Appeal numbers FTC/23/2010 and FTC/24/2010
[2011] UKUT 195 (TCC)

Beer duty- preliminary issues- whether the extent of the charge to duty is calculated by reference to the volume of beer in each container as it passes the duty point- identification of the point in the calculation of beer duty at which one ignores fractions of a penny- whether such truncation is per container or monthly when returns are made

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

CARLSBERG UK LIMITED
INBEV UK LIMITED **Appellants**

- and -

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

TRIBUNAL: Mrs Justice Proudman

Sitting in public at The Royal Courts of Justice on 24 and 25 January 2011

Roderick Cordara QC, Jeremy White and Sam Grodzinski, instructed by McGrigors LLP, for the Appellants

Andrew Macnab, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent.

DECISION

CARLSBERG UK LTD and INBEV UK Ltd v. HMRC FTC/23-24/2010

TRIBUNAL JUDGE: Mrs Justice Proudman
RELEASE DATE:

1. This is an appeal in point of law from a decision dated 17th December 2009 of the First-tier Tribunal (Tax Chamber) (Dr John F Avery Jones CBE) ("the Tribunal") in which the Tribunal determined two related preliminary issues against the appellants. Permission to appeal was granted on 17th February 2010. The Tribunal was hearing appeals from decisions of the respondents ("HMRC") made by way of formal departmental review on 14th March 2008 (Carlsberg) and 24th September 2008 (Inbev) upholding assessments respectively dated 17th December 2007 and 1st July 2008.

2. The case concerns beer duty, an excise duty charged on alcoholic drinks under the Alcoholic Liquor Duties Act 1979 as amended ("ALDA"). Although it is the most recent of a long succession of duties on beer, stretching back to the Civil War (Mr Cordara QC and his juniors for the appellants produced an interesting historical summary) it is now charged against the background of the United Kingdom's obligations pursuant to the EU Council Directives 92/12/EEC, 92/83/EEC and 92/84/EEC.

3. The factual background is uncontroversial. The appellants are brewing companies which pay very substantial amounts of beer duty. They are what is

termed suspension brewers, meaning that they have entered into arrangements with HMRC to suspend the point at which duty becomes payable, known as the 'duty point'. Suspension arrangements are the norm for registered brewers. The appellants also benefit from deferral of payment of duty until the 25th of the month after the month in which the duty point occurs. The appellants complete a monthly return by the 15th of that month and must, as I have said, pay the amount returned by the 25th.

4. Under ALDA, the charge on beer (see s. 36(1) and (1AA)) is calculated at £x (the rate from time to time applicable) "per hectolitre per cent of alcohol in the beer". Thus the amount of beer duty is calculated by reference to the volume and strength of the beer produced by the appellants and the rate of duty in force at the relevant time. Under previous regimes duty on beer was calculated according to the specific gravity of the worts per 16 gallons, the standard barrel measure.

5. The two preliminary issues, which are interrelated, are whether or not the beer duty falls to be calculated by reference to individual containers of beer and whether or not duty of a fraction of a penny falls to be disregarded (or "truncated") on each of those containers. The point at which truncation occurs makes an enormous difference to the total amount payable.

6. The Tribunal was asked (see paragraph 2 of its decision) to consider two preliminary issues:

a) Whether, pursuant to the relevant provisions of the Alcoholic Liquor Duties Act 1979 and the Beer Regulations 1993, the Appellants were entitled (in relation to the periods covered by the Respondents' assessments at issue in these appeals) to calculate the amounts of duty payable on beer by reference to the volume of beer held in each container.

b) In the event that the Appellants were so entitled, whether they were then entitled, having calculated the duty payable per container, to disregard any fractions of a penny produced by such calculation, in accordance with section 137(4) of the Customs and Excise Management Act 1979.

7. The Tribunal decided against the appellants on the first issue so that the second did not apply. However the Tribunal also provided an analysis of the second issue as if it were answering it in full, beginning at paragraph 11 of the decision.

