RPC

Customs and excise quarterly update

November 2017

In this update we report on the Government's White Paper setting out its approach to the UK's future customs, VAT and excise regimes; the Trade Bill 2017-2019; and the implementation of the Fulfilment House Due Diligence Scheme. We also comment on three recent cases involving the Alcohol Wholesaler Registration Scheme; HMRC's revocation of a registered dealer in controlled oils licence and its refusal to restore four seized road fuel tankers; and customs inward processing.

News

Government White Paper – Legislating for the UK's future customs VAT and excise regimes

On 9 October 2017, the Government published a White Paper setting out its 'vision for a modern customs framework' after the UK leaves the EU. The White Paper sets out the Government's approach for the introduction of a new customs, excise and VAT regime. more›

Government introduces Trade Bill 2017-2019

The Trade Bill was announced in the Queen's Speech on 21 June 2017. On 7 November 2017, the Trade Bill 2017-2019 was formally introduced into the House of Commons. This was its first reading and there was no debate on the Bill. more›

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 However, when the general election was called earlier this year the FHDDS provisions were withdrawn from the Bill. The FHDDS provisions have been reintroduced in the Finance (No 2) Bill 2017. To complete the legislative framework for the FHDDS, a statutory instrument is required. more›

Cases

Corbelli Wines – HMRC failed to apply the proper approach following AWRS refusal

In *Giuseppe Corbelli and Pietro Corbelli T/A Corbelli Wines v HMRC*, the First-tier Tribunal (FTT) held that HMRC had failed to apply the proper approach when determining whether or not Corbelli Wines was "fit and proper" for registration as a wholesaler of alcohol, pursuant to section 88C(2), Alcohol Liquor Duties Act 1979 (ALDA) and as a result HMRC had to review its decision. 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 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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Behzad Fuels Ltd – HMRC directed to review decisions which failed to give proper consideration to proportionality

In *Bezhad Fuels Ltd v HMRC*, the Upper Tribunal (UT) has found that the FTT erred in not directing fresh reviews by HMRC of decisions to revoke the appellant's registered dealer in controlled oils (RDCO) licence and refusal to restore four seized road fuel tankers (the Restoration Decision). more>

Corporate Messengers Worldwide Ltd – HMRC erroneously issued penalties for customs duty and VAT

In *Corporate Messengers Worldwide Ltd v HMRC*, the FTT partially allowed an appeal against a C18 post-clearance demand for customs duty in the sum of £7,782.70, VAT in the sum of £143,047.49, and a penalty charged under section 26, Finance Act 2003, in the sum of £1,000. more>

News

Government White Paper – Legislating for the UK's future customs VAT and excise regimes

On 9 October 2017, the Government published a White Paper setting out its 'vision for a modern customs framework' after the UK leaves the EU. The White Paper sets out the Government's approach for the introduction of a new customs, excise and VAT regime. It reflects feedback received from businesses and stakeholders on the 'Future Partnership Paper', which was published in August 2017. The suggestion of a new and time-limited customs union between the UK and the EU is repeated and it also refers to a contingency plan under which appropriate legislation will be introduced in the event the UK and the EU are unable to reach agreement on appropriate customs arrangements before the UK leaves the EU in March 2019.

The Government intends to publish a draft Customs Bill later this year, which will set out the legislative framework necessary to allow the Government to create the new regime. The Customs Bill will largely be based on the Union Customs Code and it is anticipated that the administration of the VAT and excise regimes will remain largely unaltered.

A copy of the White Paper can be found here.

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Government introduces Trade Bill 2017-2019

The Trade Bill was announced in the Queen's Speech on 21 June 2017. On 7 November 2017, the Trade Bill 2017-2019 was formally introduced into the House of Commons. This was its first reading and there was no debate on the Bill.

The Bill includes measures that are considered necessary in order to provide a future trade policy for the UK once it has left the EU. It provides a legislative framework for some of the key policy statements contained in the White Paper referred to in the above news item.

