tax warehouse by an authorised warehousekeeper shall be subject to authorisation by the competent authorities of the Member State where the tax warehouse is situated. Such authorisation shall be subject to the conditions that the authorities are entitled to lay down for the purposes of preventing any possible evasion or abuse. 2. An authorised warehousekeeper shall be required to: (a) provide, if necessary, a guarantee to cover the risk inherent in the production, processing and holding of excise goods.”

36. Part 2 of the Finance Act 2001 (as amended by the Finance Act 2010) is the domestic law that regulates excise duties. Section 109 governs the authorisation of warehousekeepers and the approval of tax warehouses.

37. Section 109 of the Finance Act, 2001 provides *inter alia* at ss. (2A) that an authorisation shall be conditional on the Applicant or authorised warehousekeeper complying with excise

law in relation to excisable products, including requirements relating to accounting and stock control systems and procedures of the business to which the authorisation relates. Under s. 109 (3)(a) the Revenue is only entitled to grant an authorisation where it is shown to their satisfaction that the Applicant can satisfy the conditions of authorisation. Subsection (7)(a) stipulates that the proprietor of the warehouse is at all times responsible for the excise duty on the excisable products held in the tax warehouse, and shall, where required under the conditions of authorisation, provide security, at a level specified in the authorisation document, for such excise duty. As set out above, the Applicant was issued with a Tax Warehouse/Warehousekeeper (Proprietor) Approval Order in November, 2016.

38. Part 2 of Finance Act 2003 (as amended) provides for the liability and the payment of APT. Section 73 contains the relevant definitions. Section 75 provides:

“(1) ...Subject to the provisions of this Chapter and any regulations made under it, a duty of excise, to be known as alcohol products tax, shall be charged, levied and paid, at the rates specified in Schedule 2, on all alcohol products released for consumption ...”

39. Section 77 (as amended by s. 43 of the Finance Act 2004) provides for relief from excise duty in the following terms:

“77. —Without prejudice to any other relief from excise duty which may apply, and subject to such conditions as the Commissioners may prescribe or otherwise impose, a relief from Alcohol Products Tax shall be granted on any alcohol products which are shown to the satisfaction of the Commissioners—

(a) to be intended for use or to have been used in the production of—

(i) any beverage, other than beer, not exceeding 1.2% vol,

(ii) vinegar,

(iii) flavours for the preparation either of foodstuffs or of beverages not exceeding 1.2% vol,

(iv) medicinal products,

(v) foodstuffs, whether such alcohol product is used— (I) either as a filling in such foodstuff or otherwise, (II) either directly or as a constituent of semi-

finished products for use in the production of such foodstuff, and where the alcohol contained in such foodstuffs does not exceed 8.5 litres of alcohol per 100 kilogrammes of the product when used in the production of chocolates and 5 litres of alcohol per 100 kilogrammes of the product when used in the production of other foodstuffs, or

(vi) beer concentrate,

(b) to be intended to be denatured in accordance with their requirements, or to have been so denatured,

(c) to have been denatured in accordance with the requirements of another Member State and used in the production of a product not fit for human consumption,

(d) to have been completely denatured in accordance with the requirements of another Member State, where such requirements have been notified to the European Commission and accepted in accordance with paragraphs 3 and 4 of Article 27 of the Directive,

(e) to be intended for use or to have been used for experimental, quality control, scientific or research purposes,

(f) in the case of wine, beer, or other fermented beverage the alcoholic content of which is entirely of fermented origin, to have been produced solely by a private individual in a private premises for consumption by the producer or by the family or guests of such producer, and not to have been produced or supplied for consideration,

(g) to be intended for use or to have been used for medical purposes in hospitals and pharmacies,

(h) to be intended for use or to have been used in an industrial process provided that the final product does not contain alcohol,

(i) to be intended for use or to have been used in the manufacture of a component which is not subject to Alcohol Products Tax, or

(j) to be intended for use or to have been used in the manufacture of an oral hygiene product.”

40. The Alcohol Products Tax Regulations 2004 (S.I. 379/2004) made under s. 81 of the 2003 Act, regulate the procedures in tax warehouses. These Regulations provide in the definition section that “*approved*” means approved by the Commissioners; an “*authorised receiver*” means a person approved under Regulations 35 or 40 to receive alcohol products granted relief from tax under s. 77 of the Act of 2003; “*distiller*” means an authorised

warehousekeeper approved to produce spirits; “*suspension arrangement*” means an arrangement under which alcohol products are produced, processed, held or moved, tax being suspended; “*tax*” means alcohol products tax imposed by s. 75 of the Act of 2003 and; “*tax relieved*” means granted relief from tax under s. 77 of the Act of 2003.

41. Regulation 8 provides:

“8. (1) Alcohol products may be removed from a tax warehouse only—

(a) on payment of the proper tax in accordance with an arrangement approved for such payment,

(b) under a suspension arrangement, or

(c) where relief has been granted under section 77 of the Act of 2003, or under sections 104 or 105 of the Act of 2001.

(2) Where alcohol products are removed from a tax warehouse without payment of alcohol products tax, the Commissioners may impose conditions, including the giving of security by bond or otherwise, covering such removal.”

42. Under Regulation 28 tax shall be chargeable on alcohol product released for consumption at the rate in force for alcohol products of that category at the time of their release. Regulation 30 provides for repayment of tax in respect of exempt product as follows:

“(1) Subject to such conditions as they may think fit to impose, the Commissioners may repay, in whole or in part, the tax paid on alcohol products to which sections 77 or 78 of the Act of 2003, or sections 104 or 105 of the Act of 2001 refer.

(2) A claim by a person for the repayment of tax in accordance with paragraph (1) shall—

(a) be made to a proper officer, in writing or in such form as the Commissioners may specify for the purpose, and

(b) contain the following information in relation to the alcohol product which is the subject of the claim:

(i) the name and address of the owner,

- (ii) the classification, description, strength and quantity,*
- (iii) the amount of tax, which was charged or paid,*
- (iv) such other particulars as a proper officer may from time to time require in any particular case.*

43. Regulation 35(1) deals with the approval of an authorised receiver of denatured spirits (that is approved to do so with relief granted from tax under s. 77 of the Act of 2003) by requiring that a person will only be approved where such person—

“(a) provides such security as the Commissioners may require in any particular case, and

(b) can retain such spirits at a secure premises or place.

