TC05588

Tribunal ref: TC/2015/03237

EXCISE DUTIES — goods seized from authorised warehousekeeper — no condemnation proceedings — restoration refused — FA 1994 s 16(4) — whether refusal a decision at which HMRC could reasonably arrive — no — appeal allowed and further review directed

FIRST-TIER TRIBUNAL
TAX CHAMBER

UNITED WHOLESALE (SCOTLAND) LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

Tribunal: **Judge Colin Bishopp**
Mrs Eileen Sumpter WS

Sitting in public in Edinburgh on 28 October 2016

Mr Ben Elliott, of the English bar, instructed by PwC Legal, for the appellant

Mr Martin Richardson, of the Scottish bar, instructed by the Office of the Advocate General, for the respondents

DECISION

Introduction

1. The appellant, United Wholesale (Scotland) Limited ("UWS"), trades as a cash and carry operator, supplying independent retailers (mainly "corner shop" traders) with groceries, household products, beer, wine, spirits and tobacco. It came into existence in 2001, when it was formed by the merger of two predecessor businesses carrying on the same trade, and it now has 15 sites within the United Kingdom. It has been an authorised warehousekeeper, within the meaning of reg 3 of the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR"), since 2009. The authorisation permits it to store excise goods, under duty suspension, in an identified secure section of its warehouse in Easter Queenslie Road, Glasgow, and to dispatch goods, again under duty suspension, from the warehouse. Authorised warehouses are commonly referred to as bonded, excise or tax warehouses, terms which appear in some of the documents quoted below.

2. Authorisation is granted in accordance with ss 92 and 93 of the Customs and Excise Management Act 1979 ("CEMA"), which confer on HMRC wide discretionary powers to grant or refuse authorisation, and to revoke it once granted. An authorisation may be granted subject to limitations of time and conditions, and those limitations and conditions, too, may be varied from time to time. UWS' authorisation has been subject to differing time limits, though we understand it has always been renewed and UWS has had unbroken authorisation since 2009. There have also been some changes over time in the conditions attached to it. The authorisation in force at the time with which we are concerned in this appeal was granted on 17 January 2014, though it covered the six months from 8 October 2013 to 7 April 2014, and had attached to it four conditions of which two, conditions 1 and 4, are relevant for present purposes. They were as follows:

> "1. You are only approved to store alcohol in duty suspension that is owned by United Wholesale (Scot) Ltd."
>
> "4. Duty suspended movements in and out of the tax warehouse must be notified by:
>
> - fax to HMRC at the Glasgow office on 03000 41 555 341; or
> - email to Julia.little@hmrc.gsi.gov.uk 48 hrs in advance."

3. The operation of UWS' excise warehouse is undertaken with the assistance of a computer system, a proprietary program in common use by owners of authorised warehouses, which controls the movement of goods into and out of the warehouse, prepares reports and documents necessary for the correct operation of an excise warehouse, and which interfaces with HMRC's own Excise Movement and Control System ("EMCS"). The evidence showed that the warehouse and UWS' records had been inspected by HMRC on many occasions without significant adverse incident prior to the events we describe below.

4. At first UWS stored only excise goods it intended to sell, duty-paid, to its retail customers but in the course of 2013 it began to sell goods, under duty suspension, to other wholesale traders. None of the conditions attached to its authorisation precluded such sales; indeed, condition 4 contemplated them. In December 2013 UWS was approached by a potential new customer of this kind, Lucky Drinks 4 U Ltd ("Lucky

Drinks"). Lucky Drinks was known to HMRC since it was a registered excise dealer and shipper, that is a trader approved pursuant to s 100G of CEMA and reg 5 of WOWGR and permitted to store excise goods owned by it, duty suspended, in an authorised warehouse. UWS undertook due diligence enquiries into Lucky Drinks with a satisfactory outcome, and it agreed to accept Lucky Drinks as a customer. UWS was not, however, willing to extend credit to it; the terms agreed were that goods purchased would not be released to Lucky Drinks until they had been paid for in full.

