Customs and excise quarterly update

May 2020

In this update we report on (1) temporary changes to customs authorisations during the coronavirus outbreak; (2) the government's plans to introduce 10 new freeports; and (3) a new liability for carrying out an operation or dilution on wine. We also comment on three recent cases relating to (1) refusal of permission to appeal an excise duty assessment out of time; (2) the customs classification of mobility scooters; and (3) liability to pay excise duty in relation to the movement of dutiable goods under a suspension regime.

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Case reports

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ANY COMMENTS OR QUERIES

Adam Craggs
Partner
+44 20 3060 6421
adam.craggs@rpc.co.uk

Michelle Sloane
Partner
+44 20 3060 6255
michelle.sloane@rpc.co.uk

ABOUT THIS UPDATE

Our customs and excise update is published quarterly on the last Tuesday of every month, 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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Logfret – Taxpayer liable as guarantor to pay UK excise duty in relation to the movement of dutiable goods under a suspension regime

In *Logfret (UK) Ltd v HMRC*, the Court of Appeal confirmed the taxpayer was liable, as guarantor, to pay excise duty in relation to a number of movements of excise goods under the EU-wide Excise Control and Management system (the ECMS) pursuant to Council Directive 2008/118/EC (the Directive) as implemented by the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the HMDP Regulations). **more>**

News

Temporary changes to customs authorisations during the coronavirus outbreak (COVID-19)

On 1 April 2020, HMRC published guidance regarding temporary changes to customs policy authorisations during the coronavirus outbreak.

Border Force, or a trader's supervising HMRC office, can grant permission to temporarily vary the conditions of an authorisation should a trader find that, due to COVID-19, they are no longer able to comply with the conditions of an authorisation.

Conditions that may be varied include the following:

- changes to site opening hours
- how to process goods held in temporary storage for over 90 days, and
- the specific areas within an approved location in which customs controls must be conducted.

Applications will be considered on a case by case basis and can be made by emailing the supervising HMRC office with the subject heading: "COVID-19 customs easement request".

The guidance can be viewed here.

Extension to consultation on freeports

On 8 April 2020, HM Treasury confirmed that the consultation into the government's proposed freeport policy, which includes tariff flexibility and customs facilitations, is to be extended due to many key sectors interested in the policy, including ports, businesses and local government, experiencing disruption due to COVID-19.

The consultation, launched on 10 February 2020, sets out the government's intention to create up to 10 innovative freeports across the UK to boost global trade and productivity, generate employment opportunities and benefit the UK economy.

The consultation was initially due to close on 20 April 2020 but is now open until 13 July 2020. Responses can be made online through HMRC's Consultation Portal.

The consultation document can be viewed here.

Update to Excise Notice 163: wine production

On 30 April 2020, HMRC updated Excise Notice 163, to include liability for anyone carrying out any operation or dilution on wine or made-wine after excise duty has been accounted for on it.

Pursuant to paragraph 5.14 of Notice 163, from 1 April 2020, a trader will be liable to a civil penalty and the new product will be liable to forfeiture if someone mixes or adds water or another substance to wine or made-wine following the excise duty point, and if the addition was carried out prior to the excise duty point, the amount of excise duty would have been more than the amount actually payable.

Updated Notice 163 can be viewed here.

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Case reports

Coyle – Tribunal refuses permission to appeal out of time

In *Michael Coyle t/a Coyle Transport v HMRC*[1] the Upper Tribunal (UT) set aside the decision of the First-tier Tribunal (FTT) for errors of law, but reached the same conclusion as the FTT and refused the taxpayer permission to appeal out of time.

Background

On 12 December 2012, HMRC seized a lorry (vehicle registration PHZ6358) and its load of beer.

On 17 December 2012, Mr Michael Coyle (the appellant) wrote to HMRC objecting to the seizure of the lorry and confirmed that he traded as 'Coyle Transport'.

