Where are we now?

Indirect Tax Management of taxes

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Tarlochan Lall looks at the likelihood of a no deal Brexit, and what that means for us

Key Points

What is the issue?

The risk of a no deal Brexit remains high at the time of writing this article (7 March 2019), even if there is some delay in the UK leaving the EU.

What does it mean to me?

Although there is much material on the preparations for a no-deal Brexit, many questions remain unanswered. While larger businesses may be better prepared, many small and medium sized businesses are unlikely to be sufficiently prepared, if at all.

What can I take away?

Although the VAT regime as UK businesses have known it will continue, there will be material changes which businesses and their advisers must get to grips with. SMEs may well find that they cannot take advantage of simplifications on offer and designed to soften the blow of Brexit.

The risk of a no deal Brexit remains high at the time of writing this article (7 March 2019), even if there is some delay in the UK leaving the EU. Although there is much material on the preparations for a no-deal Brexit, many questions remain unanswered. While larger businesses may be better prepared, many small and medium sized businesses are unlikely to be sufficiently prepared, if at all. The Government’s paper ‘Implications for Business and Trade of a No Deal Exit on 29 March 2019’ issued on 26 February 2019 reported that of 240,000 known EU-only trade businesses, only 40,000 had registered for EORI numbers.

Although VAT is the prime focus of this article, for reasons explained below, VAT cannot be considered in isolation of customs procedures. The welcome postponed accounting scheme for VAT is tied to the customs procedures under the relevant regulation making provision for it.

The scope of this article is limited and does not examine a number of other VAT issues. In particular, a number of simplifications are being introduced at EU level that will be beyond the reach of UK businesses, such as those for call-off stock, chain transactions and triangulation. Those matters most immediately likely to affect business, namely the scope for using postponed accounting and claiming refunds for VAT paid in other EU states, deserve priority attention.

VAT accounting for EU acquisitions

The statutory obligation to account for VAT on acquisitions from another member state in the VAT return for the period in which the acquisition is made, with a corresponding statutory entitlement to claim input tax on those acquisitions in the same VAT return, makes VAT accounting relatively simple. The value of the acquisition for VAT purposes is determined under VAT legislation. Essentially only the value of the transaction comes into the equation.

Postponed Accounting following Brexit

HMRC's Partnership Pack on preparing for change at the UK border after a no deal EU Exit states in relation to 'dealing with import VAT' that 'the government will introduce postposed accounting for import VAT on goods brought into the UK. This means that, if you're a UK VAT-registered business importing goods into the UK, you will be able to declare and recover import VAT on the same VAT return, subject to normal rules, rather than paying import VAT when the goods arrive at the UK border'. That indicates that import VAT is to work in essentially the same way as acquisition VAT. Although the UK had a postponed accounting system for imports until its abolition in 1984, it has not been possible to find pre-1984 guidance on how it worked and whether it can be replicated now. HMRC may have better luck in searching their archives.

The Value Added Tax (Accounting Procedures for Import VAT for VAT Registered Person and Amendment) (EU Exit) Regulations 2019 SI2019 /60 ('the PA Regulation') (tinyurl.com/y5yujcp5) make provision for postponed VAT accounting, but they do not deal with input tax. Guidance on 'Accounting for import VAT' published on 6 March 2019 ('the 6 March Guidance'), however, indicates that input tax arising from imports can be claimed in the same return in which the import VAT is declared. Box 4 on VAT returns will allow import VAT to be reclaimed in place of input tax on EC acquisitions.

Under the PA Regulations, postponed accounting is optional. A registered person (P) liable for import VAT 'may have … relevant goods delivered or removed without payment of the VAT chargeable on the importation and may instead account for the VAT in accordance with the Regulations.'(Regulation 3(1) and (2)). The VAT may be accounted for in the return P has to make for the prescribed accounting period in which the liability for import VAT is incurred, provided the following conditions are met (Reg 4, referring to reg 5 conditions):

- where the goods are declared for the free circulation procedure for the purpose for the Taxation (Cross-border) Trade Act 2018 (TCTA), P’s VAT registration number must be shown on that declaration; and
- if the goods are declared for a special customs procedure, conditions relating to that procedure must be complied with.