5. There was, however, some confusion and misunderstanding about some of the other terms on which UWS and Lucky Drinks were to trade. Lucky Drinks was under the impression that it would have what it described as an "under bond" account, by which it could store excise goods it owned in UWS' warehouse although, as condition 1 of UWS' authorisation set out above indicates, that was not permissible. On 9 January 2014, in order to comply with the conditions of its own authorisation and relying on its own understanding of what had been agreed, Lucky Drinks notified HMRC of its intention to open such an account. On the same day one of UWS' employees informed Lucky Drinks that its account had been opened. We shall need to return to the confusion at a later stage.

6. On 20 January 2014 Lucky Drinks submitted a purchase order to UWS for 78 pallets of beer; the total quantity was to be dispatched, under duty suspension, to an authorised warehouse in France. UWS' staff obtained all of the relevant details of the movement—that is, the name, address and relevant registration details of the consignee, and the identity and other particulars of the carrier, as well as the details of the movement guarantee. The relevant details were supplied to HMRC, by means of the email for which condition 4 of those attaching to UWS' authorisation provided, on 30 January. The email included the sentence "The order will be dispatched once we get the acknowledgment from you". The email was sent by an UWS employee, Enosh Veeramurthy, whose position was described as the bond manager.

7. On 3 February an HMRC officer, Christine Henderson, sent a list of questions to Mr Veeramurthy, to which he responded promptly. Ms Henderson, on the same day, sent further questions, to which Mr Veeramurthy again responded promptly. In the meantime Lucky Drinks paid the total agreed price for the goods of £56,264, in three instalments, the last of which arrived on 5 February. Despite the payment of the price and the expiry of the 48 hours' notice for which condition 4 provided the goods remained in UWS' secure warehouse. UWS did not raise a formal invoice, did not record a sale in its own accounting records, and did not enter the proposed movement to the EMCS, an entry which would have generated a unique Administrative Reference Code, or ARC, the authority necessary if a duty suspended movement is to commence. In addition, although a carrier had been appointed, and it was proposed that the goods should be removed from the warehouse in three consignments on 6, 7 and 8 February, UWS had made it clear to the carrier that the removal could not take place until HMRC's approval had been obtained.

8. On 5 February HMRC officers attended the warehouse, without prior warning, in order to mark the goods for seizure. They returned later the same day and removed them. Despite UWS' protests, HMRC refused to reconsider. In the belief that HMRC would nevertheless do so, UWS delayed requesting HMRC to commence condemnation proceedings until after the time limit had expired, and the request was rejected for that

reason. UWS simultaneously sought restoration of the goods, but that too was refused. HMRC's position was and is that the sale of the goods to Lucky Drinks, and the payment of the price, had the consequence that title to the goods had passed to Lucky Drinks, and that UWS was in breach of condition 1 of its authorisation because it was storing goods which it did not own. They also took the view that UWS had no excuse for the breach, and that its offer to pay the relevant duty, as a condition of restoration, should also be rejected. Although the request for restoration was first made in February 2014 it was not until February 2015 that the request was formally refused. That refusal was upheld on review.

9. We have taken the foregoing chronology, which was substantially common ground, in part from the parties' written cases and in part from the witnesses' evidence, which was in other respects disputed. The two witnesses, in the order in which we heard them, were Stephen Gray, a chartered accountant and at the time UWS' finance director, and Louise Martin, the HMRC officer who undertook the review of the refusal to restore and whose decision is therefore the subject of this appeal (see the Finance Act 1994 ss 14, 15 and 16). HMRC sought also to rely on the evidence of Gary Leitch, whose witness statement had been disclosed to UWS' representatives only a week before the hearing, despite a direction providing for the exchange of witness statements at least four weeks in advance. Although we shall need to refer below, briefly, to Mr Leitch's part in the relevant events, we declined to admit his statement or to hear his oral evidence. The area of dispute to which his proposed evidence related had been raised by UWS over two years previously, yet (as they concede) HMRC had failed to address the point at all for about a year, and no real explanation was offered of the failure to submit Mr Leitch's statement on time; rather, we were left with the impression that it had been prepared in haste when it was belatedly realised that his evidence might be relevant. We did not consider that HMRC overcame the threshold requirements identified by the Court of Appeal in *Revenue and Customs Commissioners v BPP Holdings Ltd* [2016] EWCA Civ 121, [2016] STC 841, and it was for that reason we concluded that the evidence should not be admitted.

