Customs and excise quarterly update

November 2019

In this update we report on (1) the new customs legislation if the UK leaves the EU without a deal; (2) steel safeguard quotas; and (3) the recent deadline extension for customs authorisations made indirectly.

We also comment on three recent cases relating to (1) civil evasion penalties; (2) the meaning of "holding" goods; and (3) tariff classification.

News

Movement of goods if the UK leaves the EU without a deal

On 7 October 2019, HMRC published an impact assessment on the new customs legislation concerning businesses trading goods across the UK-EU border in the event of a no deal Brexit. more›

Steel safeguard quotas

On 29 October 2019, HMRC published guidance on imposed definitive safeguard measures on imports of certain steel products. more›

Extension of deadline for customs authorisations

On 30 October 2019, HMRC published updated guidance extending the deadline by which it will no longer accept declarations which are made indirectly by agents on their customers' behalf, to 31 January 2020. more›

Case reports

Auto-Kit International Ltd – customs civil evasion penalty overturned as no dishonesty

In *Auto-Kit International Ltd v HMRC* [2019] UKFTT 534 (TC), the First-tier Tribunal (FTT) overturned a customs civil evasion penalty imposed under section 25, Finance Act 2003 (FA03), because HMRC had not successfully established that the company director's mental state was dishonest. more›

Any comments or queries?

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Dawson's (Wales) Ltd – meaning of "holding" goods

In *Dawson's (Wales) Ltd v HMRC* [2019] UKUT 0296 (TCC), the Upper Tribunal (UT) decided that, in the absence of any evidence that establishes an earlier excise duty point, the person "holding" goods at the time that it is established that the goods are being held at a specific location, but are no longer held pursuant to a duty suspension arrangement, is chargeable to unpaid duty in respect of those goods. **more›**

Bemis Ltd – tariff classification of toilet seats

In *Bemis Ltd v HMRC* [2019] UKFTT 538 (TC), the FTT overturned a decision by HMRC classifying the appellant's product as plastic under tariff code 3922 20 00 00. **more›**

News

Movement of goods if the UK leaves the EU without a deal

On 7 October 2019, HMRC published an impact assessment on the new customs legislation concerning businesses trading goods across the UK-EU border in the event of a no deal Brexit.

In the event that the UK leaves the EU without a deal, the Customs (Import Duty) (EU Exit) Regulations 2018, would come into effect upon exit.

These Regulations provide clarification and optional facilitations which allow businesses to interact with the customs regime in a more cost effective way in order to reduce the significant administrative burdens businesses will incur in respect of goods being presented to customs, the clearance process, and customs import declarations. Examples include special customs procedures and temporary storage and transit arrangements.

The impact assessment can be viewed here.

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Steel safeguard quotas

On 29 October 2019, HMRC published guidance on imposed definitive safeguard measures on imports of certain steel products.

Certain quantities of steel may be imported duty free with each product having either annual country specific quotas or quarterly global quotas, or both. A safeguard duty of 25% will be incurred once these quotas have been reached.

Developing countries may be exempted from these measures and not incur a safeguard duty due to the low volumes of particular steel products they produce.

The guidance can be viewed here.

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Extension of deadline for customs authorisations

On 30 October 2019, HMRC published updated guidance extending the deadline by which it will no longer accept declarations which are made indirectly by agents on their customers' behalf to 31 January 2020.

Where a customs declaration requires an authorisation, the holder of the authorisation must also be the declarant. This prevents agents from using their own Simplified Declaration Authorisations to declare goods to another party's Special Procedure Authorisation.

The guidance can be viewed here.

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Case reports

Auto-Kit International Ltd – customs civil evasion penalty overturned as no dishonesty

In *Auto-Kit International Ltd v HMRC* [2019] UKFTT 534 (TC), the First-tier Tribunal (FTT) overturned a customs civil evasion penalty imposed under section 25, Finance Act 2003 (FA03), because HMRC had not successfully established that the company director's mental state was dishonest.

Background

Auto-Kit Ltd (Auto-Kit), imports fabric and leather car seat covers into the UK from outside the EU. On occasion, Auto-Kit supplies fabric free of charge to the manufacturer which is subsequently used by the manufacturer to make the products supplied to Auto-Kit.

