Customs and excise quarterly update

August 2019

In this update we report on (1) revised guidance on the Customs Special Procedures for the Union Customs Code; (2) the consultation HMRC has opened into proposed changes to the rules for red diesel used in private pleasure crafts; and (3) the government's programme to replace EU international agreements with bilateral agreements ready for the UK's exit from the EU.

We also comment on three recent cases relating to (1) whether HMRC has the power to permit temporary trading pending the determination of an appeal to the First-tier Tribunal; (2) excise wrongdoing penalties raised out of time; and (3) an appeal against an assessment for unpaid excise duty.

News

Changes to the Customs Special Procedures under the Union Customs Code

On 12 July 2019, HMRC published updated guidance on the Customs Special Procedures for the Union Customs Code, in Notice 3001. The Notice explains the generic aspects of the Customs Special Procedures under the Union Customs Code. more›

Diesel fuel used in private pleasure crafts

On 15 July 2019, HMRC opened a consultation on proposed changes to the rules for red diesel used in private pleasure craft, as a result of the judgment of the Court of Justice of the European Union (CJEU) in *European Commission v United Kingdom* (C-503/17), which require private pleasure crafts to use white diesel rather than red diesel. more›

Replacing EU International Agreements with Third Countries

On 17 July 2019, the Treasury published written statement HLWS1693, which details the work being undertaken by the government to replace EU Customs Cooperation and Mutual Administrative Assistance agreements with UK third country bilateral agreements, in preparation for the UK's exit from the EU. The aim is to ensure that the UK can maintain the benefits of the EU international agreements it is currently party to. more›

Case reports

OWD – HMRC unable to permit temporary trading pending appeal

In *OWD Ltd trading as Birmingham Cash and Carry (in Liquidation) and Anor v HMRC*, the Supreme Court has held that HMRC does not have power, under section 88C, Alcohol Duties Liquor Act 1979 (ALDA), or section 9, Commissioners for Revenue and Customs Act 2005

Any comments or queries?

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

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

(CRCA), to permit temporary trading pending the determination of an appeal to the First-tier Tribunal (FTT) against HMRC's refusal to grant approval under the Alcohol Wholesalers Registration Scheme (AWRS). more›

JC Harness – excise wrongdoing penalties dismissed as imposed out of time

In *JC Harness & Co and DDS Supplies Ltd v HMRC*, the FTT discharged excise wrongdoing penalties, as they had been raised out of time. more›

Quinn – lorry driver had no knowledge of whether excise duty had been paid

In *Gerald Quinn v HMRC*, the FTT allowed an appeal by a lorry driver against an assessment for unpaid excise duty in relation to a large consignment of wine that he had driven from France to England, due to a lack of actual or constructive knowledge on his part as to whether duty had been paid. more›

News

Changes to the Customs Special Procedures under the Union Customs Code

On 12 July 2019, HMRC published updated guidance on the Customs Special Procedures for the Union Customs Code, in Notice 3001. The Notice explains the generic aspects of the Customs Special Procedures under the Union Customs Code.

Before any special procedure can be used, authorisation must be given by HMRC.

Paragraph 2.19 of the Notice contains a list of exclusions from using the authorisation by customs declaration procedure. The Notice has updated the list to include outward processing goods (unless they are repair goods).

Annex D, which covers inward and outward processing, has also been updated at paragraph 5.19. This paragraph clarifies the conditions which must be satisfied if you wish to use outward processing relief for exporting and re-importing gold and jewellery.

1. The carat and quantity of the gold being exported must first be determined.

2. When the gold has been turned into jewellery and is being re-imported, there must be confirmation from the jewellery manufacturer that gold of the same carat and weight has been made into the jewellery being imported.

The Notice can be viewed here.

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Diesel fuel used in private pleasure crafts

On 15 July 2019, HMRC opened a consultation on proposed changes to the rules for red diesel used in private pleasure craft, as a result of the judgment of the Court of Justice of the European Union (CJEU) in *European Commission v United Kingdom* (C-503/17), which require private pleasure crafts to use white diesel rather than red diesel.

In its judgment, the CJEU held that the UK's current taxation rules which allow private pleasure crafts to use red diesel, with duty paid on it at the lower white diesel rate, contravenes the Fuel Marker Directive.

HMRC wishes to ensure that as there is a variation of duty between European Union member states, any misuse of diesel crossing European Union borders is detected.

The government intends to implement the judgment by requiring private pleasure craft to use white diesel for propulsion, and seeks evidence about the impact this will have on users of diesel propelled craft.

The consultation is open until 23.45 on 9 September 2019.