10. UWS was represented before us by Ben Elliott, and HMRC by Martin Richardson.

The evidence

11. Mr Gray explained in his witness statement how UWS came into existence, and related the history of its approval as an authorised warehousekeeper, as we have summarised it above. Mr Gray was himself one of the team of five responsible for running the secure part of the warehouse, the others being the operations director, the sales director, a buyer, and Mr Veeramurthy. It was clear to us that Mr Gray understood the requirements imposed on authorised warehousekeepers very well, and that he and UWS were careful to comply with those requirements, including the conditions of UWS' own authorisation. He explained too how UWS had taken care to avoid its becoming unwittingly involved in excise fraud, which Mr Gray knew to be prevalent. He gave as an example the decision taken by UWS to purchase only from manufacturers and authorised dealers after it had had an unfortunate experience in a purchase from a secondary supplier, and he also explained its due diligence procedures. The due diligence material relating to Lucky Drinks was exhibited to his witness statement, and

seemed to us to be comprehensive. HMRC have not suggested that it was lacking in any way.

12. UWS submitted duty returns at fortnightly intervals, and the payments due were taken by direct debit. It was subject to periodic inspections, and Mr Gray was unaware of any concern on HMRC's part—on the contrary, he said, HMRC had expressed satisfaction with its procedures. UWS had no intention of storing goods on behalf of others, and Mr Gray was not aware of any other occasion on which it had, or more accurately on which HMRC thought it had, done so; and UWS carried no insurance for others' goods. Mr Gray did not think that UWS had in fact breached condition 1 as its practice was not to treat a sale as concluded until HMRC had authorised it to release the goods. Although condition 4 required only advance notice to HMRC of an intended movement, UWS had decided, as on this occasion, to wait until approval was forthcoming before allowing goods to leave the warehouse. Indeed, a member of UWS' staff had contacted HMRC, on the morning of 5 February and before the officers arrived to mark the goods for seizure, to remind them that approval was still awaited.

13. Mr Gray was present when the officers attended to mark the goods, and again when they returned in order to remove them. He told us how he remonstrated with the officers, at the time and later in emails. He made the point in those emails that UWS was still awaiting approval from HMRC and that, not only would it not have released the goods without such approval, it did not consider it had effected a sale at all until the approval was received, even though Lucky Drinks had already paid; it was always UWS' position that a sale of this kind could not be completed until approval had been obtained. In addition, he pointed out, the goods seized represented only part of UWS' stock of the same brands of beer, and at the time of seizure no allocation to Lucky Drinks, that is the identification of specific pallets, had been made. On the other hand, Mr Gray agreed that the "pro forma" invoice which UWS supplied to Lucky Drinks, at its request, did not expressly state that the goods would be released only once HMRC's approval had been obtained.

14. Mr Gray accepted that one member of UWS' warehouse staff, Khalid Iqbal, who reported to the sales director, had mistakenly thought that UWS could store excise goods belonging to others within the warehouse. It is apparent from the documentary evidence, in particular some exchanges with Lucky Drinks, that Mr Iqbal's mistaken understanding had contributed to Lucky Drinks' belief that it had an "under bond" account and to the appearance that UWS intended to sell goods to Lucky Drinks and retain them in the warehouse for a period. However, said Mr Gray, no other member of the staff concerned with the excise warehouse held the same mistaken belief, and there was no possibility as a matter of fact that UWS would have stored the goods after sale.