HMRC first visited Auto-Kit's premises in 2011. In 2012, HMRC advised Auto-Kit that (i) the incorrect commodity code was being used on the imported goods resulting in an underpayment of duty; and, (ii) when supplying fabric to the manufacturer, Auto-Kit was required to add the value of the fabric when calculating the customs value of the product which in cases such as imports from India was to be 17% of the value of the goods.

Between 2012 and 2015, HMRC issued a number of post-clearance demand notices (C18s) for unpaid duty on the basis that Auto-Kit had continued to use the incorrect commodity code and was not applying the uplift in value when calculating the customs value of the product. Auto-Kit paid the duty assessed in the various C18s.

In 2012, HMRC also considered issuing Auto-Kit with a custom civil penalty under section 26, FA03, for failing to provide the correct particulars on customs declarations. The penalty was not charged by HMRC, however, in 2014 HMRC imposed a £250 penalty in respect of incorrect declarations.

In April 2016, HMRC also advised Auto-Kit that it believed Auto-Kit was engaging in dishonest conduct. Auto-Kit informed HMRC that it had written to the Indonesian and Indian factories in 2014 and 2015 to advise them of the position and informed its freight forwarders of HMRC's position. Auto-Kit proposed that HMRC carry out a quarterly audit and assessment for underpaid duty.

A further C18 was issued in September 2016 for failure to uplift the invoice values. At the same time, HMRC contacted the shipping agents and freight forwarders who confirmed that Auto-Kit had told them to use the correct commodity codes, but that there had been no change in their procedures since 2012.

By 2017, the imports were still incorrect and HMRC held a further meeting with Auto-Kit. On 14 December 2017, HMRC warned Auto-Kit that a further C18 would be issued and indicated that it intended to charge a civil evasion penalty for dishonest conduct at 80% of the amount of the duty evaded, a 10% reduction being given for disclosure and co-operation, respectively. The penalty was issued under section 25, FA03, for the period 2013–2017. Auto-Kit appealed to the FTT.

FTT decision
The appeal was allowed and the penalty set aside.

Auto-Kit argued that HMRC had failed to provide it with sufficient guidance on its imports and a clear process flow of how it should import its goods. Alternatively, it claimed that it should receive a significantly reduced penalty.

HMRC contended that Auto-Kit had been advised on a number of occasions of the errors it was making, but no action had been taken to ensure the correct commodity codes or 17% uplift were applied. Auto-Kit had not informed HMRC it was having difficulties resolving the issues until 2016 and there was no evidence that remedial action had been taken until June 2017. It was not for HMRC to continually raise C18s, but for Auto-Kit to ensure the imports were correctly classified and the uplift applied. By ignoring HMRC's advice, Auto-Kit's conduct was dishonest by the standards of an ordinary, reasonable person.

A penalty issued under section 25(1), FA03, has two elements: (i) the taxpayer must have engaged in conduct for the purpose of evading tax or duty; and (ii) the taxpayer's conduct must have involved dishonesty.

The FTT followed *Ivey v Genting Casinos t/a Crockfords* [2017] UKSC 67, which confirmed that dishonesty is to be determined objectively. It must first be subjectively ascertained what the actual state of the taxpayer's knowledge or belief as to the facts was. Then, the question of whether the taxpayer's conduct was dishonest was to be considered by applying the objective standards of ordinary decent people.

HMRC bore the burden of proving that the two elements referred to above were satisfied, on a balance of probabilities (section 33(7)(a), FA03).

HMRC accepted that before the 2011 visit, Auto-Kit had not acted dishonestly. In the view of the FTT, after 2013 when HMRC had again notified Auto-Kit that the errors had not been corrected and the second C18 was issued, Auto-Kit had every reason to believe HMRC would continue to detect errors in the future. Whilst the FTT accepted that Auto-Kit had "dragged its feet" as no steps had been taken by it prior to 2014 to notify its Indian and Indonesian suppliers of the required 17% uplift, there had been no other significant developments between HMRC issuing the section 26 penalty in 2013 and December 2015, when HMRC again contacted Auto-Kit.

