The Chartered Tax Adviser Examination

November 2020

Cross-Border Indirect Taxation

Suggested Solutions

ANSWER 1

To: Gerry Kray, Partner
From: Delia Gibb
Subject: Netherclean Ltd
Date: 13 November 2020

Dear Gerry

Thank you for your email dated 28 October concerning the rules relevant to the place of supply of hired goods. I have prepared the following memo to explain how the "use and enjoyment" of those goods can change the place of supply and how it will apply to our client Netherclean Ltd.

The hiring of goods will be subject to the basic business to business (B2B) rule and will normally be supplied where the customer belongs. VATA 1994 Schedule 4A Para 7 introduces a use and enjoyment rule which can shift the B2B basic rule in certain situations. Where the B2B rule results in a non-EU place of supply, the place of supply will shift to the UK where the asset is used and enjoyed in the UK. Likewise if the B2B rule results in a UK place of supply but the goods are used outside the EU, the place of supply will shift to outside the EU.

The term is undefined in EU and UK law but "use" is generally taken to mean the place where a service is consumed and the "enjoyment" aspect relates to the place where the benefit of a service is taken, in most cases this is the same place as the "use" element.

The rule can't result in the place of supply being changed from one EU member state to another – only between EU and non-EU places; and in cases where a supply is partly used between each, the possibility of apportionment exists.

For Netherclean Ltd, as the basic place of supply is determined by the supply being made to Cleanbean Ltd, a business established in Jersey, the supply will not be within the scope of UK VAT. However a B2B supply is capable of being subject to UK VAT under para 7(2), Sch 4A, VAT Act 1994 where the use and enjoyment of the services of the hiring of goods is the UK, which will be the case during the course of the 12 month London office cleaning contract. Accordingly, there will be a requirement for Netherclean to treat the place of supply as the UK. Netherclean Ltd will need to charge UK VAT to Cleanbean Ltd. However, because it appears that only some of the leased equipment will be used on the London contract and the remainder will continue to be used outside the UK, it will be necessary for Netherclean to apportion the amount charged to ensure that UK VAT is only applied to those charges that reflect the hire charge for equipment ultimately used by the customer in London. Any apportionment should be calculated on a verifiable and consistent basis.

The time of supply will be the date on which each of the monthly payments are received by Netherclean or when it issues a tax invoice, whichever is the earlier.

The expectation that the equipment will be removed from London at the end of the 12 month contract and taken to France to be used in cleaning contracts for non-taxable persons will result in these future supplies reverting to being outside the scope of UK VAT as the subsidiary, Cleanbean Ltd, is in business and established outside the EU. The use of the equipment by Cleanbean Ltd in providing cleaning services to non-taxable persons will not in this case determine the place of supply of the service by Netherclean Ltd and its supply will be one of B2B to an entity established outside the EU. Consequently, no UK VAT will be charged when the equipment is removed from the UK. There will be no obligation for Netherclean Ltd to register for VAT in France.

In summary, the use and enjoyment provisions require Netherclean Ltd to establish whether and when Cleanbean Ltd is using the leased equipment within the UK as this will require UK VAT to be charged to Cleanbean Ltd. It is however not relevant for UK VAT purposes if leased goods are used and enjoyed in the Channel Islands or other EU member states as this will not affect the UK VAT position. Nevertheless, it would be prudent for Netherclean to determine the VAT position in any other country in which its leased goods are used, as different arrangements may apply in other EU member states and third countries.

It would be worth making further enquiries as to whether Cleanbean Ltd has a fixed establishment in France as this would impact the VAT treatment of any equipment used in France by the French fixed establishment. They would need to have permanent human and technical resource present in France which they may well have by way of their staff servicing the French contracts. If these staff are permanently located in France there could well be a French fixed establishment for Cleanbean Ltd. The main supply to Cleanbean Ltd will still be outside the scope of UK VAT but there would be EC Sales List requirements for the element that is supplied to the French fixed establishment. An element of the rental would also be subject to the reverse charge in France and the invoice must make reference to this point. Given Cleanbean Ltd is likely to require your permission to move the goods into France there would be a clear indication of which goods were being used by the Jersey business establishment and by the French fixed establishment.

I hope you find this information helpful but please contact me if you require anything further.

