



# Customs and excise quarterly update

August 2020

In this update we report on (1) the government's guidance concerning border planning for the end of the transition period; (2) the government's plans to support customs intermediaries; and (3) the government's recently published policy papers on moving goods under the Northern Ireland Protocol, following the transition period. We also comment on three cases relating to (1) whether UK acquisition VAT can apply when a bonded warehouse is not located in the UK; (2) the clarification of factors HMRC can use to determine whether a person is 'fit and proper' to carry out a controlled activity; and (3) whether an acquittal of a criminal charge can preclude HMRC from issuing an excise duty assessment.

## News

### Government accelerates border planning for the end of the Transition Period

The UK government has published guidance confirming that the Brexit implementation period will not be extended beyond 31 December 2020. [more>](#)

### New measures to support customs intermediaries

Following the announcement that the transition period will not be extended and controls for importing goods will now apply from July 2021, HMRC has published guidance containing details of various measures intended to accelerate growth of the UK's customs intermediary sector. [more>](#)

### Moving goods to and from Northern Ireland and Trader Support Service

The Cabinet Office has published a policy paper which provides guidance on the future customs processes for moving goods to and from Northern Ireland. [more>](#)

## Case reports

### Ampleaward – Upper Tribunal confirms that bonded warehouse need not be located in UK for VAT exemption to apply

In *Ampleaward Ltd v HMRC* [2020] UKUT 0170 (TCC), the Upper Tribunal (UT) has confirmed that HMRC is not entitled to claim UK acquisition VAT on the purchase of alcohol from a supplier situated in a second EU state, which is then delivered to a tax warehouse in a third EU state. [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 direct tax and VAT updates on the first and last Thursday of every month, and a weekly blog, [RPC's Tax Take](#).

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### **Morgan James and Exeter Drinks – Factors to be taken into account by HMRC when determining whether a person is a 'fit and proper person'**

In *Morgan James Ltd and Exeter Drinks Ltd v HMRC* [2020] UKFTT 151 (TC), the FTT has clarified the factors that HMRC can take into consideration when determining whether a person is a 'fit and proper person' to carry out alcohol wholesaling. [more>](#)

### **Lennon – Person importing cigarettes without paying excise duty liable to excise duty assessment despite acquittal of criminal charge**

In *Brendan Lennon v HMRC* [2020] UKFTT 268 (TC), the FTT has held that the acquittal of a person of criminal charges does not preclude HMRC from issuing an excise duty assessment in respect of the goods in question. [more>](#)

## News

### Government accelerates border planning for the end of the Transition Period

The UK government has published guidance confirming that the Brexit implementation period will not be extended beyond 31 December 2020. This means that from 1 January 2021, the UK will have the autonomy to introduce its own rules to goods imported from the EU.

In recognition of the impact the coronavirus has had on businesses and their capacity to prepare for further disruption, the government has decided to introduce the new border controls in three phases up until 1 July 2021. These phases are:

**From January 2021:** Traders importing standard goods (eg clothes or electronics) will need to ensure that they prepare for basic customs requirements. They will have up to six months to complete customs declarations. While tariffs will need to be paid on all imports, payments can be deferred until the customs declaration has been made. There will also be checks on controlled goods (eg alcohol and tobacco).

**From April 2021:** All products of animal origin (eg meat, pet food, honey, milk or egg products) and all regulated plants and plant products, will require pre-notification and relevant health documentation.

**From July 2021:** Traders moving all goods will be required to make declarations at the point of importation and pay any applicable tariffs. Full safety and security declarations will be required, and for certain commodities (eg sanitary and phytosanitary) there will be increased physical checks and the taking of samples.

The above relates to Great Britain/EU trade only. It does not apply to the flow of trade between Northern Ireland and Ireland, or between Northern Ireland and Great Britain.

The guidance can be viewed [here](#).

### New measures to support customs intermediaries

Following the announcement that the transition period will not be extended and controls for importing goods will now apply from July 2021, HMRC has published guidance containing details of various measures intended to accelerate growth of the UK's customs intermediary sector.

The intermediary sector, which includes customs brokers, freight forwarders and express parcel operators, supports businesses in the importing and exporting of their goods by ensuring the necessary customs paperwork has been completed correctly.

The government has made £84 million available to support the growth of the sector. The money is being used to support businesses with recruitment, training and the provision of IT equipment and software that will facilitate customs declarations.

The government also plans to remove the financial liability from intermediaries operating on behalf of their clients so that intermediaries can take on additional

clients. Operators will also be allowed to continue declaring multiple consignments in a single customs declaration.

These measures are being introduced in anticipation of an increase in demand the customs intermediary sector will face from traders at the end of the transition period. The measures are intended to aid intermediaries in increasing their operations.

The guidance can be viewed [here](#).

### **Moving goods to and from Northern Ireland and Trader Support Service**

The Cabinet Office has published a policy paper which provides guidance on the future customs processes for moving goods to and from Northern Ireland. These custom processes, known as the 'Northern Ireland Protocol', will take effect at the end of the transitional period on 1 January 2021.

