TC02686

Appeal number: LON/2002/8331

EXCISE DUTIES – Cooking wine and cooking cognac – appeal against refusal to restore goods seized for non-payment of excise duty on importation from France – new appeal against assessment to duty of goods in stock – whether the goods were exempt from excise duty under art. 27(1) of Directive 92/83/EEC – whether s.4FA 1995 adequately implements art. 27(1)(f) of the Directive – reference to the Court of Justice of the EU – consideration of the implementation of its Judgment – whether HMRC had shown concrete, objective and verifiable evidence that the goods had been subject to an incorrect application of the Directive by the French authorities – held that they had – whether the UK's system under s.4 FA 1995 of refund of duty paid on proof of qualifying use in the manufacture of foodstuffs was a legitimate implementation of the Directive – held that it was – held that duty was payable under the assessments – new appeal dismissed – held that the reasons given for refusal to restore the seized goods were flawed in that they did not refer to the possibility that duty paid could be refunded to the Appellant on proof of appropriate use of the goods in the manufacture of foodstuffs – original appeal allowed and a further review directed under s.16(4) FA 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

REPERTOIRE CULINAIRE LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
JOHN ROBINSON

Sitting in public in London on 12 and 13 June 2012

Hugh Mercer QC and Philippe Dewast (French Advocate) instructed by Wilkins Kennedy, for the Appellant

Kieron Beal QC instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

Introduction and facts

1. This is an appeal against a decision by Mr. G. A. Murray, a Review Officer of the Respondent Commissioners ("HMRC") communicated to Dechert, then acting on behalf of the appellant, Repertoire Culinaire Ltd ("RCL") by a letter dated 17 October 2002 ("the Decision Letter"). Mr. Murray's decision was to refuse restoration of certain goods namely, 2800 litres of white wine, 2800 litres of red wine, 160 litres of port and 80 litres of cognac. Those goods had been seized by HMRC at Coquelles on 10 July 2002 on the grounds that there was no AAD (Accompanying Administrative Document) for the goods and there was no evidence that UK excise duty had been accounted for.

2. The white wine and the red wine was 11% alcohol by volume (ABV), the port was 19% ABV and the cognac was 40% ABV.

3. The Decision Letter contained the statement that "It is evident that the wine, port and cognac had salt and pepper added to them, the goods were 'undrinkable' and intended for culinary purposes".

4. The CMR document (consignment note) accompanying the goods described them as '*vin de cuisine*'. The invoice addressed to RCL from the supplier of the goods, Ravel S.A. of St-Galmier, France, gives the added description '*salé-poivré*' against each of the goods and the customs code 2103909089. In this Decision we adopt a description of the goods as "cooking wine", "cooking port" and "cooking cognac", and generally as "cooking liquors".

5. Restoration of the cooking liquors was refused on the grounds, principally, that HMRC considered that they "were subject to UK excise duty at the normal rates for alcohol".

6. Notice of appeal to the VAT and Duties Tribunals was served on 4 November 2002 by RCL against HMRC's refusal to restore the cooking liquors.

7. Following a Directions Hearing on 1 March 2007 before Miss Gort (Chairman), the appeal came before the presently constituted Tribunal (sitting as the VAT and Duties Tribunal) on 10 and 11 December 2008. Following that hearing, this Tribunal issued a Decision (release date: 24 April 2009) staying proceedings and giving its reasons for its decision to refer Questions for a preliminary ruling from the Court of Justice of the European Union ("the Court of Justice"). That Decision is attached to this Decision as Appendix 1.

8. We attach to this Decision as Appendix 2 the text of an "agreed statement of undisputed facts" which the parties put before us at the hearing on 10 and 11 December 2008 and which was included in the reference to the Court of Justice, forming part of the material on which the Opinion of the Advocate General (Kokott) and the Court's Judgment were based.

9. From this statement it appears (see: paragraph 18 thereof) that the position as at 19 July 2007 was that there was no agreement within the Community as to how the cooking liquors subject to this appeal should be treated. Some Member States took the view that cooking wine was not within the scope of excise duty under EC Directive 92/83/EEC ("the Directive") and therefore entitled to move freely within the EU without any accompanying document.

10. The Advocate General (at [84] of her Opinion) stated:

> 'The cooking liquors at issue here, however, are goods which the tax authorities of the Member State of manufacture (France) do not regard as liable to excise duty at all. That was confirmed by Répertoire Culinaire and the French Government in response to a question during the hearing before the Court. The cooking liquors had thus been released into free movement in the State of manufacture from the beginning precisely because, in the view of the authorities in that State, no excise duty at all was payable on them.'

11. We should mention at this point that this statement of fact as related by the Advocate General was contradicted by Professor Fauvarque-Cosson's Statement served by RCL in May 2012 (see: [20] below).

12. The four Questions submitted to the Court of Justice were based on a draft agreed by the parties with very little alteration by the Tribunal.

13. They were as follows:

> '1. Are cooking wine and cooking port subject to excise duty under [Council Directive 92/83/EEC of 19 October 1992 – "the Excise Directive"] in the Member State of importation on the grounds that they are within the definition of 'ethyl alcohol' under the first indent of Article 20 of [the Excise Directive]'? – "the First Question";
>
> 2. Is it consistent with the Member State's obligation to give effect to the exemptions contained in Article 27(1)(f) of [the Excise Directive], when read with Article 27(6), and/or with Article 28 EC and/or with the direct effect of those obligations and/or with the principles of equal treatment and proportionality to restrict the exemption for cooking wine, cooking port and cooking cognac to cases where alcoholic beverages have been used as an ingredient and to restrict the applicants for exemption to those persons who have used alcoholic beverages as an ingredient in products and/or those persons who carry on business as wholesalers of such products and/or they produced or manufactured such products for the purposes of that business and subject to further conditions that claims be made within an overall period of four months from the payment of duty and that the amount of the repayment be not less than £250? – "the Second Question";
>
> 3. Should the cooking wine and cooking port, if liable to duty under the first indent of Article 20 of [the Excise Directive], and/or the cooking cognac, subject to the present appeal, be treated as exempt from excise duty at the point of manufacture under article 27.1(f) [of the Excise Directive, or] alternatively article 27.1(e) [of the Excise Directive]? – "the Third Question";

4. In the light of Articles 10 [EC] and 28 EC, what effect, if any, does it have on Member States' obligations under [Articles 20 and 27(1)(f) or, alternatively, Article 27(1)(e) of the Excise Directive] if cooking wine, cooking port and cooking cognac have been released by the Member State of manufacture from the excise movement system under [Council] Directive [92/12/EC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p.1)] into free movement within the European Union? – "the Fourth Question".'

14. The Court of Justice received the reference on 8 May 2009. The Advocate General issued her Opinion on 15 July 2010 and the Court of Justice delivered its judgment on 9 December 2010 – Case C-163/09, see: [2011] STC 465.

15. The Court of Justice answered the First Question in the sense that cooking wine and cooking port were within the definition of 'ethyl alcohol' under the first indent of Article 20 of the Excise Directive (see: Judgment [30] and *dispositif* [1]). In this they reached the opposite conclusion from that suggested by the Advocate General.

16. The Court of Justice answered the Second Question in the sense that the exemption in Article 27(1)(f) of the Excise Directive may be made conditional on compliance with conditions such as those laid down by section 4, Finance Act 1995 ("FA 1995") (restriction of the persons authorised to make a claim for recovery of excise duty which has been paid, a four-month period for bringing such a claim and the establishment of a minimum amount of repayment) only if it is apparent from concrete and verifiable evidence that those conditions are necessary to ensure the correct and straightforward application of the exemption in question and to prevent any evasion, avoidance or abuse – it being for the national court to ascertain whether that is true of the conditions laid down by section 4, FA 1995 (see: Judgment [56] and *dispositif* [4]).

17. The Court of Justice answered the Third Question in the sense that in circumstances such as those in issue in the appeal, an exemption from the harmonised excise duty for cooking liquors falls under Article 27(1)(f) of the Excise Directive (see: Judgment [36] and *dispositif* [2]).

18. The Court of Justice answered the Fourth Question in the sense that if products such as the cooking liquors in issue in the appeal which have been treated as not being subject to excise duty or as being exempted from excise duty under the Excise Directive and released for consumption in the Member State of manufacture are intended to be put on the market in another Member State, that latter Member State must treat those products in the same way in its territory, unless there is concrete, objective and verifiable evidence that the first Member State has failed to apply the provisions of the Excise Directive correctly or that, in accordance with Article 27(1) of the Excise Directive, it is justifiable to adopt measures to combat any evasion, avoidance or abuse which may arise in the field of exemptions and to ensure the correct and straightforward application of such exemptions (see: Judgment [45] and *dispositif* [3]).

19. The matter came before this Tribunal again for a Directions Hearing on 29 March 2012, at which the adjourned hearing of the appeal was fixed to be heard on 12 and 13 June 2012 and RCL was given liberty to adduce further evidence, in particular relevant expert evidence of French law on or before 1 May 2012, and HMRC were given liberty to adduce further evidence in reply to any evidence so adduced by RCL by 22 May 2012.

20. Pursuant to those Directions, RCL served a Statement by Professor Benedicte Fauvarque-Cosson, an expert in the relevant French law, dated 3 May 2012. HMRC filed an Application to the Tribunal on 25 May 2012 seeking a vacation of the hearing fixed for 12 and 13 June 2012 and an extension of time (just over 3 months) for filing their evidence in reply to Professor Fauvarque-Cosson's Statement. That Application was opposed by a letter (undated) submitted on behalf of RCL and was dismissed by the Tribunal, who nonetheless gave permission to HMRC to make another application on 12 June 2012 (provided they were prepared to continue with the hearing if the application was refused).

21. The adjourned hearing took place on 12 and 13 June 2012. In the event, Mr Beal QC (for HMRC) did not seek to renew the application for a further adjournment, but stated in his Skeleton Argument that HMRC were 'accordingly obliged to proceed to the substantive hearing without any expert evidence in reply' and wished 'to reserve the right to contend on appeal that the refusal to allow them an extension of time for service of expert evidence [was] procedurally unfair'. At the hearing, Mr Beal addressed arguments based on Professor Fauvarque-Cosson's Statement.

22. In their respective Skeleton Arguments, Mr Mercer QC and Mr Dewast (for RCL), and Mr Beal QC (for HMRC) describe the principal issue remaining in dispute in the appeal as 'whether the [cooking liquor is] exempt [from excise duty] by the operation of Article 27(1) of the [Excise] Directive' (Mr Mercer and Mr Dewast) and 'whether or not [HMRC's] seizure of the [cooking liquors] was lawful under EU law' (Mr Beal).

23. In his Skeleton Argument, Mr Beal went on to say that whether or not HMRC's seizure of the cooking liquors was lawful under EU law would turn on whether or not the excise duty is properly chargeable on the cooking liquors by HMRC, which (following the Judgment of the Court of Justice) raised the following issues:

1. Were the cooking liquors exempted from excise duty under French law, so that it is incumbent on HMRC in principle to respect that treatment?

2. If so, was the exemption provided a clear misapplication of the provisions of the Excise Directive?

3. If no exemption were properly granted (for either reason), is an exemption from excise duty on the cooking liquors nonetheless mandated in domestic UK law as a result of the ruling of the Court of Justice?

24. However, in the course of the hearing, the Tribunal raised a jurisdictional issue regarding whether it could examine and adjudicate on the legitimacy of the seizure of the cooking liquors.

25. When this issue was raised, Mr Beal submitted that following *Commissioners for H M Revenue and Customs v Jones and Jones* [2011] EWCA Civ 824, paragraph 5 of Schedule 3, Customs and Excise Management Act 1979 ("CEMA") had effect that, in the absence of a notice of claim under paragraph 3 of Schedule 3, CEMA, the seized goods (*viz*: the cooking liquors) are deemed to have been duly condemned as forfeited and that this limits the scope of the issues that RPL is entitled to ventilate in this Tribunal on their restoration appeal (*ibid.* [71(5)]).