Yours sincerely

Delia Gibb

MARKING GUIDE

TOPIC		MARKS
1. Supply of services/goods	Recognition of supplies being services rather than goods, due to no option for transfer of title – (No need to refer to case names for marks).	1
2. Use and enjoyment term	B2B basic place of supply of services rule	1
	Use and enjoyment rule within Schedule 4A Para 7 shifting the POS	1
	Meaning and practical application of the term use and enjoyment", including limitation to change PoS into or out of the EU (but not between member states).	2
3. Movement of goods	Potential to claim VAT Returned Goods Relief (no need to mention form number)	1
	Requirement for Netherclean to record temporary movement of goods from UK to France (via Jersey?) in temporary movements register and to ensure return to the UK within 2 years	1
4. Specific application to Netherclean Ltd	Basic position based on establishment of customer/supplier	1
	Relevance of recognising client's customers' use of leased equipment in the UK.	1
	Place of supply of equipment used in London office contract requiring UK VAT to be charged	1
	Apportionment of consideration to determine value of supply liable to UK VAT	1
	Place of supply of equipment to be used in cleaning contracts for non-taxable customers in France – customer's business status not relevant, outside scope of UK VAT.	2
	Implications of a French FE	1
	PHS	1
TOTAL		**15**

ANSWER 2

To: J LaTour Jlatour@marche.net
From: T Une, t.une@marche.net
Subject: European publishing changes
Date: 13 November2020

Dear Jules

Thank you for your email dated 27 October regarding the proposed changes in our European operations.

Sale of paper magazines

As you are registered in France and the UK I will assume that you are storing stocks of magazines in France and the UK. Where the goods never leave the member state of despatch you will have a domestic supply i.e. UK VAT to UK customers and French VAT to French customers.

Sales to the UK market will be zero rated. Sales to French customers will be at the prevailing French rates. Zero rating will not be in point for the French sales as zero rating is only seen in the UK.

Distance sales (DS)

Where magazines are sent to non-taxable customers belonging in an EU member state that differs from the supplier, they will be subject to DS rules. If despatched to Ireland from the UK, no VAT will need to be charged because of UK zero rating for publications, until such time as the annual threshold for Ireland (€35,000) is reached. This is unlikely to be the case if the magazines are despatched from France, although local advice would be required to confirm this.

It is important that sales values are monitored for each member state into which we sell magazines. When we exceed the annual threshold, we will be required to register for distance selling within 30 days and account for VAT at the rate applicable to paper magazines in the customer's member state.

Irrespective of whether we dispatch from the UK or France we will need to register under DS rules in Ireland when annual thresholds are exceeded.

In summary I would recommend the distance selling sales are sourced from the UK as this will take advantage of the zero rate. Once the distance selling limits are breached in Ireland it will not matter which establishment deals with distance selling as Irish VAT is due.

Online publications

Access from 1 March 2021 to on-line content will be taxable where customers belong under the rules for electronically supplied services.. If annual sales of e-services across the EU are below €10,000 per year we can charge VAT at the rate applicable in the supplier's country. However, if annual DS thresholds have been breached in Ireland by 28 February 2021, we will need to include these sales within the Irish registration referred to above.

If we have not been required to make an Irish DS registration by 28 February 2021 the supplies could fall within the Mini One Stop Shop (MOSS) scheme and be accounted for through a Union scheme registration in France: alternatively, a registration in Ireland could be made. In all cases VAT will need to be charged at the rate applicable to electronic publications in Ireland.

For domestic sales in UK and France, the registrations existing for establishments in those countries will need to account for the electronic supplies. The rate in the UK is likely to be zero rated following a change in UK law on 1 May 2020 which extended zero rating to electronic versions of a zero-rated hard copy eg electronic newspapers and books.

Advertising income

Advertising income from business customers will be subject to VAT in Marche SA's member state (i.e. France or UK depending which establishment we decide upon) if the customer is also established there. Where the supplying establishment and business customer are established in different member states, the supply will be subject to the reverse charge rules with the customer accounting for VAT on the supply received at the time of each payment.

It may be useful to consider whether our French head office should handle our UK advertising agent, particularly as the majority of our advertisers are UK established businesses. By using our French establishment, we will not be required to charge UK VAT to UK business customers as these will be reverse charge supplies. This may have cashflow advantages for us, unless our customers regularly pay us before we are required to pass the VAT to HMRC.

