Customs and excise quarterly update

May 2018

In this update we report on the government's consultation on Gaming Duty Accounting Periods; the Licensing of Tobacco Manufacturing Machinery; and the European Commission's consultation on amendments to guarantees. We also comment on three recent cases involving customs classification; excise duty drawback; and excise duty liability on persons with no actual or constructive knowledge of unpaid duty.

News

Consultation on gaming duty accounting periods

On 9 April 2018, the government published a consultation document in relation to reform of gaming duty accounting periods to bring the administration of gaming duty more into line with other gambling duties. more›

Licensing of tobacco manufacturing machinery

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European Commission amendment to the Union Customs Code regarding guarantees

The European Commission has requested feedback in relation to a draft delegated regulation amending Delegated Regulation (EU) 2015/2446 (the Regulation) regarding the conditions required for a reduction of the level of the comprehensive guarantee and the guarantee waiver. more›

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Honeywell Analytics – classification of a gas monitoring device

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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.

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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Hammonds of Knutsford – Court of Appeal rejects excise duty drawback claim

In *The Queen (on the Application of Hammonds of Knutsford Plc) v HMRC*, the Court of Appeal has dismissed the taxpayer's appeals upholding the UT's decision in favour of HMRC who had rejected an exporter's drawback claim because it had breached the "inspection facility rule", pursuant to the Excise Goods (Drawback) Regulations 1995 (the 1995 Regulations). more›

Martyn Glen Perfect – Upper Tribunal confirms haulier not liable for payment of unpaid excise duty

In *Revenue & Customs Commissioners v Martyn Glen Perfect*, the UT has found that a lorry driver was not liable to pay unpaid excise duty on beer he transported to the UK, when he was unaware that the relevant paperwork was false and that the beer was part of a smuggling operation. more›

News

Consultation on gaming duty accounting periods

On 9 April 2018, the government published a consultation document in relation to reform of gaming duty accounting periods to bring the administration of gaming duty more into line with other gambling duties.

The government has indicated that its preferred option is a three-month accounting period, removing the requirement to make payments on account and allowing carry-forward of losses between periods.

The second option would involve a six-month period, also without payments on account and allowing carry-forward of losses.

The third option, involving a twelve-month accounting period, would retain payments on account and have no provision for carry-forward of losses.

Responses can be made up until 4 June 2018 and should be sent by email to: gambling.taxes@hmrc.gsi.gov.uk.

A copy of the consultation document can be viewed here.

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Licensing of tobacco manufacturing machinery

On 25 January 2018, the government announced a measure that will give it additional powers to tackle the evasion of excise duty on tobacco products through the control of tobacco manufacturing machinery.

The measure will have effect from the date of Royal Assent of Finance Bill 2017.

All new, existing owners, and users of manufacturing machinery used primarily to manufacture tobacco smoking products will have to obtain a licence for each machine by 1 August 2018.

Applications for such licences have been accepted since 1 April 2018.

HMRC will assess the "fit and proper" status of applicants and their proposed use of the machinery prior to issuing a licence. From 1 August 2018, penalty powers and forfeiture powers will come into effect in relation to those that operate without a licence.

A copy of the policy paper can be viewed here.

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European Commission amendment to the Union Customs Code regarding guarantees

The European Commission has requested feedback in relation to a draft delegated regulation amending Delegated Regulation (EU) 2015/2446 (the Regulation) regarding the conditions required for a reduction of the level of the comprehensive guarantee and the guarantee waiver.

The amendments have been proposed as it is considered that difficulties exist in relation to the practical application of the specific condition of sufficient financial resources in Article 84 of the Regulation. There are concerns that it may not provide a full picture of the capacity of the economic operator to pay the amount of customs debt and other charges covered by the guarantee.

A copy of the consultation document can be viewed here.

