Neutral Citation: [2025] UKFTT 00256 (TC)

Case Number: TC09440

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2023/09331

EXCISE—Alcohol and alcoholic beverages—Exemptions / relief—Products used for the production of foodstuffs with an alcoholic content not exceeding 5 litres of pure alcohol per 100 kg of the product—Cooking wine and other cooking alcohols—Council Directive 92/83/EEC, Article 27(1)(f)—Finance Act 1995, s 4(2)(c)

Heard on: 20 and 21 January 2025
Further written submissions: 17 February 2025
Judgment date: 25 February 2025

Before

TRIBUNAL JUDGE CHRISTOPHER STAKER
MICHAEL BELL

Between

GOURMET CLASSIC LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth KC, instructed by Reynolds Porter Chamberlain LLP

For the Respondents: Howard Watkinson of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

1. The decision of the Respondents dated 3 February 2023 to assess the Appellant to excise duty on cooking alcohols is quashed, to the extent that it relates to cooking alcohols that contain alcohol such that 100 kilograms of the relevant product would not contain more than 5 litres of alcohol.

2. If the parties are unable to agree on the amendments to the assessment under appeal required to give effect to this decision, either party is at liberty to request the Tribunal within 90 days of the date of release of this decision to determine the matter remaining in dispute.

REASONS

SUMMARY

1. The Appellant appeals against assessments to excise duty on products described as "cooking alcohols". These products were manufactured from ordinary wine or other alcoholic beverages, to which salt and/or other seasonings were added, rendering them unsuitable for consumption as a beverage. Such products are intended for use as an ingredient in cooking. Section 4(2)(c) of the Finance Act 1995 (as in force at material times), which was one of the legislative provisions transposing Directive 92/83/EEC, relevantly provided for an exemption from excise duty for food for human consumption which contains alcohol such that 100 kilograms of the food would not contain more than 5 litres of alcohol. The issue in dispute is whether cooking alcohols with an alcoholic content below that threshold were exempt from excise duty from the time of their manufacture (as contended by the Appellant), or whether they would have become exempt from excise duty only if and when actually used in the cooking of food (as contended by HMRC).

2. It is common ground between the parties that the answer depends on whether such products were themselves "foodstuffs" within the meaning of Article 27(1)(f) of Directive 92/83/EEC, and "food for human consumption" within the meaning of s 4(2)(c) of the Finance Act 1995. It is also common ground that no binding answer to this question is given in the existing case law, which includes the decisions of the Court of Justice of the European Union in Case C-458/06, *Skatteverket v Gourmet Classic Ltd* ECLI:EU:C:2008:338, [2008] 3 CMLR 13 and Case C-163/09, *Répertoire Culinaire Ltd v HMRC* ECLI:EU:C:2010:752, [2010] ECR I-12717, [2011] STC 465, and the decision of the Court of Appeal in *HMRC v Répertoire Culinaire Ltd* [2017] EWCA Civ 1845, [2018] STC 958.

3. In this decision, the Tribunal finds that such products were themselves "foodstuffs" and "food for human consumption", and that they were therefore exempt from excise duty at the time of their manufacture.

INTRODUCTION

4. The Appellant appeals against a decision of HMRC dated 3 February 2023 to assess the Appellant to excise duty under s 12(1A) of the Finance Act 1994 on products described as "cooking alcohols" or "cooking alcohol condiments". The assessment relates to the period 4 February 2019 to 14 November 2022.

5. The products in question were manufactured by the Appellant whilst under a duty suspension arrangement. After manufacture, they were released by the Appellant from its warehouse and thereby left the duty suspension arrangement, without payment of any excise duty. The position of HMRC is that the products were subject to excise duty, which the

Appellant became liable to pay when they were removed from the duty suspension arrangement. The Appellant claims that the products were exempt from excise duty.

6. By far the largest part of the assessment relates to products described as "cooking wines"; the remainder relates to other types of cooking alcohols described as "cooking spirit", "cooking beer" and "cooking cider". These products were manufactured from ordinary wine or other alcoholic beverages, to which salt and/or other seasonings were added, rendering them unsuitable for consumption as a beverage. Such products are intended for use as an ingredient in cooking. The Appellant's cooking alcohols are mainly sold to commercial kitchens via food wholesalers. In previous case law, products such as these have also been referred to as "cooking liquors", and have included also products such as "cooking port", "cooking brandy" and "cooking cognac".

7. It is undisputed between the parties that the products to which this appeal relates fall within CN code 2103 of the Combined Nomenclature ("**CN**"), which applies to "Sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard". On 24 March 2017, the following was added to the Explanatory Notes to the Combined Nomenclature of the European Union (see EU, Official Journal, 24.03.2017, C 92/9):

> **2103 90 90 Other**
>
> This subheading includes products, which would otherwise fall within Chapter 22, prepared for culinary purposes and rendered unsuitable for consumption as beverages.
>
> This subheading includes in particular 'cooking liquors' which are products referred to colloquially as 'cooking wines', 'cooking Port', 'cooking Cognac' and 'cooking brandy'. Cooking wines consist of ordinary wine or of de-alcoholised wine, or of a mixture of both, to which salt, or a combination of several seasonings (e.g. salt and pepper) has been added, rendering the product unsuitable for consumption as a beverage. In general, those products contain at least 5 g/l of salt.

On 21 April 2017, HMRC published a new Tariff Notice 14 (2017): cooking alcohols, reflecting this change to the Explanatory Notes to the Combined Nomenclature.

8. HMRC have issued Binding Tariff Information decisions classifying products of the Appellant under commodity codes 2103 90 90 and 2103 90 90 89.

9. The liability to excise duty of the products to which this appeal relates during the period to which the assessment relates is governed by s 4 of the Finance Act 1995 ("**FA 1995**"). This provision and other relevant provisions of UK legislation were enacted to transpose into UK law Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages ("**Directive 92/83**" or "**the Directive**"). References in this decision to provisions of the FA 1995 and Directive 92/83 are to the versions in force at the material time, although they are referred to in the present tense.

10. EU law ceased to apply in the UK on 31 December 2020, part way through the period to which the assessment under appeal relates. However, it is common ground between the parties that all of the case law of the CJEU relevant to this case predates 31 December 2020, and that, due to the effects of ss 2, 5(2), and 6(3) and (7) of the European Union (Withdrawal) Act 2018, and s 22(5) of the Retained EU Law (Revocation and Reform) Act 2023, the cessation of the application of EU law in the UK has had no material effect for purposes of this particular appeal on the interpretation and application of the relevant UK legislation. It is therefore unnecessary in this decision to distinguish between the periods before and after 31 December 2020.

11. Directive 92/83 provides that Member States shall apply an excise duty, in accordance with the Directive, on beer (Article 1), wine (Article 7), other fermented beverages (Article 11), intermediate products (Article 16) and ethyl alcohol (Article 19).

12. However, Article 7, which requires excise duty to be applied to wine, does not apply to cooking wine. This is because Article 8 defines "wine" for purposes of the Directive as specified products falling within CN codes 2204 and 2205. As cooking wine falls within CN code 2103, it is not wine for purposes of the Directive. For similar reasons, Article 1, which requires excise duty to be applied to beer, does not apply to cooking beer, since Article 2 defines beer as specified products falling within CN codes 2203 or 2206, such that cooking beer (which falls within CN code 2103) is not beer for purposes of the Directive. Again, Article 11, which requires excise duty to be applied to fermented beverages other than wine and beer (such as cider), does not apply to cooking cider, since Article 12 defines such beverages as specified products falling within CN codes 2204, 2205 and 2206, such that cooking cider (which falls within CN code 2103) is not a fermented beverage other than wine and beer for purposes of the Directive. Once more, Article 16, which requires excise duty to be applied to intermediate products (such as port and sherry), does not apply to cooking port, since Article 17 defines such beverages as specified products falling within CN codes 2204, 2205 and 2206, such that cooking port (which falls within CN code 2103) is not an intermediate product for purposes of the Directive.

13. Because of this, as will be seen in further detail below, some Member States for a period took the view that Directive 92/83 did not apply to cooking alcohols at all, and that such products were therefore not subject to excise duty and required no accompanying administrative document. However, in Case C-458/06, *Skatteverket v Gourmet Classic Ltd* ECLI:EU:C:2008:338, [2008] 3 CMLR 13, and again in Case C-163/09, *Répertoire Culinaire Ltd v HMRC* ECLI:EU:C:2010:752, [2010] ECR I-12717, [2011] STC 465, the Court of Justice of the European Union ("**CJEU**") held that the alcohol in such products is "ethyl alcohol" for purposes of the Directive. Article 19 of the Directive provides that "Member States shall apply an excise duty to ethyl alcohol in accordance with this Directive". The first indent of Article 20 then provides that 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". CN codes 2207 and 2208 are, respectively, undenatured ethyl alcohol of an alcoholic strength by volume of 80 % vol or higher, and undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 % vol. Thus, if cooking wine has an actual alcoholic strength by volume exceeding 1.2 % volume, the alcohol in it is "ethyl alcohol" that is subject to excise duty, even though that alcohol forms part of a product (cooking wine) which falls within another chapter of the Combined Nomenclature (namely Chapter 21).

14. However, Article 27(1)(f) of Directive 92/83 ("**Article 27(1)(f)**") relevantly provides for a mandatory exemption from excise duty for products covered by the Directive when used for the production of foodstuffs, if the alcoholic content does not exceed 5 litres of pure alcohol per 100 kilograms of the product.

15. The position of the Appellant is as follows. The cooking alcohols to which this appeal relates were themselves "foodstuffs" for purposes of Article 27(1)(f) of Directive 92/83, and were therefore exempt from excise duty pursuant to that provision because their alcoholic content did not exceed 5 litres of pure alcohol per 100 kilograms of the product. The cooking alcohols were therefore able to be released from the duty suspension arrangement and sold without any excise duty becoming payable.

16. The position of HMRC is as follows. The cooking alcohols were *not* themselves "foodstuffs" for purposes of Article 27(1)(f) of the Directive, and were therefore *not* exempt from excise duty pursuant to that provision. They were therefore liable to excise duty at the point at which they were released from the duty suspension arrangement. The exemption in Article 27(1)(f) would only have become applicable if and when the cooking alcohol was actually used as an ingredient in the preparation of food. At that point, upon proof of a qualifying end use, an application for a refund of the excise duty might have been made in accordance with the relevant provisions of the legislation dealing with alcoholic ingredients relief by a person entitled to make such an application.

