[2017] UKUT 0359 (TCC)

Appeal number: UT/2016/0190

EXCISE DUTY– revocation of registration under WOWGR-whether FTT erred in finding HMRC's decision to revoke could not reasonably have been arrived at – yes-FTT's decision set aside-appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and –

RIAZ AHMED T/A BEEHIVE STORES

Respondent

TRIBUNAL: Judge Timothy Herrington
Judge John Walters

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 12 May 2017

Amy Mannion, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Shomik Datta, Counsel, for the Respondent

DECISION

Introduction

1. This is an appeal by HMRC against the decision of the First-tier Tribunal (Judge Victoria Nicholl and Ms Claire Howell) (the "FTT") released on 7 June 2016 (the "Decision").

2. The FTT allowed the appeal of the respondent ("Mr Ahmed") against HMRC's decision made on 29 October 2015 to revoke the registration held by Mr Ahmed as a registered owner trading duty suspended alcohol under the Warehouse Keepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR").

3. HMRC have developed strategies to address the continuing threat of unpaid duty and VAT on alcohol supplies. As one response to this threat, HMRC have developed a "closer working visit programme" which provides for quarterly visits by officers of HMRC to registered owners of alcoholic goods and for such owners to provide details of their trading activity and due diligence undertaken on suppliers. Mr Ahmed was included in this programme. During the course of three visits between February 2015 and 15 August 2015, HMRC officers raised various concerns relating to Mr Ahmed's due diligence as to the identity of his suppliers and his recording of cash payments which led HMRC to decide to revoke Mr Ahmed's WOWGR registration as from 6 November 2015.

4. The FTT decided that some relevant matters were disregarded or given inadequate weight by HMRC in making their decision. It also decided that HMRC had failed to consider whether their concerns could have been more appropriately dealt with by the imposition of specific conditions. Accordingly, the FTT decided that HMRC's decision could not reasonably have been arrived at and directed HMRC to carry out a review of the decision to revoke, also directing that such review consider whether the imposition of a specific condition or restriction in relation to Mr Ahmed's trading with his suppliers would be an alternative to revocation of Mr Ahmed's registration.

5. Permission to appeal against the Decision was granted by Judge Berner on 11 October 2016.

The Law

6. The relevant statutory provisions and principles to be applied in considering decisions of the nature with which this appeal is concerned were common ground, as was the case before the FTT.

7. The starting point is s 100 G of the Customs and Excise Management Act 1979 ("CEMA") which enables HMRC to approve persons as registered excise dealers and shippers and to revoke such approvals. The provisions which are relevant for the purposes of this appeal are as follows:

"(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…

(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 Commissioners may at any time for reasonable cause revoke or vary the terms of their approval or registration of any person under this section."

8. Section 100 H (1) CEMA makes provision for regulations to be made regulating the approval and registration of persons as registered excise dealers and shippers and the variation or revocation of any such approval or registration.

9. The relevant regulations are WOWGR which, inter alia, make provision for the registration of revenue traders (that is persons carrying on a trade or business consisting of or including the buying, selling, importation, exportation, dealing in or handling of dutiable goods) as "registered owners". In that regard, Regulation 5 of WOWGR provides:

"(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. Regulation 12 of WOWGR sets out the privileges of a registered owner as follows:

"(1) Subject to regulation 14 below, a registered owner shall be afforded the following privileges in respect of relevant goods.

(2) A registered owner may—

(a) hold relevant goods that he owns in an excise warehouse; and

(b) buy relevant goods that are held in an excise warehouse."

11. Regulation 18 (1) of WOWGR provides that the approval and registration of every registered owner shall be subject to the conditions and restrictions prescribed in a notice published by HMRC.

12. The relevant notice is Excise Notice 196 ("EN 196") which provides, inter-alia, that only persons who can demonstrate that they are fit and proper to carry out an excise business will be authorised or registered.