26. The consequence is, he submitted, that it is not open to this Tribunal to conclude that the cooking liquors were legal imports illegally seized by HMRC. Our jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized cooking liquors to RCL. The rationale of *Jones v Jones* is that RPL (and other importers in similar circumstances) have or have had the opportunity to challenge the legality of the seizure in the court in condemnation proceedings by making a claim in that regard to HMRC under paragraph 3 of Schedule 3, CEMA within 1 month from the date of the notice of seizure.

27. The issue of whether the cooking liquors were or were not exempt from excise duty by operation of Article 27(1)(f) of the Excise Duty Directive or whether an exemption from excise duty is mandated in domestic UK law as a result of the ruling of the Court of Justice, in our judgment, goes to the legality of the seizure rather than to the reasonableness of HMRC's decision not to restore the seized cooking liquors to RCL. We consider that it is not open to this Tribunal to find that HMRC's refusal to restore the cooking liquors was unreasonable or otherwise legally flawed for the reason that as a matter of law the cooking liquors either did or ought to have benefitted from an exemption from excise duty. That would be to enlarge our jurisdiction by a 'side wind', which we consider we cannot do.

28. This jurisdictional issue therefore seemed at one stage to impose a barrier on this Tribunal, preventing it from determining the issue of liability to excise duty which had been raised in the appeal in 2002, had been debated at the hearing in December 2008, had formed the basis of the reference to the Court of Justice and that court's consideration and judgment, and had been the subject of both parties' Skeleton Arguments at the hearing (in June 2012).

29. The parties (with the Tribunal's encouragement) sought a way around this problem and by an email dated 29 January 2013 proposed that the Tribunal give leave out of time for a new appeal ("the New Appeal") to be made by RCL against a formal departmental review ("the Review Letter") communicated to Dechert on behalf of RCL and dated 27 September 2002, whereby Review Officer M. Farmer confirmed the decision of Officer Val Mercer to issue to RCL two assessments for excise duty dated 18 July 2002 in the amounts of £5,884 and £53,853. These assessments related, not to the cooking liquors seized as per paragraph [1] above, but to other cooking

liquors held in stock by RCL or already sold on by RCL at the time (12 July 2002) when HMRC visited RCL's premises following the seizure two days earlier of the cooking liquors as per paragraph [1] above.

30. The Review Letter makes clear that the reasons for the confirmation of the decision to issue the assessments was:

> (1) that RCL was not approved or registered to import culinary wines and spirits under any duty suspended regime – this is not denied by RCL; and
>
> (2) that RCL was not engaged in or approved for the manufacture of foodstuffs where alcohol is used as an ingredient and where exemption from excise duty may apply – this reason reflects the provisions of Article 27(1)(f) of the Excise Duty Directive, whereby *inter alia* ethyl alcohol products (such as the cooking liquors in issue) are to be exempted from excise duty when used directly or as a constituent of semi-finished products for the production of foodstuffs, filled or otherwise, and the provisions of section 4(1) and (2) FA 1995 which envisage repayment of duty following use of dutiable liquor as an ingredient in the production or manufacture of foodstuffs.

31. An appeal against the decision to issue the assessments on the second ground identified above, i.e. that RCL was not engaged in or approved for the manufacture of foodstuffs where alcohol is used as an ingredient and where exemption from excise duty may apply, would permit and require the Tribunal to determine the scope of the exemption in the light of the Judgement of the Court of Justice.

32. HMRC are prepared to consent to this procedure which they accept would enable a determination to be made by the Tribunal as to whether excise duty was properly payable in respect of the cooking liquors that are the subject of the excise duty assessments.

33. The parties also propose that the need for service of a Notice of Appeal and a Statement of Case is dispensed with and/or waived pursuant to rule 7 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"), that the New Appeal be consolidated with the current appeal (reference: LON/2002/8331) pursuant to rule 5(3)(b) of the Rules. They further propose that the former costs rules (rule 29 of the VAT Tribunals Rules 1986) should apply to the current appeal (reference: LON/2002/8331) and that that part of the consolidated appeal represented by the New Appeal should be allocated to the Complex category of cases pursuant to rule 23 of the Rules.

34. The Tribunal is content to make these Directions sought by the parties in the terms indicated in the preceding paragraph and hereby does so. We proceed to consider the issue of whether excise duty was properly payable in respect of the cooking liquors in the context of the New Appeal consolidated with the existing appeal under reference LON/2002/8331.

The relevant EU and domestic (UK) legislation

35. The relevant EU legislation is Article 27(1)(f) of the Excise Duty Directive, which provides as follows:

> '(1) Member States shall exempt the products covered by this Directive [which include ethyl alcohol] from the harmonized excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemption and of preventing any evasion, avoidance or abuse –
>
> ...
>
> (f) when used directly or as a constituent of semi-finished products for the production of foodstuffs, filled or otherwise, provided that in each case the alcoholic content does not exceed 8,5 litres of pure alcohol per 100 kg of the product for chocolates, and 5 litres of pure alcohol per 100 kg of the product for other products."

36. The UK implementing provision, section 4, FA 1995, is in the following terms:

> "4 **Alcoholic ingredients relief**
>
> (1) Subject to the following provisions of this section, where any person proves to the satisfaction of the Commissioners that any dutiable alcoholic liquor on which duty has been paid has been-
>
> (a) used as an ingredient in the production or manufacture of a product falling within subsection (2) below, or
>
> (b) converted into vinegar,
>
> he shall be entitled to obtain from the Commissioners the repayment of the duty paid thereon.
>
> (2) The products falling within this subsection are-
>
> (a) any beverage of an alcoholic strength not exceeding 1.2 per cent,
>
> (b) chocolates for human consumption which contain alcohol such that 100 kilograms of the chocolates would not contain more than 8.5 litres of alcohol, or
>
> (c) any other food for human consumption which contains alcohol such that 100 kilograms of the food would not contain more than 5 litres of alcohol.
>
> (3) A repayment of duty shall not be made under this section in respect of any liquor except to a person who-
>
> (a) is the person who used the liquor as an ingredient in a product falling within subsection (2) above or, as the case may be, who converted it into vinegar;
>
> (b) carries on a business as a wholesale supplier of products of the applicable description falling within that subsection or, as the case may be, of vinegar;

(c) produced or manufactured the product or vinegar for the purposes of that business;

(d) makes a claim for the repayment in accordance with the following provisions of this section; and

(e) satisfies the Commissioners as to the matters mentioned in paragraphs (a) to (c) above and that the repayment claimed does not relate to any duty which has been repaid or drawn back prior to the making of the claim.

(4) A claim for repayment under this section shall take such form and be made in such manner, and shall contain such particulars, as the Commissioners may direct, either generally or in a particular case.

(5) Except so far as the Commissioners otherwise allow, a person shall not make a claim for repayment under this section unless-

(a) the claim relates to duty paid on liquor used as an ingredient or, as the case maybe, converted into vinegar in the course of a period of three months ending not more than one month before the making of the claim; and

(b) the amount of the repayment which is claimed is not less than £250.

(6) The Commissioners may by order made by statutory instrument increase the amount for the time being specified in subsection 5(b) above; and a statutory instrument containing an order under this subsection shall be subject to annulment in pursuance of a resolution of the House of Commons.

(7) There may be remitted by the Commissioners any duty charged either-

(a) on any dutiable alcoholic liquor imported into the United Kingdom at a time when it is contained as an ingredient in any chocolates or food falling within subsection (2)(b) or (c) above; or

(b) on any dutiable alcoholic liquor used as an ingredient in the manufacture or production in an excise warehouse of any such chocolates or food.

(8) This section shall be construed as one with the Alcoholic Liquor Duties Act 1979, and references in this section to chocolates or food do not include references to any beverages."

RCL's submissions on the issue of whether excise duty was properly payable on the cooking liquors

37. Mr Mercer and Mr Dewast observe that section 4 FA 1995, as can be seen, provides, according to its terms, *inter alia*, a mechanism for repayment of excise duty on dutiable alcoholic liquor which has been used in the production or manufacture of food which has an alcoholic content of not more than 5 litres of alcohol per 100 kg of

the food. The repayment is to be made on a claim, which must be made by a wholesale supplier being the producer or manufacturer of the food. Claims for repayment of amounts less than £250 (a limit which may be increased by the Commissioners) will not be met.

38. Mr Mercer and Mr Dewast submit that section 4 FA 1995 should be interpreted consistently with the UK's EU obligations under the principle in *Marleasing SA v La Comercial Internacional de Alimentación* (Case C-106/89) [1990] ECR I-4135 by 'reading down' into section 4, FA 1995 the guidance given by the Court of Justice.

39. Alternatively, they submit that RPL is entitled to rely on Article 27(1)(f) of the Excise Directive to the extent that it is, on its proper interpretation pursuant to the Judgement of the Court of Justice, inconsistent with section 4, FA 1995, because Article 27(1)(f), which provides for an unconditional exemption (cf. the Judgment of the Court of Justice at [51]), has, at any rate so far as is relevant to this appeal, direct effect. They cite *Autologic Holdings plc v IRC* [2006] 1 AC 118 at [17]. They also cite *Marks & Spencer plc v Commissioners of Customs & Excise* (Case C-62/00) for the proposition that even correct implementation into domestic law by a Member State of a directive does not deprive individuals of the right to rely on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise (*ibid.* [27]).

40. The Court of Justice's answer to the Second Question (Judgment [56] see above [11]) would require the Tribunal to examine whether it was apparent from concrete, objective and verifiable evidence that the conditions in section 4, FA 1995 (*viz*: the restriction of the persons authorised to make a claim for recovery of excise duty paid, the four-month period for bringing such a claim and the establishment of a minimum amount of repayment (£250)) were necessary to ensure the correct and straightforward application of the exemption and to prevent any evasion, avoidance or abuse.

41. Mr Mercer and Mr Dewast point out that HMRC did not produce any such evidence at the hearing in December 2008, objecting in principle to do so (see: [24] and [25] of their Supplemental Skeleton dated 28 November 2008, which was with our papers).

42. Accordingly, Mr Mercer and Mr Dewast submit that the conditions referred to (which are imposed by section 4(3) and (5), FA 1995) are imposed contrary to EU law and should not be applied by the Tribunal. They note that HMRC does not propose that those conditions should be applied (see: [22] of Mr Beal's Skeleton Argument).

43. They also submit that the requirement to pay excise duty in advance of the possibility of refund (as contended for by Mr Beal) is a condition to which the application of the exemption is subject. Given that the Court of Justice had determined that the obligation imposed on Member States to grant an exemption was unconditional (Judgment [51]), the condition requiring pre-payment of excise duty must be justified by concrete objective and verifiable evidence. This was so, notwithstanding the Court of Justice's comment that Member States may give effect

to the exemption by means of a refund of excise duty paid (Judgment [53]). It was for the Tribunal to assess whether there was evidence for the necessity of the condition of pre-payment of excise duty in order to give rise to entitlement to the exemption.

44. They submit that Officer Murray's decision in the Decision Letter to refuse restoration incorporated a decision that the cooking liquors were properly seized, *inter alia* because RCL is not involved in the production or manufacture of eligible articles (i.e. foodstuffs with the permitted alcoholic content) and the Tribunal notes that Officer Farmer's decision in the Review Letter incorporated a decision that the assessments to excise duty were competent *inter alia* because RCL is not engaged in the manufacture of relevant foodstuffs. These decisions, they submit, were flawed because it is sufficient for the purposes of the application of Article 27(1)(f) that the cooking liquors were, as a matter of fact, destined for culinary use. They stress RCL EU law right not to have unlawful conditions imposed upon access to the exemption.

45. Mr Mercer and Mr Dewast further submit that all the cooking liquors concerned (all of which RCL had imported or attempted to import from France) had been released into free circulation in France in accordance with the French application of the Excise Directive.

46. The evidence that they were destined (or that it can be assumed with virtual certainty that they would in fact be used – cf the Advocate General's Opinion at [91]) for the production of foodstuffs as referred to in Article 27(1)(f) of the Excise Directive was the addition of salt and pepper to the liquors and the fact that the majority of the cooking liquors (the subject of one of the assessments) had been sold to 59 retailers, that is, to professional catering outlets.