(2) Every application for approval as an authorised receiver or as an authorised distributor of denatured spirits must be made to the proper officer in such form and manner as the Commissioners may require, and must contain—

(a) a full description of the type of such spirits and the annual quantity required,

(b) the purposes for which the spirits are to be used, and

(c) such information as the Commissioners may from time to time require.”

44. Under Regulation 40(1) provision is made in similar terms for the authorisation of receivers of undenatured alcohol products. Specifically, a person shall only be approved as an authorised receiver of such products where such person— (a) provides such security as the Commissioners may require in any particular case, and (b) can retain the tax-relieved product at a secure premises or place. Under Regulation 40(2) every application for approval as an authorised receiver shall be made to the proper officer in such form and manner as the Revenue may require.

45. Under Regulation 42 an authorised receiver is required in respect of all tax relieved alcohol products to ensure that no quantity in excess of that allowed by the authorisation is requisitioned, access is confined to persons responsible for their security and use and such products are used solely for the purpose for which authorisation has been granted. Regulation

41 requires records to be kept of all such products received and used or , recovered and returned to stock or disposed of in a manner approved by the proper officer such that there is a proper account of all such products received and used during such period.

46. The Revenue maintains that it is evident from the foregoing that the Legislature has vested the Revenue with the statutory authority to supervise excise duty and relief from APT. Applications for relief from APT should be made on the prescribed form, any approval may be subject to conditions and can only be granted where the relevant person provides such security as the Revenue require. As I read them, however, there is nothing in the Regulations to mandate the Revenue to require additional security or to impose limits or indeed to require an approval in writing. Accordingly, the fact that none of these things occurred in this case does not necessarily mean that verbal authorisation is either impermissible or did not occur or that the Applicant could not have a reasonable expectation that relief would be applied without the imposition of any such condition. It was open to the Revenue to decide not to impose conditions.

47. What is clear, however, is that approval as authorised receiver is not one and the same as a Tax Warehouse/Warehousekeeper authorisation under s. 109(2) of the Finance Act, 2001. Any trader authorised as a warehousekeeper with an approved premises who receives tax relieved alcohol under s. 77 of the Finance Act, 2003 should also be approved as an authorised receiver and a dual authorisation is required. Furthermore, the authorised receiver is under an accounting duty in respect of the requisition, delivery and receipt of tax relieved alcohol products. Accordingly, insofar as the Applicant believed it was an authorised receiver because it had a Tax Warehouse/Warehousekeeper authorisation, this belief was incorrect as a matter of fact and law. Scope for confusion arises from the fact that both provide for the fixing of a security bond.

48. The Revenue also rely on Public Notice 1887 in argument (although they do not exhibit it) which is referred to on the Form No. APT 1 Form completed by the Applicant. The Public Notice is not a legal instrument but provides guidance for service users. As regards applications for authorisation to receive tax relieved alcohol products, the Public Notice provides that Form No. APT 1 must be completed by:

“each applicant seeking an authorisation to: •receive any alcohol product (denatured or undenatured) for use for a tax-relieved purpose, or • receive denatured spirits for wholesale or for distribution.”

49. Public Notice 1887 indicates that such authorisations will be in writing and contain the relevant conditions stating as follows:

“Where an application is approved, Revenue will issue an authorisation in writing to the applicant. This document will contain an authorisation number and date together with conditions governing the approval. The applicant will also be issued with a supply of blank requisition forms.”

50. The Revenue contend that the Applicant intimated an awareness of the requirement for an authorisation in writing when he stated that he *“needed a mail”* from Revenue to the effect that he had approval.

51. Public Notice 1887 also provides for recovery of Excise in respect of the loss or unauthorised use of tax relieved alcohol products as follows:

“Persons in receipt of tax-relieved alcohol products are liable to pay Alcohol Products Tax on any alcohol which is: • used for a purpose other than that for which relief has been allowed under section 77 of the 2003 Act, or • lost, except where such loss is deemed not to have been a release for consumption, under section 98A(4) of the Finance Act 2001.”

52. In similar vein, the Alcohol Products Tax and Reliefs Manual (the copy available to the Court was last reviewed in June, 2020) provides at para. 3.8 for the issue of authorisations on foot of an application for authorisation to receive or distribute tax relieved alcohol products. It states that such persons must be approved as an authorised receiver or distributor by the Revenue under Regulations 35 or 40 of the 2004 Regulations and goes on to state:

“authorisations are to be in the form of a letter with attached conditions. It is for each Region to decide whether authorisations are issued centrally or in the individual districts. Each authorisation should:

- *Be number in an annual series. Each region is to maintain its own numbering series. To facilitate the development of a common database, the number is to be formatted by reference to the year, region and four digit number...*
- *Specify the annual quantity, description and strength of the alcohol product being relieved from tax under the authorisation;*
- *Specify that the relief is allowed under a specific subsection of s. 77 of the Finance Act, 2003 subject to conditions set out in a schedule attached,*
- *Specify the purpose approved for tax-relieved use,*
- *Where a bond is required, the amount of such bond and, if appropriate, that a cover note from an approved guarantee society will be acceptable as provision security pending execution of the Bond;*
- *Include an additional copy to be signed by a responsible official of the company and returned as a record of acceptance of the conditions.”*

53. The Manual provides a list of standard conditions as an appendix for use as a guide in issuing approvals. The Manual provides that a supply of requisition Forms No. APT 1 is to be issued with each authorisation.

54. As undenatured alcohol was sourced from other Member States to make the hand sanitizer, s. 1091A of the Finance Act, 2001 (as inserted by s. 32 of the Finance Act, 2016) has some potential relevance to activities in authorisation as a “*registered consignee*” is concerned, albeit it is understood that this did not arise.

55. Under s. 1091A(3) an authorisation under s.1091A may be limited to a specified quantity of excisable products, a single consignment, a single consignor, a specified period. Under s. 1091A(4) a registered consignee shall provide security for the excise duty on every consignment to be received, before such consignment is dispatched and enter in its accounts details of excisable products received under a duty suspension arrangement, at the end of the movement of such excisable product. Closely prescribed conditions are provided in s.1091A as to when the Revenue are empowered to grant a consignee authorisation. Under s.1091A(8) the details of the authorisation granted under ss. (2) including the conditions of authorisation shall be set down in a document, referred to as an “*authorisation document*”. Under s. 1091A(9) the authorisation document shall be signed by the Applicant and the Revenue officer.