13. EN 196 also explains that from 1 November 2014 it has been a condition of approval that registered excise businesses must make sure that they are carrying out appropriate due diligence checks on their suppliers, customers and supply chains ("the due diligence condition")

14. EN 196 explains in some detail what the due diligence condition means in practice. It 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" and summarises the steps HMRC expect a registered owner to take as follows:

- 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

15. The Notice also states that a registered owner will need to consider the full range of trading relationships it has established and the potential for fraud in each. The Notice details the main risks within the alcohol sector which include receiving goods that have been smuggled or diverted into the UK, noting that a key feature of the smuggling or diversion of alcohol to the UK market is the ability to source a product where the excise duty has been suspended. The Notice goes on to say:

> "To assess your exposure to this risk you will need to objectively assess if there is potential for duty evasion resulting from your trading activity. You will need to know who you are selling to and where the goods are destined for and understand the market for these products. Without this, there is a risk of supplying goods directly or through a third party into illicit supply chains. Import and warehousing procedures are often exploited to provide cover for the illicit movement of goods. Fraudsters will seek to distribute duty evaded goods as well as counterfeit alcohol into legitimate retail supply chains. To assess your exposure to this risk you will need to objectively consider whether the supply chain and trading activity is credible which includes knowing who you source goods from and provide a service to.

> High level indicators of risk include goods being received from unusually complex or apparently uneconomic supply routes, for example, regular supplies of UK produced goods that have been shipped out to another Member State and then re-imported. If you are sourcing duty paid goods you will also need to consider the credibility of suppliers and the level of evidence you can obtain to demonstrate the provenance and duty status of goods."

16. The Notice then states that the registered owner's regular checks during trading should be of a type and level sufficient to establish the integrity of the excise transactions and supply chains it is trading in. It says:

> "This level needs to be reasonable and proportionate to the risk. Depending on the nature of your business and complexity of your transactions, checks will need to be individually tailored. In particular, they must be sufficiently sensitive, yet robust enough, to pick up potential fraud risks. These checks should provide protection from the threat of fraud or you becoming inadvertently involved in fraudulent activity."

17. The Notice then gives examples of what the 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

18. The Notice states that as part of its enforcement and general audit programmes, HMRC will consider whether or not the steps the registered owner has taken to embed anti-fraud due diligence into its trading activity are sufficient and timely to address fraud risks in its supply chains. HMRC say they will aim to establish whether the registered trader has objectively assessed the risks in its supply chain, and the registered owner must be able to demonstrate that it has put in place reasonable and proportionate checks and effective procedures to respond to fraud risks when they arise.

19. Finally, the Notice indicates the action that HMRC will take if it finds that the registered owner has inadequate due diligence procedures as follows:

> "If your due diligence procedures are considered insufficient to address fraud risks, we will carefully consider the facts of the case before taking further action, but where appropriate we will seek to support you to strengthen your procedures.
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> In more serious cases such as a failure to consider the risks, undertake due diligence checks or respond to clear indications of fraud, we will apply appropriate and proportionate sanctions. For serious non compliance, such as ignoring warnings or knowingly entering into high risk transactions, we may revoke excise approvals and licences."

20. Section 16 of the Finance Act 1994 ("FA 1994") sets out the rights of appeal to the FTT that apply in relation to excise duty decisions. Section 16 provides, relevantly, as follows:

> **"**(1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.
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> …
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> (4) 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--
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> (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;
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> (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
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> (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.

21. The combined effect of s16(9) FA 1994, paragraph 2(1)(r) and paragraph 2(1)(p) of Schedule 5, FA 1994 is that HMRC's decision which is the subject of this appeal is a decision as to "ancillary matters".

22. Consequently, the FTT only has a supervisory rather than a full merits jurisdiction in relation to the decisions which are the subject of this appeal. The correct approach to determine the question as to whether the decision concerned could not reasonably have been arrived at is that set out in *Customs and Excise*

Commissioners v J H Corbitt (Numismatists) Ltd [1980] 2 WLR 753 at 663 which is to address the following questions:

(1) Did the officers reach decisions which no reasonable officer could have reached?

(2) Do the decisions betray an error of law material to the decision?

(3) Did the officers take into account all relevant considerations?

(4) Did the officers leave out of account all irrelevant considerations?

23. As the FTT correctly identified at [35] of the Decision, in *Balbir Singh Gora v C&E Comrs* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal.

