Neutral Citation: [2022] UKFTT 176 (TC)

Case Number: TC08503

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

London

Appeal reference: TC/2020/03167

*EXCISE DUTY — Approval to carry on a controlled activity (Alcoholic Liquor Duties Act 1979, s 88C) — Appeal against refusal of approval — "Fit and proper person" — Alcohol Wholesaler Registration Scheme (AWRS) — Whether decision maker reasonably arrived at decision (Finance Act 1994, s 16(4))*

**Heard on:** 16 - 18 May 2022
**Judgment date:** 07 June 2022

**Before**

**TRIBUNAL JUDGE CHRISTOPHER STAKER**
**DUNCAN MCBRIDE**

**Between**

**HARE WINES LIMITED**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: David Bedenham of counsel, instructed by Rainer Hughes

For the Respondents: Joseph Millington of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

The appeal against the decision of HMRC dated 11 August 2020 to refuse the Appellant's application for approval under s 88C of the of the Alcoholic Liquor Duties Act 1979 is allowed, and the Tribunal directs that:

(1) the decision shall cease to have effect immediately; and

(2) HMRC shall conduct a review of the decision taking account of the Tribunal's findings in this decision. HMRC shall conduct the review on the basis of the facts as they exist at the time of the review, but on the basis of the law and policy in force at the time of the 11 August 2020 decision.

## REASONS

**SUMMARY**

1. The Appellant company appeals against a decision of HMRC to refuse its application under s 88C of the Alcoholic Liquor Duties Act 1979 ("ALDA") for approval to carry on the controlled activity of wholesaler of controlled liquor.

2. This is an appeal to which s 16(4) of the Finance Act 1994 applies. Such an appeal is allowed only if the Tribunal is satisfied that the decision maker could not reasonably have arrived at the decision. If the appeal is allowed, the Tribunal can direct HMRC to conduct a review of its decision. The Tribunal will not allow the appeal if satisfied that HMRC would in any event inevitably have refused the application. (See paragraphs 37-47 below.)

3. Section 88C(2) ALDA provides that HMRC may grant approval only if satisfied that the applicant is "a fit and proper person to carry on the activity". HMRC guidance on determining whether an applicant is a "fit and proper person", contained in section 6.9 of Excise Notice 2002, sets out nine main criteria.

4. In this decision the Tribunal finds as follows.

   (1) The HMRC decision erroneously proceeded on the basis that (a) all nine of the criteria in the HMRC guidance needed to be met, such that the application fell to be refused if any one of them was not satisfied, and (b) it was a binary question whether a criterion was satisfied or not. The decision maker was instead required to consider all relevant facts and circumstances together in the round. (See paragraphs 35, 52, 54(1) below).

   (2) The HMRC decision makes an erroneous finding of a material fact, to the effect that a key person involved in the Appellant's business sought to deceive HMRC. In appeals under s 16(4) of the Finance Act 1994, the Tribunal makes its own determination of primary facts, and the Tribunal finds that there was no such intention to deceive. (See paragraphs 40, 48-51, 54(2) below.)

5. The Tribunal rejects the argument that before deciding to refuse the application, the decision maker was required to consider whether HMRC's concerns could adequately be addressed by granting approval subject to conditions or restrictions (see paragraphs 53 below).

6. The Tribunal directs HMRC to conduct a review of its decision on the basis of the facts as they exist at the time of the review, but on the basis of the law and policy in force at the time of the HMRC decision under appeal (see paragraphs 68 below).

**FACTS**

7. The Appellant company, a wholesaler of alcoholic drinks, was incorporated in 2014. At all material times, its sole shareholder has been Mr Kulwant Singh Hare ("**KSH**"). KSH was also the Appellant's sole director from the time of its incorporation until January 2015, when he resigned as director. Since August 2017, his son, Mr Jasdip Singh Hare ("**JSH**") has been a director, and since November 2019 the sole director.

8. In 2016, a new Part 6A was inserted into the Alcoholic Liquor Duties Act 1979 ("**ALDA**") by s 54 of the Finance Act 2015. These new provisions require UK wholesalers of dutiable alcoholic liquor to be approved by HMRC. The administrative scheme established by HMRC to give effect to these legislative provisions is known as the Alcohol Wholesaler Registration Scheme ("**AWRS**").

