



# Customs and excise quarterly update

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August 2017

In this update we report on the implementation of the Fulfilment House Due Diligence Scheme, the National Audit Office's report on the new Customs Declaration Service and the future excise duty rate changes to cooking wine and other cooking alcohol. We also comment on three recent cases involving the Alcohol Wholesalers Registration Scheme, the scope of The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and the classification of second hand clothing.

## News

### Fulfilment House Due Diligence Scheme update

The Fulfilment House Due Diligence Scheme (FHDDS) was due to be introduced in the Finance Bill 2017. [more>](#)

### Customs Declaration Service

On 13 July 2017, the National Audit Office (NAO) published its report on the progress of the new Customs Declaration Service (CDS) which is due to replace the current system (known as CHIEF) in January 2019. [more>](#)

### Cooking wine and other cooking alcohol

Cooking wine and other cooking alcohol with strength of 5% alcohol by volume (ABV) or less, has historically been treated by HMRC as exempt from excise duty. [more>](#)

## Cases

### *ABC Ltd & Others v HMRC* – HMRC has power to grant interim approvals following AWRS refusal

In *ABC Ltd & Others v HMRC*, the Court of Appeal has held that HMRC did have the necessary power, pursuant to section 88C, Alcoholic Liquor Duties Act 1979 (ALDA), to grant alcohol wholesalers interim licences until the determination of their appeals before the First-tier Tribunal (FTT) against HMRC decisions to refuse wholesale alcohol licences on the grounds that they were not "fit and proper" persons. [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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**Logfret (UK) Limited v HMRC – HMRC’s refusal to accept alternative commercial evidence unreasonable**

In *Logfret (UK) Limited v HMRC*, the FTT allowed an appeal against two excise duty assessments as HMRC’s decision to refuse to accept alternative commercial evidence had been unreasonable. [more>](#)

**Rokit – HMRC erroneously classifies second hand clothing**

In *Rokit Limited v HMRC*, the FTT allowed an appeal against a C18 post clearance demand notice and related penalty issued by HMRC in respect of customs duty on imports of second-hand clothing, on the basis that HMRC’s purported customs classification was incorrect. [more>](#)

## News

### Fulfilment House Due Diligence Scheme update

The Fulfilment House Due Diligence Scheme (FHDDS) was due to be introduced in the Finance Bill 2017. However, when the General Election was called the FHDDS provisions were withdrawn. At the time, the then Financial Secretary to the Treasury confirmed there were no policy changes and that these provisions would be legislated for at the first opportunity in the new Parliament.

On 13 July 2017, the Government confirmed that it will introduce a Finance Bill as soon as possible after the summer recess, which will contain the FHDDS provisions.

In relation to the secondary legislation, this is now expected to be published in early autumn and the Government intends to consult and hold face-to-face stakeholder meetings to discuss the proposed legislation.

The timetable for the scheme has not changed and it is intended that it will open for registration for existing fulfilment businesses in April 2018. By April 2019, all fulfilment businesses will need to be approved by HMRC in order to trade.

We understand work is currently underway to build the digital platform that will enable fulfilment businesses to register for the scheme and HMRC welcomes discussion with users regarding their requirements and to hear from those that wish to undertake pilot testing of the system before it goes live.

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### Customs Declaration Service

On 13 July 2017, the National Audit Office (NAO) published its report on the progress of the new Customs Declaration Service (CDS) which is due to replace the current system (known as CHIEF) in January 2019.

HMRC started the CDS before the UK's decision to leave the EU in June 2016, and before the Government committed to seeking a new customs arrangement from March 2019.

HMRC has made progress in designing and developing the CDS; however, there is still a significant amount of work to complete and there is a risk that HMRC will not have the full functionality and scope of the CDS in place by March 2019 when the UK plans to leave the EU.

A copy of the NAO's report can be found [here](#).

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### Cooking wine and other cooking alcohol

Cooking wine and other cooking alcohol with strength of 5% alcohol by volume (ABV) or less, has historically been treated by HMRC as exempt from excise duty.

HMRC has reviewed its current policy and has concluded this view has no legal basis. Therefore, with effect from 1 January 2018, all such products of a strength exceeding 1.2% ABV will be subject to excise duty. If the alcohol is subsequently used in a food product and the criteria for Alcoholic Ingredients Relief can be met, a refund of this excise duty may be claimed.

Full details of the changes are published in HMRC's Excise Duty Information Sheet 2 (2017), a copy of which can be found [here](#).

