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Indirect tax update

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Summary

Welcome to this week's Indirect Tax Update.

There have been no VAT judgments or decisions issued this week from the UK courts or tribunals so this week's ITU focuses on two policy documents issued by HMRC and a judgment from the Court of Justice.

The first policy paper relates to import VAT and HMRC's amended policy only to allow the legal owners of goods imported into the UK to reclaim the VAT paid on importation. This policy change was announced in 2019. The policy change has a significant impact on many businesses which import goods but which are not the legal owners of the goods. A number of these businesses and their representatives had made representations to HMRC and HMRC has, as a result, reviewed its new policy. This week, HMRC announced that, following that review, the new policy is confirmed as being correct.

The second policy paper sets out the changes that are to be introduced post 'Brexit' on the VAT treatment of overseas goods sold to customers in the UK after 1 January 2021. Whether overseas businesses sell goods directly to UK customers or sell them through online platforms / marketplaces there are some important changes being introduced on how VAT on such supplies is to be collected and accounted for.

Finally, we look at the Court of Justice judgment in the case of United Biscuits Pension Trustees. This case concerns the issue of whether certain fund management services should be classified for VAT purposes as "insurance" transactions and, thus, exempt from VAT.

The Advocate General issued an opinion in May 2020 confirming that, in his view, the investment management services could not be regarded as insurance transactions because there was no agreement to cover any particular risk in return for consideration.

The Court has now issued its judgment in line with the AG's opinion.

HMRC Policy – Recovery of Import VAT

Whether import VAT can only be reclaimed by the owner of the imported goods

In April 2019, HMRC issued Revenue & Customs Brief 02/2019 which confirmed a change of policy in relation to the recovery of import VAT (ie the VAT paid on the importation of goods from outside the EU). The Brief confirmed that only the legal owners of the imported goods could reclaim that VAT. It acknowledged that the published guidance at the time was unclear and that it was aware that many businesses that did not own the goods imported were reclaiming the import VAT incorrectly. In light of the acknowledged lack of clarity, HMRC confirmed that the new policy – that only the legal owners of the goods were entitled to reclaim the import VAT – would not be enforced until 15 July 2019.

There are many situations where the importer of goods may not be the legal owner. For example, agents acting on behalf of a principal or businesses that simply process another person's goods. Similarly, where goods are leased or hired the lessor (owner) will not be established in the UK and the lessee will import the goods for its own use for the term of the lease. Given the impact of this new policy, many businesses and their representatives challenged HMRC and on 2 October 2020, HMRC announced the results of its policy review undertaken in light of those challenges.

Revenue & Customs Brief 15/2020 sets out the results of that review. In simple terms, despite all of the representations, HMRC maintains that its new policy is correct and should continue to be applied. The Brief sets out HMRC's response to a number of scenarios. As far as agents are concerned, the Brief confirms that where an agent imports goods and he is acting in his own name but on behalf of another then the agent is regarded as importing and supplying the goods as principal. In such circumstances, the agent is entitled to reclaim the VAT paid at import but must also account for output VAT in the normal way when the goods are supplied onwards.

Where goods are imported to a customs warehouse, the point of importation is delayed until the goods are released into free circulation from the warehouse. HMRC states that where goods are supplied in the UK before they are released to free circulation, the legal owner will change before the import entry. Consequently, the new owner of the goods (the customer to whom the goods have been supplied in the warehouse) will become the legal owner and will be entitled to import VAT recovery. Where, however, legal title transfers after the goods have been released from the warehouse, the legal owner will then supply the goods to the customer and will be required to register for UK VAT but will also be entitled to reclaim the import VAT.

As far as leased goods are concerned, HMRC considers that there are two taxable events. The first is the importation of the goods themselves. The lessor remains the legal owner of the goods during the course of the lease contract and, as a consequence, is the only entity entitled to reclaim the import VAT. The second taxable event is the actual lease of the goods to the customer. Where VAT is due on the lease, the customer will, in the majority of cases, account for any VAT due on the periodic lease charges and will be entitled to reclaim the VAT on these charges subject to the normal rules.

