Customs and excise quarterly update

February 2018

In this update we report on the Government's responses to its consultation on proposals to simplify the administration of alcohol duty; HMRC's departmental plan; and HMRC's Import Fraud Strategy Refresh. We also comment on three recent cases involving customs valuation; seizure of alcohol by HMRC; and the Alcohol Wholesaler Registration Scheme.

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Simplifying the administration of alcohol duty

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HMRC's departmental plan – more criminal prosecutions promised

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Import fraud strategy refresh

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Hamamatsu Photonics – Customs duty value and transfer pricing adjustments

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Hodson – Challenges to the seizure of alcohol by HMRC

In *Hodson v HMRC*[2], the Upper Tribunal (UT) upheld the decision of the First-tier Tribunal (FTT), that it had no jurisdiction to decide an appeal against an excise duty assessment following seizure of goods where the seizure had not been challenged within the relevant time limits. 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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Smart Price Midlands and Hare Wines – HMRC must disclose documents relating to its decisions that certain companies were not "fit and proper" for registration as wholesalers of alcohol

In *HMRC v Smart Price Midlands Limited and Hares Wines Limited*[4], the UT has dismissed HMRC's appeals upholding the FTT's directions that HMRC disclose documents in relation to its decisions that a number of companies were not "fit and proper" for registration as wholesalers of alcohol, under section 88C(2), Alcohol Liquor Duties Act 1979 (ALDA). more›

News

Simplifying the administration of alcohol duty

In November 2017, the Government published a summary of responses to its consultation document on proposals to simplify the administration of alcohol duty for the benefit of those who produce, process or store alcohol. There was general support for simplified registration procedures and the Government has said it will consult further on a single registration process for all producers of alcohol. In relation to duty payment returns, the Government has confirmed that its aspiration is to standardise, into a single duty payment return, the payment procedures for alcohol production areas and it intends to standardise the accounting period for all alcohol production duty returns which it intends to consult further on. The Government also recognises the burden created by the need to provide guarantees and intends to consult further on this.

Following consideration of the responses to the consultation, the Government intends to set out more detailed plans for its simplification programme and intends to issue a second consultation document later this year.

A copy of the responses can be viewed here.

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HMRC's departmental plan – more criminal prosecutions promised

On 14 December 2017, HMRC published its single departmental plan setting out its objectives and how they will be achieved, including making greater use of criminal prosecutions to tackle tax evasion.

In the plan, HMRC states that it is committed to three key objectives. These are to maximise revenues; bear down on avoidance and evasion; and to design and deliver a professional, efficient and engaged organisation.

Under the plan, HMRC will invest £800m to tackle tax evasion and non-compliance in the tax system. It will also increase its ability to prevent tobacco and alcohol smuggling.

HMRC plans to increase the number of criminal investigations into serious and complex tax crime, focusing particularly on wealthy individuals and corporates, with the aim of increasing prosecutions in this area.

A copy of HMRC's departmental plan can be viewed here.

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Import fraud strategy refresh

In November 2017, HMRC announced that it intends to update its Import Fraud Strategy, which was first released in 2015. HMRC is working with members of the Joint Customs Consultative Committee to gain input from trade into its strategy. It intends to finalise its strategy by March 2018.

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Cases

Hamamatsu Photonics – Customs duty value and transfer pricing adjustments

In *Hamamatsu Photonics Deutschland GmbH v Hauptzollamt München*[1], the Court of Justice of the European Union (CJEU) has confirmed that the Community Customs Code (CCC) does not allow transfer pricing adjustments, made after the end of the relevant accounting period, to change the customs value.

Background

Hamamatsu Photonics Deutschland GmbH (Hamamatsu), a company established in Germany, belongs to a group of global companies whose parent company, Hamamatsu Photonics, is established in Japan. Hamamatsu distributes optoelectronic devices, systems and accessories.

Hamamatsu purchased imported goods from its parent company, which charged its intra-group prices in accordance with the advance pricing agreement agreed between the group and the German tax authorities.

