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Indirect tax update

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Summary

Welcome to this week's Indirect Tax Update.

This week's main story concerns a judgment from the UK's Supreme Court involving the importation of garlic bulbs from China.

The issue was whether HMRC's demand for the payment of both Customs Duty and Anti-dumping duty in relation to these importations was made within the appropriate time limits.

The case has gone through all levels of the UK's domestic courts starting out in the First-tier Tribunal in 2013 followed by appeals to the Upper Tribunal in 2015 and the Court of Appeal in 2018. The Court of Appeal found in favour of the taxpayer and HMRC appealed to the UK's Supreme Court.

Customs law is governed by EU legislation (the Customs Code) which sets out specific time limits within which a tax authority can seek payment of a customs debt. This is generally limited to three years after the date on which the customs debt is incurred (usually the point of importation). However, the Customs code provides an exception to that general rule. Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period.

HMRC considered that this condition had been met and so it issued a demand to FMX outside the normal three-year window. The Supreme Court has found for HMRC and has allowed its appeal.

Readers will be aware of the recent decision in the case of NewsCorp UK & Ireland where the First-tier Tribunal ruled that the supply of digital versions of newspapers should be treated the same as printed versions for VAT purposes and should be zero-rated. HMRC has announced that it is to appeal that decision but has invited affected business to make claims for any overpaid VAT. These claims will be rejected by HMRC pending the outcome of the appeal.

Finally, we also look at a Court of Appeal judgment in the case of Aria Technology Ltd concerning HMRC's 'assessment' procedures.

United Kingdom Supreme Court – HMRC v FMX Food Merchants Import Export Ltd – (FMX)

Whether HMRC's assessment for Customs Duty within time limit.

This case goes back a long way. In 2003 and 2004, FMX imported a number of consignments of garlic. The garlic was said to have originated in Cambodia but it was discovered subsequently that the garlic had actually originated in China. Under the General System of Preferences (GSP) then in force, the rate of duty payable for garlic originating in Cambodia was 0% whereas the rate for Chinese origin garlic was 9.6%. HMRC issued a post-clearance demand in 2007 (for a number of later importations) against which FMX appealed and, in 2010 the First-tier Tribunal dismissed the appeal finding that the garlic had, in fact, originated in China (the first appeal). In 2011, HMRC then issued post clearance demands for the 2003 and 2004 importations (ie some seven to eight years after the customs debt had been incurred. FMX appealed against the demands (the second appeal) arguing that HMRC were 'out-of-time' to do so.

Customs law is regulated by EU legislation (the Customs Code) which sets out strict time limits for a tax authority to issue demands for the payment of duty. Generally, the tax authority cannot issue a demand more than three years after the date on which the customs debt was incurred (ie the act of importation). However, exceptionally, the Customs Code allows a tax authority to exceed that three year limit in cases where the customs debt arises as the result of "*an act which, at the time it was committed, was liable to give rise to criminal court proceedings*". In this case, the certificates of origin had been falsified to show Cambodia as the country of origin. That falsification amounted to an act that was liable to give rise to criminal proceedings – albeit that FMX were not implicated in relation to the false certificates of origin. Accordingly, HMRC proceeded to issue the post clearance demands for the 2003 and 2004 importations.

Under the Customs Code, demands issued outside the three-year time limit must be issued "under conditions set out in the provisions in force". However, the UK has failed to make any statutory provisions in this regard and FMX argued in its second appeal that, in the absence of a UK statute, the time limit must default back to the three-year rule. Acknowledging that the UK had failed to legislate, HMRC argued that, in the absence of a UK provision, it could rely on the EU general provision (unwritten) that communication of the demand to FMX must be 'within a reasonable time period'. HMRC contended that the act of falsifying the certificates of origin (an act which was liable to give rise to criminal proceedings) meant that the three-year time limit was automatically displaced and, in the absence of a specific UK statute setting out the conditions for issuing demands outside the three-year limit, it was entitled to rely on the EU principle of legal certainty. It had raised the post-clearance demands within 4 months of the original Tribunal ruling which found that the garlic had originated in China.

The First-tier Tribunal had originally allowed FMX's appeal in this second appeal but this was overturned by the Upper Tribunal. FMX then won its appeal to the Court of Appeal and HMRC was granted leave to appeal to the Supreme Court. In its judgment, the Supreme Court has agreed with HMRC and has allowed its appeal. The post clearance demands issued in 2011 relating to imports made by FMX in 2003 and 2004 were made within a reasonable time-frame from the First-tier Tribunal's decision in the first appeal. Accordingly, the post clearance demands were not 'out of time'. HMRC's appeal was allowed.

