



TC03499

Appeal number: TC/2013/04772

EXCISE DUTY – refusal to register appellant as registered owner under Warehousekeepers and Owners of Warehoused Goods Regulations 1999 due to alleged inadequacy of information supplied – whether decision could reasonably have been arrived at - yes - whether further review of the original decision should be required – no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SPLENDOUR TRADERS LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE GREG SINFIELD
MRS SHAHWAR SADEQUE**

Sitting in public in London on 14 March 2014

**Attia Bano and Zahid Mehmood, directors of Splendour Traders Limited, for
the Appellant**

**William Hays, counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

1. This is an appeal by Splendour Traders Limited (“STL”) against a decision of the Respondents (“HMRC”) to refuse STL’s application to be approved and registered as an owner of duty-suspended goods held in an excise warehouse under regulation 5 of the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 (“WOWGR”). HMRC refused the application on the ground that STL had not provided certain information that had been requested by HMRC. For the reasons set out below, we are not satisfied that HMRC could not reasonably have arrived at the decision to refuse the application in the circumstances. Accordingly, we dismiss STL’s appeal.

Background

2. The fiscal and regulatory context of an application to be a registered owner under WOWGR was set out by the Tribunal in *Eastenders Cash and Carry Plc v HMRC* [2011] UKFTT 25 (TC) at [2] and [3] as follows:

“2. Beers, wines and spirits are subject to excise duty. Goods which are liable to excise duty may be held in what is called excise duty “suspension” after those goods have been manufactured or imported. In other words, excise duty which would otherwise be payable in respect of those goods is suspended until they are released onto the home (i.e. UK domestic) market. Goods in respect of which duty is suspended must be physically held in specified excise warehouses.

3. Both the keepers of excise warehouses and owners of goods held in excise warehouses must be registered under WOWGR. This is because excise warehousekeepers and owners of goods held in excise warehouses have control over goods which are held in excise duty suspension and must ensure that the goods are not released onto the home market without duty being paid. If such goods were so released and sold on the home market without duty being paid (an event known as “diversion”) HMRC would not receive the duty that was otherwise payable and a fraud would be committed on the exchequer.”

3. The statutory provisions that govern applications to be a registered owner of goods in an excise warehouse are contained in the Customs and Excise Management Act 1979 (“CEMA”) and WOWGR.

4. Section 100G CEMA relevantly provides as follows:

“(2) The Commissioners may approve, and enter in a register maintained by them for the purpose, any revenue trader who applies for registration under this section and who appears to them to satisfy such requirements for registration as they may think fit to impose.

...

(4) The Commissioners may approve and register a person under this section for such periods and subject to such conditions or restrictions

as they may think fit or as they may by or under the regulations prescribe. ...”

5. Regulation 5 WOWGR is as follows:

5 “(1) For the purposes of section 100G of the Act, the Commissioners may approve revenue traders who wish to deposit relevant goods that they own in an excise warehouse and register them as registered excise dealers and shippers in accordance with section 100G(2) of the Act.

(2) A revenue trader who has been so approved and registered shall be known as a registered owner.”

10 6. Regulation 18 WOWGR provides for the conditions and restrictions that are or may be imposed on registered owners and includes the following:

15 “(1) The approval and registration of every registered owner shall be subject to the conditions and restrictions prescribed in a notice published by the Commissioners and not withdrawn by a further notice.”

20 7. HMRC have prescribed conditions that must be met by a person wishing to be approved and registered as a registered owner in Notice 196 Excise Goods: authorisation of warehousekeepers and approval of premises (October 2012). Section 5 of Notice 196 sets out what an owner of excise goods must do in order to be approved and registered to hold them in an excise warehouse. Section 5.2 describes the registration process for an owner of excise goods and includes the following:

25 “You must send an up to date business plan with your application. You may be requested to send further additional business papers to substantiate your application. When all the requested information is held by HMRC we intend to process your application within 45 working days.

30 If you are unable to provide a business plan or other requested information you should contact the NRU. Failure to do this will result in your application not being processed until this information is received.

...

In considering your application, HMRC will follow the guidelines set out in paragraph 3.2 of this notice.

...

35 As a part of our registration procedure we will ask for further information about you and your business. If you fail to supply this information we will place your application on hold until this information is received.

...