56. There is nothing on the evidence in this case to suggest that an application for a consignee authorisation was ever made or advised, still less issued and reference was made to s.1091A for the very first time during the hearing. No reference is made to s. 1091A in the Statement of Opposition, in the affidavits filed on behalf of the Revenue or in their written submissions. It is my understanding that authorisation as a warehouse consignee is a substitute in certain circumstances for authorisation as a warehousekeeper and it seems from reading the Tax and Duty Manual (referred to above) that this authorisation may not be necessary where a warehouse approval has issued under s.109. I say this because the Tax and Duty Manual states (at para. 3.5.3):

“Any person who is approved as an Authorised Receiver and who intends to import tax relieved undenatured alcohol products directly from other Member States for use in manufacturing or scientific research purposes, and who does not meet the criteria for warehousekeeper authorisation, as per par. 3.5.2, must be approved as a Registered Consignee and must comply with EDE (Excise Duty Entry) and EMCS (Excise Movement and Control Systems) requirements.”

57. It seems that in this case there was no requirement to have both authorisation as warehousekeeper and as registered consignee.

58. From all of the foregoing what is clear is that the Revenue is vested with the statutory authority to supervise excise duty and relief from APT and that these functions are ongoing and can extend to seeking the payment of APT where tax relieved product is used for a purpose other than that for which relief was allowed. Of further note, s. 78(1) of the Finance Act, 2003 provides for repayment of APT on products eligible for relief under s. 77 of the Act. The Revenue’s Tax and Duty Manual describes this provision at para. 3.3 of the Manual in the following terms:

“It is accepted that repayment is not the preferred option for either the trade or Revenue, because the repayment system would tie up working capital for traders and involve extra administration costs for Revenue. However, the law provides for the option of repayment and it may be advantageous in certain circumstances such as in

the case of low volume users, or where the entitlement to relief is established post payment of the excise duty.”

59. Accordingly, where Excise has been paid on a product which was entitled to Relief, the Revenue may give effect to such relief by way of repayment.

ISSUES

60. The Applicant’s primary case is based on its contention that a Revenue Officer granted it authority to increase its alcohol stocks to make hand sanitizer without liability to APT. The Applicant contends that it relied on this verbal authorisation to its detriment by proceeding to make hand-sanitizer and that it has a legitimate expectation that the Revenue will not resile from the authorisation already represented to be in place.

61. The Revenue fundamentally disagree and deny that any authorisation issued. They maintain that the application remains undetermined and no decision has been made on a claim for Relief in respect of the hand-sanitizer products.

62. On the basis that the Revenue’s position is accepted by the Court and the Applicant does not succeed in establishing that an authorisation to receive tax relieved alcohol products was given, the Applicant counters in the alternative that the Court should either declare an entitlement to the Relief or deem the failure to process the application an unlawful refusal of Relief. In this regard the Applicant refers to the inconsistent treatment of the Applicant as compared with other distillers who produced hand sanitiser. In those other cases authorisation was given without delay.

63. The Revenue contend that the Court has no role or function in determining an entitlement to Relief and that this is the preserve of the Revenue. It is further contended that there has been no deemed refusal of the claim for Relief as no determination has yet been made.

64. Accordingly, I am tasked in the first instance with determining the factual dispute between the parties as to whether or not Revenue authorised the Applicant to receive additional quantities of alcohol without payment of APT to make hand sanitizer. My finding in this regard is relevant to deciding whether the Applicant enjoys a legitimate expectation to the grant of

Relief based on the grant of a verbal authorisation. Even where I find that no verbal authorisation was given, however, I must nonetheless proceed to consider whether there are other circumstances which would justify the grant of declaratory relief as to a legitimate expectation or otherwise as pleaded. In so doing I am required to consider various arguments as to the appropriateness of the relief sought, prematurity and mootness. While a claim for damages was pleaded in the Statement of Grounds, this claim was not pursued during the hearing and no evidence was led to substantiate a claim in damages with the result that I do not consider it a live issue in the proceedings.

ISSUE OF FACT: WHETHER THE RESPONDENT AUTHORISED RELIEF FROM EXCISE DUTY

65. As noted above, the Applicant's case is primarily based on its understanding that a Revenue Officer granted it authority to increase its alcohol stocks without liability to APT in order to produce hand sanitizer. The Revenue very strongly dispute this contention.

66. I am faced with resolving this dispute of fact. No application to cross-examine was made in this case and accordingly, the dispute of fact falls to be determined on the strength of the affidavit evidence.

67. In *Kearns v. DPP* [2015] IESC 23, in concurring with the judgment of Dunne J., Hardiman J. stated:-

"I agree with Ms. Justice Dunne's statement at page 15 of her judgment:

"There is undoubtedly a conflict in the evidence between Ms. Tweedy and Detective Garda Gannon as to whether or not any marks would have been left on the camera box showing the tape lifting of the finger mark. Given that there was such a conflict in the evidence on affidavit below the learned President, it is perhaps surprising that no attempt was made to resolve that conflict by the cross-examination of witnesses before the President. That conflict remains and is not possible on the evidence before this Court to resolve that conflict."

68. Hardiman J. proceeded to conclude (para. 6):

“Where it is not possible to resolve a conflict, the relevant issue will naturally be resolved against whichever party carries the onus of proof, which in this case is the applicant/appellant.”

69. In that same judgment Hardiman J. reiterated his earlier comments in *Bolinden Tara Mines v. Cosgrave* [2010] IESC 62 as follows (para. 7):

“It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a note of intention to cross-examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of fact which may have been deposed to. In a case where there is no contradictory evidence an attack of the evidence which is made before the court must include cross-examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case, even taking the evidence it has produced at its height”

70. This passage from *Bolinden Tara Mines v. Cosgrave* was cited with approval in *IBB Internet Services Ltd. v. Motorola Ltd.* [2013] IESC 53 wherein Clarke J. endorsed *Bolinden* and his own judgment in *McInerney Homes Ltd. (No. 2)* [2011] IEHC 4. To similar effect in *T.A. v. Minister for Justice* [2014] IEHC 532 at para. 5.3, MacEochaidh J. concluded that the Applicants had failed to discharge the burden of proof where material facts were disputed on affidavit and there was no attempt to have the case remitted to plenary hearing or to seek to cross-examine on the affidavits filed by the respondent in that case.

