Customs and excise quarterly update

February 2019

In this update we report on the effect of a no deal Brexit in relation to (1) customs processes and procedures; (2) binding tariff information; and (3) changes to tax procedures. We also comment on three recent cases relating to (1) obtaining an injunction when HMRC revoke Authorised Warehousekeeper status; (2) the application of retrospective inward processing authorisation periods; and (3) the seizure of vehicles.

News

Updated guidance on customs processes and procedures in the event of a no-deal Brexit

On 6 February 2019, HMRC published an updated version of its partnership pack which provides guidance to businesses on customs processes and procedures in the event of a no-deal Brexit. **more›**

Important information about the effect of leaving the EU without a deal on Binding Tariff Information (BTI)

On 18 January 2019, HMRC published a letter to UK traders setting out the effect of leaving the EU without a deal on BTI. **more›**

Updated guidance on changes to customs, excise and VAT procedures in the event of a no-deal Brexit

On 6 February 2019, the Government published updated guidance on the customs, excise and VAT procedures which will have to be applied to goods traded with the EU in the event of a no-deal Brexit. These are broadly the same as those currently applied to goods traded outside of the EU. **more›**

Case reports

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In *Q Ltd v HMRC*, the High Court granted an interim injunction, following HMRC's revocation of the taxpayer's Authorised Warehousekeeper status. **more›**

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.

We also publish a Tax update on the first Thursday of every month, a VAT update on the final Thursday of every month and a weekly blog, RPC Tax Take.

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Key Plant Automation Ltd – the application of retrospective inward processing authorisation periods

In *Key Plant Automation Ltd v Revenue & Customs Commissioners*, the FTT held that under Article 508(3) of Council Regulation 2913/92, the maximum period for which a retrospective Inward Processing Authorisation (IPA) can be granted is one year. more›

Holly Clark – these were exceptional reasons to restore seized vehicle

In *Holly Clark v Director of Border Revenue*, the FTT held that UK Border Force did not consider all the evidence before it in deciding whether to restore a seized car to its innocent owner. more›

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Updated guidance on customs processes and procedures in the event of a no-deal Brexit

On 6 February 2019, HMRC published an updated version of its partnership pack which provides guidance to businesses on customs processes and procedures in the event of a no-deal Brexit.

The pack includes a step-by-step guide to importing.

In order to import from the EU, businesses will be required to:

- register for a UK Economic Operator Registration and Identification number to trade
- determine the commodity code for their goods which will allow them to complete declarations, check whether they need to pay customs duty and enquire about potential duty reliefs
- decide on the value of their goods to determine the level of customs duty payable
- check whether they are prohibited or restricted from bringing their goods into the UK; a special licence may be needed for goods such as medicines and chemicals
- establish the origin of their goods as either wholly obtained and produced in a single country or whose production involved materials from more than one country
- consider whether they are able to use any of the customs special procedures available to traders such as transitional simplified procedures or storage compromising of customs warehousing
- choose the correct customs procedure code for their goods
- make their customs declarations using the Customs Declaration Service
- pay import duty and VAT if applicable, and
- ensure they keep records of all traded goods declared to HMRC.

The updated guidance can be viewed here.

Back to contents>

Important information about the effect of leaving the EU without a deal on Binding Tariff Information (BTI)

On 18 January 2019, HMRC published a letter to UK traders setting out the effect of leaving the EU without a deal on BTI.

Should the UK leave the EU without a deal, from 29 March 2019, HMRC will replace the current BTI service with a digital service. BTI rulings will also be referred to as Advanced Rulings.

The same information used for the existing service will be required, namely:

- Government Gateway user ID
- Password, and
- Economic Operator Registration and Identification number.

Current UK-issued BTI rulings will be valid until either the expiry date stated on your certificate or the date your BTI is revoked, whichever is earlier.

The letter can be viewed here.

Back to contents>

Updated guidance on changes to customs, excise and VAT procedures in the event of a no-deal Brexit

On 6 February 2019, the Government published updated guidance on the customs, excise and VAT procedures which will have to be applied to goods traded with the EU in the event of a no-deal Brexit. These are broadly the same as those currently applied to goods traded outside of the EU.

The UK intends to establish an independent trade remedies system by the time the UK exits the EU. There will also be implications for a range of specific goods regulated under EU legislation.

The important changes are set out below:

Customs and excise

The free movement of goods between the UK and EU will end. Businesses will be required to apply the same customs and excise rules to goods moving between the UK and EU as are currently applied to goods moving between the UK and non-EU countries. When goods enter or leave the UK, customs declarations will be required and separate safety and security declarations will be required by the carrier of the goods in relation to imports into the UK.

