Customs and excise quarterly update

February 2020

In this update we report on the government's plans to (1) introduce 10 new freeports; (2) introduce import controls; and (3) its consultation into the UK's tariff policy following the UK's departure from the EU. We also comment on three recent cases relating to (1) time limits to issue a post-clearance demand under the Community Customs Code; (2) tariff classification of fluid and blanket warming cabinets used in hospitals; and (3) what constitutes "complicity" in the context of smuggling.

News

Consultation on freeports

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Government plans to introduce import controls

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Consultation opened regarding the UK's new tariff policy

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Case reports

FMX – Supreme Court considers limitation issues for custom duty post-clearance demands

In *FMX Food Merchants Import Export Co Ltd v HMRC* [2020] UKSC 1, the Supreme Court held that HMRC, when issuing Post Clearance Demands, can rely on Article 221(4) of the Community Customs to displace the normal three-year time limit, even though the UK had not enacted a finite alternative time limit, but the demand must be issued within a reasonable time. more›

Any comments or queries?

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Central Medical Supplies – classification of fluid and blanket warming cabinets used in hospitals

In *Central Medical Supplies Ltd v HMRC* [2019] UKFTT 651 (TC), the First-tier Tribunal (FTT) found that fluid and blanket warming cabinets used in hospitals should be classified, under customs heading 9402 of the Combined Nomenclature (CN), as medical furniture and therefore no customs duty is payable on importation. more›

Jacek Szymanski – what constitutes "complicity" in the context of smuggling

In *Jacek Szymanski (T/A Everpol) v Director of Border Revenue* [2019] UKUT 343 (TCC), the Upper Tribunal (UT) dismissed an appeal brought against a decision of the First-tier Tribunal (FTT), and found that for the purposes of Border Force's restoration policy for seized commercial vehicles (the Restoration Policy), turning a blind eye to suspicious circumstances would constitute "complicity" in the context of smuggling. more›

News

Consultation on freeports

On 10 February 2020, the Department for International Trade launched a consultation into the government's proposed freeport policy, which includes tariff flexibility and customs facilitations.

The consultation sets out the government's intention to create up to 10 innovative freeports across the UK to boost global trade and productivity, generate employment opportunities and benefit the UK economy.

The consultation is open until 20 April 2020.

The consultation document can be viewed here.

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Government plans to introduce import controls

On 10 February 2020, the government published a press release regarding its plans to introduce import controls on goods being imported from the EU after the end of the transition period on 31 December 2020.

Traders in both Great Britain and the EU will be required to submit customs declarations and have goods checked at the border in order to manage who and what is coming into Great Britain.

The press release can be viewed here.

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Consultation opened regarding the UK's new tariff policy

On 6 February 2020, the Department for International Trade launched a public consultation into the UK's tariff policy following the UK's departure from the EU.

The Trade Secretary announced that the government is preparing to simplify the UK's tariff regime and cut import tariffs on the majority of goods coming into the UK in order to provide consumers with greater variety and lower prices.

The government's plans include rounding tariffs down to the nearest 2.5, 5 or 10% and removing tariffs of less than 2.5% completely.

The consultation is open until 5 March 2020.

The consultation document can be viewed here.

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Case reports

FMX – Supreme Court considers limitation issues for custom duty post-clearance demands

In *FMX Food Merchants Import Export Co Ltd v HMRC* [2020] UKSC 1, the Supreme Court held that HMRC, when issuing Post Clearance Demands, can rely on Article 221(4) of the Community Customs to displace the normal three-year time limit, even though the UK had not enacted a finite alternative time limit, but the demand must be issued within a reasonable time.

Background

FMX imported ten consignments of garlic to the UK in 2003 and 2004. It declared the garlic as originating in Cambodia and claimed exemption from import duties under the EU's Generalised System of Preferences. In 2007, the European Anti-Fraud Office (OLAF) concluded that the garlic was from China and import duty was payable on the garlic.

In March 2011, HMRC issued a C18 Post Clearance Demand (C18) note to FMX in the sum of £503,577.63. FMX appealed, arguing that it was too late to issue the C18 due to the three-year time limit set out in Article 221(3) of Council Regulation (EEC) No 2913/92 (the CCC)[1]. HMRC relied on Article 221(4) of the CCC, which provides that where the debt arises from activity which is "liable to give rise to criminal court proceedings ... the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period".

The First-tier Tribunal (FTT) allowed FMX's appeal on the basis that the UK had no provisions in force extending the three-year time limit. The Upper Tribunal (UT) disagreed and accepted HMRC's argument, holding that Article 221(4) displaces the three-year time limit in cases involving criminality, even if the member state had not enacted provisions. The Court of Appeal reinstated the FTT's decision. It was of the view that the UT's decision violated legal certainty as importers would be exposed to stale C18s without any time limit. HMRC appealed to the Supreme Court.