Advertising agency involvement

The advertising agent will be acting on our behalf to attract advertisers to take content on-line and in our magazines. Because they are acting as a disclosed agent for commission we will be required to ensure that advertisers are invoiced by us and we will need to determine where they are established to ensure that we charge domestic VAT to customers established in the same member state as our advertising sales office. If we use our French head office to make advertising supplies to UK and Irish businesses, we will not need to charge them VAT as these will be reverse charge supplies. There is therefore a marginal benefit in using the French head office.

In the unlikely event that any non-business customers wish to advertise through us, we will need to ensure that we charge the domestic VAT rate determined by the supplier's location, no matter where the customers are established in the EU.

Agency supplies to us

If we use the French establishment to manage our advertising, charges to us from the UK advertising agency will be B2B supplies and not subject to UK VAT. Our French recipient establishment will only be required to account for local VAT through the reverse charge mechanism on the 4% charged.

In contrast, a UK established entity would be charged at 20% and may suffer a cashflow disadvantage until the input tax is recovered, depending upon the timing of the transactions and the VAT return. There may be a marginal benefit in using the French head office.

Summary and Recommendations

1. There is a VAT advantage by making distance sales from the UK as sales to Ireland up to the annual threshold would be better made from the UK as they will be zero rated which is unlikely to be the case with France. Once the distance selling threshold is breach in Ireland it does not matter where the distance selling supplies are made from as Irish VAT will be due.

2. Accounting for electronically supplied services sales through existing UK and French registrations and the Irish registration created for DS will avoid the need for MOSS registrations. If no registration yet exists in Ireland, EU MOSS in France or an Irish registration must be used. The supplies are likely to be zero rated when supplied to UK customers.

3. Making advertising supplies from the French establishment and treating the UK agency fee under the reverse charge mechanism should favour cashflow and will make France the better location for the advertising sales liaison team.

Please contact me if you require anything further.

Kind regards

Terri Une

MARKING GUIDE

TOPIC		MARKS
1. Sale of Paper magazines – distance sales	Place of supply of magazines – B2B where transport begins; B2C in the destination member state.	1
	Liable as zero rate until distance selling threshold reached then domestic rates apply (likely to be positive)	1
	Variable DS thresholds across EU, calendar year sales apply	1
	Requirement to monitor sales values and register within 30 days	1
	Minimal advantage in making DS sales into Ireland from either UK or FR establishments (Although UK sales can be zero rated up to the annual threshold and this may not be possible if made from FR). (Recommendation 1)	2
	Because of single entity having two registrations all sales to consumers in UK and FR will need to be accounted for by the respective "in country registration" – they are not DS sales. Furthermore they will be zero rated when made into the UK.	1
2. On-line publishing	Fall within definition of electronic services and subject to VAT where customers belong. ZR in UK (bonus mark?)	2
	Less than €10,000 EU annual sales – domestic VAT rates apply	1
	Existing DS registration in Ireland will need to be used for sales into IE. UK and FR establishments accounting for sales made to those countries.	2
	If no such DS registration yet required in IE, EU Moss scheme from UK or FR establishments will need to account for those sales or make single registration in IE. Irish rates applying in all cases. (Recommendation 2)	2
3. Advertising income	If French establishment makes supplies these will be mainly reverse charge supplies to UK and Irish advertisers. Alternatively if UK makes supplies UK VAT needs to be charged to UK but not Irish advertisers.	1
4. Agency involvement commission	UK agency can reverse charge agency supply to French establishment for which 4% commission is paid – cashflow advantage (Recommendation 3)	1
	We need to determine whether to charge VAT or not depending on customer status	1
	If non-business and EU established – domestic VAT applies	1
PHS		2
TOTAL		**20**

Marks will be awarded for credible alternative recommendations.

ANSWER 3

To**:** NKraase@walviss.nl
From: Cheryl.Joyce@BWVAT.co.uk
Date: 13 November 2020
Subject: UK VAT queries

Dear Niels

Thank you for your email.