15. A substantial part of Mr Gray's evidence was devoted to events which followed the seizure. He believed he had reached an agreement with Mr Leitch (who, we should record, became involved in the case only after the seizure had taken place, and was reliant for his information on what he was told by others) that the goods would be restored on payment by UWS of the duty, on its "unwinding" the sale by repayment of the price to Lucky Drinks, and by amendment of its terms of sale to make it clear, in the future, that a sale could be regarded as effective only when HMRC's approval was secured and the goods actually left the warehouse. Mr Gray was, he told us, extremely disappointed when, as he saw it, HMRC went back on the agreement which he thought

had been reached. As we declined to hear Mr Leitch's evidence we do not think it right to reach a conclusion on the question whether there was an agreement from which HMRC resiled, a point which is not critical to our decision, though we shall have something more to say on the topic later. We should, however, record at this point that Mr Gray's belief immediately after the seizure that an agreement could be achieved contributed to the decision not to require HMRC to commence condemnation proceedings within the one month time limit, a decision which, with the benefit of hindsight, can be seen to have been misguided: for the reasons we develop later, we think UWS should have won any such proceedings had HMRC not thought better of their position and conceded before the proceedings came to fruition.

16. Ms Martin's evidence expanded on her review letter and on her application of what she understood to be HMRC's policy. In her letter, after reciting the events as we have described them above, she described the policy, making the point that it was "intentionally robust". She then listed the various documents relating to the sale with which she had been provided; it is not suggested that any of relevance were not before her. The conclusion she drew from that examination was put as follows:

> "I can see from the case papers that Lucky Drinks raised an under bond order and that your company have referred to this order as being for 'duty suspended stock'. It is also apparent from the purchasing and sales papers that Lucky Drinks sold the goods to their customer J W Wines Ltd while they were still in the warehouse and this suggests to me that there had been a sale in warehouse between UWS and Lucky Drinks, for Lucky Drinks to have subsequently sold the goods on. This is not permitted within the terms of your Excise Warehouse Approval."

17. Ms Martin then set out her conclusion, which it is worth quoting in full:

> "Having examined the purchasing and sales paperwork relating to these goods, I can see that a member of the Sales staff arranged under bond sales with Lucky Drinks and that the Bond Manager then facilitated the transfer of stock while the goods were being held in duty suspense in the warehouse. I find it difficult to accept that two members of staff in such important roles could make this mistake.
>
> It is my view, having examined the case paperwork that there had been an unapproved sale of goods in your warehouse. The goods appear to have been sold by your company to Lucky Drinks and then onwards by them to their customer.
>
> Your company has additional conditions on its approval, the first being that you are only approved to store alcohol in duty suspense that is owned by your company and the 4th being that duty suspended movements must be notified to HMRC 48 hours in advance. Your company did inform HMRC prior to the stock moving out of the warehouse in line with their approval. On this occasion HMRC seized the goods.
>
> The conditions on your approval allow HMRC to exercise some control over what happens in this approved warehouse and are in place in order to protect the revenue and to prevent the illicit trade in excise goods. HMRC have taken the view that the conditions of the approval have been breached and as such they seized the goods subject to the sales.
>
> It is my view that having this large amount of goods restored could threaten legitimate trade and create unfair competition, allowing the sale of cheap alcohol that has not borne the proper amount of excise duty onto the UK market and as such the goods should not be restored."

18. In her oral evidence, Ms Martin stressed the fact that there had been a breach of condition 1 of the approval: it was not an incident which could simply be disregarded. It would, she said, be only in exceptional circumstances that seized goods might be restored, and she gave as an example a seizure for non-payment of duty when the holder of the goods had later been able to demonstrate that the relevant duty had in fact been paid. She later expanded on her approach to the application of HMRC's policy, making it clear that she would invariably uphold a refusal to restore unless it could be shown that the goods should not have been seized. Here, she thought the staff failings she identified in her letter justified the seizure, and there was no part of HMRC's policy, as she understood it, which allowed her to restore goods following a failure to comply with a condition of authorisation. She agreed, after some prompting by Mr Elliott, that HMRC's published policy did not state that goods seized might be restored only in exceptional circumstances, but said that there was "always a risk", even though should could not identify what the risk was in this case.

