[2021] UKFTT 0192 (TC)

TC08142

Excise duty – appeal against HMRC's decision to refuse approval for registration as a wholesaler of alcohol on the basis that they were not satisfied that the appellant was a fit and proper person – Section 88C(2) of the Alcoholic Liquor Duties Act 1979 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/02923

BETWEEN

HARP WINES & SPIRITS LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER DR CAROLINE SMALL

The hearing took place on 10, 11 and 12 February 2021 via the Tribunal video platform.

Having heard Mr David Bedenham, of counsel, instructed by Rainer Hughes, for the Appellant

Mr Ben Hayhurst, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against a decision of the respondents ("HMRC") dated 30 March 2017 (the "Refusal Decision") refusing the appellant's application for approval to carry on the controlled activities of selling and arranging to sell controlled liquor wholesale under Section 88C of the Alcoholic Liquor Duties Act 1979. The approval and registration scheme for wholesaling of alcohol contained in that section has come to be known as the Alcohol Wholesaler Registration Scheme ("AWRS").

2. The application was refused on the basis that HMRC were not satisfied that the appellant was a fit and proper person to carry on the activity of the wholesale of dutiable alcoholic liquor.

Preliminary issue

3. At the outset of the hearing Mr Hayhurst stated that, in response to Mr Bedenham's Skeleton Argument, he had checked with Officer Foss, whose decision is the subject matter of this appeal, whether she had discussed it with anyone else. Officer Foss conceded that, as a matter of governance, she had discussed her decision with her manager, Officer Chivers. Mr Hayhurst therefore sought leave to lodge with the Tribunal notes of those conversations which had been extracted from the HMRC system. He also produced a copy of the published version of HMRC's internal manual AWRS30400 together with a copy of one paragraph that had been redacted from it. Mr Bedenham confirmed he did not object to the late disclosure and the documents were admitted in evidence.

The evidence

4. The evidence before us concerned events both before and after the Refusal Decision.

5. We had a hearing Bundle of 1703 pages, plus a Bundle of authorities and Skeleton Arguments from both parties. We heard evidence from Officers Foss and Midgeley for HMRC and Mr Patel for the appellant.

Background

6. The appellant was incorporated on 2 January 2014 and registered for Value Added Tax with effect from 1 February 2014. According to its Companies House filing the nature of its business is "46342 Wholesale of wine, beer, spirits and other alcoholic beverages". Its principal place of business was in Newhaven until, on 27 June 2019, a change to Hove was notified.

7. Mr Praful Patel is the appellant's sole director and shareholder and he was appointed on 2 January 2014.

Statutory test for approval

8. Part VIA of the Alcoholic Liquor Duties Act 1979 ("ALDA"), which was inserted by the Finance Act 2015 with effect from 26 March 2015, provides for the regulation of the wholesale of alcoholic liquor upon which duty is charged under that Act. The selling of alcohol wholesale is a controlled activity under that Part.

9. In so far as relevant to this appeal, Section 88C ALDA provides:

> "88C Approval to carry on controlled activity
>
> (1) A UK person may not carry on a controlled activity otherwise than in accordance with an approval given by the Commissioners under this section.

(2) The Commissioners may approve a person under this section to carry on a controlled activity only if they are satisfied that the person is a fit and proper person to carry on the activity."

10. A person who contravenes Section 88C(1) by selling controlled liquor wholesale is guilty of an offence under Section 88G and is liable on conviction to imprisonment, a fine or both. Alternatively, HMRC may impose a civil penalty on such a person.

Meaning of fit and proper

11. There is no definition of "fit and proper person" in ALDA. HMRC has published non-statutory guidance on whether a person is regarded as fit and proper in Excise Notice 2002: Alcohol Wholesaler Registration Scheme ("EN 2002"). At the relevant time, Section 6.10 of EN 2002 stated:

"**6.10 The fit and proper test**

Only applicants who can demonstrate that they're fit and proper to carry on a controlled activity will be granted approval. This means HMRC must be satisfied the business is genuine and that all persons with an important role or interest in it are law abiding, responsible, and don't pose any significant threat in terms of potential revenue non-compliance or fraud.

HMRC will assess all applicants (not just the legal entity of the business but all partners, directors, and other key persons) against a number of 'fit and proper' criteria to establish:

- there's no evidence of illicit trading indicating the business is a serious threat to the revenue, or that key persons involved in the business have been previously involved in significant revenue noncompliance, or fraud, either within excise or other regimes, some examples of evidence HMRC would consider are:
    - assessments for duty unpaid stock or for other under-declarations of tax that suggest there's a significant risk that the business would be prepared to trade in duty unpaid alcohol
    - seizures of duty unpaid products
    - penalties for wrongdoing or other civil penalties which suggest a business don't (*sic*) have a responsible outlook on its tax obligations
    - trading with unapproved persons
    - previous occasions where approvals have been revoked or refused for this or other regimes (including liquor licensing etc)
    - previous confiscation orders and recovery proceedings under the Proceeds of Crime Act
    - key persons have been disqualified as a director under company law
- there are no connections between the businesses, or key persons involved in the business, with other known non-compliant or fraudulent businesses
- key persons involved in the business have no criminal convictions which are relevant for example, offences involving any dishonesty or links to organised criminal activity - HMRC will normally disregard convictions that are spent provided there are no wider indications that the person in question continues to pose a serious threat to the revenue (an 'unspent' conviction is one that has not expired under the terms of the Rehabilitation of Offenders Act 1974)

- the application is accurate and complete and there has been no attempt to deceive
- there haven't been persistent or negligent failures to comply with any HMRC record-keeping requirements, for example poor record keeping in spite of warnings or absence of key business records
- the applicant, or key persons in the business, have not previously attempted to avoid being approved and traded unapproved
- the business has provided sufficient evidence of its commercial viability and/or credibility - HMRC won't approve applicants where they find that they cannot substantiate that there's a genuine plan to legitimately trade from the proposed date of approval
- there are no outstanding, unmanaged HMRC debts or a history of poor payment
- the business has in place satisfactory due diligence procedures covering its dealings with customers and suppliers to protect it from trading in illicit supply-chains, see section 12 for more information about due diligence.

The list above isn't exhaustive. HMRC may refuse to approve you for reasons other than those listed, if they have justifiable concerns about your suitability to be approved for AWRS.

HMRC are also unlikely to approve an application if the applicant has previously had their application for AWRS approval refused if the reasons for the previous refusal are still relevant."

12. By "other key persons", HMRC means those who play a key role in the operation of the business to the extent that they can be seen as one of its "guiding minds", eg persons who have authority and responsibility for directing and controlling the activities of the business or day to day management.

13. The relevant part of HMRC's published internal guidance in this regard reads as follows:-

"**Refusing an application for approval**

ALDA S88C(2) and 88C(5) provide the legal provisions to allow us to refuse (or revoke) a business's approval, provided we have good reason to believe the business does not meet our fit and proper tests. You must base a decision to refuse an application on solid evidence that will support the decision made if it is tested at a tribunal hearing.
Your evidence must show that, on the balance of probability:

- the wholesaler is not a 'fit and proper' person to hold an AWRS approval
- that there is, or would be, a significant risk to the revenue; or
- that any of the requirements stated within this guidance (or Excise Notice 2002) have not been satisfactorily met.

Your decision should be based on the suitability of the business and its key officials and guiding minds. The credibility of the business should be a key factor in that decision.

As the assurance officer, you are the 'decision maker' in terms of granting or refusing approval and are responsible for drafting the reasons for refusal on the refusal letter. Stating all the grounds for refusal is vital as the applicant must know exactly why approval has been refused.

Where grounds for refusal (or revocation) are identified, you should agree with your line manager (at least Senior Officer level (SO) is recommended) before taking the appropriate action."

14. As we record at paragraph 3 above, there is a further paragraph, which is not included in the published version, and Officer Foss confirmed that she had considered it. It suffices to say that it deals with the situation where an officer does not have sufficient grounds to refuse an application, in which event the imposition of suspension conditions should be considered in order to minimise the compliance risk. The argument in that paragraph is that that would be more appropriate where regulatory breaches are involved rather than attempts at evasion. However, the key point is that conditions are suggested as being applicable where there are doubts about compliance but there is insufficient evidence to refuse approval.

The appellant's application for AWRS approval

15. On 11 February 2016, the appellant lodged the application for AWRS approval online. The application incorrectly stated that the appellant had been incorporated on 1 January 2013, that its principal place of business was in Hove and that a previous place of business in the past three years was in Newhaven.

16. However, there is no doubt that the principal place of business was in Newhaven as various HMRC officers had visited Mr Patel at those premises four times before the application was made (on 6 March and 6 August 2014 and 24 April and 26 May 2015) and on seven occasions thereafter (on 12 and 20 January and 27 November 2017 and 26 March, 3 October, 7 November and 5 December 2018). Correspondence was consistently sent to that address. Whether or not the appellant also had a place of business in Hove at that time is unknown but it seems to us that that is more than likely. Certainly HMRC had no record of that. In fact, we observe that in his answer to the 11th question posed by Officer Foss at the meeting on 12 January 2017 he told her that the only business premises were in Newhaven.

17. The application stated that the trading activity was "Cash and Carry" and the intention was to supply to "trade, like pubs and hotels". However, elsewhere on the form, the trade aspect was identified as being other wholesalers. The appellant stated that it would import alcohol using a third party to store it and an Italian and a German supplier were identified.

18. The inaccuracies and contradictions were not explored at the hearing but only noted when writing this decision.

19. On 13 December 2016, Officer Foss contacted the appellant confirming that she and another officer would visit the appellant on 12 January 2017. She enclosed two fact sheets but she asked Mr Patel to look at EN 2002, telling Mr Patel that it was available on line, stating that it gave "examples of what I would expect to see for a registered wholesaler". She asked that those be read before the visit. In addition she requested the following information:-

(1) An overview of the business and its activities;

(2) List of customers;

(3) List of suppliers;

(4) List of products;

(5) An overview and evidence of due diligence checks you carry out on customers and suppliers;

(6) Company information such as legal entity, directors, partners, silent partners, stakeholders, investors; and

(7) Details of the year-end for accounting purposes and the accountants' details if applicable.