UK VAT registration

As Walviss intends to sell the windfarm upon completion, which would be a taxable land supply due to it being a new (i.e. less than 3 years old) work of civil engineering **[0.5 mark]**, it can voluntarily register for UK VAT as an intending trader**. [0.5 mark].** Failing that, a compulsory registration would be required either when the taxable supply is made, or (as is likely) having reasonable grounds to believe that taxable supplies would be made within the next 30 days. To the extent that turbines are outside the 12 nautical mile territorial waters of the UK, these will be outside the scope of UK VAT and an apportionment would be required. **[1 mark]**

A UK VAT registration will however be required for the acquisition of panels and heaters for domestic installation from the Netherlands. Walviss will be responsible for accounting for UK VAT on the arrival of the goods in the UK. **[0.5 mark]**

The information provided indicates that you will not have the necessary technical and human resources to have a VAT establishment in the UK, and as such Walviss would register as a non-established taxable person (NETP) and will be required to do this 30 days before the delivery is to be received **[0.5 mark]** (if it has not already registered in respect of the windfarm taxable sale as set out above).

The value of the panels and heaters exceeds the £85,000 VAT registration threshold under Schedule 3 of VATA 1994. No additional reporting will be required in the UK as the Intrastat arrivals threshold of £1,500,000 will not be exceeded. **[0.5 mark]** The tax point arising on the acquisition of solar panels and air heaters from The Netherlands will be the earlier of the invoice date or the 15th day of the month following the month in which the goods arrived. The acquisition will need to be included in the UK VAT return for the correct period. **[0.5 mark]**

UK VAT charges

The requirement for Walviss to fulfil its s.106 obligations by making installation for no consideration will not impact the recoverability of UK VAT (the acquisition from The Netherlands and charges by local subcontractors) as the costs will be incurred for business purposes and will be recoverable. **[0.5 mark]**
The wind farm installation will require Walviss to fix the turbines to the seabed, which means that any services connected with the installation of turbines will be land related services as per Sch. 4a of VATA with place of supply where the land is. **[1 mark]** Any turbines installed within the UK territorial scope of 12 nautical miles will be in the scope of UK VAT and supplies received in relation to them will be in scope of UK VAT. **[0.5 mark]**

The planning application fees from the local planning office, although directly related to land, will be outside the scope of UK VAT as statutory charges. **[0.5 mark]**

Importation

UK VAT will be due on the importation of turbines from Norway based on the value of the goods and the transportation costs. **[1 mark],** this VAT can be recovered by Walviss if it is the importer of record **[0.5 mark]** but the VAT will not be recoverable if no UK VAT registration is in place at the time when the importation into the UK takes place. **[1 mark]**

Intracommunity supplies

The supply of gearboxes by Wale will also be an intracommunity arrival in the UK, on which UK VAT will be due. The gearboxes will be supplied during an install-and-fit service with the place of supply in the UK, for 18 of the turbines. **[0.5 mark]** UK allows a simplification for install-and-fit services in the UK and this simplification will be available to Wale because Walviss is registered in the UK **[1 mark**]. UK VAT will be accounted for by Walviss under its UK VAT registration on the value of the supply related to the turbines located in the UK territorial waters. **[0.5 mark]**

The installation of turbines beyond territorial waters is outside the scope of UK VAT and no UK VAT is due on supplies related to them, including reverse charge obligations. **[1 mark]**

The movement of installation equipment from The Netherlands for use during the installation can be treated as temporary movement of own goods, if the goods are returned to The Netherlands within two years and no VAT reporting obligations will be required in the UK **[1 mark]** (a register of movements must be maintained in the Netherlands. **[0.5 mark]**). The movement of materials from The Netherlands will, however, be a deemed supply in the UK and subject to acquisition tax. **[0.5 mark]**

The place of supply of the general rule services will always be in The Netherlands and subject to reverse charge there because Walviss is established there and has no fixed establishment in the UK. **[0.5 mark].** The technical inspection of the turbines provided by Hval will be a service falling within the general rule with a place of supply in the Netherlands. **[0.5 mark]**

The PR agency services for the management of the advertising campaign, including the billboard advertising and radio campaign will fall within the general rule with the place of supply in The Netherlands and subject to reverse charge there. **[1 mark]**

The postal supplies of letters with brochures will be categorised as printed material and treated as goods subject to zero-rate under Sch 8 group 3. However, if this printed material is not specified and it is supplied as part of the overall PR contract it will be an ancillary supply and treated as a supply of a general rule service. **[1 mark]**

The place of supply of the legal services will be The Netherlands in relation to the turbines installed outside of the territorial waters. The legal services related to the turbines in the UK territorial waters will be subject to UK VAT as they are related to UK land. **[1 mark**]. Any UK input VAT can be recovered on the UK VAT return of Walvis

Please let me know if you have any questions or would like to discuss anything in more detail.