9. Businesses, such as the Appellant, which were already trading prior to the introduction of these new provisions were required to apply for approval under the AWRS by 31 March 2016, and were entitled to continue trading in the meantime until HMRC took a decision on their applications. On 10 March 2016, the Appellant made an application for approval under the AWRS.

10. On 10 February 2017, the HMRC officer dealing with the application sent the Appellant a letter stating that HMRC were minded to refuse the application for reasons set out in that letter, and inviting further representations from the Appellant. On 23 February 2017, the Appellant's solicitors sent HMRC a response to that letter. On 20 March 2017, HMRC sent to the Appellant a decision refusing the application.

11. On 23 March 2017, the Appellant appealed to the First-tier Tribunal ("**FtT**") against the 20 March 2017 refusal decision (Tribunal appeal number TC/2017/02532). On 18 April 2017, the parties agreed case management directions in that appeal. On 25 April 2017, HMRC applied to vary the directions to limit the disclosure obligations for which they provided. The Appellant opposed that application which, following a hearing, was refused by the FtT. HMRC appealed against the FtT's decision to the Upper Tribunal, which in turn dismissed the HMRC appeal: *HMRC v Hare Wines* [2017] UKUT 465 (TCC). HMRC then appealed against the decision of the Upper Tribunal to the Court of Appeal, which on 16 May 2019 allowed HMRC's appeal, finding that the original disclosure direction had been too broad: *HMRC v Smart Price Midlands Ltd and Hare Wines* [2019] EWCA Civ 841 ("***Smart Price***"). Although the Court of Appeal was concerned with the issue of disclosure and not the substantive appeal against the 20 March 2017 HMRC decision, its judgment expressed the view that that HMRC decision was "inadequate and incomplete", and referred to "the opacity of the reasons given for the refusal of approval" (at [59], [71], [72]).

12. In a letter dated 19 June 2019, HMRC advised the Appellant that in the light of comments made by the Court of Appeal in its judgment, HMRC had concluded that the 20 March 2017 decision should be cancelled and the decision remade, and that the application for AWRS approval would therefore be reconsidered and a new decision issued in due course.

13. On 2 July 2019, the parties agreed a consent order that the Appellant's appeal in Tribunal appeal number TC/2017/02532 was allowed. On 30 August 2019, the Tribunal refused an application made by the Appellant for an order under rule 10(1)(b) of the Tribunal's Rules that HMRC pay the Appellant's costs in relation to that earlier appeal: *Hare Wines Ltd v Revenue & Customs* [2019] UKFTT 556 (TC).

14. During the course of the above events, the Appellant applied for injunctive relief to the High Court, which granted an order (in August 2017, varied in June 2019) requiring HMRC to maintain approval of the Appellant under the AWRS until 14 days after determination of the

Appellant's FtT appeal, and providing that the order will continue to apply even if the HMRC decision under appeal in the FtT is withdrawn by HMRC and replaced by a fresh decision. The parties agree that the effect of this High Court order is that the Appellant is approved under the AWRS pending determination of this present FtT appeal, and that the Appellant has been subject to the obligations of a person so approved since the High Court order was issued. The Appellant has accordingly lawfully continued to trade in the interim.

15. Following the withdrawal of the earlier 20 March 2017 decision, an HMRC officer with no prior involvement in the case, Mr Hamza Bone, was appointed to make the new decision on the application for AWRS approval. He visited the Appellant's premises with his manager, Officer Brendan Ricketts, on 5 September 2019 and 7 November 2019, and had other communications with the Appellant.

16. Officer Bone also had communications with, and received information from, two other HMRC officers, Mr Dariusz Idziak and Mr Grahame Hitchins. Officer Idziak was a caseworker with HMRC's Individuals and Small Business Compliance unit, who had been tasked to monitor the Appellant's day-to-day operations as part of HMRC's alcohol trader monitoring scheme. Officer Hitchins was a civil investigator in the HMRC Fraud Investigation Service ("FIS"), undertaking a civil assurance intervention. Officers Idziak and Hitchins worked in conjunction, including by conducting several visits together to the Appellant's premises. On 30 April 2020, Officer Hitchins advised the Appellant that it had been taken out of the FIS investigations.

