The Personal Tax Planning Review

VALUE ADDED TAX ON THE IMPORTATION OF EXCISE GOODS

Robert Venables QC

1 The Problem

1.1 The Single Market

Whatever else may have happened on 1st January 1993, it was not the introduction of a single market in the European Community, with free movement of goods as between member states and elimination of all fiscal frontiers, the aim of the European Community Treaty.[1] While we have moved somewhat closer to that happy state, how much closer is acutely controversial.

1.2 Excise Duty on Transported Excise Goods

One burning question, currently being litigated, is whether excise goods which private individuals have obtained duty-paid in one member state of the Community may then be transported to another member state without further payment of excise duty. The Court of Appeal is provisionally of the view that the immunity from excise duty in the state of importation is conditional upon the goods being personally accompanied by their owner at the time of importation, although the matter has been referred to the European Court of Justice for a preliminary ruling.[2] As Leading Counsel for the applicants, it would not be appropriate for me to comment at this stage on the merits of that dispute or on the novel cannons of construction applied by the Court of Appeal.

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[1] See Article 7A.

[2] See *R v Commissioners of Customs & Excise ex parte Emu Tabac SARL et al.* (referred to in this article as "the *Emu* case", Court of Appeal 31st July 1995, a case involving principally "Death" brand cigarettes. It appears that excise duty is not within the scope of STI or STC as the decision is not reported in either of these publications.

1.3 Value Added Tax on Transported Excise Goods

1.3.1 The Question

Instead, I consider in this article another related matter which, fortuitously, is not being decided in the current round of litigation, namely whether excise goods which private individuals have obtained subject to the payment of value added tax in one member state of the Community may then be transported to another member state without further payment of that tax, whether or not they are accompanied by their owners when they cross the border.

1.3.2 Is the Question Academic?

Is the point, it might be asked, of any interest, given that rates of value added tax, unlike rates of excise duty, have been harmonised throughout the Community? The answer is that indeed in general it does not matter very much to the consumer, but the case of excise goods is very special. For the tax base by reference to which value added tax is calculated in each member state includes the excise duty exigible.[3] The excise duty payable in some Latin or Orthodox country is likely to be a fraction of that payable in a more northern country, to the extent that in the latter the excise duty will form the preponderant determinant in the purchase price.

According to evidence filed in the *Emu* case, over three billion pounds a year of value added tax on cigarettes and tobacco products alone could be lost to the United Kingdom Exchequer if the duty is not exigible on unaccompanied importation.

1.3.3 Why is the Question not being Litigated in the *Emu* case?

The claim of the Commissioners of Customs & Excise in the *Emu* case was that excise duty was exigible under Article 10 of Council Directive 92/12/EC ("the Directive") in that the First Applicants were involved in distance selling covered by that Article. If that was correct, then it followed that United Kingdom value added tax was also exigible on importation of the excise goods into the United Kingdom. See 3.3.2.2 below.

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[3] In the UK, the statutory authority is Value Added Tax Act 1994 Schedule 6 paragraph 3, which provides that "where any goods whose supply involve their removal to the United Kingdom ... are charged in connection with their removal to the United Kingdom with a duty of excise ... then the value of the supply shall be taken for the purposes of this Act to be the sum of its value apart from this paragraph and the amount, so far as not already included in that value, of that duty ... which has been paid or is to be paid in respect of the goods."

The Applicants claimed immunity from United Kingdom excise duty on importation of excise goods by virtue of Article 8 of the Directive, which provides that "As regards products acquired by private individuals for their own use and transported by them, the principle governing the internal market lays down that excise duty will be charged in the Member State in which they are acquired." They accepted that if Article 10 applied, then it overrode Article 8. The Court of Appeal appears to have been of the view that neither Article 8 nor Article 10 applied. If that is right, excise duty will be exigible on importation of the goods into the United Kingdom but value added tax will, in my opinion, not, for the reasons given below.

Before the first instance hearing, it had been agreed between the Applicants and the Respondent and stated in open court that value added tax would not be exigible on the importation if excise duty were not exigible. Hence the success of the application would be conclusive also as to value added tax.