24. However, as Ms Mannion submitted, the application of the reasonableness test to a decision by HMRC to revoke approval involves judicial intervention in a question which has built-in latitude. In *CC & C Ltd v HMRC* [2014] EWCA Civ 1653, the Court of Appeal stated at [15] that in circumstances such as this:

> "… the fact that the criterion for the tribunal's intervention is formulated in terms of unreasonableness reflects the fact that the management of the excise system is a matter for the administrative discretion of HMRC. The decision whether a registered owner remains a fit and proper person to trade in duty-suspended goods is a good example of the kind of decision which HMRC are peculiarly well-fitted to judge, since it requires what is necessarily to some extent a subjective—albeit evidence-based— assessment of such matters as the attitude of the trader and its principal employees to due diligence issues and their sensitivity to the risk of becoming involved, albeit unintentionally, in unlawful activities."

25. Section 16(4) FA 1994 confers a power on the Tribunal to give certain directions if HMRC make an unreasonable decision. However, it does not require the Tribunal to order a further review in every case in which HMRC reach a decision that is unreasonable in the sense outlined at [22] above. Thus, in *John Dee Ltd v CCE* [1995] STC 941, a case which concerned an appeal originating in the VAT Tribunal, the Tribunal had concluded that the Commissioners had failed to have regard to additional material relating to the appellant's financial information. Neill LJ (with whom the other Lords Justices agreed) held that counsel for the company contesting the security requirement in that case had been right to concede that where it is shown that, had the additional material been taken into account the decision would inevitably have been the same, a tribunal can dismiss an appeal.

26. Nevertheless, in our view where the tribunal has found a decision to be unreasonable in the sense outlined at [22] above then unless the circumstances clearly demonstrate that HMRC would be bound to make the same decision the proper course to take is for the Tribunal to direct that the decision concerned should be reviewed again. If there is any doubt on the point, the matter should be determined in favour of directing a further review.

27. Section 12 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") sets out the powers of the Upper Tribunal when in deciding an appeal the Tribunal finds that the making of the FTT's decision involved the making of an error on a point of law. Section 12 (2) TCEA provides:

> "(2) The Upper Tribunal—
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> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
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> (b) if it does, must either –
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.
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> […]
>
> (4) In acting under subsection (2)(b)(ii), the Upper Tribunal—
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> (a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and
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> (b) may make such findings of fact as it considers appropriate."

28. As Ms Mannion submitted, The Upper Tribunal has an extended jurisdiction, permitting it, if remaking a decision, to find facts as appropriate (s 12(4)). This extended jurisdiction recognises that the Upper Tribunal is a specialist tribunal with the function of ensuring the FTT adopts a consistent approach to the questions of principle which arise under the statutory scheme in question: see *HMRC v Pendragon plc [*2015] UKSC 37, per Lord Carnwath at [47] to [48]. In performing this function, the Upper Tribunal is entitled, having found errors of approach in the consideration of the FTT, to exercise the power to re-make the decision making such factual and legal judgments as are necessary for the purpose: see [50] of the judgment.

The Facts

29. The FTT made relatively short findings of fact at [7] to [22] of the Decision. We can summarise the findings made as follows.

30. Mr Ahmed was approved as a registered owner to trade in duty suspended alcohol on 21 July 2001. On 22 January 2014 Mr Ahmed was included in the "closer working visit programme" referred to at [3] above.

31. During a visit to Mr Ahmed on 18 February 2015, Officers Harry and Kendall of HMRC advised him to obtain advance notification of the vehicle registrations of lorries bringing goods to his UK bond account with Seabrooks. He was also asked questions about his typical deals, his suppliers and customers and about a load destined to his UK bond account that had been seized.

32. At a second visit on 18 May 2015, the Officers referred to seven seizures of loads which had been destined to Mr Ahmed's UK bond account. Mr Ahmed said he was aware of all of those seizures and he had ceased to trade with all of the suppliers of these loads other than Ellermore Trading and Bugatt as they had both assured him that they were seeking to recover the loads. Mr Ahmed was advised that he should obtain transport information from EU suppliers before the goods leave for his UK bond account with Seabrooks. Mr Ahmed was asked whether he properly recorded payments received in cash and was given a copy of EN 196. In a letter shortly after that meeting, HMRC advised Mr Ahmed that he was required to keep a cash book and to comply with the due diligence requirements of EN 196, the letter concluding with the warning that if his procedures did not improve significantly it may result in his WOWGR approval being revoked.