47. They submit that 'the sole issue for this Tribunal is whether there is concrete, objective and verifiable evidence that France has failed to apply the provisions of the[Excise Directive] correctly in application of [[45] of the Judgment of the Court of Justice]. They submit that the burden of proof on that issue is on HMRC and that there is no such evidence. Therefore, they contend, the UK is obliged to respect the French treatment of the cooking liquors and that fact that they were lawfully in free circulation (whether or not this was the result of an exemption having been granted by the French tax authorities). The Court of Justice had approached the reference on that basis, as could be seen in the formulation of the Fourth Question. They submit that the system of Article 27(1)(f) does not require the 'granting' of an exemption – there is automatic exemption if the goods are for the requisite use.

48. Mr Mercer and Mr Dewast submit that HMRC's case had changed between the hearing on 10 and 11 December 2008 and the hearing on 12 and 13 June 2012. In 2008 HMRC (then represented by Mr Sarabjit Singh) had argued that the conditions in section 4 FA 1995 had not been fulfilled, in that RCL was not the right person to benefit from the exemption because it was not a manufacturer of relevant foodstuffs – so that the debate had been whether those conditions were lawful. In 2102 HMRC were arguing for the first time (in a case where duty had not been paid) that there was a requirement for duty to have been paid before exemption could be claimed.

49. They also note the Advocate General's comment that absent concrete and objectively verifiable evidence that the products in question were not free of or exempt from excise duty or that they could be used in ways contrary to the spirit and purpose of the exemption, 'the [UK] tax authorities' insistence on payment of the excise duty on the cooking liquors at issue turns out to be pure formalism which cannot be objectively justified' (her Opinion, [92]).

50. They accept that in [54] and [55] of the Judgment, the Court of Justice did not go that far, but left it to the Tribunal to determine on the basis of concrete, objective and verifiable evidence whether the conditions laid down in section 4 FA 1996 were necessary to ensure the correct and straightforward application of the exemption under Article 27(1)(f) or to prevent any evasion, avoidance or abuse.

51. They complain that HMRC's case invites the Tribunal in effect to breach the principle of effectiveness (referring to the Advocate General's Opinion at [110]) and free movement of goods and the [principle of cooperation in good faith between the Member States (*ibid.* [90]). They remind the Tribunal of Article 4(3) of the Treaty on European Union to the effect that 'pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.

52. Mr Mercer and Mr Dewast cite *Italian Republic v Commission of the European Communities* (Case C-482/98) [2000] ECR I-10861 and *UAB Profisa v Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos* (Case C-63/06) [2007] ECR I-3239. The Court of Justice had laid down in *UAB Profisa* (*ibid.* [19]) that Article 27(1)(f) of the Excise Directive:

> 'should be understood as imposing an obligation on Member States to exempt from harmonised excise duty ethyl alcohol imported into the customs territory of the European union and contained in chocolate products intended for direct use, where the alcohol content does not exceed 8.5 litres for every 100 kilograms of the chocolate products.'

53. Mr Mercer and Mr Dewast submitted that HMRC should not be permitted at this stage to advance what they said was a new case: that there was properly a requirement to pay duty before it could be refunded pursuant to the exemption and that this procedure was legal because it was tied to the end use specified in Article 27(1)(f). They made a formal application in this regard.

54. They submitted that this argument was logically prior to the issue of whether the conditions for the exemption were satisfied and the attempt to run it at the hearing on 12 and 13 June 2012 was an example of *Henderson v Henderson* abuse of process. They cited *Johnson v Gore Wood & Co* [2002] 2 AC 1 at pp.30-31, where Lord Bingham of Cornhill said in considering this question a court must make:

> 'a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before'.

55. Mr Mercer and Mr Dewast nonetheless addressed arguments to what they alleged was HMRC's new case. They made the point that the Court of Justice, when answering the Fourth Question had not stressed the issue of whether an *exemption* had been granted in France, but referred instead to the *treatment* of the cooking liquors in France 'as not being subject to excise duty or as being exempted from that duty under [the Excise Directive] and released for consumption in the Member State of manufacture', stating that such products, where they 'are intended to be put on the market in another member State, the latter must treat those products in the same way unless there is concrete, objective and verifiable evidence' that France had failed to apply the provisions of the Excise Directive correctly or that it was justifiable to adopt measures to combat evasion, avoidance or abuse (see Judgment [45]).

56. Regarding the evidence of Professor Fauvarque-Cosson, Mr Mercer and Mr Dewast submitted that the burden of proof was on HMRC to show the failure of France to apply the exemption correctly.

HMRC's submissions on the issue of whether excise duty was properly payable on the cooking liquors

57. Mr Beal points out that under the provisions laid down in section 4 FA 1995, repayment of duty on cooking wine, cooking port and cooking cognac is possible, where the exemption applies.

58. He does not submit (as Mr. Singh had done at the December 2008 hearing) that RCL is not entitled to duty relief under article 27(1)(f) because it was not engaged in the manufacture of relevant foodstuffs. He said that HMRC was not any longer relying on the requirement in section 4 FA 1995 that the user of the cooking liquors must make a claim (or on the time limit or the amount limit for any such claim) but he did submit that it was law for the UK to operate a refund system which was tied in to end use of cooking liquors.

59. He submitted, however, that the proper course would have been for RCL to have paid excise duty on the cooking liquors and then seek a refund of the duty once appropriate proof of use (in the manufacture of foodstuffs) could be demonstrated. That would have permitted the exemption to be applied in a correct way in the UK and is the mechanism provided by section 4(1) FA 1995 and a course of implementation of the exemption in Article 27(1)(f) which the Court of Justice has explicitly endorsed (Judgment [47]).

60. Mr Beal analysed the Judgment of the Court of Justice. He noted that the Court of Justice had observed that exemptions and chargeability to excise duty must be applied in a uniform way in the Member States for the sake of the internal market (Judgment [38] to [40]). He also recognised that the Court of Justice had rules that exemption from duty by one Member State had accordingly to be recognised by the other Member States (Judgment [41]).

61. But he submitted that the Court of Justice had made it clear that a Member State (the UK) would not have to be bound by an incorrect application of the Excise Directive by another member State (France) (Judgment [43]) – this, he referred to as

"Option 1". The Court of Justice had also made it clear that it was open to Member States to adopt measures to combat evasion, avoidance and abuse (Judgment [43]) ("Option 2"). HMRC were not relying on Option 2. They were, however, making a case that Option 1 was open to them – namely that France had incorrectly applied the Excise Directive to the cooking liquors and the concrete, objective and verifiable evidence (cf. Judgment [44]) establishing this was contained in Professor Fauvarque-Cosson's Statement.

62. Mr Beal also submitted that the Court of Justice had made it clear that the application of the exemption under Article 27(1f) of the Excise Directive depends on the end use of the products in question (Judgment [49]).

63. He drew attention to the conclusion of the Court of Justice in its Judgement at [53]:

> 'Consequently, although the Member States may give effect to the exemption under Article 27(1)(f) of [the Excise Directive] by means of a refund of excise duty paid, depending on how the products in question are used, they cannot, on the other hand, make the application of that exemption conditional on compliance with conditions which are not proven by concrete, objective and verifiable evidence, to be necessary to ensure the correct and straightforward application of such an exemption and to prevent any evasion, avoidance or abuse.'

64. He submitted that there was no proof of the final use of the products (cooking liquors) which were the subject of the assessments, and without proof of use for a qualifying purpose, the exemption does not apply as a matter of EU law.

65. Mr Beal submitted that it followed from the fact that the Court of Justice had authorised the giving of effect to the exemption by means of a refund of excise duty that there was no exemption at source. He submitted that the Court of Justice had outlined two different ways in which the exemption could be implemented: either by a domestic implementation, which could be by means of a refund of excise duty paid, depending on how the products in question are used (but without the imposition of unnecessary conditions) or by recognition of another Member State's implementation, unless there was evidence that such implementation was incorrect.

66. He submitted that it was an assumption, rather than a finding, that the cooking liquors in issue had been in free circulation in France. The Advocate General had said (her Opinion at [84]) that the cooking liquors had been released into free circulation because, in the view of the French authorities, no excise duty at all was payable on them. She did not criticise this approach because she agreed that no excise duty was payable, but in this she had been overruled by the Court of Justice (Judgment [30]). In any case, Professor Fauvarque-Cosson's evidence was that the French system had proceeded on the basis that cooking wines fall within an exemption regime made conditional on the making of a *déclaration préalable* (her Statement, [29]).

67. Mr Beal invited the tribunal to consider the basis on which RCL could reasonably contend that the cooking liquors had been in free circulation in France, in such circumstances that the UK was obliged, pursuant to the answer given by the Court of Justice to the Fourth Question to treat them in the same way in its territory. He

submitted that they could legally only have been in free circulation in France either on the basis that no excise duty was payable on them at all (a view supported by the Advocate General, but rejected by the Court of Justice, and, incidentally not supported by Professor Fauvarque-Cosson's Statement), or on the basis that a French exemption regime had applied to them.

68. Professor Fauvarque-Cosson's evidence was that Article 27(1)(f) of the Excise Directive had been transposed into French law by Article 302 D bis II (d) of the *Code général des imp□ts*, promulgated on 29 August 2001. Before that, in 1999, a Circular, published in the *Bulletin Officiel des Douanes* replaced a former French system based on the "*droit de fabrication*" with one based on the European regime of exemptions (her Statement, [16], [18]).

69. Professor Fauvarque-Cosson had stated that the French exemption regime was linked to the use of the products, as required by Article 27(1)(f) of the Excise Directive. "*Opérateurs*" in the "*secteur des preparations alimentaires*" required to be identified and such *opérateurs* could only benefit from the exemption if they had made a "*déclaration préalable*", a preliminary declaration given to the French customs authorities. She comments (her Statement, [21]):

> 'This requirement of a "*déclaration préalable*" is very important. It demonstrates that *opérateurs* must comply with various requirements. These requirements are imposed by the [Circular] precisely because the French regime is that of an exemption. If there were total freedom, no "*déclaration préalable*" would be necessary. Once this *déclaration préalable* has been accomplished, French law does not impose any sort of "*document d'accompagnement*" [Accompanying Administrative Document]: the goods are no longer excise goods and are in free circulation.'

70. Users of relevant goods (for example manufacturers of foodstuffs) ("*utilisateurs*") and suppliers and intermediaries, such as wholesalers ("*fournisseurs et intermédiaires (comme les marchands en gros)*") make specific declarations applicable to their status (*déclaration préalable de profession spécifique*) and, upon such declaration, each one receives from the French customs authorities a specific identification number which they must use in all their transactions (Professor Fauvarque-Cosson's Statement, [22]).

71. (We note at this point that there is evidence in our papers that Ets Ravel of St Galmier (the supplier of RCL (see paragraph 6(d) of the Agreed Statement of Undisputed Facts at Appendix 1)) was issued by the *Douanes at Droits Indirects* authority at Saint-Etienne, France, on 24 October 2000, with an identification number FR 93 397 E 0009. But Mr Beal objects that this number cannot relate to the exemption regime established in 2001 and must be for use on AAD and SAD forms.) We also have a copy of a document (apparently accompanying a consignment of cooking wine and issued by Ravel quoting that identification number) which states that:

> '*Ce vin de cuisine, rendu impropre à la consummation à raison de 10g de Sel et 10g de Poivre par litre de vin.*

Ce vin devient alors un ingredient pour sauces et sauces préparées; condiments et assaisonnements, composés, et deviant livre de circulation.'

that is, that the cooking wine with the addition of salt and pepper becomes an ingredient for sauces, etc. and goes into free circulation. But Mr Beal objects that there is no indication that this document complies with the requirements described by Professor Fauvarque-Cosson, noting that the terminology used ('*le profession de fabricant*') is not the same as that described in her Report. We also have a copy of a document certifying that a French customs official had been present (presumably at Ravel's premises) on 11 July 2002 (the day after the seizure of cooking liquors in issue in this appeal) to witness the *dénaturation* by the addition of 10 grams of salt and 10 grams of pepper to 4,290 litres of cognac, 3,150 litres of *Vin Cuisine Blanc*, and 3,000 litres of *Vin Cuisine Rouge* and confirming that the appropriate *bordereaux de dénaturation* had been archived. Mr Beal objects that this is not confirmation of the use of the product or of the product's being passed to an identified user of it and so does not demonstrate compliance with the French exemption regime identified by Professor Fauvarque-Cosson.