Following the transfer pricing adjustments, Hamamatsu applied for a repayment of customs duty. The repayment application was rejected by the German tax authorities on the grounds that it was incompatible with Article 29(1) of the CCC, which refers to the transaction value of individual goods, not that of mixed consignments.

Hamamatsu lodged an appeal against this decision. The German court hearing the appeal referred the following questions to the CJEU for a preliminary ruling:

- do the provisions of Article 28 et seq. of the CCC permit an agreed transfer price, which is composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, to form the basis for the customs value, using an allocation key, regardless of whether a subsequent debit charge or credit is made to the declarant at the end of the accounting period?
- if so, can the customs value be reviewed and/or determined using simplified approaches where the effects of subsequent transfer pricing adjustments (both upward and downward) can be recognised?

CJEU decision

The CJEU observed that by virtue of Article 29 of the CCC, the customs value must reflect the real economic value of an imported good and take into account all of the elements of that good that have economic value. The customs value of imported goods is the transaction value; the price actually paid or payable for the goods when they are sold for export to the customs territory of the European Union. Furthermore if, as a general rule, the price actually paid or payable for the goods forms the basis for calculating the customs value, that price is a factor that potentially must be adjusted where necessary in order to avoid the setting of an arbitrary or fictitious customs value.

However, the CJEU also observed that the cases in which it had allowed a subsequent adjustment of the transaction value had been limited to specific circumstances, relating,

1. (Case C-529/16).

amongst other things, to quality defects, or faulty workmanship in the goods, discovered after their release for free circulation.

The CJEU also noted that the CCC does not impose any obligation on importer companies to apply for adjustment of the transaction value where it is subsequently adjusted upwards; and that it does not contain any provision enabling customs authorities to safeguard against the risk that those undertakings only apply for downward adjustments. The CJEU concluded that the CCC does not, therefore, allow account to be taken of a subsequent transfer pricing adjustment of the transaction value. As the first question was answered in the affirmative, the CJEU did not proceed to consider the second question.

Comment
This judgment provides much needed guidance on the impact of retroactive transfer pricing adjustments on the customs value of goods imported into the EU. As a result of the CJEU's decision, goods imported by companies applying a transfer price that allows for retroactive adjustments, cannot base that price on the transaction value method. One of the other customs valuation methods must be used.

A copy of the judgment can be viewed here.

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Hodson – Challenges to the seizure of alcohol by HMRC

In *Hodson v HMRC*[2], the Upper Tribunal (UT) upheld the decision of the First-tier Tribunal (FTT), that it had no jurisdiction to decide an appeal against an excise duty assessment following seizure of goods where the seizure had not been challenged within the relevant time limits.

Background
On 17 May 2012, Mr Carl Hodson (the Appellant) was stopped at Dover whilst driving a vehicle containing mixed wine. The goods had an Administrative Reference Code (ARC).

Two days earlier, the same vehicle using the same ARC number had goods seized by Border Force. An information sheet was issued to the Appellant recording the seizure details. The goods were deemed to be duly seized and condemned under paragraph 5, Schedule 3, Customs and Excise Management Act 1979 (CEMA). Neither the Appellant nor any other person challenged the decision to seize the goods.

At the relevant time, Schedule 3, CEMA, provided that HMRC must give notice of seizure to the owner of the goods. An appeal was required within one month by way of a notice of claim. Where no such notice was given in the required time period, goods were deemed to be duly condemned as forfeited.

On 13 May 2013, the Appellant received a demand for excise duty payment in the sum of £39,908 which was appealed on 7 June 2013. On 6 May 2014, the Appellant received a penalty demand in the sum of £7,981, which was later increased to £13,967. The Appellant lodged an appeal on 26 August 2014.

2. [2017] UKUT 439 (TCC).

FTT decision

The FTT held that it had no jurisdiction to decide the appeal because the Appellant had not challenged the deemed effect of the goods being duly seized. Instead, the Appellant had challenged the demand for excise duty and penalties and accordingly HMRC's decision relating to the seizure could not be considered by the FTT.

The FTT established two key facts: i) the Appellant was not the owner of the goods; and ii) a notice of seizure was served on the owner of the goods, Empire Suppliers Ltd.