UK Trade Tariff

Goods traded between the UK and the EU will be subject to the same requirements as third party goods. Import declarations will be required, customs formalities and checks will be carried out and any custom duties will have to be paid.

The UK Trade Tariff detailing the import duty rates and rules will be made available before 29 March 2019.

VAT for businesses

The Government intends to keep VAT processes as similar as possible to the current procedures but differences to VAT rules applying to transactions between the UK and EU countries will include postponed accounting for import VAT on goods brought into the UK. This means that UK VAT registered businesses importing goods to the UK will be able to account for import VAT on their VAT return, rather than paying import VAT on, or soon after, the time that the goods arrive at the UK border. This will apply both to imports from the EU and non-EU countries.

Trade remedies

Instead of complaints of unfair trade processes or unforeseen surges in imports being investigated by the European Commission (DG Trade), an independent trade remedies system will be operated by the UK Trade Remedies Authority to investigate injury to the UK industry.

The updated guidance can be viewed here.

Back to contents>

Case reports

Q Ltd – injunction granted following revocation by HMRC of Authorised Warehousekeeper status

In *Q Ltd v HMRC*[1], the High Court granted an interim injunction, following HMRC's revocation of the taxpayer's Authorised Warehousekeeper status.

Background

Q Ltd was authorised by HMRC to store goods on which full excise duty had not been paid.

In August 2018, HMRC informed Q Ltd that it was considering revoking its Authorised Warehousekeeper status. Correspondence ensued in which HMRC confirmed to Q Ltd that prior notice would be given before any revocation decision was made.

On 17 December 2018, HMRC revoked Q Ltd's Authorised Warehousekeeper status with immediate effect. HMRC then extended the time period for suspension to take effect until 2 January 2019.

Q Ltd intended to appeal HMRC's decision to revoke its authorisation to the First-tier Tribunal (FTT). In the meantime, Q Ltd applied to the High Court for an injunction preventing HMRC's decision from taking effect.

High Court judgment

The application was granted.

In granting the injunction, the Court considered the test formulated in *ABC Ltd v HMRC* (the *ABC* test) for determining whether an injunction should be granted where there is a pending appeal to the FTT. The *ABC* test confirms that, in seeking an injunction, a taxpayer is required to provide compelling evidence that the appeal would succeed, including: i) documentary financial evidence; and, ii) a statement from an independent professional who does more than reformulate the taxpayer's stated opinion.

Q Ltd was not in a position to provide the necessary evidence to satisfy the stringent *ABC* test and contended that a short interim injunction should be granted to preserve the status quo until it could provide the necessary evidence. The Court considered the principles set out in *American Cyanamid Co v Ethicon Ltd*[2] (the *American Cyanamid* principles), namely:

- whether there is a serious issue to be tried
- whether there would be an adequate remedy in damages if an injunction was not granted, and
- the balance of convenience.

Q Ltd argued that there was a serious issue to be tried and following *Factortame*[3], there was no automatic right to damages for an administrative decision of the kind in question. Additionally, the balance of convenience lay in favour of granting the interim injunction because of the immediate financial and reputational effect the revocation would have on it.

HMRC contended that the *American Cyanamid* principles were not applicable and that there was insufficient evidence for the Court to be satisfied of the effect of the revocation. Referring to *CC & C Ltd v HMRC*[4], HMRC argued that there was no judicial power to make a suspensory

1. [2018] EWHC 3637 (QB).
2. [1975] AC 396.
3. *R v Secretary of State for Transport ex p Factortame Ltd (No 2)* [1991] 1 AC 603.
4. [2014] EWCA Civ 1653.

order pending the outcome of an appeal. Moreover, Q Ltd had had adequate notice (since August 2018) of HMRC's potential decision to revoke its Authorised Warehousekeeper status and it should have been in a position to provide the necessary evidence. There was no balance of convenience in favour of granting an interim injunction.

The Court confirmed that where a taxpayer genuinely wishes to collate evidence required to seek an injunction, the *American Cyanamid* principles are the correct principles to apply when deciding whether to grant a short interim injunction. Once evidence has been gathered, the more stringent *ABC* test should be applied in deciding whether an injunction should be granted.

It was clear to the Court that Q Ltd intended to pursue an appeal against HMRC's revocation decision to the FTT and if the injunction was not granted, there was a real financial and reputational risk for Q Ltd.