Although the FTT was of the view that Auto-Kit had not taken all diligent steps it could have been expected to take in the circumstances, the FTT was not satisfied that Auto-Kit's lack of motivation to address the issues was due to a desire to obtain a cash flow advantage to which it was not entitled, or seek to avoid paying the duty owed. Whilst it was clearly not appropriate for Auto-Kit to propose that HMRC carry out a quarterly audit, there was nothing to suggest that Auto-Kit's actions were anything more than a simple lack of diligence. There was no reason why HMRC could not have imposed a civil penalty under section 26, where the burden would have been on Auto-Kit to refute the penalty.

Comment

This decision confirms that a section 25 penalty requires a finding of dishonesty. In order to be dishonest, conduct has to be considered dishonest by the standards of ordinary decent people. It is not sufficient for HMRC to prove a lack of diligence, reasonable excuse or carelessness; dishonesty must be proven. Auto-Kit's mental state was such that it could not be characterised as dishonest. HMRC had failed to discharge the burden in relation to dishonesty and intentional evasion of duty.

The decision can be viewed here.

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Dawson's (Wales) Ltd – meaning of "holding" goods

In *Dawson's (Wales) Ltd v HMRC* [2019] UKUT 0296 (TCC), the Upper Tribunal (UT) decided that, in the absence of any evidence that establishes an earlier excise duty point, the person "holding" goods at the time that it is established that the goods are being held at a specific location, but are no longer held pursuant to a duty suspension arrangement, is chargeable to unpaid duty in respect of those goods.

Background

Dawson's (Wales) Ltd (Dawsons) is a wholesaler of alcoholic drinks. It appealed against an assessment issued by HMRC in respect of goods which were physically held by Dawsons. The goods were not physically received and held by Dawson's suppliers but they were responsible for arranging for the goods to be physically shipped direct to its premises.

In respect of all the assessed supplies, HMRC traced the supply chain back from Dawsons' suppliers to missing, deregistered or hi-jacked companies. HMRC had no evidence that excise duty was paid in respect of the goods, nor had it been able to establish that any of the companies, which appeared further back in the chain, took physical possession of the goods prior to receipt by Dawsons.

HMRC assessed Dawsons under section 12(1A), Finance Act 1994 (FA94), on the basis that the goods were physically held outside a duty suspension arrangement and UK excise duty on those goods had not been paid, with the consequence that a duty point had arisen under regulation 6(1)(b), Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) (the Regulations). HMRC considered that Dawsons was the first known person to hold the goods and was liable to pay excise duty under Regulation 10(1) of the Regulations.

DWL appealed the assessment to the FTT. The FTT determined the following as preliminary issues:

1. Whether Regulation 6(1)(b) of the Regulations and/or Article 7(2)(b) of Directive 2008/118/EC (the 2008 Directive) are incompatible with the principles of proportionality and legal certainty either (a) generally, or (b) where the person assessed upon the basis of those provisions has identified its supplier to the relevant tax authority (the Proportionality issue).

2. Whether the FTT has jurisdiction to consider a challenge to a decision to assess under Regulation 6(1)(b) of the Regulations based on its unreasonableness and/or public law principles on an appeal under section 16(5), FA94 (the Jurisdiction issue).

3. Whether a person who has *de facto* and/or legal control of goods but who does not have physical possession of goods "holds" the goods for the purpose of Regulation 6(1)(b)/ Article 7(2)(b), consistent with the definition of "held" under Regulation 33 of the Regulations (the Holding issue).

The FTT determined the Proportionality issue and the Jurisdiction issue in favour of HMRC and the Holding issue in favour of Dawsons.

Dawsons appealed the Proportionality issue and the Jurisdiction issue to the UT. HMRC cross-appealed the Holding issue.

UT decision

In addition to appealing to the UT, Dawsons also brought a separate claim for judicial review of HMRC's decision to make the assessment. This claim was transferred to the UT to be heard at the same time as the substantive appeal.

The UT considered the decision of the UT in *Davison & Robinson Limited v HMRC* [2019] STC 694, which had not been decided before the FTT heard the preliminary issues. *Davison & Robinson* decided that HMRC has no discretion as to whom it should assess in a situation where there have been multiple holders of excise duty goods in respect of which duty remains unpaid and is required to assess against the first established excise duty point.

The UT dismissed Dawson's claim for judicial review on the basis that judicial review will be refused where a suitable alternative remedy is available. In light of the position in *Davison & Robinson*, Dawsons could pursue its challenge through the statutory appeal route and therefore had an effective alternative remedy.