20. Some of that information was furnished prior to the meeting.

21. On 12 January 2017, Officers Foss and Allen visited the appellant. Mr Patel's agent also attended, Mr Sibbering, and on being asked about his role he stated that he had helped to "pull together his due diligence policy".

22. At the outset Mr Patel confirmed that he had not read EN 2002 although he had "flicked" through it.

23. In the course of that meeting Officer Foss, having prepared a comprehensive list of questions then asked numerous questions to assist her in assessing the application. The draft questions and the responses thereto and the recorded summary of the visit are included in the Bundle.

24. Amongst the information that was ingathered, she noted that wine was imported from Germany and Italy and held in duty suspension at Ferryspeed (C.I.) Limited ("Ferryspeed") having been transported there by Wineflow Clearance Ltd ("Wineflow"). Mr Patel would telephone Wineflow instructing them to collect and deliver the goods. Mr Patel stated that he did not know the source of that wine and he confirmed that the appellant did not really operate any form of stock control. He stated that he dealt only in wine and soft drinks and there was no cash business. He only had the premises in Newhaven and the only assets of the business were a forklift, racking and computers. He named his five main suppliers (one of whom supplied soft drinks). We observe that that list did not include the Italian supplier named in the application (and who continued to be a supplier). His customers were wholesalers in the UK.

25. As far as due diligence was concerned he said that he did obtain business reports provided by Credit Safe Business Solutions Limited ("Credit Safe"). It was stated that all suppliers were visited, and the appellant had copies of VAT numbers, company registrations, copies of passports and utility bills. He was considering a third party due diligence provider but in the interim, if uncertain, Mr Sibbering would assist. It was stated that he would keep a log of all due diligence going forward and he would update it monthly with checks on AWRS and VAT or if prompted by Credit Safe.

26. Following that meeting, Officer Foss asked for further information and a copy of the due diligence policy. That was provided but, as she noted, it was not specific to the business and simply appeared to be a general ingathering of information.

27. On 10 February 2017, Officer Foss wrote to the appellant with a "minded to" letter informing the appellant that she was considering refusing the application. In that letter she gave the reasons for the potential refusal and asked for further information.

28. On 2 March 2017, Rainer Hughes, the solicitors acting for the appellant, made detailed representations to the effect that any such refusal would be unjustified.

29. On 30 March 2017, Officer Foss wrote to the appellant explaining that she had refused the application because the appellant did not meet the requirements of the AWRS fit and proper criteria. She set out six "key points" that she had taken into account in reaching her decision.

30. On the same date she wrote to Rainer Hughes replying to their letter and enclosing a copy of the Refusal Decision. That letter was also copied to the appellant. Apart from rebutting Rainer Hughes arguments, Officer Foss stated "… I can confirm that I have considered whether there would be suitable conditions that would allow us to approve the HWS. I concluded in that case that there were no conditions I could impose which would reduce the risk to an appropriate level".

The Refusal Decision

31. The decision letter ("the Refusal Decision") set out the following "key points" in the decision, namely:-

(1) "There is evidence of illicit trading and errors suggesting that [the appellant] is a threat to the revenue as key persons involved in the business have previously been involved in significant revenue non-compliance."

The evidence cited was

(a) a seizure in August 2014 ("the 2014 seizure") of spirits held by the appellant without a Warehousekeepers and Owners of Warehoused Goods Regulations ("WOWGR") approval, and

(b) the fact that Mr Patel had also been a director of a previous similar business namely Gimlet Italian Food Traders Limited ("GIFT") which had been involved in the non-declaration of excise duty on wine imported into the UK.

(2) "There is evidence of connections between key persons and other known non-compliant businesses"

The evidence cited was

(a) Mr Patel had been a director of GIFT which had been involved in the non-declaration of excise duty on wine imported into the UK,

(b) on 8 May 2015 HMRC issued the appellant with a letter in relation to recent transactions with a defaulting trader, SS Traders Limited ("SSTL"), and

(c) in February 2016 the appellant had also been issued with a letter to advise that they had entered into arrangements with a defaulting trader namely Meadowhall Wholesale Limited ("Meadowhall").

(3) "There have been persistent or negligent failures to comply with HMRC record keeping requirements"

The evidence cited was:

(a) the 2014 seizure, and

(b) Mr Patel's link with GIFT.

(4) "The applicant, or key persons in the business have previously attempted to avoid or traded unapproved."

The evidence cited was:

(a) the 2014 seizure, and

(b) Mr Patel's admission in January 2017 to running an off-record operation selling wine.

(5) "The business has not had in place satisfactory due diligence procedures covering its dealings with customers and suppliers to protect it from trading in illicit supply chains"

The evidence cited was:

(a) in May 2015, the appellant had received the letter from HMRC about SSTL which was described as "… a defaulting trader",

(b) in February 2016, the appellant had been issued with the letter advising that "…they had entered into arrangements with a defaulting trader", namely Meadowhall,

(c) Mr Patel's admission about running an off-record operation selling wine.

(6) "The business has provided sufficient evidence of its current commercial viability, but not of its credibility"

The evidence was that although the accounts indicated a viable business making a profit, the credibility of the company was in doubt when penalties and the off-record illicit trading was taken into account.

The appellant's response

32. If HMRC refuse an application for approval and the applicant wishes to challenge that decision then the applicant can either appeal immediately to the First-tier Tribunal ('FTT') under Section 16 of the Finance Act 1994 ('FA94') or ask for the decision to be reviewed by another HMRC officer not previously involved in the matter and then, if the decision is confirmed on review, appeal to the FTT.

33. In this instance, the appellant appealed to the Tribunal on 4 April 2017. HMRC's decision took effect from 30 April 2017 and would have had the consequence of devastating the appellant's existing wholesaling business, so the appellant successfully applied to the High Court for an order to the effect that, pending resolution of this appeal by the FTT, HMRC should add the appellant to the list of persons permitted to make wholesale supplies of alcohol. That High Court order was extended by consent on 22 August 2017.

34. As a result of that order, the appellant has been able to continue to operate its business since the Refusal Decision was made.

Jurisdiction of the FTT on appeal

31. A decision to refuse an application for approval under Part VIA ALDA is a decision as to an ancillary matter for the purposes of Section 16 FA94. Section 16(4) provides that the FTT has a supervisory jurisdiction in relation to decisions as to ancillary matters as follows:

"(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 -

(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."

35. Section 16(6) FA94 provides that the burden of proof in an appeal under the section is on the appellant.

36. Whether HMRC are satisfied that a person is fit and proper to carry on the activity of a wholesaler of alcoholic goods is a matter for the administrative discretion of HMRC. The FTT's powers to interfere with a decision by HMRC that a person is not fit and proper are limited and can only be exercised where the decision is one which could not reasonably have been arrived at (see *CC & C Ltd v HMRC*[1]).

37. The House of Lords in *Customs & Excise Commissioners v JH Corbitt (Numismatists) Ltd*[2] set out the approach for the FTT (then the VAT Tribunal) to follow where it has a supervisory jurisdiction at page 239. Lord Lane stated that the Tribunal could only review the decision if it were shown that 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.

38. In *Balbir Singh Gora v Customs & Excise Commissioners*[3], 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 was reasonable.

The Issue

39. The appellant has the burden of proof. In order to succeed, the appellant must establish, on the balance of probabilities, that Officer Foss (a) failed to consider matters which should have been taken into account, or (b) took into account some irrelevant matters, or (c) otherwise reached a decision that was so plainly wrong that no officer of HMRC, acting reasonably, could have reached it.

The facts relied on by the Tribunal in relation to the refusal and our reasons

Introduction

40. In support of her decision, Officer Foss had relied on five evidential points, namely:-

(a) The non-declaration of excise duty by GIFT between 2011 and 2013.

(b) The Section 9 Taxes Management Act enquiry ("the TMA enquiry") in relation to the off-record operation selling alcohol.

(c) The WOWGR seizure in August 2014 where the appellant had had goods seized as they were held without the correct WOWGR approval ("the 2014 seizure").

(d) The link with SSTL and associated poor due diligence by the appellant.

(e) The link with Meadowhall and associated poor due diligence by the appellant.

41. There are two further evidential points on which HMRC rely in support of her decision, namely:

(a) An excise assessment in the sum of £93,808 ("the Excise Assessment") issued on 6 May 2015 which has been appealed to the Tribunal but stayed behind *HMRC v Martyn Glen Perfect*[4] ("Perfect").

(b) A warning letter issued on 1 August 2018 followed by a Regulatory Penalty of £500 issued on 18 April 2019 for breaching the due diligence requirements of EN 2002 at section 12: Excise due diligence ("the Regulatory Penalty").

42. Although this was not the way in which it was dealt with either in the Tribunal hearing or in the decision letter, it is appropriate to set out a time line dealing not with HMRC's

[1] [2014] EWCA Civ 1653 at [15] – [17]
[2] [1980] STC 231
[3] [2004] QB 93, [2003] EWCA Civ 525
[4] 2019 EWCA Civ 465

enquiries, but rather with what actually happened. Therefore, we deal with the fact finding in relation to the five primary factors in the sequence in which they happened. We deal with SSTL and Meadowhall together with the Regulatory Penalty under the banner of due diligence. We conclude with Excise Assessment.

43. In summary, although there are many discrepancies in terms of different accounts being alleged to have been given at different times, the only significant "changes" in the available evidence are the suggestions in Mr Patel's witness statement, for the first time, that he volunteered information to HMRC on a number of occasions. We do not accept that for the reasons set out below.

Mr Patel

44. Mr Patel has at all times been the guiding mind of the appellant and therefore the question as to whether or not the appellant is a "fit and proper person" turns in large part on his conduct and his credibility. Mr Bedenham urged the Tribunal to find Mr Patel to be a straightforward witness who acknowledged his errors but who had, in popular parlance, moved on.

45. On having had the time to read all of the documentation in the Bundle, we found that there were numerous discrepancies or inconsistencies, particularly in relation to the evidence relating to Mr Patel's own involvement in his current or historical business ventures.

46. In summary, we do not accept that he was straightforward or truthful either in various dealings with HMRC over the years or in his evidence to the Tribunal. Indeed for the reasons set out below we found his evidence to lack credibility throughout.

47. Before turning to each of the factors identified by Officer Foss we looked at the conflicting versions of Mr Patel's various accounts of his prior history so that there is a context.