8. The appellants contend that the quantum of tax due is ascertained by reference to the amount and strength of the beer in any given container at the statutory duty point. It is said that rounding down to the nearest legal penny, in accordance with s.137(4) of the Customs and Excise Management Act 1979 ("CEMA"), properly occurs in respect of the individual sums of duty on the contents of each container as it passes the duty point. HMRC disagree. They take the view that duty is to be calculated by reference to the total volume of beer chargeable in any given accounting period. Thus any truncation of the total duty figure takes place at the final calculation only so that rounding down only occurs on the global amount accounted for.

The primary legislation

9. I start with the Council Directives. The three Directives referred to above provide, respectively, for (i) the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, (ii) the harmonisation of the structure of excise duties on alcohol and alcoholic beverages and (iii) the approximation of the rates of excise duty on alcohol and alcoholic beverages.

10. Despite Mr Cordara QC's eloquent submission that these directives hold the key to the preliminary issues before the Upper Tribunal, I do not accept that the Tribunal's reasoning is incompatible with EU law. Indeed his argument does not sit easily with the observations of the Court of Justice of the European Union ("ECJ") in *JD Wetherspoon plc v. Revenue and Customs Commissioners* [2009] STC 1022 at [39]-[51] and *Koninklijke Ahold v. Staatssecretaris* [2009] STC 1022 at [34]-[43]. That said, I agree with the Tribunal that these cases are of limited assistance since they deal with rounding for Value Added Tax purposes. This case is concerned with the construction of ALDA and *The Beer Regulations 1993 SI 1993 No 1228* as amended ("the regulations") and CEMA.

11. The thrust of the EU legislation is the duty point, not payment and collection of the duty. The only provisions of particular assistance are Articles 5 and 6 of Directive 92/12/EEC. Article 5 provides that beer shall be subject to excise

duty at the time of production within (or importation into) the relevant territory of the Community. Article 6 is important because it provides for the time when excise duty should become chargeable. The point of chargeability is a key concept under EU law and the domestic legislation mirrors this concept accordingly in accordance with the principle enunciated in *Marleasing SA v. La Comercial Internacional de Alimentation SA* (Case C-106/89) [1990] ECR I-4135.

12. S.2 (2) ALDA provides,

> "For all purposes of this Act-
>
> (a) except where some other measure of quantity is specified, any computation of the quantity of any liquor or of the alcohol contained in any liquor shall be made in terms of the volume of the liquor or alcohol, as the case may be;
>
> (b) any computation of the volume of any liquor or of the alcohol contained in any liquor shall be made in litres as at 20°C; and
>
> (c) the alcoholic strength of any liquor is the ratio of the volume of the alcohol contained in the liquor to the volume of the liquor (inclusive of the alcohol contained in it);…"

13. S.2 (3) – (4) confer power on HMRC to make regulations, as follows:

> "(3)…regulations prescribing the means to be used for ascertaining for any purpose [and ss. (4) says that different regulations may be made for different purposes under this subsection] the strength, weight or volume of any liquor…

(3A) Without prejudice to the generality of subsection (3) above, regulations under that subsection may provide that for the purpose of charging duty on any…beer…contained in any bottle or other container, the strength, weight or volume of the liquor in that bottle or other container may be ascertained by reference to any information given on the bottle or other container by mean of a label or otherwise or to any documents relating to the bottle or other container."

14. The appellants and HMRC both emphasise that the only charging provision is s.36 ALDA. This provides,

"– Beer: charge of excise duty.

(1) There shall be charged on beer –

(a) imported into the United Kingdom, or

(b) produced in the United Kingdom,

a duty of excise at the rates specified in subsection (1AA) below.

(2) Subject to the provisions of this Act-

(a) the duty on beer produced in, or imported into, the United Kingdom shall be charged and paid, and

(b) the amount chargeable in respect of any such duty shall be determined and become due,

in accordance with regulations under s. 49 below…"

15. Thus as a matter of principle the legislation imposes excise duty on beer produced in (or imported into) the UK and charges it at a certain specified rate per hectolitre per cent of alcohol in the beer.

16. Section 49 ALDA grants HMRC, "with a view to managing, securing and collecting the duty on beer produced in, or imported into, the United Kingdom

or to the protection of the revenues derived from the duty of excise beer", a further power to make regulations –

> "...(d) for securing and collecting the duty;
>
> (e) for determining the duty and the rate thereof and, in that connection, prescribing the method of charging the duty;
>
> (f) for charging the duty, in such circumstances as may be prescribed in the regulations, by reference to a strength which the beer might reasonably be expected to have, or the rate of duty in force, at a time other than that at which the beer becomes chargeable".

