

Docket: 2011-2768(EA)I

BETWEEN:

CADENZA LIMITED PARTNERSHIP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 17, 2012, at Montreal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Agent for the Appellant: Daniel Pambianchi
Counsel for the Respondent: Marie-France Dompierre

JUDGMENT

The appeal from the assessment made under *Excise Act, 2001* for the period from July 1, 2006 to October 31, 2009, is allowed in part and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of January 2013.

“François Angers”

Angers J.

Citation: 2013 TCC 7
Date: 20130125
Docket: 2011-2768(EA)I

BETWEEN:

CADENZA LIMITED PARTNERSHIP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal with respect to an assessment under the *Excise Act, 2001 (EA)* for the period from July 1, 2006 to October 31, 2009.

[2] The appellant is a limited partnership, the partners being Daniel Pambianchi, Mauro Pambianchi, Cherif Tadros and Antonio Mancici. The appellant is a licensee that operated under an excise warehouse licence during the relevant period and owns a winery known as the Maleta Winery.

[3] In the fall of 2009, the Canada Revenue Agency (CRA) visited the appellant's premises to review some credits that had been requested. They later conducted an audit of the appellant's operations to verify excise duty compliance, as a request to terminate the appellant's excise warehouse licence had been made. An excise warehouse licence is issued to allow a winery to store its bottled wine and defer any liability payable until the wine is sold instead of payment being due when it is bottled. An audit was therefore conducted. In a letter dated January 21, 2010 to the appellant, the acting excise duty officer for the CRA provided a summary of four adjustments she ultimately made in the assessment under appeal.

[4] The first item is with respect to 154.5 litres of wine which the excise duty officer considers to have been removed by the appellant for inventory adjustment purposes without supporting documentation for the adjustments. She relied on subsection 138(2) of the *EA* which states that duty is payable by the licensee or user at the time the wine cannot be accounted for. An inventory adjustment needs to be supported by some kind of record that indicates why the adjustment was made. The duty assessed is \$79.12.

[5] The second item concerns non-duty-paid packaged wine that was used to make wine jelly without a user's licence. The quantity of wine used for that purpose was 45 litres, and duty was assessed at \$23.05. The appellant does not dispute the amount so assessed as the wine used to produce wine jelly must either be duty-paid or have been produced by a licensee that holds a user's licence to make jelly. The appellant did not have such a licence.

[6] The third item concerns non-duty-paid packaged wine that was removed for use in competitions, the total quantity involved being 102 litres. Under subsection 145(2) of the *EA*, duty is not payable on non-duty-paid packaged alcohol that is, in the case of wine, taken for use by an excise warehouse licensee if that licensee is also the wine licensee who produced or packaged the wine and the wine is provided free of charge to individuals for consumption as a sample at the premises where the licensee produces or packages wine. Therefore, any packaged wine that is entered into a competition would need to be duty-paid as it is consumed off-site. With respect to this particular item, the appellant agrees that such was not the case for part of the assessed quantity so that there is an amount payable of \$45.33, leaving a disputed amount of \$6.91.

[7] The final item concerns credits claimed by the appellant on 135 litres of 2007 vintage 100% Canadian exempt wine. The appellant used its 2007 vintage to pay down duty liability that still existed in its excise warehouse licence pool. The excise duty officer relied on subsections 135(1) and 135(2) of the *EA*, which state that duty is imposed on wine that is packaged in Canada but not apply on wine that is produced in Canada and composed wholly of agricultural or plant product grown in Canada. The credit cannot be given on 100% Canadian exempt wine since duty is not payable on it. The amount assessed is \$69.15 and the appellant admits to having made an error in that regard. The appellant submits, though, that it has "exhausted [its] pool by an amount exceeding 135 [litres]" and asks that "the duty payable [be] credited accordingly."

[8] The above four items represent a total of 436.5 litres. The duty payable was calculated at \$0.5122 a litre for a total assessment of \$223.56.

[9] The second and fourth items are not in dispute. Concerning item four, the appellant has stated both in its correspondence with the CRA and the Department of Justice (Exhibits A-2 and I-2) and in the testimony of its representative in Court that there was an error on its part and that it no longer had any objections with regard to that item. The appellant does however request that since it has "exhausted [its] pool by an amount exceeding 135 [litres] . . . the duty payable [be] credited accordingly." That request has nothing to do with the validity of the assessment with regard to the fourth item as it is admitted by the appellant that it was properly assessed. Whether or not he is entitled to a credit with respect to the duty owed is not within the jurisdiction of this Court to determine. The assessed duty is justified and the appellant should resolve its credit issue with the CRA.

[10] There remain, therefore, two matters to be decided by this Court. They are whether the appellant is liable for the duty assessed of \$79.12 on packaged wines covered by the first item, which deals with inventory adjustments and for an assessed duty amount of \$6.91 on packaged wines covered by the third item, which deals with the quantity of non-duty-paid packaged wines that was removed from the premises for competition purposes.