The consultation document can be viewed here.

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Replacing EU International Agreements with Third Countries

On 17 July 2019, the Treasury published written statement HLWS1693, which details the work being undertaken by the government to replace EU Customs Cooperation and Mutual Administrative Assistance agreements with UK third country bilateral agreements, in preparation for the UK's exit from the EU. The aim is to ensure that the UK can maintain the benefits of the EU international agreements it is currently party to.

The UK third country bilateral agreements will ensure cooperation between customs authorities in facilitating legitimate trade and fighting customs fraud. They will also set out a legal framework for exchanging information regarding customs matters between the UK and international parties.

The written statement can be viewed here.

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Case reports

OWD – HMRC unable to permit temporary trading pending appeal

In *OWD Ltd trading as Birmingham Cash and Carry (in Liquidation) and Anor v HMRC*[1], the Supreme Court has held that HMRC does not have power, under section 88C, Alcohol Duties Liquor Act 1979 (ALDA), or section 9, Commissioners for Revenue and Customs Act 2005 (CRCA), to permit temporary trading pending the determination of an appeal to the First-tier Tribunal (FTT) against HMRC's refusal to grant approval under the Alcohol Wholesalers Registration Scheme (AWRS).

Background

Finance Act 2015, introduced the AWRS scheme requiring wholesalers supplying duty-paid alcohol to be approved by HMRC under section 88C, ALDA.

OWD, together with a number of other wholesalers (the wholesalers) were already involved in the wholesale supply of duty-paid alcohol when the AWRS scheme was introduced. They applied to HMRC for AWRS approval. The applications were refused as HMRC was not satisfied that they were "fit and proper" persons.

The wholesalers appealed to the FTT and requested that HMRC allow them to continue to trade pending determination of their appeals. HMRC refused and the wholesalers challenged HMRC's refusal by way of judicial review proceedings.

The challenge was dismissed in the High Court and the wholesalers appealed to the Court of Appeal. The Court of Appeal held that temporary approval can be granted to a person under section 88C, ALDA, but not under section 9, CRCA.

The wholesalers appealed and HMRC cross-appealed, to the Supreme Court.

Before the Supreme Court, the following two issues were considered:

1. what power does HMRC have to permit a person to carry on trading pending the determination of an appeal to the FTT; and

2. if HMRC does not have such a power or it refuses to exercise it, what interim relief can the High Court grant?

Supreme Court judgment

The Supreme Court allowed HMRC's appeal against the Court of Appeal's decision that HMRC has the power to permit temporary trading under section 88C, ALDA and dismissed the wholesalers' appeal against the Court of Appeal's determination that HMRC does not have the power to permit such temporary trading under section 9, CRCA.

With regard to whether HMRC has power under section 88C, the Supreme Court was of the view that as HMRC had concluded that the wholesalers were not fit and proper persons, it does not have the power to grant temporary approval and the Court of Appeal was correct to conclude

1. [2019] UKSC 30.

that consideration of hardship and the impact of the decision were not material to an evaluation under section 88C of whether a person was a fit and proper person.

Having found that there was no power under section 88C, ALDA, the Court turned to whether there was a power under section 9(1), CRCA, which permits the Commissioners to do anything they consider "necessary or expedient in connection with the exercise of their functions, or incidental or conducive to the exercise of their functions". The Court concluded that section 9 does not provide an alternative route to section 88C. This is not only because section 88C permits authorisation under that section, but also because of the attributes of the whole scheme of which section 88C forms part. If HMRC uses section 9 to allow a trader to continue to trade, HMRC would be holding them out as a "fit and proper" person when it has formed the opposite view under section 88C.

In relation to the second issue regarding the interim relief powers of the High Court, the Supreme Court noted that if the High Court was to order HMRC to grant temporary approval pending an appeal where HMRC has concluded that the wholesaler is not a "fit and proper" person, it would be requiring HMRC to be satisfied that the wholesaler was a "fit and proper" person, contrary to its actual conclusion. The High Court's power to issue an injunction is exercisable for the purpose of making a person do something that was within that person's power to do. In the situation under consideration, HMRC did not have such a power. However, as the case for relief was not made out and there had been an absence of debate in relation to it, the Supreme Court decided not to express a definitive conclusion on this issue.

Comment

As the Supreme Court has confirmed that (1) HMRC does not have power to permit temporary trading pending the determination of an appeal to the FTT against its refusal to grant approval under the AWRS; and (2) the High Court cannot grant interim relief, in the form of an injunction permitting temporary trading, taxpayers who have been refused HMRC approval under the AWRS, will have to apply to the FTT to expedite their appeals. Given that the FTT is already very busy, it is difficult to see how it will be able to cope with an influx of requests for expedited appeals.

