

Bundesverwaltungsgericht

Tribunal administratif fédéral

Tribunale amministrativo federale

Tribunal administrativ federal

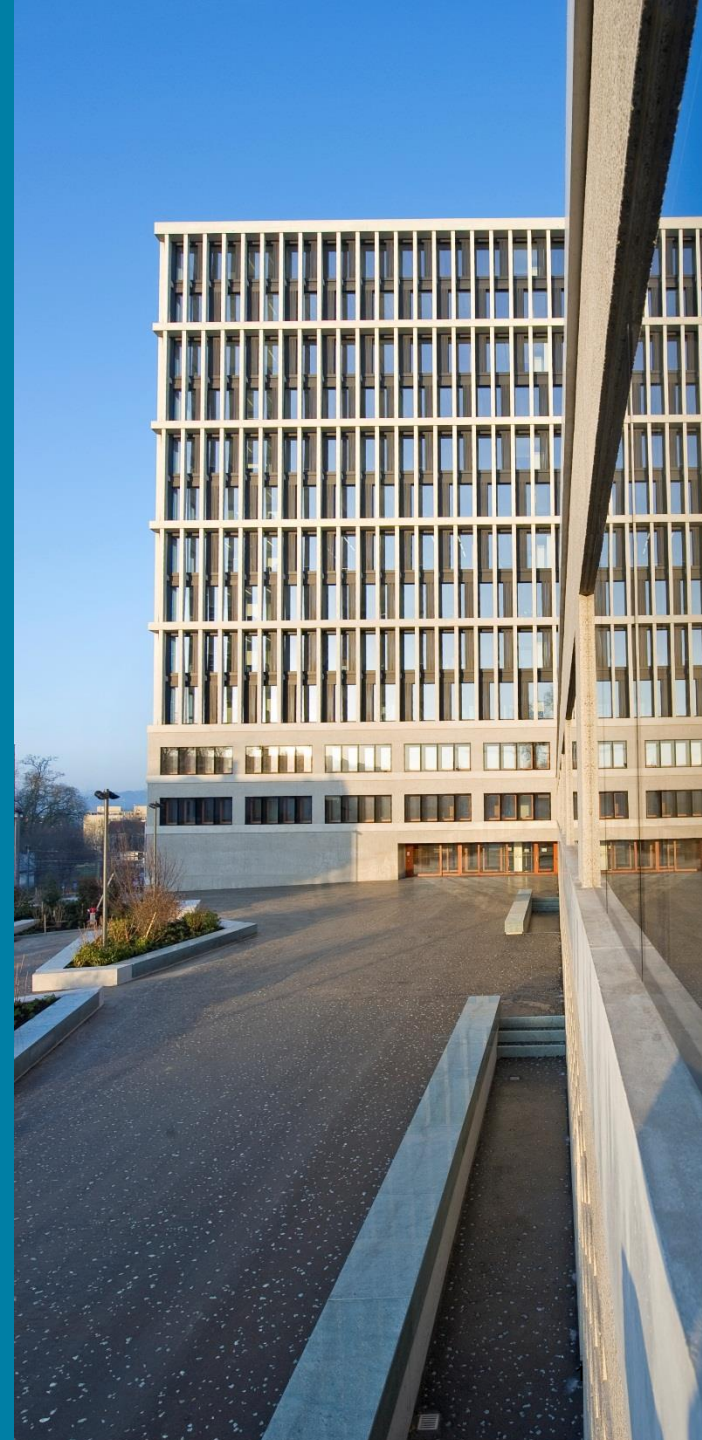


Happy hour in tax court

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Customs duties: Swimwear for man or shorts for women?



Customs duties: Is a sofa for dogs a sofa or a cushion?



Customs duties:
Is a table without a table leaf a table or a part
of furniture?



Tax on tobacco: Are liquid cartridges for e-cigarettes subject to tax on tobacco?



Heavy traffic duties:
Refund only if containers are longer than
18 feet and broader than 7 feet?



Customs: Are customs competent to destroy confiscated Euro- and Dollarbills contaminated by cocaine?



Happy hour in court as Swiss judges tested cocktails

The Swiss newspaper Tages-Anzeiger reports that judges at one of the country's highest courts held a mid-morning cocktail event to determine whether a drinks company's canned beverages should be taxed as alcopops (flavored alcohol beverages).

Two judges and a court clerk convened the 10am tippie at the Federal Administrative Court in Bern on April 14. They tested each of the company's five drinks twice – with and without ice – to check whether the beverages were sweet enough to be labelled alcopops.

The court confirmed yesterday that the judges' verdict was that the drinks tasted like alcopops and should be taxed accordingly. (ap).

Legislation on alcohol in Switzerland

- Swiss Alcohol Board
- Subject to alcohol legislation: spirits, sweet wines, vermouth and alcopops, ethanol for consumption purposes and the products made from it, as well as flavorings and essences.
- Taxation, compliance with advertising regulations, protection of minors.

Background of the Case

- Ruling Case (declaratory procedure, Art. 25 Administrative Procedure Act, APA)
- Austrian importer intended to import a new kind of alcoholic beverage into Switzerland.
- Customs were requested to confirm that the beverages are not regarded as alcopops.