71. Here, although the Applicant defines a key issue between the parties as whether there was an authorisation, he has not sought to cross examine the respondent on their categorical averments that there was no such authorisation. The Applicant nonetheless contends that it has discharged the burden of proof on it through its affidavit evidence when regard is had to the surrounding circumstances which include the very fact that the Applicant proceeded to produce and release to market hand sanitiser which would be an act of madness in the absence of a relief from excise duty as the tax due would be very many multiples of the price charged for a bottle of hand sanitiser. He also points to the absolutist nature of the assertion on affidavit of Ms.

Gilligan that she records all telephone conversations when in point of fact there was a telephone conversation prior to the submission of the first Form No. APT 1 which it is common case occurred but which does not appear to have been the subject of a file note and which is described in different terms in two different places on the Revenue's file. Ms. Gilligan explains this by reference to the fact that she was not yet the assigned officer dealing with the application at that time. By way of supplemental affidavit, she clarifies that she recorded every telephone call after she was assigned the file.

72. In the face of a direct contradiction on affidavit as to whether or not a verbal approval occurred, it seems to me that the single most compelling feature of the evidence to support the Applicant's belief that an authorisation issued is the action of the Applicant in proceeding to make hand-sanitizer. His counsel describes as "*madness*" the act of proceeding to produce hand-sanitizer without authorisation given the scale of potential exposure to APT where relief from excise duty is not authorised. When one notes the differential between the sale price of a bottle of hand-sanitizer with the rate of excise duty, it is immediately apparent that engaging in the production of hand-sanitiser would be ruinous in the absence of Relief and as a business proposition it is entirely unviable. There are other factors, however. It is accepted that the Applicant made contact with Ms. Gilligan seeking advice in relation to sources of ethanol for hand-sanitizer. I find it very strange, given the exigencies presented by the pandemic, that during the course of this conversation the importance of waiting for written approval was not stressed to the Applicant, if this were a real issue. It is also clear that the Applicant notified the Revenue of the imports in accordance using the Excise Movement and Control System. If, as Revenue maintain, the quantities imported far exceeded the authorised amounts, this begs the question as to why a concern was not immediately raised in relation to authorisation.

73. It is clear from the evidence that the Applicant is a one-man business that could not afford to meet a liability to tax on the quantity of alcohol involved in its production of hand-sanitizer. No amount of altruism or desire to act in the national interest at a time of crisis which I am sure did motivate the Applicant could over-ride the economic reality of producing hand-sanitizer and paying the Excise duty arising without securing exemption available for such product.

74. Against this, there is a weight of documentation to support the Revenue's position that authorisations normally issue in writing and with a degree of formality in terms of a

requirement to keep records, the absence of which is inconsistent with a conclusion that the Applicant could be correct in his understanding that a verbal authorisation had issued.

75. It seems to me entirely possible that a verbal authorisation might have been given due to the exigencies at the time.. The onus is on the Applicant who contended that sworn affidavit evidence on behalf of the Revenue should not be accepted, in respect of a point of fact which was material to the court's final determination, to ask the court to take appropriate measures such as granting leave to cross-examine, so that questions concerning the credibility or reliability of the evidence concerned could be put to the witness and the court could reach a sustainable conclusion as to the accuracy or otherwise of the evidence concerned (see *RAS Medical Limited trading as Park West Clinic v. The Royal College of Surgeons in Ireland* [2019] 1 I.R. 63. In the absence of cross-examination and having regard to the fact that the onus of proof is on the Applicant as the moving party in these judicial review proceedings, I am bound to accept that the Revenue's categorical assertion that no verbal authorisation was given.

76. In arriving at this conclusion, I have not ignored the hearsay evidence (in the form of third party emails) produced by the Applicant in relation to how other operators were treated but am careful not to attach significant weight to evidence of this nature. As is well established, the mere fact that a document is exhibited in an affidavit does not, in and of itself, turn that document into admissible evidence and the document required to be proved. Had the Applicant wished to rely on the experiences of third parties the appropriate course would have been to secure affidavit evidence from them (see *RAS Medical*). The third party evidence is not only hearsay but is also lacking in specificity as to the fuller circumstances of those applications such as would allow a real comparison to be made and is produced in a manner which does not permit of a fair opportunity to respond on the part of the Revenue in light of third party confidentiality considerations. It is also noted that while the Applicant contended that others had received verbal authorisation in a conversation with Ms. Gilligan in June, 2020, this is not supported by the hearsay evidence subsequently produced. While others say that they obtained authorisation quickly and without condition beyond the approval of the AGFM, they do not say that it was verbal.

LEGITIMATE EXPECTATION

77. While verbal authorisation under the APT system as contended by the Applicant has not been established on the evidence, it seems to me that a question nonetheless remains in the very particular circumstances which arise here as to whether the Applicant was entitled to rely on his course of dealings with the Revenue as being such as to give rise to an assurance or understanding that where hand-sanitiser was produced in accordance with AGFM approval, the product would then be relieved from Excise duty. In other words, might the Applicant have reasonably understood from the course of dealing had during a national health crisis that the importation of alcohol by him for use in the production of hand sanitizer would be exempt from excise duty and does he enjoy a legitimate expectation based on this course of dealing to an exemption from excise duty without condition upon satisfying the Revenue that the alcohol, properly accounted for, was used for the purpose of the production of hand sanitizer as approved by AGFM even though he proceeded without an authorisation in writing of the kind which it is the Revenue's practice to issue.

78. At the outset, I believe it is important to identify a material difference between the decisions in *Wiley v. The Revenue Commissioners* [1994] I.R. 160 and *Cork Opera House Plc v. The Revenue Commissioners* [2012] 2 I.R. 65. These two cases are authorities against any Court intervention which might be considered tantamount to telling the Revenue that a concession should be granted to which the Applicant was not entitled.

79. In the *Cork Opera House* case the High Court held that the Applicants were not entitled on the basis of expectation to pursue a remedy which would require the Revenue Commissioners to act in a way that was unauthorised by statute. However, there is no question here of the Revenue being directed to grant a Relief to an Applicant who is not qualified for the Relief. The statutory scheme envisages the grant of Relief in respect of the production of hand-sanitiser and the Relief has been granted to other distillers who made hand-sanitisers at the beginning of the health crisis.