The Bill focuses on providing continuity for business and consumers and contains provisions which:

- create powers to assist in the transition of over 40 existing trade agreements between the EU and other countries
- enable the UK to become an independent member of the Agreement on Government Procurement ensuring that UK businesses have continued access to £1.3tn worth of government contracts and procurement opportunities in 47 countries
- establish a new independent UK body, the Trade Remedies Authority, to protect UK businesses against unfair trade practices.

A copy of the Bill can be found here.

A copy of the Explanatory Notes can be found here.

A copy of the Bill factsheet can be found here.

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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 earlier this year the FHDDS provisions were withdrawn from the Bill. The FHDDS provisions have been reintroduced in the Finance (No 2) Bill 2017.

The draft Fulfilment Business (Approval Scheme) Regulations 2018, have also been published and on 23 October 2017, the Government issued a consultation on the draft regulations seeking in particular, a better understanding of:

- the impact on fulfilment businesses in applying the obligations of the FHDDS, including record-keeping requirements
- whether the provisions relating to group registrations will be beneficial to group companies
- the impact of the FHDDS on small and micro businesses.

Any response to the consultation must be provided by 15 December 2017 and can be emailed to: indirecttax.projectteam@hmrc.gsi.gov.uk.

The timetable for the FHDDS 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.

A copy of the consultation can be found here.

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Cases

Corbelli Wines – HMRC failed to apply the proper approach following AWRS refusal

In *Giuseppe Corbelli and Pietro Corbelli T/A Corbelli Wines v HMRC*[1], the First-tier Tribunal (FTT) held that HMRC had failed to apply the proper approach when determining whether or not Corbelli Wines was "fit and proper" for registration as a wholesaler of alcohol, pursuant to section 88C(2), Alcohol Liquor Duties Act 1979 (ALDA) and as a result HMRC had to review its decision.

Background

In April 2016, with the aim of combating excise duty evasion, HMRC introduced the alcohol wholesaler 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 it sells 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.

Corbelli Wines (the Appellant), operate in the UK as a wholesaler of alcohol purchased from EU suppliers. It is VAT registered and approved as a tax warehouse and a registered consignee. Upon the introduction of AWRS, the appellant submitted an application to HMRC to be approved for registration. On 30 December 2016, HMRC issued a decision letter to the Appellant refusing approval (the Decision). In summary, the reasons given by HMRC in the Decision were as follows:

- in 2012/13, Border Force had made three seizures of goods in relation to which the Appellant was named as the consignee
- in 2014/15, the Appellant had moved wine, imported under its registered consignee approval, to a warehouse operated by Safe Cellars Ltd on the basis that it was in duty suspense when duty should in fact have been paid on receipt
- the Appellant applied to HMRC for an approval, pursuant to the Warehouse Keepers and Owners of Warehoused Goods Regulations 1999, which was refused and the Appellant did not appeal against this refusal
- the Appellant had failed to satisfy HMRC that it had satisfactory administrative and due diligence procedures in place
- one of the partners of the Appellant had been the sole director of a company which had gone into liquidation owing substantial sums to HMRC.

The Appellant appealed the Decision to the FTT denying knowledge of, or involvement in, any wrongdoing in 2012/13; asserting that it had moved the wine to Safe Cellars after being advised by HMRC that doing so was lawful; and indicating that the liquidated company had failed for genuine reasons and was a separate entity from the Appellant. The Appellant argued that HMRC had failed to take proper account of its response and that the Decision was one which no reasonable decision-maker could have reached. In addition, the Appellant requested that the FTT direct HMRC to review the Decision, pursuant to section 16(4), Finance Act 2004.

[1] [2017] UK FTT 0615 (TC).

FTT decision

The FTT allowed the Appellant's appeal and ordered HMRC to conduct a review of the Decision, taking into account only those matters which the FTT had deemed were relevant and discounting those matters which the FTT considered to be irrelevant.