The Supreme Court also commented that the AWRS legislation may be incompatible with the ECHR and it will be interesting to see if the government amends the legislation to permit temporary trading pending the determination of an appeal to the FTT.

The judgment can be viewed here.

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JC Harness – excise wrongdoing penalties dismissed as imposed out of time

In *JC Harness & Co and DDS Supplies Ltd v HMRC*[2], the FTT discharged excise wrongdoing penalties, as they had been raised out of time.

Background

Between 30 June 2010 and 31 January 2012 (the Relevant Period) JC Harness & Co (JCH) purchased 113 loads of wine from Dawson's (Wales) Ltd (Dawsons) and sold them to WM

2. [2019] UKFTT 272 (TC).

Morrisons PLC (Morrisons). At no time did JCH have physical possession of the wine. DDS Supplies Ltd (DDS), acting as broker, arranged the purchase.

HMRC visited JCH's premises on 30 November 2011 and concluded that excise duty had not been paid on the wine. In 2012, JCH provided HMRC with details of its purchases from Dawsons during the Relevant Period.

In 2013, Dawsons was assessed to excise duty in respect of the wine. Morrisons were assessed for a penalty in respect of the same goods in 2014. On 24 April 2016, HMRC purportedly assessed JCH to a penalty. These penalty assessments were withdrawn in early 2017, as HMRC concluded that they had been improperly raised.

On 22 May 2017, penalty assessments in a different amount were imposed on JCH, under Schedule 41, Finance Act 2008 (FA 2008), due to a duty rate change part way through the Relevant Period. The change had not been reflected in the previous withdrawn assessments and had only been identified by HMRC in February 2017.

In June 2017, HMRC imposed excise wrongdoing penalties on both JCH and DDS, under Schedule 41, FA 2008, which were appealed to the FTT. HMRC subsequently revised the penalties down in October 2018.

The FTT hearing was a preliminary issue hearing to determine whether the penalty assessments, issued to JCH on 22 May 2017, were out of time on the basis that Dawsons had been assessed to excise duty in respect of the wine in 2013.

FTT decision
The penalty assessments were discharged.

The time limits for imposing penalties under Schedule 41, FA 2008, are set out in paragraph 16 of that Schedule. Paragraph 16(4)(a), directs that a penalty assessment must be made within 12 months from the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed. Alternatively, paragraph 16(4)(b), prescribes that if there is no such assessment, the time limit is 12 months from the date on which the amount of tax unpaid, by reason of the relevant act or failure, is ascertained.

JCH and DDS argued that the paragraph 16(4)(a) time limit was irrelevant to the penalty assessments because there was no tax assessment. Therefore, the default time limit period under paragraph 16(4)(b), applied. However, that time limit had expired several years before the assessments were imposed. Even though HMRC had recalculated the quantum of the penalty in 2017, such a recalculation could not restart the clock for the purpose of time limits.

HMRC contended that paragraph 16(4)(a) was applicable because the assessment on Dawsons was an assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalties were imposed. Additionally, the appeal period for the assessment had not expired as Dawsons had appealed the assessment and was awaiting determination.

The FTT considered the recent case of *General Transport SpA*[3], which is currently on appeal to the Court of Appeal.

In *General Transport*, there had been an assessment to an excise duty wrongdoing penalty in respect of a movement of wine on which the customer had been assessed to pay the duty. Before the assessment to a penalty, the appellant had been assessed for the duty, but HMRC had subsequently withdrawn that assessment and assessed the customer for the duty instead.

The FTT concluded in that case that the penalty assessment was in time under paragraph 16(4)(a) because it was assessed within 12 months of the end of the appeal period for the withdrawn assessment on the appellant. The Upper Tribunal (UT) overturned the FTT's decision on the basis that Parliament could not have intended that the withdrawn assessment should still drive the determination of a time limit under paragraph 16(4)(a).

In the alternative, the FTT had also found that the penalty assessment was timely because it was within the 12 months of the end of the appeal period for the assessment on the customer. The UT determined that the "relevant act or failure" was the taxpayer's act or failure in acquiring possession of the wine at a time when payment of duty was outstanding. The UT reasoned that paragraph 16(4)(a) does not consider blame, it simply determines whether the taxpayer's act or failure caused the tax assessed on the customer to be unpaid. The UT concluded that it did. The acts of the taxpayer in arranging transport of the wine caused it to come into the UK in circumstances where UK excise duty was not paid. Such a conclusion would have followed whether or not the taxpayer was to blame. Therefore, paragraph 16(4)(a) requires a causal connection such that the tax is ascertained less than 12 months before the penalty is assessed on the taxpayer.