80. In *Wiley*, the Applicant was not entitled under the statutory scheme to the relief because of the extent of his disability as he was not a person “*wholly or almost wholly without the use of his legs*” and therefore not entitled under the statutory scheme. The only qualifying factors the Applicant was made aware of in this case was that the alcohol was intended for use or was used in the production of an exempted product (which hand sanitiser is accepted to be) and, in

the absence of further conditions (whether under Regulations 35 or 40 of Alcohol Products Tax Regulations 2004 (S.I. 379/2004) or otherwise) , that approval be obtained from DAFM.

81. Unlike the situation in *Wiley and Cork Opera House*, the effect of finding a legitimate expectation to the grant of Relief where eligibility for same under s. 77 is demonstrated in this case would not have the result of telling the Revenue that a concession should be granted to which the Applicant was not entitled. The legislation itself provides for an exemption and does not require a written authorisation or any particular formality, albeit that it empowers the Revenue to impose conditions and the types of conditions which may be imposed are apparent from the Alcohol Products Tax Regulations 2004 (S.I. 379/2004) but the Revenue also have a power not to impose conditions. Immediately, this means that this is in a different category of case to *Wiley and Cork Opera House*. As a matter of law, the Applicant is already entitled to the Relief where the Revenue is satisfied that the alcohol imported was used in the production of hand-sanitiser and there has been compliance with any conditions imposed by Revenue, where conditions have been imposed. What is really at issue here is whether the Applicant can benefit from Relief where the Revenue have not formally confirmed that it was not imposing conditions in advance of the production of hand-sanitizer or its release to market but where the entitlement to relief is otherwise demonstrated.

82. Both parties rely on *Glencar Exploration v. Mayo County Council* [2002] 1 I.R. 84. In *Glencar* Fennelly J. disposed of the legitimate expectation question there arising on the basis that it is not enough to demonstrate an expectation that a respondent would act properly or lawfully but it is necessary to go further and show something “*in the nature of an understanding or promise or representation, express or implied, addressed to or applicable to the Applicants*” and nothing beyond that was shown on the evidence in that case. He proceeded, however, on an *obiter* basis to identify principles which have been cited with approval since then as follows (p. 87):

“In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. I would emphasize that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the

representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority, or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public body will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it.”

83. The Revenue contend that one need not go any further than the first of the requirements stipulated by Fennelly J. because Revenue neither made a statement nor adopted a position amounting to a promise or representation. They point out that when the Applicant requested approval by way of “*mail*” it was requested to make its application on the prescribed form. The prescribed form on its face refers to an authorisation in writing. They contend that there was nothing said or done by Revenue that might give rise to an expectation that Revenue had, unconditionally or otherwise, authorised a significant increase in its alcohol stocks without any increase in bond or other conditions. They maintain that the Applicant acted unilaterally and imported alcohol without awaiting Revenue approval.

84. On the other hand, it is clear from the Applicant’s evidence that he would not have proceeded to import ethanol for the production of hand-sanitiser had he not understood from his contact with Revenue that the production of hand sanitiser in accordance with approval of the DAFM would be relieved from Excise. Whilst I have not found as a fact that the Applicant received verbal authorisation from the Revenue official he was dealing with, it seems to me very material that when discussing the import of ethanol for use in the production of hand-sanitiser with the Revenue that the Applicant was not counselled by the Revenue official during those contacts to wait for formal authorisation or told there was any issue with his application notwithstanding that it must have been obvious that the Applicant was urgently trying to identify suppliers so as to respond to the health service crisis. It is noteworthy that no query whatsoever was raised with regard to the first Form APT submitted on hte 20th of March, 2020 whereas immediate queries were raised with the subsequent form submitted in respect of a significantly increased application.

85. Whilst accepting that there was no evidence as to the individual circumstances of other distillers who produced hand sanitizer with the benefit of approval from the Revenue, the fact that other distillers received confirmation from the Revenue of the applicability of Relief and were producing hand-sanitiser in response to the health crisis on condition only of approval from the AGFM appears also to have been common knowledge in the industry. The Revenue did not respond in these proceedings in respect of identified third parties for reasons of third party confidentiality but it did not dispute on a general level that approvals had issued on condition only of DAFM approval. It would have been possible for Revenue to deal with the general situation without touching on any individual case were the Applicant's contention as to Revenue practice in this regard wrong and indeed, they did so to the extent that they said the Applicant had not identified verbal authorisation in any other case.

86. It seems to me that I can infer from the failure of the Revenue to deny the Applicant's contention that authorisation issued to others on condition only of an approval from the DAFM, that the Applicant's understanding in this regard is correct albeit that there may be reasons in other cases why further conditions would not be required (such as, for example, the scale of their existing operations and the size of bonds already in place) which would distinguish those cases from this one. Nor is it disputed that the fact that authorisation had issued to distillers was the subject of media coverage. It seems to me to be also relevant that when the Applicant formally notified the Revenue of the import of alcohol at levels which far exceeded his standing warehouse approval authorisation for the distillation of gin, no issue was raised at that time nor for several months. In fact, no issue was raised until after he had already ceased production because the shortage of hand sanitiser had been addressed.

87. On the basis of the foregoing, I am satisfied that there is evidence of an implied representation arising from the course of dealing as outlined to the effect that subject to DAFM approval, the Applicant's production of hand-sanitizer in the smaller quantity set out on the first APT 1 Form would be relieved from the payment of Excise duty without further condition.

88. I am further satisfied that this representation was conveyed both directly and indirectly to the Applicant. It was conveyed directly insofar as his dealings with the Revenue led him to believe that all that was required was a DAFM approval. It was conveyed indirectly insofar as it was known within the industry that other distillers were producing excise exempt hand-

sanitizer in response to the public health crisis on compliance only with a condition as to DAFM approval.