17. CEMA s. 137 (4) provides,

> "(4) For the purpose of calculating any amount due from or to any person under the customs and excise Acts by way of duty, drawback, allowance, repayment or rebate any fraction of a penny in that amount shall be disregarded."

Although this section applies for the purposes of this case I observe that it has been repealed with effect from 21 July 2008 by s. 162 of the Finance Act 2008. I am told that the reason is that the subsection was enacted to avoid the use of halfpennies and it is thought to be otiose since the halfpenny was abolished.

18. Commercial brewers are required to be registered with HMRC in respect of their premises by virtue of s. 47 ALDA. Anyone who fails to register attracts civil penalties under the provisions of that section. A person so registered is termed a registered brewer. A registered brewer (or -immaterial for present purposes- a packager: see ALDA s. 41A(3)(a)) may however also be

registered as a registered holder entitled to suspension arrangements under the provisions of s. 41A ALDA and regulations 4, 9, 10 and 12 of the regulations. Such a person is commonly referred to as a suspension brewer. The regulations permit the suspension brewer to hold beer chargeable with excise duty at the brewery premises until the duty ceases to be suspended. The time at which the duty point occurs thus differs according to whether the brewer is or is not a suspension brewer.

Overview of the arguments

19. HMRC's argument on the first issue can be summarised by saying that ALDA requires duty to be charged simply on "beer" and there is nothing in any of the legislation, primary or secondary, which requires or permits duty to be charged per bottle or can.

20. At the heart of HMRC's argument on the second issue is a distinction in the case of a registered suspension brewer between the duty point, that is to say the time when the charge to duty occurs and it becomes *payable*, and the time when it is *required to be paid* under the relevant regulations. Both s. 41A ALDA and the regulations (as well as s. 36(2) ALDA) distinguish between the duty point and the time when duty is to be paid. HMRC contend that this distinction is reflected in the use of the word "due" in the phrase in s.137(4) CEMA, "for the purposes of calculating any amount due…by way of duty…".

HMRC's argument is thus that the duty is not due until it has to be paid. The word "due" does not appear anywhere in the applicable regulations. However, as the Tribunal said in paragraph 12 of the decision, the draftsman of ALDA used very precise language in s. 36(2),

> "drawing a distinction between the duty being 'charged', and 'paid'; and 'the amount chargeable' in respect of the duty being 'determined' and 'become due', all of which is to be determined by regulations".

21. The appellants contend that the container is the natural chargeable item. Beer, as a liquid, must be held in a container and it is the container which passes the duty point in each case.

22. At the heart of the appellants' argument on both issues is the contention that as a matter of logic the amount of duty must be definitively ascertainable at the date when it becomes payable, that is to say the duty point, rather than the date (said to be an arbitrary date fixed by the regulations) when the taxpayer has actually to pay it to HMRC.

The first preliminary issue

23. I therefore turn to the regulations made pursuant to those powers to investigate the question whether there is a requirement that duty is determined or calculated on a per container basis.

24. The regulations, which set out the detailed mechanism for the calculation and payment of duty including the procedures governing suspension and deferral, were made under the powers conferred by ALDA.

25. Regulation 21 provides that a return has to be furnished to HMRC not later than the 15th day of the month following the end of the period to which it relates showing the amount of duty payable by the brewer. Regulation 20 provides that registered brewers and registered holders have until the 25th day of that month to pay the duty payable.

26. For the purpose of the charge imposed by s. 36 ALDA on beer produced in the United Kingdom beer is deemed in all cases to have been produced in accordance with regulation 8. In the absence of any special direction from HMRC beer is produced,

> "at the earlier [sic] of-
>
> (a) the time when the beer is put into any package;
>
> (b) the time when the beer is removed from the brewery;

(c) the time when the beer is consumed;

(d) the time when the beer is lost;

(e) the time when the beer reaches that state of maturity at which it is fit for consumption."