FACTS

17. The Appellant company was established in 1998 by Mr Angus l'Anson, who is its sole director and shareholder, for the purpose of manufacturing and supplying cooking alcohols.

18. Mr l'Anson says as follows. Prior to establishing the company, he satisfied himself that there would be no excise duty to pay on the cooking alcohols. From the time that the Appellant company was established, it did not pay any VAT or excise duty in relation to the production or sale of the products. This tax position was an important foundation of the business, which was established on this basis. Mr l'Anson engaged with HM Customs and Excise in relation to the matter at the time that the business was founded, and subsequently had dialogue with HMRC. He has always sought to be legally compliant.

19. On 12 May 2017, an officer of HMRC sent an email to Mr l'Anson stating that a review of cooking alcohol had been carried out, that HMRC had "concluded that the exemption at source for low strength alcohols is no longer supportable as it has no basis in law", and that clarification on the issue would soon be published.

20. On 7 July 2017, HMRC sent a notice to the Appellant stating that "Historically, we have treated cooking wines that are of a strength of 5% abv or less as exempt from excise duty", but that "It is clear that the current treatment has no legal basis and is not provided for in excise legislation", and that "in future, excise duty will be charged on any cooking wines which have a strength exceeding 1.2 per cent abv". The notice stated that the date from which excise duty would apply to these products was 1 January 2018. It added that "The Alcoholic Ingredients Relief scheme (as detailed in Excise Notice 41) provides a mechanism for the reclaim of excise duty if alcohol is used in the production of a foodstuff".

21. Further exchanges between the parties ensued.

22. Ultimately, on 3 February 2023, HMRC issued the assessment to excise duty against which the Appellant now appeals, which relates to cooking alcohols supplied by the Appellant in the period 4 February 2019 to 14 November 2022. The assessment was upheld in a review conclusion letter dated 30 June 2023. On 26 July 2023, the Appellant commenced the present Tribunal appeal proceedings. The Appellant initially advanced four grounds of appeal, namely that (1) culinary alcohol is a foodstuff; (2) culinary alcohol is a semi-finished product; (3) culinary alcohol is not a liquor; and (4) the assessment was out of time. However, at the hearing the Appellant did not pursue the second to fourth grounds.

23. The hearing of this appeal took place on 20 and 21 January 2025. The hearing bundle included witness statements of Mr l'Anson and of an officer of HMRC who was involved in the matter. Neither witness was cross-examined, such that the evidence in both witness statements stands. Prior to the hearing, the Tribunal communicated to the parties in writing that it might be assisted by answers to several questions, and these questions were addressed by the parties at the hearing. At the hearing, it was agreed that HMRC could, after the hearing, file a written explanation of a change made to Excise Notice 41 in 2016, and this

was filed by HMRC on 23 January 2025. On 5 February 2025, the Tribunal advised the parties in writing that it was minded to take certain matters into account, and invited any submissions by the parties on those matters. Written submissions were submitted by the Appellant and HMRC, both dated 17 February 2025.

24. At the hearing, the parties confirmed that the following matters are common ground and not in dispute.

(1) If the cooking alcohols to which this appeal relates are "foodstuffs" within the meaning of Article 27(1)(f) of Directive 92/83, they will be "other food for human consumption" within the meaning of s 4(2)(c) FA 1995. The latter was enacted to transpose the former, and should therefore be interpreted consistently with the former.

(2) The cooking alcohols to which the assessment under appeal relates were unpalatable and unsuitable for consumption as a beverage. Each of the cooking alcohols to which this appeal relates had an alcoholic content of less than 5 litres of alcohol per 100 kilograms of the product. If used as an ingredient in the preparation of food, the resulting food preparation would inevitably have an alcoholic content of less than 5 litres of alcohol per 100 kilograms of the food preparation.

(3) If the cooking alcohols to which this appeal relates were "foodstuffs" within the meaning of Article 27(1)(f) of Directive 92/83, then they were exempt from excise duty from the time that they were manufactured, given that their alcoholic content was not in excess of 5 litres of pure alcohol per 100 kilograms of the product, and the Appellant's appeal will succeed. Conversely, if they are not "foodstuffs" within the meaning of Article 27(1)(f), the appeal will fall to be dismissed. This is the sole issue in this appeal.

    (a) Article 27(1)(f) is to be read as if it were punctuated in the following way: "when used**,** directly or as a constituent of semi-finished products**,** for the production of foodstuffs". Thus, for a product covered by the Directive to fall within the exemption, it must be "used … for the production of foodstuffs".

    (b) If the cooking alcohols to which this appeal relates were "foodstuffs", then the ethyl alcohol in them will, at the time that the cooking alcohols were manufactured, have been used for the production of "foodstuffs" (namely for the production of the cooking alcohols), and the appeal will succeed.

    (c) On the other hand, if the cooking alcohols to which this appeal relates are *not* "foodstuffs", then the ethyl alcohol in them will only have been used for the production of "foodstuffs" once the cooking alcohols were actually used as an ingredient in the cooking of food, and the appeal will fall to be dismissed.

(4) The previous case law referred to in paragraphs 32-73 below contains no answer binding on this Tribunal to the question that the Tribunal is called upon to determine in this appeal. Each party refers to this earlier case law only as persuasive support for its arguments.

25. It was also common ground between the parties at the hearing that the word "foodstuffs" in Article 27(1)(f) of Directive 92/83 cannot be intended to include absolutely everything that might potentially be included in the ordinary meaning of that term, since the products covered by the Directive—in particular beer, wine, other fermented beverages (such

as cider), and intermediate products (such as port and sherry)—might themselves potentially be encompassed by that ordinary meaning. Both parties agree that this is clearly not intended. For instance, Article 7 of the Directive requires an excise duty to be applied to wine, and Article 8 defines wine as including specified wines with an actual alcoholic strength by volume exceeding 1.2% vol. but not exceeding 15% vol. Thus, Articles 7 and 8 would specifically require excise duty to be applied to such a wine with an actual alcoholic strength by volume of say 4% vol. However, if such a wine was a "foodstuff" for purposes of Article 27(1)(f) of Directive 92/83, it would be exempt from excise duty under that provision as it would have an alcoholic content less than 5 litres of pure alcohol per 100 kilograms of the product. The result would be that Article 27(1)(f) would negate the express intent of Articles 7 and 8.

26. Both of the parties therefore seek to identify types of products that are excluded from the definition of "foodstuffs" for purposes of Article 27(1)(f) of the Directive.

(1) The position of the Appellant is as follows. The word "foodstuffs" in Article 27(1)(f) excludes beverages, but does not exclude liquid foodstuffs that are not beverages. The cooking alcohols to which this appeal relates are foodstuffs for purposes of Article 27(1)(f) because they are "foodstuffs" but are not beverages.

(2) The position of HMRC is as follows. The word "foodstuffs" in Article 27(1)(f) excludes products that are liquid (or "fully liquid" or "wholly liquid"), and includes only solid or semi-solid foodstuffs. The cooking alcohols to which this appeal relates *are not* foodstuffs for purposes of Article 27(1)(f) because they are liquid.

LEGISLATION

27. Article 20 of Directive 92/83 provides that:

> 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 by volume exceeding 22 % vol.,
>
> — potable spirits containing products, whether in solution or not.

28. Article 26 of Directive 92/83 provides that "References in this Directive to CN codes shall be to the codes of the combined nomenclature of Commission Implementing Regulation (EU) 2018/1602, amending Annex I of Council Regulation (EEC) No 2658/87".

29. Article 27 of Directive 92/83 provides that:

> 1. Member States shall exempt the products covered by this Directive from the harmonized 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:
>
> (a) when distributed in the form of alcohol which has been completely denatured in accordance with the requirements of any Member State …;

(b) when both denatured in accordance with the requirements of any Member State and used for the manufacture of any product not for human consumption;

(c) when used for the production of vinegar falling within CN code 2209;

(d) when used for when used for the production of medicines defined by Directive 65/65/EEC;

(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.;

(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.

2. Member States may exempt the products covered by this Directive from the harmonized 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, when used:

(a) as samples for analysis, for necessary production tests, or for scientific purposes;

(b) for scientific research;

(c) for medical purposes in hospitals and pharmacies;

(d) in a manufacturing process provided that the final product does not contain alcohol;

(e) in the manufacture of a component product which is not subject to excise duty under this Directive.

…

6. Member States shall be free to give effect to the exemptions mentioned above by means of a refund of excise duty paid.

30. Section 4 FA 1995 as in force at times material to this appeal relevantly provides:

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.

...

(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.

31. Sections 1(1) and 4(1) of the Alcoholic Liquor Duties Act 1979 as in force at times material to this appeal defined "dutiable alcoholic liquor" as spirits, beer, wine, made-wine and cider.

PREVIOUS CASE LAW

Skatteverket v Gourmet Classic Ltd

32. At some time in the 2000s, the Appellant in the present proceedings contemplated marketing its cooking wine in Sweden. It applied for a preliminary opinion from the Skatterättsnämnden (Swedish Revenue Law Commission) as to how the cooking wine would be taxed in Sweden. The Skatteverket (Swedish tax administration) participated in the proceedings before the Skatterättsnämnden, and submitted that the cooking wine was subject to alcohol duty, but that it was covered by the exemption in the Swedish legislation transposing Article 27(1)(f) of Directive 92/83, such that no excise duty was to be levied on it. The Skatterättsnämnden gave its preliminary opinion to this effect.

33. The Skatteverket then brought an appeal before the Regeringsrätten (Supreme Administrative Court) seeking to have the opinion given by the Skatterättsnämnden upheld. In these proceedings, the Appellant agreed with the position of the Skatteverket. It was a feature of the Swedish legal system that an appeal could be brought before the Regeringsrätten against a decision of the Skatterättsnämnden, even though both parties in fact agreed with the decision below. The Regeringsrätten then decided that it was necessary to obtain a preliminary ruling from the CJEU on the following question: "Is the alcohol contained in cooking wine to be classified as ethyl alcohol as referred to in the first indent of Article 20 of Directive [92/83]?" (See Case C-458/06, *Skatteverket v Gourmet Classic Ltd*, Opinion of Advocate General Bot, ECLI:EU:C:2008:191, [2008] ECR I-4207, [2008] 3 CMLR 13 ("**AG Bot**"), at [12]-[21].)