Although the Court considered that Q Ltd may struggle to satisfy the *ABC* test, a short interim injunction was granted to allow it time to gather sufficient evidence.

Comment

This judgment provides some clarity on the principles to be applied by the courts when deciding whether to grant an injunction in circumstances where a taxpayer is pursuing an appeal against a decision by HMRC to revoke its Authorised Warehousekeeper status to the FTT. The stringent *ABC* test will be applied by the courts in determining whether an injunction is to be granted, but where the taxpayer requires more time to gather evidence, the *American Cyanamid* principles will be considered in deciding whether to grant a short interim injunction.

A copy of the judgment can be viewed here.

Back to contents>

Key Plant Automation Ltd – the application of retrospective inward processing authorisation periods

In *Key Plant Automation Ltd v Revenue & Customs Commissioners*[5], the FTT held that under Article 508(3) of Council Regulation 2913/92, the maximum period for which a retrospective Inward Processing Authorisation (IPA) can be granted is one year.

Background

Key Plant Automation Ltd (Key Plant) is a company that manufactures machines. In late 2011 to early 2012, as part of its manufacturing process, it needed to import gearboxes, which were then to be exported.

Key Plant researched the appropriate tariff codes using the gov.uk tariff website. Key Plant's gearbox manufacturer had advised that it apply for an IPA – a trade facilitation measure which allows goods to be imported with suspension of customs duty and VAT where goods are to be processed and re-exported. The tariff website, however, indicated that the appropriate code was a tariff of 0%. Key Plant contacted the HMRC Tariff Helpline, which confirmed this. Key Plant decided not to apply for an IPA as paying VAT and reclaiming it would be easier.

In December 2013, HMRC refused an application for repayment of duty paid in relation to an import in September 2013, stating that the imported goods were completed gearboxes, with a tariff of 3.7%.

5. [2018] UKFTT 648 (TC).

This refusal was sent to Key Plant's freight forwarders and Key Plant only received the notification in October 2014. On receipt, Key Plant applied for an IPA, which was granted in January 2015, to cover the period October 2014 to October 2015. It was subsequently amended to grant retroactive authorisation with effect from October 2013[6].

Further to a HMRC review in 2015 into Key Plant's imports from the start of 2012, Key Plant was required to pay backdated duty and VAT of £50,673.59.

Key Plant appealed to the FTT, seeking repayment of duty and VAT for the period from December 2012 to October 2013 (the effective date of the IPA).

FTT decision
The appeal was dismissed.

Key Plant argued that had the decision letter been sent to it in December 2013 rather than to the freight forwarders, it would have applied for the IPA then, for retrospective authorization to December 2012. This would have allowed it to claim additional relief of £22,370.42 in duty and VAT. It also argued that it had no way of knowing that it was applying an incorrect tariff code and it should not be liable for duty for a period when HMRC knew that the wrong code was being used but did not inform it of this fact. Finally, it argued that it was unfair that HMRC could review imports for a three year period, but a taxpayer could only obtain retrospective authorisation for a one year period.

HMRC argued that because refusal to grant an IPA fell within paragraph 1(f), Schedule 5, Finance Act 1994 and was an ancillary matter under section 16(8), Finance Act 1994, the FTT's powers were limited to those set out in section 16(4), which did not include the power to grant repayment of the customs debt accrued between September 2012 and October 2013. It also argued that retrospective IPAs cannot be granted from a date more than one year before the date of application. The period prior to October 2013 could not therefore be covered and it had correctly corresponded with Key Plant's representative in September 2012 in relation to the payment. Any failure by the representatives to inform Key Plant was a commercial matter between the representative and Key Plant.

The FTT concluded that HMRC had no duty to correspond specifically with Key Plant in relation to repayment. Key Plant was aware that HMRC was querying repayment, so the FTT considered it should have checked with its representative on the outcome of that query.

In relation to Key Plant's argument that HMRC had acted unfairly, the FTT held that it has no general judicial review function and therefore has no jurisdiction to consider the fairness of HMRC's actions (*Hok Limited v Revenue & Customs Commissioners*[7]). Accordingly, the FTT had no power to grant repayment and the appeal was dismissed.

Comment
This decision highlights the importance of effective communications between businesses and their representatives when it comes to HMRC correspondence. The FTT is not willing to correct communication failings which it considers to be a commercial matter between the parties concerned.

6. Article 508(3) of Council Regulation 2913/92, which sets the provisions for IPAs, does not permit retrospective authorisation to be granted from a date more than a year before the date of application.
7. [2012] UKUT 363 (TCC).

