Import VAT recovery by businesses and recent challenges
An introduction to import VAT recovery by non-owners

In addition to customs formalities which are now required for goods brought into the UK from the EU following the end of the Brexit transition period, many businesses also face the prospect of paying import VAT on goods brought from EU Member States into the UK. In many cases, retailers will be able to recover such costs through the VAT return via the monthly postponed import VAT accounting (“PVA”) statement (or a using C79 certificate if import VAT is paid at the time of import).

However, businesses should be aware of HMRC’s policy of not permitting import VAT recovery where a taxpayer does not own the goods at importation. As this policy applies to goods entering the UK from the EU, the increased scope for potential irrecoverable input tax highlights the importance for retailers of understanding their supply chain and underlying documents.

Background

HMRC have often challenged attempts by businesses to recover import VAT as input tax where the importer of record listed on the import declaration (the C88 form) is not the owner of the goods. This policy was confirmed in Revenue and Customs Brief (“RCB”) 2 (2019), which was published on 11 April 2019.

As such, after a transitional period to allow for businesses to make any necessary changes to ensure the correct procedures are used going forward, from 15 July 2019 input tax deduction of import VAT was only to be accepted by HMRC where it is incurred by the owner of imported goods.

Following the publication of this RCB, and a number of representations by businesses impacted by such changes, HMRC reviewed its position, culminating in the publication of RCB 15 (2020) on 2 October 2020. This RCB confirmed the position outlined in RCB 2 (2019) that taxpayers cannot recover import VAT where they are not the owner of the goods at the point of import.

Meaning of ownership

Following the issuance of the RCBs, there were a number of discussions with regards to the meaning of ownership and how this interacted with the concept of title passing between the parties. As a result, HMRC have recently updated the guidance where references to “title” has been replaced with references to “ownership”.

HMRC’s view is that ownership of the goods means the ‘right to dispose of goods as owner’. This could in practice mean that ownership and the legal title in the goods are separated and can transfer at different points in the transaction (a common example of this being transactions with a retention of title clause). In order to avoid import VAT becoming a cost in the supply chain, to the extent possible, it is important that all parties in the supply chain are clear with regards to the point at which the ownership in the goods passes and that sufficient evidence is held to support this.

Some factors that help determine this include:

**Incoterms**: Whilst not a determining factor in its own right for VAT purposes, the Incoterms usually give an indication of the obligations commercially agreed between the seller and the buyer. For example, under the Delivery At Place (“DAP”) Incoterms, risk/ownership transfers at a ‘named place’ agreed by the parties, usually prior to the goods being cleared for import. However, in practice, there is often a lack of clarity on when or where the transfer of ownership (i.e. the right to use/dispose goods) takes place and this could create a risk of the import VAT becoming irrecoverable and/or creating additional VAT compliance obligations for the respective parties. As a result, it has become increasingly important that the parties specifically agree (and appropriately record in documentary evidence) the time and place at which the ownership transfers.
Another common example of Incoterms is Delivery Duty Paid ("DDP"), which indicate that the seller will be responsible for delivering the goods to the customer’s destination. Under DDP, there is an expectation that the ownership in the goods passes from the seller to the buyer once the goods are delivered to the buyer’s address. In practice, this would mean that an overseas seller is likely to have an obligation to import the goods into the UK and it will incur the import VAT. Where the seller remains the owner of the goods at the time of import, it should be able to recover import VAT via its UK VAT return, but may be required to register and account for UK VAT on the onward supply.

Contracts: Businesses should determine whether the contracts specifically mention when the ownership in the goods is transferred between the seller and the buyer. In practice, for a large number of supplies, there may not be a written contract, the contract may not have such clauses, or due to the sheer volume of the contracts, the business may not have full visibility of the agreed terms. In absence of such visibility, a number of retailers are considering use of other documents to agree/identify the point at which ownership in the goods transfers (such as side letters, emails, additional T&Cs etc.).

Clarity of and sufficiency of evidence: As noted above, due to the large volume of contracts which many retailers have in place, other documents may be used to identify the point of transfer of ownership. In such cases, both the buyer and seller should ensure that sufficient evidence is retained to demonstrate the appropriateness of any recovery of import VAT as input tax. Businesses should also ensure that this evidence is both clear and not contradicted, either by other documents or by the actual conduct of the parties.

