Appeal number: FTC/04/2011
[2012] UKUT 44 (TCC)

EXCISE DUTY – sections 55 and 62 Alcohol Liquors Duties Act 1979, Cider and Perry Regulations 1989, Wine and Made-wine Regulations 1989 – whether a discontinuance within regulation 13(a) on a sale of a business as a going concern holding stock of cider and made-wine – position where premises are both cider premises and a winery but made-wine is held only for the purpose of the cider business – proviso to regulation 12: application for some other purpose

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

Between :

ANTHONY MURPHY AND ROBERT HORTON
(FORMER ADMINISTRATORS OF DCC
REALISATIONS LIMITED)

Appellants

-and-

TIMOTHY JAMES BRAMSTON
(LIQUIDATOR OF DCC REALISATIONS LIMITED) **Interested party**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS

Respondents

TRIBUNAL: The Hon Mr Justice Roth and Judge Charles Hellier

Sitting in public at the Rolls Building, Royal Courts of Justice
on 3-4 November 2011

Rupert Baldry QC (instructed by **Clyde & Co)** for the **Appellants**

Rebecca Haynes (instructed by **the General Counsel and Solicitor to HM Revenue and Customs)** for the **Respondents**

Tarlochan Lall (instructed by **Moon Beever**) for the **Liquidator**
as an interested party

DECISION

1. This is an appeal, brought with permission granted by the Upper Tribunal, from the decision of the First Tier Tribunal ("the FTT") released on 6 May 2010 ("the Decision") whereby it dismissed an appeal against assessment to excise duty on the company now called DCC Realisations Ltd ("DCCR") by the Respondents ("HMRC"). The case concerns the interpretation and application of the Cider and Perry Regulations 1989 ("the CPR") and the Wine and Made-wine Regulations 1989 ("the WMWR") as regards the imposition and incidence of excise duty in circumstances where the purchaser of a business continues its operations as a going concern. In the present case, that arose by reason of a pre-packaged administration, often known as a "pre-pack".

2. DCCR appeals by its former joint administrators, who were joined as an interested party. The formal appellant below was the liquidator of DCCR, the company having gone into a creditors' voluntary liquidation on 19 September 2007. The liquidator also appeared and was represented at the hearing of this appeal, but took no part in the argument.

3. The relevant facts are very simple. DCCR, which was previously called The Devon Cider Company Ltd, had carried on business as cider makers and bottlers from premises at Tiverton in Devon ("the premises"). DCCR was accordingly registered as a cider-maker pursuant to section 62(2) of the Alcoholic Liquor Duties Act 1979 ("the ALDA") and the CPR in respect of those premises. DCCR was also licensed as a winery pursuant to ALDA section 55(2) and the WMWR in respect of the premises. Although not set out in the Decision, we were told that this was because it had a small business making fortified apple juice, which for the purpose of the ALDA and

WMWR constitutes “made-wine” (in accordance with the definition in ALDA section 1(5)).

4. On 23 July 2007, DCCR went into administration. Under the pre-pack arrangements, a Business Sale Agreement was entered into with a company then called Hexshelf Seven Ltd (“H7”) and Hexshelf Five Ltd (“H5”) whereby H7 acquired the stock, work in progress, equipment and goodwill of DCCR and H5 acquired the intellectual property of DCCR, for the purpose of carrying on the business as a going concern. H5 and H7 were both wholly-owned subsidiaries of Hexshelf Eight Ltd (“H8”), and by an agreement of the same date made with DCCR and the administrators, H8 acquired from DCCR all the shares in the subsidiary company of DCCR that owned the premises. The completion date under both agreements was 23 July 2007, and their purpose, as indeed happened, was that the business would be continued at the premises under this new ownership. H7 changed its name to “The Devon Cider Company Ltd”, DCCR changed its name to “DCCR Realisations Ltd” and on the completion date DCCR permanently ceased training. It seems clear that, to the outside world, the making and supply of cider at the premises had the appearance of continuing as the same business, albeit that in fact and law it was a different corporate entity under new ownership.