In coming to its decision, the FTT considered whether the Decision was reasonably arrived at pursuant to section 16(4), Finance Act 2004. It concluded that the approach required under section 16(4) is akin to that in judicial review proceedings and it should consider whether the HMRC Officer who made the Decision had taken reasonable steps to obtain all relevant information and had properly applied himself/herself to the decision-making process.

The FTT concluded that there were a number of factors which indicated that HMRC had failed to properly apply itself in the decision-making process.

The FTT noted that the "fit and proper person" test required that the persons seeking approval had the qualities and skills properly to operate a wholesale alcohol business. It was designed to ensure that there was no material risk of loss of excise duty as a result of their activities. The term "fit" was directed at the applicant's knowledge of what was required to ensure compliance with excise rules and procedures, while "proper" referred to their honesty. The FTT concluded that HMRC had failed to properly apply the "fit and proper" test, commenting that HMRC had taken account of irrelevant issues. It could not be said that the Decision would have been the same if it had excluded such matters.

Other factors also undermined the credibility of the Decision. For example, HMRC had paid no real attention to the Appellant's response to its concerns, and had taken no steps to obtain readily available information. It had approached the "fit and proper" test by identifying a list of failings which, it asserted, meant that the Appellant posed a risk. However, HMRC could not explain the nature or level of that risk. Moreover, HMRC had not considered any positive factors and had drawn no distinction between inadvertent failings and knowing breaches. The FTT concluded that that was not a proper approach. HMRC should have balanced all the factors for and against approval before making the Decision.

With regard to the 2012/13 seizures, the FTT concluded that there was no basis for HMRC to conclude that the partners of the Appellant knew of any wrongdoing. It was unreasonable simply to assume that a person failed to meet an aspect of the "fit and proper" test simply because they were a consignee. HMRC had to establish some evidential basis for the existence of a concern that an applicant was not a fit and proper person and it had to give an applicant an opportunity to respond, but that had not happened in the present case.

HMRC had simply assumed that the partners of the Appellant had acted knowingly or dishonestly in relation to the movements to Safe Cellars Ltd. In fact, they had obtained advice from HMRC and had acted in an open and honest, albeit mistaken, way. Finally, HMRC had not considered whether the debts of the liquidated company had arisen as a result of genuine business failure or deliberate non-compliance, and it had therefore failed to reach a proper conclusion on the level of risk.

Comment

This decision will be welcomed by alcohol wholesalers who have applied for and been refused a licence under AWRS. It confirms the proper approach HMRC must take when determining whether an applicant is "fit and proper" for registration as a wholesaler of alcohol, pursuant to section 88C(2), ALDA, and the potential grounds of appeal that may be argued by anyone refused a licence under AWRS.

A copy of the decision can be found here.

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Behzad Fuels Ltd – HMRC directed to review decisions which failed to give proper consideration to proportionality

In *Bezhad Fuels Ltd v HMRC*[2], the Upper Tribunal (UT) concluded that the FTT erred in not directing fresh reviews by HMRC of decisions to revoke the Appellant's registered dealer in controlled oils (RDCO) licence and refusal to restore four seized road fuel tankers (the Restoration Decision).

Background

Behzad Fuels Ltd (the Appellant) was a bulk supplier of diesel with an RDCO licence.

On 12 June 2009, the Appellant asked HMRC to carry out tests on the fuel it supplied, following a customer complaint that the fuel was not road worthy. Following HMRC's testing, the fuel in the vehicle running tank was found to be contaminated with red diesel. The vehicle was seized by HMRC pursuant to a fee-based "restoration agreement" that all traces of red diesel were to be removed within 24 hours of release.