34. On 3 April 2008, in the proceedings before the CJEU, the Advocate General gave his opinion, concluding that the Court did not have jurisdiction to give a ruling on the question referred by the Regeringsrätten, on the basis that there was no genuine controversy between the parties to the main proceedings in Sweden, and that it was not the function of the CJEU to deliver advisory opinions on general or hypothetical questions (*ibid*., at [22]-[58]).

35. On 12 June 2008, the CJEU gave its judgment in the case, in which it found that it *did* have jurisdiction to reply to the question posed by the Regeringsrätten: *Skatteverket v Gourmet Classic Ltd* ECLI:EU:C:2008:338, [2008] ECR I-4207, [2008] 3 CMLR 13 ("***Gourmet Classic***") at [18]-[33]. The CJEU said that the answer to the question referred 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 Directive 92/83" (*ibid*., at [34]-[40]). The Court reasoned as follows. Although cooking wine is, as such, an edible preparation falling within chapter 21 of the Combined Nomenclature, it

contains ethyl alcohol falling within CN codes 2207 and 2208. If the ethyl alcohol contained in cooking wine has an alcoholic strength exceeding 1.2 % volume, that alcohol falls within the scope of the first indent of Article 20 of Directive 92/83 notwithstanding that that cooking wine is, as such, regarded as an edible preparation.

36. Thus, the CJEU in this case decided no more than that the alcohol in cooking wine with an alcoholic strength exceeding 1.2 % volume is a product covered by Directive 92/83, by reason of the first indent of Article 20. That is undisputed by the parties in the present appeal. The CJEU made no express finding in this case in relation to the question whether cooking wine could itself be a "foodstuff" for purposes of Article 27(1)(f).

37. Nevertheless, there are features of this case that are of potential significance in this appeal.

38. First, it is clearly recorded by AG Bot at [14] that the alcoholic strength of the Appellant's cooking wine in issue in that case was 4.5 litres of pure alcohol per 100 kilograms of finished product, that is to say, within the range to qualify for the exemption under Article 27(1)(f).

39. Secondly, it is clearly recorded by AG Bot at [11], [16]-[18] and [23] that the position of the Swedish tax administration was that no excise duty was to be levied on the cooking wine because it fell within the exemption in the provision of the Swedish legislation transposing Article 27(1)(f).

40. Thirdly, it is clearly recorded in the judgment of the CJEU itself at [12] that "the Skatterättsnämnden came to the conclusion that although cooking wine is, in principle, subject to excise duty, *since it is a foodstuff* it is exempt from such duty under Article 27(1)(f) of Directive 92/83" (emphasis added). It was thus clear to the CJEU that the Swedish tax administration was proceeding on the basis that the cooking wine itself was a "foodstuff" for purposes of Article 27(1)(f). It was equally clear to the CJEU at that time that the Regeringsrätten had not asked the CJEU for a preliminary ruling on the question whether this was a correct interpretation of Article 27(1)(f), notwithstanding that it could have easily added this as a second question to its request for a preliminary ruling. Indeed, it appears that the Regeringsrätten was the final instance in Sweden in administrative matters, such that it would have been obliged by Article 267 of the Treaty on the Functioning of the European Union to seek a preliminary ruling on this second question also, unless the Regeringsrätten considered either that this second question was not raised in the case before it, or considered that the matter was *acte clair*.

41. Fourthly, despite the above, the CJEU itself made no observation on the issue of the interpretation and application of Article 27(1)(f), or on the failure to the Regeringsrätten to seek a preliminary ruling on the interpretation of that provision. The CJEU simply stated at [39], with this knowledge of the common position of the parties, that the cooking wine "constitutes ethyl alcohol within the meaning of the first indent of Article 20 of Directive 92/83, … without prejudice to the exemption provided for in Article 27(1)(f) of that directive".

42. It appears that after the CJEU gave its preliminary ruling, the Regeringsrätten found in the main proceedings in Sweden that:

> Since the alcohol in this case is directly contained in food and the alcohol content does not exceed 5 litres of pure alcohol per 100 kilograms of the food, the conditions for exemption under [the provision of Swedish legislation transposing Article 27(1)(f)] are met. The Supreme Administrative Court therefore finds, in line with the Skatterättsnämnden,

> that the company is not liable to pay alcohol tax for the products in question.[1]

43. Given that the CJEU was not asked to give a preliminary ruling on the question whether the cooking wine was a "foodstuff" for purposes of Article 27(1)(f), it might perhaps be going too far to suggest that its failure to say anything about this issue amounted to a tacit endorsement of the common position taken by the parties in that case. However, its failure to say anything at all about the interpretation of Article 27(1)(f) does suggest that it saw nothing obviously problematic about the agreed position of the parties in that case.

Répertoire Culinaire Ltd v Revenue & Customs

44. In April 2009, the First-tier Tribunal issued a decision in a case unrelated to the present proceedings, *Répertoire Culinaire Ltd v Revenue & Customs* [2009] UKFTT 75 (TC) ("***RCL* FTT-1**"). The appellant in this case challenged a decision of HMRC to refuse restoration of cooking liquors that had been seized by HMRC in 2002. These goods had been detained at the United Kingdom Customs Control Zone, Coquelles, France, as they were in the course of being imported into the United Kingdom from France. The goods were detained on the ground that there was no Accompanying Administrative Document for them and no evidence that UK excise duty had been accounted for. The reason for this was that France was one of the Member States that at that time considered that cooking liquors were not products covered by Directive 92/83 and that they could circulate freely within the European Union without the need for any accompanying document (see *ibid*. at [12] and paragraph 13 above).

45. The cooking liquors in this case all had an alcoholic content in excess of 5 litres of pure alcohol per 100 kilograms of the product (*ibid*., at [2], and at Appendix 1 ("Agreed Statement of Undisputed Facts") at [4]). This makes *Répertoire Culinaire* clearly distinguishable from the present appeal. Although there is a dispute between the parties to the present appeal as to the correct interpretation of Article 27(1)(f), they both agree that the cooking liquors in *Répertoire Culinaire* were ineligible for the exemption in Article 27(1)(f) on the ground that their alcoholic content was too high, and that they would only have subsequently become exempt under Article 27(1)(f) if and when they were subsequently used for the production of foodstuffs with an alcoholic content not exceeding 5 litres per 100 kilograms of the product. Such subsequent use is referred to in this decision as a "qualifying use".

46. The First-tier Tribunal decided to request a preliminary ruling from the CJEU on four questions.

47. On 15 July 2010, Advocate General Kokott gave her opinion in the case: *Répertoire Culinaire Ltd v Revenue & Customs* ECLI:EU:C:2010:434, [2010] ECR I-12717 ("**AG Kokott**").

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[1] Sweden, Regeringsrätten [Supreme Administrative Court], No. 3948-05, judgment of 11 June 2009, RÅ 2009 not 103, https://lagen.nu/dom/ra/2009/not/103. The original reads: "Eftersom alkoholen i detta fall ingår direkt i livsmedel och alkoholinnehållet inte överstiger 5 liter ren alkohol per 100 kilo av livsmedlet är villkoren för undantag enligt 7 § första stycket 5 LAS uppfyllda. Regeringsrätten finner därför i likhet med Skatterättsnämnden att bolaget inte är skyldigt att betala alkoholskatt för de aktuella produkterna.". The website of the Swedish tax administration confirms that "the Supreme Administrative Court found that, since the alcohol was directly incorporated into food and the alcohol content did not exceed 5 litres of pure alcohol per 100 kilograms of food, the conditions for exemption were met. The company was therefore not liable to pay alcohol tax on the cooking wines." See https://www4.skatteverket.se/rattsligvagledning/edition/2025.1/322009.html. The original reads: "Vidare konstaterade Högsta förvaltningsdomstolen att, eftersom alkoholen ingick direkt i livsmedel och alkoholhalten inte översteg 5 liter ren alkohol per 100 kilo av livsmedlet, var villkoren för undantag uppfyllda. Bolaget var därför inte skyldigt att betala alkoholskatt för matlagningsvinerna …". (The Regeringsrätten changed its name to Högsta förvaltningsdomstolen on 1 January 2011: see https://www.domstol.se/hogsta-forvaltningsdomstolen/om-hogsta-forvaltningsdomstolen/historik/.)

48. On 9 December 2010, the CJEU gave its judgment, providing its preliminary ruling on all four of the questions: *Répertoire Culinaire Ltd v HMRC* ECLI:EU:C:2010:752, [2010] ECR I-12717, [2011] STC 465 ("***RCL* CJEU**").

49. On 30 April 2013, the First-tier Tribunal issued its final decision in the main proceedings: *Répertoire Culinaire Ltd v Revenue & Customs* [2009] UKFTT 75 (TC) ("***RCL* FTT-2**"). The appellant appealed to the Upper Tribunal against this decision.

50. On 26 February 2016, the Upper Tribunal gave its decision: *Répertoire Culinaire Ltd v Revenue & Customs* [2016] UKUT 104 (TCC) ("***RCL* UT**"). HMRC then appealed to the Court of Appeal against this decision.

51. On 20 November 2017, the Court of Appeal gave its judgment: *HM Revenue and Customs v Répertoire Culinaire Ltd* [2017] EWCA Civ 1845, [2018] STC 958 ("***RCL* CA**"). The Court of Appeal allowed the appeal, set aside the decision of the Upper Tribunal, and reinstated the decision of the First-tier Tribunal.

52. It is unnecessary to analyse these judgments and decisions in detail, since they deal largely with issues that are not material to the present proceedings.

53. The first of the four questions on which *RCL* FTT-1 requested a preliminary ruling from the CJEU was whether cooking liquors are subject to excise duty under Directive 92/83 on the ground that they are within the definition of "ethyl alcohol" under the first indent of Article 20 of Directive 92/83. Although a positive answer to this question had already been given by the CJEU in *Gourmet Classic*, the First-tier Tribunal considered that the CJEU might nonetheless wish to revisit the issues in the light of new arguments now being raised (*RCL* FTT-1 at [78]). AG Kokott initially proposed that the CJEU should indeed depart from *Gourmet Classic* and hold that the alcohol in cooking wine and cooking port does not fall within the definition of ethyl alcohol under Article 20, first indent. However, the CJEU disagreed, and held, as it had found in *Gourmet Classic*, that "Article 20, first indent, of Directive 92/83 must be interpreted as meaning that the definition of 'ethyl alcohol' in that provision applies to cooking wine and cooking port" (*RCL* CJEU at [30]). The subsequent proceedings in *RCL* FTT-2, *RCL* UT and *RCL* CA all proceeded on this basis. This is not disputed in any way by the parties in the present proceedings. The answer given by the CJEU to this first question, and its reasoning, therefore deal with matters that are outside the scope of the issues in dispute in this case.