Kind regards

Cheryl Joyce

MARKING GUIDE

TOPIC	MARKS
UK VAT registration	
Taxable Land Supply	0.5
Intending trader registration	0.5
Compulsory registration and apportionment	1
Registration triggered by acquisition of goods	0.5
Deadline for NETPU registration & voluntary registration	0.5
Intrastat not required	0.5
Tax point of acquisition	0.5
UK VAT charges	
Recoverability of UK VAT on free-of-charge installations	0.5
Land related services	1
Territorial scope of the UK	0.5
Liability of planning application fees	0.5
Importation	
Importation value for UK VAT	1
Recoverability of import VAT – importer of record	0.5
Recoverability of import VAT – UK VAT registration requirement	1
Intracommunity supplies	
Install and fit of gearboxes	0.5
Install and fit simplification available	1
Walvis to account for VAT on supply from Wale	0.5
Place of supply of legal services	1
Movement of equipment as temporary movement	1
Register of movements	0.5
Movement of materials as deemed acquisition	0.5
Place of supply of general rule services	0.5
Place of supply of technical inspection by Hval SA	0.5
Liability of PR agency services	1
Liability of supplies of printed material as part of the campaign	1
Liability of legal services	1
Presentation and higher skills	2
TOTAL	**20**

ANSWER 4

Sian Adviser
Straight Tax Advisers
99 Book Road
London L21 4FY

Gayan Udawatte
Consoles'R'Us Ltd
1 Warehouse Avenue
Bristol B32 5DE

13 November 2020

Dear Gayan,

RE: Consoles'R'Us Ltd VAT Advice

Further to our meeting yesterday, below is my analysis and advice.

VAT Analysis

Under the Missing Trader Intra-Community (MTIC) Fraud provisions, a taxable person is jointly and severally liable for unpaid VAT where

i) It receives a taxable supply of relevant goods and services;
ii) At the time of supply it knew or had reasonable grounds to suspect that some or all of the VAT payable would go unpaid to HMRC; and
iii) HMRC have served a s.77A VAT Act 1994 notice.

The games consoles are 'relevant goods and services' under s.77A as 'electronic equipment made or adapted for use by individuals for the purposes of leisure, amusement or entertainment'.

The triangulation simplification procedure that Herní S.R.O has opted to use means that Gamerzon Ltd is obliged to account for VAT on the supplies made to it, in the UK, as an acquisition.

Consoles'R'Us Ltd has been accounting for output tax on the supply to Game Mode Ltd, deducting input tax incurred on the supply from Gamerzon Ltd.

Evidently, following HMRC's letter, Gamerzon Ltd has not accounted for tax on the supply to it, as an acquisition.

Under a s.77A notice, Consoles'R'Us Ltd would be jointly and severally liable for the unpaid VAT. It is likely that the same notification letter has been sent to other supply chain companies.

As Consoles'R'Us Ltd had no direct knowledge of VAT being unpaid the question is whether there were reasonable grounds to suspect that some or all of the VAT would go unpaid to HMRC. This is presumed where the price payable for the goods is less than the lowest market value or a price previously paid. The onus under a s.77A notice is on you to demonstrate that you should not be held jointly and severally liable for the VAT. Please could you provide any evidence relating to the market value of the consoles. The consoles from Gamerzon Ltd are cheaper than those previously acquired from Consolas SRL. However, Consoles'R'Us Ltd now undertakes more work on the consoles, and the reduction in cost could be attributed to this. Evidence would be needed to establish such, or another reason for the price differential.

In my view, it is possible that the price disparity seems larger than what could justifiably be attributed to this, given the minimal additional cost incurred. This would mean that Consoles'R'Us Ltd had reasonable grounds to suspect that some or all of the VAT has been unpaid.

Normally the transfer of goods within the same legal entity from one Member State to another would be a deemed supply of own goods, however, the transfer of the consoles to Ireland is only a temporary movement for the purposes of processing and repair works. Therefore, there is no deemed supply. Consoles'R'Us Ltd must maintain a temporary movements register for these purposes.

Next steps

Consoles'R'Us Ltd has 21 days from the date of the letter to respond, providing an explanation for the lower price, along with any other relevant factors. If no response is sent, or HMRC do not accept the explanation, then Consoles'R'Us Ltd will be sent a liability notice demanding payment.