5. Like the FTT, we shall for clarity and convenience continue to refer to H7 by that name throughout.

6. At the time of completion, DCCR had on the premises a quantity of cider which it would have sold itself to the customers of the business if it had not gone into administration. That formed part of the stock sold to H7.

7. DCCR also had and included in the stock that was sold a quantity of made-wine (ie, fortified apple juice). This made-wine had been made by another cider maker, Gaymer Cider Company ("Gaymer") and purchased by DCCR. If DCCR had not gone into administration, it would have used that made-wine to make cider, which it would then have sold. It is common ground that none of the made-wine which DCCR had on the premises and which passed to H7 under the Business Sale Agreement was made by DCCR itself. By reason of an exception in the WMWR to which we shall come, Gaymer had not paid excise duty on the supply of that made-wine to DCCR.

8. The quantities of these goods are not recorded in the Decision but can be derived from HMRC's letter of assessment. There were about 2.7 million litres of cider and about 0.4 million litres of made-wine under 8.5% alcoholic strength, both of which attracted excise duty at the rate of 26.48 pence per litre; and about 0.7 million litres of made-wine over 8.5% alcoholic strength, which attracted duty at the much higher rate of £1.78 per litre.[1]

9. HMRC assessed DCCR to excise duty on cider under the CPR in the amount of £714,159.51 and on the made-wine under the WMWR in the amount of £1,396,859.38. The Appellants contend that they were not entitled to do so.

The Legislation

10. Made-wine and cider are subject to excise duty by reason of ALDA sections 55 and 62 respectively. ALDA section 56(1) provides, insofar as material:

[1] The position is over-simplified in para 13 of the Decision as made-wine of lower alcoholic strength attracted duty at the same rate as cider. But this is immaterial to the reasoning in the Decision or to this appeal.

> "(1) The Commissioners may with a view to managing the duties on wine and made-wine produced in the United Kingdom for sale make regulations –
>
> > (a) regulating the production of wine and made-wine for sale, and the issue, ... and cancellation of excise licences therefor;
> >
> > (b) for determining the duty and the rates thereof and in that connection prescribing the method of charging the duty;
> >
> > …
> >
> > (d) for securing and collecting the duty;
> >
> > (e) for relieving wine or made-wine from the duty in such circumstances and to such extent as may be prescribed in the regulations."

There are analogous provisions regarding cider in section 62(5), save that the reference is to registration instead of the issue of an excise licence.

11. Both the WMWR and the CPR that apply to the assessment under appeal are regulations made in 1989 but they have been amended on several occasions since. We were told that the power to make such regulations is now also subject to the Finance (No 2) Act 1992 ("FA 1992"), section 1. This provides, insofar as material:

> "(1) Subject to the following provisions of this section, the Commissioners may by regulations make provision, in relation to any duties of excise on goods, for fixing the time when the requirements to pay any duty with which goods become chargeable is to take effect ("the excise duty point").
>
> …
>
> (4) Where regulations under this section prescribe an excise duty point for any goods, such regulations may also make provision –
>
> > (a) specifying the person or persons on whom the liability to pay duty on the goods is to fall at the excise duty point (being the person or persons having the prescribed connection with the goods at that point or at such other time, falling no earlier than when the goods become chargeable with the duty, as may be prescribed); ..."

12. The WMWR and CPR are very similar in their terms and the FTT indeed largely considered them together. However, we think that there are material differences between the application of the two regimes to the facts of this case and it is therefore appropriate to consider them separately.