48. We will then look at each of the factors identified by Officer Foss and will look at the conflicts arising through the prism of his own accounts.

His evidence as to his history

49. He has been a director of the appellant since its incorporation on 2 January 2014 (c.f. the application for AWRS at paragraph 15 above) but his involvement in the alcohol trade has a long history.

50. In oral evidence he confirmed that he had commenced business as a corner shop in the 1980s and a ships' chandler latterly in the 1980s and early 1990s. He said that he had owned two off-licenses in addition. He had sold one of those to a company, M&O Trading Ltd ("M&O"), which he described at all times as M&O. HMRC has identified it as being a retail company trading in food, beverages and tobacco. He told the Tribunal that he had been employed by M&O for £60,000 per annum for "a short period".

51. The minutes of the TMA enquiry meeting on 20 January 2017, which were approved by the tax specialist then representing Mr Patel ("the approved TMA minutes"), state that he had run three off-licenses in the 1980s and those had been sold to M&O. It narrated that:

> "For 2 or 3 months PP had been an employee [of M&O]…he was employed as a consultant as the owner was buying his experience."

52. We observe that HMRC's records relating to GIFT record that he told the officers that he had been employed by M&O for approximately 9 months prior to joining GIFT. Companies House record that he became a director of GIFT on 18 May 2011.

53. We also note that on 5 April 2016, his then agents made a prompted disclosure in the TMA enquiry conceding that Mr Patel had omitted from his tax return employment income from M&O. They confirmed that he had been an employee for the entire tax year 2010/11 (and

that income had been returned) but the omitted income related to his continued employment for a further period of 10 weeks until June 2011.

54. He told the Tribunal that he had set up and run a company called Palace Drinks for a few years and that had been an alcohol wholesaler which had bought duty paid alcohol. It was not a registered consignee. There are again conflicting accounts. In the letter of 5 April 2016 to HMRC from his then representative, they make two references to Palace Drinks Limited and they state that it was sold to a third party. The approved TMA minutes state at 11.1 that what was referred to as Palace Trading ceased trading on 31 October 2009.

55. He accepted that, at or about that time or shortly thereafter, he had made what were described in the Bundle as "white van sales" in 2010/11 which were undeclared sales of alcohol.

56. He said that that was the precursor to his involvement in GIFT and when he left GIFT he started the appellant.

57. In his oral evidence he was asked about his history but a significant omission was a company called HT & Co (Drinks) Ltd ("HT & Co") , notwithstanding the fact that he should have seen in HMRC's Skeleton Argument that they record the fact that he had been employed by that company which is another alcohol wholesaler.

58. Although, at his meeting with Officer Clifford on 26 May 2015, he disclosed to her that it was one of his main suppliers he did not disclose his employment. It was only at the visit by Officer Nash on 26 March 2018 when Officer Nash asked Mr Patel when he had sold 75% of his customers to HT & Co that Mr Patel stated that he "… gave retail customers to HT on 15 January 2015. PP advised he gave them retail customers in exchange for job. When Officer Nash asked when the employment started he declared that it was on 15 January 2015. HMRC have ascertained that according to PAYE records he left employment with them on 2 May 2018. He made no disclosure of that employment to Officer Foss although she explicitly asked him about his "role and involvement in other businesses".

59. In summary, in terms of his history, his evidence on M&O has significant contradictions and inconsistencies depending on when and where he might have been and to whom he was talking. His accounts of his other business ventures are also inconsistent.

The TMA enquiry – activities in 2010/11 and possibly later

60. In his witness statement Mr Patel stated at paragraphs 24 and 25 that HMRC had alleged that he was selling "off-record" goods and that he disputed that allegation arguing rather that he had acted as a middleman between Mr Florio and a man named Attila. Mr Florio was later his co-director in GIFT. He stated that Mr Florio offered him wine and he sold it on to Atilla. He argued that the arrangement had only lasted a short period of time and he had only "made" approximately £2,000 which he conceded that he had not declared as income. He stated that:

> "This was unintentional and was a mere mistake. It was an oversight on my part. However, I did volunteer this information, otherwise, they did not know anything about it."

61. The documentary evidence conflicts with most of that account.

62. It is not disputed that on 23 April 2014, HMRC initiated the TMA enquiry into Mr Patel's income tax affairs and that that enquiry took a number of years.

63. On 29 July 2015, Mr Patel's then accountants wrote to HMRC, having made various disclosures but none about what was latterly called "white van sales", seeking to close the enquiry.

64. By 25 November 2015, those accountants had disclosed that the white van sales had lasted two years and that wine had been sold to Mr Patel's contacts on the south coast. There was no mention of Atilla.

65. However, on 5 April 2016[5], those accountants wrote to HMRC about the enquiry and at numbered paragraph 23 of the letter, stated that Mr Patel had been approached by Mr Florio two years prior to the commencement of trade in GIFT, to work on a joint business venture and that venture started whilst Mr Patel was employed by M&O.

66. It was described as a trial period to see whether a business relationship would flourish. Mr Florio allegedly purchased drinks, wines and spirits, which filled a white van, and each venture had a retail value of £2,000. Mr Patel hired a van and a driver for a fortnightly delivery to Mr Patel's contacts within the drinks trade. It was alleged that there was a net profit of £170 per trip divided equally between Mr Florio and Mr Patel. There were 26 trips per annum. All the sales were in cash and Mr Patel paid for the van and the driver in cash.

67. By contrast, at the meeting with HMRC on 20 January 2017, the approved TMA minutes record a different story.

68. Those approved TMA minutes record that Mr Patel had been approached by a student looking for a job. He had arranged that the student would hire a van and go to Portsmouth every fortnight to pick up stock from Mr Florio. Mr Florio would load the van. The stock was always provided by Mr Florio and comprised cheap wine. No spirits were ever sold. It was confirmed that the retail value of the goods was £2,000. Mr Patel did not know where the stock came from and the stock was sold to only one client in London who lived in Chislehurst in Kent and who was known as Attila the Turk.

69. Mr Patel said that he knew absolutely no details about Attila who had allegedly now died. All he knew was that Atilla supplied bars and restaurants in London. All transactions were in cash. No books or records had been maintained, allegedly because it had been a trial venture. It was argued that the venture probably started on 6 April 2010 and ceased when the appellant began working at GIFT. There was a suggestion, however, that the trade may only have lasted for one year rather than the two that the accountant had disclosed to HMRC. It is not in dispute that Mr Patel became a director of GIFT on 18 May 2011.

70. The student was paid £130 per trip to include the hire of the van. Mr Patel received £85 and Mr Florio £1,785 with the cost of the stock believed to be £1,700.

71. The minutes record that Mr Patel refused to authorise HMRC to speak to Mr Florio for corroboration and that "…in order to resolve and close the enquiry" HMRC would settle that aspect of the enquiry on the basis of one year of trading.

72. On the balance of probability, although he had accepted that there had been a failure to notify HMRC or to declare income tax, we find that Mr Patel's explanation that he had voluntarily disclosed the white van sales is simply not accurate. He did not do so for a long time and the significant variation in the two accounts does not assist him. We found that Mr Patel's evidence both in his witness statement and orally, which followed the same line as the January 2017 meeting, lacks credibility.

73. We find that on the balance of probability, the undeclared trading involved both wines and spirits, lasted for at least two years and consisted of sales to Mr Patel's contacts on the south coast. It was neither unintentional or a mere mistake as he avers. Neither was it a series

[5] The appellant had produced at E42 what is clearly a draft of that letter dated 31 March 2016. It is not on headed paper and is in a different format to the letter on headed paper date stamped as received by HMRC on 6 April 2016. The content is the same.

of "casual transactions, as and when Mr Florio would offer" him wine to sell. There was a transaction at least every fortnight. It was a deliberate non-declaration of taxable activity aggravated by a failure to allow HMRC to attempt to corroborate either of the accounts in any way. His subsequent endeavour to re-state the position did not assist him. Quite simply, it was tax evasion.

74. Crucially, as far as Officer Foss is concerned, in relation to the reasonableness of her decision, insofar as it relates to this issue, the investigating officer in the TMA enquiry (Officer Horrocks) highlighted to her the fact that Mr Patel had given very conflicting accounts which were not credible. He made it explicit that the "story" and the "figures" given to him had changed and he told her that it would not be surprising if yet another version emerged were she to make further enquiry.

75. We agree with the summary that Officer Horrocks gave to Officer Foss on 26 January 2017 to the effect that there had been:

(a) a failure to notify taxable income,

(b) a failure to keep <u>any</u> records, and

(c) a failure to record transactions for excise.

GIFT and non-declaration of excise duty on wine imported into the UK (2013)

The issue

76. GIFT imported wine from both Italy and Germany. The majority of GIFT's imports travelled under cover of Excise Movement and Control System ("EMCS") which had been introduced in 2010. It enabled Member States to monitor the movement of goods in real time. Small wine producers with an annual production of less than 1,000 hectolitres were exempt from the requirements of EMCS.

77. The Italian wine was imported using the Registered Consignee Scheme ("RCS"). RCS allows a trader to receive duty suspended goods at registered premises (in GIFT's case at their premises at Claybank Road) and account for UK excise duty on arrival in the UK. To account for the UK excise duty, the trader must, at the end of each accounting period, complete a form HM2 Excise Duty Declaration to advise HMRC of the duty due, which HMRC then arrange to take from the traders duty deferment account.

78. All goods received under RCS must be declared on the HM2 regardless of whether on EMCS or not. GIFT only declared the non-EMCS movements being the wine from the small wine producers.

79. None of the EMCS movements were declared at all and so the duty went unpaid. Following an inquiry by HMRC, on 17 October 2013, an excise assessment of £304,390 was issued to GIFT.

80. On 28 February 2014, after Mr Patel had ceased to be a director of GIFT, a penalty of £45,658.50 was issued with respect to the non-declaration. It was initially suspended subject to certain conditions being met but was re-instated following GIFT's liquidation in May 2014 with significant tax debts. Neither the assessment nor the penalty were appealed.