33. Mr Ahmed provided further due diligence information to HMRC in June and July 2015. At a further meeting on 27 August 2015, Officer Kendall presented Mr Ahmed with information on Bugatt and its trading, expressing concern about the need to identify who controlled the accounts into which Mr Ahmed was to make payments for Bugatt. Mr Ahmed stated that he had visited Bugatt four times and that he would be visiting again the following week.

34. On 4 September 2015 Officer Kendall advised Mr Ahmed by letter that he was minded to revoke his registration as a registered owner on the grounds of Mr Ahmed was not a fit and proper person to hold such registration. On 7 September 2015 Mr Ahmed flew to Warsaw to meet Bugatt.

35. Having considered representations from Mr Ahmed's solicitors, on 29 October 2015 Officer Kendall wrote to Mr Ahmed setting out his decision to revoke his registration as a registered owner under WOWGR with effect from 6 November 2015. Officer Kendall stated in the letter that he had two principal reasons for this decision as follows:

> "1. I do not believe you have objectively assessed the risks of alcohol duty fraud within the supply chains in which you operate despite Officer Harry and I outlining the risks to you in meetings on the 18 February 2015, 18 May 2015 and my letter to you dated the 25 May 2015." And
>
> B. You are not keeping the records of a Revenue Trader as per The Revenue Traders (Accounts and Records) Regulations 1992."

36. Although not explained in the FTT's findings of fact, as far as the first reason is concerned, the letter explained that the concerns centred around Mr Ahmed's due diligence for Bugatt and in particular that it was not sufficient to identify the business that Mr Ahmed intended to trade with. Officer Kendall referred to the concerns raised

about Bugatt at the meeting on 27 August 2015, including the fact that the evidence as to the nature of its business made no mention that Bugatt traded in alcohol. Officer Kendall also referred to the fact that during the meeting on 27 August 2015 Mr Ahmed suggested that he was to visit Bugatt the following week in Poland, but there was no mention of that in his representations on the "minded to revoke" letter and it would have addressed his concerns had Mr Ahmed proceeded with that trip and provided Officer Kendall with further evidence of Bugatt's presence in business in Poland. Concerns were also expressed that Mr Ahmed had not obtained any documentation confirming that the UK account used to make payments to Bugatt was in fact Bugatt's account.

37. The letter stated that the WOWGR approval was not being revoked solely on the basis of the seven seizures referred to at [31] above. It stated that it was being revoked because:

> "you have not addressed the risks of possibly being involved in fraudulent transactions as outlined to you during the meetings on the 18 February 2015 and 18 May 2015. It is noted that despite two seizures relating to movements from your suppliers, Ellermore and Bugatt that you did not undertake any further due diligence or consider the risks of entering into further transactions with the suppliers."

38. The FTT found at [20] of the Decision that Officer Kendall had not considered whether a specific condition should be imposed on Mr Ahmed's trade in order to deal with any of HMRC's concerns, Officer Kendall commenting that a condition not to trade with a specific supplier would not have been appropriate because of recent case law.

39. The FTT found at [21] that Mr Ahmed's suppliers were Bugatt and Ellermore Trading in 2014 and 2015. It made the following findings at [22] regarding Mr Ahmed's contact with Bugatt:

> "Bugatt first contacted him by email in 2013 and all further correspondence was from the same email address. Mr Ahmed visited Bugatt's office in Poland before he traded with the company. He arranged a Polish speaker to accompany him to the first meeting but he was able to negotiate with the director of Bugatt, Mr Sarnecki, in English. The initial terms of business were agreed at this meeting and Mr Sarnecki visited Mr Ahmed in England soon after. When the first two trades had been delivered Mr Ahmed made payment to Bugatt's bank account in Poland. He was later notified by email that he should pay into a UK bank account. Mr Ahmed made further visits to Bugatt's office in Poland, the most recent taking place on 7 – 8 September 2015."

The Decision

40. At [37] to [43] the FTT found that some relevant matters were disregarded by Officer Kendall in making the decision to revoke Mr Ahmed's registration.