The CPR

13. It is necessary to quote in some detail from the regulations. Regulation 4 sets out definitions and provides that:

> "'cider premises' means the premises, rooms, places and vessels entered by a registered maker for use by him in his trade as a maker and any other premises on which cider is made by a maker for use by him in his trade as a maker; …
>
> 'maker' means a maker of cider who is or is required to be registered;…
>
> 'registered' means registered as a maker of cider under section 62(2) of the [ALDA] and 'registration' shall be construed accordingly;"

14. Regulations 5 to 10 lay down the regime for the registration and control of cider makers and their premises:

> **"5. Application for registration**
>
> (1) Every person required to be registered shall make application to the Commissioners for registration in respect of his premises.
>
> (2) A separate application shall be made in respect of each of the premises on which the applicant makes or intends to make cider.
>
> **6. Registration**
>
> (1) The Commissioners may register the applicant in respect of each of the premises in respect of which application is made, and may issue a separate certificate of registration in respect of each of those premises.
>
> (2) The certificate of registration shall remain the property of the Commissioners.
>
> **7. Certificate of registration**

(1) Every certificate of registration shall be kept at all times on the premises to which it relates, and shall be produced for inspection to an officer on demand.

(2) A maker shall notify the Commissioners of his intention to stop making cider at any of his cider premises.

(3) A maker shall notify the Commissioners of the discontinuance of trade in cider at any of his cider premises.

8. Cancellation of registration

(1) Where the Commissioners are satisfied that a maker has ceased to trade at his cider premises, or that cider is not being made on premises in respect of which he is registered for that purpose, they may cancel the relevant registration at any time.

(2) Without prejudice to paragraph (1) above the Commissioners may, for reasonable cause, cancel the registration in respect of the premises of any maker, provided that the Commissioners shall give three months' notice in writing of such cancellation.

9. Entries

A maker shall not begin to make cider on any premises in respect of which he is registered until he has made entry of all rooms, places and vessels intended to be used by him thereon for that purpose.

10. Withdrawal of entry

Save as the Commissioners may otherwise allow, a maker shall not withdraw his entry in respect of cider premises while there remains in any place specified therein any cider on which duty has not been paid or remitted or any materials for making cider."

15. The provisions regarding the charge of cider to duty and the excise duty point, which are at the heart of this case, are in regulations 11 to 13. These provide, insofar as material (and omitting regulations 11A and 12A):

"11. Charge to duty

(1) Subject to regulations 12 and 13 below, cider in cider premises shall be charged with duty at the time it is made and the excise duty point shall be the earlier of the following times-

(i) the time it is consumed at those premises**;** or

(ii) the time it is sent out from those premises;

Provided that–

(a) where any cider is sent out to other cider premises in accordance with regulation 12(c)(i) below, those other cider premises shall be treated as being the cider premises in which the cider was made and the maker registered in respect of those other cider premises shall be treated accordingly;

…

(2) Duty charged under paragraph (1) above shall be accounted for and paid in accordance with the provisions of regulation 23 below.

12. Removal without payment of duty

Subject to such conditions as the Commissioners may impose, including any condition that security shall be given to their satisfaction, a maker may send cider chargeable with duty out from cider premises without payment of the duty for any of the following purposes–

…

(c) removal, subject to the prior approval of the officer–

(i) to other cider premises;

….

13. Deficiencies and discontinuance of trade

Where either–

(a) the business of making cider is discontinued at cider premises having cider therein; or

(b) a certificate of registration held under regulation 6 above in respect of premises having cider therein is surrendered or cancelled; or

(c) any cider is found to be deficient or missing from cider premises for any reason (other than the reason that the cider was consumed at those premises) and the maker is unable to account for the deficiency to the Commissioners' satisfaction,

the excise duty point shall be the time of discontinuance or at the time of the surrender or cancellation of the certificate of registration or at the time the deficiency occurred, as the case may be; and the duty shall be paid in accordance with regulation 23(2) below”.”

16. Finally, regulation 23, to which reference is made in the foregoing regulations, contains the following provisions that are relevant:

23. Furnishing of returns and payment of duty

(1) Save as the Commissioners otherwise allow, every maker shall-

(a) not later that the fifteenth day of every accounting period furnish to the Commissioners, a return in approved form of all cider sent out from his cider premises for home use during the preceding accounting period and of the duty charged thereon;

…

(2) Unless payment of the duty is deferred, it must be paid at or before the excise duty point prescribed by regulation 11(1).

…

(5) As a condition of his being approved (or continuing to be approved), the Commissioners may require a registered maker to provide security, or further security, for duty."