27. I note in passing that "package" is defined in regulation 4 to have the meaning given by s. 4 (1) ALDA. That section uses "package" as a verb whereas the use in the regulations is as a noun. Nevertheless it is plain that for the purposes of the regulations "package" has a wide meaning and comprises a bottle, can, cask, keg, tanker, container or receptacle of any kind "in which beer is distributed to wholesalers or retailers".

28. For present purposes the time of production is thus usually the point at which the beer becomes fit for consumption. There is however an exception in the case of certain cask or bottle conditioned ales where the beer is not fit for consumption at the time it is packaged. In those cases, the time of production will therefore usually be the time when the beer is put into the containers in which it is to be distributed.

29. Mr Macnab advanced the somewhat rarefied argument that the time when beer is put into any package is not an instantaneous moment as it takes time for the liquid to pass into and fill the container. Thus as each drop of liquid is packaged it is deemed to have been produced.

30. Although the point of production is the same in all cases, different provisions apply to the ascertainment of the duty point according to whether the brewer is or is not a suspension brewer.

31. The duty point is prescribed by regulation 15. In cases where there are no suspension arrangements, the duty point is (ignoring importation for present purposes) the time of production: regulation 15 (1). In cases where, as here, there are suspension arrangements, regulation 15 (2) and (3) provide that the duty point will be the earliest of various times, in this case the time when the beer leaves the registered premises. In either situation, the person liable to pay the duty is the person holding the beer at the duty point: regulation 19.

32. The appellants contend that in relation to packaged beer there is a separate duty point in relation to each bottle or can as it leaves the brewery. That is on the basis that each such bottle and can, even on a single lorry, will leave the brewery one after the other, each at a slightly different time. It seems to me that this simple logic breaks down even at a basic level since (for example) all bottles arranged or stacked horizontally in the lorry will pass through the brewery gate at the same time. In any event I agree with Mr Macnab that there is no basis for the argument that each individual bottle or can should be treated as passing the duty point successively, attracting its own duty determination. Indeed, it is hard to see why, given that the process of the beer leaving the brewery is not instantaneous, the appellants' arguments are limited to bottles or cans. Why not smaller units, or larger ones?

33. It is however true that in non-suspension cases it is possible (subject to Mr Macnab's rarefied argument) that there may be a different duty point in relation to each bottle or other container in circumstances in which the beer is put into the container in the brewery to be conditioned in that container and it is not at that time fit for consumption.

34. The appellants also rely on regulations 17 and 18, reflecting s. 2 (3A) ALDA, in support of their case. s. 2 (3A) ALDA states that, without prejudice to the generality of s. 2(3), regulations may provide that for the purpose of charging duty on any beer "contained in any bottle or other container", the strength, weight or volume of the liquor in that container may be ascertained by reference to any information given on the container by means of a label or otherwise or to any documents relating to the container. Regulation 17 (1) provides,

> "the amount of beer in any container shall be deemed to be the greater [sic] of,
>
> (a) the amount determined in accordance with section 2 of [ALDA];
>
> (b) the amount ascertained by reference to information on the label of the container of the beer; and
>
> (c) the amount ascertained by reference to information on any invoice, delivery note or similar document issued in relation to the beer."

35. Regulation 17(2) contains special provisions applicable to a large pack (as defined) of beer, so that within a tolerance field the volume is to be taken as the amount stated on the label. Regulation 18 contains similar provisions to regulation 17(1) relating to strength as opposed to amount.

36. However it does not in my judgment follow from the fact that these regulations are concerned with the practical ascertainment of volume and strength of the beer according to the label on the container, supporting invoices or other documents, that duty falls to be calculated at container level. Duty remains to be calculated on the percentage of alcohol per hectolitre of beer. The regulations are concerned with the amount and strength of beer in any container; they do not specify beer in the individual container as the chargeable item.

37. The appellants contend that the Tribunal was wrong to classify s.2 (3A) ALDA as a special case. They read the decision as meaning that the Tribunal was interpreting s.2 (3A) and regulation 17 as an exception to the general position for calculating the duty on beer with reference to volume and setting out a particular instance where duty is calculated with reference to bottles or containers. I agree with Mr Cordara to the extent only that there is no special case of charging duty on bottles or containers. Duty on all beer is charged by volume and strength. The purpose of s. 2(3A) is to allow the information on the label or invoice to be used as a measure of volume and strength, not to allow bottles or cans of beer to be used as the chargeable items.