The choice of those two procedures is given by TCTA 2018 s 3. On importation, the goods must be presented to Customs (defined as the lawful importation of goods into the UK and notification thereof to HMRC in TCTA 2018 s 34(1)) and a customs declaration must be made within 90 days. As a general rule, the CDS declaration must be made electronically as specified in a public notice given by HRMC. The declaration must specify the customs procedure for which the goods are declared (free circulation or special procedure) and such other information also specified in a public notice by HMRC. It must also be accompanied by documents specified in a public notice and the person making the declaration must state that it is correct and complete to the best of the person’s knowledge. No new public notices have been identified thus far.

HMRC must determine, as soon as practicable after receiving it, whether the declaration has been made in accordance with the relevant provisions and whether or not it is complete. If they are satisfied that the goods have been presented to them on import, the declaration has been made as required, and it is complete, they must notify the person making the declaration. That notification constitutes acceptance of the declaration. HMRC have the power to verify the declaration and there are provisions allowing amendment or withdrawal. Once the goods are presented to Customs, they are subject to their control and remain subject to their control, even after being declared, until the procedure is discharged. In the case of goods declared for free circulation, they are discharged from the free circulation procedure once HMRC notify the person making the declaration that the goods are discharged. The Government paper issued on 26 February 2019 reported that HMRC have estimated the administrative cost of ‘customs declarations alone’ at around £13bn p.a.

HMRC have the power for simplifying or disapplying the requirements in relation to customs declarations. HMRC have announced that they are introducing a new Transitional Simplified Procedure (‘TSP’) to make the roll-on, roll-off ports and the Channel Tunnel easier for the initial period following Brexit. In order to use the TSP, a trader must sign up for it. On 4 February 2019, HMRC issued guidance for signing up to the TSP. The procedure will be available until at least April 2020.

HMRC's guidance issued on 4 February 2019 does not make clear how the use of the TSP interacts with postponed accounting, but did not appear to facilitate postponed accounting. The 6 March Guidance makes clear that those using the TSP 'can also account for import VAT on your VAT return'. But there appear to be important limitations on who can use the TSP.

i). Who can and cannot use the TSP

An importer wishing to use the TSP must be established in the UK, have an EORI number and must be importing goods from the EU into the UK, including goods travelling via the EU having come from outside the EU and cleared customs formalities on entering the EU.

The TSP cannot be used by importers:

- only importing from outside the EU directly into the UK;
- who choose to use a customs special procedure;
- who have those acting on behalf of traders, such as freight forwarders. The guidance also states that if an operator already trades outside the EU and has a customs agent or software, those can be used to make declarations for EU-UK trade and a TSP is not required. This suggests that the TSP is essentially for those who are new to import procedures;
- who have in the past had overdue tax returns, have not paid tax or duties or whose business is insolvent. The reference to tax returns suggests that any overdue tax return disqualifies an operator; and it is not clear whether HMRC will have or exercise any discretion for say a single breach which is remedied. There is a reference to such transgressions being on HMRC's records, so an operator may not find out whether or not they are disqualified until they apply to use the TSP.

ii). Using the TSP

There are separate regimes for standard goods and controlled goods.

In the case of standard goods, the operator will need to make a customs declaration 'within [their] commercial records when the goods cross the border'. The information such records must include is:

- the date and time the goods arrived in the UK;
- a description of the goods, commodity code and quantity imported;
- the purchase and (if available) sales invoice numbers;
- the serial numbers (if appropriate);
- delivery details; and
- supplier emails.

The reference to commercial records suggests that no standard form is being created for use by operators so a document created for the purpose of ‘commercial records’ should be sufficient, although HMRC’s clarification on this point would be helpful. There is nothing specific about a truth statement being in the commercial records declaration required to be made at the border. However:

- a supplementary declaration must be sent by the fourth working date of the month following the date of arrival of the goods in the UK; and
- HMRC will take a direct debit on the 15th day of the month after the goods arrive in the UK if there are ‘duties or taxes to pay’. There is no mention of the effect, if any, of the option taken up by the trader for postponed accounting. Although the 6 March Guidance confirms that those using TSP can account for import VAT on their VAT return, that guidance is silent on whether the direct debit will be taken.

In the case of controlled goods, namely those that require an import licence or are excise goods, such as alcohol or tobacco, a separate controlled goods procedure will need to be used. This requires a simplified frontier declaration to be sent before the goods are imported. The full supporting document, including any licence, must accompany the goods. Once again, a supplementary declaration must be sent by the fourth working date of the month following the arrival of the goods in the UK.

