Customs and excise quarterly update

November 2018

In this update we report on (1) HMRC's guidance on how to prepare for the Customs Declaration Service; (2) the launch of the Customs Declaration Service; and (3) HMRC's guidance on trading with the EU in the event of a no-deal Brexit. We also comment on three recent cases relating to (1) the calculation of gaming duty; (2) tariff classification of seasoned chicken meat; and (3) mobility scooters.

News

Preparation for the CDS

On 11 July 2018, HMRC published guidance on how to prepare for the introduction of the Customs Declaration Service (CDS) and how to make declarations under the new system. more›

Launch of the CDS

On 16 August 2018, HMRC executed the first software release for the CDS. The new service provides an updated system for importers and exporters completing customs declarations when trading outside the EU. more›

Guidance on trading with the EU if there is a no-deal Brexit

On 23 August 2018, HMRC published guidance on trading with the EU in the event the UK leaves the EU without a Brexit deal. Notwithstanding that it is generally considered to be in the mutual interests of both the UK and the EU to secure a negotiated outcome, HMRC has issued this guidance in order to assist businesses in a "no-deal" scenario. more›

Cases

London Clubs Management Limited – non-cash inducements have no value for the purpose of gaming duty

In *HMRC v London Clubs Management Limited*, the Court of Appeal has dismissed HMRC's appeal and held that non-cash inducements given to customers by casinos have nil value for the purpose of gaming duty under section 11(10), Finance Act 1997 (FA 1997). more›

Invicta Foods Limited – tariff classification of chicken breasts

In *Invicta Foods Limited v HMRC*, the Court of Appeal has allowed the taxpayer's appeal and held that imported chicken breasts should be classified under Chapter 16 of the Combined Nomenclature (CN). 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.

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Invamed Group Limited – customs classification of electric mobility scooters

In *The Commissioners for Her Majesty's Revenue and Customs v Invamed Group Limited and others*, the UT has allowed HMRC's appeal against the decision of the FTT, and held that certain electric mobility scooters are properly classified as vehicles "principally designed for the transport of persons" within CN heading 8703 and not as "carriages for disabled persons" under heading 8713. **more›**

News

Preparation for the CDS

On 11 July 2018, HMRC published guidance on how to prepare for the introduction of the Customs Declaration Service (CDS) and how to make declarations under the new system.

CDS is being introduced gradually and the timing of the move to this system from the Customs Handling of Import and Export Freight (CHIEF) will depend on businesses' or their agent's software developer or Community System Provider.

It is expected that the majority of importers will start using CDS early in 2019. Exporters will migrate to CDS when export functionality becomes available in March 2019. Meanwhile they should continue to use CHIEF. This means that CDS and CHIEF will run in parallel for a short period of time.

To make declarations under the new system businesses are required to:

- ensure they have an Economic Operator Registration and Identification number and a log in for the Government Gateway
- understand the additional and different information required to ensure compliance with the Union Customs Code and CDS Trade Tariff, and
- provide employees with any training and information required.

The guidance sets out additional steps for users of third party software. For example, ensuring providers are working with HMRC to understand the technical requirements of the new system.

A copy of the guidance can be viewed here.

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Launch of the CDS

On 16 August 2018, HMRC executed the first software release for the CDS. The new service provides an updated system for importers and exporters completing customs declarations when trading outside the EU.

The following steps should be taken in response to this launch:

- importers, exporters and agents need to work with software developers to comprehend how the additional information to be included within import and export declarations as required by the Union Customs Code will impact their business
- software providers should ascertain what changes must be made to their software packages and ensure customers are updated, and
- traders should familiarise themselves with how the CDS will be implemented.

Once the second and third phases are implemented, businesses will be able to see in one place more customs information, including new and existing services.

A copy of HMRC's news story can be viewed here.

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Guidance on trading with the EU if there is a no-deal Brexit

On 23 August 2018, HMRC published guidance on trading with the EU in the event the UK leaves the EU without a Brexit deal. Notwithstanding that it is generally considered to be in the mutual interests of both the UK and the EU to secure a negotiated outcome, HMRC has issued this guidance in order to assist businesses in a "no-deal" scenario.