41. At [37] the FTT said:

> "At the hearing, Officer Kendall gave evidence that he accepted that none of Mr Ahmed's due diligence failures was, of itself, sufficient to justify the revocation but that taken together they more than justified his decision. He went on to comment that if Mr Ahmed had been able to produce photographic evidence of Bugatt's offices in Poland and its ownership of the UK bank account into which Mr Ahmed had made payments the registration would not have been revoked."

38. The FTT then said that this evidence reflected the statements in the letter of 29 October 2015 referred to at [35] above. It went on to say at [40]:

> "When giving evidence on how the decision reflected Mr Ahmed's response to the visits and 'minded to' letter, Officer Kendall commented that Mr Ahmed's actions to comply were "to destroy my argument". The decision therefore disregards Mr Ahmed's visits to Poland, which should have been given weight as indicative of a good compliance attitude following the meetings. Instead Officer Kendall commented at the hearing that the September 2015 visit was further evidence of Mr Ahmed's failure to carry out due diligence as he had failed to take a photograph of Bugatt's offices."

42. At [42] the FTT found that Officer Kendall had not taken into account a relevant consideration in relation to Mr Ahmed's treatment of cash as follows:

> "Mr Ahmed was told about the risks of paying a supplier in cash and the obligation to keep a cash book. At the meeting on 18 May 2015 Mr Ahmed told the HMRC officers that he had told all of his suppliers that he would not pay any supplier in cash from June. However, rather than taking account of this positive compliance with the education and guidance provided at the meetings, Officer Kendall referred only to the former practice of paying Ellermore Trading in cash without good reason and without keeping a cash book as required by the Revenue Traders (Accounts and Records) Regulations 1992."

43. The FTT found at [42] that a further relevant consideration had not been considered by Officer Kendall as follows:

> "Mr Ahmed asked at the meeting on 27 August 2015 whether he should stop trading with Bugatt and what more could he do. Officer Kendall's response was that this was a decision for Mr Ahmed to make and that it was not for HMRC to drip feed him the answers. In Mr Ahmed's response to the 'minded to' letter he confirmed that he would be willing to stop trading with Bugatt. We found that this exchange was relevant to the decision as an indication of Mr Ahmed's willingness to learn from HMRC's officers' visits to educate him and to operate his duty suspended business in a fit and proper manner. In contrast, Officer Kendall disregarded this willingness as it came as a result of the information that HMRC had provided."

44. Finally, on the question of relevant considerations the FTT found at [43] and [44] as follows:

> "43. The decision refers to three pieces of information sourced by HMRC that raised concerns as to whether Bugatt was trading in alcohol. This information could not otherwise have been available to Mr Ahmed through his own due diligence. The first piece of information was that HMRC had received information from the Polish authorities in 2013 (in relation to another matter) that Bugatt did not have an office in Warsaw at that time. Second, HMRC had information (in relation a missing trader file) about a UK company that had alleged that it traded in hard drives, as opposed to alcohol, with Bugatt. Third, HMRC had been able to check Bugatt's European Community sales declarations and found that they had not declared any sales to Mr Ahmed in the last quarter of 2014 or the first quarter of 2015.
>
> 44. We found that Officer Kendall sought to use the negative connotations of this information that HMRC had sourced to suggest that Mr Ahmed's due diligence on Bugatt was not sufficient, notwithstanding he could not have obtained this information as a trader and therefore had not failed to find it in his own due diligence. The decision disregarded Mr Ahmed's response that he had evidence of Bugatt's trade in alcohol in the supplies that he had received and that he had visited Bugatt's office in Warsaw."

45. The FTT then considered whether HMRC should have considered as an alternative to revocation the imposition of a specific condition at [45] as follows:

> "Having found the facts that were taken into account in the decision and those that were disregarded but should have been taken into account, we considered whether the imposition of a specific condition could have been a more appropriate way of dealing with HMRC's concerns about Mr Ahmed's trade with Bugatt. In this respect we noted Officer Kendall's concerns about Mr Ahmed's failure to obtain the licence numbers of the vehicles that were to deliver stock into his UK bond account. We agree with Mr Bedenham that there could be practical difficulties in providing the licence number of the tractors used for any consignment as these may change with the drivers, but we found that Officer Kendall should have considered whether it would be appropriate to impose a specific condition that Mr Ahmed should obtain advance notification of the licence number of the trailers into which his consignments from Bugatt have been loaded."