17. Accordingly, if DCCR had continued to trade, cider duty on the cider which it held at the premises on 23 July 2007 would have been payable at the time when that cider was sent out: regulation 11(1)(ii). But because DCCR discontinued trading, HMRC contend that the circumstances fall within regulation 13(a) and the excise duty point was accelerated to the time of discontinuance.

18. Curiously, although they contain detailed provisions as to the time when payment of excise duty is to be made, and despite the express enabling power in section 1(4)(a) of the FA 1992, the CPR do not specify who is the person liable to pay the duty. Regulation 23 requires a return to be made and the payment of duty at or before the excise duty point (absent deferral). Clearly it is a registered maker who has to pay the duty, but regulation 23 does not assist in determining whether a registered maker has to pay duty only in respect of cider which he himself has made. Regulation 12(c)(i) provides that, where HMRC approves, the maker of cider which is subject to duty does not have to pay when the cider is sent out to other cider premises. But in those

circumstances the receiving cider premises are deemed to be the cider premises at which the cider was made and the maker registered in respect of those premises is treated accordingly, pursuant to proviso (a) in regulation 11(1). That deeming provision suggests that the scheme of the legislation is that the registered maker who makes the cider on which duty has to be paid is the person who is liable to pay that duty.

19. It is of course well established that fiscal legislation should be given a broad, purposive, as opposed to a formalistic, interpretation: see eg: *IRC v McGuckian* [1997] 1 WLR 991, per Lord Steyn at 1000, Lord Cooke at 1005. We consider that approach applies with particular emphasis to the construction of secondary legislation which, as Ms Haynes on behalf of HMRC was constrained to accept, is not very well drafted.

20. Mr Baldry submitted that the scheme of the CPR is to tax cider when it is "sent out". However, that is clearly not the scheme of regulation 13. That provision deals only with the situations in which the cider is not "sent out".

21. Regulation 13(b) appears to be concerned with a cider-maker ceasing either to trade or to produce cider at his premises, since it is generally in those circumstances that his registration would be cancelled: see regulation 8. Regulation 13(a) clearly covers the situation where his business is closed down such that cider is no longer made at the premises. Indeed, it seems that there would therefore be some overlap between regulation 13(a) and (b). It makes good sense that in those situations the obligation to pay duty does not arise only when the cider at the premises is sent out, since at that stage the person who made the cider would no longer be registered and, indeed, may no

longer be trading at all. We consider that the clear purpose of these provisions is to create an excise duty point at the time of cessation and thereby accelerate the time when the duty has to be paid.

22. It is beyond question that regulation 13(a) would apply if the registered cider maker sold his business to a company operating from different premises even if the cider was sent out to the purchaser of the business some time after the sale. Ms Haynes suggested that in those circumstances HMRC could approve the sending out of the cider to the new purchaser without payment of duty pursuant to regulation 12(c)(i). However, that raises the question whether regulation 12 takes precedence over regulation 13 which provides, as we have said, for the incidence of the excise duty point at the time of cessation and, pursuant to regulation 23(2) the duty must be paid at that point. It is unnecessary to resolve that issue for present purposes: we consider that regulation 12(c)(i) could in any event not apply when the purchaser of the business takes over the existing premises, as in the present case, since then the cider is not going to be "sent out" from the premises by the cider-maker selling the business.

23. Mr Baldry submitted that where the purchaser of the business effectively takes over the existing premises and continues the business there as a going concern, regulation 13(a) is not engaged. That would be contrary to what we discern as the purpose of these provisions. Moreover, it would give rise to the anomaly that if the transferor gave notice to HMRC of his intention to transfer his business and thereby stop making cider at his cider premises, as he is required to do under regulation 7(2), then HMRC could cancel his registration as of the date of cessation pursuant to regulation 8(1), which

would unquestionably trigger an excise duty point under regulation 13(b). The fact that the transferee of the business would be continuing to make cider at the premises would not affect the position. In consequence, if the Appellants' interpretation were correct, by dint of the failure to notify, or delay by HMRC in deregistration, the transferor would avoid liability for duty on cider which he had made which was sent out of the premises after he ceased trading but before his deregistration.