On 2 August 2013, HMRC issued an excise duty assessment under section 21(1A), Finance Act 1994, in the sum of £29,140 (the duty assessment) and on 3 September 2013, a related penalty assessment under Schedule 41, Finance Act 2008, in the sum of £5,828 (the penalty assessment). Both assessments were addressed to Coyle Transport.

On 10 July 2018, the appellant appealed to the FTT.

The grounds of appeal gave the following reason why the appeal was made late:

"This assessment was brought in relation to vehicle PHZ6358, which is owned by the Appellant's father. This assessment was addressed to Coyle Transport which belongs to the Appellant's father. It was only when HMRC contacted the Appellant directly did he realise that they were not trying to fix him with the assessment."

The substantive grounds of appeal were:

"Coyle Transport for which our client Michael Coyle was registered as sole proprietor was not the Coyle Transport which was operated by his father Mr Eamon Coyle, who was the registered owner of vehicle registration PHZ6358 which was the vehicle involved in the interception by HMRC."

FTT decision

The FTT refused permission to bring a late appeal, holding that the appellant was aware of the assessments when they were issued.

The appellant argued that the assessments were addressed to the Coyle Transport operated by his father and were not properly addressed to him and as such, time did not begin to run at all in relation to any appeal. The FTT accepted that Coyle Transport was neither a natural or legal person but noted from section 114, Taxes Management Act 1970 (TMA 1970) (which provides that want of form or errors are not to invalidate assessments), that the relevant question was how a reasonable person, looking at the assessments addressed to Coyle Transport would objectively have read them. The FTT concluded that the assessments were received by the appellant and would have been understood as being directed to the appellant who was the person conducting the business at that time, rather than to his father.

The appellant appealed to the UT.

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UT decision
The UT set aside the FTT decision but also refused the appellant permission to appeal out of time.

In the view of the UT, the FTT had erred in law in concluding that HMRC had made assessments against the appellant, rather than his father.

While the FTT was entitled to take into account the correspondence between the appellant, trading as Coyle Transport, and HMRC, when applying the reasonable recipient objective test, and to conclude that the appellant had not provided good reason for the delay, the FTT went further than it needed to. It only had to assess the merits of those issues in line with the application to appeal out of time.

In addition, the FTT misdirected itself on the law, as section 114, TMA 1970, does not apply to excise duty assessments and related penalties made under Finance Act 1994 and Finance Act 2008.

As the FTT had erred in law in considering that section 114, TMA 1970, was applicable in the circumstances of the case and in deciding whether there were valid assessments (this should have been determined at a subsequent substantive hearing, should permission to appeal late be granted), the UT set aside the FTT's decision and remade it. Taking into account the significant length of delay of 4 years and 9 months, the lack of a good explanation for the delay, the weakness of the appellant's substantive case, the need for litigation to be conducted efficiently, at proportionate cost, and for time limits to be respected, the UT concluded that permission to appeal out of time should be refused.

Comment
In this case, it was the appellant's prior correspondence with HMRC and his VAT registration confirming that he was trading as Coyle Transport, to whom the assessments were addressed, which influenced both the FTT and the UT in concluding that a reasonable recipient, in the appellant's circumstances, would have understood the assessments to be directed to the person conducting the business at the relevant address ie the appellant.

The appellant's argument that no valid assessments had been issued raises an interesting issue. Under the relevant legislation (section 16(1B) and (1F), Finance Act 1994 and Schedule 41, Finance Act 2008) a right of appeal only arises once there is something amounting to an excise duty assessment and penalty assessment. Had the appellant been correct in his argument that no assessments had been made, the FTT would have no jurisdiction to deal with the purported appeal and would be unable to give permission in relation to non-existent assessments.

The decision can be viewed here.

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Invamed – Mobility scooters attract zero duty

In *Invamed Group Ltd & Others*[2], the Court of Appeal held that mobility scooters attract zero customs duty under heading 8713 of the Combined Nomenclature, being classified as "carriages for disabled persons", rather than "motor cars and other motor vehicles".