Broadly, the guidance will ensure the following:

**Northern Ireland to Great Britain:** Moving goods from Northern Ireland to Great Britain will remain as it is now. Unfettered access, with no additional processes, paperwork or restrictions. The government's position is that export or exit summary declarations for goods moving to Great Britain should not be required, but this does require EU agreement.

**Great Britain to Northern Ireland:** Any changes for goods moving from Great Britain to Northern Ireland will be kept to a minimum. Food and agricultural products, and all goods classified as sanitary and phytosanitary, will be subject to specified processes. A new 'Trader Support Service' will be established, at no extra cost to traders, to allow for wraparound support with regard to these changes. The Trader Support Service will include the handling of digital import and safety and security declarations on behalf of traders, at no additional cost.

**Northern Ireland and Ireland and Northern Ireland and other EU Member States:** Trade in goods between Northern Ireland and Ireland, and between Northern Ireland and other EU Member States, will be unaffected. There will be no changes at the border, no additional paperwork, tariffs or regulatory checks.

Any 'Free Trade Agreements' between the UK and the rest of the world (non-EU nations) will include Northern Ireland.

The policy paper can be viewed [here](#).

## Case reports

### Ampleaward – Upper Tribunal confirms that bonded warehouse need not be located in UK for VAT exemption to apply

In *Ampleaward Ltd v HMRC* [2020] UKUT 0170 (TCC), the Upper Tribunal (UT) has confirmed that HMRC is not entitled to claim UK acquisition VAT on the purchase of alcohol from a supplier situated in a second EU state, which is then delivered to a tax warehouse in a third EU state.

#### Background

Ampleaward Limited (Ampleaward) was an alcohol wholesaler, registered for UK VAT and approved to own non-duty-paid goods in tax warehouses in the UK. It purchased alcohol from a supplier established in another EU member state; the supplier used Ampleaward's UK VAT number on the invoice. The alcohol was delivered to a bonded warehouse in a third EU member state, in which Ampleaward was not registered for VAT. Ampleaward sold the alcohol to a customer in a fourth member state, to which the alcohol was delivered and where the customer was not registered for VAT. All this occurred while the alcohol was held in duty suspense.

HMRC assessed Ampleaward for acquisition VAT and it appealed the assessments to the First-tier Tribunal (FTT).

#### Legislation

Section 13(3), Value Added Tax Act 1994 (VATA) (incorporating the relevant provisions of the Principal VAT Directive (PVD) into UK domestic law), sets out a 'fallback' rule, by which goods are treated as acquired in the UK if the acquirer uses a UK VAT number for the purposes of their acquisition. Section 18, VATA, sets out rules governing the place of acquisition of dutiable goods where those goods are subject to a warehousing regime. Sections 24 and 26, VATA, set out the UK's domestic provisions relating to the credit of input tax.

#### FTT decision

The appeal was dismissed.

In the view of the FTT, unless Ampleaward could show that VAT had been accounted for (even if subsequently recovered as input VAT) in a EU member state, it was required to account for UK VAT as it had used its UK VAT number to acquire the goods. Section 18 was not in point, since Article 157(1)(b) of the PVD permitted a member state to exempt intra-state supplies between bonded warehouses and acquisitions into bonded warehouses only within that state. Section 18 did not therefore apply since the goods were never physically in the UK.

Ampleaward appealed to the UT.

#### UT decision

The appeal was allowed.

Ampleaward argued that its purchase of alcohol was not subject to acquisition VAT in the UK, as section 18(3) operated to treat the acquisition as taking place outside the UK and neither sections 13 or 18, stated that goods must be acquired into a UK bonded warehouse. Alternatively, if its acquisition of the alcohol was subject to UK

VAT, it was entitled to an equal and opposite credit for input VAT, resulting in no obligation to account for the acquisition VAT for which it had been assessed.

The UT agreed that the warehousing exemption contained in section 18 was not limited to UK warehouses and noted that a conforming construction must 'go with the grain' of the legislation. In the instant case, it was not possible to employ such a conforming construction and section 18(3) therefore applied and took precedence over section 13(3).

### Comment

This decision demonstrates how complex the world of indirect tax can be when goods are traded across international borders. In addition to the usual complexity of the VAT rules, when goods are also liable to excise duty and are traded within the confines of a fiscal warehouse, the tax rules become even more difficult to apply.

Ordinarily, when a member state has failed to implement a provision of EU law correctly, the tax tribunals interpret the domestic law in a manner which conforms with EU law, but on this occasion the UT felt unable to do so.

The decision can be viewed [here](#).

### Morgan James and Exeter Drinks – Factors to be taken into account by HMRC when determining whether a person is a 'fit and proper person'

In *Morgan James Ltd and Exeter Drinks Ltd v HMRC* [2020] UKFTT 151 (TC), the FTT has clarified the factors that HMRC can take into consideration when determining whether a person is a 'fit and proper person' to carry out alcohol wholesaling.