81. Those are the bare facts.

82. In his witness statement and his oral evidence, Mr Patel said nothing about how and when he came to join GIFT beyond his conflicting descriptions of the white van sales. What he did say is that Mr Florio submitted all the returns and controlled the documentation of all duty declarations. He argued that Mr Florio had told him that HMRC had not taken funds from the

bank accounts on a direct debit basis[6]. He could not say when that happened. He alleged that he "checked" with the bookkeeper who had said everything was "OK". Again the timing for that is not specified. He goes on to say in his witness statement that at the meeting with HMRC in March 2013:

> "We informed HMRC that they stopped taking direct debits from the company accounts, and requested for them to look into the matter".

83. He went on to argue that the settlement with HMRC, which he says was agreed on 17 July 2013, was predicated on the basis that the fault lay with HMRC because they had failed to take the direct debits and no penalty was agreed. Lastly, he stated that by the time the assessment and penalty were issued "I had already left the company."

84. As with much else with Mr Patel's testimony that is certainly not borne out by the documentary and other evidence. Bluntly, Mr Patel's assertion that he asked HMRC to investigate is in stark contrast with HMRC's records. Furthermore, although the penalty was issued on 28 February 2014 after Mr Patel left GIFT, the assessment was issued more than two months before he left.

85. HMRC's report of the visit on 12 March 2013 is detailed, as are the reports of the subsequent visits, and we accept those as being accurate for the reasons we set out below.

86. The key points about that first visit are that Mr Florio was not present at the beginning of the visit and Mr Patel gave a detailed description of the business structure and operating methods and that was confirmed by Mr Florio when he subsequently arrived. Clearly, Mr Patel understood the business model and was an active director. Indeed he told the Tribunal that he ran the business and that the banking arrangements were amongst his responsibilities. He said that Mr Florio was solely responsible for ensuring that the correct excise returns were made to HMRC. In the course of that first visit HMRC had asked about the bank accounts and made a note as to how they operated.

87. HMRC's records show that during the initial visit on 12 March 2013 "… the trader was asked to outline how duty is brought to account." There is then a record of Mr Florio's explanation in relation to completing the HM2 returns with details of the paper movement documents received and his understanding that "the system" calculated and took the duty on the movements using EMCS. HMRC record that on returning to that issue later in the visit, the same explanation that the system took the duty was received. They asked for copies of the deferment account statements which they took away to check.

88. HMRC then go on to record that:

> "Following the initial visit a series of checks on the deferment account information provided by the trader compared with prints obtained prior to the event were undertaken … no duty declaration matched goods received via EMCS could be found. A letter and supporting schedule was issued to the trader requesting an explanation of where and how the duty due on EMCS movements had been paid. This was followed up with a number of phone calls to the trader and his bookkeeper. The trader was unable to provide an explanation and in order to move the case forward we arranged a further visit".

That is entirely inconsistent with Mr Patel's assertions.

[6] Paragraph 14 of his witness statement

89. That further visit was conducted on 18 June 2013 and Mr Patel does not refer to it in his witness statement. At that visit HMRC handed over factsheets covering both The Human Rights Act and penalties. Again that is wholly inconsistent with Mr Patel's account of events.

90. Patently, HMRC had discovered the non-disclosure and the failure to account for duty.

91. It would appear that only Mr Florio was present at the meeting on 18 June 2013 and HMRC record that "The trader was asked and confirmed he had understood the letter and schedule. He also acknowledged the error." He produced a schedule of his calculation of the omitted duty but it did not accord with HMRC's records so the officers took it away to check.

92. HMRC then compared Mr Florio's schedule with their own and the EMCS entries for the period. Unsurprisingly, a full check showed that their schedule was correct. They then produced a further schedule showing, line by line, the duty calculation for each of the EMCS entries and sent that to GIFT on 3 July 2013, together with a summary of the total amount due. A further visit was arranged for 17 July 2013.

93. The meeting on 17 July 2013 was with both directors and it is recorded that:

> "The trader again acknowledged the error … He stated that he sought assurance from his bookkeeper that the company was paying duty on all its transactions... Mr Florio confirmed he was aware of the change to EMCS and electronic-Ads, but believed the 'system' calculated the duty due. However he could offer no explanation as to why he had not checked earlier and had accepted his bookkeeper's assurances beyond the fact that he was still paying approximately the same duty as was paid prior to the switch to EMCS. When questioned further the level of duty payment remained broadly static initially due largely to an overall increase in the volume of goods being declared … and … the companies (*sic*) change in customer base".

94. Clearly, Mr Patel is wrong in saying that agreement was reached at the meeting of 17 July 2013.

95. It was only on 29 July 2013 that Mr Florio emailed HMRC agreeing that their figure for omitted duty was correct and, as noted above, that resulted in the excise assessment of £304,390.

96. As Officer Foss made clear in her witness statement this definitely was not a case where HMRC failed to collect duty (as alleged by Mr Patel and Rainer Hughes) as HMRC did collect all of the duty that was declared by GIFT. HMRC was not aware that the majority of the duty payable by GIFT had not been declared. Mr Patel was a director for all but two months of the period of assessment. Officer Foss is also correct in saying that it is the responsibility of all directors to ensure that there is compliance with obligations, such as payment of tax and duties, by the company.

97. In advance of a meeting on 22 October 2013, with GIFT's consent, when considering the level of penalty, HMRC contacted the now former bookkeeper to check the position with him. The problem was that he had simply reconciled the deferment account statements received from HMRC to the business bank account. He had not seen the HM2s submitted by Mr Florio and he had had no access to EMCS.

98. HMRC decided that GIFT's behaviour was careless not least because in 2012, not having submitted an EMCS return for 09/12, HMRC had written pointing out that even nil returns were required. HMRC decided that the disclosure was prompted.

99. When this was put to Mr Patel, his argument was to say "I say I prompted it but it was not recorded". He was unable to state what direct debits were not taken. He said that he had raised the question of direct debits with Mr Florio who had told him that everything was

"properly done". (Of course that is in contrast with his witness statement – see paragraph 82 above). He also said that he had asked the bookkeeper and the bookkeeper had said that everything was in order. It was put to him that he had said that GIFT ran on a margin of 10 to 15% and there should have been alarm bells ringing where there was a failure to pay duty of in excess of £300,000. He denied that on the basis that the turnover had gone up and there had been more debtors. His final argument was that with hindsight he should have checked more closely but he had simply trusted that Mr Florio had all matters in hand.

100. If Mr Patel had indeed pointed out to HMRC that no payments for duty had been made by direct debit, we would have expected that HMRC would not only have noted that, but they would have changed the profile of their enquiry. They knew that that was not how the system worked.

101. The banking was entirely his responsibility and he had disclosed details of the banking arrangements in GIFT to the officers. We do not find it credible that they would not have recorded the fact that he had argued that it came down to a question of direct debits. In a similar vein, if Mr Patel had raised the matter with the bookkeeper it would be expected that that would have been raised in HMRC's discussions with the bookkeeper. Lastly in this regard, it is not credible that Mr Florio would have conceded that it was an error and not raised the question of the direct debits, particularly, if Mr Patel is correct in saying in his witness statement that Mr Florio had told him that the direct debits had not been implemented by HMRC.

102. It is not material but it is relevant in the context of an assessment of Mr Patel's credibility to look at Mr Patel's accounts of his departure from GIFT.

103. Mr Patel was apparently a director of GIFT from 18 May 2011 until 31 January 2014. He owned 50% of the company.

104. He has given differing accounts of his reasons for leaving GIFT. At the visit from HMRC on 6 August 2014, Mr Patel told Officer Fisher that he had been asked to leave GIFT by Mr Florio, his co-director, and he was given no reason for this. He had been paid £25,000 for his 50% shareholding.

105. At the meeting on 8 May 2015, he told Officer Clifford that he and Mr Florio had decided to split GIFT into two businesses and there had been an informal "gentleman's agreement" to split the geographical area in two.

106. The approved TMA minutes, record at 8.1 that he left GIFT "…on 31 December 2013 after a fall out with Alex Florio" and at 11.1 that Companies House had it recorded that he left on 31 January 2014 but that he "…had actually left on 31 December 2013 following a disagreement with Alex Florio".

107. HMRC's records for GIFT state that Mr Florio confirmed that Mr Patel's directorship had terminated by mutual consent.

108. Certainly, Mr Patel incorporated the appellant on 2 January 2014 and then used premises leased by GIFT. We find that Mr Florio and Mr Patel did not part company as a result of a disagreement. That would not be consistent with the fact that the appellant took over the lease of its premises from GIFT and bought stock from GIFT prior to the liquidation.

109. We do not find Mr Patel's evidence to be credible and we do not accept that he told HMRC anything about direct debits. Furthermore, at the very least, he should have been aware either that a large sum of duty had not been paid or that only a tiny amount of duty, comparatively speaking had been paid. As a director, and as the director responsible for monitoring the finances and bank accounts it was incumbent on him to ensure that the appropriate financial controls were in place. They were not.

110. On the balance of probability we find HMRC's detailed account to be accurate.

The 2014 seizure

111. On 6 August 2014, some eight months after incorporation, HMRC officers made an unannounced visit to the appellant. Mr Patel was asked if he knew of any business irregularities that he wished to disclose and he replied saying "no". However, during the meeting Mr Patel told the officers that he had purchased some stock from the liquidator of GIFT and it included wine and spirits. The goods were held at Ferryspeed's duty suspended warehouse.

112. The officers asked Mr Patel if he had any excise approvals or whether it was his intention to apply for any, and he said "no" in regard to both. In that context, the officers noted that Mr Patel was aware of the requirement to be approved by HMRC if holding goods in duty suspense.

113. At that meeting he was asked about the quantity of spirits he held at Ferryspeed and he said "30 cases of Limoncello". He did not check his records at that time. The officers left briefly to call their office and arrange for the goods to be seized.

114. When they returned Mr Patel stated that he had recollected that he also had some beer at Ferryspeed and suggested that there were 216 cases of 24 x 330 ml. He was advised by the officers that that was also liable to forfeiture as it was not approved to be held in duty suspense. He stated that he had paid the duty on the beer that morning direct to HMRC by credit transfer and the van had been sent to collect the beer from Ferryspeed.

115. The HMRC officers attended Ferryspeed's warehouse with a view to seizing and removing the stock and on doing so they found that in fact there were 273 cases of spirits including 104 cases, rather than 30, of Limoncello. There were 74 cases of Liquore Limoni, 20 cases of brandy and 75 cases of Grappa. The beer had already been removed.