I would strongly recommend responding and would be happy to draft a letter. Please could you provide any evidence that Consoles'R'Us Ltd undertook reasonable checks to establish the credibility of Gamerzon Ltd. Such could include checks into Gamerzon Ltd's history and if there was adequate insurance on the consoles. Please also provide any evidence to explain the price discrepancy between Consolas SRL and Gamerzon Ltd, including, for example, evidence of the cost difference in the works undertaken in Ireland, or the lowest market price of the consoles; as well as evidence that Consoles'R'Us Ltd considered the commercial viability of the transactions both during the negotiation and generally, of the goods being sold at this price, and with no change during this time period.

Potential Liability

The notification covers 16 VAT quarters.

Suppliers output VAT = £75 inc. VAT = £12.50 VAT

Sale price = £120 inc. VAT = £20 VAT

Consoles'R'Us Ltd have accounted for £7.50 VAT for each unit (£20 outputs - £12.50 inputs).

£12.50 is unpaid.

Total unpaid liability is:

(£12.50 x 200 units per month) x 3 months x 16 quarters = £120,000

Yours sincerely,

Sian Adviser

MARKING GUIDE

TOPIC	MARKS
Identify where unpaid VAT came from	2
Set out conditions for MTIC provisions, and satisfaction (or not) of them	3
View on whether price disparity rebuts presumption of reasonable grounds to suspect, with reason (conclusion either way is acceptable provided it is supported with a valid argument)	1
Deemed self-supply rules, not applicable when only temporary	2
Identifying HMRC would have sent notification to other companies in chain	0.5
Time limit for responding to letter	0.5
What will happen if no response/HMRC don't accept	1
Request of relevant information	2
Calculation of potential liability	2
PHS	1
TOTAL	**15**

ANSWER 5

From: JGeorge@CTA.co.uk
To: RHawks@MilliganHomeImprovements.co.uk
Date: 13 November 2020
Re: Classifying your goods

Ray

Thanks for your email. I understand the need to reduce costs, but I would advise that you take a cautious approach. You must be careful that this does not ending up costing you more in the long run.

It is important to note that how goods are classified is not a choice; there will be one Commodity Code that applies to each of the goods you import. Classification is complex and it can be difficult to know that you have considered all relevant information.

[1 mark]

Most countries use the same six digit World Customs Organisation, Harmonized Commodity Description and Coding System (or Harmonized System / HS) code to identify goods. However, at import you have to declare the 10-digit EU tariff code (or commodity code) which is based on the HS code.

[1 mark]

Using the wrong Commodity Code can make a big difference to the amount of Customs Duty paid at import and can affect whether other measures such as licensing apply. As such it is very important to ensure that the correct code is used.

[1 mark]

Both the World Customs Organisation and the European Union publish guides ("Explanatory Notes") to help explain what goods are and are not proper to particular headings. Additionally, there are many individual EU Regulations that determine the classification of individual products. As a result, it may be advisable to seek specific advice on the classification of individual products before you reclassify them.

[1 mark]

<u>The General Interpretive Rules (GIR)</u>

It is also worth understanding the general pan-European rules that govern the process of classification so that you know what is involved. These are applied strictly by all member states and are generally worked through in a hierarchical order.

[1 mark]

GIR 1 – The titles of sections of the tariff are not legally binding. The tariff headings and any notes e.g. on what goods are included or are excluded from certain headings shall be used to determine the classification of the goods.

[1 mark]

GIR 2(a) - any reference to an item is taken to mean a reference to an unfinished article providing that the item has the essential character of the finished item. It shall also refer to an unassembled or disassembled item.

[0.5 mark]

GIR 2(b) - references to a particular material or substance shall be taken to include articles made partly of that material or substance and in such cases the goods shall be classified in accordance with GIR 3.

[0.5 mark]

GIR 3 - where goods may otherwise be classified under two or more headings when applying GIR 2(b), classification shall be determined by working through the following rules:

GIR 3(a) - a description that is more specific shall be preferred to a general description. It also says that where two or more headings refer only to part of the material or substances that make up the goods, the descriptions shall be regarded as equally specific.

[0.5 mark]

GIR 3(b) -where 3(a) does not give a classification, then the item shall be classified as if they consisted only of the material or component which gives the item its essential character.

[0.5 mark]

GIR 3(c) - where goods cannot be classified under either 3(a) or 3(b) they are classified under the heading which is last in numerical order as long as all those being considered have equal merit.