Do they meet the requirements of Art. 23bis para. 1 letter a and para. 2bis Federal Alcohol Act?

Art. 23bis Federal Alcohol Act (excerpt)

¹ Are subject to the tax on specialty spirits:

a. Products to which spirits are added

^{2bis} The tax is increased by 300 percent on sweet spirits with an alcohol level of less than 15 percent by volume which contain at least 50 gram of sugar per liter, expressed as invert sugar, or a corresponding sweetness, and which are sold ready to be consumed in bottles or other containers.

What are the prerequisites of an «Alcopop»?

The beverage has to:

- be sweet,
- contain spirits,
- have an alcohol level of less than 15 percent by volume,
- contain at least 50 gram of sugar per liter, expressed as invert sugar, or a corresponding sweetness,
- be sold ready to be consumed in bottles or other containers.

Facts in Pictures



Facts in Words (excerpt from the can producer's website)

- The cocktails are packaged in twin aluminum cans that are joined together by a red ring that doubles as a can opener and shaker seal.
- The top can contains the alcohol and the bottom can holds the fruit juices.
- Ingredients are kept separated until opened and poured into the accompanying shaker with ice prior to consumption.

Comparison with the prerequisites of an «alcopop»

The beverage has to:

- be sweet: disputed
- contain spirits: not disputed
- have an alcohol level of less than 15 percent by volume: not disputed
- contain at least 50 gram of sugar per liter, expressed as invert sugar, or a corresponding sweetness: not disputed
- be sold ready to be consumed in bottles or other containers: disputed

Disputed points

1. Do they taste sweet?
2. Are they «ready to be consumed»

Point 1: Question of facts => procedure of taking evidence

Point 2: Question of law => interpretation of law

Point 1: Evidence whether the cocktails taste sweet?






Art. 12 APA

The authority shall establish the facts of the case ex officio and obtain evidence by means of the following:

- a. official documents;
- b. information from the parties;
- c. information or testimony from third parties;
- **d. inspection;**
- e. expert opinions.

Inspection

Sensory perception by the members of the court:

- visual perception: eyes  => Augenschein
- auditive perception: ears 
- olfactory perception: nose 
- gustatory perception: tongue 
- tactile perception: skin 

How to organize a «Zungenschein»

- Formal procedure of taking evidence (summons, presence, minutes etc.)
- Practical preparation: delivery of cocktails by appellant, preparation of cups and ice by court clerk
- Implementation: excerpts from the minutes
- What could have been organized better?

Result

- Cocktail 1
cooled without ice: slightly to medium sweet
mixed with ice: slightly sweet
- Cocktail 2
cooled without ice: medium sweet
mixed with ice: medium sweet
- Cocktail 3
cooled without ice: slightly sweet
mixed with ice: slightly sweet
- Cocktail 4
cooled without ice: very sweet
mixed with ice: very sweet
- Cocktail 5
cooled without ice: medium to very sweet
mixed with ice: medium to very sweet

Point 2: Are they «ready to be consumed»?




Interpretation of the term «ready to be consumed»

Methodical approach: Interpretation of law

- Starting point of each interpretation is the wording.
- The wording in the three official languages is of equal value.
- Deviation from wording is allowed if there are good reasons to assume that the wording does not reflect the real meaning of the provision.
- Such reasons can be found in the history of the provision (historical element), purpose of the provision (teleological element) or in the relation of the provision to other provisions (systematical element).
- Pluralism of methods: Combination of the methods which – in the concrete case – are most convincing to lead to a reasonable and practicable result.

Wording «ready to be consumed»

Wording in the three official languages:

-  : konsumfertig gemischt
-  : Sous forme de mélanges prêts à la consommation
-  : Mesculate e pronto al consumo



Beverage: ready to be consumed = ready to be drunk

According to German leading dictionaries: «can be immediately (i.e. without additional preparation) drunk».

=> The wording does not include the cocktails.

Reasonable grounds to deviate from the wording?

- history of the provision (historical element),
- purpose of the provision (teleological element),
- relation of the provision to other provisions (systematical element).

Reasonable grounds to deviate from the wording?

- purpose of the provision (teleological element):
 - prevention of alcohol abuse among minors
 - distinguish “alcopops” from cocktails which have to be prepared in a complex and time-consuming procedure
 - immediate disposability of the alcoholic beverages at all places
- Despite the necessary short mixing the cocktails are ready to be consumed.
- history of the provision (historical element):

Spirits are subject to Tax on Alcohol regardless the manner of preparation, including new procedures.
- Although the twin-can system is new procedure the resulting mix is subject to tax.

Result: The cocktails are «Alcopops»

They are

- sweet,
- contain spirits,
- have an alcohol level of less than 15 percent by volume,
- contain at least 50 grams of sugar per liter, expressed as invert sugar, or a corresponding sweetness,
- are sold ready to be consumed in bottles or other containers.



The cocktails are subject to the increased tax.

Conclusion for Tax Judges

Being a Tax Judge is not only:

- factually interesting,
- legally challenging and
- economically necessary,

but also fun.



I wish to all of you an all around satisfactory activity as a tax judge.