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Cases

Honeywell Analytics – classification of a gas monitoring device

In *HMRC v Honeywell Analytics Limited*[1], the Court of Appeal has held that the Upper Tribunal (UT) erred in law in setting aside the First-tier Tribunal's (FTT) finding that the principal use of a gas monitoring device was an alarm within Combined Nomenclature (CN) heading 8531 8095 90 and not a measuring device within CN heading 9026 8020 90.

Background

Honeywell Analytics Limited (Honeywell) designs, manufactures and sells gas detection solutions. The dispute concerned one of Honeywell's products, the Gas Alert Micro 5 (the device).

Honeywell submitted a Binding Tariff Information (BTI) to HMRC, classifying the device under CN 9026 8020 90 as an instrument for gas measurement with a duty rate of 0%. HMRC replied issuing a BTI notification under CN heading 8531 8095 90, which covers electric sound or visual signaling apparatus and has a duty rate of 2.2%. HMRC's BTI notification was upheld following a formal HMRC review. Honeywell appealed to the FTT.

The FTT dismissed the appeal and upheld the BTI on the basis that while the device measured gases, its intended and actual use, according to marketing material, was as an alerting and detection device.

Honeywell appealed the FTT's decision to the UT.

The UT held that that FTT was wrong to have decided that the device did not have measurement as one of its uses and was wrong to conclude that CN heading 9026 8020 90 was restricted to devices whose only function was to measure the level of gas. The UT set aside the BTI and substituted a classification of 9026 8020 90.

HMRC appealed the UT's decision to the Court of Appeal.

Court of Appeal judgment

The appeal was allowed.

The Court held that the UT had erred in law in setting aside the FTT's decision.

The FTT had correctly directed itself in relation to the approach to classification recognising that the decisive criteria for classification is to be found in the goods' objective characteristics and properties and that subjective considerations had no part to play in the process. The Court concluded that the FTT had reached a lawful and fully reasoned decision, that the device was primarily an alarm and there was no justification for the UT's view that the FTT's decision was perverse. Notably, the Court also said that the UT had made an error of law in holding that marketing material and a product's targeted use were not to be taken into account when considering the objective characteristics of a product.

Comment

This judgment is now largely of academic interest as classification consultations have taken place throughout Europe, which has resulted in a draft Regulation directing that similar products to the device should be classified under CN heading 9027 with a duty rate of 2.5%. The

1. [2018] EWCA Civ 579.

judgment does, however, provide helpful guidance on the approach that should be adopted when classifying products and confirms that marketing materials and a product's intended use are to be taken into account when considering the objective characteristics of a product.

A copy of the judgment can be viewed here.

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Hammonds of Knutsford – Court of Appeal rejects excise duty drawback claim

In *The Queen (on the Application of Hammonds of Knutsford Plc) v HMRC*[2], the Court of Appeal has dismissed the taxpayer's appeals upholding the UT decision in favour of HMRC who had rejected an exporter's drawback claim because it had breached the "inspection facility rule", pursuant to the Excise Goods (Drawback) Regulations 1995 (the 1995 Regulations).

Background

Where goods are exported from the UK to another European Member State and excise duty has been paid on those goods, an exporter may be entitled to "drawback" of the duty if certain conditions are satisfied. The 1995 Regulations provide that the goods must have been made available for inspection by HMRC for not less than two business days after HMRC have been given notice by the exporter of the intended export. Where that requirement (the inspection facility rule) has not been met, HMRC will not normally allow an exporter's drawback claim unless it is the first time the exporter has breached the inspection facility rule.

Hammonds of Knutsford Plc (Hammonds), is an alcohol wholesaler selling alcohol to customers in both the UK and other countries.

The present proceedings arose out of HMRC's refusal to allow drawback claims made by Hammonds in 2010 and 2011, on the basis that Hammonds did not comply with the inspection facility rule.

In relation to certain consignments of beer, Hammonds faxed "Notices of Intention" to HMRC. However, without Hammonds' knowledge, the beer left storage before the end of the period required by the inspection facility rule.