There would have been little point in the Applicants applying to amend the application to determine what had now become a separate value added tax question, as the primary relief sought was an injunction restraining the Commissioners of Customs & Excise from seizing the excise goods on importation. If excise duty was exigible and had not been paid, then the seizures were justified on that ground, quite apart from whether or not they would also have been justified on account of non-payment of value added tax.

In fact, although the notices of seizure referred to unpaid value added tax as well as excise duty and Imperial Tobacco plc, the interveners, raised value added tax issues at first instance,[4] Counsel for the Commissioners laid great stress on the fact that value added tax was not in issue in the proceedings and seemed very concerned to say as little as possible on the matter.

2 Another View

In the *Emu* case, the interveners filed "expert" evidence of United Kingdom value added tax law, sworn by a certain gentleman employed by a leading firm of chartered accountants who appears to have no legal qualifications whatsoever.[5]

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[4] According to their evidence, if the applicants were to succeed, the loss to the Exchequer would be of broadly similar amounts of value added tax and excise duty, enough to compel the Chancellor to raise basic rate income tax by several pence in the pound to compensate.

[5] No lawyer would, of course, have dreamed of purporting to give "expert" evidence of English law to an English judge. Making up his mind as to what is the law is something the judge is perfectly capable of doing himself. Indeed, it is one of his principal functions. To that end, he is assisted by the arguments of counsel, but not expert evidence.

The interveners argued at first instance that it would be a dreadful thing if the applications succeeded as thereby large amounts of both excise duty and value added tax would be lost to the Crown. They apparently took the view that both excise duty and value added tax were in fact exigible if the goods were not accompanied by their owner as they were transported into the United Kingdom.

3 The Author's View

3.1 No Importation Charge

Prior to 1993, UK value added tax was exigible on a *supply* of goods made in the United Kingdom and on *importation* of goods from anywhere outside the United Kingdom. As from 1st January 1993, the position is changed. The importation charge as such is exigible only where the goods are imported from outside the European Community, but there is in certain cases a charge on intra-Community acquisitions. See Value Added Tax Act 1994 s.1(1), which provides:

> "Value added tax shall be charged, in accordance with the provisions of this Act -
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> (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply),
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> (b) on the acquisition in the United Kingdom from other member States of any goods, and
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> (c) on the importation of goods from places outside the member States ..."

3.2 Charge on Acquisitions

One of the conditions of the charge on *acquisitions* from other member states of the Community is that:

> "the acquisition is a taxable acquisition and takes place in the United Kingdom".[6]

An acquisition can, assuming the goods do not consist in a new means of transport, be a "taxable acquisition" only if, *inter alia*:

> "the goods are acquired in the course or furtherance of (i) any business carried on by any person or (ii) any activities carried on otherwise than by

[6] Section 10(1)(a).

> way of business by any body corporate or by any club, association, organisation or other unincorporated body ..."[7]

Hence, even if there can be said to be an acquisition by the purchasers of excise goods from another Member State,[8] it is not a taxable acquisition if the purchasers are all individuals purchasing and importing for their own personal use and not for the purpose of any business.

3.3 Deemed Supply of Goods in United Kingdom

3.3.1 Value Added Tax Act 1994

There can nevertheless in certain circumstances be a UK VAT charge where goods are purchased by a UK resident individual for his private consumption from a vendor in another member state and are imported into the United Kingdom. Technically, this is not a tax on importation or acquisition. Instead, the relevant legislation deems the supply of goods to be made in the United Kingdom.

Value Added Tax Act 1994 section 7 (Place of supply) applies for the purpose of determining whether goods or services are supplied in the United Kingdom.[9] So far as a supply of goods is concerned, subsection (2) applies only if the supply of any goods does not involve their removal from or to the United Kingdom. Subsections (3) to (7) provide a series of successive tests which are to be applied in order where the supply of goods does involve their removal to or from the United Kingdom.