Comment – Having reviewed its policy change, HMRC has confirmed that the policy remains as set out in Brief 02/2019. This will have a significant impact on many businesses and will impact many more after the end of the Brexit transition when import VAT will become due on most goods arriving in the UK. In the circumstances, the matter may now be challenged in the courts. In the meantime, businesses importing goods will need to ensure that they are the legal owners of the goods at the time of importation if they are to reclaim any VAT paid.

Preparing for Brexit – HMRC Guidance

Changes to the VAT treatment of overseas goods sold to UK customers from 1 January 2021

HMRC has, this week, published further guidance for businesses in relation to the VAT treatment of overseas goods sold to UK customers after the Brexit transition period ends.

From 1 January 2021 new VAT rules are to be introduced to deal with situations where goods are sold to UK customers by overseas sellers. This will ensure that goods from EU and non-EU countries are treated in the same way and that UK businesses are not disadvantaged by competition from VAT free imports. Where goods are imported with a value below £135, no import VAT will be due. However, the sellers of the goods will either be obliged to register for UK VAT and account for VAT on the supply to the UK customer or, if the goods are sold via an online marketplace, the VAT due on the supply will be collected and accounted for by the online marketplace. The guidance also confirms that these new rules will apply to B2B transactions where the goods are valued below £135 unless the customer provides his UK VAT number to the supplier – in which case the customer will account for any VAT due under the reverse charge.

Where goods are physically located in the UK and are sold through an online platform or marketplace, the new rules will mean that the marketplace will become responsible for accounting for any VAT due on the supply of those goods in the UK.

Whilst no import VAT will be due on goods valued at less than £135, HMRC confirms that customs clearance formalities will still need to be followed for non-fiscal reasons (ie collection of trade statistics). With only 90 or so days left to go until the end of the transition period, overseas businesses selling goods to UK customers and online platforms / marketplaces which facilitate such supplies need to give urgent attention to these new UK VAT accounting rules.

Comment

These new rules are intended to ensure that UK businesses selling goods to UK consumers are not put at a commercial disadvantage by ensuring that overseas suppliers – selling the same goods to the same consumers – cannot do so on a VAT free basis.

Overseas businesses that sell directly to UK consumers will be required to register for UK VAT and to account for UK VAT through a UK VAT return. However, where such suppliers sell the goods to UK consumers via an online platform / marketplace, HMRC will make the platform / marketplace liable to account for any VAT due.

With only 90 or so days to go before the end of the transition period, affected businesses need to consider their UK VAT obligations as a matter of some urgency.

Court of Justice of the European Union – Judgment – United Biscuits Pension Trustees Ltd

Whether investment management services may be classified as 'insurance' transactions

Historically, the UK had treated the supply of fund management services by an insurance business as exempt from VAT in accordance with the provisions of the EU's First Life Insurance Directive. However, in his opinion published in May this year, the Advocate General was of the view that the investment management services provided by a fund manager to a pension scheme did not qualify as 'insurance' services. This view was based on the fact that the services provided by the fund manager did not meet the definition of insurance services that has been established by the Court in earlier cases. This was because the services in question did not involve the agreement by the supplier to cover any type of risk in return for payment by the customer of consideration. In the absence of such an agreement, the AG concluded that the fund management services were not insurance transactions in the proper sense of that expression.

The CJEU has now issued its judgment and, agreeing with the Advocate General, has confirmed that the fund management services supplied to the pension scheme Trustees by both insurance businesses and non-insurance businesses were not insurance transactions as they do not provide any form of indemnification for the materialisation of risk.

The matter will now return to the UK Court of Appeal but it seems that this is the end of the road for United Biscuits and other pension schemes that were stood behind this case.

Comment

United Biscuits Pension Trustees (UBPT) incurred VAT on the supply of fund management services by fund managers that were not classed as insurance businesses. It brought a claim against HMRC to recover this VAT as it argued that the services should have been exempt from VAT and treated the same for VAT purposes as the services provided by insurance businesses.

The Court of Justice has now confirmed that, as there was no contract of insurance neither supply met the definition of "insurance transactions" established by the Court. The fund management services did not involve any agreement to indemnify UBPT for the materialisation of any risk. Accordingly, the services were not insurance transactions and were not, therefore, covered by the VAT exemption provided for in Article 135(1)(a) of the VAT Directive.

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