Hammonds contended that HMRC was not entitled to refuse its drawback claims. Hammonds was granted permission to apply for judicial review and the matter was subsequently transferred to the UT, pursuant to section 31A, Senior Courts Act 1981. In a decision released on 20 April 2016, the UT dismissed Hammonds' application on the grounds that the necessary requirements of the inspection facility rule had not been satisfied. Hammonds appealed that decision to the Court of Appeal.

Court of Appeal judgment

The appeal was dismissed.

Hammonds had relied on the following two main grounds of appeal:

1. although Article 22 of Council Directive 92/12/EEC (the 1992 Directive) referred to European Member States being able to refuse reimbursement where "correctness criteria" laid down by them had not been satisfied, the wording was not carried forward into Council Directive 2008/118/EC (the 2008 Directive), which therefore did not provide any authority for Member States to refuse reimbursement on the basis of additional conditions, and

2. [2018] EWCA Civ 135.

2. for reasons of proportionality and fiscal neutrality, a claim for reimbursement of tax or duty could not be denied where the substantive requirements of that right were satisfied, as they were in the present case.

In relation to the first ground, the Court held that the 2008 Directive did not say anything about "correctness criteria". Instead it provided, in general terms, for excise duty to be levied, collected, reimbursed or remitted "according to the procedure laid down by each Member State". That change in wording from the 1992 Directive did not mean that Member States were to lose any right to refuse reimbursement that they had previously enjoyed but rather it allowed for the possibility of refusal if the procedure was not complied with. The Court concluded that it was inherently unlikely that the 2008 Directive was intended to remove a pre-existing entitlement to deny reimbursement for failure to follow the procedure imposed by a Member State.

In relation to the second ground, Hammonds relied on principles derived from a line of VAT cases, decided by the Court of Justice of the European Union[3], to argue that once excise duty had been paid in two Member States, the taxpayer was entitled to repayment and the claim could not be refused for breach of a domestic procedural rule. The Court concluded that while those principles might be relevant, they were not directly on point and regard must be had both to the terms of the relevant directives and to the differences between VAT and excise duty.

The 1992 Directive, which governed Hammonds' 2010 claims for drawback, specifically stated that a request for reimbursement could be refused by HMRC if it did not satisfy a Member State's "correctness criteria". The inspection facility rule was appropriately classified as a "correctness criteria" and was designed to reduce fraud in this area. The Court therefore concluded that HMRC had been entitled to take the view that Hammonds' failure to comply with the rule meant that it could not prove that the substantive requirements of a claim for drawback had been satisfied. The Court further concluded that paperwork that Hammonds relied on was no substitute for the opportunity to inspect and that the rule went to the very heart of any claim for drawback as it enabled HMRC to establish that the claim was valid. Finally, the Court concluded that there was no breach of fiscal neutrality where a claim was refused for failure to meet basic conditions designed to establish the claim substantively.

Comment

This is a cautionary tale for alcohol wholesalers who have or intend to apply for a refund of duty paid on exported alcohol under the "drawback" regulations. In particular, it highlights the necessity for alcohol wholesalers to strictly comply with the "inspection facility rule", by ensuring that following notice to HMRC of their intention to export the goods, they ensure that the goods are made available to HMRC for inspection for "not less than two business days", otherwise any drawback claims made are likely to be refused by HMRC. Alcohol wholesalers should ensure that they are contractually protected with regard to any losses suffered as a result of warehouses failing to follow release instructions.

A copy of the judgment can be viewed here.

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3. Case C-101/16 *SC Paper Consult SRL v Directia Regionala a Finantelor Publice Cluj-Napoca*; Joined Cases C-95/07 and C-96/07; *Ecotrade SpA v Agenzia delle Entrate* [2008] STC 2626 and Case C-272/13 *Equoland Soc coop arl v Agenzia delle Dogane*.

Martyn Glen Perfect – Upper Tribunal confirms haulier not liable for payment of unpaid excise duty

In *Revenue & Customs Commissioners v Martyn Glen Perfect*[4], the UT has found that a lorry driver was not liable to pay unpaid excise duty on beer he transported to the UK, when he was unaware that the relevant paperwork was false and that the beer was part of a smuggling operation.

