



# Customs and excise quarterly update

May 2017

In this update we report on the launch of the register of approved UK alcohol wholesalers, HMRC's Customs Information Paper 5 (2017) (CIP 5), which clarifies the correct codes to use when sending free circulation goods to the special territories of the EU, and the new address for HMRC's National Clearance Hub. We also comment on three recent cases involving the classification of long life woven polypropylene shopping bags, interest on reimbursed customs duty and tobacco penalties.

## News

### Launch of register of approved UK alcohol wholesalers

On 1 April 2017, HMRC launched an online service that will allow those who purchase alcohol for onward sale to check that their UK wholesaler is approved under the Alcohol Wholesale Registration Scheme (AWRS). [more>](#)

### Customs Information Paper 5 (2017): export declarations – free circulation goods bound for the special territories of the EU

On 27 February 2017, HMRC published Customs Information Paper 5 (2017) (CIP 5), which clarifies the correct codes to use when sending free circulation goods to the special territories of the EU. [more>](#)

### New address for HMRC National Clearance Hub

On 1 March 2017, HMRC issued Customs Information Paper 6 (2017) (CIP 6), advising of a new address for the National Clearance Hub as part of HMRC's digital programme. [more>](#)

## Case reports

### Euro Packaging – classification of long-life shopping bags

In *HMRC v Euro Packaging UK Lied*, the First-tier Tribunal (FTT) allowed an appeal against decisions by HMRC relating to the customs duty to be paid on the importation from countries outside the EU of shopping bags and its refusal to remit the customs duty. [more>](#)

### Wortmann – interest on import duties reimbursed due to breach of EU Law

In *Wortmann KG Internationale Schuhproduktionen v Hauptzollamt Bielefeld*, the Court of Justice of the European Union (CJEU) ruled that where import duties, including anti-dumping duties, are reimbursed on the ground that they were levied in breach of EU law, the Member State must also pay interest on the sums refunded. [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 Disputes 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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**British American Tobacco – penalty for oversupply of tobacco**

In *British American Tobacco (Holdings) Ltd v HMRC*, British American Tobacco (Holdings) Ltd (BAT) was partly successful in its appeal to the FTT against a penalty notice issued by HMRC for breach of statutory duty under section 7A(1), Tobacco Products Duty Act 1979 (TPDA). [more>](#)

## News

### Launch of register of approved UK alcohol wholesalers

On 1 April 2017, HMRC launched an online service that will allow those who purchase alcohol for onward sale to check that their UK wholesaler is approved under the Alcohol Wholesale Registration Scheme (AWRS).

UK alcohol wholesalers should include their unique reference number on invoices and correspondence and retailers and other trade buyers can verify the number against HMRC's register of approved wholesalers.

Wholesalers who have not registered should do so without further delay. New wholesale businesses must apply for AWRS approval 45 days before they begin trading.

The online service can be found [here](#).

### Customs Information Paper 5 (2017): export declarations – free circulation goods bound for the special territories of the EU

On 27 February 2017, HMRC published Customs Information Paper 5 (2017) (CIP 5), which clarifies the correct codes to use when sending free circulation goods to the special territories of the EU.

In December 2016, the Customs Information Paper 63 (2016) (CIP 63) advised a change to the combination of declaration type box 1 (subdivision 1) and country of destination code box 17, in order to comply with Union Customs Code requirements. CIP 63 did not focus on the change in declaration type for free circulation goods being sent to Jersey and Guernsey, which were sent using code "EX". CIP 63 changed the declaration type to "CO" and this change was to come into effect immediately. As there were no transitional provisions, operators would have experienced significant difficulties due to the software changes needed. HMRC therefore decided to postpone this change. CIP 5 confirms the change will now come into force on 1 September 2017.

A copy of the CIP 5 can be found [here](#).

### New address for HMRC National Clearance Hub

On 1 March 2017, HMRC issued Customs Information Paper 6 (2017) (CIP 6), advising of a new address for the National Clearance Hub as part of HMRC's digital programme. In relation to the National Duty Repayments Centre (NDRC), HMRC has said that forms need to be posted at least two working days before the last working day of the relevant month. If they are not received by NDRC prior to the last working day of the month end, there may be an impact on trader's deferment accounts.

A copy of the CIP 6 can be found [here](#).

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## Cases

### **Euro Packaging – classification of long-life shopping bags**

In *HMRC v Euro Packaging UK Limited*<sup>1</sup>, the First-tier Tribunal (FTT) allowed an appeal against decisions by HMRC relating to the customs duty to be paid on the importation from countries outside the EU of shopping bags and its refusal to remit the customs duty.

