Docket: 2012-2336(EA)I

BETWEEN:

ANISSA FOLEY, BARRY FOLEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 19, 2013, and reasons delivered orally from the Bench on August 20, 2013, at London, Ontario.

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Jack Sousa
Counsel for the Respondent:	Shane Aikat

JUDGMENT

The appeal from the reassessments of excise duty made under the *Excise Act, 2001*, notices of which are dated February 22, 2010, for the periods from January 1, 2006 to December 31, 2007 and January 1, 2008 to April 30, 2009, is allowed, and the reassessments are vacated on the basis that the wine packaged by the Appellant is exempt from the assessed excise duty pursuant to paragraph 135(2)(*a*) of the *Excise Act, 2001*.

Signed at Ottawa, Canada, this 6th day of September 2013.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2013 TCC 276
Date: 20130906
Docket: 2012-2336(EA)I

BETWEEN:

ANISSA FOLEY, BARRY FOLEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

**(Delivered orally from the Bench
on August 20, 2013, at London, Ontario)**

Pizzitelli J.

[1] The Appellant was a wine producer that held a licence under the *Excise Act, 2001*, of Canada, S.C. 2002, c. 22, as amended (the "*Act*"), that appeals reassessments of excise duty by the Minister of National Revenue (the "Minister") in respect of 19,471 litres of wine bottled from January 1, 2006 to December 31, 2007 ("First Period") and in respect of 10,383 litres of wine bottled from January 1, 2008 to April 30, 2009 ("Second Period") resulting in excise duty of $12,222 assessed in respect of the First Period and $6,720 assessed in respect of the Second Period. As per the *Act*, duty at a rate of $0.5122 per litre was assessed for that portion of the wine bottled from January 1, 2006 to June 30, 2006 and duty at a rate of $0.62 per litre was assessed for that portion of the wine bottled from July 1, 2006 to the end of the Second Period.

[2] The Appellant argues it was exempt from the assessed excise duty above on the basis of an exemption contained in paragraph 135(2)(*a*) of the *Act*; namely arguing the wine it produced was composed wholly of agricultural or plant product grown in Canada. The Respondent argues that the Appellant used an additive composed of ingredients grown outside of Canada in the production of its wines; namely a syrup imported from Poland containing sugars and fruit juice that effectively disqualified the wine from the aforesaid exemption.

[3] The sole issue to be decided then is whether the syrup used by the Appellant caused the wine it bottled to fail to meet the requirement that the wine be composed wholly of agricultural or plant product grown in Canada.

[4] Most of the facts are not in dispute and the Appellant has admitted the assumptions of the Minister in paragraphs 9(a) to (d) inclusive of the Reply; namely that the Appellant holds a valid wine licence under the *Act*, that it bottled the number of litres during the First and Second Periods on which duty was reassessed and that its wine contained more than 7% alcohol by volume giving rise to the duty rates if no exemption applied. The Appellant also admitted the facts pleaded in paragraph 10 of the Reply; namely that the wine bottled by the Appellant during the Periods in question were packaged in bottles each less than 100 litres and were not repackaged before being sold to consumers. The Appellant also admitted that the wine contained additive produced in Poland although in evidence testified that additive was only added when required, in about 75 to 80% of the batches it produced.

[5] The only assumptions of the Minister in dispute were those found in paragraphs 9(e) and (f) of the Reply which read as follows:

> (e) The wine bottled by the appellant during the First and Second Periods contained fruit juice/syrup produced in Poland and composed of ingredients grown outside of Canada (the "Additive"); and
>
> (f) The Additive was used to alter the flavour composition of the wine packaged by the appellant, and was not used solely to facilitate the fermentation of the wine.

[6] In brief, the Appellant takes the position that the Additive was not a fruit juice but a form of sugar that was used in the fermentation process to allow sufficient level of sugar to attain the desired level of sweetness not attained through the addition of granular sugar through the initial fermentation process. The Respondent, through its assumptions in dispute above, argues its purpose was mainly for flavouring as an agricultural or plant product produced outside Canada. The difference in their

respective characterization of the Additive may be relevant if the Court finds the existence of the Additive per se does not disqualify the wine from being subject to the exemption; or, in other words, finds that the Additive does not prevent the wine from being composed wholly of agricultural product grown in Canada but finds it consisted of fruit juice as a principal component.

[7] The evidence of the Appellant is that the syrup imported from Poland was a sugar, composed of glucose and fructose, types of sugar, that are used in a second stage of the fermentation process to adjust the sweetness of the wine. There is no dispute that the Appellant grew most of its own fruit; namely black currants, strawberries, raspberries and blueberries on its farm in Ontario or purchased other fruits such as cranberries grown in Canada that it used to make its wines.