Supreme Court's judgment

The appeal was allowed.

The Supreme Court considered Article 221(4), and concluded that its purpose is to preserve the integrity of the criminal process whilst leaving the conditions (including time limits) for a communication of a customs debt to each member state. The disapplication of the three-year time limit is the automatic result of the likelihood of criminal court proceedings and member states do not need to select a different time limit.

The Court then considered whether this would allow HMRC to issue demands without any time limit and whether this would be a breach of legal certainty in EU law.

The Court rejected HMRC's contention that the domestic law doctrines of abuse of process and laches assist, because they concern the conduct of legal proceedings, not the communication of a customs debt. The Court also rejected HMRC's contention that the Limitation Act 1980

1. This is a previous version of the EU's Customs Code. The issues in this appeal did not arise under the current version of Union Customs Code, Council Regulation (EU) No 952/2013.

could be invoked because this would require the Court to disapply section 37(2)(a) of that Act (which provides that the Act does not apply to customs debts) on the basis that it was inconsistent with EU law.

The Court also considered EU jurisprudence which establishes that where provisions in force appear to allow legal action without any time limit, then the principle of legal certainty requires that action to be carried out within a reasonable time[2]. The Court concluded that HMRC was obliged to issue its post-clearance demands within a reasonable time and on the facts of this case, HMRC had not failed to act within a reasonable time.

Comment

Although this decision is largely of historic interest, as new Post Clearance Demand limitation provisions are now in force (in the Union Customs Code, which came into effect on 1 May 2016), the decision is still relevant to a number of taxpayers that have appeals relating to C18s where HMRC has, relying on Article 221(4) of the CCC, issued the C18 outside the three-year time limit. HMRC will need to demonstrate in each case that in issuing the C18, it has acted within a reasonable time period.

A copy of the judgment can be viewed here.

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Central Medical Supplies – classification of fluid and blanket warming cabinets used in hospitals

In *Central Medical Supplies Ltd v HMRC* [2019] UKFTT 651 (TC), the First-tier Tribunal (FTT) found that fluid and blanket warming cabinets used in hospitals should be classified, under customs heading 9402 of the Combined Nomenclature (CN), as medical furniture and therefore no customs duty is payable on importation.

Background

Central Medical Supplies Ltd (CMS) was a manufacturer and supplier of medical equipment. Its appeal concerned the correct classification, for customs duty purposes, of fluid warming cabinets and blanket warming cabinets which were manufactured by a company in Wisconsin, USA and imported into the UK by CMS.

In 2018, CMS applied for Binding Tariff Informations (BTIs) in relation to the warming cabinets. A BTI provides a customs classification which is binding on the customs authorities as against the importer who obtains it until it expires or is revoked or annulled. HMRC issued BTIs to CMS, classifying the warming cabinets under heading 8419 of the Combined Nomenclature (CN), which has a duty rate of 3.4%.

HMRC maintained that the customs classifications in the BTIs under heading 8419 were correct, as the cabinets were "machinery... for the treatment of materials by a process involving a change of temperature such as heating...".

2. *Sanders v Commission* [2004] ECR II-3315.

CMS contended that no customs duty should be paid on importation, as the appropriate customs heading was either under Chapter 90, heading 9018, because the cabinets fell within the description of "instruments and appliances used in medical... sciences", or Chapter 94, heading 9402, because the cabinets were "medical... furniture".

CMS challenged the BTIs issued by HMRC. They were both confirmed in a statutory review, following which CMS appealed to the FTT.

FTT decision
The appeal was allowed.

Taking into account the terms of heading 9018, and the terms of the explanatory notes of the Harmonised System Explanatory Notes (HSEN) as a whole, the FTT agreed with HMRC's submission that the word "used", as it appears in heading 9018, should be narrowly construed. The warming cabinets therefore did not fall within heading 9018, as they were not used directly for some form of medical procedure, even though their intended use was in a medical context. The FTT determined that, even if they were prima facie included in heading 9018, they are medical furniture and would be expressly excluded by paragraph (r) of the HSEN.

The FTT was satisfied that, in the context of the headings and the HSEN as a whole, the warming cabinets may properly described as (a) medical furniture (within heading 9402), and (b) machinery or plant for the treatment of materials by a process such as heating (within heading 8419). Prima facie, the warming cabinets were classifiable under headings 9402 and 8419. Rule 3 of the General Rules for the Interpretation of the Nomenclature (GIR), was therefore engaged.

GIR 3 provides that, when goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

"(a) The heading which provides the most specific description shall be preferred to headings providing a more general description ...