Degree of control and ability to onward sell: Another factor that helps in determining the ownership of the goods is the relative level of control which both buyer and seller have throughout the supply chain. This might include the ability of the buyer to further contract with other parties to sell the goods onward, or a buyer’s ability to control the goods in other ways (e.g. direct the movement of the goods).

Revenue recognition: Retailers may also need to consider where revenue is recognised in the supply chain. While this will not be determinative of the point at which ownership transfers, it may be a useful indicator.

Technical basis

Notwithstanding HMRC's policy, the Value Added Tax Act 1994 ("VATA 1994") does not specifically restrict the recovery of import VAT to the owner of goods.

Section 24, VATA 1994 states that import VAT is input tax:

“24(1) subject to the following provision of this section, ‘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,

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.”

Sections 25 and 26, VATA 1994 further clarify that taxpayers may claim a credit at the end of each accounting period for input tax so far as this is attributable to taxable supplies made by that taxpayer. This will be subject to a business possessing evidence that it has incurred this input tax, by way of the monthly statement generated under the new PVA mechanism introduced in the UK from 1 January 2021 or a C79 certificate.

Therefore, the UK legislative provisions do not explicitly state that there is a requirement for a taxpayer to be owner of the goods for import VAT to be recoverable as input tax.
However irrespective of the UK legislative provisions, a reasoned order issued by the Court of Justice of the European Union ("CJEU") in October 2020 (Weindel Logistik Service) shows that where a business does not take ownership of the goods, there may not be a “direct and immediate link” between import VAT incurred by a non-owner and its onward taxable supplies. Therefore, whilst this case may not be directly applicable in supply chains where a retailer eventually does take ownership, it does highlight the importance of establishing the general principle of there being "a direct and immediate link" between VAT incurred and onward taxable supplies to support VAT recovery.

The EU VAT Committee ("the Committee") (a consultative committee which does not have the power to bind the European Commission or individual EU Member States) considered the recoverability of import VAT in 2011. It concluded that a taxable person should not be entitled to deduct this as input tax if both of the following conditions are met:

1. He does not obtain the right to dispose of the goods as owner; and
2. The cost of the goods has no direct and immediate link with his economic activity.

However, the Committee’s condition that the taxpayer “obtain[s] the right to dispose of the goods as owner” is not easy to reconcile in the situation where a retailer obtains the right to dispose of the goods as owner only after the point of importation. Yet even if the Committee intended the first condition to encompass situations where ownership transfers after importation, we note that under the criteria it suggested, a taxpayer would still need to meet the second condition in order for input tax deduction to be denied. As such, even where a non-owner incurs import VAT, it is arguable that a direct and immediate link to the non-owner’s onward taxable supplies would justify input tax recovery under the VAT Committee’s suggested standard. However, as noted, given the opinion of the VAT Committee does not have the force of law, it could not be used as a basis for input tax recovery as an alternative to HMRC’s stated position in the RCBs. The Committee’s guideline does, however, illustrate that HMRC’s approach was not necessarily reflecting the Committee’s position.

While HMRC’s RCBs do not make reference to either the case law or the recommendations of the VAT Committee, it is important to note that Weindel Logistik Service will remain retained case law of the EU, and therefore binding on the UK, until such a point as Parliament (via a change in the law), the Court of Appeal or the Supreme Court diverge from the current position. As such, taxpayers will continue to be required to demonstrate a direct and immediate link between input tax incurred and onwards taxable supplies.

**Impact of Brexit**

From 1 January 2021, imports into the UK include movements of goods from EU Member States (these movements previously regarded as dispatches/acquisitions and not subject to import VAT). As such, the volume of supplies into the UK where import VAT is chargeable, both for owners and non-owners, has increased. For example, movements of goods by non-owners such as where an item is sent from the Republic of Ireland for repair in Great Britain may now result in irrecoverable import VAT, resulting in higher costs of doing business.

Therefore, whilst from 1 January 2021 HMRC have introduced the option to use PVA in the UK which should make import VAT recovery easier from an administrative perspective (as fully taxable business can self-account for import VAT and recover it via the same VAT return), the introduction of PVA does not change the rules regarding whether VAT can be recovered as input tax, as is noted in HMRC’s guidance on PVA, and as such, PVA will not remove HMRC’s requirement that the business that recovers import VAT is also the owner of the goods at the point of import.