54. The second of the four questions on which *RCL* FTT-1 requested a preliminary ruling from the CJEU concerned the compatibility with EU law of provisions of the UK legislation dealing with refunds of excise duty for alcoholic products used as ingredients for food. Article 27(6) of the Directive provides that "Member States shall be free to give effect to the exemptions mentioned above by means of a refund of excise duty paid". The UK legislation imposed restrictions on who could apply for such a refund, and the time-limit within which such applications had to be made, and prescribed a minimum amount for which claims had to be made. The second question asked whether these restrictions were consistent with the United Kingdom's obligation to give effect to the exemption contained in Article 27(1)(f).

55. The CJEU answered that Article 27(1)(f) permitted such restrictions "only if it is apparent from concrete, objective 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", and that it was for the national court to ascertain whether restrictions in national legislation met this requirement. The subsequent proceedings in *RCL* FTT-2, *RCL* UT and *RCL* CA were concerned primarily with the question whether the restrictions on refunds in the UK legislation met this requirement, and if not, the consequences of this. As a result of the answer given by the CJEU to this question, the UK

legislation relating to refunds was changed with effect from 1 February 2016, and an updated version of Excise Notice 41 was issued on 19 February 2016.

56. The answer given by the CJEU to this second question, and its reasoning, also deal with matters that are outside the scope of the issues in dispute in this case. Both parties to the present appeal are agreed that if the Appellant's cooking alcohols were "foodstuffs" for purposes of Article 27(1)(f), the Appellant will not be liable to pay excise duty. There will be no question of the Appellant having to first pay excise duty and then claim a refund. Conversely, both parties are agreed that if the Appellant's cooking alcohols *were not* "foodstuffs" for purposes of Article 27(1)(f), the Appellant became liable to pay excise duty when the products were removed from a duty suspension arrangement, subject to the right subsequently to claim a refund if the products were actually used to cook food. However, there is no issue in the present proceedings concerning the compatibility with the Directive of the applicable scheme for claiming refunds, and no issue concerning the interpretation and application of that scheme.

57. The third of the four questions on which *RCL* FTT-1 requested a preliminary ruling from the CJEU read as follows:

> Should the cooking wine and cooking port, if liable to duty under the first indent of article 20 of Directive 92/83, 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), alternatively article 27.1(e), of Directive 92/83?

The reason why the First-tier Tribunal asked this question is not made entirely clear in *RCL* FTT-1. In the subsequent proceedings in *RCL* FTT-2, *RCL* UT and *RCL* CA, the appellant argued that the cooking liquors in that case could qualify for an exemption under Article 27(1)(f), even if they had not yet been put to a qualifying use, on the basis that it was sufficient that the products were destined to be put to a qualifying use (the "**future use argument**"). It may be that the First-tier Tribunal in *RCL* FTT-1 had this argument in mind, and that it was asking, in effect, "Should the cooking wine … be treated as exempt from excise duty at the point of manufacture … [as opposed to at the point when it is actually put to a qualifying use]?" Alternatively, the question might have been intended to ask which of two exemptions in Article 27(1) would be the applicable exemption in the case of cooking liquors: Article 27(1)(e), or Article 27(1)(f). It seems that there was at the time some uncertainty about this (see *RCL* FTT-1 at [9] and [16], and see paragraph 87 below). In any event, the CJEU interpreted the question in the latter sense. It answered this question by stating that although it could not be ruled out that cooking wine might be used for the production of flavours within the meaning of Article 27(1)(e), as a rule any exemption would be under Article 27(1)(f).

58. The answer given by the CJEU to this third question, and its reasoning, again deal with matters that are outside the scope of the issues in dispute in this case. Both parties to the present appeal proceed on the basis that any exemption in this case would be under Article 27(1)(f). The future use argument, which was rejected by the Court of Appeal in *RCL* CA, is similarly outside the scope of the issues in dispute in this case. Both parties proceed on the basis that if the cooking alcohols in this case were themselves foodstuffs, they were exempt under Article 27(1)(f), and that if they were not themselves foodstuffs, they would only have become exempt under Article 27(1)(f) if and when they were put to a qualifying use. The Tribunal finds that the Appellant in these proceedings does not rely on any future use argument (see paragraph 93(4) below).

59. The fourth of the four questions on which *RCL* FTT-1 requested a preliminary ruling from the CJEU concerned the consequences of the fact that the cooking wine in that case had already been released by France (the Member State of manufacture) from the excise movement system into free movement within the European Union. The CJEU answered that the consequence of this was that the United Kingdom also had to treat those products as not being subject to excise duty or as being exempted from that duty, "unless there is concrete, objective and verifiable evidence that the first Member State has failed to apply the provisions of [Directive 92/83] correctly …". Subsequently, in *RCL* FTT-2, the First-tier Tribunal found that HMRC had proved that France's application of the Directive in 2002 was incorrect, and that the United Kingdom had not been bound to treat the cooking liquors as outside the scope of the Directive. There was no appeal against that particular finding (see *RCL* FTT-2 at [87]; *RCL* CA at [31]).

60. The answer given by the CJEU to this fourth question, and its reasoning, thus once more deal with matters that are outside the scope of the issues in dispute in this case. The cooking alcohols in the present case were manufactured in the United Kingdom. There is no suggestion of the United Kingdom being bound by the earlier treatment of the goods in any other State.

61. Thus, the *Répertoire Culinaire* case deals generally with matters other than the issue in dispute in this case.

62. Nevertheless, there are also features of the *Répertoire Culinaire* case that are of potential significance in this appeal.

63. First, the decisions in *RCL* FTT-1, *RCL* CJEU, *RCL* FTT-2, and *RCL* UT were given before HMRC issued its notice of 7 July 2017, stating that "Historically, we have treated cooking wines that are of a strength of 5% abv or less as exempt from excise duty" (see paragraph 20 above). It therefore appears that at the time of these decisions, HMRC accepted that cooking wines with a strength of 5% abv or less fell within the exemption in Article 27(1)(f) of the Directive. The unchallenged evidence of Mr l'Anson is that from the time of the establishment of the Appellant's business in 1998 he had proceeded on this basis, and that up until the time that HMRC issued the 7 July 2017 notice, HMRC had permitted this. This all makes it unlikely that representatives of HMRC would have said anything in any of these cases to suggest that cooking wines with a strength of 5% abv or less would not be exempt from excise duty under Article 27(1)(f) of the Directive. Furthermore, the hearing in *RCL* CA was held after the 7 July 2017 notice had been issued, yet there is no mention of it in the judgment in *RCL* CA. This makes it unlikely that representatives of HMRC said anything in the Court of Appeal proceedings concerning the question whether or not cooking wines with a strength of 5% abv or less would be exempt from excise duty under Article 27(1)(f).

64. Indeed, the decision in *RCL* FTT-1 at [50]-[51] records counsel for HMRC as making the following submission:

> Mr. Singh [counsel for HMRC] 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.
>
> 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.

65. A copy of a version of the document referred to in this quote (CED No. 372rev 1 of 28 May 2002) ("**CED No. 372**"), was provided to the Tribunal by HMRC after the hearing. It

contains guidelines adopted by the Excise Committee established pursuant to Article 24 of Directive 92/12/EEC (now repealed), which was composed of the representatives of the Member States and chaired by a Commission representative. Item 1 of this document, entitled "Excise treatment of cooking wine and cooking cognac CED 365", states that the delegations unanimously accepted that "Since their classification in CN 2103 9090 89, cooking wine and cooking cognac are to be considered as food preparation", that "As a foodstuff with an ethyl alcohol content of more than 1.2% by volume, cooking wine and cooking cognac are eligible for the exemption from excise duties provided for in Article 27(1)(f) of Directive 92/83/EEC, provided their alcohol content does not exceed 5 litres of pure alcohol per 100 kilogrammes", and that "Where the conditions for obtaining the exemption provided for in Article 27 (1)(f) are not fulfilled, cooking wine and cooking cognac are subject … when released for consumption, to the application of the excise duties laid down in Article 3 of Directive 92/84/EEC".

66. Secondly, the matters above make it unlikely that anything said by the courts and tribunals in *RCL* FTT-1, *RCL* CJEU, *RCL* FTT-2, *RCL* UT and *RCL* CA was intended to address the situation of cooking wines with a strength of 5% abv or less.

67. HMRC seek to rely on a statement in *RCL* CJEU to the effect that "the application of the exemption under [Article 27(1)(f)] by a Member State depends on the end-use of the products in question" (at [49]). However, that statement was made in the context of the CJEU's treatment of the question relating to restrictions on refunds of excise duty. In this paragraph, the CJEU appears to be addressing the future use argument. It appears to be stating that in a case where cooking wine does not meet the requirements for an exemption under Article 27(1)(f) because its alcoholic strength is too high, excise duty must be paid, and a refund can be applied for once it is put to a qualifying end-use. This is because the exemption depends on end-use, and not on intended future end-use. The CJEU cannot be understood as addressing the situation where the cooking wine itself falls below the alcoholic strength threshold in Article 27(1)(f), or as addressing the question whether the manufacture of cooking alcohol could in itself be a qualifying end-use of the alcohol in the original wine.

68. HMRC also refer to statements in *RCL* UT to the effect that "the CJEU held that [the cooking liquors] would only be exempt as long as they were used in the production of foodstuffs (and the alcoholic content of the foodstuffs satisfied the relevant criterion)" (at [19]), that "The CJEU decided that the exemption depends on the end use of the products" (at [21]), that "Article 27(1)(f) requires that the alcohol be used for a qualifying purpose" (at [43]), that "It is not enough that it is destined or intended for such use" (at [43]), and that "that there can be no exemption at source, in the sense that cooking liquors are not inherently exempt by their nature … [and they] only become exempt if they are actually used for the qualifying purpose" (at [47]), and other similar statements, as well as similar statements in *RCL* CA including at [19], [24], [60], [62], [64], [65], and [68]. The same observations apply to all of these statements. They were all made with reference to cooking liquors that did not of themselves meet the requirements for the exemption under Article 27(1)(f) because their alcoholic strength was too high. These statements cannot be understood as intending to address the question whether or not a cooking alcohol that itself meets the alcoholic strength requirement of Article 27(1)(f) would be treated differently. The Tribunal cannot accept the HMRC argument that the existing authorities "strongly suggest that cooking wines are not themselves 'foodstuffs' for the purposes of the exemption in Article 27(1)(f) of the Directive, or the domestic legislation". These authorities do not suggest this at all, let alone suggest it strongly. The finding in *RCL* CA was that a product which does not itself satisfy the requirements for an exemption under Article 27(1)(f) because its alcoholic content is too high will not qualify for the exemption merely because it is intended to be used in future for the

production of a product that will satisfy those requirements. That was the "future use" argument that was rejected in that case. (See *RCL* CA at [65], [83], [84]: "the right to exemption for cooking liquors can arise only when they have actually been used for the production of foodstuffs with an alcoholic content below the specified limits".) There was no finding in *RCL* CA that a product will be excluded from the definition of a "foodstuff", even if its alcoholic content is below the threshold in Article 27(1)(f), merely because it is intended for future use as an ingredient in a final food product.