40 If we do not accept your application, we will inform you in writing and give our reasons for the rejection. We will offer you a review of our decision or you can appeal direct to the independent tribunal”

8. Section 3.2 of Notice 196 states:

5 “If we are not satisfied with the information provided to us, we may refuse to authorise you. In addition, if you fail to provide us with the information requested, we will place your application on hold until the information is received. We will notify you of the reason or reasons for the refusal.”

Facts

9. There was no dispute about the relevant facts. Ms Bano and Mr Mehmood provided witness statements that set out some background information and the progress of STL’s application by reference to correspondence between the parties. Mr William Hays, who appeared for HMRC, did not seek to cross-examine Ms Bano and Mr Mehmood so their witness statements stood as their evidence, which we accept. Insofar as any facts were not included in the witness statements, they could be ascertained from the documents produced by both parties. On the basis of the witness statements and documents, we find the facts to be as follows.

10. STL was established in 2010 with the aim of trading in good quality beers in UK and other EU markets. In order to achieve that aim, STL registered with a numbers of suppliers, namely HT & Co Limited, Elbrook Cash & Carry Limited and Malcolm Cowen (Drinks) Limited, which were all based in the UK but had accounts with and supplied beers in bonded warehouses in France and Belgium. STL opened accounts in the same bonded warehouses, including IEFW in France and Transport Wybo NV in Belgium. STL bought beers from those suppliers under bond in the excise warehouses. STL supplied the beers to customers in France either under bond or at French duty rates if the customer wanted the beers to be delivered to its own unbonded warehouse. The French customers included Sarl Max and Drinks Club in Coquelles.

11. Having traded satisfactorily in France, STL decided to expand its business by importing beers into the UK. STL intended to buy the beers from its suppliers in the French and Belgian excise warehouses and move them, under duty suspension, to the UK. In order to be able to do so STL needed to open an account with an excise warehouse in the UK. In May 2012, STL asked Seabrook Warehousing Limited of Barking, Essex (“Seabrook”) whether it could open an account. In a letter dated 30 May 2012, Seabrook agreed that STL could open an account on provision of certain information and payment of a deposit of £2,000. In the letter, Seabrook strongly recommended that STL should apply for a WOWGR registration. STL paid the deposit to Seabrook and opened the account in June 2012.

12. In September 2012, STL applied to HMRC to be registered under WOWGR as an owner of duty suspended goods in an excise warehouse. STL contacted several cash-and-carry stores in London and offered to sell them duty-paid stock. We were shown two letters from outlets that stated that they were interested in buying duty-paid beers and other alcoholic drinks from STL.

13. In a letter dated 4 March 2013, Mr Karlvin Lochan of HMRC stated that he had taken on the processing of STL's application and asked STL to provide certain information including "letters of intent to trade from your suppliers".

5 14. On 18 March 2013, STL sent various items of information to HMRC by email, attaching a business plan, certificate of incorporation, VAT registration certificate, and utility bills. STL also stated that it had opened an account with Seabrook and attached documents in relation to that account.

10 15. On 20 March 2013, STL sent more information relating to the company to Mr Lochan. On the same day, Mr Lochan sent STL a letter thanking STL for the information already provided and stating that he was still waiting for certain information that he had asked for in his letter of 4 March which he set out in the letter. The information requested included "letters of intent from your suppliers". The letter also asked whether the suppliers listed on page 13 of STL's business plan were existing suppliers or new suppliers.

15 16. On 11 April 2013, STL sent an email to Mr Lochan in response to his letter of 20 March. The email stated:

20 "I have received your letter on 5 April 2013. As I have already sent you all details [sic]. Please see attached [sic] letter as I tried to reply you for every question. Sorry for late reply but I received letter on weekend."

17. Attached to the email was an undated letter of three pages from Ms Bano that said:

25 "Dear Karlvin
Please see below information are [sic] requested by you. I have already emailed you all these details on 18/03/2013."

18. The letter gave unnumbered responses which to questions asked by Mr Lochan in his letter of 20 March 2013. In relation to suppliers, it included the following:

30 "We are already working with our suppliers but in Europe under bound [sic]. Please see attached under bound [sic] invoice from supplier.

...

List of supplier [sic] mentioned in business plan is of existing suppliers"

19. Mr Lochan replied by email on the following day as follows

35 "Hello Attia,
Unfortunately, at this time your application has been forwarded for rejection.