(c) When goods cannot be classified by reference to 3(a) or 3(b) they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

In the view of the FTT, the description in heading 8419 was specific regarding one function of the warming cabinets, namely, the treatment of materials by a process involving a change of temperature such as heating. In contrast, the description in heading 9402 was specific as to the context in which the warming cabinets are used, namely, a medical context, and the functionality of the warming cabinets for storage and as furniture. The FTT found that the competing headings were therefore specific in relation to different characteristics and it could not be said that either of the headings provided the most specific description.

The FTT therefore had regard to GIR 3(c), so that the warming cabinets were to be classified under the heading which occurred last in numerical order among those which equally merited consideration. This resulted in a classification under heading 9402, as medical furniture.

Comment

In addition to providing helpful guidance on the correct classification, for customs duty purposes, of the cabinets in dispute and related medical equipment, the decision is a good example of the FTT applying the approach to classification issues summarised by Arden LJ (as she then was) in *Amoena (UK) Ltd v HMRC* [2015] EWCA Civ 25.

A copy of the decision can be viewed here.

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Jacek Szymanski – what constitutes "complicity" in the context of smuggling

In *Jacek Szymanski (T/A Everpol) v Director of Border Revenue* [2019] UKUT 343 (TCC), the Upper Tribunal (UT) dismissed an appeal brought against a decision of the First-tier Tribunal (FTT), and found that for the purposes of Border Force's restoration policy for seized commercial vehicles (the Restoration Policy), turning a blind eye to suspicious circumstances would constitute "complicity" in the context of smuggling.

Background

Jacek Szymanski (Mr Szymanski) was a Poland-based haulier. His vehicle, a tractor towing a trailer unit, was intercepted by Border Force at the port of Dover on 15 May 2016. Whilst documentation stated that the vehicle was carrying mattress filling, it contained unprocessed tobacco weighing approximately 2,000kg. The vehicle was seized under section 170B, Customs and Excise Management Act 1979 (CEMA).

This was not the first time that the vehicle had been seized; it had been seized earlier in 2016 after it was found carrying 2,400 cigarettes and 16.8 litres of vodka, which was subject to duty of £770.

Border Force issued a decision, which was upheld on review, refusing to restore the trailer unit to Mr Szymanski (although the tractor was returned), finding that he had been complicit in the smuggling of goods. Border Force applied section C of its Restoration Policy which provides that a vehicle will not usually be restored if the operator failed to provide evidence that they were neither responsible for, nor complicit in, the smuggling attempt and the revenue in issue was at least £50,000.

In this case, had the tobacco been processed, the duty payable would have been some £490,000 and it was the second seizure of the vehicle in 12 months. In addition, Mr Szymanski had not enquired into the business activities of the person to whom the goods were being delivered and failed to question the unclear delivery arrangements which had been provided to him.

Mr Szymanski appealed to the FTT on the basis that Border Force's decision was unreasonable.

The FTT dismissed the appeal, holding that Border Force's decision had been arrived at reasonably and Mr Szymanski had turned a blind eye and was complicit in the smuggling, for the purposes of Border Force's Restoration Policy. Mr Szymanski appealed to the UT.

UT decision
The appeal was dismissed.

In the view of the UT, there was no error of law in the test which had been applied by the FTT in arriving at its decision.

Mr Szymanski contended that the FTT had erred in its interpretation of "complicit". The FTT had found that a person could be complicit even if they merely turned a blind eye, and agreed to do something without question in circumstances where a reasonable person would make further enquiries in order to ascertain whether what he was told was credible.

The UT disagreed with Mr Szymanski. In its view, the FTT had not erred in its interpretation of "complicit". The UT considered that by referring to "turning a blind eye", it was evident that the behaviour that the FTT had considered could constitute complicity and be established by evidence of the existence of circumstances which ought reasonably to have given rise to suspicion of smuggling.

The UT also found that there was no error of law in the FTT's conclusion that it was inevitable that Border Force would have decided that Mr Szymanski would have been "complicit" in the smuggling given the inadequacy of the checks he carried out and the unclear account of the delivery arrangements he had provided.

Comment
This decision provides useful guidance on the factors the FTT will take into account when considering whether a restoration decision of Border Force has been reasonably reached. Those that wish to successfully appeal restoration decisions need to be able to demonstrate that the factors taken into account by Border Force in reaching its decision were either unreasonable or erroneous or that it failed to take into account relevant considerations. Thorough preparation of an appeal case will maximise the prospects of it succeeding.

A copy of the decision can be viewed here.

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- Shortlisted – Banking Litigation Team of the Year – Legal Week Awards 2019
- Shortlisted – Commercial Litigation Team of the Year – Legal Business Awards 2019
- Shortlisted – Best Copyright Team – Managing IP Awards 2019
- Shortlisted – Insurance Team of the Year – Legal Business Awards 2018
- Winner – Best Employer – Bristol Pride Gala Awards 2018
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- Shortlisted – Corporate Team of the Year – The Lawyer Awards 2017
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