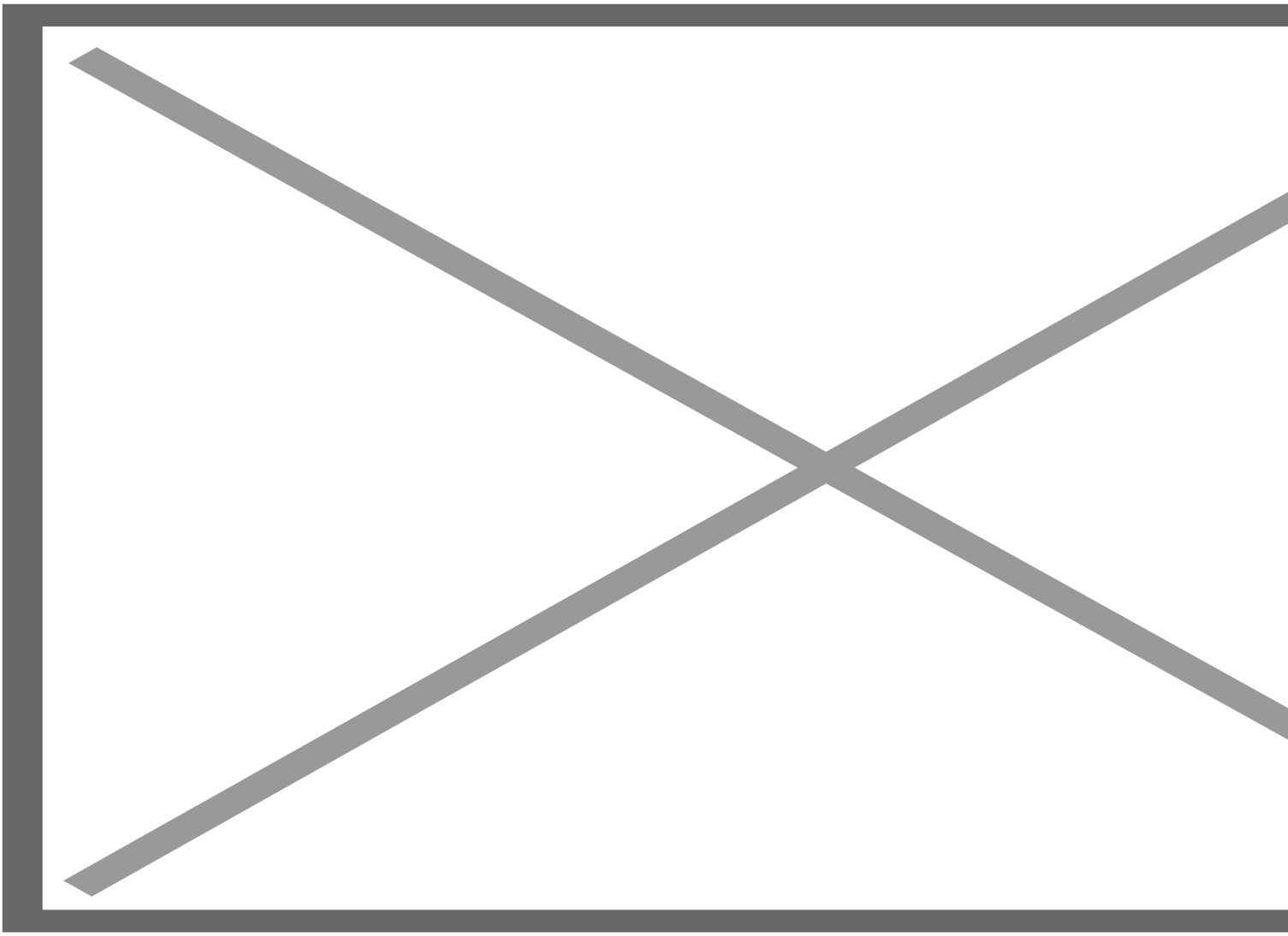
Careful review

Indirect Tax



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Alan McLintock examines who, in principle, is entitled under VAT law to recover import VAT

Key Points

What is the issue?