If you wish to contest this, I suggest you wait until you have received the rejection letter, then you can take what action you feel appropriate."

20. The next communication that STL received was a letter dated 19 April 2013 from Mr Lochan that included the following:

5 “I am writing to advise you that your application to be registered under WOWGR has been rejected as per section 5.2 of Public Notice 196 (October 12).

In reaching this decision, the following has been taken into account:

- Requests for further information were made to you on the 20/03/2013
- To date there has been no reply to the requests for further information.”

21. The letter then set out what steps STL could take if it disagreed with the decision. The was, of course, not correct when it said that there had been no reply to the requests for information as Ms Bano had written to Mr Lochan on 11 April. Having taken instructions, Mr Hays stated that Mr Lochan's response to the email from STL 11 April was made in that form because the letter rejecting the application for registration had already been sent although it was post-dated 19 April 2013 in order to preserve STL's rights of appeal.

22. By letter dated 30 April, STL asked Mr Lochan to review of his decision of 19 April. The letter stated:

20 “The grounds of our review application are that in reply to your letters of 04/03/2013 and 20/03/2013 regarding further information for registration we sent you all the required information firstly on 18/03/2013 and secondly on 11/04/2013 (please see enclosed copies email [sic]).

25 In giving the reasons to reject our application for registration under WOWGR you stated that we have failed to submit all the required further information. We kindly ask you to take into account that on each occasion we provide you with all the information in order to be registered under WOWGR. Please find as under all the required further information once again in support of my review application and register my company and the WLOWGR ...”

23. The letter then set out a series of questions that had been asked by Mr Lochan in letters of 4 March and 20 March with replies to each question. Relevantly, at number 3 the letter stated as follows:

35 “I need letters of intent from your suppliers.

We are already working with our suppliers but in Europe under bound [sic] (please see some enclosed under bound [sic] invoices from the supplier).”

24. The letter of 30 April was received by HMRC on 7 May 2013 and accepted as a request for a review. In a letter dated 16 May, HMRC notified STL that a review would be carried out. On 19 June, the HMRC review officer, Brian McCann, sent STL a letter stating that the review had been concluded and that the decision

contained in Mr Lochan's letter of 19 April 2013 was being maintained. The letter stated as follows:

“Points at Issue

5 Your company applied for a WOWGR registration as you wished to purchase in UK, duty suspended excise goods, for supply to UK customers duty-paid and customers in other EU member states in duty suspension.

10 You were asked to supply detailed information in letter [sic] dated 20 March 2013 by 27 March 2013. Part of the information you were asked to provide was letters of intent from your customers [sic] stated on page 13 of your Business Plan stating that they would supply you with duty suspended excise goods to you in the UK and details of the cost of each product.

15 You failed to supply the information by the due date and you were notified that your WOWGR (Owner) application had been refused which is the decision in dispute.

...

What I have Considered in my Review

20 On 30 April 2013 you provided a response to each of the points contained in Officer Lochan's letter of 20 March 2013 plus documentation. Officer Lochan examined all the information provided and has advised that he would not change his decision contained in letter dated 19 April 2013 as you had failed to provide letters of intent from your customers [sic] stated on page 13 of your Business Plan notifying that they would supply you with duty suspended excise goods to you in the UK and details of the cost of each product. Officer Lochan also advised that you failed to provide a copy of your company's price list.

30 Although you provided 4 invoices from Malcolm Cowen (Drinks) Ltd, these only advised that your company had access to duty suspended beers being held in the account of Drinks Club at MT Manut Tax Warehouse in France which had been supplied from Malcolm Cowen (Drinks) Ltd account at Transport Wybo NV (MB) Tax Warehouse in Belgium. These invoices stated that your company was responsible for all excise duties on VAT. These invoices did not demonstrate that your company will be supplied with excise goods for delivery to the UK under duty suspension.

Review Conclusion

40 You have failed to supply to provide [sic] letters of intent from your customers [sic] stated on page 13 of your Business Plan notifying that they would supply you with duty suspended excise goods to you in the UK and details of the cost of each product. You did provide a price list at pages 11 and 12 of your business plan. The requirement to submit the letters of intent to supply duty suspended excise goods to your company in the UK is fundamental in the consideration for a successful application for WOWGR (Owner) Registration.

