Customs and excise quarterly update

August 2018

In this update we report on (1) changes to gaming duty accounting periods; (2) HMRC's policy paper on tobacco duty on heated tobacco; and (3) an amendment to the Export (Penalty) Regulations 2003. We also comment on three recent cases relating to (1) the customs classification of Beyblades; (2) excise duty assessment time limits; and (3) restoration of seized tobacco.

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Changes to gaming duty accounting periods and administration of the tax

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Amendments to the Export (Penalty) Regulations 2003

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Any comments or queries

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About this update

Our customs and excise update is published quarterly, and is written by members of RPC's Tax team.

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Lithuanian Beer – excise duty assessment time limits

In *Lithuanian Beer Ltd v Revenue & Customs Commissioners*, the Court of Appeal has held that the level of knowledge required under section 12(4)(b), Finance Act 1994 (FA), for the purpose of limitation on HMRC's power to issue an assessment, is actual knowledge rather than constructive knowledge. more›

Maciej Kotarski – restoration of whole leaf tobacco

In *Maciej Kotarski v the Director of Border Force*, the First-tier Tribunal (FTT) has allowed the taxpayer's appeal against the decision by Border Force (BF) not to restore seized whole leaf tobacco on the basis that, on the evidence before it, legal ownership was established. more›

News

Changes to gaming duty accounting periods and administration of the tax

On 6 July 2018, HMRC published a policy paper in relation to changes to gaming duty accounting periods to bring gaming duty into line with the administration of other gambling duties.

The way gaming duty is calculated and accounted for is to change. Businesses will have a six month accounting period within which they are obliged to complete returns without the requirement to make payments on account partway through those accounting periods. Gaming duty losses may also be carried forward and offset against future liabilities.

The proposed changes are to be introduced in Finance Bill 2018-19 and if enacted will come into force on 1 October 2019.

A copy of the policy paper can be viewed here.

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Tobacco duty on heated tobacco

On 6 July 2018, HMRC published a policy paper introducing "heated tobacco" as a new category of tobacco product in the Tobacco Products Duty Act 1979 (TPDA). The duty rate for heated tobacco will be set at Budget 2018.

Heated tobacco products differ from regular tobacco products as the tobacco is heated but not burned, as in conventional tobacco products.

At present, there are few heated tobacco products on the market and the current legislation principally focuses on tobacco designed for smoking.

The TPDA will be amended to provide a description of heated tobacco and include it as a category of tobacco product.

The new duty will exist from the date of Royal Assent of Finance Bill 2018-19 and the commencement date will be announced at Budget 2018.

A copy of the policy paper can be viewed here.

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Cases

Hasbro European Trading BV – customs classification of a spinning top toy

In *Hasbro European Trading BV v Revenue and Customs Commissioners*[1], the Court of Appeal has allowed the taxpayer's appeal against the decision of the Upper Tribunal (UT), and concluded that spinning tops known as "Beyblades" are correctly classified as "articles for ... table or parlour games" within Combined Nomenclature (CN) heading 9504 and not as "other toys" under heading 9503.

Background

A Beyblade is a form of spinning top set in motion with a rip-cord powered launcher. They are designed to be used in head-to-head battling and launched into a bowl-shaped arena called a "Beystadium". They can be used without a stadium, for example, in a cardboard box or on a desk or table.

Hasbro European Trading BV (Hasbro) contended that Beyblades are correctly classified as "articles for ... table or parlour games" under heading 9504 of the CN. HMRC argued that Beyblades should be classified as "other toys" under heading 9503. The significance of these classifications was that if Beyblades fall within heading 9504 they can be imported into the EU free of customs duties, whereas if heading 9305 applies, Beyblades are liable to ad valorem customs duties of 4.7%.

Hasbro contended before the First-tier Tribunal (FTT) that Beyblades were correctly classified solely under heading 9504, not 9503. The FTT decided that Beyblades fell under both heading 9503 and heading 9504. Accordingly, the FTT applied the tie-breaker rule in the General Interpretative Rules (GIR) 3(a), under which the heading which provides the most specific description of goods is to be preferred to a heading which provides a more general description. The FTT concluded that heading 9503 provided the more specific description. It found that heading 9503 specifically referred to "spinning ... tops" whereas heading 9504 referred to "articles ... for table or parlour games", which the FTT considered was less specific.

