



TC05152

Appeal number: TC/2015/06707

*EXCISE DUTY – revocation of registration under WOWGR –whether
HMRC’s decision following the “minded to” letter was reasonable*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RIAZ AHMED T/A BEEHIVE WINE STORE

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE VICTORIA NICHOLL
CLAIRE HOWELL**

Sitting in public at royal Courts of Justice London on 3 and 4 May 2016

David Bedenham, Counsel, instructed by Rainer Hughes for the Appellant

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

DECISION

Introduction

5 1. This is an appeal against a decision of the Respondents (“HMRC”) made on 29 October 2015 to revoke the registration held by the Appellant (“Mr Ahmed”) under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 (“WOWGR”).

10 2. Three working days prior the date set for the hearing Mr Ahmed made an application for permission to rely on an additional witness statement and for disclosure by HMRC of documents and information relating to third party WOWGR approved traders. Mr Ahmed believed that this evidence would support his claim that HMRC had acted in breach of the EU principle of equality and Article 1 of Protocol 1 of the European Convention on Human Rights (“A1P1 rights”). HMRC objected to
15 the application on the grounds that it had been made belatedly, that it was disproportionate and onerous given the breadth of disclosure requested and that it would lead to a delay in the hearing and additional costs. HMRC reserved the right to cross examine the additional witness.

20 3. We considered this application as a preliminary issue at the hearing. As it had been established by the date of the hearing that the additional witness would not be available for cross-examination Mr Ahmed withdrew his application to rely on this witness evidence.

25 4. The disclosure requested concerned details of WOWGR approved traders who had traded with one of the same suppliers as Mr Ahmed (Bugatt Investment Spolka Z O O (“Bugatt”) and details of “any and all WOWGR approved traders that have received 7 (or more) seizures and yet have not had their approvals withdrawn”. HMRC was able to confirm at the hearing that Bugatt’s EC sales lists did not show any sales to UK traders. The second part of the request was not particularised in a way that would allow HMRC to search and provide the information within the timescale of the
30 hearing.

35 5. We refused Mr Ahmed’s application for disclosure as it was contrary to the overriding objective of The Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 (“the Rules”) that provides for litigation to be conducted efficiently and at a proportionate cost. Mr Ahmed applied for an expedited hearing on 9 December 2015 and the parties agreed the list of documents in February 2016. Mr Ahmed could have requested further disclosure at that time or in the following month without delaying the hearing.

Background

40 6. In 2013 HMRC reviewed the policy with regard to WOWGR and, from 1 November 2014, registered traders were required to ensure that they carry out appropriate due diligence checks on their suppliers, customers and supply chains. This

shift from HMRC reviewing suppliers and customers to traders being required to carry out risk based due diligence as a condition of their registration was accompanied by a programme of regular visits to registered traders to educate and support them with this obligation.

5 **The facts**

7. By agreement between Counsel we heard oral evidence from Officer Kendall, Higher Officer of HMRC, first and then evidence from Mr Ahmed. Both were cross examined. We also read a witness statement from Officer Harry of HMRC. From this witness evidence and the contents of the bundles we found the following facts:

- 10 8. Mr Ahmed was approved as a registered owner to trade in ‘duty suspended’ alcohol on 21 July 2001. This allowed him to buy alcohol in duty suspense for delivery into his UK bond account and to sell it on to a UK based customer. He also sells duty paid alcohol from retail premises in Ilford. Mr Ahmed trades both lines of business under the name ‘Beehive Wine Store’.
- 15 9. On 22 January 2014 Mr Ahmed was included in the ‘closer working visit programme’. This provided for quarterly visits by officers of HMRC and for Mr Ahmed to provide details of his trading activity and due diligence on a regular basis.
- 20 10. On 18 February 2015 Officers Harry and Kendall visited Mr Ahmed. During the meeting Mr Ahmed was advised 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.
- 25 11. On 18 May 2015 HMRC Officers Harry and Kendall visited Mr Ahmed. It was noted that there had been seven seizures of loads destined to his UK bond account. Mr Ahmed was aware of all of the seizures and he had ceased to trade with all of the suppliers of these seized loads other than Ellermore Trading and Bugatt as they had both assured him that they were dealing with UK Border Force in relation to the recovery of the loads. Officer Kendall advised Mr Ahmed that in the light of these seizures he should obtain transport information from EU suppliers before the goods
- 30 leave for his UK bond account with Seabrooks. Officer Kendall also asked about the reasons for making payment in cash to Ellermore Trading and asked whether this was properly recorded in a cash book. Mr Ahmed was given a copy of EN 196 and told that this set out his obligations as a registered owner of duty suspended goods.
- 35 12. On 26 May 2015 Officer Kendall sent a letter to Mr Ahmed summarising what had been discussed at the meeting on 18 May and advised him that he was required to keep a cash book and to comply with section 10 of EN 196. He concluded that “if there have not been significant improvements with your procedures this may result in the revocation of your WOWGR approval”.
- 40 13. Mr Ahmed provided further due diligence information to HMRC in June and July 2015.