#### **Background**

Euro Packing UK Limited (the appellant) is a UK manufacturer and supplier of packaging products. It imported into the UK woven and non-woven shopping bags. The bags at issue in this appeal were long life woven polypropylene shopping bags (the bags).

The appellant classified the bags under Combined Nomenclature (CN) heading 4202 929890, which carries a rate of duty of 2.7%. In determining the classification of the bags, the appellant relied upon advice received from HMRC and HMRC's conduct.

In HMRC's view, the correct CN heading was 4202 921900 and therefore the rate of duty was 9.7%. In addition, whatever guidance and actions HMRC had given or taken, the appellant was not entitled to rely upon such guidance and actions to obtain remission of the correct amount of duty.

HMRC issued a C18 post clearance demand note in the sum of £989,689.19, which the appellant appealed.

There were two main questions for determination by the FTT. First what is the correct classification of the bags and secondly, if the higher rate of 9.7% duty is payable, is the appellant entitled to remission of the duty pursuant to Articles 220, 236 and 239 of the Community Customs Code (CCC).

#### **FTT's decision**

In relation to the first question, in order for the bags to fall within the CN code contended for by HMRC, they must be covered with "plastic sheeting" visible to the naked eye. The FTT was of the view, from a visual examination of the bags, that their outer surface was covered in a form of plastic. The FTT accepted the appellant's evidence that the industry usage and understanding of "plastic sheeting", referred to in the CN, was thicker than that applied to the bags in issue. The FTT therefore concluded that the bags were not covered in "plastic sheeting", but rather were covered in a very thin layer of plastic which allowed the underlying texture of the woven material to show through, something which would not be evident if the bags had been covered in plastic sheeting.

The FTT therefore allowed the appellant's appeal.

Although not necessary given its decision on the first issue, the FTT went on to consider the issue of remission and concluded that remission would have been due under Article 239 of the CCC.

1. [2017] UKFTT 0160.

### Comment

This decision provides helpful guidance on the rules for classifying products and will be useful to businesses importing similar bags. The decision also provides a useful summary of the FTT's jurisdiction in relation to remission claims, confirming that the FTT does have jurisdiction to determine both Article 220(2)(b) and Article 239 remission claims.

A copy of the decision can be found [here](#).

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### **Wortmann – interest on import duties reimbursed due to breach of EU Law**

In *Wortmann KG Internationale Schuhproduktionen v Hauptzollamt Bielefeld*<sup>2</sup>, the Court of Justice of the European Union (CJEU) ruled that where import duties, including anti-dumping duties, are reimbursed on the ground that they were levied in breach of EU law, the Member State must also pay interest on the sums refunded.

### Background

The case involved a dispute between the German tax authorities and Wortmann, a German shoe retailer, in relation to anti-dumping duties imposed on imports of footwear from China and Vietnam. After the duties were annulled by the CJEU (Case C-249/10), Wortmann applied to the German customs authorities for the reimbursement of duties paid with interest. The German customs authorities reimbursed the duties under Article 241 of the Community Customs Code, however, it refused to pay interest. Although Article 241 does not give rise to the payment of interest, the provision allows for Member States to provide for this possibility in their national legislation. Germany had made such provision, but Wortmann had not made a claim.

### CJEU's decision

The CJEU, following the opinion delivered by Advocate General Campos Sanchez-Bordona on 8 September 2016, decided that Article 241 is not applicable to situations where the reimbursement of anti-dumping duties is required as a result of a ruling from the EU Courts declaring those duties to be invalid. Where import duties, including anti-dumping duties, are reimbursed on the ground that they have been levied in breach of EU law, national customs authorities are obliged to pay interest on the refunded duties from the date of payment of those duties.

### Comment

The CJEU's judgment will be welcomed by importers seeking reimbursement of import duties levied in breach of EU law. Importers that are seeking reimbursement of such duty should ensure they also apply for interest.

A copy of the judgment can be found [here](#).

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### **British American Tobacco – penalty for oversupply of tobacco**

2. Case C-365/15).

In *British American Tobacco (Holdings) Ltd v HMRC*<sup>3</sup>, British American Tobacco (Holdings) Ltd (BAT) was partly successful in its appeal to the FTT against a penalty notice issued by HMRC for breach of statutory duty under section 7A(1), Tobacco Products Duty Act 1979 (TPDA).

### Background

Section 7A(1), TPDA, imposes a duty on tobacco companies, such as BAT, not to supply hand-rolling tobacco where the nature, or circumstances, of the supply make it likely that the tobacco would be resupplied to persons likely to smuggle it into the UK.

This dispute concerned whether BAT had in fact supplied hand-rolling tobacco in such circumstances.