The Appellant appealed to the UT.

UT decision

The appeal was dismissed.

The UT considered *HMRC v Jones*[3], the leading Court of Appeal decision on the FTT's jurisdiction in relation to the effect of paragraph 5, Schedule 3, CEMA, when goods are seized. The Court of Appeal in that case confirmed that there are two procedures for resolving disputes under CEMA: i) court proceedings against the condemnation and forfeiture of the goods; and ii) FTT proceedings against HMRC's review decision refusing restoration of the seized goods.

In *Jones*, the Court of Appeal held that the FTT must give effect to the clear deeming provisions in CEMA. An owner's seized goods could only be condemned as forfeit pursuant to a Court Order, so the FTT did not have original jurisdiction. The FTT's jurisdiction was limited to hearing an appeal against HMRC's discretionary decision not to restore the seized goods to the owner. The goods are legally forfeited by virtue of the deeming provisions and the notice procedure makes it clear that, unless the seizure is challenged, it is not possible to subsequently argue the goods were not liable to forfeiture.

The Appellant argued that: i) paragraph 5, Schedule 3, CEMA, was not engaged because the goods had not been seized from him, nor had a notice of seizure been served upon him; ii) a notice can only be given to the owner of the goods; iii) *Jones* did not apply where the FTT was dealing with a person who was not the owner of the goods; and iv) as he did not own the goods, he could not make the sworn statement required by paragraph 10(1), Schedule 3, CEMA, which automatically resulted in any court proceedings giving judgment in favour of HMRC depriving him of access to a court, which was a breach of Article 6 of the European Convention on Human Rights (ECHR).

The UT rejected the Appellant's submissions. The FTT had found as a fact that the goods were in the Appellant's possession and the Appellant was provided with information about the seizure. Nevertheless, on the Appellant's own case, the notice of seizure had been served on the owner of the goods, Empire Suppliers Ltd, who could have served a notice of claim. As a consequence, as no notice of claim was served within the relevant period, the goods are deemed to have been duly condemned.

With regard to Article 6, the UT held that the deeming provisions and the restoration procedure are compatible with the ECHR because the owner is entitled to challenge the legality of the seizure.

3. [2011] EWCA Civ 824.

Comment
The process for disputing seizures of alcohol by HMRC is complex. This case demonstrates the importance of ensuring challenges to HMRC seizures are made in the correct forum and within the relevant statutory time limits. The decision confirms that the FTT has no jurisdiction in relation to the deeming provisions in paragraph 5, Schedule 3, CEMA. The correct procedure for challenging the original condemnation and forfeiture of goods is by way of court proceedings which will generally take place in the Magistrates Court. The FTT only has jurisdiction to deal with appeals against HMRC review decisions in relation to restoration. Those that are "holding" alcohol which is seized should liaise with the owner of the goods immediately to make sure their position is protected in order to avoid a later unexpected excise duty liability. Those transporting alcohol on behalf of others may wish to consider protecting their position by way of an appropriate agreement.

A copy of the decision can be viewed here.

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Smart Price Midlands and Hare Wines – HMRC must disclose documents relating to its decisions that certain companies were not "fit and proper" for registration as wholesalers of alcohol

In *HMRC v Smart Price Midlands Limited and Hares Wines Limited*[4], the UT has dismissed HMRC's appeals upholding the FTT's directions that HMRC disclose documents in relation to its decisions that a number of companies were not "fit and proper" for registration as wholesalers of alcohol, under section 88C(2), Alcohol Liquor Duties Act 1979 (ALDA).

Background
Five companies, including Smart Price Midlands Limited and Hares Wines Limited, applied separately to HMRC to be approved and registered under the alcohol wholesalers registration scheme (AWRS). HMRC refused their applications on the basis that they were not "fit and proper" persons.

The companies appealed HMRC's decisions to the FTT.

The substantive appeals have yet to be heard.

The FTT issued directions in each appeal requiring HMRC to disclose "all documents which were considered by [their] officer when reaching the decision". HMRC applied to the FTT for a variation of those directions and its applications were heard together on 8 May 2017. The FTT refused HMRC's applications.