24. The FTT avoided this anomaly and gave effect to the purpose of the legislation by holding that regulation 13(a) should be expanded by substitution of the full defined meanings of "cider premises", including the definitions of "registered" and "maker", so that the provision could be read as:

> "Where … the business of making cider is discontinued at premises, [etc] entered by a maker of cider registered with the Commissioners in respect of them (and on which that maker makes cider for sale), and which have cider therein …" : see paras 44-45 of the Decision.

25. Mr Baldry criticised that approach on the basis that it did not reflect the full definition of "cider premises" and inserted a reference to "that maker" making cider for sale whereas the definition refers to "any other premises on which cider is made by a maker for use by him in his trade as a maker".

26. On a literal approach we can see some force in that criticism. Moreover the words of regulation 13(a), literally read, could clearly refer to the commercial activity of making cider being discontinued. On that construction, if the commercial activity is continued as a going concern, albeit by someone else, regulation 13(a) would not apply. However, having regard to the purpose of these provisions and the use of the term "cider premises", we consider that "the business" can also be interpreted to mean the business in respect of which

the premises have been registered as cider premises. In our judgment, since the provision is capable of being read in that way, which achieves the purpose of the legislation and avoids the anomaly to which we have referred, it is the construction which should apply. Accordingly, albeit by a slightly different route, we reach the same conclusion as the FTT at paragraph 46 of the Decision. It follows that DCCR was liable to pay cider duty on the cider at its premises on 23 July 2007. Since the liability for that duty falls on DCCR, it is clear that no further duty fell to be paid on that cider under regulation 11(1)(ii) when it was subsequently sent out by H7.

The WMWR

27. Regulation 4 sets out definitions, including the following:

> "'licence' means licence issued under section 54(2) or 55(2) of the Act, and "licensed" shall be construed accordingly; …
>
> 'producer' means a producer of wine or off made-wine who is or is required to be licensed;
>
> …
>
> 'winery' means the premises, rooms, places and vessels entered by a licensed producer for use by him in his trade as a producer and any other premises on which wine or made-wine is made by a producer for use by him in his trade as a producer ."

28. Regulations 5 to 10 contain provisions regarding licensing and entries that exactly mirror the CPR, save for use of the terms 'licence' and 'production' in place of 'registration' and 'making'. Regulation 23 is similarly in the same form as the equivalent provision of the CPR.

29. Although regulations 11 to 13 also closely reflect the CPR, it is appropriate to set them out insofar as material:

"**11. Charge to duty**

(1) Subject to regulations 12 and 13 below, wine or made-wine in a winery shall be charged with duty at the time it is made and the excise duty point shall be the earlier of the following times-

(i) the time it is consumed at that winery**;**

or

(ii) the time it is sent out from that winery;

Provided that–

(a) where any wine or made-wine is sent out to another winery in accordance with regulation 12(c)(i) below, that other winery shall be treated as being the winery in which the wine or made-wine was produced and the producer licensed in respect of that other winery shall be treated accordingly;

…

(2) Duty charged under paragraph (1) above shall be accounted for and paid in accordance with the provisions of regulation 23 below.

12. Removal without payment of duty

Subject to such conditions as the Commissioners may impose, including any condition that security shall be given to their satisfaction, a producer may send wine or made-wine chargeable with duty out from a winery without payment of the duty for any of the following purposes-

…

(c) removal, subject to the prior approval of the officer-

(i) to another winery;

(ii) to the premises of a vinegar maker for use in the production of vinegar; or

(iii) in the case of made-wine only, to premises in respect of which any person is registered in accordance with section 62(2) of the Act as a maker of cider, for use as an ingredient in the making of cider on those premises;

…

Provided that if any wine or made-wine which has been sent out of a winery under the foregoing provisions of this

regulation is applied to some purpose other than one therein mentioned, the time of that occurrence shall be the excise duty point; and the duty shall be paid in accordance with regulation 23(2) below.