The vehicle was released and HMRC returned a few days later to re-test the fuel. On 16 June 2009, HMRC found further traces of fuel in the running tank. The vehicle was seized for a second time and a further fee-based "restoration agreement" entered into. The agreement contained a warning that this was the second occasion that red diesel had been detected and that HMRC operate a "three strikes" policy and on the third occasion they would seize the vehicle.

The Appellant asked HMRC to return the payment fee on the basis that the running tank had been emptied "to the extent physically possible" and the detected red diesel was residual contaminating particles. HMRC refused this request.

Further tests were carried out by HMRC on 4 March 2013 and red diesel was detected in the storage tank and the running tanks of four vehicles. Additionally, bleaching agent was also discovered during HMRC's visit, the result of a former employee's unauthorised experiments on the purification of biodiesel. A Seizure Information Notice was issued by HMRC. The vehicles were seized on 5 March 2013 and the fuel was liable to forfeiture.

HMRC refused the Appellant's restoration requests and upheld its decision in a review letter, dated 15 July 2013 (the Restoration Decision) on the basis that there was a possibility of laundering, with specific reference to the bleaching agent discovery. This was despite the percentage of red diesel being about 4% and an expert report determining that the presence of the fuel was most likely due to error. The Appellant appealed the Restoration Decision to the FTT.

HMRC revoked the Appellant's RDCO licence on 5 November 2013 (the Revocation Decision), on the basis that large quantities of laundered fuel were present on the premises and the vehicles had been seized. The revocation was upheld by a review decision dated 18 February 2014, and the Appellant appealed the Revocation Decision.

[2] [2017] UKUT 0321 (TC).

FTT decision – the Restoration Decision

With regard to the Restoration Decision, the FTT held that HMRC had not given enough consideration to contemporaneous evidence surrounding the contamination of the vehicles to reasonably arrive at the Restoration Decision. The FTT directed a further review by HMRC of the Restoration Decision taking into account the explanations for the presence of the bleaching agent and issues of proportionality in relation to whether the vehicles should be returned for a fee.

Following the FTT's direction, HMRC issued a revised restoration decision on 18 February 2014 (the second Restoration Decision), again refusing to restore the vehicles. The Appellant appealed the second Restoration Decision.

FTT decision – the second Restoration Decision and the Revocation Decision

In relation to the second Restoration Decision, the FTT dismissed the appeal.

In the view of the FTT, HMRC had not acted unreasonably in using the "three strikes" policy as its starting point for decisions. The Appellant's submissions that the 2009 incidents were one event and the seizures arose from a "self-referral" were considered, but the FTT concluded that a clear warning had been given following the second seizure in 2009 and the Appellant had not removed all traces of red diesel.

The FTT accepted that the "self-referral" and whether the Appellant had any knowledge of the contamination, had not been considered by HMRC, but in its view, knowledge of the "self-referral" would not have changed HMRC's decision.

With regard to the Revocation Decision, the FTT dismissed the Appellant's appeal on the basis that it was reasonable for HMRC to expect an RDCO licensed company to uphold higher standards. Although HMRC had taken into account irrelevant factual issues, in the view of the FTT, the large quantities of laundered fuel were sufficient to justify HMRC's decision. The FTT refused to direct that HMRC review its decisions on the basis that the same decisions would be reached if such a review was carried out

The Appellant appealed the FTT's decisions in relation to both the second Restoration Decision and the Revocation Decision to the UT on the principle ground that the FTT had made an error of law in deciding that it was inevitable, notwithstanding the unreasonableness of the HMRC decisions, that HMRC would make the same decisions if a further review was to be directed.

UT decision

With regard to the second Restoration Decision, the UT found that HMRC's "three strikes" policy did not cover circumstances where there was inadvertent misuse of controlled oil which was not deliberate. HMRC's strict policy could not have led to a proper consideration of proportionality by HMRC. There was potential to determine the 2009 seizures as only one event and it remained to be considered whether the fuels for all four vehicles came from the same source. In the view of the UT, where proportionality is considered with negligent or inadvertent behaviour in mind, a different decision may have been made. As such, the UT concluded that the FTT had made an error of law in refusing a further review of the second Restoration Decision.