In addition, this case demonstrates the importance of choosing the correct litigation forum. In practice, identifying the correct forum is not always straightforward, especially following the decision of the Court of Appeal in *R (oao Glencore Energy UK Ltd) v HMRC*[8]. If a taxpayer commences judicial review proceedings in the High Court, HMRC will often argue that the taxpayer has an alternative remedy and should have brought an appeal before the FTT and if the taxpayer has pursued an appeal before the FTT, rather than judicial review proceedings, HMRC often argue that the FTT lacks jurisdiction (as it did in this case).

In circumstances where there is some jurisdictional uncertainty, it may be prudent for a taxpayer to make a "protective" application for judicial review (as there are strict time limits within which judicial review proceedings must be commenced) in addition to filing an appeal with the FTT. If appropriate, the judicial review proceedings can then be stayed pending the outcome of the proceedings before the FTT.

A copy of the decision can be viewed here.

Back to contents>

Holly Clark – these were exceptional reasons to restore seized vehicle

In *Holly Clark v Director of Border Revenue*[9], the FTT held that UK Border Force did not consider all the evidence before it in deciding whether to restore a seized car to its innocent owner.

Background

Holly Clark (Ms Clark) regularly allowed her father, Mr Clark, to borrow her car to make trips to France to purchase tobacco.

On 2 February 2017, Mr Clark was driving Ms Clark's car when he was stopped at the port of Dover with 200 cigarettes and 7.5 kilogrammes of rolling tobacco. Mr Clark claimed that he had purchased the cigarettes and tobacco for friends and family. The customs officer considered that the goods had been purchased for a commercial purpose and not for own use and the cigarettes and tobacco were seized under section 139, Customs and Excise Management Act 1979 (CEMA), as being liable for forfeiture under section 49(1)(a)(i), CEMA. Ms Clark was issued with a Seizure Notice but she did not challenge the legality of the seizure of the goods or the vehicle and the goods were condemned.

On 6 February 2017, Ms Clark wrote to UK Border Force (UKBF) requesting restoration of her vehicle pursuant to section 152(b), CEMA. UKBF refused the restoration request on 7 March 2017. On 28 March 2017, Ms Clark asked HMRC for a review of the decision not to restore her vehicle.

On 4 May 2017, UKBF reviewed its decision and agreed to restore Ms Clark's vehicle for a fee of £1,350 on the basis that Mr Clark had not made the trip for profit and it was a first offence.

Ms Clark appealed the decision to restore the vehicle for a fee to the FTT on the basis that she did not know why her father was taking the vehicle to France, she did not smoke and it is UKBF's policy to restore vehicles owned by third parties who are not present and who are innocent or who have undertaken reasonable steps to prevent smuggling. In addition, Ms Clark said that she needed the vehicle for transportation of her seven month old son and suffers from anxiety and certain mental health issues.

8. [2017] EWCA Civ 1716.
9. [2018] UKFTT 657 (TC).

FTT decision
The appeal was allowed.

The FTT has limited jurisdiction in appeals against restoration and can only consider whether the decision reached by UKBF was reasonable (section 16(4) to (6), Finance Act 1994). It cannot decide whether an item should or should not be restored. If the FTT considers that a decision is not reasonable, it can set aside the decision and request UKBF to remake it.

On this basis, the issue for the FTT was whether UKBF's decision to restore the vehicle for a fee was one which could reasonably have been reached.

The basis of UKBF's case was that although Ms Clark was an innocent party, she should have made reasonable checks as to why her father wanted her vehicle to ensure that it was not used for smuggling. Further, UKBF did not consider Ms Clark's mental health and childcare difficulties to constitute exceptional hardship.

The FTT concluded that UKBF had not considered all of the evidence before it, in particular that Ms Clark did not smoke and her mental health was at risk as a consequence of not having the use of her car. The decision to restore the car for a fee was not reasonable and proportionate in the circumstances and the FTT directed UKBF to conduct a further review within 28 days of its decision and it said that the further review would need to be based on the conclusions reached by the FTT with a further right of appeal if Ms Clark was dissatisfied with the outcome of the further review.

Comment
This decision provides useful guidance as to what constitutes "exceptional reasons" for the purposes of restoration requests made under section 152(b), CEMA. Those transporting goods subject to excise duty need to be aware of UKBF's stringent policies to ensure vehicles are not seized.

A copy of the decision can be viewed here.

Back to contents>

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