In the event that the UK leaves the EU without agreement being reached with the other members of the EU, there will no longer be free movement of goods between the UK and the EU. This will affect businesses conducting UK-EU trade.

The same customs and excise rules will be applied to goods circulating between the UK and the EU as apply to goods trading between the UK and non-EU countries. Customs declarations will therefore be required when goods are imported to and exported from the UK to the EU and vice versa. Those carrying the goods will also need to make separate safety and security declarations.

The Excise Movement Control System will stop being used to control suspended movements between the UK and the EU. It will, however, still be used to control movements of duty suspended excise goods within the UK. Businesses moving excise goods will need to ensure that such goods are placed into excise duty suspension to prevent duty becoming immediately due.

A copy of the guidance can be viewed here.

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Cases

London Clubs Management Limited – non-cash inducements have no value for the purpose of gaming duty

In *HMRC v London Clubs Management Limited*[1], the Court of Appeal has dismissed HMRC's appeal and held that non-cash inducements given to customers by casinos have nil value for the purpose of gaming duty under section 11(10), Finance Act 1997 (FA 1997).

Background

London Clubs Management Limited (LCM) operates casinos in London. As a marketing tool, LCM provided selected customers with a range of means of placing free bets, such as non-negotiable chips and certain vouchers, collectively called free bet vouchers or "Non-Negs".

Non-Negs could only be used to place bets at gaming tables. They could not be cashed in or used to pay for goods and services. Gaming duty was calculated under section 11, FA 1997, by applying specified rates to the "gross gaming duty", which comprised charges made by the casino and banker's profits in respect of dutiable gaming.

The issue to be determined was whether the Non-Negs had a value for the purpose of gaming duty.

FTT decision

The FTT held that the value of the Non-Negs, for the purposes of section 11(10), was their face value. The FTT rejected the argument put forward by LCM that the Non-Negs did not have any value "in money or money's worth" because the player did not pay for the Non-Negs and did not risk anything of value when he played the Non-Negs.

LCM appealed to the Upper Tribunal (UT).

UT decision

LCM's appeal was allowed.

The UT held that section 11, as well as the cases of *Lipkin Gorman v Karpnale*[2] and *Aspinalls Club Limited v HMRC*[3] supported the argument that the value staked was the amount put at risk by the player when making the stake. In the view of the UT, the value was the amount of real money risked in the game and not a notional amount represented by the face value of the stake. The UT went on to hold that the Non-Negs had a nil value and that where a Non-Neg was returned as a prize to be staked again the value of the prize was also nil, by virtue of the Betting and Gaming Duties Act 1981 (BGDA 1981).

HMRC appealed to the Court of Appeal.

Court of Appeal judgment

HMRC's appeal was dismissed.

HMRC argued that the UT erred in law by:

- misconstruing section 11(10)(a), FA 1997and misapplying *Lipkin Gorman* and *Aspinalls*
- misconstruing sections 20(3) and (4), BGDA 1981, which led it to misapply section 11(10)(b) FA 1997.

1. [2018] EWCA Civ 2210.
2. [1991] 2 AC 548.
3. [2013] EWCA Civ 1464.

The Court held that the calculation of the stakes staked with the banker in section 11(10)(a) FA 1997, involved a basic calculation of real-world stakes received from players which, if necessary, could be regarded as receipts in a set of accounts. It would not include artificial values placed on tokens given to the player by the casino which intrinsically had no real world value.

In relation to the construction of section 20, BGDA 1981, the Court determined that the UT was correct in concluding that Non-Negs received or retained by a player as a prize had no value for the purpose of section 11(10)(b). Staking Non-Negs in a casino game did not entail a payment in return for a benefit.

Accordingly, the Court concluded that Non-Negs did not constitute a stake which was required to be considered in the calculation of gross gaming yield or of banker's profits and dismissed HMRC's appeal.

Comment
This decision provides useful guidance on the correct interpretation of section 11(10), FA 1997, and section 20, BGDA 1981 and confirms that free chips do not have value for the purpose of calculating gaming duty.