The UT noted that the FTT's decision refusing a further review of the Revocation Decision was made on the basis that there were large quantities of laundered fuel on the Appellant's premises, which demonstrated a breakdown in company procedures and due diligence which did not warrant the Appellant keeping its RDCO status. The UT also noted that HMRC's policy does not cover situations where there is no deliberate misuse of controlled oils, and HMRC had not considered this possibility when it made the Revocation Decision. The UT said that the consideration of irrelevant factors would not have led to the same conclusion. As such, proportionality had not been considered by HMRC and it concluded that the FTT had made an error of law in refusing a further review of the Revocation Decision.

The UT determined that the FTT's errors of law were significant. Consequently, the UT decided to remake the FTT's decisions. The second Restoration Decision and the Revocation Decision were set aside and HMRC was directed to undertake a further review taking into account the subsequent findings of fact and the issue of proportionality.

Comment

This decision provides a timely reminder that HMRC's policies must take into account a range of circumstances and must be proportionate. Where HMRC makes a decision which is disproportionate having failed to properly consider all the relevant facts, it is likely that such a decision will be amenable to successful challenge.

A copy of the decision can be found here.

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Corporate Messengers Worldwide Ltd – HMRC erroneously issued penalties for customs duty and VAT

In *Corporate Messengers Worldwide Ltd v HMRC*[3], the FTT partially allowed an appeal against a post-clearance demand note (C18) for customs duty in the sum of £7,782.70, VAT in the sum of £143,047.49, and a penalty charged under section 26, Finance Act 2003, in the sum of £1,000.

Background

This case concerned the inward processing (IP) relief customs procedure. IP relief enables customs duty and VAT to be suspended or refunded on imports of goods from outside the EU which are processed inside the EU and then later re-exported.

Corporate Messengers Worldwide Ltd (the Appellant), applied for IP authorisation. On 3 October 2014, HMRC informed the Appellant that its application was approved and valid for the period 1 September 2014 to 30 April 2016. The letter:

- requested that the Appellant read HMRC's Public Notice (PN) 221 and confirmed that first use of the authorisation number would be treated as confirmation that the Appellant would comply with the conditions of the approval
- informed the Appellant that it would be responsible for the duty and associated charges on all goods entered and processed and for ensuring records were kept detailing the processing operations carried out
- informed the Appellant that the authorisation number must be quoted on all import transfer and export declarations.

On 11 November 2014, HMRC's National Import Reliefs Unit wrote to the Appellant in relation to its use of IP with a Simplified Authorisation (SIP). HMRC advised the Appellant that SIP was designed for occasional use only, with a maximum of 10 uses in a 12 month period. The Appellant had used SIP 44 times in the period from 17 December 2012 to 17 December 2013. The Appellant

[3] [2017] UKFTT 773 (TC).

was advised to apply for IP authorisation or, if it already held such authorisation, to use that for future imports. The Appellant was allowed to continue to use SIP until 11 February 2015. This was later extended to 31 August 2017, as a transitional measure as a result of the Union Customs Code replacing the Community Customs Code (CCC) in relation to Customs Procedures with Economic Impact, of which IP was one.

On 30 April 2015, the Appellant wrote to HMRC requesting that it be permitted to amend the IP authorisation by the addition of six further Customs Codes (CCs).

On 19 October 2015, HMRC informed the Appellant that its request was agreed, with retrospective effect from the date of application.

HMRC's CITEX Operation Individuals and Small Business Compliance unit (ISBC) visited the Appellant's premises on 15 December 2015 to conduct an audit. The audit identified that one CC declared was not on the authorisation list. On 2 February 2016, a customs civil penalty warning letter was issued in relation to the CC infraction. HMRC on this occasion decided not to charge a penalty.