Hasbro appealed the FTT's decision to the UT on the basis that the FTT had proceeded incorrectly in considering the relevant Harmonised System Explanatory Note (HSEN) for the heading 9503, which was not in the heading itself. Hasbro contended that the FTT should not have considered the HSEN when deciding which heading provided the more specific description for the purposes of GIR 3(a). In addition, Hasbro argued that once the HSENs were put to one side, heading 9504 provided a more specific description than heading 9503.

The UT dismissed the appeal, holding that there was nothing precluding the FTT from taking into account the relevant HSENs when comparing two headings. The UT found that what was required was a "comparison of what is covered by the two headings, not a comparison of the wording of the two headings". As for Hasbro's second argument, the UT held that the term "toy", used in heading 9503, was more specific than the terminology "articles", used in heading 9504.

Hasbro appealed to the Court of Appeal, where the main issues to be determined were:

- did the FTT and UT attach excessive importance to the HSEN in respect of heading 9503?
- if yes, does heading 9503 nonetheless provide a more specific description of Beyblades than heading 9504 (ie the question under GIR 3(a))?
- what is the significance of the words "which equally merit consideration" in GIR 3(c)?

1. [2018] EWCA Civ 1221.

Under GIR 3(c), if goods cannot be classified by reference to 3(a) or 3(b), they are to be classified under the heading which occurs last in numerical order among those which equally merit consideration.

Court of Appeal judgment
The appeal was allowed.

With regard to question 1, the Court held that HSEN can and should be taken into account when deciding whether an item is capable of being classified under a particular heading. Following *Kawasaki Motors Europe NV v Inspecteur van de Balastingdienst*[2], explanatory notes do not have legally binding force, but act as an important aid to the interpretation of the scope of the various tariff headings.

However, the Court was of the view that the FTT and UT were not entitled to attach the importance they did to the HSENs. While explanatory notes were not wholly irrelevant when applying GIR 3(a), the headings could not be treated as if they incorporated words found in the explanatory notes but not in the headings themselves. According to the Court, and contrary to the view of the UT, the focus must be on the wording of the rival headings, not on "what is covered by the two Headings" nor on parts of explanatory notes that are not replicated in the actual headings.

In relation to question 2, the Court stated that in general, the heading encompassing the most limited range of goods can be expected to be the most specific, whilst a heading covering a broader range is likely to be seen as more generic. As for which of headings 9503 or 9504 was most specific, the Court was not convinced by the UT's reasons as to why it considered 9503 to be more specific. This was partly because "articles for ... parlour games", unlike "toys", captured the fact that Beyblades are to be used competitively. Accordingly, it concluded that 9504 was the most specific.

On the basis of its conclusion in relation to question 2, question 3 was no longer relevant.

Comment
This judgment provides helpful guidance on the operation of GIR 3(a), as well as the application of HSENs to decisions on classification. It is a useful reminder of the close linguistic analysis that needs to take place in classification decisions.

A copy of the judgment can be viewed here.

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Lithuanian Beer – excise duty assessment time limits

In *Lithuanian Beer Ltd v Revenue & Customs Commissioners*[3], the Court of Appeal has held that the level of knowledge required under section 12(4)(b), Finance Act 1994 (FA), for the purpose of limitation on HMRC's power to issue an assessment, is actual knowledge rather than constructive knowledge.

Background
Lithuanian Beer Limited (LBL) carries on a business which includes the import of flavoured ciders. It was common ground between the parties that flavoured cider attracts the excise duty rate applicable to "made wines", rather than the lower rate applicable to regular cider.

2. [2006] Case C-15/05
3. [2018] EWCA Civ 1406.

Between December 2007 and January 2011, LBL imported flavoured cider and mistakenly paid the lower level of excise duty that was applicable to regular ciders, instead of the higher rate for "made wines".

The mistake was discovered and on 14 November 2011, HMRC assessed LBL for the underpaid duty, amounting to £189,662.

LBL appealed against the assessment to the First-tier Tribunal (FTT) on the sole ground that HMRC was out of time to raise the assessment.

The relevant limitation provision is contained in section 12(4) FA. Section 12(4)(b) provides that HMRC has one year, beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge.

LBL argued that on two occasions (in February 2010 and on 2 November 2010), HMRC officers attended the premises of LBL and were presented with information that would have given them the opportunity to discover the composition of the cider and the taxation error. It was later conceded by LBL that HMRC did not obtain sufficient knowledge at the February 2010 visit.

The FTT dismissed LBL's appeal, on the ground that HMRC would have only had knowledge of the composition of the cider when it read the documents containing the information.