There is therefore no requirement for your company to be registered under Section 100G(2) of the Customs and Excise Management Act 1979 and Warehousekeepers and Owners of Warehoused Goods Regulations 1999 Regulation 5.

5 The decision contained in Officer Lochan's letter dated 19 April 2013 has to be maintained.”

25. On 18 July, STL lodged a notice of appeal against the decision of 19 April 2013 confirmed on review as stated in the letter dated 19 June.

Summary of submissions

10 26. Ms Attia Bano and Mr Zahid Mehmood, directors of STL, presented the case for the company. They submitted that STL had satisfied all the requirements under section 100G CEMA and Regulation 5 WOWGR. They contended that HMRC's refusal of STL's application to be registered under WOWGR was based purely on the fact that STL had not provided the information on time. They said that STL had
15 explained why it had not provided all the information immediately and answered all the questions in its letter requesting a review of the original decision. The review decision confirmed the original decision on the ground that STL had not provided letters from suppliers showing that they intended to supply duty suspended excise goods to STL in the UK. Ms Bano and Mr Mehmood stated that STL had been
20 successfully buying and selling beer products under bond in the French excise warehouse for some time. The suppliers named in the business plan had been selling beers to STL since it commenced trading. HMRC had seen purchase orders and invoices from those suppliers. Ms Bano said that she had explained to the suppliers that STL intended to bring goods into the UK and sell them to UK customers. She
25 said that the suppliers had told her that STL had the right to do what it liked with the beers once it had bought them. Ms Bano and Mr Mehmood were confident that the suppliers would continue to supply STL when it started to sell beers duty paid in the UK and that STL would have a viable business in the UK in the next phase of its business. At the hearing, Mr Mehmood admitted that STL had not provided any
30 estimate of the prices to be charged to the customers but stated that this was because it was not possible to estimate the prices in advance. Mr Mehmood also acknowledged that the suppliers had never issued any letters stating that they would continue to supply STL when STL began to trade with customers in the UK. He said that if HMRC really needed a letter from each of STL's suppliers stating that they would
35 continue to sell beers to STL then STL would obtain such letters and provide them to HMRC.

27. Mr Hays submitted that the reason for the rejection of STL's application to register given in the decision letter of 19 April 2013 was that there had not been any
40 response to the request for further information made by Mr Lochan in his letter of 20 March. The review letter of 19 June concluded that some further information had been provided by STL, which was considered by Mr Lochan, but STL had failed to provide letters of intent from the suppliers and that was why the original decision was maintained. Mr Hays readily accepted that the references to “customers” in the letter of 19 June 2013 were typographical errors. The letter should have referred to

“suppliers”. Mr Hays pointed out that the letters of 4 March and 20 March from Mr Lochan both correctly asked STL to provide “letters of intent from your suppliers”. Notwithstanding that the review decision letter referred to customers when it should have said suppliers, Mr Hayes submitted that the error was clear and, once that was accepted, the decision could be understood. He submitted that the question for the Tribunal was whether the decision was one that could not reasonably be arrived at. HMRC considered that, without the information requested, they could not be satisfied that STL’s proposed business was viable. In the absence of any letters of intent from STL’s suppliers, HMRC concluded that there would be an unacceptable risk to the revenue if they were to approve and register STL as a registered owner. Mr Hayes submitted that while there were no letters of intent from your suppliers, the decision of HMRC would be the same even the Tribunal were to require HMRC to conduct a further review of the original decision.

Discussion

28. This appeal is brought under section 16 Finance Act 1994 (“FA94”). By virtue of paragraph 2(1)(p) of Schedule 5 and section 13A(2)(j) FA94, a decision as to whether or not a person is to be approved and registered for the purposes of section 100G CEMA is a relevant decision for the purposes of sections 14 and 15 of the FA94, which concern reviews, and section 16 FA94 which relates to appeals. Section 16(8) provides that, subject to some irrelevant exceptions, a decision specified in Schedule 5 is a decision as to an ancillary matter. Section 16(4) FA94 provides:

“In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or a further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.”

29. In the grounds of appeal and skeleton argument, STL asked the Tribunal to grant it registration as an owner of duty suspended goods in an excise warehouse but we cannot register STL or compel HMRC to do so. Our jurisdiction in this appeal is limited by section 16(4). We can only allow the appeal if STL can satisfy us, on the balance of probabilities, that the decision appealed against is one that HMRC could not reasonably have arrived at. If we are so satisfied, we can only exercise the powers

in section 16(4)(a) to (c). Even if we consider that we would have made a different decision to that of HMRC, we cannot substitute our own decision on whether STL should be registered.