[0.5 mark]

GIR 4 - where goods cannot be classified under the proceeding rules, they shall be classified under the heading appropriate to the goods which they are most alike.

[0.5 mark]

GIR 5(a) - cases imported with the goods that they are designed to hold, such as cases for musical instruments, are to be classified as the item they contain. GIR 5(b) says that normal single use packaging imported with the goods are classified under the same heading as the goods.

[1 mark]

GIR 6 - GIRs 1 to 5 still apply when considering subheadings in the tariff and that you must compare notes etc at the same level e.g. you cannot compare the notes at four digit level to the notes for a different code at six digit level.

[1 mark]

<u>Recommendations</u>

If having reviewed these rules you still believe that you have got the classification of the goods wrong in the past, I would recommend that you do not simply change the commodity code you declare on future imports. This has two potential drawbacks.

1) If you are wrong, you leave yourself open to demands (C18s) to recover underpaid Customs Duty and Import VAT at a later date.

   You may also receive Civil Penalties for making incorrect declarations. These could be between £250 and £2,500 per declaration, although it is unlikely that a penalty would be issued for every incorrect declaration.

   If HMRC took the view that goods had been deliberately mis-classified to reduce the amount of Customs Duty paid, they could issue a Civil Evasion Penalty which starts at 100% of the unpaid Customs Duty and Import VAT.

[3 marks]

2) If however the new commodity codes are the right ones you have paid too much Customs Duty on entries made in the past. Simply using the new codes going forward would not change that - see recommendation 1.

[1 mark]

As a result I would recommend the following:

1. Submit a repayment claim to HMRC covering all relevant imports made in the last three years. This will stop any further entries falling out of time while they consider your application;

2. Ask for a Binding Tariff Information from HMRC. This is a legally binding ruling stating what the correct tariff classification is, these last three years. Although these are not retrospective, if you can demonstrate that you have imported the same goods in the past, it would be hard for HMRC to argue that the ruling did not apply;

3. In the meantime, you could use the lower Customs Duty rate and if the BTI does confirm the higher Customs Duty rate, you could send HMRC a voluntary disclosure to advise them of the underpayment. This should at least remove the possibility of them issuing penalties.

[3 marks – any other relevant recommendations will gain credit]

Other relevant points:

1. Could check BTI database for ones already issued to others – persuasive for their products (although only able to invoke if you are the holder)
2. How they go about applying for one – he asked 'what you think we should do' – so a candidate could give more detail about the application process, online, and information to include – pictures/tech spec of goods etc
3. There could be CJEU or UK cases that have classified products that they import

We can help you review the classifications that you are using and advise further.

[PHS - 2 marks]

Regards
John

MARKING GUIDE

TOPIC	MARKS
Classification is not a choice – there is one code for each product. It is complex.	1
Harmonized Six digit code should be same – Customs Duty determined by extra digits – must declare 10 digits	1
Commodity Code determines Customs Duty rate and other measures	1
WCO and EU publish guidelines and individual regulations determine the classification of many products. May need specialist advice.	1
GIRs	
GIRs govern the process and must be worked through in order.	1
GIR 1 – Titles of sections of tariff are not legally binding. Headings and notes shall be used.	1
GIR 2(a) – Reference to an item includes an unfinished as long as it has the essential character. Also includes disassembled item.	0.5
GIR 2(b) – References to material or substance include articles partly made of that substance.	0.5
GIR 3 – If two codes appear relevant under 2(b) then: GIR 3 (a) – more specific description is preferred to a general one. If two headings refer to part of the materials, the descriptions shall be regarded as equally specific.	0.5
GIR 3(b) – If GIR 3(a) does not give a result, then the item shall be classified as if they contained only the material that gives it its essential character.	0.5
GIR 3(c) – If 3(a) and 3(b) do not give a result, then use the classification that is last in numerical order.	0.5
GIR 4 – If GIR 3(c) does not give a result, classify the goods under the heading for goods which they are most like.	0.5
GIR 5(a) – Cases imported with goods they are designed to hold are classified with the item they contain…	0.5
And normal single use packaging is classified as the goods they contain.	0.5
GIR 6 – GIRs 1-5 still apply when considering sub-headings in the tariff…	0.5
And compare notes at the same level of digits.	0.5
Recommendations	
Do not simply reclassify goods going forward: If wrong this could lead to C18s and Civil Penalties; Incorrect declarations could lead to Civil Penalties of between £250 - £2,500 per declaration. If HMRC see this as a deliberate attempt to pay less Customs Duty they could issue a Civil Evasion Penalty, starting at 100% of the Customs Duty involved.	1 1 1
If right, you have not reclaimed the overpaid Customs Duty from past declarations.	1
Submit repayment claim to HMRC covering all incorrect entries from last three years. Ask for BTI. Not retrospective but can be persuasive for repayment claims. Could use lower rate in meantime and make voluntary disclosure if BTI does not confirm your view.	3 marks for any relevant recommendations
PHS	2
TOTAL	**20**