There can be an almost automatic assumption that if you are a taxable business that has paid the import VAT (even if payment is in the future by way of postponed accounting) and you have the requisite bit of paper from HMRC, that you have a matching entitlement to recover this import VAT.

What does it mean to me?

This is not always the case and on 11th April 2019, HMRC issued their ‘Revenue and Customs Brief 2 (2019): VAT – import VAT deducted as input tax by non-owners’ which sets out HMRC’s position on import VAT.

What can I take away?

Readers should review their shipping terms and supply chains (and any call off stock arrangements).

With the United Kingdom’s departure from the European Union stumbling indecisively towards a hard Brexit, this article looks at who, in principle, is entitled under VAT law to recover import VAT.

There can be an almost automatic assumption that if you are a taxable business that has paid the import VAT (even if payment is in the future by way of postponed accounting) and you have the requisite bit of paper from HMRC, that you have a matching entitlement to recover this import VAT. This is not always the case and on 11 April 2019, HMRC issued their ‘Revenue and Customs Brief 2 (2019): VAT – import VAT deducted as input tax by non-owners’ which sets out HMRC’s position on import VAT. This states ‘HMRC is aware of incorrect treatment by businesses whereby import VAT has been incorrectly deducted as input tax by non-owners of the goods’ and means the owner *at the time of import* (and subject to the usual evidence of import being properly held). This restriction or condition has not hitherto been visible anywhere in HMRC’s own guidance or in the relevant Public Notices issued to guide taxpayers. HMRC has also updated their internal guidance to say: ‘Only the person to whom the supply was made for use in the furtherance of his taxable business can make a valid input tax claim. This is a fundamental principle. It overrides the question of who may have paid for the supply. It also overrides the question of who may hold the relevant invoice or other evidence where the representative or agents made payments on behalf of the principal.’ It is worth noting that HMRC’s position is based on what is or is not a valid input tax claim (and their interpretation of what this entails).

HMRC’s view is reportedly heavily influenced by the deliberations and conclusions held by the 94th Meeting of the EU VAT Committee on 19 October 2011 (Document C). The VAT Committee is a non-binding forum for EU tax authorities to bring complex interpretational issues to their peers. This looked at the recovery of import VAT by agents and states:

> *‘The VAT Committee almost unanimously confirms that a taxable person designated as liable for the payment of import VAT pursuant to Article 201 of the VAT Directive shall not be entitled to deduct if both of the following conditions are met:*
>
> *he does not obtain the right to dispose of the goods as owner;*
>
> *The cost of the goods has no direct and immediate link with his economic activity.*
>
> *This shall be the case even if that taxable person holds a document fulfilling the conditions for exercising the right of deduction as laid down by Article 178(e) of that Directive.’*

However, we should note that the VAT Committee guidance says ‘...if both the following conditions are met’ and thus seems to only restrict recovery if an importer does not own the goods AND the cost of the goods has no ‘direct and immediate link’ with the importing taxpayer’s activity. HMRC’s position seems to apply only the first of the above two tests and assume that if you do not own the goods then the associated import VAT cannot be input VAT of your business.

If we look to the EU Principal VAT Directive ('PVD') then the preamble to the PVD says '(43) Member States should be entirely free to designate the person liable for payment of the VAT on importation.' Article 201 goes on to say: 'Article 201 On importation, VAT shall be payable by any person or persons designated or recognised as liable by the Member State of Importation.' Therefore, Member States have in theory a degree of flexibility over who is the importer of record that pays the import VAT. The payment of import VAT however does not, in itself, give rise to the corresponding right to recover this VAT.

Article 168 (PVD) states: 'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay: ... (e) the VAT due or paid in respect of the importation of goods into that Member State.'