Subsection (2) applies, then, if the supply of any goods does not involve their removal from or to the United Kingdom. In that case, they are to be treated as supplied in the United Kingdom if they are in the United Kingdom and otherwise are to be treated as supplied outside the United Kingdom. In the circumstances envisaged, it is not, in my opinion, the supply itself which involves the removal of the goods to the United Kingdom, as the removal is no concern of the supplier, so that the supply is *prima facie* made outside the United Kingdom. As the

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[7] Section 10(3)(a).

[8] Which, having regard to the definition in s.11(1), is very doubtful.

[9] The section applies subject to sections 14 and 18. Section 14, which deals with "acquisitions" from a person belonging in other member States, applies only when a supply in another member State involves the removal of goods from the other member State to the United Kingdom but that supply is made for the purpose of making a supply by an intermediate supplier to another person. That is clearly not the case in circumstances envisaged. Section 18 applies only where goods are subject to a warehousing regime and is therefore likewise not in point.

Customs might conceivably raise arguments similar to those in the *Emu* case,[10] however, let us also consider the alternative hypothesis.

Subsections (4) to (7) provide a series of successive tests which are to be applied in order where the supply of goods does involve their removal to or from the United Kingdom. If, applying the subsection (4) test, one finds the answer, then one looks no further. If one does not, however, one goes on to the subsection (5) test and so on. The test in subsection (7) is the long-stop test which applies if no other test is in point.

The subsection (4) test is potentially in point in the case of distance selling. It provides:

> "goods whose place of supply is not determined under any of the preceding provisions of this section shall be treated as supplied in the United Kingdom where
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> (a) the supply involves the removal of the goods to the United Kingdom by or under the directions of the person who supplies them;
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> (b) the supply is a transaction in pursuance of which the goods are acquired in the United Kingdom from another member State by a person who is not a taxable person;
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> (c) the supplier -
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> (i) is liable to be registered under Schedule 2; or
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> (ii) would be so liable if he were not already registered under this Act or liable to be registered under Schedule 1; and
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> (d) the supply is neither a supply of goods consisting in a new means of transport nor anything which is treated as a supply for the purposes of this Act by virtue only of paragraph 5(1) or 6 of Schedule 4."

Each and every one of these four tests (a)-(d) must be satisfied. Where goods are acquired by private individuals for personal consumption, then condition (b) will

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[10] A major argument is that where the vendor sells goods abroad and delivers them abroad to an agent for the purchaser knowing that the agent will arrange for their transport to the United Kingdom, then the goods are "dispatched or transported directly or indirectly by the vendor or on his behalf".

be satisfied.[11] In the case of excise goods, condition (c) will be satisfied in every case.[12] Condition (d) will be satisfied in every case of an actual sale on arm's length terms. The crucial condition will thus be (a), whether the supply involves the removal of the goods to the United Kingdom by or under the directions of the vendor. While it was argued by counsel for the Customs & Excise in the *Emu* case that a virtually identical condition relevant to excise duty is satisfied where the vendor hands over the goods abroad to an agent for the purchaser whom the vendor knows will arrange for the removal of the goods to the United Kingdom, none of the four judges appeared to think that it was a good point and simply ignored it in their judgments. In my view, the condition is plainly not satisfied in the conditions envisaged. Hence the subsection (4) test is of no help.

The subsection (5) test is the mirror image of the subsection (4) test. It involves the case where the supply involves the removal of the goods by or under the direction of the person who supplies them *to* another member State. It is therefore likewise not in point in the circumstances envisaged.

The subsection (6) test provides that goods whose place of supply is not determined under any of the preceding provisions of the section are to be treated as supplied outside the United Kingdom where (a) their supply involves their being imported from a place *outside the member States* and (b) the person who supplies them is the person by whom, or under whose directions, they are so imported. That, again, is not in point.

This then brings us to the final test, in subsection (7), which provides that goods whose place of supply is not determined under any of the preceding provisions of the section but whose supply involves their removal to or from the United Kingdom are to be treated (a) as supplied in the United Kingdom where their supply involves their removal from the United Kingdom - which is clearly not in point - and (b) as supplied outside the United Kingdom in any other case.