46. Accordingly, the FTT decided that Officer Kendall's decision could not reasonably have been arrived at and directed that it should be reviewed again: see [46] of the Decision.

Grounds of Appeal and issues to be determined

47. HMRC's grounds of appeal can be summarised as follows:

(1) The FTT erred in its treatment of HMRC's decision. It was not open to the FTT, on the facts found, to conclude that HMRC's decision was outside of the range of reasonable decisions open to them. In particular, HMRC contend that the FTT paid no regard to the reasons why HMRC made the decision to revoke Mr Ahmed's registration;

(2) The FTT erred in finding that HMRC failed to have regard to material considerations or relied upon irrelevant considerations; and

(3) The FTT failed properly to apply the burden of proof in relation to Mr Ahmed's evidence.

48. On the basis of these alleged errors of law, HMRC invites us to set aside the Decision and remake the decision in favour of HMRC. They ask us to find that, on the basis of the facts found, including the implicit finding that the due diligence condition had not been met over a period of months (or by us making an express finding of the same), the decision to revoke was, on the information before the decision-maker, plainly within the reasonable range. In the alternative, we are invited to set aside the decision and remit the case to the FTT for a fresh hearing.

Discussion

49. We start by setting out what we regard as being the correct approach for a tribunal to take when considering an appeal against a decision of the nature with which this appeal is concerned.

50. First, the tribunal should be aware of the purpose of the regulatory regime and the business environment within which it operates and ensure that its decision-making takes account of that issue. It is well known that there continues to be a high-risk of excise fraud in the alcohol sector and the regulatory regime established pursuant to WOWGR and the relevant guidance in EN 196 is designed to minimise such fraud, particularly fraud in the supply chain. In particular, EN 196 highlights the risk of a trader receiving goods that have been smuggled or diverted into the UK, noting that a key feature of the smuggling or diversion of alcohol to the UK market is the ability to source a product where the excise duty has been suspended. Another common fraud is committed by non-UK suppliers who have made a legitimate delivery of duty suspended goods to a registered owner in the UK subsequently using the same documentation for another delivery which purports to be sent to the same registered owner but, in reality, is destined to be diverted and "slaughtered" with the result that dutiable goods on which excise duty has not been paid unfairly compete with the legitimate market.

51. The due diligence condition introduced in November 2014 was clearly designed to address the problem of fraud in the supply chain and is therefore a crucial tool in tackling excise duty fraud. As Ms Mannion submitted, the regulatory regime is structured so that registered owners, who have the privilege of holding excise duty goods in an excise warehouse, are given the responsibility for assessing the risk of fraud in the supply chain. EN 196 gives registered owners detailed guidance as to how they might undertake proper due diligence on their suppliers, which we have set out in some detail at [14] to [17] above.

52. As the failure to carry out proper due diligence, taking account of this guidance, can result in a high risk of excise duty fraud in the supply chain, it is no surprise that EN 196 clearly states that serious cases of failure can result in the revocation of a registered owner's approval under WOWGR.

53. Clearly, however, there will be a spectrum of circumstances which HMRC will have to consider in each case when deciding whether revocation is the appropriate course. The guidance in EN 196 on this issue, which we reproduce at [19] above, takes account of that principle. In particular, the guidance makes it clear that a business whose procedures are found to be inadequate will in appropriate circumstances be given guidance as to how to improve those procedures and given the opportunity to demonstrate that improvements have been made. In our view, that would be a particularly appropriate course in cases where there is no evidence of the registered owner being implicated in any actual fraud and where there is evidence that the registered owner is both able and willing to make the necessary improvements.

54. Clearly, a decision to revoke registration should not be taken lightly and such a decision must be proportionate in all the circumstances. Section 100 G (5) CEMA provides that an approval may only be revoked where there is "reasonable cause". Therefore, in order for such a decision not to be flawed it will be need to have been made after considering all the relevant circumstances, including where revocation follows a warning to improve, what steps the registered owner has taken to demonstrate that he is able and willing to comply with the justifiable high standards that are expected of a registered owner who is on the frontline when it comes to tackling excise duty fraud.