Therefore, the importer can recover the import VAT *to the extent the importer uses the imported goods for the importer's business purposes*. Where the goods in question have been sold on or are otherwise not owned at the time of import then the first question is whether the importer can actually use those imported goods for the purposes of its business and the second question is does it matter when this use takes place (pre or post import).

Looking at the UK VAT legislation, Section 24(1), VATA 1994, states: '24(1) ... 'input tax', in relation to a taxable person, means the following tax, that is to say-… (c) VAT paid or payable by him on the importation of any goods from a place outside the member States, being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.'

Article 24(1) says '..used or to be used' which reads to me to suggest the use connected with your business can be pre or post import (such as flash sales where you perhaps manufactured and sold on a good and were the importer but not the owner, at the time of import).

Will impacted taxpayers now have to argue *Sveda* (C126/ 14) or similar case law that has widened exactly what is deemed input VAT and what is considered to have a direct and immediate link to taxable activity? It is certainly arguable that HMRC has formalised a narrower interpretation of what constitutes input VAT than others might take or case law support.

It is also not clear how a hard Brexit affects call off stock arrangements. The current guidance states 'Treatment of call-off stocks varies between Member States. Some treat the removal as a transfer of own goods. The UK interpretation relies on the customer acquiring the *right to dispose of the goods as owner* in the sense that they can use the goods as they wish subject to their paying for them at that stage. Therefore a UK customer receiving goods in these circumstances from a supplier in another Member State, should account for VAT on acquisition on the basis of the movement of the goods even though title may not pass until they are 'called-off'.' So in the post hard Brexit world, the customer will most likely have to act as importer of record .... but without holding title to the actual goods at the time of import. So provided and assuming the UK customer has the right to dispose of the goods as owner (but does not hold legal title) then will HMRC accept the continuation of call of stock relief? Will supporting legal agreements need amended to specifically introduce ownership/right to dispose into the agreement to provide certainty that the import VAT will not be challenged (and is 'the right to dispose of goods as owner' a concept easily recognisable and definable in commercial agreements while keeping separate when title of the goods transfers?).

It is probably also worth noting HMRC's own language in the business brief and related internal guidance. The brief and guidance uses the following labels:

- Ownership – 'owner of the relevant goods', 'owner' 'non-owner', 'ownership of the goods',
- Title – 'Title to the goods'

- Ownership and title – ‘ownership and title’
- Supply – ‘person to whom the supply was made’.

While ‘title’ is a term of art defined by common or civil law, ‘ownership’ seems a more nebulous term and in VAT a supply of goods means the right to dispose of tangible property as owner (‘as owner’ meaning not actually the owner but being treated as if you were). This covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner, even if there is no transfer of legal ownership of the property (see Case C-320/ 88 *Shipping and Forwarding Enterprise Safe*). The underlying issue being that title is determined by civil or common law across different Member States and standardising what a supply of goods is on a moving legal definition was unworkable and so the definition of a supply of goods for VAT purposes became the right to dispose of goods as if you were the owner. So, ownership and title seem to broadly equate to the same thing but that someone who is not the owner can be treated for VAT purposes as making or receiving a supply of goods, if they have the right to dispose of the goods as if they were the owner.

In terms of VAT recovery, does any of the above splitting definitions of what ownership is or who has it matter in determining who can recover import VAT? Well the acid test for recovery is whether the import VAT is input VAT for your business. I would rather focus on case law on input tax than case law on what ownership is and while one may inform your thinking on the other, they are different concepts and case law on input VAT is in my view both more important and more useful.

So, what to do? Readers should review their shipping terms and supply chains (and any call off stock arrangements). Could you have transactions where you are not the owner at the time of import? Do you need to review INCO terms (published by the International Chamber of Commerce to agree the tasks, costs, and risks associated with the transportation and delivery of goods)? While INCO terms do not set out when title transfers, some businesses align both together as a matter of course. Consider also the law of unintended consequences, if you make changes to delay or bring forward a change in ownership so as to align owner with importer to mitigate any UK import VAT recovery risk; have you created any new VAT registration or liability consequences elsewhere along your supply chain?

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