Background

The case 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 Ltd (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). In its judgment,[3] the CJEU provided guidance stating that the intended use of a product can be used to objectively classify the product for tax purposes if it is "inherent to the product" at the time of import. The CJEU said that where a product was designed "for disabled persons" this meant it was designed solely for disabled persons; whether non-disabled persons might then use it was irrelevant to its classification under the Combined Nomenclature. The FTT consequently found that the scooters should be classified as "carriages for disabled persons, whether or not motorised" attracting zero duty under heading 8713.

HMRC appealed the decision to the UT. The UT disagreed with the decision of the FTT, finding that the electric scooters should be categorised as "motor cars and other motor vehicles principally designed for the transport of persons" and therefore attract customs duty of 10% as prescribed under heading 8703 of the Combined Nomenclature.

In the view of the UT, the FTT had erred in principle in finding that where the design failed to confer advantages compared to walking for the able-bodied, this indicated that the scooters were not designed for non-disabled persons as well as disabled persons. The FTT had also erred in finding characteristics which afforded extra advantages for non-disabled individuals. The UT was of the opinion that, on the basis of their features, the scooters should be regarded as designed for both able-bodied and disabled persons. As a result, the FTT was incorrect to classify the scooters under 8713.

We commented on the UT's decision in the November 2018 issue of our Customs and Excise Quarterly Update.

Invamed appealed to the Court of Appeal.

Court of Appeal judgment

The appeal was allowed.

The Court agreed with the FTT that the mobility scooters attract zero customs duty under heading 8713 of the Combined Nomenclature, being classified as "carriages for disabled persons", rather than "motor cars and other motor vehicles" under heading 8703 of the Combined Nomenclature.

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The CJEU's judgment in *Invamed* was carefully considered by the Court. In the view of the Court, the CJEU's reference to the irrelevance of the scooter's use by non-disabled persons in light of their original purpose was a strong indication that the CJEU had either accepted that the classification of the scooters was the remit of the member state's courts or had changed its provisional view about their intended purpose.

While the UT had been correct in concluding that the CJEU's judgment in *Invamed* had provided important guidance on what was meant by "disabled persons" in heading 8713, when deciding whether the scooters were intended for use as transport generally, or solely by disabled persons, the Court said that consideration must be given to the disadvantages that would be experienced by a non-disabled user. The CJEU's judgment meant that the scooter's intended use must be classified in light of its objective characteristics and properties. The more that the scooter's characteristics catered for the disabled, as opposed to those who were able to walk but elected not to, the more clearly the scooter was designed specifically for disabled use. The Court noted that the factual analysis and where the line is to be drawn in any given case is a matter for the FTT, based on the evidence before it and applying its own expertise. The Court was not satisfied that the FTT had misdirected itself regarding the legal test to be applied, or reached a decision which on the correct application of the test was not open to it to reach on the facts.

Comment
The Court of Appeal has confirmed a number of important general principles of classification in addition to those specific to the classification of the mobility scooters under consideration. In respect of the scooters, and the classification of products more widely, the intended use of a product is to be determined by its objective characteristics and properties.

The judgment can be viewed here.

Logfret – Taxpayer liable as guarantor to pay UK excise duty in relation to the movement of dutiable goods under a suspension regime

In *Logfret (UK) Ltd v HMRC*[4], the Court of Appeal confirmed the taxpayer was liable, as guarantor, to pay excise duty in relation to a number of movements of excise goods under the EU-wide Excise Control and Management system (the ECMS) pursuant to Council Directive 2008/118/EC (the Directive) as implemented by the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the HMDP Regulations).

Background
Logfret (UK) Ltd (Logfret) contracted with a consignor to carry four consignments of alcohol products from a bonded warehouse in the UK to bonded warehouses in other EU member states between 2011 and 2013. Logfret did not undertake the carriages itself, preferring to sub-contract the carriage of the goods. In addition, it gave the required guarantee regarding the eventual liability for excise duty in relation to the goods, wherever and whenever that liability might arise.

