Why should I be interested in the vapour recovery scheme?

Indirect Tax

01 October 2015

CIOT responds to the HMRC excise duty consultation

The CIOT has responded to HMRC's excise duty consultation, 'Vapour recovery scheme: options for replacing the extra-statutory concession (ESC)'.

Although views are sought from oil producers, fuel duty payers and businesses in the fuel supply chain, such as petrol retailers, on how HMRC should replace the *ultra vires* vapour recovery scheme, it has a wider impact than the excise duty. There are difficulties with unjust enrichment and important commercial and – indirectly – VAT issues to overcome.

What is vapour recovery?

When petrol is supplied by road tanker, some of it escapes as vapour during loading and unloading. EU law requires suppliers to recover this vapour for environmental purposes. It is estimated that between 0.1% and 0.2% of each load is captured on each delivery.

The excise duty to be paid is determined when petrol is released from a duty point for eventual home consumption, typically at the fuel producer's terminal. Therefore, by the time the vapour is released and captured it has already become liable for duty.

HMRC allow the captured vapour to be returned to the supplier's tanks at the refinery (before the duty point) and mixed with fuel on which duty has not been paid. This combined fuel will then be sold. Thus, fuel on which duty has already been paid is re-sold, with duty being paid again.

Who can claim a refund?

To avoid double taxation on the resale of duty paid fuel vapour, suppliers may then claim a credit of duty already paid on the recovered product using the vapour recovery scheme. Historically, this claim has been made by producers using a complex formula but it is now acknowledged, following the Wilkinson case, that there is no UK legislative basis for this refund mechanism.

However, if the invoiced amount by the supplier, including duty, is wrong – because there can be under-delivery of fuel through incorrect measurement and vapour release – the retailer has been overcharged for an amount of product plus an amount of duty (and VAT) that has never been received. The supplier claims the refund of duty paid on the vapour release and does not pass this on to the retailer.

Previously, HMRC have allowed the refund claims to be made by the suppliers only, not the retailers, citing administrative ease and risk of fraud. However, an option would be to allow retailers to apply to defer duty themselves and these supplies would then be made under duty suspension. Any refund could be made directly to the retailer and avoid unjust enrichment issues. See the FTT decision in *Brobot Petroleum Limited v HMRC* [2015] UKFTT 427 (TC).

EU principles to be addressed

We believe EU law obliges HMRC to be compliant with and have regard to EU principles such as unjust enrichment, double taxation and legal certainty. Therefore, any future scheme must address this and we recommend that the basis of that should be legislative rather than policy or practice-based because legal certainty is vital for both taxpayers and HMRC.

On enforcement, we note that HMRC already have enough powers to address issues arising from this scheme before additional measures are introduced.

The full response can be found on the CIOT website.