ANSWER 6

From: Ron@CTAAdvisers.co.uk
To: Jenny@Toy'n'Game.co.uk
Date: 13 November 2020
Re: Goods supplied to UCY Co

Dear Jenny

There is a Customs Duty relief, called Returned Goods Relief (RGR), that would help you re-import these goods without paying Customs Duty, if you have the right paperwork. Getting relief from paying the Customs Duty is easier than getting relief from paying the Import VAT.

[1 mark]

Customs Duty Relief - RGR

RGR allows free circulation or EU Customs Duty paid goods that were exported from the EU up to three years ago, to be re-imported without payment of Customs Duty. There are a number of other conditions, which in your case seem to be met.

[1 mark]

The goods must be re-imported in the same state they were in when they were exported except that work necessary to preserve them or keep them in good condition is allowed.

[1 mark]

You do not need to re-import the whole quantity of goods exported to obtain relief as long as you can prove that the goods were exported from the EU and can meet the other conditions.

[1 mark]

You will need to have proof of the original export which should not be a problem for the goods you sold. You would need to be able to demonstrate that the goods re-imported are the same ones. Again with your normal commercial paperwork and the correspondence with the US customer, this should not be a problem.

[1 mark]

Relief from Import VAT

The Import VAT situation is more complicated. Customs law does not recognise any concept of "groups" as VAT law does. Customs law is all based on individual entities such as companies.

[1 mark]

Import VAT is charged and collected as if it were a duty of Customs (VATA 1994 S1(4)).

[1 mark]

However, at import the debt is created under the Union Customs Code, which is Customs law, so the debt, including the Import VAT debt (VATA 1994 S1(4)) is incurred by whoever is named on the import declaration. They do not have to be the owner of the goods.

[1 mark]

We then have to consider S43(1)(c) VATA 1994 which says that for a VAT group any VAT paid at import shall be treated as paid by the representative member; with VAT Regs 1995, Reg 121D's use of "person" when saying that for VAT purposes only the person who exported the goods is entitled to VAT relief at importation.

[1 mark]

This leaves some area of doubt as to who exactly is entitled to claim the VAT relief at import especially as Toy'n'Game Wholesale Ltd was the exporter and it has only just formed a VAT Group with Toy'n'Game Retail Ltd. It might be acceptable for a different member of the VAT group to re-import the goods and claim the relief, but this is not certain. It would be safest for Toy'n'Game Wholesale Ltd to re-import the goods and claim the relief. It can then transfer them to your sister company if necessary, without charging VAT.

[1 mark]

I trust this is clear but please do not hesitate to let me know if we can be of any further assistance.

Regards

Ron

MARKING GUIDE

TOPIC	MARKS
Use RGR, can get relief from Customs Duty with right paperwork. Getting relief from Import VAT is harder.	1
Can get Customs Duty relief if goods are re-imported within 3 years and meet other conditions.	1
Must be re-imported in same state except that necessary preservation work is allowed.	1
Don't have to re-import whole quantity as long as can prove export and meet other conditions.	1
Evidence of export and that they are same goods is needed.	1
Import VAT	
Harder. Customs law is based on individual companies. VAT law recognises groups.	1
Import VAT is charged and collected as if it were a duty of Customs	1
Debt at Import is created under UCC – importer does not have to be owner.	1
VAT Act says all transactions are undertaken by Group Representative Owner but VAT Reg 95 say for RGR only the "person" who exported the goods is entitled to relief.	1
Leaves some doubt who may claim RGR VAT Relief; especially as group only recently formed. Safest for Toy'n'Game Wholesale Ltd to re-import, claim relief and transfer goods to Toy'n'Game Retail Ltd.	1
TOTAL	**10**