HMRC appealed to the UT.

UT decision
The appeals were dismissed.

HMRC's first ground of appeal related to the purpose of an appeal. HMRC argued that the FTT had erred in concluding that an appeal triggered a disclosure obligation to enable "an unsuccessful applicant [to] form a view as to whether to challenge the decision on grounds of

4. [2017] UKUT 0465 (TCC).

unreasonableness". HMRC argued that this was wrong as disclosure was ordered to facilitate the just determination of an appeal, not to enable a party to identify potential arguments on appeal and claimed that the latter would be a classic "fishing expedition".

The UT said that it was clear that questions as to what was and what was not considered by the HMRC officer were important to the appeals and that the FTT was entitled to make a direction for the disclosure of those documents considered by the officer, on the basis that this was necessary for a just and fair resolution of the appeals. The UT further stated that "without expressing any views as to the ultimate outcome of the appeal, there is a good arguable case that the decision letter is inadequate and incomplete, in that the reference to 'key points' begs the question of what was taken into account by the decision-maker, and what was disregarded".

HMRC's second ground of appeal related to the function of the FTT. HMRC argued that the FTT had erred in concluding that its function was to discover "what matters were taken into account and what matters were not taken into account" so that it could determine whether the decision was reasonable. HMRC argued that the FTT had justified this on the basis that it can adopt "an inquisitorial approach in appropriate cases", but without explaining why the present case was such an appropriate case. The UT rejected this argument.

HMRC's third ground of appeal was that the FTT had applied the wrong principles in exercising its discretion to depart from the automatic disclosure provided for in the Tribunal Rules. The UT concluded that the FTT gave reasons for departing from the starting position in Rule 27(2) of the Tribunal Rules in order to enable the FTT to deal with appeals justly and fairly.

HMRC's fourth ground of appeal was that the same direction was made by the FTT in all of the appeals, irrespective of their individual facts. The UT considered that the FTT was entitled to do so because all of the cases shared a common factor in that HMRC, as the decision maker, is the only person who knows what it relied upon when making its decisions and it would not be possible for the FTT to dispose of the appeals fairly and justly, and for the Appellants to participate fully, without the disclosure that the FTT had ordered.

HMRC's fifth ground of appeal was that because the FTT had made directions for disclosure in a class of cases, irrespective of their individual facts, the FTT could not have taken into account proportionality, as the Tribunal Rules require. The UT did not accept that the FTT had failed to consider proportionality. On the contrary, the UT concluded that the FTT expressly considered whether the directions that the FTT was making would impose an unreasonable burden on HMRC's resources and, on the material before it, had decided that they would not. HMRC had the opportunity to put forward evidence at the hearing before the FTT as to why the directions would be disproportionate. The UT concluded that the FTT had no material before it to suggest that disclosure would be disproportionate.

HMRC's final ground of appeal was that the FTT's decision was in stark contrast to the approach of the High Court to disclosure in the comparable field of judicial review. The UT concluded that it was within the margin of discretion afforded to the FTT to make a direction which required the material in question to be disclosed. HMRC further argued that the effect of the FTT's directions would be to act as a brake on HMRC staff conducting comprehensive investigations because investigators would be reluctant to consider sensitive documents if they know that they will

have to be disclosed which would not be in the public interest. The UT rejected this argument. The discretion afforded to the FTT by the Tribunal Rules has to be exercised with the objective of dealing with cases justly and fairly and there was no evidence before the FTT to support the claim made by HMRC that adverse consequences would result from the disclosure directions.

Comment

This decision will be welcomed by alcohol wholesalers who have applied for and been refused a licence under AWRS. Alcohol wholesalers who have been refused a licence should consider requesting from HMRC copies of relevant documents and/or the HMRC decision maker's reasoning for concluding that the applicant is not "fit and proper" for registration as a wholesaler of alcohol under section 88C(2), ALDA. Such documentation and information is likely to be helpful should the reasonableness of HMRC's decision be challenged and in advancing any arguments that HMRC took into account irrelevant factors or failed to take into account relevant factors.

A copy of the decision can be viewed here.

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