116. On 3 September 2014, in regard to the 273 cases of spirits seized, an assessment of £10,169 was issued to the appellant together with a penalty of £4,119.85. The penalty also related to the beer which was not included in the assessment as Mr Patel had removed it that morning. The penalty was assessed on the basis of deliberate behaviour. The disclosure was viewed as prompted and a reduction was given to the 35% minimum. Neither was appealed.

117. In his witness statement Mr Patel stated that it had been an "unintentional mistake" on his part because he had not realised at the time that he bought a mixed batch of wine and spirits from the liquidator of GIFT, that he needed a licence. In his oral evidence he argued that he had known nothing about WOWGR because Mr Florio had always dealt with that aspect of the business in GIFT. He primarily dealt in wine and that was not covered by WOWGR and he had simply had not known that he needed that for spirits and beers.

118. We do not accept that. Quite apart from the fact that the officers had recorded that he conceded that he knew about WOWGR, at a minimum anyone trading in wholesale alcohol would know that anything other than wine held in bond requires WOWGR.

119. The agreement that the appellant had signed with the liquidator, relating to the purchase of this stock, had been produced in the Bundle. Pertinently, there are a number of references to duty, namely:

(a) Clause 3.2 provides that in addition to the purchase price the appellant would be liable for "…for the avoidance of doubt, any payment due in respect of Duty on the stock."

(b) Clause 5.2 states that on completion the goods would be delivered to the appellant at the warehouse (Ferryspeed which is where it was already situated in GIFT's account).

(c) Clause 7 that "without prejudice … the buyer shall satisfy and discharge all Duty relating to the Stock …".

120. We do not accept Mr Patel's argument in his witness statement that he had provided HMRC with "rough" quantities of the goods. That is not a credible explanation. There is a vast difference between 30 cases of spirits and 273 cases let alone the fact that he had not volunteered the information about the 216 cases of beer when first questioned. He can scarcely have forgotten about that given that he had paid the duty on it that morning and arranged for it to be uplifted.

121. Mr Patel had been very active in GIFT. He knew or should have known about WOWGR, he knew that he was purchasing a not insignificant amount of spirits and beer and he knew that he was responsible for the duty on that. At the very least he should have taken appropriate steps to ascertain what was required of him. It does not suffice to argue, as he did, that Mr Florio had always dealt with such matters and effectively he was an innocent abroad. We do not accept that it was an unintentional mistake. The penalty imposed by HMRC was on the basis of deliberate behaviour and was not appealed. Had it simply been a mistake one would have expected there to have been an appeal.

Due Diligence

SSTL and Meadowhall

Background

122. On 6 March 2014, Officer Clifford visited the appellant and had a discussion with Mr Patel about alcohol fraud. The visit report records that she:

> "… talked about alcohol fraud, and the need to undertake robust due diligence. She explained that alcohol was considered a high risk to the revenue, due to the volume of smuggled stock finding its way in to alcohol supply chains. PP said that he had known his suppliers for 15-20 years through GIFT. He had built up a good network over the years. PP said he knew about due diligence 'packs'. JC said that due diligence should be meaningful, and not just a box ticking exercise. She explained that PP should consider whether his suppliers would be in a position to pay their VAT to HMRC, and he should be satisfied that the stock he was buying was correctly duty paid and not illicitly purchased."

SSTL

123. On 8 May 2015, HMRC wrote to the appellant stating:

> "I am writing to advise you that as a result of our enquiries in respect of your transactions involving supplies of alcohol related products we now know that 6 transactions commenced with the defaulting trader, **resulting in a loss to the public revenue that exceeds £19,518**.
>
> You should satisfy yourself that you have undertaken sufficient due diligence commensurate with the procedures to satisfy yourself as to the integrity of your suppliers and customers, and of the underlying supply chain. It is your responsibility to determine which checks to carry out and whether to undertake transactions in light of the results of those checks".

124. Those transactions were with SSTL in the period 3 December 2014 to 15 December 2014 and were itemised in the letter.

125. Following the issue of that tax loss letter, on 26 May 2015, Officer Clifford made an unannounced visit to the appellant. She explained that she had been asked to visit to find out to whom the appellant had sold the goods purchased from SSTL.

126. Officer Clifford again talked about alcohol fraud generally and the need to undertake robust due diligence. Mr Patel initially said that he had done his own due diligence and they seemed a "proper company". He had been recommended to use them by Manoj Patel of Best Buy Supplies. He had contacted SSTL by telephone and he dealt with someone called Stanley.

127. He then said that due diligence had been done by a company called "Due Diligence Something". He was asked to send the due diligence pack to HMRC together with copies of all invoices from SSTL. That was not received.

128. He was asked about due diligence for his other named suppliers. Mr Patel's response was that he knew all of his suppliers and so he had not done due diligence because he had known them for a long time. Officer Clifford reinforced the need for proper due diligence.

129. The due diligence that he later produced to the Tribunal for SSTL consisted of

(a) a copy of an amended VAT registration certificate dated 14 October 2014 with the trade classification " 56290 other food service activities",
(b) a copy Certificate of Incorporation dated 2011,
(c) a one page copy of a passport for a Che Wai Leung issued on 24 October 2014, which had a handwritten note saying that he was known as Billy Leung, and
(d) a copy of an account statement from Regus dated 24 April 2015 for the rental of a serviced office space in Watford.

130. HMRC correctly argue that that due diligence is wholly inadequate and shows little more than that SSTL existed as a company. There are a number of problems, namely:-

(a) The passport makes no link to the person called Stanley. When he was asked about that in cross-examination Mr Patel merely said that the passport was for the man he knew as Stanley. That simply does not accord with the handwritten note stating that the man was known as Billy.

(b) There is no explanation as to why the VAT certificate refers to food service activities when SSTL were trading in alcohol. That should have alerted him to inconsistencies and potential fraud.

(c) There is no explanation as to why a wholesaler in alcohol would be trading from a serviced office.

131. Mr Patel could not explain when he had obtained the due diligence. He had told the officers that he had not traded with SSTL after December 2014 and indeed that is what he says in his witness statement. By contrast in response to a question about his reaction to the tax loss letter, he told the Tribunal that when he received it in May 2015 he had "stopped trading with them straight away". Patently that is not correct and he ceased trading with SSTL in December 2014. HMRC produced an internal email dated 20 March 2017 from Officer Stock to Officer Foss stating "I can confirm there were no sales made by SS Traders to Harp after December 2014."

132. In that event clearly, since the Regus account statement is dated April 2015 that had been provided after trading had ceased and certainly did not inform a decision whether the appellant should trade with SSTL. In cross-examination, Mr Patel conceded that he had obtained it because it was "needed for HMRC". He could not remember when the other items had been obtained. He said that "at that time" he just done basic checks because he had thought that that would have sufficed, given that Officer Clifford had not told him precisely what to do.

133. We do not accept that. He has always been made aware of the need for due diligence, he has repeatedly been referred to the then current EN 2002 which makes explicit what is required of any taxpayer in his position.

134. Mr Patel has never produced due diligence from the company "Due Diligence something" to which he referred and he told the Tribunal that that had been the company used by SSTL for their due diligence.

135. On 15 October 2015 HMRC wrote to the appellant stating that they understood that the appellant had entered into arrangements that purported to be business arrangements with SSTL and that the VAT registration of SSTL had been cancelled with effect from 8 October 2015.

Meadowhall

136. A similar letter was sent to the appellant by HMRC on 17 February 2016, in relation to Meadowhall Wholesale Limited stating that that VAT registration number had been cancelled with effect from 30 January 2016.

137. The due diligence produced by the appellant in respect of Meadowhall consisted of

(a) a copy of a Certificate of Incorporation dated 29 November 2013

(b) a copy amended VAT registration certificate with trade classification "46342 wholesale alcoholic beverages"

(c) a copy of a BT telephone bill dated 9 September 2015 in the sum of £464.60 but only £15.29 of that related to calls and the bill pointed out that there was a further sum of £604.03 outstanding which was due for immediate payment.

(d) a one page copy of a passport for a Ben Taylor.

138. It is not known who Ben Taylor might be and, at a minimum, that telephone bill was worthy of further enquiry since Meadowhall was held out as a significant business. There is no evidence of any other due diligence on Meadowhall.

139. In his oral evidence Mr Patel said that after receiving the SSTL tax loss letter he had filed it since his view was that he had no other suppliers in the UK so he did not need to change anything. Of course, that was not true, as is evidenced by Meadowhall, but the appellant also had other UK suppliers, such as Bookers, as he himself said in other contexts when trying to justify his actions or lack thereof. He said in evidence that he had not changed his approach to due diligence because HMRC had not explicitly told him to do more. We find that unacceptable. HMRC had warned him more than once about due diligence and that it needed to be robust, he had EN 2002, he now had a tax loss letter but he ignored it and blames HMRC.

Both traders

140. In the representations from Rainer Hughes dated 2 March 2017, they had argued that the tax loss letters are mere warnings and that the appellant had carried out due diligence on the two suppliers. They stated in that regard that "such a warning gives notice to a trader that they **may** be buying from someone who in turn **may** be caught up in a chain of supply with questionable origin". They stated that the appellant "… has already produced to HMRC details of the due diligence done including company searches, VAT checks, attendance at sites, identification documents from the various traders including photographs as well as other independent checks."

141. In her letter of 30 March 2017 to Rainer Hughes, Officer Foss responded pointing out that it was not a question of "may" as both SSTL and Meadowhall were "direct suppliers" to the appellant, as indeed they had been.

142. Officer Foss also pointed out that she had spoken to the officers involved in previous compliance visits and there was no evidence that the type of information referred to by Rainer Hughes had been received. On that basis she stated that the appellant had not provided sufficient evidence that the due diligence carried out on those two suppliers was adequate to detect fraudulent activity.

143. For this hearing Mr Patel produced, with his witness statement, what he described as "sufficient due diligence" for both SSTL and Meadowhall and those are the items specified at paragraphs 129 and 137 above.

144. As we have indicated above, Mr Patel should have been, and be, aware of the provisions of EN 2002, as any alcohol wholesaler should.