89. Finally, while it might be said that the Applicant could not reasonably have entertained this belief in circumstances where the Public Notice to which it was referred by Revenue by the reference to it contained on the Form No. APT he was asked to submit indicated that an authorisation would issue in writing and no such authorisation issued in writing, it must also be recalled that that these events unfolded at a time of national health emergency and the requirement for an authorisation in writing is not prescribed by law in section 77. The reasonableness of the Applicant's belief has to be seen in this context. If ever there were a situation where there was a need for prompt decision making by the Revenue, this would appear to have been such an occasion. The Applicant would have every expectation that its application would receive urgent attention and would be promptly determined but the Revenue maintain, even now, that they made no decision at that time.

90. Of the two positions adopted by the parties in these proceedings, the Applicant appears to me the more reasonable. Two years post application for approval of relief for the production of hand sanitizer the Revenue's position is that the matter remains under consideration. It maintains that this is because relief by way of prohibition has been sought in these proceedings. I cannot accept this. Quite apart from the fact that no interim relief was ever granted, proceedings did not issue until the end of August, 2020 which was more than five months after the application was made at a time of a worldwide public health crisis in March, 2020. The Revenue's position in this regard is simply not sustainable. On receipt of the second application in April, 2020, the Revenue asked questions to which the Applicant never responded because it was no longer proposed to proceed with the import of the additional quantities envisaged in that application. However, the Revenue never asked questions of receipt on the first application. If anything, the fact that the second application for a larger quantity of alcohol resulted in enquiry only goes to highlight the lack of any enquiry in respect of the first application and supports the reasonableness of the Applicant's belief that there was no issue with this first application.

91. Accordingly, in the absence of an indication that there was an issue with the application, I can understand why the Applicant would have been led to believe that hand-sanitizer produced would be exempt from Excise duty, as provided for under the legislation and that no

special conditions were being imposed beyond the requirement to get approval from the DAFM. Revenue practice is well established and the Applicant should not properly have proceeded without securing a formal commitment in writing from Revenue confirming authorisation with no special conditions. Were it not for the situation of a health emergency, the failure to do so would in my view be fatal to any claim to legitimate expectation. To my mind the existence of the health emergency is the single biggest factor in this case. It weighed in favour of the urgent grant of authorisation and a reduced need for formality. I cannot conclude in the circumstances then prevailing that the Applicant could not reasonably have entertained the belief that Relief would be applied on securing approval from DAFM for the product itself without any formal authorisation in writing from the Revenue. I accept that this was the Applicant's belief based on his course of dealing with Revenue from which it could reasonably have been implied by him that once DAFM approval was obtained, alcohol properly recorded and demonstrated as being acquired for the purpose of and/or used in the production of hand-sanitizer would be exempt from excise duty.

92. It seems to me entirely reasonable in all of the circumstances, where approval was sought at a time of a health emergency and an urgent consideration of same would be presumed by public authorities, where authorisation duly issued from the AGFM, where the Revenue were known and reported in the media to be authorising the import of excise relieved product by distilleries for the production of hand sanitiser and where there had been open communication with the Revenue in relation to the import of ethanol for this very purpose and subsequent contemporaneous notification of the fact of import, that the Applicant would have a legitimate expectation that the Relief would apply without further condition so long as the alcohol product was used and properly accounted for in the production of hand-sanitizer.

93. In this case the only condition identified to the Applicant was the need to secure DAFM authorization, which it did. While the Revenue might have imposed other conditions as regards security or otherwise, they did not do so. I am satisfied that the Applicant is therefore entitled, as a matter of legitimate expectation, to the application of the Relief where and to the extent that the Applicant can satisfy the Revenue as to the production of hand-sanitizer on an *ex post facto* basis. The extent of the Relief allowable having regard to the actual quantities involved and the Applicant's accounting in this regard is a matter for the Revenue and not this Court. I will not make a determination in relation to the quantity of hand-sanitiser made and the

Applicant's legitimate expectation as to the grant of Relief as found by me only applies to the extent that exempted intention or use is demonstrated to the satisfaction of the Revenue.

94. In the absence of an actual authorisation, the Applicant ought not to have released the hand-sanitizer to market on a tax-exempt basis and to the extent that it did, the Applicant is in breach of regulatory controls adopted by the Revenue and liable to assessment to excise duty. I consider that the assessment to a liability to excise duty is on the basis of the Applicant's legitimate expectation that alcohol product used in the production of hand-sanitizer would be relieved from excise duty in accordance with DAFM permission and therefore no liability to excise duty arises once hand-sanitizer was produced in accordance with DAFM permission where the Revenue did not impose other conditions as regards security or otherwise upon an application duly made to it. The burden remains on the Applicant to satisfy the Revenue as to the actual use of the alcohol imported on foot of the Form APT submitted on the 20th of March, 2020 in the production of an exempted product where a release to market has occurred. Where hand-sanitizer remains at the Applicant's warehouse and has not been released to market, it is my understanding that a liability to excise duty does not arise at this time as it is a liability which arises on release to market but the Applicant is required to properly account to the Revenue through its records in respect of all such product held by it in warehouse.

IS THE RELIEF A MANDATORY OR PEREMPTORY RELIEF? IS THERE AN ENTITLEMENT TO DECLARATORY RELIEF?

95. The Applicant contends that the relief under s. 77(1) is mandatory in that it "shall" apply once the Revenue are satisfied that the alcohol is to be used for one of the prescribed purposes. It is argued that as the Revenue has never disputed that the alcohol has been used for the purpose of making hand-sanitiser, the Applicant is entitled as of right to the Relief and the Applicant seeks certain declaratory reliefs in this regard. It is accepted, however, that the Revenue may, should they choose, apply conditions albeit it is contended that this does not apply in the case of an *ex post facto* application of the relief. It is also accepted that the Revenue may decline Relief where the alcohol, perhaps intended for use in the production of hand sanitiser, is not subsequently used for this purpose.

96. While the Applicant points to what it contends are "agreed facts" and asserts that the Revenue has not in any way denied or disputed the existence of the Relief nor is it not in dispute

by the Revenue that the use of alcohol to manufacture sanitizer is exempted from APT, this fails to acknowledge the function of the Revenue in deciding, on the facts of a given case, the conditions of eligibility are met. The Applicant glides over the fact that under s. 77 it is for the Revenue to be satisfied as an entitlement for relief under that section. While an entitlement to relief exists as a matter of law, the arbiter of whether eligibility is demonstrated in a particular case remains with the Revenue. Accordingly, an assessment and an accounting function vests in the Revenue in discharge of its function in determining whether an entitlement to Relief is demonstrated in any given case, and if so the extent of the Relief.