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## Cases

### **ABC Ltd & Others v HMRC – HMRC has power to grant interim approvals following AWRS refusal**

In *ABC Ltd & Others v HMRC*<sup>1</sup>, the Court of Appeal has held that HMRC did have the necessary power, pursuant to section 88C, Alcoholic Liquor Duties Act 1979 (ALDA), to grant alcohol wholesalers interim licences until the determination of their appeals before the First-tier Tribunal (FTT) against HMRC decisions to refuse wholesale alcohol licences on the grounds that they were not “fit and proper” persons.

#### **Background**

In April 2016, with the aim to combat excise duty evasion, HMRC introduced the alcohol wholesalers registration scheme (AWRS). AWRS requires a wholesaler of duty-paid alcohol to be registered and approved as a “fit and proper” person by HMRC pursuant to section 88C, ALDA. A wholesaler commits a criminal offence if they sell alcohol without being registered. Those approved appear on a register which is accessible to the public. From 1 April 2017, anyone purchasing alcohol from a wholesaler who is not approved commits a criminal offence if he knows, or ought to have known, of the lack of approval.

ABC Ltd, X Ltd and Y Ltd (the claimants), were required to be registered because they sold alcoholic drinks wholesale. The claimants applied to HMRC to be registered and approved as “fit and proper” persons under AWRS. HMRC issued decisions refusing approval on the basis they did not consider the claimants to be “fit and proper” persons. The refusal letters indicated that the claimants could continue to trade for a further one month only.

The claimants appealed HMRC’s decisions to refuse registration to the FTT. They asked HMRC to place them on the approved register until the conclusion of their appeals before the FTT (which were expected to take at least eight months). The claimants contended that unless HMRC put some remedial arrangement in place, their statutory right of appeal would be rendered worthless because the companies would cease to exist and a successful appeal would not make good the substantial losses that would result from a cessation of trading.

The claimants relied upon protection of their property rights by Article 1 Protocol 1 (A1P1) of the European Convention on Human Rights (ECHR) and contended that the goodwill of the companies, built up over many years, would be destroyed by HMRC’s actions. Such interference would be disproportionate as the companies would be put out of business whilst their appeals were pending. Notwithstanding this, HMRC considered that it had no power to grant a temporary approval and refused interim approval pending determination of the appeals by the FTT.

The claimants subsequently issued proceedings in the High Court for judicial review and also applied for interim relief by way of an injunction against HMRC until the earlier of the conclusion of the judicial review proceedings or the FTT appeals.

The claimants were refused permission and interim relief by the High Court and appealed to the Court of Appeal.

1. [2017] EWCA Civ 956.

### Court of Appeal judgment

The appeal was allowed.

The Court considered two issues:

- Does HMRC have the power to allow a wholesaler to continue to trade lawfully pending appeal, and, if so, in what circumstances?
- What are the powers of the High Court to grant interim relief to enable a wholesaler to continue trading pending an appeal to the FTT?

In relation to the first issue, the Court held that section 9, Commissioners of Revenue and Customs Act 2005, does not provide HMRC with the power to approve persons as fit and proper to trade in wholesale alcohol pending an appeal to the FTT, when HMRC has concluded they are not fit and proper persons. However, section 88C, ALDA, provides a mechanism which would enable HMRC to achieve the same end in appropriate circumstances. HMRC could properly conclude that a person is fit and proper for a limited time, possibly subject to further conditions which mitigate the risks perceived by HMRC in approving the person generally as fit and proper.

The Court therefore quashed HMRC's decisions refusing to entertain the claimants' request for temporary approval until the conclusion of their appeals and remitted the matter to HMRC for redetermination.

In relation to issue two, the Court held that the High Court does have jurisdiction to grant injunctive interim relief. However, in order for a claimant to obtain injunctive relief in the present circumstances, it needs to provide the Court with compelling evidence demonstrating that an appeal to the FTT would be ineffective. The Court concluded that in this instance the evidence was not sufficient to grant the claimants interim relief.

### Comment

This is a welcome decision for alcohol wholesalers who have applied for and been refused a licence under AWRS. It confirms that HMRC has the power to grant an interim licence to wholesalers who have appealed to the FTT a decision refusing them a licence.

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

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### **Logfret (UK) Limited v HMRC – HMRC's refusal to accept alternative commercial evidence unreasonable**

In *Logfret (UK) Limited v HMRC*<sup>2</sup>, the FTT allowed an appeal against two excise duty assessments as HMRC's decision to refuse to accept alternative commercial evidence had been unreasonable.