145. EN 2006 is a lengthy document as is Section 12 which deals in detail with due diligence. However, it is appropriate to include here the more relevant parts of Section 12, namely:-

> **"EN 2006**
>
> **12.1 What HMRC means by 'due diligence'**
> Due diligence is the appropriate reasonable care a company exercises when entering into business relations or contracts with other companies, and how it responds to specific trading risks it identifies.
> …
> **12.3 Assessing risks and carrying out checks**
> …
> 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.
>
> 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're 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's too good to be true
>   - how the deal compares to the market generally

12.7 Examples of due diligence checks

Financial health

- you should undertake credit checks or other background checks on the business you intend trading with

…

Identity

- check company details provided to you against other sources (for example websites, letterheads and telephone directories)

…

- obtain copies of certificates of incorporation, VAT registration certificates and excise registration certificates where appropriate and where a trade class is quoted on these check whether or not it relates to the type of trade you're engaging in
- verify VAT and excise registration details with HMRC, including checks of the online look-up system for AWRS approved wholesalers (HMRC recommend that these checks are undertaken regularly for new trading arrangements and proportionately longer for trusted ones, unless you suspect a problem)
- obtain signed letters of introduction on headed letter paper and references from other customers or suppliers
- insist on personal contact with a senior official of the prospective supplier and where necessary, make an initial visit to their premises – you should use this opportunity to confirm the identity of the person you intend doing business with and keep a record of your meeting

  …

- obtain the prospective customer's or supplier's bank details – in the case of an import or export, check, if the supplier or recipient share the same country of residence as their bank

…

Transport

Check:

- who is responsible for the transport and if the cost of the goods is inclusive of transport – if so, does this mean that the potential logistical costs make the unit price unrealistic
- details of delivery vehicles are retained and if necessary any variations to expected transport arrangements recorded."

146. We agree entirely with Officer Foss when she states in her witness statement[7] that:

"The due diligence condition requires all excise registered businesses operating within the alcohol sector to consider the risks of excise duty evasion, as well as any commercial and other risks, when they are trading. The business is required to objectively assess the risks of alcohol duty fraud within the supply chains in which they operate. Without effective safeguards in place, there are considerable risks to all businesses along alcohol

[7] Paragraph 31

supply chains becoming involved (knowingly or not) in illicit trading or at risk of causing loss to the revenue."

147. Even a cursory glance at EN2002 makes it obvious that Mr Patel's assertion in his witness statement that he was producing "sufficient due diligence" for SSTL and Meadowhall is completely inaccurate. Quite apart from our observations on the deficiencies of even that limited due diligence, we agree with Officer Foss that more in-depth checks and further questions should have been asked, and timeously. Patently, they were not.

148. Further there are no covering documents showing how the appellant risk assessed these traders. It seems to us that that did not happen.

149. We will revert to our views in regard to due diligence once we cover not only the regulatory penalty which relates to due diligence but also Mr Patel's oral evidence on that topic.

The regulatory penalty

The first meeting

150. On 26 March 2018, Officer Nash, accompanied by another officer, visited the appellant and met with Mr Patel and enquired about due diligence and anti-fraud measures. Mr Patel stated that checks were undertaken on registrations, he did credit checks, he visited 99% of suppliers and he has an account form that he completed. He had future plans to take photographs of premises and he kept hard copies of due diligence checks undertaken. He utilised the due diligence information to check if a business is credit worthy and holds correct registrations and, of course, whether it is real. He intimated that he had a representative who made regular visits and he had two self-employed consultants. The consultants visited new customers to arrange business and as part of that, visit the premises. The appellant had contacts in the industry.

151. Mr Patel intimated that he did not check VAT registration numbers ("VRNs") and he said that he did not do so because he had known the companies for years. He did confirm that he was aware of the "look up system" and that he included VRNs on invoices.

152. The officer was provided with a copy of the due diligence file for Dacastello Vini Pregiati S.R.L. ("Dacastello").

153. Notwithstanding Mr Patel's representations as to what he said that the appellant did for due diligence, the file included only the VAT number, a copy of the director's passport and documents which were in Italian and had no translation. Mr Patel confirmed that he did not understand the documents. Later in the interview he provided the due diligence file for Cielo e Terra which was all in Italian. He confirmed that he neither spoke or read Italian.

154. He was asked what he did with the information and replied "nothing" but said in mitigation that he had met the suppliers at their premises.

155. That meeting was followed by correspondence. It transpired that the "representative" was actually an individual who worked from home and with whom Mr Patel communicated only by email, phone or in-person. He knew very little about him or what he did other than that he did not provide due diligence but acted as an agent for several wine suppliers in Europe. He introduced Mr Patel to European suppliers.

156. He confirmed that at that juncture he had verified the VAT numbers for his active customers and was going to do the same for suppliers.

The warning letter

157. On 1 August 2018, Officer Nash issued a warning letter (the "warning letter") which clearly set out the four areas of due diligence, as set out in EN 2002 at 12.2, that the appellant must meet as part of its AWRS approval namely:-

(a) Objectively assess the risks of alcohol duty fraud within the supply chains in which the appellant operated.

(b) Put in place reasonable and proportionate checks in the day-to-day trading to identify transactions that may lead to fraud or involve goods on which duty may have been evaded.

(c) Have procedures in place to take timely and effective mitigation action where a risk of fraud is identified.

(d) Document the checks the appellant needed to carry out and have appropriate management governance in place to make sure that those are and continue to be carried out as intended.

158. Officer Nash further drew the appellant's attention to the FITTED checks specified in EN 2002 (see paragraph 145 above).

159. Officer Nash identified the following factors which had led him to issue the warning letter, namely:-

(a) The appellant provided no evidence that it had assessed the risk of excise duty evasion posed by its trading partners including suppliers, customers, transporters and warehouses.

(b) The documents gathered as evidence of the checks conducted on the two suppliers reviewed during the visit on 26 March 2018 were primarily in Italian which Mr Patel had confirmed that he could neither read nor understand and no attempt had been made to obtain a translation. The only two documents that were in English related solely to basic checks on the identity of each company.

(c) Although the appellant consistently stated that it carried out credit checks and premises visits, no documentary evidence of these checks having been conducted had been identified.

(d) The appellant had failed to clarify anything about the financial health or trade of the companies with which it was involved, the provenance of the goods traded, the modes of transport and there were no details about any of the deals or the commerciality thereof.

(e) There was no evidence that the appellant had analysed or reviewed the very limited information it had obtained from its checks, let alone do so on an ongoing basis.

(f) The appellant had not provided any formal procedural policy document or any information or evidence demonstrating how it would respond when fraud was identified.

160. Officer Nash went on to point out that due diligence applies to all of a company's trading partners whether new or old and simply having known a trading partner for a period of time is not either sufficient or effective due diligence.

161. Officer Nash recommended that the appellant take copies of counter-parties registration and approval certification and that all of the pages were obtained since such documentation was normally at least two pages long with any conditions or restrictions listed on the second page.

162. Officer Nash pointed out that if the appellant purchased alcohol which was said to be UK duty paid, it should review Excise Notice 207 which relates to that.

163. In summary, Officer Nash requested that the appellant reviewed their due diligence procedures and provide an updated policy document together with evidence of checks undertaken.

Subsequent events

164. On 3 October 2018, at another meeting, Mr Patel confirmed that the updated due diligence policy had not been completed. He stressed that he did not see any risk in goods being brought into the UK because he was responsible for paying the duty. He stated that he did not record the registration numbers of delivery vehicles, nor did he check to see if the distilleries the appellant used were approved.

165. Following the meeting, Officer Nash reviewed the draft due diligence policy and provided further feedback by email and offered further assistance. He subsequently emailed Mr Patel and his adviser giving details of relevant excise notices and referring back to the Warning Letter and discussions in the previous meeting. He explained his concerns with the draft policy and gave a number of suggestions.

166. In summary, Officer Nash explained that he did not consider the appellant's business to be low risk, not least because the appellant did not check whether trading partners held relevant approvals and Mr Patel knew very little about the transport arrangements. He pointed out that the policy was expressed in very general terms, did not give specific examples of the risks present in the supply chains or provide information as to how the risks would be addressed. He was concerned that decisions were based on assumptions rather than evidence. He made explicit the need for record keeping and documentation of evidence and decision making.

167. Specifically, on 25 October 2018, Officer Nash emailed both Mr Patel and his advisor referencing EN 2002 and again stating that his main concern was the lack of checks on suppliers and transporters.

168. On 15 November 2018, Officer Nash having emailed Mr Patel pointing out that the due diligence policy should have been delivered by that date, the updated due diligence policy was submitted and Officer Nash met with Mr Patel again on 4 December 2018. At that meeting the new policy was discussed and the current checks were reviewed. Officer Nash established that the appellant had delivered goods to Worldewide Limited ("Worldewide") at an address that was not their approved address. Officer Nash asked for the due diligence file for Worldwide and that showed no evidence of any reasoning or any lookup service checks. It then transpired that there were similar problems with Celtic Wines limited ("Celtic").

169. Although the due diligence policy had allegedly been in place before 15 November 2018, little seemed to have changed. Although a translation had been obtained of Bellini Distillati S.R.L's. ("Bellini") due diligence document, no further due diligence had been completed since the Warning Letter and the Dacastello file remained in Italian. Mr Patel confirmed that he knew nothing of his suppliers transport arrangements.

170. On 4 December 2018, Officer Nash met with Mr Patel and his adviser to discuss the new due diligence policy. Officer Nash pointed out that the invoices provided by Mr Patel had shown two wholesale addresses that did not match the address on their approval.

171. On the 3 January 2019, the due diligence file for Europemarc Limited was received. That included the VAT certificate, utility bill, identification for the director, a copy of the HMRC approval letter and copies of the Certificate of Incorporation and a credit report by Credit Safe Business Solutions Limited. The VAT registration stated that there business was "sales of

foods, beverages and tobacco". There was no evidence that any of the information had been assessed in line with the new policy.

172. On 19 February 2019, Officer Nash emailed Mr Patel intimating that he wished to undertake a check on five files, namely the files for Worldewide, Celtic, Belleni, and Dacastello. The due diligence files for all but Asiana Limited were provided.