72. "*Fournisseurs*" (manufacturers, importers, suppliers) must have a list of all their customers and may only supply to them and upon evidence of their customers' own identification number, indicating that the customers have complied with their own obligation of prior notice (to make a *déclaration préalable*). Professor Fauvarque-Cosson states that 'failing such evidence, the product must be taxed' (her Statement, [23]).

73. "*Utilisateurs*" (users of the products as food ingredients) must provide evidence of prior notification (*déclaration préalable*) in ordering the products and must keep a detailed accounting ("*une comptabilité matière*") on a pre-numbered page book of all the products purchased and used (Professor Fauvarque-Cosson's Statement, [24]).

74. Professor Fauvarque-Cosson states (her Statement [25]) that these conditions are applicable to the *opérateurs* established in France but are not imposed in intracommunity exchanges 'no doubt to avoid creating a restriction on free movements of goods'. She adds that French customs authorities carry out regular verification visits to *fournisseurs* and *utilisateurs* (which include close verification of the volumes of salt and pepper being added) and 'in consequence *fournisseurs* / *utilisateurs* are authorised to apply the exemption to products to which salt and pepper have been added in the requisite concentrations (Professor Fauvarque-Cosson's Statement, [27]).

75. Mr Beal informed the Tribunal that HMRC invited RCL to provide evidence of the operation of the French system on the facts of this case but that it had declined to do so. He submits that there is accordingly no evidence that RCL's supplier in France made the appropriate notification in the course of supplying RCL and that in the event that no such declaration was made the goods should have been taxable. He adds that there is no evidence that RCL as an intermediary made any equivalent declaration (as was accepted in oral submissions by Mr Mercer) and that RCL's customers clearly have not made any declarations at all.

76. He submitted that the result is that the products (cooking liquors) cannot be shown to have been exempted from excise duty under the French legal regime and there is accordingly no exemption granted by another Member State which HMRC are compelled to respect in their treatment of the products in question.

77. Mr Beal submitted that insofar as RCL seeks to rely on the non-application of the French regime for customers in another Member State (see [75] above) that cannot establish an exemption from duty granted under the French implementation of the Excise Directive. It may mean that no duty is imposed in France on the products, but it does not mean that an actual exemption from duty has been granted.

78. He submitted that since there is no valid and subsisting (French) exemption in relation to these goods, the UK is free to treat the cooking liquors as subject to its own implementation of the Excise Directive – i.e. the scheme provided by section 4, FA 1995 but without any reliance being placed on the conditions criticised by the Court of Justice.

79. Mr Beal accepts that if the French legal regime operates in the way described by Professor Fauvarque-Cosson there is no risk of non-implementation of the Excise Directive by France – France has simply not granted any exemption for these products under its own domestic legal provisions.

80. He points out the inconsistency between Professor Fauvarque-Cosson's analysis and the evidence of M Espous which suggested that no excise duty was imposable on cooking wine.

81. He also comments that provided that cooking liquors despatched from France to another Member State are not treated as exempt from duty under French law, there is no wrongful implementation of the Directive. He submits that in that case 'France simply declines to impose any excise duty on the goods and leaves the proper treatment of duty to the Member State of receipt (here, the UK).' He submits that it would only be if cooking liquors removed from France to another Member State were treated as exempt *without any requirement for their final use to be determined*, that French law would fail to comply with Article 27(1)(f) of the Excise Directive, read in the light of [49] of the Judgment of the Court of Justice. He comments that 'happily, that does not seem to be the position'.

82. Mr Beal submits that an exemption from duty of the cooking liquors is not nonetheless mandated in domestic UK law as a result of the Judgment of the Court of Justice. He argues that since no exemption has been granted (correctly or incorrectly) under French law and no duty was paid in France, the UK is entitled to exercise its jurisdiction to require confirmation of the eventual use of the goods as a pre-cursor to repayment of the excise duty upon proof of use. No evidence of specific use of the cooking liquors in issue has been produced.

83. He submits that as excise duty was payable on the cooking liquors on importation (but subject to a refund on proof of appropriate use being shown) the cooking liquors seized on 10 July 2002 were validly seized by HMRC.

84. Mr Beal submitted that unless RCL could demonstrate a directly effective right to an exemption from excise duty for the cooking liquors in issue, then section 4 FA 1995 cannot be 'trumped' – that is, the force of section 4 FA 1995 as a provision of applicable domestic law is not impaired.

85. He submitted that Article 27(1)(f) of the Excise Directive provided for no directly effective exemption and the Court of Justice, in its Judgment, has not indicated that section 4(1) or (2) FA 1995 is invalid.

86. Mr Beal submitted that his submissions to the Tribunal on the appeal hearing in June 2012 involved no abuse of process. In Mr Singh's Supplemental Skeleton Argument for the December 2008 hearing, HMRC had made it clear that their case was that exemption from excise duty was linked to the final use of the cooking liquors in the preparation of foodstuffs. Although some of the reasoning adopted by HMRC at earlier stages of the dispute no longer stood, HMRC's view had always been that excise duty was due (which had been confirmed by the Court of Justice in its Judgment, and also in *Skatterverket v Gourmet Classic Limited* (Case C-459/06), referred to at length at the hearing in December 2008) and that no exemption fell to be applied. This was still HMRC's case. It was unobjectionable, and to be expected, that parties would modify their case to take account of the Judgment of the Court of Justice on a reference. Further, following the procedural step of admitting an appeal against the excise assessments, fairness required that HMRC should be allowed to submit that payment of excise duty was due and the reasons therefor.

Discussion and decisions

87. We start by considering the issue of whether excise duty was properly payable on the cooking liquors, both those seized on 16 July 2002, and those in respect of which the assessments were raised on 18 July 2002. We consider this issue in the context of the New Appeal. We regard it as outside our jurisdiction to consider it in the context of the original appeal for the reasons given above at [27].

88. This topic was dealt with by the Court of Justice in its consideration of, and answer to, the Fourth Question – see [37] to [45] of the Judgment.

89. We find as a fact that all the cooking liquors concerned were 'treated as not being subject to excise duty or as being exempted from that duty under [the Excise Directive] and released for consumption in [France, being] the Member State of manufacture' (cf. Judgment [37]). The French Government confirmed at the hearing before the Court of Justice that the cooking liquors at issue are goods which the French tax authorities do not regard as subject to excise duty at all ([84] of the Advocate General's Opinion). This was also confirmed by the evidence of M. Allo, *Chef du Bureau F/3, Contributions indirectes Chef du Bureau F/3, Contributions indirectes* at the *Direction Générale des Douanes et Droits indirects* of the French Ministry of Economy, Finance and Industry, to which HMRC made no objection at the hearing in December 2008, and M. Imola, president of the *Syndicat National des Producteurs d'Alcools et produits dérivés pour metiers de bouche* and Managing Director of *Bardinet Gastronomie*, who evidence likewise was not objected to by HMRC at the hearing in December 2008. We accept that Professor Fauvarque-

Cosson's evidence is to contrary effect and we have not been able to reconcile the differences between her evidence and the other evidence mentioned. It is sufficient to say that we prefer that other evidence on this point.

90. The Court of Justice went on to say (at [41] to 45] of the Judgment), as follows:

> '41. The uniform application of the provisions of [the Excise Directive] requires that the imposition or not of excise duty on a product and the exemption from duty of a product in a Member State must, as a rule, be recognised by all the other Member States.
>
> 42. Any other interpretation would compromise the attainment of the objective of [the Excise Directive] and would be likely to hinder the free movement of goods.
>
> 43. However, in that context, a Member State cannot be bound by an incorrect application of the provisions of [the Excise Directive] by another Member State not denied the possibility, recognised by the twenty-second recital in the preamble thereto and by Article 27 of that directive, of adopting measures to combat any evasion, avoidance or abuse which may arise in the field of exemptions and to ensure the correct and straightforward application of such exemptions.
>
> 44. Nevertheless, the finding that such measures have been applied incorrectly or the adoption of such measures must be based on concrete, objective and verifiable evidence (see, to that effect, Case C-482/98 *Italy v Commission* [2000] ECR I-10861, paragraphs 51 and 52).
>
> 45. In those circumstances, the answer to the fourth question is that, if products such as the cooking wine, cooking port and cooking cognac in issue in the main proceedings, which have been treated as not being subject to excise duty or as being exempted from that duty under [the Excise Directive] and released for consumption in the Member State of manufacture, are intended to be put on the market in another Member State, the latter must treat those products in the same way in its territory, unless there is concrete, objective and verifiable evidence that the first Member State has failed to apply the provisions of that directive correctly or that, in accordance with Article 27(1) thereof, it is justifiable to adopt measures to combat any evasion, avoidance or abuse which may arise in the field of exemptions and to ensure the correct and straightforward application of such exemptions.'

91. Mr Beal (for HMRC) disclaimed any reliance on the need to adopt measures to combat evasion, avoidance or abuse and ensure the correct and straightforward application of the exemptions (his 'Option 2' – see, above [61]).

92. The question for us is whether there is the necessary 'concrete, objective and verifiable evidence' that France has failed to apply the provisions of the Excise Directive correctly. We consider that the burden of proof in establishing this proposition lies on HMRC, because what they seek to establish is an exception to the general rule referred to by the Court of Justice at [41] of the Judgment. It is also an exception to the principle of cooperation between Member States.

93. It has been clear since the Court of Justice's decision in this case (9 December 2010) (and arguably since the Court's decision in *Gourmet Classic* on 12 June 2008) that cooking liquors have been correctly characterised as 'ethyl alcohol' and within the excise duty regime pursuant to Article 20 of the Excise Directive. The correct position in 2002 was, we find, unclear (see: Mr Allo's and Mr Imola's evidence, agreed fact 18 and, indeed, the facts of *Gourmet Classic*).

94. The Judgment of the Court of Justice does not give explicit guidance on whether a Member State's application of the Excise Directive is to be regarded as correct or incorrect by reference to the relevant law as interpreted at the time of the event in relation to which a judicial decision comes to be made, or the time of the judicial decision itself. On the basis that the Court of Justice's interpretation in its Judgment declares the meaning of Article 20 as it has always been, we conclude that HMRC have discharged the burden on them of showing that (insofar as France treated the cooking liquors as outside the application of the Excise Directive at all – i.e. as not being within the characterisation of ethyl alcohol) France's application of the Excise Directive was incorrect. Therefore we conclude that the UK is not bound to treat the cooking liquors as outside the scope of the Excise Directive.

95. We find that France has not treated the cooking liquors as exempt under Article 27(1)(f) of the Excise Directive. The evidence referred to at [89] above was that France treated the cooking liquors as not subject to excise duty at all. This would exclude exempt treatment. We accept Mr Beal's submissions (in particular those based on Professor Fauvarque-Cosson's evidence) that RCL has not established that France treated the cooking liquors as exempt from duty under Article 27(1)(f) of the Excise Directive. The documentary evidence recalled at [71] above does not establish this either.

96. We also accept Mr Beal's submission that the Judgment of the Court of Justice makes clear that there can be no exemption at source, without any reference to how the products in question are used. We consider that this is inherent in the Court's agreement that 'the Member States may give effect to the exemption under Article 27(1)(f) of [the Excise Directive] by means of a refund of excise duty paid, depending on how the products in question are used' and that it also follows from the wording of Article 27(1)(f) itself, applying the exemption to products 'when used directly or as a constituent of semi-finished products for the production of foodstuffs ...'. The exemption is, as Mr Beal submitted, tied in to the end use of cooking liquors. We cannot accept the submission of Mr Mercer and Mr Dewast that it is sufficient for the purposes of Article 27(1)(f) that the cooking liquors were, as a matter of fact, destined for culinary use. The French regime, as described by Professor Fauvarque-Cosson's evidence, with the stress of the various *declarations préalables* made, is also inconsistent with a general 'at source', automatic, exemption for cooking liquors.