97. It is clear that the production of hand-sanitizer engages an entitlement to Relief under s. 77(a)(iv) and (g) where a producer demonstrates to the satisfaction of the Revenue that alcohol products are intended for use in or have been used for exempted purposes and there has been compliance with the Revenue conditions in this regard. While the relief is expressed in mandatory terms “*shall*”, it is conditional in two ways. Firstly, the entitlement to relief is subject to such conditions as the Revenue may prescribe. Secondly, the intention to use or the use of alcohol in production must be shown to the satisfaction of the Revenue to be or to have been for an exempted purpose.

98. I agree with the Applicant’s submissions to the extent that the relief is mandatory where the conditions of eligibility for relief are met but this is no more than a statement of the law. I disagree with the Applicant that this should result in declaratory relief establishing the Applicant’s entitlement to the relief. It is the Revenue and not this Court which must be satisfied that an entitlement to the relief is shown. The Revenue’s decision-making power is limited by the parameters of the provision which gives it power to act and it must exercise its decision-making function in an *intra vires* and reasonable manner.

99. However, on the evidence in this case, I am satisfied that the Revenue has made no decision on the question of eligibility for relief under s. 77 and this question remains under consideration. It is not for me in these proceedings to step into the shoes of the Revenue to determine that the Applicant has established an entitlement to the Relief notwithstanding that it seems to me as a matter of law that once the statutory criteria for eligibility for relief are demonstrated to the satisfaction of the Revenue, then the Revenue has no residual discretion to refuse relief. The fact that the existence of the relief on the statute books is accepted and an

entitlement may be established on evidence submitted as to compliance with eligibility criteria does not mean that it is appropriate for me to order the grant of the relief.

100. Accordingly, while the Applicant seeks declaratory relief in relation to certain facts which it contends are established and also to the effect that the Revenue does not have any discretion to refuse and/or deny Relief once the criteria for its application have been met, it does not seem to me to be appropriate for this Court to grant declaratory relief to this effect.

101. In my view the declarations sought by the Applicant, of their nature, are inappropriate insofar as the Applicant does not seek declarations as to its legal rights but rather invites the court to make declarations in respect of issues of fact and to thereby shackle the powers of the Revenue. It is the Revenue who is charged by law with making a decision in respect of APT, not this Court. In *Omega Leisure Ltd. v. Superintendent Barry & Ors.* [2012] IEHC 23 the High Court (Clarke J., as he then was) at para. 4.4, indicated ... :

“It should, of course, be borne in mind that, by its very nature, a declaration is a discretionary relief and involves a jurisdiction which must, therefore, be circumspectly exercised and in accordance with the circumstances of the case.”

102. No decision on eligibility has been made by the Revenue. While the Court was prepared to grant declaratory relief in the *Point Exhibition Company v. the Revenue Commissioners* [1993] 2 I.R. 551 that case differs to this one in that it concerned a situation where the delay in the granting of a licence arose in the context of a legal uncertainty about the relevant power that the Court was in a position to resolve. The Court is not well placed in this case to reach decisions on how much hand sanitizer was actually produced, how much was released for consumption, how much remains in stock and whether alcohol imported for the purpose of producing hand sanitizer was in fact used for other purposes and therefore no longer eligible for relief.

IS THE FAILURE TO MAKE A DECISION A DEEMED REFUSAL?

103. It has been the Revenue’s position in response to these proceedings that no decision was ever made, whether as to authorisation or liability. Although the Applicant’s primary case

is that there was an authorisation upon which it relied, the Applicant sought to argue in the alternative that if it does not succeed in satisfying the Court as to the grant of an authorisation or the establishment of a legitimate expectation, then the failure to make a decision on excise liability should be deemed to be a decision to refuse APT relief.

104. The only decision which the Revenue accepts it made was a decision to instruct the Applicant to desist (by which time the Applicant had already ceased) from making hand sanitiser. The Revenue maintains that whereas no decision was ever made in relation to the Form No. APT 1 application, it now falls to Revenue to determine if the Applicant has any Excise liability. It is further maintained that the request to desist was not a “*decision*” to refuse relief, as the Applicant has incorrectly characterised it in its pleadings but arose in circumstances where the Revenue became live to the fact that quantities of alcohol in excess of the formally recorded authority which the Applicant had were being imported for use in the production of hand-sanitiser.

105. I accept on the evidence that the Applicant has not yet been assessed with any liability and it is not appropriate to deem the Revenue action on the 12th of June, 2020 to be a refusal of APT relief. I agree that in this case I am concerned with an entirely different set of facts and circumstances to the *Point Exhibition* case where the legal entitlement to issue a licence was the issue that was considered and determined by the Court. There has been no refusal of the Applicant in this instance because there appears to have been no substantive assessment. In appropriate cases the Court may find that there has been inordinate and inexcusable delay in a case such as this but will not step into the shoes of the Revenue by making a decision. It is noted, however, that the Applicant has not pursued a declaration in relation to delay or sought to mandate a decision within a reasonable time-frame so this question does not arise on the case as pleaded.

IS THERE AN UNREASONABLE/IRRATIONAL “DECISION”?

106. There is no basis for the Applicant’s contention that the so-called “*decision of 12th June, 2020*”, i.e. the request that it cease making hand sanitizer from alcohol, was either unreasonable or irrational. The Applicant had imported substantial quantities of alcohol, in excess of formal authority which the Revenue had given and had openly advertised the sale of hand sanitizer in circumstances where the Revenue had no knowledge that the Applicant had

already ceased import and production. In such circumstances, merely asking the Applicant to desist was entirely reasonable. The issue of any liability to excise duty was, on my reading of the email of the 12th of June, 2020, expressly left over for consideration on another day. Accordingly, there is no basis for any contention of unreasonableness or irrationality.

107. As I am satisfied that there has been no refusal to grant it relief from APT in respect of the manufacture of hand sanitizer, I find that the Applicant lacks *locus standi* and its application is otherwise premature insofar as it seeks to challenge the so-called refusal. Where there is an assessment and refusal of relief, it is open to appeal such decision to the Tax Appeals Commission. In the absence of any such refusal decision, the challenge by way of judicial review on reasonableness grounds is entirely premature.