[8] There is also no dispute that in the production of wines, either conventionally using grapes, or in the production of fruit-based wines as made by the Appellant, that granular sugar is often added at the fermentation stage of production to increase the level of fermentation and dictate both the alcohol content and sweetness of the wine. The Respondent's expert witness herself testified as to this fact and her report clearly described the winemaking process in paragraphs 4 to 7 of her report, which bear repeating here:

> 4. Wine is produced by the alcoholic fermentation, without distillation, of the juice of an agricultural product, other than grain or a derivative thereof. For simplicity's sake I refer to wine made principally from grapes, as it is the most widely known.
>
> 5. Ripe grapes are pressed to release the juice which is separated from the solid matter, usually by decantation (pouring off the liquid). The concentration of sugars in the juice is measured at this stage to determine whether it will be necessary to add additional sugars to reach the desired alcohol content in the finished wine, and if so, how much additional sugar is needed.
>
> 6. A yeast culture is added to the liquid mixture (juice plus any added sugar) to start the fermentation process. The yeast organism metabolizes the sugars in the mixture to ethyl alcohol as well as other by-products such as carbon dioxide. The amount of alcohol is directly related to the starting amount of sugars in the liquid. The more sugar initially, the greater the amount of alcohol produced.

> 7. When the alcohol strength reaches the desired level, or if the winemaker wants to leave residual sugar in the wine for sweetness, the fermentation process is stopped, either by dropping the temperature of the mixture ("stunning" the yeast") or adding a preservative such as sodium bisulfite. At the point the liquid may then be transferred to oak barrels or stainless steel containers ("unoaked") to be aged for several months after which it is filtered and bottled.

[9] During her testimony, the Respondent's expert witness agreed that sugars may be added at later stages, such as before bottling the wine, in order to increase the desired level of sweetness, as did the Appellant in its process, rather than just relying on the sugar level during fermentation. In fact, the Appellant's process was similar to the winemaking process described by the Respondent's expert witness for wine, with the exception that the Appellant added sugars when necessary in liquid form to the mixture before bottling to fine tune the sweetness level of the wine in addition to adding granular sugar to the mixture to increase the level of sugar necessary for the fermentation process to start. The Appellant testified that its fruit, unlike grapes, contain less sugar and that the addition of granular sugar is necessary most of the time to stimulate the fermentation process, which the Respondent's witness found normal, and that to have sweetness at the desired level, to add sugars in liquid form before bottling if required.

[10] What is clear from the Appellant's testimony, as confirmed by the Respondent's expert testimony is that sugar is a normal additive in the winemaking process as is yeast and that the addition of sugars can be used to regulate sweetness both as part of the fermentation process and afterwards. The Respondent itself implicitly acknowledges this in its assumption in paragraph 9(f) wherein it assumes the addition of the Additive was used to alter the flavour of the composition of the wine instead of just used to facilitate the fermentation of the wine. The Minister seems to take no offence to the use of sugars to aid fermentation or regulate sweetness levels in this assumption, only to the use of additives to alter the flavour in this particular assumption although argues in fact that the interpretation of paragraph 135(2)(*a*) effectively makes any ingredients not produced in Canada taint the wine from being "composed wholly of agricultural or plant product grown in Canada". Based on the Respondent's argument then it would seem clear to me the assumption in paragraph 9(f) is not relevant to its main argument, but only its alternative arguments which will be discussed later.

The Law

[11] The relevant provisions of the *Act* are found in sections 2 and 135.

[12] Subsection 135(1) reads:

> 135(1) Duty is imposed on wine that is packaged in Canada at the rates set out in Schedule 6.

[13] There is no dispute that the wine in question was packaged in Canada as per the assumptions agreed to and that Schedule 6 sets out the rates of duty that were applied by the Minister.

[14] Subsection 135(2) is an exception of the charging provision of subsection 135(1), the relevant portions of which read as follows:

> (2) Subsection (1) does not apply to wine that is
>
> (a) produced in Canada and composed wholly of agricultural or plant product grown in Canada;

[15] Section 2 is the definition section of the *Act* and defines "wine" as follows:

> "wine" means
>
> (a) a beverage, containing more than 0.5% absolute ethyl alcohol by volume, that is produced without distillation, other than distillation to reduce the absolute ethyl alcohol content, by the alcoholic fermentation of
>
> (i) an agricultural product other than grain,
>
> (ii) a plant or plant product, other than grain, that is not an agricultural product, or
>
> (iii) a product wholly or partially derived from an agricultural product or plan product other than grain; …

[16] The Respondent argues that paragraph 135(2)(*a*) effectively prohibits the use of any components in wine that is not an agricultural or plant product grown in Canada, including sugar, yeast or any flavouring or sweeteners for that matter. The Appellant argues that paragraph 135(2)(*a*) only requires that the principal ingredients used in the wine must be an agricultural plant or product grown in

Canada and that sugar or other incidental minor products are not caught by such definition. The Appellant relies on Excise Duty Notice 15 or EDN 15 issued by the Canada Revenue Agency ("CRA") in June 2006 which states:

> In order to qualify for this exemption, wine that is packaged must be made from 100% Canadian-grown agricultural products. This means that all of the primary ingredient that is fermented (e.g. grapes, berries, other fruit, honey, dandelions and rice) must have been grown in Canada.
>
> …
>
> The 100% Canadian rule will apply to any juice added in the winemaking process, but will not apply to incidental agricultural-based ingredients that are added in the winemaking process (e.g. sugar).