97. It follows that we conclude that the UK is not obliged, by the answer given by the Court of Justice to the Fourth Question, to recognise the French treatment of the cooking liquors.

98. We turn now to consider whether, in the light of the Judgment of the Court of Justice, the UK could properly require the payment of excise duty on the cooking liquors in issue pursuant to section 4, FA 1995.

99. Here we consider that Mr Beal is on strong ground when he bases his submissions on [53] of the Judgment – the Court of Justice's recognition that a Member State may give effect to the exemption under Article 27(1)(f) of the Excise Directive by means of a refund of excise duty paid, depending on how the products in question are used.

100. We do not accept the submission of Mr Mercer and Mr Dewast that the requirement to pay duty before it can be refunded on proof of a qualifying use of the products concerned is a condition, to compliance with which the exemption is subject. It is a direct consequence of the explicit link in the language of Article 27(1)(f) of the Excise Directive between the exemption and the use of the products to be exempted. Once a use within Article 27(1)(f) is shown the duty paid must be refunded. It does not prejudice the unconditional nature of the exemption, because once the use is shown the benefit of the exemption accrues unconditionally.

101. Nor do we accept that HMRC is guilty of any abuse of process in advancing the contention that an exemption with refund of excise duty paid is a legitimate implementation of the Excise Duty Directive. We accept Mr Beal's submissions recorded at [86] above on this point and dismiss RCL's application to strike out that part of the proceedings concerned with HMRC's 'new argument'.

102. We conclude, therefore, that excise duty was properly payable on the cooking liquors, both those seized on 16 July 2002, and those in respect of which the assessments were raised on 18 July 2002. No 'reading down' of the guidance given by the Court of Justice into section 4, FA 1995, or invocation of the direct effect of Article 27(1)(f) of the Excise Directive can avail RCL on this point. The establishment in the UK of a system of exemption with refund of excise duty paid is, in our judgment, immune to either of these attacks.

103. It follows that we must dismiss the New Appeal.

104. We turn now to consider the original appeal – against HMRC's refusal to restore the seized cooking liquors. On this appeal, our jurisdiction is to consider whether we are satisfied that HMRC could not have reasonably arrived at the decision it did – see: *Jones and Jones* at [43].

105. The reasons given by Officer Murray in the Decision Letter were:

1) whether the goods were liable to excise duty – which is an irrelevant consideration (see: *Jones and Jones*);

2) the fact that the importation did not comply with the Excise Goods (Accompanying Documents) Regulations 2002 and were not accompanied by an AAD – which led Officer Murray to the conclusion that the goods were liable to forfeiture pursuant to regulation 24 of those Regulations – again, an irrelevant consideration;

3) Officer Murray's view that the fact that RCL were not themselves involved in the production or manufacture of 'eligible articles' qualifying for excise duty relief under the Excise Duty (Relief On Alcoholic Ingredients) Regulations 1978 disqualified RCL for such relief . Since HMRC have (in consequence of the Court of Justice's decision (Judgment [56] – the answer to the Second Question)) disclaimed any reliance on this condition, this reason must now be viewed as irrational;

4) Officer Murray's view that the quantity of excise goods represents a significant quantity which may damage UK trade;

5) The fact that RCL had imported these type of excise goods on previous occasions without contacting Customs to establish the correct position;

6) Officer Murray's view that the claim made by Mr Chalopin (the Marketing Director of RCL) that RCL had had a previous visit from Customs and had been told that the goods were not subject to duty was inaccurate.

106. The additional reasons given in HMRC's Statement of Case which we can take into account (see: *Commissioners of Customs and Excise v Alzitrans SL* [2003] EWHC 75 (Ch), cited by Mr Beal) were:

1) that the goods were imported for culinary purposes and were therefore fit for human consumption and did not qualify under the exceptions to excise duty set out in the Statement of Case 'and the goods were consequently liable to excise duty' – this is, of course, an incomplete account of the impact of the Excise Duty Directive and does not mention the possibility of a refund of duty on proof of qualifying use;

2) that RCL had failed to account for the duty and so the goods were liable to forfeiture – strictly, an irrelevant reason following *Jones and Jones*;

3) that it was in line with HMRC's policy not to restore the goods and that it was not a case of exceptional hardship;

107. Mr Beal submitted that the fact that RCL has been unable to establish the end use of the excise goods (having not accounted for excise duty) was a reason for upholding the decision to refuse restoration.

108. On consideration of all the reasons advanced, we have concluded that the decision to refuse restoration without expressly informing RCL of the procedure it should follow, namely to pay the excise duty and seek a refund once appropriate proof of use (in the manufacture of foodstuffs) could be demonstrated, caused the decision to be fundamentally flawed.

109. It is clear why RCL was not expressly informed of the procedure – Officer Murray thought that, as RCL were not themselves involved in the production or manufacture of foodstuffs, they were ineligible to make a claim. We now know that this is an impermissible condition for qualification for the exemption (see Judgment [56]) and Mr Beal has told us that HMRC no longer seeks to apply that condition. We therefore regard Officer Murray's reliance on it as irrational.

110. Furthermore, we consider that it is relevant at this point to have regard to the evidence that RCL's use of the cooking liquors which it successfully imported was overwhelmingly likely to lead to their use in the manufacture of foodstuffs giving rise to a qualification for the exemption by way of refund of duty paid. Although no appropriate proof of any specific use has been shown, we find, from the evidence of

RCL's trade, that in all probability all cooking liquors taken into stock by RCL are in fact eventually used in the manufacture of foodstuffs giving rise to qualification for the exemption.

111. In addition, it appears to us that it was intrinsically unfair and unjust to RCL to refuse restoration of the cooking liquors thereby rendering impossible the eventual use of them which would qualify for a refund of any excise duty paid.

112. That being the position it is clear that RCL has been materially prejudiced by HMRC's decision to refuse restoration without expressly informing them of the procedure it should follow (see [108] above).

113. Officer Murray's view that the quantity of excise goods imported by RCL without payment of excise duty represents a significant quantity which may damage UK trade, and the fact that RCL had imported these type of excise goods on previous occasions without contacting Customs to establish the correct position, do not seem to us to be reasonable grounds for a refusal to offer to restore the cooking liquors on payment of the excise duty due, with the assurance that the duty would be refunded when appropriate proof of use in the manufacture of foodstuffs was shown. Officer Murray was, of course, proceeding on the premise (now known to be incorrect) that RCL could never qualify for a refund of excise duty because it was not itself a manufacturer of foodstuffs. There was no rational expectation that RCL's imports would damage legitimate trade, because the overwhelming practical likelihood was that they would be used in the legitimate manufacture of foodstuffs and so no (or minimal) net excise duty would be capable of being levied - once entitlement to refunds was taken into account. It can also be observed that the conditions (now not relied on by HMRC and in all likelihood illegal in the light of the Judgment of the Court of Justice) as to the minimum amount of duty reclaimable and the time limit in which claims were required to be made, may well have contributed to Officer Murray taking the view that sufficient of the excise duty payable on importation would not be reclaimable as to cause non-payment of the duty to impact adversely on legitimate trade in the UK. Such reasoning can be seen to be irrational in the light of the Judgment of the Court of Justice.

114. Nor do we regard Officer Murray's view that the claim made by Mr Chalopin (the Marketing Director of RCL) that RCL had had a previous visit from Customs and had been told that the goods were not subject to duty was inaccurate as a reasonable ground to refuse to offer restoration of the cooking liquors on payment of the duty with the assurance that the duty would be refunded on proof of appropriate use being given. We consider that it is more likely than not that Mr Chalopin at all relevant times *bona fide* believed that the cooking liquors could legally be imported into the UK from France without payment of excise duty.

115. The reason for the refusal to offer restoration which was given in the Statement of Case, namely that the goods were imported for culinary purposes and were therefore fit for human consumption and did not qualify under the exceptions to excise duty 'and the goods were consequently liable to excise duty' is not a reasonable ground for the decision. It is, of course, an incomplete account of the

impact of the Excise Duty Directive and does not mention the possibility of a refund of duty on proof of qualifying use.

116. The reason for the refusal to offer restoration given in the Statement of Case that it was in line with HMRC's policy not to restore the goods is in our judgment inadequate to support the reasonableness of the decision. HMRC's policy ought to have – but did not, for obvious reasons – take account of the correct legal effect of the exemption from excise duty provided for by Article 27(1)(f) of the Excise Directive.

117. As recorded above, Mr Beal submitted that the fact that RCL has been unable to establish the end use of the excise goods (having not accounted for excise duty) was a reason for upholding the decision to refuse restoration. We do not understand how RCL could have established the end use of excise goods which had been seized by HMRC. As we have indicated above, we regard it as reasonably certain that if the cooking liquors had not been seized their end use would have been one which would have qualified them for exemption from excise duty pursuant to Article 27(1)(f) of the Excise Directive. This submission does not, therefore, establish a reasonable ground for the decision.

118. We therefore conclude that Officer Murray's decision to refuse restoration without informing RCL of its entitlement to a refund of duty on proof of appropriate use of the cooking liquors could not have been reasonably arrived at.

119. We therefore allow the original appeal and direct HMRC to conduct a further review of the original decision (by Officer N Spurr of the Post Seizure Unit) dated 28 August 2002 in accordance with section 16(4) Finance Act 1994. The further review should take full account of the findings and conclusions in this Decision and should be conducted by an officer with no previous connection to this case.

120. We are aware that our decisions may give rise to costs implications. We will indicate that we are presently minded to make a direction for the payment of a proportion of RCL's costs by HMRC (but not all of them, because we have dismissed the New Appeal). This is because we have allowed the original appeal and the basis on which we have decided the New Appeal (holding that the cooking liquors were subject to excise duty on importation) is different from that originally argued for by HMRC and followed guidance from the Court of Justice obtained on a reference made against the opposition of HMRC. However, we give general liberty to apply for a costs direction. Any party applying should do so in writing within two months of the date of release of this Decision. The Tribunal hopes that the parties may be able to reach an agreement as to the consequences in costs of this Decision.

Right to apply for permission to appeal

121. This document contains full findings of fact and reasons for our decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN WALTERS QC
JUDGE OF THE FIRST-TIER TRIBUNAL
RELEASE DATE:

5

APPENDIX 1

DECISION OF THE TRIBUNAL FOLLOWING THE HEARING ON 10 AND 11 DECEMBER 2008 STAYING THE PROCEEDINGS AND GIVING REASONS FOR MAKING THE REFERENCE TO THE COURT OF JUSTICE

DECISION

Introduction and facts

1. This is an appeal against a decision by Mr. G. A. Murray, a Review Officer of the Respondent Commissioners ("HMRC") communicated to Dechert, then acting on behalf of Repertoire Culinaire Ltd ("the Appellant") by a letter dated 17 October 2002 ("the Decision Letter"). Mr. Murray's decision was to refuse restoration of certain goods namely, 2800 litres of white wine, 2800 litres of red wine, 160 litres of port and 80 litres of cognac.

2. The white wine and the red wine was 11% alcohol by volume (ABV), the port was 19% ABV and the cognac was 40% ABV.

3. The Decision Letter contained the statement that "It is evident that the wine, port and cognac had salt and pepper added to them, the goods were 'undrinkable' and intended for culinary purposes".

4. The CMR document (consignment note) accompanying the goods described them as '*vin de cuisine*'. The invoice addressed to the Appellant from the supplier of the goods, Ravel S.A. of St-Galmier, France, gives the added description '*salé-poivré*' against each of the goods and the customs code 2103909089. In this Decision we adopt a description of the goods as "cooking wine", "cooking port" and "cooking cognac", and generally as "cooking liquors".

5. Restoration of the cooking liquors was refused on the grounds, principally, that HMRC considered that they "were subject to UK excise duty at the normal rates for alcohol".