A copy of the judgment can be viewed here.

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Invicta Foods Limited – tariff classification of chicken breasts

In *Invicta Foods Limited v HMRC*[4], the Court of Appeal has allowed the taxpayer's appeal and held that imported chicken breasts should be classified under Chapter 16 of the Combined Nomenclature (CN).

Background
Invicta Foods Limited (Invicta) imports of prepared and unprepared meat products from outside the EU. It imported uncooked chicken breasts from Brazil which were treated with a non-cure brine solution of water, salt, sugar dextrose and phosphates. Following a Binding Tariff Information (BTI) issued in October 2010, these were initially classified as falling under Chapter 16 of the CN, which covers "other uncooked prepared or preserved meat".

In 2011, the BTI was revoked following a decision by HMRC and the treated chicken meat was reclassified as falling under Chapter 2 of the CN. Chapter 2 covers "cuts and boneless poultry, fresh chilled or frozen". Following the reclassification, the chicken meat was subject to a higher rate of customs duty.

A product can only fall within Chapter 16 if is "uncooked seasoned meat" within the meaning of Additional Note 6(a) (AN6(a)) to Chapter 2 of the CN. AN6(a) does not consider salt to be a seasoning.

The chicken had not been flavoured with seasoning visible to the naked eye. The only issue therefore was whether the seasoning that was used was "clearly distinguishable by taste". If it is was not then the product would fall within Chapter 2 of the CN.

Invicta appealed HMRC's new classification. It relied on a Report which compared an untreated sample of chicken with a treated sample, concluding that the seasoning that was used was clearly distinguishable by taste.

4. [2018] EWCA Civ 2204.

The FTT allowed Invicta's appeal. The FTT held that the BTI revocation was unlawful and the correct classification of the chicken breasts was under Chapter 16 of the CN, as the seasoning of the product was clearly distinguishable by taste.

HMRC's appeal to the UT was successful.

Invicta appealed to the Court of Appeal.

Court of Appeal judgment
The appeal was allowed and the Court restored the FTT's decision.

The issue for the Court to determine was whether the seasoning used was "clearly distinguishable by taste". Invicta contended that a treated sample of the chicken should be compared with an untreated sample to determine this issue. HMRC submitted that the appropriate test was to taste the seasoning alone rather than comparing the taste of the treated and untreated sample of chicken.

The Court stated that the danger in a comparative method of tasting flavour is that it may be possible to detect a difference in taste even though the product may not appear to be seasoned at all. However, the Court considered that the use of the word "distinguishable" suggests some form of comparison is required to the extent that it establishes that the seasoning is "distinguishable by taste".

The Court noted that there is nothing in AN6(a) preventing a comparative method of testing and that it would be difficult to test the product for distinctive taste without some form of comparative method being used.

In the Court's view, either a comparative or standalone method of testing may be used to determine whether the seasoning is distinguishable by taste. The Court therefore concluded that the chicken should be classified under Chapter 16.

Comment
Although this judgment is of historic interest only as Commission Implementing Regulation (EU) 1362/2013 has now clarified this area of the law, it provides useful guidance on tariff classification processes and procedures. The judgment confirms that in order to establish whether seasoning is "clearly distinguishable by taste", the test sample should be a "representative portion of the meat destined for consumption".

A copy of the judgment can be viewed here.

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Invamed Group Limited – customs classification of electric mobility scooters

In *The Commissioners for Her Majesty's Revenue and Customs v Invamed Group Limited and others*[5], the UT has allowed HMRC's appeal against the decision of the FTT, and held that certain electric mobility scooters are properly classified as vehicles "principally designed for the transport of persons" within CN heading 8703 and not as "carriages for disabled persons" under heading 8713.

5. [2018] UKUT 305 (TCC).

Background

The appeal concerned electric mobility scooters which had certain features intended to make them safer and more comfortable for use by disabled persons than ordinary scooters. Before the FTT, Invamed Group Limited and the other appellants (Invamed) contended that the scooters should be classified under heading 8713 as "carriages for disabled persons, whether or not motorised". HMRC argued that the scooters should be classified under heading 8703 as "motor cars and other motor vehicles principally designed for the transport of persons".