19. Ms Martin was also asked by Mr Elliott to explain her understanding of the rules relating to the passing of title in goods. She made the point that she was not a lawyer, which we accept, though we are bound to say we were surprised that she did not seek advice before upholding a decision which, on HMRC's own case, was wholly dependent on title to the goods having passed to Lucky Drinks prior to the seizure. Pressed on the point she said that receipt of payment was enough to pass title, and added that the fact that Lucky Drinks had sold the goods on to its own customer must mean that title had passed to it since it would otherwise not have been able to enter into an onward sale agreement. She was, she said, fortified in that view because the evidence available to her indicated that Lucky Drinks itself thought it owned the goods.

20. Ms Martin accepted that UWS had complied with condition 4 of the authorisation, but said she did not regard that as a relevant factor since she would expect nothing less. She was also of the view that UWS' offer to pay the duty was rightly rejected because restoration for that reason would undermine the deterrent effect of seizure.

UWS' arguments

21. Mr Elliott accepted that in the absence of condemnation proceedings he had to begin from the position that the seizure was lawful, by virtue of the deeming provisions of para 5 of Sch 3 to CEMA, and for the reasons explained by the Court of Appeal in *Revenue and Customs Commissioners v Jones & Jones* [2011] EWCA Civ 824, [2012] Ch 414. He therefore acknowledged that for the same reasons he could not argue that UWS had not, in fact, breached condition 1 of its authorisation. His focus, therefore, was on the reasonableness of Ms Martin's approach to the application of HMRC's policy and on the proportionality of her conclusion. Since Mr Richardson accepted that there were some flaws in Ms Martin's approach we shall return to this aspect of the case in our conclusions, rather than recite Mr Elliott's submissions on the topic, with which we agree.

22. The essence of Mr Elliott's argument about proportionality, with which we can also deal briefly, was that the review decision failed to take account of the agreement which Mr Gray believed he had concluded with Mr Leitch (again, we shall return to this point in our conclusions), of the fact that the assumed breach of condition 1 was attributable to no more than a genuine and unintended mistake, and of the extent of UWS' cooperation with HMRC both before and after the seizure. Moreover, he argued,

the decision was disproportionate to the aim said to be pursued, of protecting legitimate trade, since UWS had offered to pay the duty, a course which would have obviated any risk to that trade. Even accepting that there had been a breach of condition 1, it was clear from the evidence that UWS had complied in every other respect with the conditions of its authorisation, and that the goods would not have been released without HMRC's prior agreement—thus the risk to the revenue to which Ms Martin referred was not a real risk. HMRC's policy made it clear that restoration with conditions was possible, but neither the officer who refused restoration nor Ms Martin, in the course of her review, even considered that course. Rather, Ms Martin's approach was that goods should be restored only if they should not have been seized at all, but that was not what the policy provided.

HMRC's submissions

23. As we have said, Mr Richardson accepted that there were flaws in Ms Martin's approach (with which we shall deal later) but, he argued, they were relatively minor and, had she approached the matter correctly, the outcome would have been the same. We should, for that reason, dismiss the appeal: see *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941. He did not disagree with Mr Elliott's argument that the review decision must be reasonable and proportionate but, he said, the fact of a breach of condition 1 was a serious matter which HMRC could not overlook. Two members of UWS' staff had made the same mistake, and their having done so revealed a failure of supervision. It was not a material factor that UWS had cooperated with HMRC; no less should be expected, and a trader could not expect indulgence merely because he had done what he was obliged to do.

24. It was not disputed that HMRC could properly formulate and apply a policy: see *Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ 267, [2002] 1 WLR 1766 at [55] to [63]. Nor was it arguable that the policy itself was unreasonable. The risks of excise fraud were such that it was legitimate for HMRC to restrict restoration to exceptional cases; and there was no basis on which it could be said that this case was exceptional. Much of UWS' case amounted, in substance, to a challenge to the grounds for seizure—in other words, it sought to argue that the goods had not in fact been sold—and of the remainder some was irrelevant and some unfounded. Ms Martin was right to reject as a relevant factor that UWS had complied with condition 4, and she was similarly right to reject the offer to pay the duty as a reason to offer restoration.

25. The test was whether, in the light of UWS' breach of condition 1, Ms Martin's decision was one at which she could not reasonably have arrived; it is not sufficient that we might arrive at a different decision ourselves. The question to be asked was whether Ms Martin had taken into account an irrelevant factor, had ignored or failed to give adequate weight to a relevant factor, or had misdirected herself as a matter of law: see *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231 at 239. It was not possible to say that she had committed any such errors, and it followed that her decision should stand.