6. We attach to this Decision as Appendix 1 the text of an "agreed statement of undisputed facts" which the parties put before us. From this statement it appears (see: paragraph 18 thereof) that the position as at 19 July 2007 was that there was no agreement within the Community as to how the cooking liquors subject to this appeal should be treated. Some Member States took the view that cooking wine is not within the scope of excise duty under EC Directive 92/83/EEC ("the Directive") and therefore entitled to move freely within the EU without any accompanying document.

7. There appear to be conflicting opinions given by the Excise Committee on the issue of whether cooking liquors are subject to excise duty under the Directive. Mr. Mercer QC, for the Appellant, refers to CED No. 234 of 1997, which appears to be supportive of the interpretation for which he contends, whereas Mr. Singh, for HMRC, claims support for his (contrary) contention in CED No. 365 of 2001 and CED No. 372 Final of 2002. The Tribunal notes, however, that the guidelines issued under reference CED No. 373 Final of 2002 were not unanimously approved.

8. The Tribunal received a Witness Statement from M. Albert Allo, *Chef du Bureau F/3, Contributions indirectes* at the *Direction Générale des Douanes et Droits indirects* of the French Ministry of Economy, Finance and Industry, to which HMRC made no objection. We accept the statements of fact made in that Witness Statement and in the other Witness Statements to which we make reference below.

9. M. Allo states that at the meeting of the Excise Committee on 22 November 2004, the Commission tabled a proposal for new guidelines (CED No. 497 of 2004) which would cancel the guidelines in CED No. 372 Final of 2002 and propose to consider cooking wine and cooking cognac as aromas which benefit for the exemption from excise duty provided for under article 27.1(e) of the Directive, instead of article 27.1(f).

10. M. Allo further states that by then the position of Member States was confused, as recorded in the minutes of the Excise Committee held on 24 and 25 November 2005 (CED No. 505 of 2005).

11. From M. Allo's evidence the Tribunal finds as follows.

12. The position of France and Ireland is that cooking liquors are not products covered by the Excise Directive and may circulate freely within the European Union without the need for any accompanying document.

13. Apparently France is the only producer of cooking wine and has a long well established practice of dealing with cooking wine. French Customs are well aware of the nature of cooking liquors which have been tested in an independent laboratory. From these tests it has been concluded that cooking liquors can only be used as food preparation. French Customs are equipped with appropriate means of control of the movements of cooking liquors and have had no history of fraud or abuse in their use.

14. It is not possible (at any rate as a matter of economic practicality) either to reverse the mixing process to separate the alcoholic beverage from the pepper and salt or to isolate the alcoholic content of the wine in its entirety.

15. M. Allo further states that having regard to the extent of confusion among Member States on this issue, a decision of the Court of Justice would be welcome and the French Government would consider intervening in judicial proceedings before the Court of Justice. (It should be noted that M. Allo's

Statement was made (on 3 April 2007) before the case of *Gourmet Classic* – see paragraph 21 below – and also that the French Government apparently took no part in the proceedings before the Court of Justice in that case.)

16. M. Allo also states that the Excise Committee has given consideration to the classification of cooking liquors as aromas which benefit from the exemption from excise duty provided for under article 27.1(e) of the Directive, instead of article 27.1(f).

17. The Tribunal also received a Witness Statement from M. Alain Imola, president of the *Syndicat National des Producteurs d'Alcools et produits dérivés pour metiers de bouche* and Managing Director of *Bardinet Gastronomie*, which was not objected to by HMRC. M. Imola states that in both capacities he has acquired substantial knowledge of the operations of the exportation business of cooking liquors throughout the European Union. He states with reasons his opinion that cooking liquors are not subject to excise duty.

18. The Tribunal also received a Witness Statement from M. d'Espous, the Managing Director of the Appellant, again not objected to by HMRC. M. d'Espous states that the Appellant has sold cooking liquor to 59 restaurants, 3 outside caterers, 3 hotels and one wholesaler, whose customer base consists entirely of restaurants. He confirms that the Appellant's customers use cooking liquor purchased from the Appellant as an ingredient incorporated into foodstuffs. He confirms that even before incorporation into a sauce or dish, the alcohol content of cooking wine is never above 5%. After incorporation, because of the process of simmering, the alcohol content is further diluted.

19. Between the time when the appeal was lodged (on 4 November 2002) and the substantive hearing (10 and 11 December 2008) the issues debated between the parties have been refined. At the hearing the Tribunal was invited to adjudicate on two issues, as follows:

    1) Are cooking liquors products subject to excise duty under the Directive?; and

    2) If so, are cooking liquors exempt from excise duty by application of article 27 of the Directive?

20. It was the Appellant's submission that we ought to refer questions on these issues to the Court of Justice of the European Communities ("ECJ"). HMRC opposed this.

21. The first issue has already been considered by the ECJ in the reference in *Skatteverket v Gourmet Classic Limited* (Case C-459/06). On 12 June 2008 the ECJ delivered a judgment in that case in which it ruled that "the alcohol contained in cooking wine is, if it has an alcoholic strength exceeding 1,2% by

volume, to be classified as ethyl alcohol as referred to in the first indent of article 20 of [the Directive]".

22. In the light of the judgment of the ECJ in *Gourmet Classic*, HMRC submit that the first issue is now settled in their favour and that there is no sensible basis on which the same question can be put to the ECJ again. As to the second issue, HMRC submit that they have implemented the exemption under article 27.1(f) of the Directive in a rational and reasonable way, and in accordance with the wide discretion afforded to them by the Directive and that we are able to decide the second issue without making a reference to the ECJ.

23. Mr. Mercer, submitting that we ought to make a reference to the ECJ on both issues, said that there are special features of the *Gourmet Classic* case which make it appropriate and proper for us to make a reference on the first issue, with which *Gourmet Classic* was concerned. He makes other submissions, based on alleged prejudice would be suffered by the Appellant if we do not make a reference on the first issue. He submits that we should also refer a question on the second issue.

24. At the conclusion of the hearing we indicated that we would make a reference to the ECJ on both issues and asked the parties to consult as to the text of an appropriate reference. They have done so, prior to this Decision being released, and have jointly proposed a draft of the questions to be submitted to the ECJ for a preliminary ruling. We gratefully adopt the draft, to which we have made minor amendments. We attach to this Decision, as Appendix 2, the questions to be referred.

25. In this Decision we deal, first, with the arguments on the two issues identified and then go on (under the heading *Gourmet Classic*) to record the parties' submissions on the question of whether we should make a reference to the ECJ in this case. We conclude by giving our reasons for deciding to do so.

First issue: are cooking liquors subject to excise duty under the Directive?

26. As to the first issue, the parties agree that if cooking liquors are products subject to excise duty, that result will follow from an application of article 20 of the Excise Directive (definition of 'ethyl alcohol').

27. Article 19 of the Excise Directive provides that member States shall apply an excise duty to ethyl alcohol in accordance with the Directive, and article 20 defines the term 'ethyl alcohol' for the purposes of the Directive.

28. The definition in article 20 is as follows:

> "For the purposes of this Directive the term 'ethyl alcohol' covers–
>
> All products with an actual alcoholic strength by volume exceeding 1,2% volume which fall within CN codes 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN,

Products of CN codes 2204, 2205 and 2206 which have an actual alcoholic strength exceeding 22% vol.

Potable spirits containing products, whether in solution or not."

29. To understand this definition reference must be made to the CN codes mentioned therein (and in those CN codes themselves). The codes are within Chapter 22 of the CN (beverages, spirits and vinegar). Specifically, they are:

    a. **CN code 2207** – Undenatured ethyl alcohol of an alcoholic strength by volume of 80% vol or higher; ethyl alcohol and other spirits, denatured, of any strength :

    b. **CN code 2208** – Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol; spirits, liqueurs and other spirituous beverages; compound alcoholic preparations of a kind used for the manufacture of beverages :

    c. **CN code 2204** – Wine of fresh grapes, including fortified wines; grape must other than that of heading 2009 :

    d. **CN code 2205** – Vermouth and other wine of fresh grapes flavoured with plants or aromatic substances :

    e. **CN code 2206** – Other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included :

    f. **CN code 2009** – Vinegar and substitutes for vinegar obtained from acetic acid :

The first issue – the Appellant's submission

30. The Appellant's submission on this issue is that when considering the applicability of article 20 of the Directive in this case, the "products" on the facts of this case, are (a) the cooking wine, (b) the cooking port and (c) the cooking cognac.

31. The "products" so understood do not fall within any of the codes within Chapter 22 of the CN, but within Chapter 21 of the CN (miscellaneous edible preparations) and specifically within CN code 2103, which is as follows:

    a. **CN code 2103** – Sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard :

32. Mr. Mercer refers to Note 1(a) to Chapter 22 of the CN (an overall note) which states that the Chapter does not cover "products of this chapter (other than those of heading 2209 [vinegar etc.] prepared for culinary purposes and thereby rendered unsuitable for consumption as beverages (generally heading No. 2103)".

33. Mr. Mercer points to Mr. Murray's agreement that the cooking liquors do not fall within Chapter 22 of the CN, stated in the text of the Decision Letter, where he (Mr. Murray) says: "The invoice from Ravel S.A., a copy of which I enclose, shows the Customs tariff code 2103909089. The classification

system is agreed internationally and I believe this is the correct code for the goods."

34. Mr. Mercer submits that the scheme of the Directive is to split alcoholic beverages into 5 categories, reflected in Sections I to V (article 20 falling within Section V: Ethyl Alcohol). The categories are: beer, wine, fermented beverages other than wine and beer, intermediate products and ethyl alcohol.

35. His submission is that the definition of "ethyl alcohol" in article 20 of the Directive excludes cooking wine and cooking port because these products do not fall in any of the three indents of the article.

36. Specifically, the first indent of article 20 does not apply because cooking wine and cooking port are not products falling within CN codes 2207 or 2208 (which, he submits, cover spirits only, not wine).

37. The second indent of article 20 does not apply because, although CN codes 2204, 2205 and 2206 cover respectively wine, fortified wine and other fermented beverages, products within the second indent must have an alcoholic strength by volume (ABV) exceeding 22%. As noted above, the cooking wine was 11% ABV and the cooking port was 19% ABV.

38. The third indent of article 20 does not apply because neither the cooking wine nor the cooking port was "potable spirits", and neither contained products, whether in solution or not.

39. He prays in aid the opinion given by the Excise Committee of the European Commission ("the Excise Committee") in relation to wine lees and grape marc in CED No. 234 of 1997. The Excise Committee was of the view that wine lees and grape marc would not, if standing alone, fall within CN codes 2207 or 2208, but would remain wine.

40. Mr. Mercer recognises that cognac is classified under CN code 2208 (as a spirit) and that therefore cooking cognac could, at least *prima facie*, fall within the extended definition of ethyl alcohol in the first indent of article 20 of the Directive even though it forms part of a product, cooking cognac, which is within Chapter 21 of the CN (not Chapter 22). He submits that it does not actually fall within that definition because it is excluded from classification under CN code 2208 by Note 1(a) to Chapter 22 of the CN (see: paragraph 14 above) on the basis that it has been prepared for culinary purposes and thereby rendered unsuitable for consumption as a beverage. He maintains that, in any event, cooking cognac should be exempt from duty pursuant to article 27.1(f), considered below (the second issue).

The first issue - HMRC's submission

41. Mr. Sarabjit Singh submits that, for the purposes of the first indent of article 20 of the Directive, the alcohol content of the cooking wine, the cooking port and the cooking cognac should be regarded as the "product" whose nature is investigated to see whether it comes within the definition of 'ethyl alcohol' in

the article. The alcohol content is a product which forms "part of a product which falls within another chapter of the CN" for the purposes of the definition, namely CN code 2103.