69. Thirdly, if it were at all possible to infer any opinion on this issue from the *RCL* case law, it would arguably be to the effect that cooking wines *are* foodstuffs for purposes of Article 27(1)(f).

(1) AG Kokott said at [45] that "The Court itself expressly acknowledges in *Gourmet Classic* that cooking wine is an edible preparation which, as such, falls not within Chapter 22, but within Chapter 21 of the CN". Her footnote reference in support of that proposition (footnote 28) includes a reference to document CED No 372 Final of 11 November 2002, which, as noted in paragraph 65 above, stated that cooking wine is a foodstuff for purposes of Article 27(1)(f). She then goes on at [48] to note that the Court held in *Gourmet Classic* that the alcohol in cooking wine is "ethyl alcohol" within the meaning of the first indent of Article 20, "without prejudice to the exemption provided for in Article 27(1)(f) of that directive". Her footnote reference in support of that proposition (footnote 29) again includes a reference to document CED No 372 Final of 11 November 2002, which, as noted above, stated that cooking wine shall be exempted from tax under Article 27(1)(f) provided that the alcoholic content does not exceed 5 litres of pure alcohol per 100 kilograms. Given what is said by AG Kokott at [45], the Tribunal does not accept the HMRC argument that AG Kokott referred to CED No 372 Final only in the context of determining whether cooking wine fell within the definition of ethyl alcohol for purposes of Article 20 of the Directive.

(2) In *RCL* CJEU, the Court added at [26]-[28] that "the fact that cooking wine and cooking port are, as such, regarded as edible preparations falling within chapter 21 of that nomenclature", and "the fact that the cooking wine and cooking port are unsuitable for consumption as beverages", are facts that "are of relevance only in relation to the exemption of products subject to the harmonised excise duty". This appears to be stating that the fact that cooking wines are edible preparations is not relevant to the question of whether they are subject to excise duty, but is only relevant to the question whether they qualify for an exemption from excise duty. This appears to suggest cooking wine, being an "edible preparation", is a "foodstuff" for purposes of the exemption in Article 27.

(3) It is true that AG Kokott said at [78] that "The decisive criterion for exemption is thus the alcoholic content of the foodstuff produced using a cooking liquor, but not the alcoholic content of the cooking liquor itself" (and see the discussion more generally at [74]-[79]). However, the Tribunal does not accept the HMRC argument that this supports the HMRC case. The effect of this conclusion of AG Kokott is that even if a cooking alcohol has an alcoholic content in excess of 5 litres of pure alcohol per 100 kilograms, it may still qualify for the exemption in Article 27(1)(f) if the final food product that it is used to make falls below that threshold. (In such cases, as was subsequently held in *RCL* CA, the exemption will apply only if and when the cooking alcohol is actually used to make a final food product.) The Tribunal does not understand AG Kokott as saying that even if a cooking alcohol itself already falls below the threshold, it will not qualify for

the exemption unless and until it is used to make a final food product. Her statement at [45] that "cooking wine is an edible preparation which, as such, falls … within Chapter 21 of the CN" seems to leave open that cooking alcohols themselves can be "foodstuffs" for purposes of Article 27(1)(f). At footnote 50, AG Kokott said that "The alcoholic content of the ingredient is relevant only as a preliminary question in the context of the first condition under Article 27(1)(f) of Directive 92/83 (see above, point 72 of this Opinion), and when it is necessary to determine whether a liquor subject to excise duty is present at all (see, for example, Article 20, first or second indent, of Directive 92/83)". The point discussed at paragraph 72 of her opinion was whether the cooking liquors were "alcohol or an alcoholic product within the meaning of Directive 92/83". Thus, footnote 50 in her opinion would seem to mean that the alcoholic content of an ingredient is *not* relevant to the question whether the ingredient itself is a "foodstuff", but that it is only relevant to determining whether the ingredient is a product covered by the Directive in the first place.

Revenue & Customs v Asiana Ltd

70. *Revenue & Customs v Asiana Ltd* [2014] UKUT 489 (TCC), [2015] STC 577 ("***Asiana***") was an appeal by HMRC against a direction made by the First-tier Tribunal allowing the appellant, who had been assessed to excise duty and customs duty on imports of Shaoxing cooking wine, to add further grounds of appeal challenging the validity of s 4(3) and (5) FA 1995, relating to the procedure for claiming refunds of excise duty. The Upper Tribunal allowed the appeal, having found that the further grounds of appeal were unarguable.

71. This decision of the Upper Tribunal, and its reasoning, deals with matters that are outside the scope of the issues in dispute in this case, for the reasons given in paragraphs 54-56 above.

72. In *Asiana*, the appellant argued that the exemption in Article 27(1)(f) of the Directive should be available if the relevant qualifying use can be demonstrated, without the need to first pay the excise duty and then claim a refund. The Tribunal rejected this argument (see at [41]-[44]). This case is of no relevance to the present appeal, for the same reasons as those given in paragraph 56 above.

73. HMRC rely on *Asiana* for statements at [21], [22] and [29(b)] to the effect that the duty had to be paid first, and that the right to claim a refund would depend on the claimant being able to satisfy HMRC as to the end use. This Tribunal finds it impossible to see how these statements could be understood as an expression of opinion by the Upper Tribunal that cooking wine with an actual alcoholic strength by volume exceeding 1.2 % volume can never itself qualify for the exemption under Article 27(1)(f), even if its alcoholic content is less than 5 litres of pure alcohol per 100 kilograms of the product, or that the exemption can only ever apply to cooking wine of any alcoholic strength once it has actually been used in the cooking of food. The cooking wine in that case was about 13% abv. Statements in *Asiana* must be understood as referring to cooking wine with an alcoholic content in excess of 5 litres per 100 kilograms.

DETERMINATION

74. The only substantive issue for determination by the Tribunal is whether the cooking alcohols to which this appeal relates are "foodstuffs" within the meaning of Article 27(1)(f) of Directive 92/83 (see paragraph 24 above).

75. Directive 92/83 does not define the concept of "foodstuffs", nor does it refer in this respect to the national law of the Member States. In the circumstances, this term must be interpreted in accordance with the usual meaning of the word in everyday language, taking into account the legislative context in which it occurs and the purposes of the rules of which it is part (Case C-331/19, *Staatssecretaris van Financiën v X* ECLI:EU:C:2020:786, [2020] STC 2359 ("***SvF v X***") at [23]-[24]). It must be borne in mind that the word "foodstuffs" may have different meanings in different contexts, such that its definition in EU legislation dealing with diverse subjects such as food safety, VAT and excise may not be the same (*ibid*., at [31]).

76. HMRC argue that the approach to interpretation that the Tribunal should adopt should be a "unified process", and "not one in which a linguistic exercise is to be performed first and in isolation from context and purpose". The Tribunal accepts that this may be one way of describing the approach *SvF v X*. The Tribunal, when reaching its final conclusion as to the correct interpretation, must look at the various considerations (usual meaning, legislative context, purpose, etc) together as a whole, not as separate isolated factors. However, that does not mean that the Tribunal cannot deal with these considerations separately in its prior analysis leading up to its final deliberation and conclusion. It would be difficult for the Tribunal to do otherwise.

77. In this case, the parties agree that the word "foodstuffs" in Article 27(1)(f) of the Directive cannot be intended to include absolutely everything that might potentially be included in the ordinary meaning of that term, for the reason given in paragraph 25 above.

78. Each of the parties has put forward its own interpretation of this term for purposes of this appeal (see paragraph 26 above). The Tribunal confines itself in this decision to choosing between those two competing interpretations. As the Tribunal has heard contradictory arguments in relation to these two interpretations only, it would not be appropriate for the Tribunal to consider possible alternative interpretations.

79. The practical effect of both interpretations is to exclude beverages from the definition of "foodstuffs" for purposes of the exemption in Article 27(1)(f). The difference between the two interpretations is that the Appellant's interpretation would exclude beverages only, while the HMRC interpretation would exclude also other liquids, even if they are not beverages. Thus, in effect, the Tribunal is asked to determine whether or not HMRC is correct in maintaining that liquids that are not beverages are also excluded from the scope of the exemption. The correctness or otherwise of the HMRC interpretation consequently becomes the focus of the enquiry. This does not mean that HMRC bear the burden of proof or persuasion. The Tribunal proceeds on the basis that the Appellant bears the burden of proving any asserted facts, and the burden of persuasion in relation to points of law. The question is whether the Appellant has discharged its burden of establishing that the HMRC interpretation is wrong.

80. It is noted at the outset that Article 27(1)(f) refers both to "foodstuffs" and to "semi-finished products". The term "semi-finished products", like the term "foodstuffs", is not defined for purposes of the Directive. However, at the hearing, HMRC did not argue that the cooking alcohols fall outside the exemption in Article 27(1)(f) on the ground that the word "foodstuffs" excludes "semi-finished products", or otherwise excludes items that would not be consumed by humans in their existing form without being further processed or added to something else. The Tribunal is therefore not called upon to determine whether "semi-finished products" are a sub-set of "foodstuffs", or whether or to what degree the concepts of "semi-finished products" and "foodstuffs" overlap, or whether the cooking alcohols to which

this appeal relates are "semi-finished products". The only question is whether or not they are "foodstuffs".

81. The Tribunal finds as follows.

82. The HMRC interpretation is not supported by the object and purpose of the Directive.

    (1) The overall purpose of the Directive is to achieve harmonization. The third recital of the Directive states that "it is important to the proper functioning of the internal market to determine common definitions for all the products concerned". The Directive permits Member States to adopt certain variations, provided that these do not cause unacceptable problems for the internal market (see in particular the eighth and seventeenth recitals of the Directive). The fact that the exemptions provided for in Article 27 are mandatory serves that harmonization purpose. *RCL* CJEU at [42] indicates that an objective of the Directive is "the free movement of goods". It further states at [48] that "the objective of the exemptions contained in Directive 92/83 is, in particular, to neutralise the impact of excise duties on alcohol used as an intermediate product in other commercial or industrial products".