173. Mr Patel confirmed that he did not have a file for Asiana Limited and he had not dealt with them apart from one transaction in the previous year.

174. Having reviewed these due diligence packs, on 18 April 2019, Officer Nash issued a penalty in the sum of £500 for a breach by the appellant of the conditions of approval under the AWRS. The point at issue was whether the due diligence undertaken by the appellant was sufficient to meet the standard required by HMRC as stipulated in EN 2002 and whether the due diligence procedures undertaken by the appellant covering dealings with customers, suppliers or potential transport companies were sufficient to protect the appellant from trading in illicit supply chains.

175. Officer Nash issued a penalty letter dated 18 April 2019. That lengthy letter contained the following points, namely:-

(a) The documents in the diligence packs consisted of identity documents with very little evidence if any further checks relating to financial health, terms of contract, payment and credit agreements, transport, or the existence of the provenance of the goods.

(b) The appellant was still not assessing the risk of fraud within its individual alcohol supply chains.

(c) No financial checks had been undertaken for two of the four traders and in respect of the other two there were only very limited checks.

(d) By way of email dated 25 October 2018, HMRC had explained it had specific concerns with the consultant obtaining spirits from Bellini with UK duty stamps but without knowing if they held HMRC approval. The due diligence pack provided on 22 February 2019 still showed no evidence. Therefore no attention had been paid to the Warning Letter.

(e) There were still documents in the due diligence packs with no English translation.

(f) The appellant had asked for trade references for Celtic and Worldewide yet there was no evidence that they were followed up and no explanation as to why it had not been followed up.

(g) The appellant had provided a document called "Due Diligence Control Record" and that document reviewed the information obtained from the minimal checks that had been conducted. However, even that was only attached to two of the diligence packs.

(h) The information and reviews contained within those two records was not always supported by the evidence in the due diligence packs themselves. The example given was that the appellant had stated that they were satisfied with the *bona fides* of the haulier used by the counter-party but there was no evidence to support it.

(i) There was no or limited evidence about which products are supplied in what quantities, what the customer's intended markets are and whether the appellant considers there is a viable onward market in the stated country of sale.

(j) There was incomplete or missing evidence. The AWRS checks for Celtic and Worldewide did not actually evidence that these companies were approved. Full copies of approval certificates were not found within some of the due diligence packs.

(k) Negative indicators were ignored as, for example, the VAT certificate for Celtic demonstrated the business activity as "retail sale of beverages" not the wholesale of alcoholic beverages.

(l) In only two of the four due diligence packs did the appellant provide any indication that it intended to review checks and how often it was intended to do so.

176. On 17 May 2019, the appellant's representative wrote a very lengthy letter of rebuttal questioning the officer's competence and requesting an internal review of the penalty decision.

177. On 9 July 2019, the internal review upheld the penalty decision at some length. In summary, it stated that the appellant had been warned on numerous occasions about the inadequacy of its due diligence and on each occasion the clear deficiencies in the due diligence were identified. Although "some measures" were introduced after the first visit and Warning Letter and the policy was updated, the officer found that the appellant was still entering into business without proper risk assessment. There was no evidence to show that the appellant had established reasonable and proportionate checks with customers and suppliers in terms of the FITTED checks. The checks that the appellant had conducted were simply not adequate, they were simplistic. There was no evidence of checks relating to terms of contract, payment and credit agreements, transport, the existence or provenance of the goods. The credit checks were not consistent.

178. The appellant's agent responded on 30 July 2019, questioning the competence of that officer, accurately pointing out an error in one short sentence in 11 closely typed pages and stating that "Our client is responsible for paying the duty and it is because of this fact that our client considers that there can be no risk of duty evasion." The officer had inaccurately referred to Mr Patel stating at a meeting on 10 October 2018 that he was not responsible for the duty.

179. There was no meeting on that date and Mr Patel has consistently stated that he pays the duty. In all other respects the review conclusion letter tallies with the other records.

180. The penalty has not been appealed.

181. In his witness statement, Mr Patel's only response to the regulatory penalty was that: "For commercial reasons, the penalty was accepted on a without admission basis". In his oral evidence when asked why he had failed to take appropriate action following the issue of the Warning Letter, he said that "I did what I thought was right at the time." We expand further on his oral evidence under the heading "Discussion".

The Excise Assessment

182. This assessment was issued on 6 May 2015 and related to the duty on goods said to have been supplied to the appellant by Best Buys Supplies Limited ("Best Buys") on 5, 7, 8, 12, 14, 15 and 16 May 2014.

183. HMRC's argument in relation to this was that the appellant's Grounds of Appeal revolve around legal arguments as to the duty point (hence the stay behind *Perfect*) and the suggestion that HMRC failed to make proper enquiries to establish whether the duty point arose at an earlier point in time. HMRC point to the fact that the appellant is not suggesting that duty was paid on the goods but rather contends that the assessment should be raised against other persons.

184. We are not persuaded by that argument since it would be open to the appellant to seek to change the Grounds of Appeal, if so advised, in due course.

185. HMRC's other argument was that, just as with SSTL and Meadowhall, the transactions with Best Buys Supplies Limited can be traced to tax losses. That evidence is not before us and we do not accept that argument.

186. Officer Foss was aware of the assessment but did not take it into account because the assessment was subject to appeal. We do accept HMRC's argument that that approach did not represent HMRC policy but it did demonstrate that Officer Foss adopted a cautious and reasonable approach in favour of the appellant. She did in relation to this matter.

187. Furthermore, we take the view that that was a commendably cautious approach since Officer Foss was very well aware that Mr Patel had said that it was the guiding mind of Best Buys who had commended SSTL to him. In our view her approach to that was most certainly reasonable.

Discussion

188. For the reasons set out in the immediately preceding paragraphs, we do not accept HMRC's argument that the Excise Assessment is a valid factor in considering whether or not the Refusal Decision was unreasonable.

189. Both parties referred us to *Corbelli Wines v HMRC*[8] and, in particular, to paragraph 310 *et seq*. There is no dispute that the FTT must conduct its own fact finding exercise and reach a conclusion as to the reasonableness of HMRC's decision based on the facts as found by the FTT and not simply on the facts as known by, or as they appear to, the decision-maker.

190. In this case the only facts that did not exist at the date of the Refusal Decision were those relating to due diligence in the context of the regulatory penalty.

191. Mr Bedenham criticised the evidence given by Officer Foss, submitting that it was unsatisfactory, vague and defensive and argued that she had made grudging concessions from time to time. He urged the Tribunal to be wary of accepting her evidence where there was no supporting documentation or if it was inconsistent with the documentation.

192. Whilst we understand Mr Bedenham's argument that Officer Foss was evasive in her responses in cross-examination, because that was our view at the time, nevertheless, when we reviewed all of the evidence we came to a different view.

193. Mr Bedenham's starting point was his cross-examination asking Officer Foss whether or not, or to what extent, she had considered the business model of the appellant. Bluntly she failed to answer and could only say that she had looked at matters in the round, the case had come to her identified by the computer or by the high risk team as high risk and she had just proceeded on that basis.

194. In fact, when we looked at the documentation it was abundantly clear that, on receipt of the application, not only had she made extensive enquiries internally, appropriately only to the officers directly involved, she had also endeavoured to obtain as much evidence as possible from the appellant. That can be seen from paragraphs 15-30 above.

195. At the meeting with Mr Patel on 12 January 2017 (paragraph 23 above), she asked numerous questions from an *aide memoire* which had been meticulously prepared prior to the meeting. We have no doubt that she understood the business model as described by Mr Patel at that time. (As can be seen his descriptions of his business models have not always been consistent.)

196. Unfortunately, it is the case that Officer Foss' oral evidence was often confused and contradictory. There was quite a lot which she said that she could not recall. She did explain

[8] 2017 UKFTT 615 (TC)

that, of approximately 150 cases, she had only refused possibly five applications in total. On reflection our view is that she was easily flustered and we find that her responses to cross-examination were possibly as a result of nerves or inexperience in court and/or in video hearings. That was difficult to judge at the time because her face was in the shadows throughout. Nevertheless, the documentation in the Bundle showed a thorough and considered approach to her decision on the application. We find that to the extent that there were omissions, such as the failure to note the significant contradictions in the appellant's application, that was to the benefit of the appellant.

197. We refer below to the detail of her oral evidence on conditions but as with the rest of her oral evidence, we found that, where it was in conflict with the consistent written evidence we prefer the written evidence.

Officer Foss' approach to the Refusal Decision

198. Before we turn to the factual evidence relating directly to the appellant there are two aspects of the Refusal Decision which were questioned by Mr Bedenham.

199. The Refusal Decision states that "I have taken the following key points into account in reaching this decision" and Mr Bedenham relied upon Lady Justice Rose at paragraph 59 in *Smart* where she stated:

> "I agree with the comment of the Upper Tribunal in *Hare Wines UT* that the Refusal letter is inadequate and incomplete. The obligation placed on HMRC in regulation 4(4) of the Wholesaling of Controlled Liquor Regulations 2015 is to give 'the reasons' not the 'key points' for the refusal. The applicant should be able to understand the reasons for the refusal of the application from the refusal letter as a self-standing document."

200. He went on to refer to the recent decision of *Casa di Vini Ltd v HMRC*[9] ("CdiV") where the FTT stated at paragraph 170 that HMRC decision-makers should "not set out just the key points or even use such terminology when giving reasons for a decision", albeit the FTT then went on to accept the decision-maker's explanation for use of the term "key points" and found that it had no bearing on the reasonableness of the decision.

201. Officer Foss stated that she had used an HMRC template which included those words and that it was standard practice not to amend it. She was also very clear that there were no other points that she had looked at. We can see from the documentation that that is the case. We accepted that.

202. Secondly, Mr Bedenham argued that because Officer Foss had referred to a threat to the revenue rather than a serious or significant threat, being the wording in EN 2002, her decision was materially flawed. We do not agree.

203. Firstly, the problem lies with the HMRC template completed by Officer Foss which at box 1 on the left side refers to "serious threat to the revenue" whereas the right, where details are infilled relating to non-compliance, the word used at the heading is simply "threat". Of course she was relying on those details.

204. In summary, it was clear to us that, although Officer Foss considered that each of the five factors individually meant that there was a threat to the revenue, it was when she looked at all of the relevant factors together and applied the fit and proper test that she came to believe that the appellant posed a significant threat to the revenue.