42. He referred to the opinion of the Excise Committee in relation to the tax treatment of cooking wine and cooking cognac in CED No. 365 of 2001. The Excise Committee was of the view that ethyl alcohol as referred to under headings 2207 and 2208 is not restricted solely to ethyl alcohol obtained by fermentation followed by distillation. He also referred to the Guidelines issued by the Excise Committee on 11 November 2002 under reference CED No. 372 Final, which noted that the delegations "almost unanimously" had accepted that "since classification in CN codes 2207 and 2208 is not exclusively reserved for ethyl alcohol obtained by distilling, cooking wine and cooking cognac, which have an alcoholic strength by volume of more than 1,2%, are to be deemed "ethyl alcohol" within the meaning of article 20 of the Directive. He submitted that the issue has been settled in the sense contended for by HMRC by the judgment of the ECJ in *Gourmet Classic*.

The second issue: if cooking liquors are products subject to excise duty within article 20 of the Directive, are they nevertheless exempt from excise duty by application of article 27.1 of the Directive?

43. Article 27 of the Directive is contained in Section VII, headed 'Exemptions'.

44. Article 27 relevantly provides as follows:

    a. "1. Member States shall exempt the products covered by this Directive from harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse-

    b. (e) when used for the production of flavours for the preparation of foodstuffs and non-alcoholic beverages with an alcohol strength not exceeding 1,2% vol.;

    c. (f) when used directly or as a constituent of semi-finished products for the production of foodstuffs, filled or otherwise, provided that in each case the alcoholic content does not exceed 8,5 litres of pure alcohol per 100 kg of the product for chocolates, and 5 litres of pure alcohol per 100 kg of the product for other products."

45. The United Kingdom has purportedly implemented article 27.1(f) of the Directive by the enactment of section 4, Finance Act 1995 ("FA 1995").

46. Section 4, FA 1995 is in the following terms:

    a. "4 **Alcoholic ingredients relief**

    b. Subject to the following provisions of this section, where any person proves to the satisfaction of the Commissioners that any dutiable alcoholic liquor on which duty has been paid has been-

        1. used as an ingredient in the production or manufacture of a product falling within subsection (2) below, or

        2. converted into vinegar,

ii. he shall be entitled to obtain from the Commissioners the repayment of the duty paid thereon.

c. The products falling within this subsection are-

1. any beverage of an alcoholic strength not exceeding 1.2 per cent,

2. chocolates for human consumption which contain alcohol such that 100 kilograms of the chocolates would not contain more than 8.5 litres of alcohol, or

3. any other food for human consumption which contains alcohol such that 100 kilograms of the food would not contain more than 5 litres of alcohol.

d. A repayment of duty shall not be made under this section in respect of any liquor except to a person who-

1. is the person who used the liquor as an ingredient in a product falling within subsection (2) above or, as the case may be, who converted it into vinegar;

2. carries on a business as a wholesale supplier of products of the applicable description falling within that subsection or, as the case may be, of vinegar;

3. produced or manufactured the product or vinegar for the purposes of that business;

4. makes a claim for the repayment in accordance with the following provisions of this section; and

5. satisfies the Commissioners as to the matters mentioned in paragraphs (a) to (c) above and that the repayment claimed does not relate to any duty which has been repaid or drawn back prior to the making of the claim.

e. A claim for repayment under this section shall take such form and be made in such manner, and shall contain such particulars, as the Commissioners may direct, either generally or in a particular case.

f. Except so far as the Commissioners otherwise allow, a person shall not make a claim for repayment under this section unless-

1. the claim relates to duty paid on liquor used as an ingredient or, as the case maybe, converted into vinegar in the course of a period of three months ending not more than one month before the making of the claim; and

2. the amount of the repayment which is claimed is not less than £250.

g. The Commissioners may by order made by statutory instrument increase the amount for the time being specified in subsection 5(b) above; and a statutory instrument containing an order under this subsection shall be subject to annulment in pursuance of a resolution of the House of Commons.

h. There may be remitted by the Commissioners any duty charged either-

1. on any dutiable alcoholic liquor imported into the United Kingdom at a time when it is contained as an ingredient in any chocolates or food falling within subsection (2)(b) or (c) above; or

2. on any dutiable alcoholic liquor used as an ingredient in the manufacture or production in an excise warehouse of any such chocolates or food.

ii. (8) This section shall be construed as one with the Alcoholic Liquor Duties Act 1979, and references in this section to chocolates or food do not include references to any beverages."

47. Section 4 FA 1995, as can be seen, provides *inter alia* a mechanism for repayment of excise duty on dutiable alcoholic liquor which has been used in the production or manufacture of food which has an alcoholic content of not more than 5 litres of alcohol per 100 kg of the food. The repayment is made on a claim, which must be made by a wholesale supplier being the producer or manufacturer of the food. Claims for repayment of amounts less than £250 (a limit which may be increased by the Commissioners) will not be met.

The second issue – the Appellant's submission

48. The Appellant submits that cooking wine, cooking port and cooking cognac come within the exemption in article 27.1(f) whether used directly for the production of foodstuffs, or indirectly for the production of foodstuffs as a constituent of a semi-finished product (a sauce), provided that the alcoholic content of the resultant foodstuff product (Mr. Mercer gives *boeuf bourguignon* as an example) does not exceed 5 litres of pure alcohol per 100 kg of the foodstuff product.

49. Mr. Mercer supports his submission that the foodstuff to be considered for the purposes of the application of article 27.1(f) is the resultant dish by comparison with the regime laid down in the article for chocolates, where it is plain, he submits, that the relevant "foodstuff" is the chocolate (he gives chocolates filled with *Cointreau* liqueur as an example).

The second issue – HMRC's submission

50. Mr. Singh submits that a possible interpretation of article 27.1(f) is that the "product" referred to (on the facts of this case) is the cooking wine, cooking port and cooking cognac, and that exemption only applies if the alcoholic content of these products does not exceed 5%. It does in all three cases.

51. He points out that this interpretation was "almost unanimously" accepted by the delegations constituting the Excise Committee which laid down the Guidelines in CED No.372 Final of 11 November 2002.

52. However his main submission is that article 27 leaves Member States with a discretion to impose conditions of the exemption and that the United Kingdom's implementation of article 27.1(f) in section 4 FA 1995, while imposing conditions, is nevertheless potentially more generous than the interpretation favoured by the Excise Committee in CED No.372 Final. He makes the point that article 27.6 expressly permits Member States to give effect to the article 27 exemptions by means of a refund of excise duty paid, and that section 4 FA 1995 was structured to give effect to the exemption in article 27.1(f) in that way.

53. He points out that under the provisions laid down in section 4 FA 1995, repayment of duty on cooking wine, cooking port and cooking cognac is possible, even in a case where the alcoholic content of the cooking wine, cooking port or cooking cognac exceeds 5% (as it does on the facts of this case) so long as the cooking wine, cooking port or cooking cognac is used in the production or manufacture of a food which contains no more than 5 litres of alcohol per 100 kg. He comments that, given the generosity of this interpretation, the United Kingdom is entitled to impose strict limits on its application.

54. Mr. Singh submits that the Appellant is not entitled to duty relief under article 27.1(f) as implemented by section 4 FA 1995 because it did not use the cooking liquors as an ingredient in food products (section 4(3) FA 1995) but instead acted as wholesaler of the cooking liquors themselves.

55. He submits that by restricting the exemption to, *inter alios*, those persons who used cooking liquors as an ingredient in a product or acted as wholesalers of the product in which the cooking liquors had been used as an ingredient, the United Kingdom promoted the correct and straightforward application of the exemption, because the product itself could be readily inspected to ensure that 100 kg of the product itself did not contain more than 5 litres of alcohol. He criticised the Appellant's interpretation of the exemption because it relied on the cooking liquors being used in the production of foodstuffs to be produced after the exemption had been applied, thus rendering it impossible to check that the 5 litres per 100 kg condition was satisfied and thereby encouraging abuse of the exemption.

Gourmet Classic

56. The circumstances giving rise to the reference in *Gourmet Classic* were unusual. Gourmet Classic Ltd. was a British undertaking wishing to market cooking wine on the Swedish market. Before marketing the cooking wine, Gourmet Classic Ltd. asked the Swedish Revenue Law Commission (*Skatterättsnämnden*) for an opinion confirming that its cooking wine was not subject to excise duty because, in its view, cooking wine was covered by the exemption laid down in article 27.1(f) of the Directive.

57. The cooking wine featuring in *Gourmet Classic* consisted of a mixture of approximately 40% of ordinary wine, red or white, and approximately 60% of de-alcoholised wine to which a small amount of salt had been added. The alcoholic strength of the cooking wine was 4.5 litres of pure alcohol per 100 kg of the cooking wine.

58. HMRC through their Tariff and Statistical Office informed Gourmet Classic Ltd. that its cooking wine was covered by CN subheading 2103 9090 89.

59. In the course of the proceedings before the Swedish Revenue Law Commission (which performs an essentially administrative function in giving a preliminary opinion on matters which concern, in particular, taxpayers in

their relationships with the public authorities with respect to their tax liabilities), the Swedish tax administration (*Skatteverket*) maintained that Gourmet Classic Ltd.'s cooking wine was subject to excise duty under paragraph 6 of the Swedish law on excise duty on alcohol (*lagen om alkoholskatt*) – which provides that excise duty is payable on goods covered by CN headings 2207 and 2208, with an alcoholic strength exceeding 1.2% vol., even when those goods form part of a product which falls within another chapter of the Combined Nomenclature.

60. However the Swedish tax administration also submitted that Gourmet Classic Ltd.'s cooking wine was covered by the exemption laid down in point 5 of paragraph 7(1) of the Swedish law on excise duty on alcohol. This exemption states that no excise duty is payable on goods used directly in foodstuffs or as ingredients of semi-finished products for the production of foodstuffs, filled or otherwise, provided that the alcohol content in each individual case does not exceed 8.5 litres of pure alcohol per 100 kg of product used to make chocolates and 5 litres of pure alcohol per 100 kg of product used to make other foodstuffs.

61. There was therefore agreement between Gourmet Classic Ltd. and the Swedish tax administration that Gourmet Classic Ltd.'s cooking wine must be regarded as ethyl alcohol within the meaning of article 20 of the Directive and that it benefited from the exemption laid down in article 27.1(f) of the Directive.

62. The Swedish Revenue Law Commission gave its opinion based on the recommendation of the Swedish tax administration, although the President of the Swedish Revenue Law Commission issued a dissenting opinion, according to which cooking wine does not fall within the scope of the Swedish law on excise duty on alcohol.

63. A special feature of the Swedish appellate system is that the Swedish tax administration may bring an appeal before the Swedish court (*Regeringsrätten*) about an opinion adopted by the Swedish Revenue Law Commission, even if the appeal seeks confirmation of that opinion. In this case, the Swedish tax administration brought an appeal before the Swedish court seeking to have the opinion given by the Swedish Revenue Law Commission upheld. Gourmet Classic Ltd. also contended that the Swedish Revenue Law Commission's opinion should be followed.

64. The Swedish court however took the view that in order to give a ruling it was necessary to obtain the ECJ's answer to the question: "Is the alcohol contained in cooking wine to be classified as ethyl alcohol as referred to in the last indent of article 20 of the [Directive]?".

65. When the reference came before the ECJ, the opinion of the Advocate General (Bot), which was delivered on 3 April 2008, was entirely concerned with the question of whether the ECJ had jurisdiction to give a ruling on the question

referred by the Swedish court. The Advocate General's opinion was that the ECJ lacked such jurisdiction, on the ground, essentially, that what the Swedish court sought was an advisory opinion, and not a preliminary ruling justified by the need to resolve a genuine controversy.

66. The ECJ (Fourth Chamber) dealt with the matter without an oral hearing, having heard the opinion of the Advocate General and having considered written observations submitted on behalf of the Commission and the Belgian and Portuguese Governments.

67. In its judgment, dated 12 June 2008, the ECJ disagreed with the Advocate General's opinion and held that it was not being asked to give an advisory opinion on a hypothetical question and accordingly had jurisdiction to reply to the question posed by the Swedish court. (Its ground for this decision was that the procedure before the Swedish court was not simply to obtain confirmation of the opinion of the Swedish Revenue Law Commission, but to provide in the exercise of the court's judicial function a definitive legal judgment which would bind the tax authorities.)