Comment – it is unusual for a Member State to have to rely on the general principles of EU law in the absence of domestic law. For whatever reason, the UK has failed to implement statutory provisions setting out the conditions for issuing post clearance demands in cases where, as here, the customs debt had arisen as a result of a criminal act. In the circumstances, the Supreme Court was satisfied that HMRC's issue of the demand within four months of the first Tribunal decision was not unreasonable.

HMRC – Revenue & Customs Brief 1/2020

Zero-rating of digital publications

In edition 01/2020 of the Indirect Tax Update we covered the judgment of the Upper Tribunal in the case of NewsCorp UK and Ireland Ltd. That decision concerned the issue of whether the publication of a newspaper in digital format should be treated for VAT purposes as if it were a printed newspaper and zero-rated.

The Tribunal found that the digital version of the newspaper was identical to the print version save that it was provided in an electronic format as opposed to in print. Accordingly, the Tribunal concluded that the UK's VAT law must be regarded as 'always speaking' and must be interpreted in the light of technological developments since the law was enacted. The UK law zero-rating newspapers was enacted in 1973 when the UK joined the EU (as it is now). At that time, the concept of digital publications had not been developed (or even contemplated) but the purpose of zero-rating books and newspapers (to promote literacy and education) is as extant today as it was in 1973. The Tribunal allowed the taxpayer's appeal.

HMRC has now published Revenue & Customs Brief 01/2020 confirming that it has been granted leave to appeal the Upper Tribunal's judgment to the Court of Appeal. This is not likely to be heard for at least 18 months. In the meantime, however, HMRC has invited claims for overpaid VAT from businesses that consider themselves to be in a similar position as NewsCorp. HMRC has stated that, despite the Upper Tribunal ruling (which is legally binding), it has not changed its policy in relation to digital publications. As such, any claims that are submitted will be rejected but businesses will be entitled to lodge appeals with the First-tier Tax Tribunal pending the outcome of the NewsCorp appeal.

Affected businesses should act now and submit claims for any VAT overpaid in the last four years. This should be done with the full expectation that the claim will be rejected and that an appeal will need to be lodged with the FTT.

Comment

Where an organisation considers that the decision in NewsCorp applies to its own supplies of digital publications it should provide HMRC with full details in writing, including:

- a full description of the supplies for which the claim is being made and which item of Group 3 of Schedule 8 the supplies fall

- clear reasons why it is considered that the claim should be treated in the same way as the supplies in the News Corp Upper Tribunal decision

a breakdown of the amounts of overpaid VAT being claimed by prescribed accounting period and the method by which they have been calculated

A claimant must be able to give, on request, copies of documentation used in the calculation of a claim. If insufficient information is given in support of a claim it will be rejected and the organisation will need to resubmit its claim with the requisite information.

Court of Appeal – Aria Technology Ltd

Whether an assessment had been made

The issue in this case was whether, in the circumstances, HMRC had issued an assessment and notified it to the taxpayer. UK VAT law states that where HMRC consider that a VAT return is incorrect, it may raise an assessment of the amount due and notify it to the taxpayer. In normal circumstances, HMRC will issue a document entitled 'Notice of Assessment' but, in some cases, (as here), HMRC will amend a return by writing to the taxpayer.

In this case, the taxpayer traded in CPU's. HMRC took the view that the transactions were connected to VAT fraud and, accordingly, it denied the appellant the right of recovery in relation to £750,000 of input tax. Instead of issuing a 'Notice of Assessment' to recover the input VAT claimed, HMRC amended the VAT return for the period 07/2006. This was notified to the appellant by way of a letter issued in October 2008.

The appellant argued that HMRC had failed to make a valid assessment. It argued that the alteration of the VAT return by HMRC was not an assessment. All that had happened was that HMRC had denied the recovery of input VAT and HMRC's letter advising what it considered to be the correct amount of VAT due for the period could not be considered to be an assessment.

The Court of Appeal disagreed. The reasonable reader would have understood HMRC's letters, read together as they had to be, as recording and notifying a determination by the Commissioners of the amount of VAT assessed as being "due" and, moreover, as being due "now". On an objective analysis, they did record an "assessment" of the VAT due and were not simply a correction of the figures set out in the VAT return which had been submitted by the Appellant.

Comment

It is not uncommon for HMRC to 'amend' a VAT return and to write to the taxpayer advising of such amendment.

This judgment confirms that the issue of such a letter – setting out the correct liability from HMRC's perspective is, objectively, an assessment.

The difficulties in this case arose from HMRC's misconception that an 'assessment' cannot be raised in cases where a VAT return has not been 'processed'. The Court disagrees.

In its closing remarks to the judgment, the Court of Appeal suggested that HMRC should review its internal procedures to ensure that the making of such assessments along with notification to the taxpayer are recorded internally within HMRC.

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