    (2) The interpretation contended for by HMRC is no more consistent with these purposes than the interpretation contended for by the Appellant.

    (3) The overall purpose of the Directive is not to combat evasion, avoidance or abuse as such. The Directive does not contain specific provisions dealing with this subject-matter in a general way. However, the chapeau to Article 27 does positively require Member States to lay down conditions for the exemptions provided for in that provision to ensure their correct and straightforward application, and for preventing any evasion, avoidance or abuse. The 22nd recital to the Directive states that "Member States should not be deprived of the means of combating any evasion, avoidance or abuse which may arise in the field of exemptions". Thus, it is a purpose of the Directive to ensure that the exemptions in Article 27 do not lead to evasion, avoidance or abuse.

    (4) The Tribunal does not accept the HMRC argument that the HMRC interpretation is more consistent with the purpose of preventing evasion, given "the inherent risk of fully liquid alcohols being the subject of evasion, avoidance or abuse". HMRC do not explain concretely what additional risk of evasion would exist if liquids that are not beverages could potentially benefit from the exemption in Article 27(1)(f). Much less does HMRC present any evidence of the concrete existence of such risk.

    (5) The HMRC interpretation is not supported by the HMRC argument that "the purpose of the Directive and implementing domestic legislation is to ensure that both alcohol and alcoholic beverages with an abv of more than 1.2% are in general subject to [excise duty], unless and until they are either themselves used in an end qualifying product or are the subject of another specific exemption". This merely begs the question of what is an end qualifying product and what are the other specific exemptions.

83. The HMRC interpretation is not supported by the text of the Directive.

    (1) The word "liquid" appears nowhere in the Directive. Nor does the word "solid".

    (2) Some of the other exemptions in Article 27(1) include products that are liquid (denatured alcohol, vinegar) or that could be liquid (medicines, flavours). There is

no suggestion that the other exemptions are intended to exclude products that are liquids.

(3) The fact that Article 27(1)(f) defines the alcoholic content of foodstuffs by litres of pure alcohol per 100 kilograms of the foodstuff does not indicate that this exemption is intended to apply only to solids. It is true that it may be difficult to measure many solid foodstuffs by volume, and that it is generally practicable to measure solid foodstuffs by weight. The fact that Article 27(1)(f) provides for foodstuffs to be measured by weight rather than volume might therefore be an indication that the term "foodstuffs" *includes* solid foodstuffs. However, it is possible to measure liquids by either volume or weight. The fact that Article 27(1)(f) provides for foodstuffs to be measured by weight rather than volume therefore provides no reason to infer an intention to *exclude* liquid foodstuffs. There is no evidence before the Tribunal as to why this particular method of measuring alcoholic content was chosen for Article 27(1)(f) but not for any of the other provisions of the Directive, and any further conclusion based on this choice of method for Article 27(1)(f) would be speculation.

(4) The Tribunal cannot accept the HMRC argument that "There would be little apparent purpose to subjecting cooking liquors with an abv of over 1.2% but lower than the limit in the Art.27(1)(f) exemption to [excise duty] yet simultaneously automatically exempting them as a foodstuff". The Directive does not in fact subject *cooking liquors* to excise duty. As was made clear by the CJEU in *Gourmet Classic* and *RCL* CJEU, the Directive subjects the *ethyl alcohol in* the cooking liquors to excise duty, and Article 27 grants an exemption to that ethyl alcohol in certain circumstances. Where there are automatic exemptions in legislation, it is common for the legislation to apply a general rule to a certain subject, and then to provide for the automatic exemption in certain circumstances. In all such cases, where a subject falls within the exemption, the legislation will impose the general rule on the subject and then simultaneously automatically exempt the subject. There is nothing unusual in this. Furthermore, it is not as if Article 19 of the Directive would be deprived of all effect in relation to liquid foodstuffs, if the exemption in Article 27(1)(f) applied to them. The exemption would apply only where the liquid foodstuff has an alcoholic content not exceeding 5 litres of pure alcohol per 100 kilograms of the foodstuff.

84. On the other hand, the Appellant's interpretation has some support in the text of the Directive.

(1) Article 27(1)(e) refers to "foodstuffs and non-alcoholic beverages", thereby drawing a distinction between "foodstuffs" and "beverages". In common parlance, a distinction may be drawn between "food" and "drink" (beverages).

(2) The text of the Directive contains numerous references to beverages, including in the title itself. Most of the products covered by the Directive are in fact specifically beverages. The distinction between what is and what is not a beverage is therefore integral to the application of the Directive generally.

(3) Apart from Article 27(1)(e), which specifically mentions beverages, all of the other exemptions in Article 27(1) and (2) are either products that are not beverages (denatured alcohol, vinegar, medicines), or which have not been used as beverages (such as products used for scientific or medical purposes, or in a manufacturing process for a final product that does not contain alcohol, or in the manufacture of a component product which is not subject to excise duty). This

suggests that, or at least is consistent with the conclusion that, the exemptions do not include beverages except when specifically mentioned.

85. The HMRC interpretation is not supported by the legislative history of the Directive.

(1) In 1991, the Economic and Social Committee commented as follows on the proposal that became Directive 92/83:

> As the Committee has already stated in its Opinion ESC No 832/90 of 5 July 1990 (point 3.4.1), it does not seem expedient to charge excise duties on solid foods which contain alcohol. Such products pose no health risks and making them subject to duty would only have unfavourable effects on competition.
>
> The Committee therefore proposes that the sub-paragraph should read:
>
> > "when used for the production of foodstuffs and confectioneries which are not alcoholic drinks;"
>
> (EU, Official Journal, 18.3.91, C 69/29).

(2) In 1992, the European Parliament proposed adding the following new recital to the proposed Directive that became Directive 92/83: "Whereas alcohol used in the manufacture of perfumes, toilet waters, cosmetics and medication and the production of solid foodstuffs should be exempt from duty" (see EU, Official Journal, 16.3.92, C 67/125). However, this reference to "solid foodstuffs" did not appear in the final text of the Directive.

(3) The Tribunal cannot accept the HMRC argument that this shows that the exemption in Article 27(1)(f) was intended to apply only to "solid foods" and not to liquids.

(a) The 1991 comment of the Economic and Social Committee proposes an exemption for "solid foods which contain alcohol", and then proposes achieving this by adding text to the proposed Directive that does not include the word "solid". HMRC contend that this shows that the word "foodstuffs" is used in this document to mean "solid food". However, it is not possible to draw conclusions to which any significant weight can be given from the very brief comment in this document. It refers back to an earlier opinion given by the same Committee in 1990, which is not before the Tribunal, and this comment would need to be read in the light of what is stated in that earlier opinion. This comment refers to "confectioneries which are not alcoholic drinks" rather than "drinks other than alcoholic drinks", suggesting that the word "confectioneries" might include liquid foods that are not drinks. In any event, even if it could be concluded that the Economic and Social Committee considered the word "foodstuffs" to include only "solid food", it could not be concluded that the Council of the European Communities or the European Parliament did so. Indeed, the subsequent 1992 proposal of the European Parliament for the inclusion in the Directive of a reference to "solid foodstuffs" suggests that the European Parliament considered that the word "foodstuffs" alone would not be confined to solid foodstuffs.

(b) The 1992 proposal of the European Parliament for the inclusion in the Directive of a reference to "solid foodstuffs" was ultimately not adopted. The reasons why it was ultimately decided not to adopt these words are not

in evidence before the Tribunal. The Tribunal cannot speculate as to what those reasons were. The most obvious potential explanation would be that the word "solid" was ultimately not included in the Directive because it was ultimately decided that the exemption should not be confined to solid foodstuffs. If there was a conscious intention to limit the exemption to solid foodstuffs, it is very difficult to explain why the word "solid" would have been omitted, when its inclusion had been expressly proposed by the European Parliament in an opinion that is expressly referenced in footnote 1 to the Directive. It can hardly be said that it was already so obvious that the exemption was confined to solid foodstuffs that the inclusion of the word "solid" must have been considered redundant.

86. The HMRC interpretation is not supported by case law of the CJEU applying Article 27(1)(f) of the Directive. That case law is considered in paragraphs 32-43, 47-48, and 53-69 above. For the reasons there given, it provides no support for the HMRC interpretation. It arguably provides some persuasive support for the Appellant's interpretation (see paragraphs 37-43 and 69 above).

87. The HMRC interpretation is not supported by guidelines issued by the Excise Committee of the European Union.

(1) The decision in *RCL* FTT-1 contains descriptions of various documents issued by the Excise Committee.

(2) While earlier documents of the Excise Committee may have taken a different view (this is unclear) (see *RCL* FTT-1 at [7]), the Excise Committee laid down Guidelines in CED No. 372, which accepted what is now the Appellant's interpretation, namely that cooking wines are foodstuffs for purposes of Article 27(1)(f) and will qualify for the exemption under that provision if they have an alcoholic content of less than 5 litres of pure alcohol per 100 kilograms (see paragraphs 64-65 above).

(3) Subsequently, in 2004, the Excise Committee considered a proposal for new guidelines, which would have cancelled the guidelines in CED No. 372, and would have considered cooking wine and cooking cognac as falling within the exemption in Article 27(1)(e) of the Directive, instead of Article 27(1)(f): see CED No. 497 of 22 November 2004 entitled "Excise treatment and the intra-Community movement of cooking wine and cooking Cognac", which stated in relation to this matter that "Although some Member States raised concerns, the final position of all Member States remained unclear" (see also *RCL* FTT-1 at [9]).

(4) However, at a subsequent meeting of the Excise Committee in 2005, the proposed new guidelines were not adopted because 7 or 8 Member States were opposed to it: see CED No. 505. The Chair of the Excise Committee is recorded as stating that the situation was not at all satisfactory because the existing guidelines were

not being applied uniformly.[2] Significantly, one of the Member States opposing the change appears to have been the United Kingdom.[3]

(5) In its judgment of 11 June 2009 (paragraph 42 above), the Regeringsrätten applied the guidelines in CED No. 372.[4]

(6) In 2010, it was then clarified in *RCL* CJEU that other than in exceptional cases, cooking alcohols fall within the exemption in Article 27(1)(f) rather than Article 27(1)(e) (see paragraph 57 above).

