

Cooking wine can qualify for duty exemption
Gourmet Classic Ltd (C-458/06)

Summary

In a ruling which opens the door for excise duty exemption on certain food products containing alcohol, and which will therefore be of interest to all wholesale food producers, the ECJ has held that the alcohol contained in cooking wine qualifies to be treated as ethyl alcohol (irrespective of the fact that it can also be regarded as an 'edible preparation') and, therefore, potentially exempt from excise duty. Traditionally, cooking wine and alcohol used in certain food products, have been treated as being liable to excise duty. Affected businesses should seek appropriate specialist advice on the potential issues and opportunities arising from this case.

Background

This case concerns the question of whether the alcohol in cooking wine must be regarded as ethyl alcohol within the meaning of Article 20 of Directive 92/83/EEC. It is somewhat unusual, in that the parties to the proceedings agreed that the alcohol contained in cooking wine must be regarded as ethyl alcohol within the meaning of that provision. The ECJ therefore had to decide, as a preliminary issue, whether a dispute actually existed and consequently, whether it had jurisdiction to give a ruling on the question referred.

The Appellant, a UK company, was considering marketing its cooking wine in Sweden. Before doing so, it asked the Swedish tax authorities to confirm that the cooking wine was not subject to excise duty because, in its view, cooking wine was covered by the exemption laid down in Article 27(1)(f) of Directive 92/83.

The cooking wine in question consists of a mixture of approximately 40% of ordinary wine, red or white, and approximately 60% of de-alcoholised wine to which a small amount of salt has been added. The alcoholic strength of the cooking wine is 4.5 litres of pure alcohol per 100 kg of finished product.

Article 20 of Directive 92/83 provides that the term 'ethyl alcohol' covers:

....all products with an actual alcoholic strength by volume exceeding 1.2% volume which fall within CN [headings] 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN,

Article 27(1)(f) of the same Directive provides that:

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

In Sweden, the taxation of alcohol and various types of alcoholic drinks is regulated by the Law (lagen (1994:1564) om alkoholskatt (SFS 1994, No 1564): 'the LAS') on excise duty on alcohol. Under Paragraph 6 of the LAS excise duty on ethyl alcohol is payable on products covered by CN headings 2207 and 2208 with an alcoholic strength exceeding 1.2% by volume, even when those products form part of a product which falls within another chapter of the Combined Nomenclature. However, no duty is payable on products which are used directly in foodstuffs or as a constituent of semi-finished products for the production of foodstuffs filled or otherwise, provided that, in each case, the alcohol 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 foodstuffs.

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Although the Swedish tax authorities were of the opinion that the cooking wine in question should be exempt from excise duty, the authorities wished to confirm that this opinion was well founded and submitted the following question to the ECJ for a preliminary ruling:

"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]?"

Held

In his earlier opinion, the Advocate General suggested that the ECJ lacked jurisdiction to hear the case, on the basis that the parties concerned were in agreement and the referring court was merely seeking to create a precedent.

After analysing a number of principles concerning its jurisdiction, the ECJ held that it did have jurisdiction to hear the case and to answer the question referred.

Having so decided, the ECJ had little difficulty in finding (without prejudice to the exemption provided for in Article 27(1)(f)) that the alcohol contained in cooking wine, if it has an alcoholic strength exceeding 1.2% by volume, constitutes ethyl alcohol within the meaning of the first indent of Article 20 of Directive 92/83. The fact that cooking wine is regarded as an 'edible preparation' does not affect that assessment, as the first indent of Article 20 of Directive 92/83 applies even when the products covered by that provision form part of a product which falls within another chapter of the combined nomenclature.

"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 Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages."

Implications

Having held that the alcohol contained in cooking wine can be classified as ethyl alcohol, the ECJ's decision means that wine used for cooking purposes only, and manufactured in a certain way, can benefit from excise duty exemption.

Cooking wine has traditionally been treated as being liable to excise duty, therefore this decision will be of interest to all wholesale food producers. It also highlights the fact that the excise duty treatment of other flavourings (such as alcoholic flavourings under CN code 3302) may be unlawful, and may also increase the excise duty control requirements on these products.