17. On 19 February 2020, Officer Bone sent the Appellant a letter stating that he was minded to refuse the application for AWRS approval for reasons set out in that letter, and inviting further representations from the Appellant (the "**MTR letter**"). On 19 June 2020, the Appellant's solicitors sent HMRC a response to the MTR letter (the "**MTR response**").

18. On 11 August 2020, Officer Bone issued a decision refusing the application for approval under the AWRS (the "**Refusal Decision**"). On 27 August 2020, the Appellant initiated the present FtT appeal against that decision.

19. The hearing of this appeal was held on 16, 17 and 18 May 2022. No witness evidence was presented by the Appellant. The hearing bundle included witness statements of HMRC Officers Hitchins, Ricketts, Bone and Idziak. Oral evidence was given by Officers Hitchins and Bone. The Appellant did not require Officer Ricketts to be called for cross-examination and his witness statement was accepted into evidence. The Appellant did wish to cross-examine Officer Idziak, who was however unavailable due to illness. The parties agreed that the hearing should not be adjourned, that the witness statement of Officer Idziak should be accepted into evidence, but that the Tribunal when determining what weight to give to his evidence should take into account that he was unavailable for cross-examination. The Tribunal decided to proceed on that basis.

20. The Appellant submits that the appeal should be allowed, and that the Tribunal should direct (1) that the decision shall cease to have effect immediately, and (2) that HMRC shall conduct a review of the decision taking account of the Tribunal's findings in this appeal.

21. HMRC submit that the appeal should be refused.

## LEGISLATION

### AWRS approval

22. Part VIA ALDA (ss 88A to 88K) is entitled "Wholesaling of controlled liquor".

23. Section 88A(8)(a) ALDA provides that selling controlled liquor wholesale is a "controlled activity". Section 88A(2) ALDA provides that a sale of controlled liquor is a sale

of dutiable alcoholic liquor on which duty is charged at a rate greater than nil, the excise duty point for which falls at or before the time of sale.

24. Section 88C ALDA provides:

> (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.
>
> (3) The Commissioners may approve a person under this section to carry on a controlled activity for such periods and subject to such conditions or restrictions as they may think fit or as they may by or under regulations made by them prescribe.
>
> (4) The conditions or restrictions may include conditions or restrictions requiring the controlled activity to be carried on only at or from premises specified or approved by the Commissioners.
>
> (5) The Commissioners may at any time for reasonable cause revoke or vary the terms of an approval under this section. …

25. Section 88F further provides that a person may not buy controlled liquor wholesale from a UK person unless the UK person is an approved person in relation to the sale. Contraventions of ss 88C(1) and/or 88F can give rise to criminal liability on the part of the seller and/or buyer.

26. Section 88E(1)(a) ALDA enables regulations to be made regulating the approval and registration of persons under Part VIA ALDA.

27. Regulation 3 of The Wholesaling of Controlled Liquor Regulations 2015 (the "**2015 Regulations**") provides that every person required to be approved under s 88C ALDA must apply on a prescribed form, and that an application for approval must contain full information about every matter referred to in the prescribed form.

28. Regulation 4(4) of the 2015 Regulations provides that "If the Commissioners refuse an application for approval they must notify the person who made the application of that fact and give the reasons for the refusal".

29. Regulation 7 of the 2015 Regulations provides that "In addition to any conditions or restrictions that the Commissioners may think fit to impose on an approved person under section 88C(3) of the Act, the approval of a person is subject to such conditions and restrictions as the Commissioners may prescribe".

30. Regulation 8 of the 2015 Regulations provides:

> (1) An approved person must keep and make available such records relating to controlled activities as the Commissioners may prescribe.
>
> (2) An approved person required by this regulation to keep a record must do so at the time of or as soon as possible after —
>
> (a) the happening of the event that is required to be recorded; and
>
> (b) in any other case, the moment when the information that is required to be recorded is first known to the approved person.
>
> (3) Any record that is required to be kept by this regulation must be preserved for a period of six years, or such lesser period as the

Commissioners may allow, starting on the day that the obligation to keep the record arises.