14. A meeting was convened by Officers Harry and Kendall at HMRC's offices on 27 August 2015. Mr Ahmed attended the meeting with his representative from Rainer Hughes. At the meeting Officer Kendall presented Mr Ahmed with information on Bugatt. Mr Ahmed stated that he had visited Bugatt four times and that he would be visiting again the next week. Officer Kendall expressed concern about the need to identify who controlled the accounts into which Mr Ahmed was to make payments for Bugatt.

15. On 4 September 2015 Officer Kendall wrote a letter to Mr Ahmed to advise him that he was 'minded to' revoke his registration as an owner of duty suspended goods because Mr Ahmed was not a fit and proper person to hold a registration.

16. On 7 September 2015 Mr Ahmed flew to Warsaw and met with Mr Sarnecki of Bugatt.

17. Mr Ahmed's representative set out his response to HMRC's 'minded to' letter in a letter dated 17 September 2015.

18. On 29 October 2015 Officer Kendall made his decision to revoke Mr Ahmed's registration as registered owner of duty suspended goods under WOWGR with effect from 6 November 2015. The reasons were set out under the following headings:

"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."

19. Mr Ahmed lodged his appeal on 12 November 2015. Mr Ahmed also brought judicial review proceedings in *The Queen on the Application of Ahmad v Commissioners for Her Majesty's Revenue and Customs* [2015] EWHC 3954 (Admin). Mr Ahmed was unsuccessful but Mr Justice Mitting observed that the "First-tier Tribunal therefore has all the powers it needs to consider the proportionality of a revocation decision. The fact that the remedy it can order is effectively limited to a quashing decision does not mean that proportionality, and so lawfulness of the decision, cannot be examined."

20. At the hearing Officer Kendall gave evidence from which we found that he 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 was not aware of specific conditions having been imposed since the introduction of 'minded to' letters, but he commented that a condition not to trade with a specific supplier would not have been appropriate in any event because of recent case law.

21. From Mr Ahmed's oral evidence we found that he had one customer for his duty suspended stock and a number of suppliers from time to time. His suppliers in 2014 and 2015 were Bugatt and Ellermore Trading.

22. 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.

10 **The law and Excise Notice 196**

23. HMRC's power to grant, regulate and revoke approval to trade in duty suspended alcohol is set out in the Customs and Excise Management Act 1979 ("CEMA") as follows:

24. Section 100G - Registered excise dealers and shippers

15 "(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.

25 (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.

30 (3) In the Customs and Excise Acts "registered excise dealer and shipper" means a revenue trader approved and registered by the Commissioners under this section.

(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.

35 (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.

(6) ..."

25. Section 100H (1) - Registered excise dealers and shippers regulations

“Without prejudice to the generality of section 100G above, registered excise dealers and shippers regulations may, in particular, make provision –

- 5 (a) regulating the approval and registration of persons as registered excise dealers and shippers and the variation or revocation of any such approval or registration ...
(b)-(p) ...”

26. “Revenue trader” is defined in section 1(1) of CEMA and includes “any person carrying on a trade or business subject to [the Act] which consists of or includes ...
10 the buying, selling, importation, exportation, dealing in or handling of [dutiabale goods]”.

27. The Warehousekeepers and Owners of Warehoused Goods Regulations SI 1999/1278 (as amended) (“WOWGR”) were made under powers conferred by sections 100G and 100H of CEMA. Regulations 5,7, 12 and 18 of WOWGR provide
15 as follows:

Regulation 5 – 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
20 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.”

Regulation 7 – Registration

“(1) The Commissioners shall furnish every relevant revenue trader with a
25 certificate of registration.

(2) When a person ceases to be a relevant revenue trader he shall immediately destroy his certificate of registration.”

Regulation 12- Privileges of a registered owner

30 “(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.”

35 Regulation 18 (1) – 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.”

5 28. Excise Notice 196 - “Excise goods- registration and approval of warehousekeepers, warehouse premises, owners of goods and registered consignors” (“EN196”) was made published pursuant to regulation 18.