55. Therefore, when a tribunal is considering an appeal against a revocation of a registered owner's approval on the grounds that the registered owner has failed to comply with the due diligence condition, as Ms Mannion submitted, the starting point for the tribunal must be to consider all the circumstances that have led to that decision and the factors taken into account by HMRC in making that decision. The tribunal should then consider how HMRC have dealt with any representations from the registered owner as to his compliance with the due diligence condition and the steps he has taken in that regard, both in relation to his initial procedures and any improvements made as a result of HMRC's intervention.

56. It follows that will then be necessary for the Tribunal to make findings of fact as to the extent to which the due diligence condition has been complied with. Although it is not necessary for a registered owner to follow the guidance in EN 196 slavishly and it will be open to registered owner to demonstrate compliance with the condition by other means, it would be good practice to measure the procedures and steps that the registered owner has taken as regards due diligence against the detailed guidance set out in EN 196. Having made those findings of fact, the tribunal should then consider the extent to which HMRC may not have taken into account other relevant factors or may have relied on irrelevant matters, because, as the FTT correctly identified in this case, if that is the case it will need to consider whether HMRC's decision should be set aside. The tribunal will also have to consider whether, in all the circumstances, the decision to revoke can be regarded as a proportionate response.

57. However, the fact that HMRC may have relied on irrelevant factors, or taken into account relevant factors, does not inevitably mean that the Tribunal should direct that the decision should be reviewed. The tribunal needs to have in mind the observations of the Court of Appeal in *CC & C Ltd* at [24] above to the effect that the

assessment of the attitude of the trader to due diligence issues is primarily a matter for HMRC to judge. It follows that tribunal should be very slow to interfere with the decision purely on the basis that HMRC should or should not have given different weight to particular factors, unless it is clear that because of the weight given or not given to particular factors the decision to revoke must be regarded in all the circumstances as disproportionate. Consequently, the tribunal should bear in mind, as established in *John Dee*, as referred to at [25] above, that a direction should not be made to review a decision in circumstances where, despite flaws in the decision-making process, any review decision would inevitably come to the same result.

58. We now turn to the approach of the FTT in this case. Mr Datta submits that HMRC's challenge to the manner in which the FTT dealt with HMRC's decision is unfounded and is merely a challenge to the method of expression of the decision the FTT, rather than its substance. The FTT quite properly, he submitted, "cut to the chase" and set out the matters which it considered were determinative of the issues raised by the appeal, namely those issues to which the FTT found HMRC had failed to pay regard. He submits that it is clear from the FTT's decision that HMRC's reasons for the revocation were considered but that findings of fact were made to the effect that Mr Ahmed demonstrated a positive compliance attitude and a willingness to learn which justified the direction of a further review.

59. We reject those submissions. In our view, the FTT failed to engage adequately with the reasons for HMRC's decision and the background against which it was made. It failed to follow at all the approach that we have outlined at [50] to [57] above.

60. Consequently, the matters which it found to be in Mr Ahmed's favour were held to justify a review of HMRC's decision without there having been a careful analysis of the reasons why HMRC decided that revocation was justified.

61. The FTT referred to HMRC's submissions to the effect that Mr Ahmed was not fit and proper due to his failure to improve his procedures despite the regular engagement and education from HMRC's officers and warnings given that failure to improve could lead to the loss of his WOWGR registration. Having received those submissions, the FTT should have considered, and made findings, as to whether before HMRC's intervention Mr Ahmed's due diligence procedures were in its view inadequate. The FTT should then have considered the steps that Mr Ahmed took in response to HMRC's intervention before its decision to revoke was made and, in particular, whether he had made improvements to his procedures and whether as a consequence of those improvements it could be said that Mr Ahmed was able and willing to meet the due diligence condition.

62. It was only after having made those findings that the FTT should have considered the question as to whether HMRC's decision to revoke was in all the circumstances proportionate and otherwise one that could have reasonably been arrived at. If it found that the decision was flawed because, for example, HMRC had disregarded relevant factors which tended to show an improvement in the registered owner's procedures, then the correct approach at that point was to consider whether those matters were sufficiently material that if the decision to revoke was reviewed

again, the result would not inevitably have been the same. As we have indicated at [26] above, having identified flaws in the decision, the hurdle of inevitability is a high one to surmount.