Three of the four consignments were never recorded on the EMCS as having arrived at their EU destinations. The fourth was recorded as having arrived at an Italian bonded warehouse, after several changes in the intended destination of the goods, and not until 11 months after the goods had been dispatched.

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Under the terms of the EMCS, excise goods can be moved across EU borders without creating a liability to pay excise duty. However, the duty becomes payable in the country where any "irregularity" event occurs which deems the goods to be "released for consumption", triggering a duty point. If it is not possible to ascertain where the irregularity was committed, the Directive provides for the duty to be payable in the country where the relevant goods were dispatched from.

HMRC assessed Logfret as liable to pay duty on all four movements as the goods travelling under the duty suspension arrangement did not arrive at the destination warehouse within four months of dispatch and Logfret was the guarantor.

Logfret appealed the assessments to the FTT. The question to be determined was whether, in the given circumstances, the relevant legislation imposed liability on Logfret under its guarantee.

The FTT allowed Logfret's appeals on the basis that the irregularity in relation to the goods took place in France and so any liability to excise duty did not arise in the UK.

HMRC successfully appealed to the UT. The UT held that if the goods had not arrived at their declared destination within four months of despatch, there was a deemed irregularity (in relation to the movement) which triggers an excise duty liability in the country of despatch unless evidence can be produced that either the goods did actually arrive at the declared destination within the time limit, or that the irregularity actually took place at some other location. In the circumstances and on the facts of the case, the UT was of the view that the FTT was wrong to conclude that the irregularity occurred in France. As the goods did not arrive at the declared destination within four months of their despatch, there was a deemed irregularity which triggered a liability to duty in the country of despatch, namely, the UK.

Logfret appealed to the Court of Appeal.

Court of Appeal judgment
The appeal was dismissed.

The Court held:

1. A deemed "irregularity" occurred if goods moved under a duty suspension arrangement were not shown on the EMCS to have arrived at the specified destination by the end of the period of four months from the dispatch date, unless it could be shown that the goods did in fact arrive within that time. It was therefore irrelevant for Logfret to show that one of the movements was eventually (after the end of the four-month period) the subject of a report of receipt through the EMCS.
2. A movement of excise goods under a duty suspension arrangement comes to an end, as regards all or any of the goods comprised in the movement, if and when those goods are released for consumption on an irregular departure from the duty suspension arrangement, for example, on being delivered to a location other than the specified tax warehouse.
3. Evidence to be used under the first or the second paragraph of Article 10(4) of the Directive to show that goods had in fact arrived at the specific tax warehouse of destination, so that the movement had come to an end under Article 20(2) of the Directive, must be evidence emanating from or endorsed by the competent authorities of the EU member state of destination.

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4. Under the second paragraph of Article 10(4) of the Directive, if the guarantor wishes to show that the movement of goods ended in accordance with Article 20(2) of the Directive, that must be shown to have occurred before the end of the four-month period from the date of dispatch.
5. Logfret could not argue that Article 10(5) of the Directive applied in relation to either the third or fourth movements, on the basis that it had been ascertained by the end of the three year period that the irregularity actually occurred in France, because that point had not been taken before the FTT.

Comment

This case provides helpful guidance on the legal position of those providing guarantees when an "irregularity" occurs. The case serves as a cautionary tale for any company acting as a guarantor in relation to the payment of excise duty in connection with the movement of excise goods under duty suspension. It is recommended that full due diligence is carried out prior to the movement and that contractual indemnities are in place with the owner of the excise goods to cover an "irregularity" which leads to HMRC calling in the guarantee and issuing an excise assessment.

The judgment can be viewed here.

ENDNOTES

1. [2020] UKUT 0113 (TCC).
2. [2020] EWCA Civ 243.
3. *Invamed Group Ltd v Revenue and Customs Commissioners* (C-198/15) EU:C:2016:362.
4. [2020] EWCA Civ 569.