29. From 1 November 2014 it has been a condition of approval as an excise warehousekeeper, registered owner, duty representative or registered consignor that it must comply with a “due diligence condition”. This is explained in paragraph 10 of EN196 as requiring 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 summarised as follows :

- Objectively assess the risks of alcohol duty fraud within the supply chains within which you operate
- 15 • 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
- 20 • Document the checks that 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

29. The Finance Act 1994 provides a right to challenge a decision on revocation. It sets out that a trader may request that a decision to revoke is reviewed under section 14. Section 16 then provides for an appeal against the review decision to the first tier tribunal. The tribunal’s power on appeal is set out in Section 16(4) Finance Act 1994 as follows:

30 “(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—

35 (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

40 when comparable circumstances arise in future.”

Submissions

5 30. Mr Ahmed submits that the decision to revoke his WOWGR registration was not reasonable because it was not supported or justified by the underlying facts and it was disproportionate.

10 31. Mr Ahmed had also claimed that the decision was in breach of the EU principle of equality and that Article 1 of the First Protocol to the European Convention on Human Rights was in point as the decision will result in the loss of goodwill. Mr Bedenham advised at the beginning of the hearing that his client no longer wished to pursue these claims.

15 32. HMRC submits that the decision to revoke was reasonable and that revocation was the necessary resort in circumstances where HMRC had lost faith in Mr Ahmed's ability or willingness to operate his duty suspended approvals in a fit and proper manner. Mr Ahmed was not fit and proper due to his failure to improve his procedures despite the imposition of the due diligence condition in November 2014, the regular engagement and education from HMRC officers and warnings given that failure to improve could lead to the loss of his WOWGR approval.

Discussion

20 33. This Tribunal's power is to review the decision made following the response to the 'minded to' letter in order to determine whether it was reasonable. In exercising our supervisory jurisdiction we noted that in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231 Lord Salmon commented that the tribunal cannot substitute "its own discretion merely because it prefers its own
25 discretion to that exercised". As Lord Lane explained, a review of the exercise of discretion should consider whether "the commissioners had acted in a way which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight."

30 34. In *CC&C Ltd v Revenue and Customs Commissioners* [2015]1WLR 4043 Underhill LJ commented that "the law means that HMRC's power of revocation is indeed capable of operating harshly... It is all the more important, therefore, that they take all possible care to ensure that any such decision is well founded." He went on to suggest that a 'minded to' letter should be sent to a trader before a revocation decision
35 is made so that the trader has an opportunity "to draw to HMRC's attention, before the decision is taken, factual or other matters which they may have overlooked or misappreciated in their assessment of the grounds for revocation."

35. We therefore considered the facts in order to determine whether the decision was reasonable or whether it had taken into account some irrelevant matter or had

disregarded something to which it should have given weight, taking account of Mr Ahmed's response to the 'minded to' letter. We noted in this context that Pill LJ accepted in *Gora v C&E Comms* [2003] EWCA Civ 525 that "given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself [the] primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision [the subject of the appeal under section 16] was reasonable."

36. Our findings of fact are set out in paragraphs 7-22 above and from these we found that some relevant matters were disregarded in making the decision as follows:

10 37. (1) 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
15 payments the registration would not have been revoked. This reflects the statements on page 2 of his letter as follows:

38. "During the meeting on 27 August 2015 you suggested that you were to visit Bugatt the following week in Poland. There is no mention in your solicitor's letter that this trip went ahead and I would suggest that the easiest way to address my
20 concerns would have been to proceed with that trip and provided me with further evidence of the Bugatt's presence and business in Poland." and

39. "You have not obtained any documentation confirming that the UK account that you transfer funds into is in fact Bugatt's bank account. Within the pack you provided to Officer Harry there is a front page of a bank statement but this is for Mr Sarnecki's personal account. The only confirmation of the account you have is from a
25 Hotmail email account alleged to be from Bugatt."

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
30 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.

35 41. (2) 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
40 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.

42. (3) 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.

43. (4) 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. 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.

Decision

46. We found that the decision could not reasonably have been arrived at given the number of relevant matters that were disregarded by Officer Kendall in making his decision and his failure to consider whether the imposition of a specific condition would be more appropriate than revocation.

47. For the reasons set out above, the appeal against Officer Kendall's decision succeeds. In accordance with section 16(4) Finance Act 1994 we direct that HMRC must carry out a review of the decision to revoke. The review must take account of all of the findings of fact set out in this decision and, if it is concluded that revocation is appropriate, consider whether the imposition of a specific condition or restriction would be an alternative to revocation of Mr Ahmed's registration.

48. 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.

**VICTORIA NICHOLL
TRIBUNAL JUDGE**

RELEASE DATE: 7 June 2016