The UT was of the view that as a result of the decision in *Davison & Robinson*, the UT no longer needed to express a view on the Proportionality issue or the Jurisdiction issue.

The UT therefore focused on the Holding issue. Dawsons argued that if the meaning of "holding" included legal ownership with power to direct delivery but without physical possession, then it followed that each supplier in the supply chain before Dawsons had been "holding" the excise goods and therefore there was at least one identifiable duty point prior to Dawsons holding the goods, with the result that the assessment against it should be discharged.

The UT found that the strict controls imposed by the 2008 Directive over the movement of excise goods focus on where the goods are physically located at any particular time prior to their release for consumption. Therefore, in the absence of any evidence that establishes an earlier excise duty point, the person holding those goods at the time that it is established that the goods are being held at a specific location, but are no longer held pursuant to a duty suspension arrangement, must be chargeable to the unpaid duty.

The UT felt unable to determine the Holding issue in favour of Dawsons due to the agreed and assumed facts on which the preliminary issues hearing had proceeded before the FTT, as these contained no detail as to the factual matters that the UT considered would be determinative. In particular, the assumed facts included a statement that none of the entities in the supply chain had taken physical possession.

The UT set aside the decision of the FTT and remitted the matter to the FTT in order that the Holding issue, and any other outstanding issues that remained to be determined by the FTT on the appeal, could be determined at a substantive hearing in light of the UT's decision.

Comment
This decision confirms that a person who has *de facto* and/or legal control of goods but who does not have physical possession of goods, "holds" the goods for the purpose of Regulation 6(1)(b)/Article 7(2)(b).

The decision also provides helpful guidance on the relevant facts that a person will need to establish in order to successfully appeal an assessment issued under section 12(1A), FA94.

The decision can be viewed here.

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Bemis Ltd – tariff classification of toilet seats

In *Bemis Ltd v HMRC* [2019] UKFTT 538 (TC), the FTT overturned a decision by HMRC classifying the appellant's product as plastic under tariff code 3922 20 00 00.

Background
Bemis Ltd (Bemis) imports toilets seats from its parent company in the United States. The product is made from approximately 85% wood flour, which is a powder obtained from grinding sawdust, shavings or other wood waste, and 15% pehnolic resin (plastic). The product is marketed to consumers as a wooden toilet seat.

In 2012 and 2014, HMRC issued Binding Tariff Information (BTI) rulings classifying the product as wood under heading 4421, with a duty rate of 0%. On 7 March 2017, HMRC issued a third BTI ruling which classified the product as plastic, under heading 3922, with a duty rate of 6.5%.

Bemis appealed this decision.

FTT decision
The appeal was allowed and the FTT classified the product as wood under heading 4421.

The FTT applied Rule 2(b) of the General Rules for the Interpretation of the Combined Nomenclature (GRI) which provides "the classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3". The FTT noted that the product consists of 85% wood flour and 15% resin. Accordingly, in the view of the FTT, the product was clearly made of more than one material or substance and it was necessary to apply Rule 3(b) in order to ascertain whether either material provides the essential character of the product.

The FTT commented that the essential character of toilet seats is that they are a rigid object which confirms to a shape appropriate to their use, and which supports the weight of a person using it and is capable of being secured to the toilet itself. It was accepted by the FTT that the wood alone would not provide the necessary rigidity and the resin alone would not have any of the characteristics of a toilet seat. Rule 3(b) therefore could not be applied to classify the product. The FTT then considered Rule 3(c), which classifies the product under the heading which occurs last in numerical order among those which equally merit consideration. As headings 3922 and 4221 merit consideration in this case, the FTT concluded that the product should be classified under heading 4421.

Comment

This decision provides a helpful summary of how the FTT will apply the GRI. Although HMRC informed the FTT that three BTIs had been issued by member states which classify toilet seats made of wood powder and resin as being plastic under heading 3922, the FTT did not attach much weight to this as it was not possible to discern whether the BTIs addressed identical products. It is anticipated that given the confusion across the EU regarding the classification of these types of products, this issue will be raised at the Customs Code Committee (Tariff and Statistical Nomenclature Section).

The decision can be viewed here.

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