(7) The Guidelines in CED No. 372 were applied by the Swedish Regeringsrätten in 2009 (see paragraph 42 above).

(8) The Guidelines in CED No. 372 were referred to by AG Kokott, with apparent approval, in 2010 (see paragraph 69(1) above).

(9) There is no evidence before the Tribunal that the Excise Committee has since modified its position.

(10) Even if the guidelines in CED No. 372 are not legally binding, the Tribunal is entitled to take the matters in (1) to (9) above into account. HMRC argue that guidelines of the Excise Committee are not binding, that CED No. 505 indicates that the guidelines in CED No. 372 were not being applied uniformly, and that although CED No. 372 originated with the treatment by Ireland of cooking wine, it appears that Ireland itself has subsequently not followed the approach in CED No. 372 (see paragraph 88(6) below. However, that does not alter the fact that the HMRC interpretation is not positively supported by any of the Excise Committee documents, while the Appellant's interpretation is supported by CED No. 372. This is a matter that the Tribunal is entitled to consider.

(11) An email sent by HMRC to Mr l'Anson on 12 May 2017, which foreshadowed the change in HMRC position, stated that "cooking wine cannot be considered to

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[2] CED No. 505, Item (13), "Alcool: Traitement fiscal du 'vin de cuisson' et du 'Cognac de cuisson' – proposition d'orientation (CED 497)", concludes: "Le Président regrette vivement que la situation ne soit pas du tout satisfaisante car la première orientation, pourtant adoptée par le Comité, n'est pas appliquée de manière uniforme. Constatant l'opposition de 7 à 8 États membres à cette seconde orientation qui a la qualité d'être pragmatique, le Président conclut qu'il n'est pas opportun de prolonger la discussion." ("The Chairman deeply regretted that the situation was not at all satisfactory because the first guideline, which had nevertheless been adopted by the Committee, was not being applied uniformly. Noting that 7 or 8 Member States were opposed to this second approach, which had the advantage of being pragmatic, the Chairman concluded that it was not appropriate to prolong the discussion.")

[3] *Ibid*., stating amongst other matters: "La délégation britannique est satisfaite de l'orientation précédente. Par contre la nouvelle orientation est 'trop large' et entraînerait des distorsions entre les États membres." ("The UK delegation is satisfied with the previous approach. However, the new guideline is 'too broad' and would lead to distortions between Member States.")

[4] Sweden, Regeringsrätten [Supreme Administrative Court], No. 3948-05, judgment of 11 June 2009, RÅ 2009 not 103, https://lagen.nu/dom/ra/2009/not/103. "Punktskattekommittén vid EU:s generaldirektorat för skatter och tullar har den 11 november 2002 antagit vägledande s.k. guidelines (CED No 372) rörande frågan hur matlagningsvin skall behandlas vid tillämpningen av artikel 20 och 27.1 f i det föregående nämnda direktivet. Enligt dessa guidelines skall matlagningsvin, eftersom det klassificeras enligt KN-nr 2103 9090 89, anses som livsmedel. Enligt nämnda guidelines skall från skatteplikt enligt artikel 27.1 f undantas matlagningsvin under förutsättning att alkoholhalten inte överstiger 5 liter ren alkohol per 100 kilogram." ("The Excise Duty Committee of the EU's Directorate-General for Taxation and Customs has on 11 November 2002 adopted guidelines (CED No 372) concerning the question of how cooking wine should be treated in the application of Articles 20 and 27(1)(f) of the aforementioned directive. According to these guidelines, cooking wine, since it is classified under CN code 2103 9090 89, is to be regarded as a foodstuff. According to the said guidelines, cooking wine shall be exempted from tax under Article 27(1)(f) provided that the alcohol content does not exceed 5 litres of pure alcohol per 100 kilograms.")

be an exempt product in its own right. This has since been confirmed by the EU Commission." When asked by the Tribunal, HMRC stated that this reference to confirmation by the EU Commission was probably a reference to a letter dated 4 March 2016 from the Directorate-General Taxation and Customs Union of the European Commission. This letter dealt with the question whether the UK was required to treat a product as exempt if it had already been treated as exempt in another Member State (that is, the fourth of the questions on which a preliminary ruling had been requested and given in *RCL* CJEU: see paragraphs 48, 59 and 60 above). The letter stated that because "Article 27(1)(f) depends on the end-use of the product in question", then if products are imported into the UK, "Exemption would ultimately have to be granted in the UK, as the Member State of destination, where the product would be consumed". Because of this, said the Commission, "it seems appropriate that economic operators in the UK would have to show that exemption under Article 27(1)(f) have been properly granted by another Member State, if they wish to avoid paying duty on importation into the UK". The Tribunal considers that this letter was dealing with an entirely different question to that before the Tribunal in the present case, and that the reference in this letter to "end-use" adds nothing to what is stated in paragraph 67 above.

88. The HMRC interpretation is not supported by the practice of EU Member States, to the limited extent that there is information about it before the Tribunal in these proceedings.

(1) The parties took the position at the hearing that the Tribunal is not bound by the way that the Directive has been applied in practice by other Member States, and that even if the practice of every EU Member State was consistent, it is possible that they might all be applying the Directive incorrectly.

(2) Nevertheless, the Tribunal considers that the practice of EU Member States in implementing a directive can be given some persuasive weight. Decisions of national courts of other countries applying EU legislation can be persuasive authorities in the same way that decisions of courts of other countries may serve as persuasive authorities in any other context. The legislation and administrative practices of other States may potentially also be of some persuasive weight, particularly when a large number of States adopt a consistent practice.

(3) However, there is no evidence before the Tribunal of the practice of any present EU Member States other than Sweden, the Netherlands and Ireland.

(4) As to Sweden, the judgment of the Regeringsrätten in 2009 supports the Appellant's interpretation (see paragraphs 42 and 87(5) above). It has some persuasive weight because the conclusion that it reached was the same as that reached by the Skatterättsnämnden, because the conclusion of the Skatterättsnämnden was known to the CJEU and was not criticised by it in *Gourmet Classique* (see paragraphs 37-43 above), and because it demonstrates that a highest level court in Sweden considered this conclusion to be compatible with what the CJEU had decided in that case.

(5) The Netherlands appears to take the same approach as Sweden.[5]

[5] Ministerie van Financiën, Douane, Handboek Accijns, 50.10.00 Vrijstellingen (Ministry of Finance, Customs, Excise Manual, 50.10.00 Exemptions) at para. 3.1.2: "uitslag van kookwijn uit de AGP kan met toepassing van de vrijstelling van artikel 64a, eerste lid, onderdeel f WA, mits voldaan aan voorwaarde van maximaal 5 liter absolute alcohol per 100 kg product" ("the release of cooking wine from the bonded warehouse may take place with the application of the exemption of [the Netherlands law transposing Article 27(1)(f) of the Directive], provided the condition of a maximum of 5 litres of absolute alcohol per 100 kg of product is met").

(6) Ireland appears to apply the "future use" approach that was expressly rejected in the United Kingdom by *RCL* CA (see paragraphs 57, 58 and 68 above),[6] such that its approach has no persuasive weight in this case.

89. The HMRC interpretation is not supported by the UK's own domestic legislation transposing the Directive into UK law.

(1) There is no reference in the relevant provisions of the FA 1995 to "liquids" or "solids".

(2) On the other hand, s 4(8) FA 1995 states that "references in this section to chocolates or food do not include references to any beverages". That directly supports the Appellant's interpretation, that the word "foodstuffs" excludes beverages but not other liquid foodstuffs.

90. The HMRC interpretation is not supported by HMRC's own previous practice.

(1) The 7 July 2017 notice sent by HMRC to the Appellant acknowledges that "Historically, we have treated cooking wines that are of a strength of 5% abv or less as exempt from excise duty". Thus, prior to 2017, HMRC accepted the Appellant's interpretation.

(2) That notice went on to say that "It is clear that the current treatment has no legal basis and is not provided for in excise legislation", and that "in future, excise duty will be charged on any cooking wines which have a strength exceeding 1.2 per cent abv". However, the notice gives no explanation of why this treatment had no legal basis, or why HMRC had previously thought otherwise, or what had prompted HMRC to re-think its position. Nor was any such explanation forthcoming during the course of the hearing.

(3) An email sent by HMRC to Mr l'Anson on 12 May 2017, which foreshadowed the change in HMRC position, states that "The Repertoire Culinaire (RC) case that you have referred to has confirmed that cooking wine cannot be considered to be an exempt product in its own right". At the time that that email was sent, the decision of the Upper Tribunal in *RCL* UT had been issued, but the hearing before the Court of Appeal had not yet been held. For the reasons given above, the Tribunal sees nothing in the decision in *RCL* UT that would have justified this change in position.

(4) It is true that it was stated in *RCL* UT at [19] that the CJEU had decided in *RCL* CJEU that "Rather than cooking liquors being exempt by definition under the relevant provision (held to be Art 27(1)(f)), the CJEU held that they would only be exempt as long as they were used in the production of foodstuffs (and the alcoholic content of the foodstuffs satisfied the relevant criterion)." That may in

https://www.belastingdienst.nl/bibliotheek/handboeken/html/boeken/HA/vrijstellingen-vrijstelling_van_accijns_zonder_vergunning.html.

[6] Revenue, Irish Tax and Customs, Revenue Excise Manual, Alcohol Products Tax and Reliefs Manual, February 2016, para. 3.2.1: For cooking wine, cooking port and cooking cognac, "Relief may be granted where it is shown to the satisfaction of Revenue that the product is intended for use or has been used in the production of … foodstuffs, whether such alcohol product is used- either as a filling in such foodstuff or otherwise, either directly or as a constituent of semi-finished products for use in the production of such foodstuff". https://www.taxfind.ie/binaryDocument//pdfs/http___www_revenue_ie_en_about_foi_s16_excise_alcohol_products_tax_alcohol_products_tax_and_reliefs_manual_pdf_20160225233009.pdf. See also Revenue, Irish Tax and Customs, Tax and Duty Manual, Denatured and Undenatured Alcohol Products, February 2025, para. 1.4.1. https://www.revenue.ie/en/tax-professionals/tdm/excise/alcohol-products-tax/denatured-undenatured-alcohol-products.pdf.

fact have been the practical consequence of the judgment in *RCL* CJEU for the particular appellant in that case. Because the cooking wines in that case had an alcoholic content greater than 5 litres of pure alcohol per 100 kilograms of the product, they did not qualify for an exemption under Article 27(1)(f) unless and until they were used in the production of foodstuffs that did have an alcoholic content below that threshold. However, for the reasons given above, nothing in that decision suggests that the cooking wines in that case would not have qualified under Article 27(1)(f) if they had had an alcoholic content of less than 5 litres of pure alcohol per 100 kilograms of the product.