Discussion and conclusions

26. We deal first with Mr Gray's belief that he had reached an agreement with Mr Leitch that the goods would be restored. We have no doubt that Mr Gray, whom we found to be a wholly credible witness and whose evidence we accept, genuinely

believed that he had reached such an agreement. We recognise, however, the force of Mr Richardson's argument that the exchanges of emails which took place following the seizure do not set out in unequivocal terms what the terms of any such agreement might have been, and it is for that reason that we have concluded that we should not make a finding on that aspect of the case in the absence of evidence from Mr Leitch. Nevertheless, it is perfectly clear from those exchanges that, at the very least, Mr Gray was led to believe that an agreement was possible, and that he supplied information and documents which he thought would persuade Mr Leitch to accept that the goods should not have been seized because title to them had not passed or, if it had, that UWS was guilty of no more than an inadvertent and innocent mistake to which seizure of the goods was an over-reaction.

27. It will not have escaped attention that Mr Gray's evidence, as we have set it out, was that only one member of UWS' staff had mistakenly thought that it was possible for UWS to store Lucky Drinks' goods, whereas Ms Martin was under the impression that two members of staff had made the same mistake. We have not been able, from the material before us, to resolve that discrepancy. It is certainly possible that Mr Veeramurthy, too, laboured under a misapprehension, since the several emails he sent in the days between the making of the agreement for the sale of the goods to Lucky Drinks and the seizure are equivocal about ownership of the goods, although they make it clear beyond doubt that he knew that the goods could not be released until HMRC's approval to the movement had been obtained. Our inability to resolve this discrepancy does not, however, present any difficulty in determining the appeal.

28. We should make the point before going further that we are fully conscious of what the Court of Appeal decided in *Jones & Jones*, and that we must accept that the seizure is deemed to have been lawful. We set to one side, therefore, our view that UWS might well have won condemnation proceedings had they been commenced. Nevertheless, even starting from the assumption that title had passed and UWS had consequently breached condition 1 of its authorisation, we heard and read the evidence with mounting astonishment that HMRC had thought it appropriate to seize the goods rather than merely detain them while the true facts were established, and to refuse to restore them without conditions. It seems to us that in this case HMRC have lost any sense of proportion.

29. We accept that, by reason of the confusion to which we have referred, HMRC had a legitimate interest in establishing what UWS was doing. Had it been discovered that UWS was indeed intending to store excise goods, including these goods, on behalf of others in breach of condition 1 of its authorisation it would be difficult to say that HMRC had acted in any way unreasonably. But relatively brief enquiry, and examination of the relevant documents, would have cleared up the confusion and would have demonstrated that UWS had no intention of storing others' goods in the ordinary meaning of that phrase; and we do not detect that HMRC now argue otherwise. Their only argument is that, by allowing title to pass, there was a breach of the condition, and that alone is enough.

30. Assuming, as we must, that title had in fact passed because (adopting Ms Martin's reasoning) the price had been paid, it is worth remembering that the final instalment of the price was received only on the day of the seizure. Arrangements were already in place for the removal of the goods, but they had been put in abeyance not because of

any desire for delay on the part of UWS or Lucky Drinks, but because UWS was unwilling to release the goods without HMRC's approval. How it can be said, in those circumstances, that UWS was storing the goods on behalf of Lucky Drinks, in any meaningful sense, is impossible to understand; but in any event it is perfectly plain that any breach of the condition was trivial, inadvertent and inconsequential.

31. HMRC also seem to us to have lost sight of the purpose behind the imposition of conditions, namely to protect the revenue by ensuring that excise goods are not released for consumption without payment of the applicable duty. Mr Gray's evidence, which was not challenged on this point, was that if HMRC's approval to the release of the goods had not been forthcoming, the sale to Lucky Drinks would have been cancelled. We find as a fact, lest there be any doubt, that this is what would have happened—moreover, it is what did happen once the goods had been seized. UWS could instead have waited until 48 hours had elapsed following the notification to HMRC of the intended release of the goods and then, and consistently with condition 4, it could have allowed Lucky Drinks to remove them whether or not HMRC had approved the movement. One might think that the much more prudent course, likely to afford greater protection to the revenue, was to do as UWS in fact did even if, technically, it put it in breach of condition 1. Ms Martin, as we have recorded, could not offer any reason why what UWS did presented any risk at all. Moreover, it is difficult to understand the logic of the last of the paragraphs of her letter, quoted at [17] above: UWS was not asking for the goods to be restored in a manner which would enable them to escape duty.

32. UWS has, however, been treated as if it were wantonly in breach of the conditions of its authorisation, and as if its actions presented a real risk of duty evasion. Had HMRC stood back from the detail, and in particular if they had considered the purpose rather than merely the letter of condition 1, they might themselves have recognised that they were over-reacting. Mr Gray's evidence, which was again not challenged on this point, was that UWS was a compliant trader. At the risk of repetition, we have no doubt, and find as a fact, that there was no prospect that the goods would have been released to Lucky Drinks, or for that matter anyone else, under duty suspension without HMRC's approval: we accept Mr Gray's evidence to that effect. He was also willing to, and did, amend UWS' terms of business to meet HMRC's concerns; but while the amendment, making it clear that title in goods sold in this manner does not pass until release avoids an infringement of condition 1, it seems to us to do little to diminish the already minimal risk of duty evasion.

33. We come finally to Ms Martin's review which is, of course, the subject-matter of the appeal. As Mr Richardson was compelled to accept, Ms Martin's view that seized goods should be restored only if they should not have been seized reveals a fundamental misunderstanding of HMRC's discretionary restoration powers. They are conferred by s 152(b) of CEMA, which permits HMRC to restore "any thing forfeited or seized"; by its own terms the scope of the subsection is not confined to things which should not have been seized. It follows that Ms Martin misdirected herself about the task before her, and for that reason alone her conclusion cannot stand.

34. Sadly, the criticism does not end there. Even assuming, as we must, that she was right to conclude that title in the goods had passed and that there was in consequence a breach of condition 1, Ms Martin failed even to consider whether the breach was material; as her evidence made clear, in her eyes the fact of the breach, without more,

was enough. She also failed to consider the relevance of UWS' compliance with condition 4, saying that it was no more than was to be expected. That response, however, misses the point. The purpose of condition 4 was to ensure that HMRC were forewarned of an intended movement, and put into a position to intervene if they detected any cause for concern. If there was any cause for concern in this case, beyond the perceived breach of condition 1, we were not made aware of it. The fact that UWS not only gave advance notice but waited for approval should, in our view, have reassured HMRC; the dismissal of its doing so as "no more than what was to be expected" is blinkered and unfair.

35. Lastly, Ms Martin does not appear to have taken any account of proportionality, a topic which is not mentioned in either her review letter or in her witness statement. In our view it is obvious beyond argument that to deprive an otherwise compliant trader of a substantial quantity of goods for a trivial and, as we are satisfied, inadvertent breach of a condition, when there is no identifiable risk to the revenue, is a wholly disproportionate response. Had the officers concerned, and Ms Martin in particular, looked at the entire picture rather than, as they did, focussed on the breach of the condition to the exclusion of all else they could only have reached the same conclusion themselves.

36. We cannot, of course, compel HMRC to restore the goods (or, due to the passage of time, pay compensation) because of the limits on our jurisdiction imposed by s 16(4) of the Finance Act 1994. We can, instead, do no more than require HMRC to conduct a further review, "in accordance with the directions of the tribunal". The directions we make are that the findings of fact in this decision, and in particular but not exclusively that the breach was technical, inadvertent and inconsequential, are to be respected, and HMRC are to take account of the absence, on their own case, of any identifiable risk to the revenue. The only rational outcome of a further review is that the goods should have been restored without conditions.

Appeal rights

37. 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 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

COLIN BISHOPP

TRIBUNAL JUDGE

RELEASE DATE: 11 JANUARY 2017