[9] [2021] UKFTT 11 (TC)

205. In her witness statement at paragraph 45 she made it clear that "The basket of evidence on which I based my decision was varied … All the aspects considered have led to my decision to refuse…approval".

206. We accept that she knew and understood that denial of approval could only be on the basis that a taxpayer was not a fit and proper person because there was a significant or serious threat to the revenue.

The evidence

207. For the reasons set out above, where there was conflict between the oral evidence of Officer Foss and the documentation produced by her, we preferred, and accepted the latter.

208. As we have indicated above, and for the reasons therein set out, we did not find Mr Patel to be a truthful witness. He has repeatedly demonstrated what could, at best, be described as a cavalier approach to tax compliance. We comment further on that below.

209. Mr Bedenham accepted that the evidence of Officer Midgeley was straightforward but argued that it was of limited value as his involvement covered only the period from March 2018 to July 2019 and he had no current knowledge of the appellant. He was simply producing the documentation for Officer Nash who was on sick leave.

210. Officer Midgeley's evidence was indeed straightforward but there was one key element on which we rely and that is that he was clear that revocation of the temporary approval enjoyed by the appellant would not have been considered an appropriate remedy where there were already proceedings in that regard before the FTT. The fact that Officer Nash issued "only" a regulatory penalty does not therefore mean that HMRC did not believe at that time that the appellant still posed a serious risk to the revenue.

Our key findings in respect of the evidential factors relied upon by Officer Foss

211. As we have made explicit we find that the undeclared "white van sales" in the TMA enquiry amounted to tax evasion.

212. We were asked to find that the non-declaration of duty by GIFT was a mere error and was simply careless. We see from Officer Foss' research that the Officer who was responsible for that, in explaining it to Officer Foss on 14 March 2017, stated:

> "At the time I was very new to excise, as were 'new' penalties and evasion approach. As a result GIFT got the benefit of the doubt and I did not prove deliberate behaviour. If I picked up this case now I am certain I would be able to prove that it was deliberate. More importantly Mr Patel would have been best placed to know that the duty was not being accounted for as he dealt with the business bank account so he would have known that only what was being declared on the HM2 was being taken from the account and that HMRC was not taking anything further for the duty on the EMCS. We live and learn!
> …
>
> As explained above HMRC did not fail to collect the duty. HMRC collected all duty that was declared as being due. GIFT did not declare all of the duty due."

213. We have already made the point that Mr Patel would or should have known that the duty had not been paid because he dealt with the business banking. However, we take the view that it was indeed deliberate behaviour and that the officer was correct. Immediately prior to this Mr Florio and Mr Patel had spent two years evading tax by failing to account for, or in any way record, the white van sales. In our view, it is simply a consistent pattern of behaviour.

214. The fact that the appellant purchased stock from the liquidation of GIFT and then failed to pay the duty is unsurprising to us given that pattern of behaviour. Mr Patel certainly knew that he had to pay the duty and he did so on the beer but just several months too late.

215. The remaining factors were the lack of appropriate due diligence in SSTL and Meadowhall and, as we have indicated we agree with Officer Foss. Shortly put, it was inadequate by any standard.

The regulatory penalty

216. We agree with HMRC that the evidence adduced by Officer Midgeley in relation to Officer Nash's dealings with the appellant is relevant in considering the reasonableness of Officer Foss' decision. It is also relevant to our own fact finding.

217. Although we do not require to consider inevitability at this juncture, we find that the extensive evidence of Mr Patel's approach to due diligence in his dealings with Officer Nash, taken in conjunction with his oral evidence on that issue to the Tribunal, points to an ongoing and very significant risk to the Revenue in his past, current, and indeed any, business model. Whilst it is undeniably the case that the test of the inevitably is a very high hurdle[10] we find that it is met in this case.

218. The Warning Letter set out in clear terms what was required of the appellant but in practice little of substance changed thereafter. The new due diligence policy is still in general terms, and like the previous one produced to Officer Foss it appears to us to be a matter of form over substance. For Mr Patel it appears to be a tick box exercise. As the regulatory penalty letter makes clear the appellant has not implemented its own due diligence policy. That was the case with the previous policy.

219. We do not accept the argument that Mr Patel's oral evidence was simply frustration as his business model has changed. Given his history we find that his business model could change at any time.

220. His oft repeated view was that if he bought alcohol from abroad and he paid the duty when the alcohol came out of bond, then there would be no problem. He has repeatedly been told that that is wrong and it is.

221. He has produced neither to HMRC nor the Tribunal any evidence that he ever did any appropriate due diligence prior to undertaking a trade. During the Tribunal the appellant was very dismissive about any form of due diligence and it was clear that he did not see it as being a necessary part of his business even after numerous warnings from HMRC.

222. He was very emphatic that, in his words, it was not appropriate or reasonable for him to make or instruct checks on those transporting alcohol despite that being drawn to his attention on numerous occasions. His statement to the Tribunal that "If the goods are delivered to the customer what can go wrong?" demonstrates vividly that he continues to completely ignore the FITTED checks in EN 2002.

223. He said that he was a small cog and fraudsters were not going to say that they are fraudulent. He did not see the imperative of undertaking robust due diligence because of fraud in alcohol supply chains.

224. He said more than once that he would have no time to run the appellant if he did the level of due diligence recommended by HMRC.

225. In summary, notwithstanding the extensive efforts by Officer Nash to educate and encourage Mr Patel to do appropriate due diligence, as at the date of the regulatory penalty

[10] Paragraph 219 CdiV

there was still non-compliance with all four of the mandatory principles of due diligence set out in EN 2002.

Was the refusal decision unreasonable?

226. The starting point is Lady Justice Rose where she states at paragraph 55 of *HMRC v Smart Price Midlands Ltd*[11] ("Smart"):

> "…the task of the tribunal is to consider whether the appellant trader has established that no reasonable officer could refuse approval because of the conduct relied on by HMRC in the decision to refuse approval, having regard to (a) the extent to which HMRC continues to rely on that conduct in its statement of case to defend the appeal; (b) any exonerating conduct relied on by the trader; (c) whether any disputes of primary facts relevant to that conduct are resolved by the tribunal in favour of the party asserting that the facts are well founded; and, where the issue is raised, (d) whether any conditions or restrictions short of refusal could have adequately protected the revenue."

227. Officer Foss was of course the officer who made the decision in this case. HMRC are still relying on the five factors or matters relied upon by her and on which we comment above. For the reasons narrated above we not only find that it was not unreasonable to rely on those matters, but that it was very appropriate to do so.

228. As can be seen, we find no exonerating conduct on the part of Mr Patel as the guiding mind of the appellant. On the contrary, we find that it is his approach to tax compliance and due diligence that has exacerbated the position.

229. We do not accept Mr Patel's account of any areas where there are disputes of fact and that for the reasons set out under each section in this decision.

230. As far as conditions are concerned, we do not accept Mr Patel's assertions that he has learnt by his mistakes and he would abide by any conditions that might be imposed.

231. A good example of Officer Foss' flustered oral evidence relates to the imposition of conditions where she made what Mr Bedenham would have described as a grudging concession that in hindsight she supposed she could have imposed a condition in relation to the 2014 seizure. That is looking at that incident in isolation. Looking in isolation, and posed with the same question, in relation to GIFT firstly, she said that no condition would be appropriate because of the failure to declare duty, the failure to honour director's duties and obligations and the failures in record keeping let alone the large sums involved. When pressed she said that she did not know if a condition would be appropriate but that she had discussed it with her superior officer. She had.

232. The Notes of Discussion record that prior to issuing the "minded to" letter they looked at the evidence and actively considered conditions in the light of the available guidance and decided that there were "…no conditions appropriate to reduce the risk to an appropriate level".

233. Prior to issuing the Refusal Decision and the letter to Rainer Hughes dated 30 March 2017, she again discussed the issues and that in the context of the letter. Rainer Hughes had raised the question of reasonable conditions that might be imposed. Her reply was to the effect that:

> "I can confirm that I have considered whether there would be suitable conditions that would allow us to approve the HWS. I concluded in that case that there were no conditions I could impose which would reduce the risk to an appropriate level. I do not agree, therefore, that the guidelines have been breached."

[11] [2019] EWCA Civ 841

234. In her witness statement at paragraph 46 she repeated that statement.

235. As we have indicated at paragraph 14 above, HMRC impose conditions only where an officer does not have sufficient grounds to refuse approval. In this case we accept Officer Foss' view that she did have sufficient grounds to refuse, which, in our view, she did.

Conclusion

236. HMRC may approve a person to carry on a controlled activity only if they are satisfied that the person is a fit and proper person to carry on the activity. In deciding to refuse the appellant's application, HMRC had particular regard to the five matters described above. Each matter was plainly relevant to the issue as to whether the appellant is a fit and proper person to carry out a controlled activity and, as discussed above, each and every one raised serious questions about the appellant's fitness and propriety. Although there was not a great deal of evidence about SSTL and Meadowhall, and in her witness statement Officer Foss indicated that those were lesser factors when she came to her decision, we do not agree with the weight that she attached to that. The appellant's attitude to due diligence, as amplified by its position in the regulatory penalty and in Mr Patel's oral evidence, reinforces the view that, the appellant's approach to due diligence is a very serious risk.

237. The fact that Officer Foss conceded that, perhaps, in the Refusal Decision, she may have put some of the five matters under the wrong headings does not necessarily undermine the decision to refuse to approve the appellant under the AWRS. Each and every one of the six headings identified in paragraph 31 above correctly identifies at least one of these five matters.

238. We consider that HMRC were entitled to conclude that they were not satisfied that the appellant is a fit and proper person to carry on the activity of the wholesale of alcoholic liquor. The decision to refuse to approve the appellant under the AWRS was not so plainly wrong that no officer of HMRC, acting reasonably, could have reached it.

239. Furthermore, even if we are wrong in that, given the attitude to due diligence and the approach to tax compliance over a period of time, the high standard of inevitability that any decision on review would be the same is met.

Decision

240. For all these reasons the appellant's appeal against HMRC's decision to approve the appellant under the AWRS is dismissed.

Right to apply for permission to appeal

241. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 26 MAY 2021