Were the assessments in time under paragraph 16(4(a)?
The FTT considered that it was bound by the UT's decision in *General Transport*. In the view of the FTT, the relevant act of JCH and DDS was dealing in the goods after the assessed duty point arose.

Although there are other UT decisions which establish that the same goods can have more than one duty point (see for example *B&M Retail Ltd*[4] and *Davison & Robinson*[5]), paragraph 16(4)(a) sets a time limit for assessment of a penalty by reference to the duty point for which the duty assessment was raised. The only duty assessment on the goods in question was the one raised against Dawsons, so the duty point assessed by that assessment was necessarily before JCH and DDS dealt in the goods. As such, paragraph 16(4)(a) was irrelevant for the purpose of these appeals and the appropriate time limit was contained in paragraph 16(4)(b).

Were the assessments in time under paragraph 16(4)(b)?
The FTT considered when the duty was "ascertained" for the purpose of paragraph 16(4)(b). JCH and DDS argued that "ascertained", in paragraph 16(4)(b), refers to when the duty is first ascertained, not when it is re-ascertained following a recalculation. HMRC argued that the amount of tax was not ascertained until February 2017, when the correct rate of duty was identified, notwithstanding the previously withdrawn incorrect assessment. The penalty assessments were therefore raised within the 12 month time limit.

3. [2019] UKUT 4 (TCC).
4. [2016] UKUT 429 (TCC).
5. [2018] UKUT 437 (TCC).

In the view of the FTT, "ascertained" refers to the date the tax was first ascertained after the duty point triggered by the relevant act or failure. HMRC ascertained the duty when it assessed Dawsons to the duty. That was the point it knew the amount of duty unpaid by reason of JCH and DDS' dealing in the wine.

In *General Transport*, the UT had drawn a distinction between tax which had been ascertained and tax which was merely ascertainable. In the FTT's view, the UT in that case had concluded that a re-ascertainment of the tax did not restart the clock. Parliament intended for there to be a cut-off point for the assessments and that errors should not lead to an indefinitely extended time limit for the making of the assessment. The 12 months' time limit to issue a penalty assessment runs from the date when the tax was first ascertained, even if the first ascertainment which resulted in the first penalty assessment contained an error.

The FTT held that the duty on the goods, which was referable to the duty point for which the appellants' penalised behaviour was causally linked, was first ascertained when Dawsons was assessed in 2013. Even though multiple trigger points can arise, the same goods can only be assessed once to excise duty. The duty must have been ascertained before Dawsons was assessed.

The FTT considered that the assessments on Morrisons, JCH and DDS were "re-ascertainments" of the original assessment issued to Dawsons. The FTT held that these re-ascertainments did not restart the clock for making the ascertainment. The FTT considered that even if they did, they were both 12 months before the penalties so the penalty assessments were necessarily out of time. Additionally, the re-calculation of the duty did not restart the clock. It is irrelevant that this re-calculation was within 12 months of the date of the penalty assessments.

Comment

This is an important decision as it confirms the applicability of the time limit provisions contained in paragraph 16, Schedule 41, FA 2008, for excise wrongdoing penalties. Paragraph 16(4)(a) will only apply where there is a causal connection between the duty assessment and the individual's wrongdoing. Paragraph 16(4)(b) will apply where there is no assessment to which the behaviour could be causally linked, such that the relevant date is when the duty was first "ascertained", that being when it could be first ascertained by HMRC.

The decision also highlights that time limits do not restart for HMRC just because it has incorrectly calculated an assessment and re-issued it in the correct sum at a later date. Whilst the decision relates specifically to paragraph 16, Schedule 41, FA 2008, it is important that those in receipt of assessments check to see whether a limitation argument can be relied on.

A copy of the decision can be viewed here.

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Quinn – lorry driver had no knowledge of whether excise duty had been paid

In *Gerald Quinn v HMRC*[6], the FTT allowed an appeal by a lorry driver against an assessment for unpaid excise duty in relation to a large consignment of wine that he had driven from France to England, due to a lack of actual or constructive knowledge on his part as to whether duty had been paid.

Background

In July 2012, the UK Border Force (UKBF) intercepted a vehicle and trailer carrying 15,426 litres of wine (the Goods) travelling from France. Mr Quinn, the driver of the vehicle, stated he worked for a firm called "Quinn Brothers" in Donegal.