Thus, the net result is that where a private individual in the UK employs an agent to purchase excise goods duty-paid in another member State and these goods are then transported to the United Kingdom not by or under the directions of the vendor but by an agent for the purchaser, then the supply is treated as occurring outside the United Kingdom. Only if the supply involves the removal of the goods

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[11] It is not altogether happily worded. Suppose I buy claret by mail order from the vineyard which produces it, I could literally argue that condition (b) is not satisfied because, as a barrister, I am registered for value added tax purposes and am thus a taxable person. The draughtsman should have added the words "or who, being a taxable person, does not acquire them for the purpose of any business carried on by him in the United Kingdom".

[12] See paragraph 1(3), especially (a).

to the United Kingdom by or under the direction of the person who supplies them is there deemed to be a supply of goods in the United Kingdom.

3.3.2 The Sixth Directive

3.3.2.1 Relevance

The present UK legislation came into effect from 1st January 1993. Amendments were made by Finance (No 2) Act 1992 to the Value Added Tax Act 1983, since consolidated into the 1994 Act. The amendments were made to give effect to the obligations of the United Kingdom under the Sixth Council Directive of the European Community, on the common system of value added tax.

3.3.2.2 General Principle of Place of Supply of Goods

The general principle of the Sixth Directive is that where goods are dispatched or transported, whether by the supplier or by the person to whom they are supplied or by a third person, then the supply is situate in the place where the goods are at the time when dispatch or transport to the person to whom they are supplied *begins*: see Article 8(1)(a). If there is no such dispatching or transporting, then the place of supply is the place where the goods are when the supply takes place: see Article 8(1)(b). Thus, in the present case, the supply would undoubtedly be in the state of acquisition.

3.3.2.3 Transitional Arrangements

Article 28b B.1, however, is a transitional arrangement whereby, in derogation of Article 8(1), the place of the supply of goods "dispatched or transported by or on behalf of the supplier from a Member State other than that of arrival of the dispatch or transport shall be deemed to be the place where the goods are when the dispatch or transport to the purchaser ends."[13]

This provision applies where, *inter alia*, the supply of goods is effected for a non-taxable person, i.e., a private individual buying for personal consumption.

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[13] Where does a dispatch end? As a matter of English, in the same place as it starts. Yet that can hardly have been intended by the draughtsman. For if all that the supplier has done is to dispatch the goods, rather than transport them, then the Member State in which the dispatch ends will almost invariably be that where the goods are at the time when the dispatch begins, so that Article 28b.B.1 will make no difference to the position under Article 8(1)(a) or, for that matter, (b). Hence, it is likely that the draughtsman thought of a dispatch ending in the place where ends the transport to which the dispatch has given rise.

Article 28b B.2 provides a derogation from the principle in B.1 in the case of goods *other than products subject to excise duty* where the total value of such supplies does not in any one calendar year exceed certain limits.[14] This is the only way in which I can discern that goods which are subject to duties of excise are treated differently from other goods.

Thus, it is clear that value added tax would be exigible on an importation by an individual from any Member State of goods for his private use *only* if the goods are "dispatched or transported by or on behalf of the supplier" from the other Member State.[15]

4 Conclusion

In my opinion, even if the European Court of Justice were to rule against *Emu* or were not to rule at all, so that the provisional opinion of the Court of Appeal remained the binding authority on the question of excise duty, marketing strategies of the type engaged in by *Emu* and *The Man in Black Ltd* would, provided they did not involve the removal of the goods from the other member state to the United Kingdom by or under the directions of the person who supplied them, still be effective to ensure a considerable overall value added tax saving.

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[14] For the derogation and the exception from the derogation in the case of goods subject to excise duty in the Value Added Tax Act 1994, see Schedule 2 para 1.

[15] These words clearly echo Article 10 of the 1992 Excise Duty Directive "dispatched or transported directly or indirectly by the vendor or on his behalf". (It is unlikely that the words "directly or indirectly" add anything.) It was for this reason that the Applicants accepted that if the Commissioners of Customs & Excise established that Article 10 of the Directive applied then it must follow that United Kingdom value added tax would be exigible, as well as excise duty.