63. We do not accept that in this case the FTT implicitly found that Mr Ahmed's procedures were inadequate before HMRC's intervention and that he then made sufficient improvements to them which HMRC failed to take into account in making its revocation decision.

64. In our view, none of the FTT's findings could properly be characterised as improvements to Mr Ahmed's procedures.

65. First, the FTT made no findings as to what Mr Ahmed's procedures were before HMRC's intervention. It made a finding at [11] that Mr Ahmed was given a copy of EN 196 following his first meeting with HMRC and at [12] that he was told to comply with it in the letter sent to him following that meeting and that if there were not significant improvement in procedures that may result in the registration as a registered owner being revoked.

66. Secondly, in our view, none of the matters on which the FTT relied at [37] to [44] of the Decision could properly be characterised as evidence of improvement in Mr Ahmed's procedures and that he was able to meet the requirements of the due diligence condition. At the very highest, they could be said to demonstrate a change in attitude and a willingness to learn and listen to HMRC. Indeed, Mr Datta did not put Mr Ahmed's case any higher than that. However, that falls a long way short of having actually implemented robust procedures and again, the FTT made no findings as to what the change in attitude had produced in terms of revised and improved procedures.

67. In particular, although the FTT referred to a further visit to Poland having taken place, it made no findings as to what resulted from that meeting in terms of further due diligence on Bugatt and its business having been undertaken and what record Mr Ahmed had made of the due diligence. In our view, the FTT placed undue reliance on the fact, as recorded at [44] of the Decision, that HMRC relied on information that would not otherwise have been available to Mr Ahmed through his own due diligence. This information emerged after Mr Ahmed had been given the opportunity of improving his due diligence procedures and was relied upon by HMRC after it appeared to them that adequate improvements had not been made.

68. We therefore conclude that the FTT erred in law in its approach to reviewing HMRC's decision and that HMRC has made out its case on the first of its grounds of appeal. In our view, the FTT's errors of approach are so significant alone that we should set aside the Decision and we do not need to consider the second and third grounds in any detail.

69. As far as the second ground is concerned, because the FTT did not make specific findings as to Mr Ahmed's due diligence procedures and how, if at all, they had been improved following HMRC's interventions it is difficult to see how the

matters on which the FTT relied could be said to be sufficient in themselves to justify the setting aside of HMRC's decision. As we have said, those factors should properly have been weighed up against the findings on the due diligence procedures before the FTT decided that HMRC's decision should be reviewed again.

70. As far as the third ground is concerned, it is clear that the burden is on Mr Ahmed to demonstrate that HMRC's decision was one which could not reasonably have been reached. It follows from our analysis of the FTT's approach that the matters on which the FTT relied in deciding to direct a further review of HMRC's decision were not sufficient in themselves to have satisfied this burden in the absence of a proper analysis of the reasons for HMRC's decision.

Further Steps

71. We have decided that we should exercise our discretion under s 12(2) (a) TCEA to set aside the Decision.

72. Ms Mannion submits that in those circumstances we should remake the decision ourselves by making findings that the due diligence condition had not been met over a period of months and that the decision to revoke was, on the information before the decision-maker, plainly within the reasonable range.

73. In our view the appropriate course to take is to remit the matter for a fresh hearing before the FTT. We are reluctant to remake the decision in circumstances where the question as to whether it is reasonable to revoke Mr Ahmed's registration depends to a large degree on the relevant tribunal's assessment of Mr Ahmed and his ability and willingness to comply with the due diligence condition. We have not had the benefit of seeing any transcript of his evidence. Furthermore, the FTT has not made adequate findings of fact on those matters and in those circumstances in our view it would be unfair to Mr Ahmed for us to proceed by attempting to fill in the gaps purely on the basis of the written material put before us.

Disposition

74. The appeal is allowed. We direct that the Decision be set aside and the matter remitted to the FTT for a fresh hearing before a differently constituted panel of the FTT.

JUDGE TIMOTHY HERRINGTON **JUDGE JOHN WALTERS**

UPPER TRIBUNAL JUDGES
RELEASE DATE: 11 September 2017