MOOTNESS

108. Insofar as the Applicant seeks an order of *certiorari* in respect of the decision of the 12th of June, 2020 directing the Applicant to desist, it is contended on behalf of the Revenue that this relief is moot. The Applicant was granted leave to challenge the Revenue's so-called "*decision of 12th June 2020*" wherein it was instructed to cease making hand sanitizer. By that time, the Applicant's director avers that it had already ceased production and it has since explained that it had used up the alcohol, the demand had peaked and it felt it had "*done his bit*". In such circumstances and where it has no desire to continue with the manufacture of hand sanitizer, quashing the Revenue's request that the Applicant desist from that manufacture has no practical benefit and its application for *certiorari* is moot in line with established authority such as *Irwin v. Deasy* [2010] IESC 35.

CONCLUSION

109. Having made an enquiry about utilising alcohol to make hand sanitizer on the 18th of March, 2020, the Applicant was advised to make an application on Form No. APT1. It did so on the 20th of March, 2020 but on the 1st of April, 2020 made a further application for authorisation to receive a far greater volume of alcohol relieved from APT. Immediately on receipt of this second application, Revenue identified a need for an increased bond and other information but the Applicant did not engage further or provide the information and the

application was not further progressed as the market created by a situation of crisis had dissipated and authorisation in the increased amount was no longer necessary. The Applicant has failed to establish a verbal authorisation allegedly granted on the 24th of March, 2020. The Applicant has, however, established a course of dealing at an urgent time of national health crisis upon which it was entitled to rely in proceeding to produce hand sanitizer on the basis that it would be exempt from excise duty in respect of alcohol intended for use or actually used in said production without further condition as regards an increased bond or otherwise.

110. An extraordinary feature of this case is the fact that two years after an application which was clearly urgent in nature was made to seek relief from Excise duty in respect of the production of hand-sanitiser, the Revenue's position is that no decision has been made. The Revenue point to the failure of the Applicant to respond to queries raised by email dated the 2nd of April, 2020 following the second APT application to excuse this but they were aware at least from the 12th of June, 2020 that this second application was not being pursued and that production had ceased. They were also formally notified when alcohol in quantities far in excess of the Applicant's ware-house-keeper's approval was imported by the Applicant in April, 2020 but raised no query in respect of same at that time.

111. At that point it became necessary to determine whether the Applicant was entitled to Relief on an *ex post facto* basis. Such further queries as were raised by the Revenue in June, 2020 were addressed by the Applicant without further queries being raised, at least insofar as has been demonstrated on the evidence. These proceedings were commenced on the 27th of August, 2020, nearly 6 weeks after the Applicant had responded to the queries raised. The Revenue contend that it could not progress matters while proceedings were pending pointing to the fact that an order of prohibition preventing the Revenue from raising an assessment in respect of the alcohol the subject matter of the approval application is sought in the proceedings. It is not clear to me why the fact that an order of prohibition in those terms was sought had prevented the Revenue from deciding on whether Relief applies or not. No interim or interlocutory relief was granted. I do not consider it at all satisfactory that nothing further happened in relation to the application for Relief from July, 2020 and the Revenue is still saying that it has made no decision as to whether the Applicant is entitled to Relief.

112. In circumstances where the Revenue's position in meeting these proceedings is resolute that it has made no decision yet on the application for Relief, it seems to me particularly

unfortunate that there was no pre-litigation correspondence in this case. Such correspondence might have allowed clarity to be achieved with regard to the parties' respective positions. The failure to engage in appropriate correspondence was a lost opportunity both to crystallise the issues and perhaps also to avoid unnecessary and expensive litigation.

113. The Revenue have not expressed themselves satisfied that the Applicant intended to use the imported alcohol for a relieved purpose or approved the Applicant for relief from APT. Approval by the DAFM for the Applicant to market hand sanitizer does not bear upon the excise risks attendant to the vastly increased quantities of ethanol for which the Applicant sought authorisation and is not material to the question of relief from APT save to the extent that a condition of securing relief imposed by Revenue was that such approval be obtained.

114. It remains a matter for Revenue to determine whether or not the statutory pre-requisites in s. 77 of the 2003 Act have been met but in circumstances where I have found that the Applicant had a legitimate expectation to an entitlement to relief without condition imposed pursuant to Regulation 35 and/or Regulation 40 or otherwise where no such conditions were imposed. The within proceedings have pre-empted that decision and the Applicant seeks declarations touching upon the Revenue's statutory functions that are not appropriate to grant. It has not been established that the Revenue have denied relief nor reversed an approval nor acted irrationally or unreasonably in refusing relief or directing the Applicant to cease production of hand-sanitizer.

115. APT relief is not mandatory or preemptory, but, falls to be considered in accordance with statutory criteria, including compliance with such conditions as the Revenue may prescribe or otherwise impose and then when it is shown to the satisfaction of the Revenue that the alcohol in question was used for the production of relevant products. This is consistent with the statutory scheme which vests the Revenue with responsibility for safeguarding any duties that may be owed to the State. The Revenue are not required to impose conditions and where conditions have not been imposed, it still remains for the Revenue to be satisfied that alcohol was used in the production of hand sanitiser. Here, no evidence has been adduced in relation to the quantities of alcohol that were processed or the amount of hand sanitizer produced (indeed some ambiguities in this regard came to light during the hearing) and there is no basis, either in fact or law, for me to make declarations or otherwise dictate how the Revenue might exercise their statutory functions in relation to excise duty assessed as liable to

be paid by the Applicant in respect of such quantity of hand sanitizer as has been released to market.

116. Further, there is no basis for quashing by way of *certiorari*, the so-called “*decision*” of *12th June 2020*, wherein the Applicant was requested to cease production in circumstances where the Applicant had no authorisation, and where the Applicant had itself already ceased production. That is a moot issue.

117. I am satisfied, however, that the Applicant has substantiated an entitlement to a declaration that it has a legitimate expectation to the grant of relief once it establishes to the satisfaction of the Revenue that the alcohol imported, properly accounted for to the satisfaction of the Revenue, was intended for and/or was used in the production of hand-sanitiser, the only condition imposed by the Revenue being that the hand-sanitizer be approved by the DAFM and there being no additional condition imposed by the Revenue as to security or storage pursuant to Regulation 35 and/or Regulation 40 of the 2004 Regulations or otherwise.