31. HMRC have published guidance on the AWRS scheme, in the form of Excise Notice 2002 ("**EN2002**"). Quotes and references below to this guidance are to the version in force at the time of the decision under appeal.

32. Section 6.9 EN2002 provides:

> 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 do not pose any significant threat in terms of potential revenue noncompliance 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 non-compliance, or fraud, either within excise or other regimes, some examples of evidence HMRC would consider are:
>   - o assessments for duty unpaid stock or for other underdeclarations of tax that suggest there's a significant risk that the business would be prepared to trade in duty unpaid alcohol
>   - o seizures of duty unpaid products
>   - o penalties for wrongdoing or other civil penalties which suggest a business do not have a responsible outlook on its tax obligations
>   - o trading with unapproved persons
>   - o previous occasions where approvals have been revoked or refused for this or other regimes (including liquor licensing, and so on)
>   - o previous confiscation orders and recovery proceedings under the Proceeds of Crime Act
>   - o 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 have not been persistent or negligent failures to comply with any HMRC recordkeeping 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 will not 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

This list is not 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 is 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.

The nine main dot points in the passage quoted above are referred to below for convenience as the nine "**fit and proper criteria**". A reference below to the "**first [etc] fit and proper criterion**" is a reference to the first [etc] main dot point in the passage quoted above.

### Appeals to the FtT

33. The Finance Act 1994 ("**FA94**"), ss 13A(2)(j) and 16(1B) and Schedule 5 paragraph 3(1)(p) provide that an unsuccessful applicant for approval under s 88C ALDA may appeal to the FtT against the HMRC decision to refuse the application. Section 16(8) FA94 provides that such an HMRC decision is an "ancillary matter". Section 16(4) FA94 provides:

> (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.

**APPLICATION OF LAW**

### AWRS approval

34. The "fit and proper person" test in s 88C(2) ALDA is concerned not only with potential wrongdoing on the part of the applicant. It also requires that the applicant be a person who is aware of risks elsewhere in the supply chain, and who has the appropriate attitude, processes and procedures for avoiding becoming involved in supply chains where *others* are involved in

wrongdoing (*Continental Cash & Carry Limited v Revenue & Customs* [2022] UKFTT 49 (TC) ("***Continental***") at [15]-[19]).

35. In determining an application for approval under the AWRS (that is, for approval under s 88C ALDA), the HMRC decision maker must consider all of the relevant facts and circumstances together in the round. It would be wrong in law and unreasonable for the decision maker to proceed on the basis (1) that all nine of the fit and proper criteria in section 6.9 EN2002 need to be met, such that the application necessarily falls to be refused if any one of them is not satisfied, and (2) that it is a binary question whether a given criterion is satisfied or not. (See paragraph 52 below.)

36. A decision maker is not required, before concluding that an applicant is not a fit and proper person, to consider whether HMRC's concerns could adequately be addressed by granting approval subject to conditions or restrictions (see paragraph 53 below).

**Appeals to the FtT**

37. In an appeal to which s 16(4) FA94 applies, the burden is on the Appellant to establish that the decision maker could not reasonably have arrived at the decision (s 16(6) FA94, *Continental* at [40]).

38. This limitation on the Tribunal's powers of intervention in a s 16(4) FA94 appeal "reflects the fact that the management of the excise system is a matter for the administrative discretion of HMRC", who are "peculiarly well-fitted to judge" questions such as whether a person is fit and proper to carry out activities requiring authorisation under customs and excise legislation (*CC&C Ltd v Revenue & Customs* [2014] EWCA Civ 1653 at [15], [48], [51]).

39. For purposes of s 16(4) FA94, a decision will be one that the decision maker could not reasonably have arrived at if (1) the decision maker took into account irrelevant considerations, (2) the decision maker failed to take into account relevant considerations, (3) the decision maker made an error in relation to a point of law, and/or (4) the decision was otherwise one which no reasonable officer of HMRC could have reached in the circumstances (*Continental* at [41]).