Background

Martyn Glen Perfect is a self-employed lorry driver. In 2013, he was stopped at the UK border carrying 26 pallets of beer on which excise duty was due but had not been paid. Mr Perfect thought that the load was in duty suspense. The paperwork Mr Perfect carried was found to be false. HMRC assessed him to excise duty in the amount of £22,790, under regulation 13(1) and (2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the 2010 Regulations), and imposed a penalty under Schedule 41, Finance Act 2008.

Mr Perfect appealed to the FTT which allowed his appeal, on the basis that he was an "innocent agent", lacking actual or constructive knowledge of the fact that the goods were liable to excise duty. The FTT discharged the penalty. In reaching its conclusion, the FTT was influenced by its conclusion that HMRC had only conducted a "very limited investigation" into the smuggling.

The FTT's decision was appealed by HMRC to the UT where it argued that the 2010 Regulations impose strict liability on those who deliver or hold goods. Accordingly, it was sufficient that Mr Perfect knew he was carrying pallets of beer, which are goods of a kind which are liable to excise duty. As before the FTT, Mr Perfect argued that the 2010 Regulations did not impose liability on those who are innocently in possession of the goods and that he was an "innocent agent."

UT decision

The appeal was dismissed.

The UT considered the meaning of the phrase an "innocent agent." It disagreed with HMRC's contention that the innocent agent exemption only extends to those cases where the agent has no knowledge that the goods are excise goods, in other words, if an agent knows the nature of the goods he "knows the risks" and will be fixed with liability.

The UT held that a person who lacks both actual and constructive knowledge of the goods or the duty which is payable on them, cannot be the "holder" for the purposes of liability for excise duty. Thus, the concept of "innocent agent" extends to anyone lacking actual or constructive knowledge of the fact that there is duty due on the goods he is carrying which has gone unpaid.

The UT said that this conclusion was consistent with the purpose of Council Directive 2008/118/EC (the 2008 Directive) which the 2010 Regulations seek to implement. In the view of the UT, it would not be fair, proportionate or reasonable to impose liability for evaded excise duty on HGV drivers who lack any involvement in, or knowledge of, the criminal enterprise.

The UT also rejected HMRC's argument that any unfairness or lack of proportionality in the application of the regime could be mitigated by HMRC exercising discretion in individual cases. The UT stated that the exercise of discretion in individual cases is not to be confused with the need for the system to be fair and proportionate to all in its application.

4. [2017] UKUT 476 (TCC).

As for HMRC's investigation, of which the FTT had been critical, the UT stated that if HMRC had made greater effort to find out who was responsible for the smuggling, then the outcome may have been different. Those at fault could have been tracked down or, if Mr Perfect had refused to co-operate, the FTT might have been persuaded that he was not entirely innocent. The UT noted that HMRC is not powerless to prevent tax evasion of the type which occurred in this case.

With regard to the penalty, the UT held that the FTT had erred in its reasoning for its discharge, and instead stated that the penalty regime under Schedule 41, Finance Act 2008, operated independently of the excise duty liability regime, which meant that innocent agents could be penalised for carrying goods (the FTT had assumed that the discharge of the assessment led to the discharge of the penalty). However, it came to the same conclusion as the FTT, holding that the penalty should be discharged on the basis that Mr Perfect had a "reasonable excuse", under paragraph 20, Schedule 41, for carrying the goods, as he was innocent of any wrongdoing and lacked any knowledge, actual or constructive, of the criminal enterprise.

Comment

This case provides helpful clarification of the definition of an "innocent agent" and the situations in which it will apply, as well as helpful analysis of the law surrounding liability for excise duty. The FTT and UT's criticism of HMRC's lack of investigation into the criminal enterprise is also noteworthy. The decision makes clear that HMRC's focus should be on finding the individuals or companies behind any suspected criminal enterprise, rather than on innocent agents.

The decision can be viewed here.

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