[17] Frankly, I am of the view that the Appellant's position as confirmed by the CRA's EDN 15 is consistent with the clear wording of paragraph 135(2)(*a*). There is no question that the Appellant was producing wine in Canada. The only issue in dispute is whether the wine was composed wholly of agricultural plant or product grown in Canada. On first thought one might be tempted to assume that all ingredients throughout the entire process should be included in analysing this factor but this would be a ridiculous and impossible result for several reasons.

[18] Firstly, the definition of wine itself refers to an agricultural or plant product that is subject to the fermentation process. The terms agricultural or plant products referred to in the section 2 definition section of wine are the same terms used in paragraph 135(2)(*a*). A common sense interpretation would suggest that it is the ingredients that are fermented that must be wholly grown in Canada, not the ingredients that cause the fermentation process such as sugars and yeast. In the case at hand, the Respondent's auditor acknowledged that the Appellant's fruit products that are the subject of fermentation were grown on the Appellant's farm in Canada or were grown on other farms in Canada and purchased by the Appellant and so I find this criteria to be met.

[19] By requiring that the agricultural or plant products be alcoholically fermented, Parliament has clearly acknowledged that those products must undergo a process that it chose not to restrict to ingredients grown or otherwise produced in Canada. If Parliament had intended that the sugars and yeast necessary for the process of fermentation that is a requirement of the definition of wine and without which wine could not be produced according to the testimony of the Respondent's expert witness; especially where the fruit used was not high enough in sugar content to start off with,

as is the case for the Appellant's products the majority of time, then it should have said so.

[20] It follows as well that if Parliament was only concerned that the products being fermented were grown in Canada, then any ingredients added as sweeteners at later stages to raise the sweetness level of wine or affect its flavour for that matter, are not included as part of the agricultural or plant products that had to be grown in Canada.

[21] This is exactly consistent with the interpretation given to the provision in EDN 15. Accordingly, I find such interpretation bulletin to be consistent with the law and not inconsistent with it so as to render it unenforceable as suggested by the Respondent.

[22] It is absolutely clear on the evidence of both the Appellant and the Respondent's expert witness that the liquid syrup imported from Poland served the same function as sugar, and consisted of glucose, fructose and maltose, all sugars per the Respondent's expert witness that accounted for between 93 and 98% of the dry weight content of such products.

[23] The Respondent's expert witness testified that the two samples of liquid syrup from Poland she was asked to test only had fruit juice content of between 8 to 10%, so that if one to two litres of such syrup was added to each wine batch as per the testimony of the Appellant 75 to 80 % of the time, which I find credible, the volume of fruit juice in the batch would only account for between 1 to 2% thereof in total, hardly a principal ingredient nor one that could produce the volume of litres the Minister reassessed on. Moreover, since the ingredient was added after the fermentation process to increase the sweetness level, the timing of which was not disputed by the Respondent, then such minor fruit juice was not even the subject of the fermentation process as required above. In my view, it is irrelevant whether such small amount affects the flavour of the wine. I accept the Appellant's testimony that liquid syrup used did not always match the fruit that was the subject matter of the fermentation as the goal was to fine tune sweetness of the wine not to impact its flavour. This evidence was not contradicted and the opinion of the expert witness in her report that the purpose was to affect flavour was, as per her own testimony, premised on the assumptions given to her by the CRA official who retained her services.

[24] Finally, it must be said that based on the testimony of the Respondent's expert witness, sugar is commonly added to the liquid from the grapes or other fruit together with yeast to ferment it. If, as she testified, Canadian sugar refineries use only about

10% Canadian sugar beet sugar mixed with sugar cane sugar in their product, it would be almost impossible to buy 100% sugar on the market in Canada for use in fermenting wine. There was no evidence proffered by the Respondent suggesting a pure form of Canadian beet sugar is separately refined and sold, only that the refineries blend it with non-Canadian product. It would make no sense to assume Parliament intended to create an exception not readily obtainable or even possibly so without using more specific language.

[25] In conclusion, the interpretation given to paragraph 135(2)(*a*) of the *Act* by the Appellant as stated in the CRA's EDN 15 is in my opinion consistent with the plain meaning of the language of such paragraph and the definition of wine from section 2 imported into that paragraph. The assumptions of the Minister, including those contested in paragraphs 9(e) and (f) then, even if true, are not capable of supporting the Minister's reassessments Accordingly, the Appellant's appeal is allowed in full.

Signed at Ottawa, Canada, this 6th day of September 2013.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2013 TCC 276
COURT FILE NO.:	2012-2336(EA)I
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