38. In summary, the appellants cannot in my judgment identify any provision that specifies beer in the individual container as the chargeable item rather than simply, "the beer". I agree with the Tribunal that the "container" provisions of regulations 17 and 18 do not provide a comprehensive measure of volume applying in all cases from which it follows that the regulations envisage duty to be levied on the beer per container. S. 36 ALDA simply prescribes that excise duty shall be charged on "beer". S. 2 (3) ALDA authorises HMRC to make regulations prescribing the means to be used for ascertaining for any purpose the strength, weight or volume of the beer. Again, s. 2 is not concerned with any container in which beer may be held at any given time. There is nothing in either section, including to my mind s. 2 (3A) ALDA, to suggest that duty is to be payable by reference to the bottle or container in which it is held.

39. I would add that if the appellants' contentions are correct, they would result in different amounts of duty being payable on the same total volume of beer of the same strength, dependent on the size of the container in which the beer is held. Mr Macnab adduced examples of what he submitted would be the arbitrary effect of the legislation in such circumstances and the Tribunal referred to the practical consequences in paragraphs 3 and 10 of the decision.

40. The only matter that gives me pause is the fact that the position may be different for non-suspension brewers who could have multiple duty points arising in a single day. I would however make three observations. First, I am

not concerned with that situation and do not know what submissions might be made by a non-suspension brewer. Secondly, all registered brewers make monthly returns so that, if HMRC are correct on the second preliminary issue, the multiplicity of duty points does not result in differential treatment as to truncation. Thirdly, for the reasons I have already given, the usual case is unlikely to be a separate duty point for each bottle since the duty point occurs at the time, if earlier than the packaging, that the beer becomes fit for consumption.

41. I therefore find that on the first preliminary issue the Tribunal reached the right conclusion for the right reasons.

The second preliminary issue

42. The Tribunal did not consider it necessary to answer the second preliminary issue but it nevertheless did go on to consider when truncation applies. The two issues are intertwined since the appellants' case is only of any relevance if truncation of duty at container level is permitted.

43. To my mind HMRC are correct and the provisions of ALDA as to chargeability are simply not concerned with the basis for, or truncation of, duty calculations. Both ALDA and the regulations distinguish the duty point from the calculation of the duty to be paid in the monthly return. The

appellants' argument is that s. 137(4) CEMA must be applied at the duty point because the amount of duty must be certain at the time when it becomes payable. However that argument assumes that the duty is payable per container. On the basis that HMRC is correct, determination of the amount of duty at the time it is chargeable is certain, but the figure produced could run to a number of decimal places. Accordingly, s. 137(4) allows the taxpayer to ignore fractions of a penny when accounting for duty in the tax returns.

44. I confess I do not understand the Tribunal's statement in paragraph 19 of the decision that payment is required to be made at the duty point if suspension does not apply, or on or before the 25th of the month if it does. Regulation 20 appears to apply to all registered brewers not merely suspension brewers. The default provisions of regulation 20 (1), requiring duty to be paid at the duty point, appears therefore only to apply to unregistered brewers who, as one would expect, do not get the benefit of any indulgence as to time for payment. It is true that suspension brewers have an added deferral benefit, but that is because suspension of the duty point has a knock-on effect on the date for payment. I observe in passing that regulation 21, the provision requiring returns to be made, applies to all brewers.

45. However, it does not really matter whether the Tribunal is right or wrong about the date for payment in relation to non-suspension brewers as that issue makes no difference to the Tribunal's conclusion. There is a distinction between duty becoming chargeable and payable at the duty point, and duty

becoming due and having to be paid on the 25th of the month. That distinction is recognised in the use of the word "due" in "any amount due" in s. 137(4) CEMA. Although the obligation to pay crystallises at the duty point, the duty does not have to be paid, and thus does not become due as a debt recoverable at law, until the 25th of the month following the duty point. I agree with the Tribunal that it is for the purpose of calculating the amount to be paid that the amount is truncated to remove fractions of a penny.

46. I therefore dismiss the appeal.

MRS JUSTICE PROUDMAN

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

Release date: 29 March 2011