Valuation

Import VAT is charged on the value that must be declared for the purposes of import duty. Therefore, the customs valuation rules apply. Although in a vast majority of cases, the transaction value would apply, the customs valuation rules have five other methods of valuation which must be applied in a prescribed order. Perhaps the most significant difference from the current VAT rules will be that the customs value is taken to include the following if not included in the customs value used, namely:

- taxes, duties (including customs duties) and other charges levied outside or in the UK by reason of the importation;
- all incidental expenses, such as commission, packing, transport and insurance costs up to the good' first destination in the UK; and
- if at the time of importation the further destination within the UK of the goods is known, such incidental charges in so far as they result from the transport of the goods to that other UK destination.

Where for some reason the exact amount of VAT cannot be established and HMRC are satisfied that is the case, output tax can be estimated. The estimated amount must be adjusted in the next return. The 6 March Guidance states that: 'You can still account for import VAT on your VAT return, even if you cannot confirm the customs value of the goods imported. You should declare the highest value for VAT and reclaim any eligible input tax under the normal rules.'

Exclusion from postponed accounting

HMRC have the power, by issuing a direction, to prevent the use of postponed accounting 'where they consider it necessary to do so for the protection of the revenue'. A written notice must be given, but it cannot be retrospective. A direction is subject to the rights of appeal.

Input tax and postponed accounting

As stated above, the PA Regulation does not specifically deal with the treatment of input tax under postponed accounting. Also as stated above, the 6 March Guidance, clarifies the position. The 6 March Guidance also states that CHIEF or CDS will issue a C79 certificate for imports made before 10.59 on 29 March 2019 and a monthly import VAT statement for imports made from 11pm on 29 March 2019 and that further information on the statements will be issued at a later date. The 6 March Guidance also states that: 'A monthly statement will be generated online which you should download and keep for your records. It will indicate the total import VAT postponed for the previous month and when to include it in your VAT return.' HMRC appear to take the view that no further changes to the legislation are needed.

Exports

Exports by UK businesses may be adversely affected if customers are deterred by having to pay VAT at their border on goods purchased from the EU. Article 211 of the VAT Directive permits member states to adopt postponed accounting. A number of countries such as the Netherlands, Luxembourg, Denmark and the Czech Republic have forms of postponed accounting systems. Thus far, Brexit specific postponed accounting in EU member states have not been identified.

VAT refunds

VAT incurred by a business in an EU member states where the business does not have an establishment and do not make supplies must be claimed through a cross-border VAT refund scheme rather than any VAT returns. UK businesses can make the claim electronically to HMRC. HMRC then forwards the claim to the relevant tax authorities in the other EU state. The business thereby avoids any practical language issues; and delays in payment attract interest.

Following Brexit, the UK will become a third country, and UK business must make separate claims to each relevant EU member state's tax authorities in the same way as other non-EU business have to. It will therefore be necessary to become familiar with the relevant country's procedure for making claims, any restrictions on claims and any entitlement to interest. Country specific guides in English can be accessed through the European Commission's website. However, these are only guides and in cases of doubt or complexity, it may become necessary to contact the relevant tax authority or take local advice. The obvious impact will be on cash-flow.

Services

Although services generate the vast majority of revenue for the UK economy, they have received less attention in the Brexit debate. The Partnership Pack states that the main place of supply rules will remain the same for UK businesses. The principle is simple; the devil is in the detail. Much complexity arises out of the place of supply rules; and also in the case of mixed supplies of goods and services. The rules on fixed establishments give rise to legal and practical issues. The Partnership Pack is silent on those. There is some guidance on changes needed to IT systems and mini-one-stop-registrations for online services which will need to move to another EU states' regime for non-EU operators. The place of supply rules do shield the impact of Brexit considerably. The reverse charge will operate on EU and non-EU B2B imports of services in essentially the same way. The financial services and insurance sectors are warned that the input tax deduction rules for supplies to the EU may be changed. The February 2019 version of the Partnership Pack states that businesses will be updated soon.

Conclusion

Although the VAT regime as UK businesses have known it will continue, there will be material changes which businesses and their advisers must get to grips with. SMEs may well find that they cannot take advantage of simplifications on offer and designed to soften the blow of Brexit.

This article is correct at the time of writing: 7 March 2019.