On 23 June 2016, ISBC wrote to the Appellant to advise that they had undertaken a review of the Appellant's IP Suspension Bills of Discharge (C&E812) for the period 21 September 2011 to 31 March 2014. The review "holistically examined" imports to the IP regime and identified the following five issues that required the Appellant's immediate attention:

(1) on two occasions the C&E812 showed an incorrect Customs Procedure Code
(2) only one bill of discharge should be received each quarter
(3) CCs for which the Appellant was not authorised had been used
(4) on three occasions the Appellant was shown as the consignee of goods which had not been shown on the C&E812s (HMRC queried how the goods had been disposed of and advised of its intention to raise a post clearance demand note (C18) to recover the customs duty and VAT on these items)
(5) there was no evidence of any of the goods on the bills of discharge being exported from the EU because the Appellant's Economic Operator Registration Identification (EORI) number was not shown in box 2 on the export declarations (evidence of how the goods moved from the UK to outside the EU was requested and HMRC advised of its intention to raise a post clearance demand note (C18) to recover the customs duty and VAT on these items).

HMRC requested comments in relation to the discrepancies listed above within 30 days and in the absence of a response it informed the appellant that it would issue a post clearance demand note (C18) in the sum of £150,830.19.

The Appellant responded to HMRC by email on 6 July 2016, admitting it had made a mistake in relation to issues 1 and 2. As to issue 3, the Appellant explained it was due to items being entered for import before arriving at the Appellant's warehouse. In respect of issue 4, the Appellant said this had been a genuine mistake due to human error. On issue 5, the Appellant advised that as a freight forwarding company, which does not buy and sell goods and does not import and export goods, filling in box 2 of the export declaration was not necessary.

HMRC responded to the Appellant's letter on 4 August 2016, stating that it had not changed its view. Accordingly, on 26 August 2016, a post-clearance demand note (C18) was issued in the sum of £150,830.19. On 30 August 2016, the Appellant requested a review of the decision to issue the post-clearance demand note (C18) and on 20 October 2016, the decision was upheld on review.

On 27 October 2016, HMRC issued to the Appellant a penalty assessment for a serious error, in the sum of £1,000.

On 15 November 2016, the Appellant appealed to the FTT the post clearance demand note (C18) and the penalty assessment.

FTT decision

The appeal was partially allowed.

The FTT considered two issues:

(1) were unauthorised CCs used on some occasions?
(2) was it lawful to issue post-clearance demand notices for failure to insert the requested details in box 2 of the export declaration?

In relation to the first issue, the FTT concluded that unauthorised CCs were used on some occasions and this was a breach of Article 204 of the CCC and it was not possible to apply for CC's retrospectively as HMRC's PN 221 does not permit retrospection. There was obvious negligence by the Appellant and a customs debt was incurred.

Pursuant to section 16(5), Finance Act 1994, the FTT reduced the customs duty claimed from £7,782.70 to £5,535.96 and the VAT demand from £143,047.49 to £29,437.98.

In relation to issue two, the FTT concluded that HMRC was incorrect to issue a post-clearance demand note (C18) for failure to complete box 2 of the export declaration. There was no failure under Article 203 CCC as there was no physical removal, nor any failure to present, nor any use of a wrong CPC that could have led to the goods acquiring Community goods status. There is nothing in the authorisation that requires the entry in box 2 of the export declaration to show the Appellant's EORI number and Article 204 does not therefore apply. The Appellant as a forwarder or agent did not own or have a right to dispose of the goods which were subject to IP. It followed that the Appellant was not obliged to complete box 2 of the export declaration.

The FTT held that the penalty was not properly imposed for the alleged failure and it was therefore quashed.

Comment

This decision confirms that those operating IP authorisations cannot apply retrospectively for CCs and authorised codes must be used at the relevant time. The decision also confirms that there is no requirement for freight forwarders to insert their name and EORI number in box 2 of the export declaration.

A copy of the decision can be found here.

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