BAT was issued with an initial notice by HMRC informing it that HMRC was considering imposing a penalty for breach of section 7A(1). Although BAT took steps to address HMRC's concerns, HMRC subsequently issued a penalty notice under section 7B(1), TPDA.

The issues to be determined were:

- the scope of the duty under section 7A(1)(b)
- whether the penalty HMRC imposed constituted a charge of equivalent effect to a customs duty charge contrary to Article 30 of the Treaty of the Functioning of the European Union (TFEU)
- whether HMRC was required to prove that there had been smuggling arising from BAT's supplies
- whether the penalty was a criminal charge for the purposes of Article 6 of the European Convention on Human Rights (ECHR) (the right to a fair trial)
- whether Article 6 was engaged and, if so, whether judicial review by the tax tribunal would satisfy the ECHR requirement for review by a court of full jurisdiction
- the extent of the court's jurisdiction under the TPDA
- whether section 16(6), Finance Act 1994, infringed the presumption of BAT's innocence under Article 6(2) by placing the burden of proof on BAT to prove its grounds of appeal
- the relationship between the initial and penalty notices.

### FTT's decision

#### *Scope of duty*

The FTT said that "resupplied" should be given its ordinary meaning ie "supplied again". There was no inherent limitation on the number of resupplies and resupplies perceived to be 'too remote' could not be excluded. The duty to avoid smuggling was accordingly wide enough to capture the resupply of hand-rolling tobacco from retailer to consumer.

#### *Was the penalty a charge equivalent to customs duty contrary to Article 30 TFEU?*

The penalty was charged to BAT itself for breaching its statutory duty not to facilitate smuggling under section 7A(1), not on the goods themselves and so was not comparable to a customs duty charge and not contrary to Article 30.

#### *Was HMRC required to prove smuggling?*

In the view of the FTT, HMRC was not required to prove smuggling. The words in section 7B should be given their ordinary meaning. The language only required HMRC to "think" that BAT, without reasonable excuse, was in breach of the duty. HMRC did not have to prove that there was actual smuggling nor that the nature of or circumstances of the supplies made it likely that

3. [2017] UKFTT 167 (TC).

the tobacco would be resupplied to persons likely to engage in smuggling.

*Was the penalty a criminal charge engaging Article 6 ECHR?*

The FTT concluded that the penalty was more than a mere preventative or regulatory measure and was therefore a criminal charge for the purposes of Article 6 (*Engel v Netherlands*<sup>4</sup>) and Article 6 was therefore engaged.

*Did the FTT have sufficient jurisdiction for the purposes of Article 6 ECHR?*

The FTT was of the view that it did have sufficient jurisdiction as it had the power to quash or vary HMRC's decision, and to substitute its own decision and accordingly section 16(5), Finance Act 1994, should be construed to give effect to BAT's ECHR rights.

*Did the reverse burden of proof imposed by section 16(6) Finance Act 1994 infringe BAT's Article 6(2) ECHR right to the presumption of innocence?*

The FTT concluded that the penalty provisions went no further than was necessary to effectively protect excise duty revenue. Looking at the penalty provisions in the context of the whole scheme of the legislation, the FTT was satisfied that the reverse burden of proof did not go beyond reasonable limits and therefore did not infringe Article 6(2) ECHR.

*The relationship between the initial and penalty notices*

An initial notice is intended to give the recipient an opportunity to take corrective action to avoid having to pay a penalty. The FTT drew attention to the fact that a penalty notice is required to refer only to specific matters related directly to issues raised in an initial notice. To raise a penalty notice on any other ground would effectively deprive the tobacco manufacturer receiving the penalty of that opportunity and frustrate Parliament's intention. To the extent that the penalty notice went beyond issues raised in the initial notice, the FTT said they should be set aside.

Owing to BAT's awareness that some of its supplies were likely to be smuggled, it had breached the duty imposed upon it by section 7A(1). As it had no reasonable excuse, BAT was liable to pay a penalty but the amount was substantially reduced.

**Comment**

It would appear that this is the first time the penalty provisions contained in sections 7A-C, TPDA, have been considered by the FTT. The parties had agreed that this appeal would be treated as a test case and the FTT has provided some helpful guidance on how the relevant provisions are to be applied. Tobacco manufacturers will note, in particular, the broad scope of the term "resupplied". Any penalty notice received should be carefully scrutinised to ensure that it only refers to matters arising from specific issues raised in the preceding initial notice.

A copy of the decision can be found [here](#).

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4. A/22 (1978-80) 1 EHRR 647 applied.

## About RPC

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- Winner – Law Firm of the Year – The Lawyer Awards 2014
- Winner – Law Firm of the Year – Halsbury Legal Awards 2014
- Winner – Commercial Team of the Year – The British Legal Awards 2014
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