### Background

Logfret (UK) Limited (Logfret), appealed to the FTT against two assessments raised by HMRC relating to four movements of alcohol, for which its only involvement had been to provide the movement guarantee.

The alcoholic goods transported in the four movements were under duty suspension, moving between a UK bonded warehouse to another bonded warehouse in the EU.

2. [2017] UKFTT 484 (TC).

HMRC raised the assessments on the basis that irregularities had occurred. For three movements, the goods were not receipted on the Excise Movement and Control System (EMCS) and for the fourth movement, whilst the goods were receipted on EMCS, this occurred over four months after the date of dispatch. On this basis, HMRC considered an excise duty point had occurred pursuant to The Excise Goods (Holding, Movement and Duty Point) Regulations 2010, SI2010/593 (the Regulations), and Logfret, as guarantor, was liable for the duty pursuant to Regulation 9 of the Regulations.

Logfret contended that in relation to the fourth movement, there was no requirement for the goods to be receipted on EMCS within four months. In relation to the other movements which were not receipted on EMCS, Logfret provided alternative evidence showing the goods arrived at their destination and, for movement three, also contended the purported irregularity occurred outside the UK.

#### **FTT decision**

The appeal was allowed.

In relation to the fourth movement, the FTT considered the Regulations and the EC Council Directive 2008/112/EEC (the Directive) and held that there was no provision that imposed a four month deadline within which goods must be receipted on EMCS.

If goods are not receipted on EMCS, Regulation 81(4) of the Regulations allows the provision of alternative evidence to demonstrate arrival of the goods at their destination. There is nothing in the legislation to suggest what would be acceptable in this regard. The FTT considered the list of what HMRC considers to be acceptable alternative evidence in HMRC Public Notice 197, paragraph 12.10. Logfret had provided the documents listed but not a letter from the relevant fiscal authorities in the destination member state confirming receipt. The FTT accepted Logfret's argument that the examples were alternative evidence and HMRC's decision to raise the assessments on the basis that there was no letter from the fiscal authorities was flawed.

#### **Comment**

This decision provides helpful guidance on the Regulations and to those facing excise duty assessments where HMRC alleges irregularities have occurred. Businesses which provide movement guarantees need to be aware of their potential unlimited exposure and should conduct sufficient due diligence on counterparties in order to protect themselves commercially and avoid an unexpected excise duty assessment.

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

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## Rokit – HMRC erroneously classifies second hand clothing

In *Rokit Limited v HMRC*<sup>3</sup>, the FTT allowed an appeal against a C18 post clearance demand notice and related penalty issued by HMRC in respect of customs duty on imports of second-hand clothing, on the basis that HMRC's purported customs classification was incorrect.

### Background

Rokit Limited (Rokit) imported second-hand clothing.

The issue which fell to be decided by the FTT was under which Combined Nomenclature (CN) headings the second-hand clothing should be classified. Rokit argued that the clothing should be classified under CN heading 6309, which relates to "rags", with 0% duty rate or CN heading 6310, which relates to "worn clothing", with a 5.3% duty rate. HMRC argued that it should be classified under Chapter 61 or 62, with a 12% duty rate.

HMRC argued that in order for CN heading 6309 to apply, the clothing had to show signs of appreciable wear and the items must be items that most people would throw out as not being worthy of being worn anymore and not capable of being cleaned and/or repaired for sale.

### FTT decision

The appeal was allowed.

In relation to CN heading 6309, the FTT was of the view that HMRC's interpretation of heading 6309 was unjustified and said that "worn clothing" meant clothing that showed readily noticeable signs of wear. It did not mean clothing that could not be repaired or clothing that most people would discard as unworthy of being worn any more.

In the FTT's view, HMRC was not justified in taking the view that all goods should be classified at 12% rather than considering any apportionment or sampling of the clothing products in issue.

The FTT agreed with Rokit's suggested apportionment of 70% "worn clothing" within heading 6309, 17% "rags" within heading 6310, and 13% "new clothing" within Chapter 61 or 62. The FTT therefore substituted the decision in the C18 to reflect this apportionment and the penalty was cancelled.

### Comment

This decision provides helpful guidance on the rules for classifying products and will be useful to businesses importing similar clothing products. Businesses need to ensure that they correctly classify their products if they wish to ensure they pay the correct amount of duty and avoid an HMRC C18 post clearance demand note.

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

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3. [2017] UKFTT 0447.

## About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 83 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol.

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