Mr Quinn provided the UKBF officers with a CMR (International Consignment Note) for the Goods, which came with a unique 'Administrative Reference Code' (ARC). The same ARC number had earlier been provided by the driver of another vehicle. The UKBF seized the Goods, Mr Quinn's vehicle and the trailer, as liable to forfeiture under Regulation 88, Excise Goods (Holding Movement and Duty Point) Regulations 2010.

HMRC investigated the matter. As it had been unable to locate the haulier or the Quinn Brothers business, on 8 July 2013, it issued an assessment for excise duty on the Goods against Mr Quinn under Schedule 12(1A), Finance Act 1994. On 29 July 2013, Mr Quinn requested a review and the decision to issue the assessment was upheld on 24 September 2013. Mr Quinn appealed.

FTT decision

The appeal was allowed.

The appeal hearing commenced in October 2014. Mr Quinn argued that it was clear he did not own the Goods, the lorry nor the trailer and therefore he did not have standing in relation to forfeiture proceedings under the Customs and Excise Management Act 1979 (CEMA). Mr Quinn also argued that he was a mere courier or custodian of the Goods and he had no actual knowledge of any intention to defraud HMRC, and the relevant law could not impose a liability for excise duty on him.

HMRC argued that as the seizure of the Goods had not been challenged, the Goods were condemned as forfeit by operation of law and HMRC could assess for duty under paragraph 5, Schedule 3, CEMA.

Unusually, no decision was released or provided to the parties after the hearing and so the appeal was re-listed before the FTT in March 2019.

On 25 March 2019, the day before the second hearing of the appeal, HMRC requested an adjournment. This was on the basis that on 19 March 2019 the Court of Appeal's decision in *HMRC v Perfect*[7] was released. The Court intimated in *Perfect* that it intended to make a reference to the CJEU for a preliminary hearing in relation to various questions which were closely linked to Mr Quinn's situation. HMRC argued that since the original hearing of the appeal in October 2014, there had been substantial developments in the case law relevant to the forfeiture of goods, that the ultimate decision in *Perfect* would be determinative of Mr Quinn's appeal and that Mr Quinn would suffer limited prejudice if the case was adjourned as the

6. [2019] UKFTT 208 (TC).
7. [2019] EWCA Civ 465.

payment of the duty had been postponed.

Mr Quinn objected to an adjournment. He argued that the appeal had already been heard once and it was not through any fault on his part that the decision of the FTT had not been handed down.

The FTT noted that two specific cases relied on by HMRC as case law which had developed since October 2014 had in fact been determined before the first hearing of Mr Quinn's appeal and both were referred to in Mr Quinn's skeleton argument which had been prepared for that hearing. Further, the UT in *Perfect* had reviewed and approved both of those cases and most of the other cases relied on in Mr Quinn's skeleton argument, concluding that, based on those authorities, the exception for liability for those who are 'innocent agents' extends to those who lack any actual or constructive knowledge of the fact that the goods are or will be duty paid (HMRC had conceded that Mr Quinn lacked such knowledge).

The FTT also noted that Mr Quinn had been extremely unlucky on at least two counts, being: (1) he could reasonably have expected a decision from the FTT by Christmas 2014 and by waiting until March 2019, the appeal hearing had not been conducted 'in a reasonable timescale'; and (2) if his appeal had been heard a few days earlier, before the Court of Appeal intimated it would make a reference to the CJEU, he might reasonably have expected his appeal to succeed as the cases he relied on were considered and approved in *Perfect*.

In the circumstances, the FTT considered the greater risk of injustice was undoubtedly to Mr Quinn and it refused HMRC's application for an adjournment.

The FTT then considered the appeal. HMRC conceded that if its appeal to the Court of Appeal in *Perfect* failed, then Mr Quinn would succeed. As Mr Quinn advanced many of the same arguments that were accepted by the FTT and the UT in *Perfect*, the FTT allowed Mr Quinn's appeal as it was accepted by HMRC that he had no actual or constructive knowledge and he could not be considered to be the holder of the goods.

Comment
There have been a number of similar appeals to the FTT in recent years and it is to be hoped that the CJEU will provide some much needed clarification in this area when it delivers its judgment in *Perfect*.

The decision also provides a good summary of the factors to be considered by the FTT when determining an application for an adjournment.

The decision can be viewed here.

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Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

38/F One Taikoo Place
979 King's Road
Quarry Bay, Hong Kong
T +852 2216 7000

12 Marina Boulevard
38/F MBFC Tower 3
Singapore 018982
T +65 6422 3000

RPC