The significance of these classifications is that if the scooters fall within heading 8713 they can be imported into the EU free of customs duties, whereas if heading 8703 applies, they will attract a 10% customs duty on importation.

The FTT referred the matter to the Court of Justice of the European Union (CJEU). The CJEU[6] reiterated the principles that had been set down in *Lecson*[7] which considered whether electric mobility scooters, which were materially the same as the scooters under consideration in the instant case, fell within heading 8713 or 8703. The decisive criterion for the classification of goods was their objective characteristics as defined by the headings. Heading 8703 refers to means of transport in general, whilst heading 8713 applies specifically to means of transport for disabled persons. Considering the relevant features, the electric mobility scooters were deemed to be a means of transport under heading 8703. The mere fact that disabled persons might be able to use the scooters did not affect their classification under heading 8703.

Applying *Lecson*, the CJEU confirmed that intended use can constitute an objective criterion for classification if it is inherent in the product at the date of import. The CJEU said that: i) "for disabled persons" means that the product is designed solely for disabled persons; ii) the fact that a vehicle may be used by non-disabled persons is irrelevant to the classification under heading 8713; and, iii) the CN Explanatory Notes (CNENs) are not capable of amending the scope of the CN tariff headings.

In considering the guidance from the CJEU, the FTT concluded that the scooters fell to be classified under both headings 8713 and 8703. Accordingly, the FTT applied the tie-breaker rule in the General Interpretative Rules (GIRs) 3(a), under which the heading which provides the most specific description of the goods is to be preferred to a heading which provides a more general description. The FTT identified three features of the scooters which were considered to be material disadvantages in the use of the scooters by able-bodied persons. As such, it held that the scooters were to be properly classified under heading 8713.

HMRC appealed to the UT on the basis that: (1) the headings were not mutually exclusive and GIR 3 had been wrongly applied; (2) the decision of the CJEU was incorrectly applied; and (3) there was a failure to apply or give sufficient weight to non-binding guides for tariff classification.

UT decision

The appeal was allowed.

With regard to ground 1, HMRC submitted that the FTT was right to find that the scooters were classifiable under heading 8703, but, having done so, wrongly failed to conclude that this necessarily precluded a classification under heading 8713 at the same time. The UT dismissed this submission, finding that the GIRs were hierarchical principles. Headings 8713 and 8703 do not contain any express exclusion of each other, so the headings cannot be mutually exclusive.

6. *Invamed Group Ltd v Revenue and Customs Commissioners* (C-198/15) EU:C:2016:362.
7. *Lecson Elektromobile GmbH v Hauptzollamt Dortmund* (C-12/10) EU:C:2010:823.

In the event that the scooters fell within both headings, GIR 3(a) would operate to determine the appropriate heading. If GIR 3(a) did not assist classification, GIR 3(c) would. The FTT had been correct in its findings.

In relation to ground 2, the UT held that the national court must approach classification in accordance with the principles derived from the judgments of the CJEU. In order to fall within heading 8713, the scooters must have been designed solely for "disabled persons". In the view of the UT, the FTT had erred in seeking to identify features which provided advantages and disadvantages to able-bodied persons. The features identified by the FTT as disadvantages to able-bodied persons were not sufficient to render the scooters as solely designed for disabled persons. Therefore, the scooters fell to be classified under heading 8703.

Following the UT's decision on grounds 1 and 2, it was not necessary for the UT to consider ground 3. Nevertheless, the UT said that sources such as CNENs, Explanatory Notes to the Harmonised Systems (HSENs), World Customs Organisation opinions, Commission Regulations and Binding Tariff Information, although non-binding, could be considered. However, such material provided a narrower definition of "disabled persons" than that provided by the CJEU and the FTT had not therefore failed to give sufficient weight to such material.

Comment
This judgment provides helpful clarification and guidance on the operation of GIR 3(a) as well as the application of CNENs and HSENs in determining classification.

A copy of the decision can be viewed here.

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