LBL's appeal to the Upper Tribunal (UT) was unsuccessful.

LBL appealed to the Court of Appeal (CA) on the grounds that the FTT and UT should have found that HMRC's knowledge on 2 November 2010 was sufficient to satisfy the test in section 12(4)(b).

Court of Appeal judgment
The appeal was dismissed.

The Court considered that the critical question to be determined under section 12(4)(b) was what matters have to come to the knowledge of HMRC in order to trigger the one year limitation.

In the view of the Court, as section 12(4)(b) refers to "knowledge", it is necessary to identify some human agent for HMRC who has actual knowledge of the relevant matters.

Applying guidance provided in *Pegasus Birds v Customs and Excise Commissioners*[4], which related to a similar limitation provision in the Value Added Tax Act 1994, the Court confirmed that "knowledge" of the cider's composition had to be actual and not constructive, and would only be actual, once read and digested by an officer of HMRC. As the second officer, who visited on 2 November 2010, had neither read nor digested the material prior to the 14 November 2010 one year cut-off date, the Court held that HMRC was within time to issue the assessment and dismissed LBL's appeal.

Comment
This judgment provides useful guidance on the state of knowledge required of HMRC for limitation purposes regarding indirect tax matters. Practitioners should always consider whether assessments issued by HMRC are in time. The state of knowledge of HMRC officers is a question of fact and this issue will need to be considered on a case by case basis.

A copy of the judgment can be viewed here.

4. [2004] EWCA Civ 1015.

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Maciej Kotarski – restoration of whole leaf tobacco

In *Maciej Kotarski v the Director of Border Force*[5], the First-tier Tribunal (FTT) has allowed the taxpayer's appeal against the decision by Border Force (BF) not to restore seized whole leaf tobacco on the basis that, on the evidence before it, legal ownership was established.

Background

On 7 August 2015, Maciej Kotarski (MK), was intercepted carrying 602.2kg of unprocessed tobacco. MK purchased the tobacco in Poland before driving in a hire van to Harwich in the UK, where he was stopped. BF alleged that once processed the tobacco would attract excise duty of £669,072.63. BF considered that the goods were acquired with the intention of fraudulently evading excise duty.

The goods were accordingly seized under section 139, Customs and Excise Management Act 1979 (CEMA) as being liable to forfeiture under sections 49(1)(a)(i) and 170B, CEMA. A tobacco cutting machine was also discovered.

In a criminal trial held in February 2017 in connection with the seizure, MK was found not guilty.

MK sought restoration of the goods from BF. On 30 May 2017, BF considered and refused a request to restore the goods on the basis that MK could not prove ownership of the tobacco.

MK then produced an invoice or "Faktura" dated 6 August 2015, showing the supply of 600kg of tobacco for 4050 Polish Zloty (£861 including £63 tax) alongside a bank statement summarising transactions from 4 to 8 August 2015.

BF maintained its decision not to restore the goods on the basis that legal title had not been proven. MK appealed this decision.

FTT decision

The appeal was allowed.

BF's Review Officer gave evidence to the FTT that the bank statement MK provided did not demonstrate that the money withdrawn was used to purchase the raw tobacco and it was insufficient to show that MK purchased the goods in the course of his business. BF contended that the cash could have been used for other purposes, such as to finance the expenses of his trip to the UK.

The FTT had difficulty ascertaining what further information could be provided to evidence a cash transaction other than the source of the cash and a receipt or invoice. BF was not able to provide any assistance to the FTT as to what further documents it required.

The FTT commented that the dates of the withdrawals on the banks statements either matched or were sufficiently near the purchase of the goods, evidenced by an invoice showing MK as the purchaser and that payment was by cash. MK had produced the proof that payment was made for the goods as requested by BF and provided as clear an audit trail through his bank statement as was possible for a cash purchase. The FTT concluded that MK was the owner of the goods and accordingly BF's decision not to restore the goods was unreasonable.

5. [2018] UKFTT 0278 (TC).

As the FTT has supervisory, as opposed to appellate, jurisdiction in cases regarding restoration of goods, the FTT directed that BF carry out a further review of the original decision, taking into account information and evidence submitted at the FTT hearing.

Comment
This decision illustrates the type of evidence necessary to establish legal ownership of goods where cash payments are made to purchase goods. If cash payments are used, businesses should keep within their records a full audit trail of the purchases made.

A copy of the decision can be viewed here.

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