[11] The first issue, which has to do with the inventory adjustments, became a concern for the excise duty officer when, in certain months in the appellant's monthly report during the audit period, adjustments made to inventory by the appellant were larger than usual. She testified that there were inventory adjustments made by the appellant in almost every monthly report, but they were very small and therefore she did not worry about them. She became more concerned, though, about the months where the adjustments were, as stated, higher than usual. It should be noted that the information on inventory adjustments used by the excise duty officer came from the appellant's own spreadsheets and numbers. The inventory adjustments figure of \$79.12 was based on the following: for January 2007 there was a difference of 13 bottles or 13.5 litres; for July 2007 there was a difference of 56 bottles or 42 litres; for April 2008 there was a difference of 22 bottles or 16.5 litres; for September 2008 there was a difference of 59 bottles; and for October 2008 there was a difference of 69 bottles.

[12] Because of the higher than usual adjustment figures for those months, the excise duty officer requested more information from the appellant regarding the adjustments, particularly documents that could substantiate them. She was given

verbal explanations but none in the form of documents. According to the excise duty officer, if one bottle is removed from the excise warehouse and there are no documents to prove where it went, the duty must still be paid. There needs to be a reason why an inventory adjustment is made.

[13] The appellant's representative did not produce, either at the audit stage or subsequently, any type of documentation that could justify the adjustments. Although he did say he had documents available when he testified, none were produced as exhibits. The appellant's representative testified that inventory adjustments needed to be made for various reasons, but those appearing on his spreadsheets under inventory adjustments (see Exhibit I-1) include all bottles of wine that have been missed by other tracking methods. For example:

1. There can be over- and under-counting at the time of bottling because of human error.
2. Because of the speed at which bottling is done, workers often only put 10 or 11 bottles in 12-bottle cases.
3. There can be a miscount at the time the physical inventory is taken at the winery, again as a result of human error.
4. There can be bottle breakage during transit.
5. Bottles opened in the retail store for customer sampling and because it can get busy and congested at times, it is impossible to record every bottle opened. There may thus be many bottles that are subject to duty.
6. Other bottles were used in making sparkling wines.

[14] The appellant's representative summed up by stating that his inventory adjustments are for bottles that either were exempt from duty or never existed because, through human error, 12 bottles were not put in the case or the bottles were miscounted

[15] The *EA* imposes excise duty on spirits, beer and tobacco products manufactured in Canada and therefore provides for control measures to ensure, among other things, effective compliance with its provisions. It is therefore necessary, as it is under the *Income Tax Act*, to keep proper records. This is required

in order to make it possible to determine whether the *EA* has been complied with. The *Canadian Oxford Dictionary* defines a record as being a piece of evidence or information constituting an account of something that has occurred, been said, etc. and as including a document preserving this.

[16] It is not disputed that the appellant maintained proper books and records. In fact, the excise duty officer relied on the appellant's spreadsheets to determine the number of bottles that were subject to an inventory adjustment. What the excise duty officer was unable to obtain during the audit were documents justifying the adjustments. The appellant's representative was able to provide some explanations, which he said were in his computer, but nothing from his computer was provided to the excise duty officer or presented in evidence.

[17] The appellant's representative's only explanations for inventory adjustments are those found in paragraphs 13 and 14 of these reasons. I do appreciate the fact that nothing is perfect and that errors and mistakes can happen in quantities and in numbers. In fact the excise duty officer has allowed minor adjustments for almost all of the appellant's monthly reports with no questions asked. The evidence does not disclose, though, why, in the aforesaid monthly reports, the number of bottles or litres that were subject to an inventory adjustment was higher than usual. I do appreciate that if cases of 12 bottles are over-counted, these cases do not show up in a later count, and that can account for a larger number than usual of inventory adjustments for a given month. The same goes for breakage in transit, although that could easily be documented.

[18] I agree with the appellant's representative that over-counted cases or missing bottles in a case never actually existed and therefore no duty should be payable on them. On the other hand, one should be able to quantify these non-existent bottles or litres if one intends not to pay duty on them. Otherwise, one is left with nothing to go on other than what falls within established tolerance levels.

[19] The auditor has applied a tolerance to almost all the monthly reports in the period under appeal except for the aforementioned months. I find that the same could perhaps be done with respect to those months and I would arbitrarily reduce the number of bottles unaccounted for in the months of January 2007, July 2007, April 2008, September 2008 and October 2008 by 20%, as those bottles may never have existed or may have been exempt from duty.

[20] The other item for which a decision is required is the non-duty paid packaged wine that was removed for use in competitions. The appellant's representative has

provided a breakdown of the number of litres under this item that were subject to duty and has acknowledged that duty was payable on 88.5 litres out of the total of 102 litres. He explains that some entries were incorrectly attributed to competitions and he provided the list of these errors. I accept those explanations and conclude that the duty of \$6.91 assessed on the 13.5 litres is not payable.

[21] The appeal is allowed in part and the assessment is referred back to the Minister for reconsideration and reassessment in accordance with these reasons.

Signed at Ottawa, Canada, this 25th day of January 2013.

“François Angers”

Angers J.

CITATION: 2013 TCC 7

COURT FILE NO.: 2011-2768(EA)I

STYLE OF CAUSE: Cadenza Limited Partnership v. Her Majesty the Queen

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: October 17, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice François Angers

DATE OF JUDGMENT: January 25, 2013

APPEARANCES:

Agent for the Appellant: Daniel Pambianchi

Counsel for the Respondent: Marie-France Dompierre

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada