TC05785

Appeal number: TC/2016/552

EXCISE DUTY – WOWGR application for registered owner status refused by HMRC – Whether refusal was unreasonable – s 100G CEMA 1979 and reg 5 WOWGR 1999 – Excise Notice 196

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr MOHAMMAD IMRAN MALIK (trading as COOL DRINKS) — **Appellant**

-and-

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

TRIBUNAL: **Judge Peter Kempster**
Mr Terence Bayliss

Sitting in public at Centre City Tower, Birmingham on 5 April 2017

The Appellant in person

Mr Joseph Millington of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. In November 2015 the Appellant ("Mr Malik") applied to the Respondents ("HMRC") for an "owner registration" under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 SI 1999/1278 ("WOWGR"). After correspondence and a meeting HMRC decided to refuse the application, and communicated that in a formal decision dated 11 January 2016 ("the Disputed Decision"). Mr Malik provided further information but on 25 January 2016 HMRC reiterated the Disputed Decision.

2. Mr Malik appealed to the Tribunal and in November 2016 I refused a strike out application by HMRC (for repeated failure to comply with Directions and instructions) and gave leave to Mr Malik to submit his documents late.

Law

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

> "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."

4. Section 100G Customs and Excise Management Act 1979 provides, so far as relevant:

> "*Registered excise dealers and shippers*
>
> (1) For the purpose of administering, collecting or protecting the revenues derived from duties of excise, the Commissioners may by regulations under this section (in this Act referred to as "registered excise dealers and shippers regulations")—
>
> (a) confer or impose such powers, duties, privileges and liabilities as may be prescribed in the regulations upon any person who is or has been a registered excise dealer and shipper; and

(b) impose on persons other than registered excise dealers and shippers, or in respect of any goods of a class or description specified in the regulations, such requirements or restrictions as may by or under the regulations be prescribed with respect to registered excise dealers and shippers or any activities carried on by them.

(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. The relevant regulations are WOWGRA. Regulation 5 provides:

"*Registered owners*

(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."

6. Regulation 18 provides, so far as relevant:

"*Conditions and restrictions that apply to registered owners*

(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.

(2) Every registered owner shall, before arranging for relevant goods to be deposited in an excise warehouse, provide the authorized warehousekeeper with a copy of his certificate of registration.

(3) Every registered owner shall, before buying relevant goods that are in an excise warehouse, provide the authorized warehousekeeper with a copy of his certificate of registration.

…"

7. The notice provided for by reg 18 is Excise Notice 196. The version of Notice 196 in issue at the date of the Disputed Decision was that dated 23 October 2014. A

new version of Notice 196 was issued on 21 January 2016. The following citations are from the 2014 version of Notice 196.

8. Paragraph 5.2 states: "In considering your [registered owner] application, HMRC will follow the guidelines set out in paragraph 3.2 of this notice."

9. Paragraph 3.2 states, so far as relevant:

> "It is important that all applicants receive a pre-approval visit so that HMRC may obtain information to assist in the processing of the application.
>
> During the visit we will examine all the business's activities and may enquire about your suppliers, customers, business plans, accounting systems, premises, financial viability, and so on. Only when we are satisfied that the business is a genuine enterprise which is commercially viable, with a genuine need for authorisation and that all key persons are fit and proper to carry on such a business, will we process the application.
>
> Reasons for refusing an application may include circumstances where:
>
> …the business is not commercially viable [or]
>
> You have not been able to demonstrate the business is genuine …
>
> The above list is not exhaustive. 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."

10. Paragraph 10.1 describes the "due diligence condition" and states:

> "Due diligence is the appropriate reasonable care a company exercises when entering into business relations or contracts with other companies, and how it responds in a deliberate reflexive manner to trading risks identified.
>
> Without effective safeguards in place, there are considerable risks to all businesses along alcohol supply chains of becoming implicated in illicit trading.
>
> This condition requires that all excise registered businesses operating in the alcohol sector consider the risk of excise duty evasion as well as any commercial and other risks when they are trading. Doing so will help to drive illicit trading out of alcohol supply chains, and reduce the risk to businesses of financial liabilities associated with goods on which duty has been evaded.
>
> From 1 November 2014 it becomes a condition of your approval as … [a] registered owner … that you must:

- objectively assess the risks of alcohol duty fraud within the supply chains in which you operate
- put in place reasonable and proportionate checks, in your day to day trading, to identify transactions that may lead to fraud or involve goods on which duty may have been evaded
- have procedures in place to take timely and effective mitigating action where a risk of fraud is identified
- document the checks you intend to carry out and have appropriate management governance in place to make sure that these are, and continue to be, carried out as intended"

11. Paragraph 10.2 states, so far as relevant:

"The fraud risks within a supply chain are unique to each business, and objective assessment of the likelihood of your trading activities contributing to fraud is an essential first step to developing effective due diligence procedures. You will need to consider the full range of trading relationships you have established and the potential for fraud in each.

…

As a general rule 'FITTED' checks should normally focus on:

- financial health of the company you intend trading with
- identity of the business you intend trading with
- terms of any contracts, payment and credit agreements
- transport details of the movement of the goods involved whether or not you are directly involved in this
- existence/provenance of goods - where goods are said to be duty paid you should normally seek sufficient detail to satisfy yourself of the status of the goods
- The Deal, understanding the nature of the transaction itself, including:
    - how the cost of the goods is built up, for example, whether it includes appropriate taxes, transport etc
    - why is it being offered
    - whether it is too good to be true
    - how the deal compares to the market generally"

Tribunal Jurisdiction

12. Appeals against HMRC decisions relating to s 110G CEMA 1979 applications are "ancillary matters" (by s 16(8), sch 5 and s 13A Finance Act 1994) and are governed by s 16(4) FA 1994, which 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 review or further review as appropriate 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 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."

13. Thus the Tribunal's jurisdiction over Mr Malik's appeal is what is usually described as a "supervisory jurisdiction" (for example, in the recent Court of Appeal decision in *GB Housley Limited V RCC* [2016] EWCA Civ 1299). From the relevant caselaw (eg in *J H Corbitt* (*Numismatists*) *Ltd* [1980] STC 231, *Peachtree Enterprises* [1994] STC 747 and *Kohanzad* [1994] STC 967) we derive the following approach, which we understand is uncontroversial:

(1) The jurisdiction of the Tribunal in this matter is only supervisory.

(2) The Tribunal cannot substitute its own discretion for that of HMRC.

(3) The question for the Tribunal is whether HMRC's decision was unreasonable in the sense that no reasonable panel of Commissioners properly directing themselves could reasonably reach that decision.

(4) To enable the Tribunal to interfere with HMRC's decision it would have to be shown that HMRC took into account some irrelevant matter or had disregarded something to which they should have given weight.

(5) In exercising its supervisory jurisdiction the Tribunal must limit itself to considering facts and matters which existed at the time the challenged decision of HMRC was taken. Facts and matters which arise after that time cannot in

law vitiate an exercise of discretion which was reasonable and lawful at the time that it was effected.

(6) The burden of proof lies on an appellant to satisfy the Tribunal that the decision of HMRC was unreasonable.

Evidence

14. We had a document bundle and we took witness evidence from Ms Katie Lines, the HMRC officer who made the Disputed Decision.

15. Ms Lines confirmed and adopted a witness statement dated 22 December 2016.

(1) On receipt of Mr Malik's application she had contacted him and met him on 9 December 2015, with two of her colleagues. The meeting took place at Mr Malik's home; a business address has been provided on the application but Mr Malik confirmed he would be operating the business from home. He confirmed he had read and understood Notice 196. He had previous retail experience and had been involved in a warehouse business, but not dealing in duty-suspended goods. He had researched bonded warehouses and had made contact with three; he was unable to take matters further without a WOWGR authorisation. He planned to trade in wine, beer and soft drinks; he did not have any specific products or brands. He was unclear as to profit margins but anticipated "about 30p-40p per case"; he said he would try to undercut his competitors. He had no forecast of business costs. He intended to advertise for customers on the websites Linkedin and Trader Under Bond. He had no business website but would create one when he started trading. He named three possible suppliers who had emailed him with offers of product; he had not yet contacted them. He stated he was aware of the due diligence guidance in Notice 196 but had not performed any checks yet on potential suppliers, warehouses or customers. He would not be using an accountant, and did not expect to use computerised records; his stock records would comprise copy emails from warehouses. He had taken a £10,000 loan from Sainsbury's Bank to fund the venture; as he was trading from home, he did not anticipate significant overhead costs.

(2) After the meeting Ms Lines considered the material provided to her and concluded:

(a) The lack of forecasts and product knowledge did not point to a viable business in a competitive market.

(b) There were no robust due diligence plans in place, which she would expect for this type of business. In particular, the plan to source customers from internet sites would make it difficult to establish legitimacy without rigorous checks.

(c) Accordingly, she did not consider Mr Malik's proposed business to be fit and proper for registration as required by Notice 196.

(3) On 11 January 2016 she formally refused the application, giving her reasons:

> "You have not been able to demonstrate the commercial viability of your business in the current market and have no contracts or intentions to supply from your suppliers. Although you have had interest from customers you have no specific confirmed orders. You have not displayed sufficient understanding of due diligence conditions or performed adequate checks on your potential suppliers and customers."

(4) Mr Malik supplied further submissions and information, which Ms Lines considered.

(a) He explained he could not buy or sell without the WOWGRA authorisation. She considered he had not demonstrated a robust, viable business plan for operation after receipt of authorisation; he had no price lists, no convincing market research, no evidence as to how he could undercut competitors' terms while still being profitable, and no detailed market awareness.

(b) He stated he would operate due diligence once he was trading. She considered that Notice 196 was clear as to the importance attributed to due diligence and, apart from reciting the examples given in Notice 196, Mr Malik had demonstrated no awareness of how he would satisfy and operate the requirements. She was concerned that the material provided was not satisfactory to protect the business from trading in illicit supply chains.

(c) He supplied business sales forecasts and profit and loss financial statements. She considered these unsatisfactory: separate forecasts for soft drinks/water, wine and beer gave identical figures; there was no indication of the units or brands involved; there was no evidence of the sources for stated buying or selling prices, or the justification for the anticipated trading volumes.

(d) He asked to be told exactly what documents he should supply to be granted an authorisation. She referred him to Notice 196.

(e) Ms Lines confirmed her original decision on 25 January 2016.

(5) Following the Tribunal's leave to Mr Malik to provide further documents in relation to his appeal, she had reviewed the additional material. She considered much of this did not explain how it supported the WOWGRA

application; some was duplicates of earlier materials; and it did not cause her to doubt her earlier conclusions.

16. In response to a question from the Tribunal, Ms Lines answered that if she were making her decision afresh on the basis of all the original and later documents and information, and on the basis of the new 2016 version of Notice 196 then she would still reach the same conclusion: to refuse the application.

Respondents' case

17. Mr Millington submitted as follows for the Respondents.

18. For Mr Malik's appeal to succeed, by s 16(4), the Tribunal must be satisfied that Ms Lines, as the person making the Disputed Decision, "could not reasonably have arrived at" the Disputed Decision. On the contrary, not only was Ms Lines's decision to refuse the WOWGRA application entirely reasonable, her decision-making process was beyond reproach.

19. Registration under WOWGRA is not a right; it is a privilege afforded to applicants who demonstrate that they are fit and proper persons to be registered. Given the important fiscal and regulatory context of WOWGR registration (see *Eastenders Cash & Carry*), it was not surprising that, as stated in Notice 196, HMRC "will robustly challenge all new applications". Notice 196 set out clearly the criteria used by HMRC in considering applications, all of which were explained, justified and reasonable. Mr Malik had full opportunity to consider Notice 196, present all the material he wished, and explain why he should be authorised. Ms Lines had followed the procedure in Notice 196. She had carefully considered and critically analysed all the information provided to her and the responses to her pertinent questions. She had given reasons why she was not satisfied that the requirements of Notice 196 were met.

20. Mr Malik had taken nothing more that the most basic steps towards furthering his proposed business. There was no evidence of relationships with potential trading partners, or research into costing and profitability, or even demonstrated awareness of the nature of the market. He had done little beyond registering with various internet networking sites. The "forecasts" provided by Mr Malik appeared to be generic and not specific to his proposed business. The source of the figures was entirely unclear. The documents listed expenses apparently not appropriate to the proposed business. The due diligence procedure list was almost identical to the list in Notice 196, and was unsupported by any explanation or examples of appropriate checks; it appeared that Mr Malik had merely parroted the information in Notice 196 without any real understanding of what was involved or why it was required.

21. If, contrary to HMRC's submissions, the Tribunal considered the Disputed Decision could not have been reasonably arrived at then, given the limited options available to the Tribunal under s 16(4), the Tribunal should consider whether it would be appropriate to require a fresh or further review; Ms Hines had explained that on a fresh review her conclusion would be the same as the Disputed Decision. The point

had been considered by the Tribunal in *RCM Worldwide Trading Ltd* [2015] UKFTT 118 (TC):

> "66 … We are less than clear what remedy is sought in this appeal insofar as our options are limited. We can find that the Decision was reasonable, which we have done, in which case it is confirmed.
>
> 67 If we had not so found, then we would have had to say that the Decision ceases to have effect which is frankly irrelevant since it places the Appellant in exactly the same position in which it currently stands, or lastly, to require the Commissioners to conduct a further review of the original Decision in accordance with the Directions of the Tribunal. Since the Appellant is adamant that no further information is necessary and given that no application has been made in the interim, it seems unlikely that the outcome would be any different."

Also in *Splendour Traders Limited* [2014] UKFTT 366 (TC) (at [32]):

> "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."

Appellant's case

22. Mr Malik submitted as follows.

23. HMRC were wrong to conclude that he was not a fit and proper person to be authorised; he was an honest man with no criminal record and no fraudulent intentions. His business was VAT registered and he needed a WOWGRA authorisation to be able to carry on his intended trade.

24. As he did not have a WOWGRA registration, he could not show evidence of trading, suppliers or customers. He was aware of the due diligence requirements in Notice 196; again, until he was WOWGRA registered he had no suppliers or customers to check. He would fully comply with Notice 196 once he was authorised and able to conduct business. He had given to HMRC names of some proposed suppliers, customers and warehouses; it appears that HMRC had not approached or checked any of these people. He had prepared trading forecasts using estimates, which was all he could do at this stage; he had not mentioned brands as he was proposing to deal with all brands and take anything on the market that was a good trade. He had included costs of business as he expected that was normal practice; for example, he would need a website. He was intending to trade from home because he had left his business address (which was the address on his application) after a serious burglary of the premises.

Consideration and Conclusions

25. We deal first with a point concerning the use of the expression "fit and proper person" in Notice 196. Mr Malik has interpreted that phrase and HMRC's refusal of

his application as being an insinuation that he is not an honest businessman and cannot be trusted. Some of the criteria in Notice 196 (at para 3.2) do relate to the financial probity of the business: "[you have] been involved in revenue non-compliance or fraud; … you … have unspent convictions; there are proven links between [you] with other known non-compliant or fraudulent businesses". However, the Disputed Decision is not based on any of those criteria, and at no point in the proceedings have HMRC made any suggestion that they have any doubts as to Mr Malik's honesty.

26. The basis for the Disputed Decision was clearly stated in Ms Lines's letter dated 11 January 2016:

> "You have not been able to demonstrate the commercial viability of your business in the current market and have no contracts or intentions to supply from your suppliers. Although you have had interest from customers you have no specific confirmed orders. You have not displayed sufficient understanding of due diligence conditions or performed adequate checks on your potential suppliers and customers."

27. Applying the approach described at [13] above, it is not open to us (nor are we required) to remake HMRC's decision, nor substitute our discretion for that of HMRC. Regulation 18 WOWGRA gives force to the conditions and restrictions set out in Notice 196. We are satisfied that Ms Lines correctly interpreted and applied the guidelines in para 3.2 of Notice 196. In particular (a) she carefully considered whether the business as explained by Mr Malik was commercially viable; and (b) she appreciated the importance attached by Notice 196 to due diligence and carefully considered Mr Malik's explanation of how he intended to identify trading risks so as to avoid becoming implicated in illicit trading. She took into account all the information supplied by Mr Malik, including considering whether later supplemental information (which Mr Malik thought helpful to his case) should cause her to amend her initial view, and she did not disregard any relevant information. She did not take into account any irrelevant matters. The conclusion she reached in support of the Disputed Decision was not one that no reasonable HMRC officer properly directing themselves could have reached.

28. On the contrary, from our careful review of the material provided by Mr Malik to Ms Lines we conclude that the Disputed Decision was the only one that could have reasonably been reached by Ms Lines on the basis of that material. The business and financial forecasts supplied had no evidential basis and, despite Mr Malik's enthusiasm, did not demonstrate that the business would (or could) be commercially viable. Although Mr Malik gave general assurances that he would perform suitable due diligence in the future, he displayed no awareness of why and how he would tailor the checks outlined in Notice 196 to his particular business.

29. Accordingly, we find that the Disputed Decision was reasonable; we confirm the Disputed Decision; and we must dismiss Mr Malik's appeal against the Disputed Decision.

Decision

30. The appeal is DISMISSED.

31. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 13 APRIL 2017