### Background

Morgan James Ltd and Exeter Drinks Ltd (the appellants), had the same sole director and applied for approval to carry on business as alcohol wholesalers under the Alcohol Wholesaler Registration Scheme (AWRS). HMRC had refused their applications on the grounds that they were linked to illicit supply chains, their common director had been linked to other businesses that were dissolved owing money to HMRC and had previously been made bankrupt on HMRC's petition, and (for one of the companies) insufficient due diligence had been carried out. For these reasons, HMRC concluded that the appellants were not 'fit and proper persons' to carry out the controlled activity.

The appellants appealed.

### Legislation

Section 88C, Alcohol Liquor Duties Act 1979 (ALDA), introduced the AWRS, pursuant to which the wholesale of alcohol is a controlled activity, requiring those carrying on that activity to be approved by HMRC. Section 88C(2) provides that HMRC will grant approval under the AWRS only where the applicant is a 'fit and proper person' to carry out the controlled activity. The FTT has a supervisory jurisdiction in respect of AWRS appeals. The standard of proof (section 16(6), Finance Act 1994) is the civil standard ie on the balance of probabilities.

### FTT decision

The appeal was dismissed.

In the view of the FTT, the appellants had failed, on the balance of probabilities, to demonstrate that HMRC's conclusion was unreasonable.

The FTT noted that its jurisdiction was engaged if HMRC had acted in a way in which no reasonable panel of commissioners could have acted, if it had taken into account some irrelevant matter or disregarded something to which it should have given weight.

It commented that the relevant case law in which the 'fit and proper person' test was discussed, did not require a clear threat to the revenue to be demonstrated in order for HMRC to refuse approval to a potential wholesaler. The appellants had not established that HMRC had unreasonably reached the conclusion that past tax losses reflected behaviours that were not consistent with the appellants being fit and proper persons. Nor had they established that HMRC had not meaningfully considered the due diligence undertaken and, in any event, even if it had not been considered, the FTT did not consider that it would have made any difference to HMRC's decision.

#### **Comment**

This decision demonstrates that HMRC can take a relatively broad approach in determining whether someone is a 'fit and proper person' for the purposes of the AWRS. It is important when challenging HMRC's refusal to approve under the AWRS that the taxpayer is able to demonstrate, with cogent evidence, that HMRC has misdirected itself and acted in a way in which no reasonable panel of commissioners could have acted.

The decision can be viewed [here](#).

#### **Lennon – Person importing cigarettes without paying excise duty liable to excise duty assessment despite acquittal of criminal charge**

In *Brendan Lennon v HMRC* [2020] UKFTT 268 (TC), the FTT has held that the acquittal of a person of criminal charges does not preclude HMRC from issuing an excise duty assessment in respect of the goods in question.

#### **Background**

Brendan Lennon (the appellant) imported 60,000 cigarettes into Northern Ireland from Ireland. He was stopped by the police. None of the cigarettes had UK duty paid markings on them. The cigarettes and vehicle were seized and the appellant was prosecuted for an offence contrary to section 170, Customs and Excise Management Act 1979. The appellant was acquitted of this charge. HMRC had also assessed the appellant for import duty pursuant to section 12(1A), Finance Act 1994, and he had appealed the assessment.

That appeal had been successful before a differently-constituted FTT in September 2018. The FTT had allowed the appeal on the ground that the appellant's acquittal of the criminal charge made the assessment *res judicata*. HMRC had sought permission to appeal that decision and, in December 2018, having conducted a review pursuant to rule 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the FTT was satisfied that there was an error of law in its decision and directed that the appeal be reheard before a differently constituted panel.

#### **FTT decision**

The appeal was dismissed.

The FTT held that the appellant's acquittal on the criminal charge did not create an issue estoppel, and had no *res judicata* effect in relation to the assessment.

In addition to arguing *res judicata*, the appellant argued that it was the Magistrates' Court, not the FTT, which had jurisdiction to determine whether seized goods were

being held for a commercial purpose, or had been imported for personal use. On the basis that no-one had challenged the seizure of the cigarettes and vehicle before the Magistrates' Court, the FTT had to proceed on the basis that the cigarettes were being imported commercially.

The FTT noted that the appellant could be liable to excise duty on the goods even if he had no intent to defraud the Exchequer and was not knowingly concerned in the fraudulent evasion of duty. There was no evidence before the FTT, apart from that provided by the appellant, of what had happened in the criminal proceedings (other than the fact of his acquittal). The FTT said that it could not simply accept the appellant's assertion that the Magistrates' Court had found he was trans-shipping the cigarettes from one place in Ireland to another via Northern Ireland, for commercial purposes.

On the balance of probabilities, the FTT found that the cigarettes were being imported into the UK, rather than trans-shipped through it, and that the appellant knew (rather than merely suspected, as he had admitted in an interview under caution) that the van contained cigarettes. In all the circumstances (which included a lack of paperwork and the appellant being paid to drive the van) it was more likely than not that the cigarettes were destined for the UK and the appellant had, at the very least, reason to suspect that the cigarettes would become liable for excise duty upon crossing the border.

The appellant was therefore liable for excise duty on the cigarettes.

#### **Comment**

This decision reinforces the fact that even where a criminal prosecution has been unsuccessful, there may still be civil consequences for those involved in the importation of certain goods.

The decision can be viewed [here](#).



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