(5) The HMRC change of position in 2017 may therefore have been based on a misreading of *RCL* UT, which was in any event set aside on appeal in *RCL* CA. Although it was set aside on points not material to these present proceedings, HMRC accept that when a decision of the Upper Tribunal is set aside on appeal, nothing remains of that decision.

(6) At times material to this appeal, it does not appear to have been HMRC's position that the definition of "foodstuffs" in Article 27(1)(f) excludes liquid foodstuffs. Rather, its position appears to have been that "Cooking wine is not a semi-finished product", that cooking wine rather "is alcohol that may be used in a finished or semi-finished article at a later stage" (email of HMRC to Mr l'Anson of 12 May 2017), that "by definition it is for use in the production of a further product", and that "Until the creation of a foodstuff, there is no basis on which to exempt excise duty" (email of HMRC to Mr l'Anson of 20 December 2018). In other words, the HMRC position at that time seems to have been that cooking wine is not a foodstuff because it is only a pre-cursor to a semi-finished product or to a final foodstuff, and is therefore not even a semi-finished product. The 30 June 2023 review conclusion letter thus states that:

> It would also make little sense to treat cooking wines as a "foodstuff" for the purposes of AIR [Alcoholic Ingredients Relief], because AIR can only be claimed if the alcohol is "used" in the production of a foodstuff. As such, it is not the "foodstuff" which is subject to duty and on which the relief is claimed. In this case, the product being used by the hospitality to produce a "foodstuff" is the company's cooking wine which, as above, is dutiable alcohol.

(7) The HMRC statement of case dated 13 February 2024 subsequently took the position (at paragraphs 27-45) that it was decided in the *Répertoire Culinaire* case and *Asiana* that cooking wine can only ever qualify for exemption under Article 27(1)(f) once it has actually been used for cooking, regardless of whether or not it is a semi-finished product.

(8) It appears that HMRC's case has evolved since then. At the hearing, HMRC did not seek to rely on these arguments, and accepted that the issue for determination in this case has not been decided in *Répertoire Culinaire* and *Asiana*. The interpretation of Article 27(1)(f) contended for by HMRC at the hearing appears to be of very recent origin.

91. The HMRC interpretation would lead to practical problems.

(1) The Appellant argues as follows. The HMRC interpretation would be uncertain and unworkable in practice. Sauces and condiments have different degrees of viscosity or "gloopiness". There would be no way for a manufacturer or importer

of alcoholic products such as sauces, glazes, marinades, batters, condiments and salad dressings to know what degree of viscosity will be the dividing line between "liquid" products and "solid" products for purposes of the HMRC interpretation of Article 27(1)(f).

(2) HMRC respond that the question of what degree of viscosity will be the dividing line between "liquid" foodstuffs and "solid" foodstuffs will be a matter for determination on a case-by-case basis in the future, and that the application of many provisions of tax law has to be determined in this way.

(3) The Tribunal accepts that the application of many provisions of tax law has to be determined on a case-by-case basis. Nevertheless, when deciding between competing interpretations of a legislative provision, the practical problems to which one particular interpretation would give rise is a relevant consideration in determining whether that interpretation is the correct interpretation. In particular, an interpretation that would inject uncertainty into the application of the exemptions in Article 27(1)(f) would seem to be inconsistent with the purposes of the Directive of achieving harmonisation, the proper functioning of the internal market, and the free movement of goods (see paragraph 82(1) above), especially given that the chapeau to Article 27(1) expressly requires that the exemptions be given a "straightforward application".

92. The HMRC interpretation is not supported by the principle that a provision which constitutes a derogation from a principle must be interpreted strictly (Case C-336/03, *easyCar (UK) Ltd v Office of Fair Trading* ECLI:EU:C:2005:150, [2005] ECR I-1947, [2005] 2 CMLR 2 at [21]). That principle obviously does not require an exception to be subjected to limitations for which no basis can be established. Given the Tribunal's conclusions in paragraphs 82-91 above, the Tribunal finds that assistance cannot be derived from this principle.

93. In general terms, in everyday language, the word "foodstuffs" connotes products containing nutrients which are swallowed by humans for the purpose of obtaining those nutrients, as well as products containing such nutrients that would not be eaten in their current state but which are used as an ingredient in cooking and then consumed as part of the final food product.

(1) In general terms, in everyday language, the word "food" connotes products containing nutrients which are swallowed by humans for the purpose of obtaining those nutrients. Depending on context, the word "food" may also include products that would not be consumed by humans in their current state, but which are used as an ingredient in cooking and then consumed as part of the final food product. An example is flour.

(2) In general terms, in everyday language, the meaning of the word "foodstuff" is similar to "food" (compare, in the context of VAT, *SvF v X* at [25]-[26]), but the term "foodstuff" would normally be considered to be a broader term than "food", and would generally be much more likely to be understood to include also products that would not be eaten in their current state but which are used as an ingredient in cooking and then consumed as part of the final food product. The word "stuff" connotes the material of which something is made.

(3) The Tribunal is not called upon to determine the meaning and effect of the term "semi-finished product" that appears in Article 27(1)(f) (see paragraph 80 above). It suffices here to say that the Tribunal is satisfied that the inclusion of this word in this provision does not mean that the word "foodstuffs" must exclude products

that would not be eaten in their current state but which are used as an ingredient in cooking and then consumed as part of the final food product. A product to which the Directive applies could be used as an ingredient to produce product A, which could then be used as an ingredient to make product B, which could in turn be used as an ingredient to make product C, which is then eaten. In such a case, it could be possible for products A, B and C all to be "foodstuffs", and for products A and B at the same time to be semi-finished products for the production of product C. HMRC have not argued the contrary.

(4) To say that a product such as flour is a foodstuff is not to apply a "future use" argument of the kind that was rejected in the *Répertoire Culinaire* case (see paragraphs 57-58 and 67-68 above). Although flour may be a product that is intended to be used in the future for making a final food product, it is itself in its current form already a foodstuff, as that word is generally understood in everyday language. A product does not have to be swallowed by a human before it becomes a foodstuff. Nor does a product have to be in the final form in which it is consumed by a human before it becomes a foodstuff.

(5) The parties did not refer to the meaning of the word corresponding to "foodstuffs" in the other language versions of the Directive. There is no suggestion that the conclusions in sub-paragraphs (1) to (4) above would be inconsistent with the other language versions.

94. The usual meaning of the word "foodstuffs" includes products that are liquids that are used as ingredients in making final food products, examples being oil, vinegar, soy sauce, fish sauce, Worcester sauce, marinades, glazes, syrups and condiments. The term also includes final food products that are liquid, such as soups and broths.

95. A product will be, or at least will be much more likely to be, a foodstuff for purposes of Article 27(1)(f), if it falls within a CN code applicable to a kind of foodstuff.

(1) There is a heavy reliance in the text of the Directive on CN codes to define types of products. Recitals to the Directive state that "it is important to the proper functioning of the internal market to determine common definitions for all the products concerned", and that "it is useful to base such definitions on those set out in the combined nomenclature in force at the date of the adoption of this Directive". Many kinds of products are defined in the Directive by reference to specific CN codes.

(2) Even where the Directive refers to a kind of product without defining it by reference to specific CN codes, such as in the case of the reference to "foodstuffs" in Article 27(1)(f), it would be consistent with the purposes of the Directive for CN codes nonetheless to be used, or at least taken into account, when interpreting the meaning of that reference. CED No. 372 takes this approach (see paragraph 65 above).

96. Considering all of the matters above, together as a whole, including amongst other matters the object and purpose of the Directive, the text of the Directive as a whole, such evidence as there is of the legislative history of the Directive, the case law of the CJEU applying Article 27(1)(f) of the Directive, the UK domestic case law relied on by the parties, the UK domestic legislation transposing the Directive into UK law, a decision of the Swedish Supreme Administrative Court, the prior practice of HMRC, the practical consequences of the HMRC interpretation, the usual meaning of the word "foodstuffs" in everyday language, and the CN code under which the product falls, the Tribunal finds that the Appellant's interpretation (see paragraph 26 above) is the better interpretation. The Tribunal also finds

that the word "foodstuffs" in Article 27(1)(f) includes products that would not be eaten in their current state but which are used as an ingredient in cooking and then consumed as part of the final food product. This interpretation is better supported by the text of the Directive as a whole (see paragraphs 83 and 84 above), the purpose of the Directive in seeking harmonization (see paragraphs 82 and 91(3) above), the text of the UK domestic legislation (see paragraph 89 above), as well as the usual meaning of the word "foodstuffs" in everyday language (see paragraph 93 above). This appears to be the interpretation taken in the Excise Committee's Guidelines in CED No. 372 (see paragraphs 64-65 and 87 above), which was applied by the Swedish Supreme Administrative Court in *Gourmet Classic* (see paragraphs 42, 87(5) and 88(4) above). The CJEU was aware that this was the interpretation taken by the court below in Sweden and advocated for by both parties to the main proceedings in that case, and the CJEU gave no indication that it saw any difficulty with this approach (see paragraphs 37-43 above). Other matters relied on by HMRC have been found not to assist its case.

97. The Tribunal finds that cooking alcohols to which this appeal relates fall within the meaning of the word "foodstuffs" in Article 27(1)(f) of Directive 92/83/EEC.

(1) The products are not beverages. They are unsuitable for consumption as beverages, and are not intended for such consumption.

(2) The products contain nutrients. They are used as an ingredient in the preparation of final food items, which are consumed by humans for the purpose of obtaining the nutrients in the final food item, including the nutrients in the Appellant's products within them.

(3) The products fall within CN code 2103 (see paragraphs 7-8 above), "Sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard", which applies to foodstuffs. This CN code falls within Chapter 21 of the Combined Nomenclature, "Miscellaneous edible preparations".

98. Any of the cooking alcohol products to which the assessment under appeal relates, that contain alcohol such that 100 kilograms of the product would not contain more than 5 litres of alcohol, therefore qualify for the exemption in s 4(2)(c) of the Finance Act 1995, which transposes Article 27(1)(f) of Directive 92/83/EEC.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

99. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Release date: 25th FEBRUARY 2025