13. Deficiencies and discontinuance of trade

Where either –

(a) the business of producing wine or made-wine is discontinued at a winery having wine or made-wine therein; or

(b) a licence held under regulation 6 above in respect of a winery having wine or made-wine therein is surrendered or cancelled; or

(c) any wine or made-wine is found to be deficient or missing from a winery for any reason (other than the reason that the cider [sic][2] was consumed at those premises) and the producer is unable to account for the deficiency to the Commissioners' satisfaction,

the excise duty point shall be the time of discontinuance or at the time of the surrender or cancellation of the licence or at the time the deficiency occurred, as the case may be; and the duty shall be paid in accordance with regulation 23(2) below…"

30. There is manifestly a close similarity between the WMWR and CPR in this regard. On that basis, HMRC argued that since DCCR was a licensed winery, regulation 13(a) had the effect that it became subject to excise duty on the made-wine at its premises at the time that it ceased trading. The FTT upheld that submission by parity of reasoning with its holding as regards the liability to cider duty under regulation 13(a) of the CPR: Decision, para 47.

31. However, on the facts of this case, there is in our view a very material difference between the position of DCCR as regards the made-wine and the cider. The cider had been made by DCCR in its business as a cider maker. If it had not ceased trading, it would have been liable to pay excise duty on that

[2] This clearly seems to be an error for "wine". See the Explanatory Note to The Wine and Made-wine (Amendment) Regulations 1997; those regulations however insert the word "cider"!

cider when it was sent out in the ordinary course of its business. The made-wine had not been made by DCCR in its business as a winery, nor was it acquired by DCCR for the purpose of its business as a winery.[3] It had been purchased from Gaymer and if DCCR had not ceased trading that made-wine would have been used to make cider and DCCR would never have been liable to pay duty upon it. DCCR would of course have been liable to pay duty on the resulting cider, but at the much lower rate applicable to cider. Therefore, if HMRC's contention is correct, regulation 13(a) here has the effect not of accelerating the payment of the excise duty on this made-wine but of causing the incidence of a duty that otherwise would not arise at all.

32. Furthermore, since the made-wine is taken over by H7 in the purchase of the business and was used by it to make cider which it then sent out, that cider would be subject to cider duty under regulation 11 of the CPR. We were told that to avoid such double duty on the same goods, HMRC had in fact assessed H7 to duty only on the additional quantity of liquid resulting from the production of cider from this made-wine. But that was by way of extra-statutory concession: it seems clear to us that all the resulting cider made by H7 was, on the plain interpretation of the CPR, subject to cider duty.

33. We do not see that it forms any part of the purpose of regulation 13 to create the incidence of duty which otherwise would never have arisen if the trade had been continued. The scheme of the WMWR as regards production of made-wine that is used for the purpose of making cider emerges clearly from the terms of regulation 12(c). Although the producer of the made-wine would

[3] Accordingly, DCCR would also not be deemed to be the maker of that made-wine under proviso (a) to regulation 11(1): see further para 36 below.

under the normal rule be liable to pay duty upon it at the time it was sent out from his winery under regulation 11, when it is removed to premises of a registered cider-maker for use as an ingredient in the making of cider, such duty on the made-wine does not have to be paid. This shows that it is no part of the legislative scheme that made-wine used for the purpose of making cider should be subject to duty as made-wine. In the same way, made-wine that is supplied to another business for the purpose of producing vinegar is also effectively exempted from duty as made-wine under regulation 12(c)(ii). In that case, as wine vinegar is not subject to any excise duty, the liquid in question will never of itself or as an ingredient of other goods attract any excise duty. Regulation 12 then carries a proviso that applies in the event that the made-wine is not used for the intended purpose, a provision to which we shall return.