5 30. The only issue in this appeal is whether the decision to refuse STL's application to be registered under WOWGR was a decision that HMRC could not reasonably have arrived at in the circumstances of this case. The relevant decision is the one made at the conclusion of the review process and communicated to STL in the letter dated 19 June 2013.

10 31. The original decision was based in part on STL's failure to respond to the request for further information in Mr Lochan's letter of 20 March. In fact, there was a rather belated response by email on 11 April, which Mr Lochan acknowledged on 12 April saying that the application had already been rejected and STL should wait and challenge the rejection. At that point, the decision letter, which was post-dated, had been issued administratively but it was not sent until after the email had been received and acknowledged. We consider that it is a matter of regret that Mr Lochan did not recall the rejection letter and review the information provided with the email of 11 April, as that would have made clear to STL that HMRC needed to see letters of intent from the suppliers before they would grant STL's application to register. That, as Mr Hays pointed out, was the basis of the decision on review to maintain the original decision, notwithstanding the fact that STL had answered the questions and provided the information requested in the letter of 20 March and it had been reviewed and accepted by Mr Lochan. Even at the hearing, it appeared to us that Ms Bano and Mr Mehmood had not appreciated that HMRC required letters of intent from the suppliers. Ms Bano and Mr Mehmood clearly thought that it was enough to say that the suppliers had always sold beers to STL and there was no reason why they would not continue to trade with STL. It seems to us that it only became clear to Mr Mehmood that HMRC required letters from the suppliers stating that they intended to continue to supply STL with beers after STL started to sell beers duty-paid to customers in the UK at the end of HMRC's case. Mr Mehmood said in reply that, if HMRC really need them, STL would obtain such letters from the suppliers and provide them to HMRC.

32. Although the review decision letter dated 19 June 2013 confused customers for suppliers, we do not consider that such confusion made the decision to refuse STL's application to register unreasonable. The letters of 4 March and 20 March sent by Mr Lochan clearly asked STL to provide letters of intent from STL's suppliers. Taking the correspondence as a whole, we consider that Ms Bano and Mr Mehmood should have understood that the reference to customers in the review decision letter should have been read as a reference to suppliers. The confusion in the review letter was, in any event, not decisive as the review officer had taken account of the representations made by STL in its detailed letter of 30 April 2013 and of the comments of Mr Lochan who had revisited his original decision after he had examined the material provided with the letter. We consider that, although regrettable, the confusion in the decision letter does not in any way invalidate HMRC's decision that STL should not be approved and registered as the registered owner because it had failed to provide all the information required, namely any letters of intent from the suppliers. In the

circumstances, we regard the decision to reject STL's application to register as a reasonable decision. We reach that conclusion because we recognise and accept that there is a risk to the revenue in granting a person registered owner status and HMRC are entitled to require applicants for such status to provide information to enable
5 HMRC to be satisfied that, among other things, the applicant is a suitable person and has a viable actual or intended business. Even if we had concluded that the decision was unreasonable, we would not have required HMRC to conduct a further review because, in the absence of any letters of intent from the suppliers, it is clear that the decision after the further review would be the same.

10 33. In conclusion, STL has not satisfied us that HMRC could not reasonably have arrived at the decision made at the conclusion of the review process and communicated to STL in the letter dated 19 June 2013. The decision was reached because STL had failed to provide certain information reasonably requested by
15 HMRC. That information was written confirmation from STL's suppliers that they would continue to supply STL when it started to sell beers duty-paid in the UK in addition to the supplies that it already made in France. The reference in the letter dated 19 June to customers instead of suppliers is regrettable but does not make the decision unreasonable. The requirement to provide confirmation from the suppliers was clearly set out in letters dated 4 March and 20 March and the error in the letter
20 dated 19 June 2013 should have been obvious to STL.

Decision

34. For the reasons set out above, we have decided that STL's appeal must be dismissed.

Right to apply for permission to appeal

25 35. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**GREG SINFIELD
TRIBUNAL JUDGE**

35 **RELEASE DATE: 10 April 2014**