68. The ECJ therefore went on to consider and rule on the question referred, whether the alcohol contained in cooking wine is to be classified as ethyl alcohol as referred to in the first indent of article 20 of the Directive.

69. The ECJ's ruling was that the alcohol contained in cooking wine is, if it has an alcoholic strength exceeding 1.2% by volume, to be classified as ethyl alcohol as referred to in the first indent of article 20 of the Directive.

70. This ruling was, however, expressly given without prejudice to the exemption provided for by article 27.1(f) of the Directive – see: [39] of the judgment.

***Gourmet Classic* – the Appellant's submission**

71. Mr. Mercer submits that, in *Gourmet Classic*, the ECJ has not addressed or answered the Appellant's submissions on the first (article 20) issue. He also submits that this Tribunal is entitled to make a reference in order to seek further clarification from the ECJ on the article 20 issue.

72. He contends that the ECJ has, in *Gourmet Classic*, simply stated its conclusion on the article 20 issue ("the fact remains that that edible preparation contains ethyl alcohol falling within headings 2207 and 2208 of [the CN]" – at [35] of the Judgment) without giving any reason for that conclusion, and certainly without considering the Appellant's arguments, summarised above, that cooking liquors do not fall within the definition of 'ethyl alcohol' in article 20 of the Directive. Neither has the ECJ considered his submission that cooking liquors do not fall within any of the definitions of the products covered by the Directive and are not subject to excise duty and are open to free circulation within the EU, as the cooking liquors, which are the subject of the appeal, were in free circulation in France before their importation into the United Kingdom.

73. He submits that second (article 27.1) issue ought also to be considered by the ECJ and states (correctly) that that issue was not before the ECJ in *Gourmet Classic*. He contends that section 4 FA 1995 is not a permissible implementation of article 27.1(f) of the Directive, for the reasons summarised above. The departure displayed by section 4 FA 1995 from what he submits is the correct interpretation of article 27.1(f) would require to be justified by the United Kingdom, and such justification could only be afforded by concrete evidence of a serious risk of evasion, avoidance or abuse. He points to M. Allo's evidence that there is no such risk. Mr. Mercer cites *Italy v Commission* (Case C-482/98).

74. Mr. Mercer submits that this Tribunal is not precluded by the ECJ's judgment in *Gourmet Classic* (or any other authority) from making a reference on the article 20 issue. He cites *Belgium v Spain* (Case C-388/95) [2000] ECR I-3123 at [52] and *Keck v Mithouard* (Cases C-267-8/91) [1993] ECR I-6097 at [16].

***Gourmet Classic* – HMRC's submission**

75. Mr. Singh submits that there is no sensible basis upon which the same (article 20) question can be put to the ECJ again, following its authoritative, binding and very recent ruling on the question in *Gourmet Classic*.

76. He contends that there was nothing "very special" about the *Gourmet Classic* case or the circumstances of the ECJ's judgment in that case which would justify a second reference being made.

Discussion

77. As there are conflicting views between Member States on the questions raised in this appeal, the Tribunal took the view that an authoritative ruling by the Court of Justice on the application (if any) of the Excise Directive to cooking liquors was necessary to enable it to decide the appeal.

78. While recognising that the ECJ's judgment in *Gourmet Classic* is both directly relevant and very recent, the Tribunal nevertheless considers that the Court of Justice may wish to revisit the issues raised in this case in the light of the Appellant's submissions on the first (article 20) issue which appear to the Tribunal to have persuasive force and seem not to have been raised in *Gourmet Classic*. The ECJ appears to the Tribunal to have been primarily concerned in *Gourmet Classic* with the jurisdiction issue arising in that case, which of course is absent from this appeal.

79. Further, this appeal may (depending on the answer to the point raised on the first (article 20) issue) raise a further issue of Community law not addressed in *Gourmet Classic*, namely the second (exemption under article 27.1) issue. If the second issue requires to be addressed, the Tribunal would wish to have guidance from the ECJ on the question of whether section 4, FA 1995 adequately implements the article 27.1(f) exemption into UK law.

80. The Appellant urged us to make a reference, notwithstanding the ECJ's judgment in *Gourmet Classic* and HMRC, while resisting that proposal, accepted that in these circumstances we are able, as a matter of Community law, to make a reference. The ECJ's judgment in *SpA International Chemical Corporation v Amministrazione delle Finanze dello Stato (*Case 66/80) is authority for the proposition that, as a matter of Community law, this Tribunal is not (by reason of any prior judgment of the ECJ) deprived of our power to refer and we must decide whether there is a need to raise once again a question which has already been settled by the ECJ. That authority shows that there may be such a need especially if questions arise as to the grounds, the scope and possibly the consequences of an earlier judgment.

81. In the Tribunal's view the conflicting opinions of the Member States referred to, and the arguments raised by the Appellant on *Gourmet Classic*, which we have set out above, raise sufficient questions as to the grounds, scope and consequences of the judgment in *Gourmet Classic* to justify, exceptionally, a second reference on the issues raised.

82. We therefore stay all further proceedings relating to this appeal until the Court of Justice has given its preliminary ruling on the Questions set out in Appendix 2 to this Decision, or until further order.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 30 April 2013

APPENDIX 2

AGREED STATEMENT OF UNDISPUTED FACTS

(compiled as at 19 July 2007)

1. Repertoire Culinaire Limited (hereafter "the Appellant") trades in the wholesale food business, at ION House, Sheep Lane, Hackney, London, E8 4QS.

2. On 10th July 2002, at approximately 14.13 hours, a Renault tractor unit, registration number 127 APJ (hereafter "the vehicle") and trailer were intercepted by Officers of HMRC at the United Kingdom Customs Control Zone, Coquelles, France. The driver of the vehicle identified himself as Mr Aleksanor Smirnov from Estonia.

3. Mr Smirnov produced a CMR document for the load, reference number N 242323, which showed 11 pallets of 'vin de cuisine'. The CMR indicated that the consignee was the Appellant.

4. The load was then inspected by an Officer, who found 5 pallets each containing 70 boxes of white wine, 11% ABV. Each box contained 8 litres of wine, amounting to 2,800 litres of white wine in total. There were also 5 pallets containing the same quantity of red wine. One pallet contained 20 boxes of port, 19% ABV. Each box contained 8 litres of port, amounting to a total of 160 litres. Finally, there were 10 boxes each containing 8 litres of cognac, 40% ABV, totalling 80 litres.

5. The goods were detained on the grounds that there was no AAD (Accompanying Administrative Document) for the goods and there was no evidence that UK excise duty had been accounted for.

6. Further enquiries were then carried out by the Respondents' National Discreditation Team (NDT), which established the following:

   a) The packaging on the cognac stated 'undrinkable', and had 'ingredients' of 1% (possibly salt and pepper).

   b) The wine had ingredients of 2%.

   c) The port did not have a label showing ingredients.

   d) The invoice from the supplier Ravel S.A. at St Galmier in France to the Appellant, dated 8th July 2002, showed that the goods were predominantly 'vin cuisine' and the applicable Customs code was 2103909089.

e) Mr J Gill-Abbate from RH Freight Services in Nottingham confirmed that RH Group provided UK distribution services and acted as freight forwarders, and that the load was part of a groupage load.

f) Mr Gill-Abbate believed that the goods were for culinary purposes and therefore exempt from duty. He provided a Customs tariff code of 2103909059.

g) NDT considered that the correct Customs tariff code was that shown on the Ravel S.A. invoice, 2103909089. There was no such code as 2103909059.

h) Mr Chalopin submitted a fax dated 11th July 2002 to NDT, with accompanying documents in French from French Customs and Ravel Distillerie Saint Galmier. One of the documents from Ravel Distillerie referred to the wine as vin cuisine with the commodity code of 2103909089, and advised that the wine was rendered undrinkable by the addition of 10 grams of salt and 10 grams of pepper per litre.

7. The Respondents' Holding and Movement Team visited the Appellant's premises on 12th July 2002, and met Mr E Chalopin, Marketing Manager, and Mrs T Hickey from purchasing. The following was established:

a) Mr Chalopin stated that the goods detained were not used by the Appellant to manufacture or process other goods, but were sold on in the same state they arrived in the UK.

b) It was explained to Mr Chalopin and Mrs Hickey that the Respondents' position was that the commodity code they had used, 2103909089, made the goods dutiable and that this commodity code was applicable throughout the EU. The Appellants' position was that duty was not payable on the goods and that French Customs did not class the goods as being subject to duty.

c) The Appellant had imported similar goods on a number of occasions in the past. Officers examined 14 delivery notes dated 3rd August 2001 to 14th May 2002 and stock on hand, and total excise duty due, on the basis that the Respondents' position was correct, was calculated to be £59,737. The goods had an ABV ranging from 11% to 60%, and the stock on hand was detained.

8. Following their enquiries, the NDT recommended that the excise goods detained at Dover on 10th July 2002 should be subject to seizure. The goods were seized as liable to forfeiture under Regulation 16 of the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 and section 49(1) of the Customs and Excise Management Act 1979, on 16th July 2002.

9. The Appellant was notified of the seizure by letter dated 16th July 2002. The Appellant's representatives requested restoration of the excise goods on 2nd August 2002.

10. By letter dated 28th August 2002, the Respondents notified the Appellant's representatives that the excise goods would not be offered for restoration. On 2nd September 2002, the Appellant's representatives sought a review of this decision.

11. On 17th October 2002, the Respondents wrote to the Appellant's representatives and notified them that a formal review of the decision had taken place, which upheld the original decision to refuse to offer restoration of the excise goods, on the grounds that:

> "A determinant factor in this case is whether the excise goods were liable to excise duty … I have concluded that the excise goods were properly liable to UK duty."

The Respondents' letter also advised the Appellant's representative of their right to appeal to the VAT and Duties Tribunal within 30 days.

12. On 18th July 2002, two assessments for excise duty were issued- £53,853 for stock sold and £5,884 for stock on hand. These assessments were upheld by the London Appeals and Reconsiderations Team on 27th September 2002.

13. In the Notice of Appeal dated 4th November 2002, the Appellant challenges the review decision dated 17th October 2002, which is the Respondents' review letter in relation to the non-restoration of the goods and which determined that the goods would not be restored because they were subject to duty.

14. The nature of the products in issue in this appeal is as follows:

    a. The cooking wine is wine and is a product formed exclusively from a process of fermentation.

    b. The cooking wine, cooking port and cooking cognac are all produced by the addition of salt and pepper.

    c. Through the addition of salt and pepper, the products become unfit for consumption as beverages, although they remain suitable for consumption when used as culinary products.

    d. Once salt and pepper are added to the products, it is not possible to isolate the alcohol content of the products in its entirety.

    e. The products are classified under the Customs Nomenclature CN 2103 909089 as sauces (foodstuff).

15. In Working Document CED 234 of 1997, the European Commission expressed the opinion that, since the alcoholic product contained in wine lees and grape marc is not a product which, if not contained in lees or marc, would fall within CN 2207 or 2208, the first indent of Article 20 would not apply to it.

16. Almost all Member States accepted Commission Guideline CED 372 Final, which stated that cooking wine and cooking cognac were subject to excise duty unless the conditions for obtaining the exemption provided for in Article 27(1)(f) of Directive 92/83/EEC applied. This Guideline was on the basis that cooking wine is within the first indent of Article 20 regardless of how the ethyl alcohol content is produced, whether by fermentation or distillation and whether or not the alcoholic ingredient of cooking wine is within CN headings 2207 and 2208.

17. In CED 475, the Minutes of the Meeting of 1 and 2 April 2004, the President of the Committee expressly stated that the Commission Guidelines do not bind the Commission and that it is up to Member States if they wish to publish them on their own responsibility.

18. The current position is that there is no agreement within the Community as to how the products subject to this appeal should be treated. Many Member States take the view that cooking wine is not within the scope of excise duty under Directive 92/83 and therefore entitled to move freely within the EU without any accompanying document.

19. Cooking wine when used as an ingredient in a final product through any recognised recipe always yields a final product with an alcoholic content of less than 5%.