34. The only reason why HMRC could impose an assessment on DCCR for duty on the made-wine under WMWR regulation 13(a) is because DCCR's premises were licensed as a winery. However, that was entirely incidental to this made-wine. It had not been made at DCCR's winery, nor was it being used for the purpose of the business of the winery. In applying the same reasoning to the made-wine as it did to the cider, the FTT failed in our judgment to pay sufficient regard to this fundamental distinction. For example, if a producer of vinegar also had an entirely separate business conducted at the same premises making wine, for which it held a licence as a winery, but then found that its wine business, unlike its vinegar business was not profitable and sold off all the wine it had produced (paying wine duty thereon pursuant to regulation 11(1)(ii)), it would still have made-wine on its premises for use in its entirely distinct business of producing vinegar. On

HMRC's construction of the regulations, by virtue of the company's decision to discontinue its wine business it would become subject to made-wine duty on the stock of made-wine held at its premises for its ongoing business of producing vinegar. Such a perverse result demonstrates that this is not how the regulations are to be interpreted and applied.

35. We consider that, as with cider and CPR, the fallacy lies in an over-literal application of the wording of regulation 13(a), but this time it is HMRC who have adopted the formalistic interpretation. In our judgment, regulation 13(a) applies to wine or made-wine which are in the premises for the purpose of the business of producing wine or made-wine that is being discontinued. The provision is not to be read as applying to wine or made-wine that is on the premises for the purpose of some other business, and it does not matter therefore whether that other business was discontinued or not. Once that interpretation is adopted, the anomalies to which we have referred do not arise, and in the present case DCCR is not liable to pay duty on this made-wine but H7 would be fully liable to duty on the cider for which that made-wine is subsequently used as an ingredient.

36. However, HMRC applied an alternative basis of assessment under the proviso to regulation 12 on the ground that the transfer from Gaymer to DCCR was pursuant to regulation 12(c)(iii). The transfer of the made-wine from Gaymer to DCCR did not lead to payment of duty by Gaymer because the removal was subject to the requisite prior approval under regulation 12(c). HMRC were to produce a copy of the letter of approval but a subsequent letter by a different officer to the liquidator of DCCR said that he had been told by the officer dealing with Gaymer that the suspension of duty on Gaymer's transfer of

made-wine to DCCR was under regulation 12(c)(i) and that the officer had not considered whether the removal was for a regulation 12(c)(iii) purpose. On that basis, the FTT found that the removal was under regulation 12(c)(i). We accept, and are indeed bound by, the FTT's finding that this was as a matter of fact the approval which the officer had given. But as a matter of law, it seems clear that this was a case where he should have considered regulation 12(c)(iii) and that the criteria of that provision were met. The proviso to regulation 12 indicates that the foregoing provisions of that regulation involve the wine or made-wine being applied to a particular purpose; and if the wine or made-wine is removed to a winery under regulation 12(c)(i), we think it is implicit that this is for use in connection with the business or operation of the winery, which was not the case here. In our view, DCCR cannot be bound by an erroneous application of the provision by HMRC as regards Gaymer, which DCCR had no opportunity to challenge and of which there is no evidence that DCCR was aware at the time.

37. Accordingly, we consider that the FTT was wrong to find regulation 12(c)(iii) irrelevant to this case and that HMRC would be entitled to impose duty under the proviso to regulation 12 if the purpose giving rise to exemption from duty under that provision were not fulfilled. That is exactly what HMRC submit is the position here because, as expressed in Ms Haynes' skeleton argument, it was put to "use as an asset in the sale of the business rather than in the production of cider…".

38. As a result of its view that regulation 12 (c)(iii) was irrelevant, this submission was not considered by the FTT. However, in our view, it is mistaken. The made-wine was included in the stock sold by DCCR to H7 but we do not

consider that this constitutes the application of the made-wine to a purpose other than the making of cider. The test under regulation 12(c)(iii), as indeed under (ii), is a functional one: it is not concerned with the status or legal ownership of the goods. H7 took over the made-wine on the premises and there is no suggestion that H7 then used it other than as an ingredient in the making of cider on those premises. Accordingly, the circumstances of the proviso to regulation 12 are not engaged as a basis for the assessment to duty.

Conclusion

39. It follows that the appeal is dismissed insofar as regards the assessment on the cider to duty under the CPR but allowed as regards the assessment on the made-wine to duty under the WMWR.

TRIBUNAL JUDGE(S)

RELEASE DATE: 09 December 2011