40. In appeals of this kind, the Tribunal determines for itself on the basis of the evidence before it the primary facts relevant to the decision, to the extent that these are in dispute between the parties (*Continental* at [44], [47]; *Casa Di Vini* v *Revenue & Customs* [2021] UKFTT 11 (TC) at [55]-[57]). If the Tribunal makes findings of material primary facts that are in contradiction to the facts found or assumed in the HMRC decision under appeal, and on which the HMRC decision is wholly or partly based, then the decision maker will have failed to take into account relevant considerations (the correct facts as found by the Tribunal), and the decision will likely be one which no reasonable officer of HMRC could have reached in the circumstances. If the Tribunal makes findings of material primary facts that the decision under appeal did not consider at all, the decision maker will have failed to take into account relevant considerations.

41. It is unnecessary in this appeal to determine whether the Tribunal's fact-finding jurisdiction in a s 16(4) FA94 appeal is limited to facts that were or should have been known to HMRC at the time of decision, or to facts that existed at the time of decision (compare *Continental* at [48]-[91]).

42. While the Tribunal can itself determine primary facts, judgments or conclusions based on those primary facts are a matter for the HMRC decision maker. Thus, for instance, the Tribunal can determine as primary facts the details of the due diligence procedures that were implemented by the applicant. However, the question whether those due diligence procedures were satisfactory to protect the applicant from trading in illicit supply chains is a matter of

judgment for the HMRC decision maker; pursuant to s 16(4) FA94, the Tribunal can only determine whether that judgment was able to be reasonably arrived at.

43. Such a judgment on the part of HMRC must be reasonable by reference to the reasoning in the HMRC decision itself and the evidence on which that reasoning is based. It is insufficient that the decision could reasonably be justified by considerations or evidence not expressly or impliedly relied on in the decision.

44. The HMRC decision may express reasons by incorporating by reference the reasons given in another HMRC document (compare *Smart Price* at [59], [71] and [72], stating that "The Refusal letter does not expressly incorporate everything in the HMRC Response letter", thereby suggesting that this would have been possible).

45. However, additional reasons justifying the HMRC decision cannot be added, for instance, in witness evidence or in submissions in a Tribunal appeal.

46. Even if the Tribunal finds that a decision was one that the decision maker could not reasonably have arrived at, the Tribunal will dismiss the appeal if it finds that the decision maker would in any event inevitably have decided to refuse the application on a proper consideration of it. "Inevitability" in this context means something higher than balance of probability: an appeal cannot be dismissed merely because the Tribunal thinks it "more likely than not" that the same conclusion would have been reached on a proper consideration of the matter. (*John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 at 953; *Continental* at [92]-[98].) The Tribunal must be satisfied that the decision maker would not realistically have reached any other conclusion.

47. Where the Tribunal requires HMRC to conduct a review of the decision under appeal, HMRC can, subject to anything in the Tribunal decision that HMRC is directed to take account of, reconsider anything decided in the original HMRC decision, and can consider anything relevant that was not considered in the original HMRC decision.

**FINDING OF DISPUTED FACT**

## The Appellant's director did not engage in deception

48. The Appellant's director, JSH, did not deliberately seek to understate the role of KSH in the Appellant's business, with intent to deceive HMRC.

49. JSH did not deliberately seek to understate the role of KSH in the Appellant's business.

(1) On the occasion of the 5 September 2019 visit, JSH said (according to the visit notes ("**VN**") of HMRC Officers Bone and Ricketts):

(a) KSH was the 100% shareholder of the Appellant company, KSH was "in most days", "JS[H] looks to him [KSH] for advice", "All the customers and suppliers know [KSH]", KSH "still takes a wage of £2,000 a month", the company was originally set up with a £200,000 loan from KSH, and while KSH did not take a dividend, the loan was still being paid back (VN Ricketts).

(b) The Appellant's business was "all [KSH] has" (VN Bone).

(c) KSH had "no specific role" and there was "No structure to his role", which was "very social" (VN Ricketts).

(d) KSH "spends a lot of time in India, due to spend 3 months there soon" (VN Ricketts). KSH's input was "less and less due to health" (VN Bone).

(2) The Tribunal considers that the picture portrayed by this evidence is that, in September 2019, KSH still actively involved himself in the business, but that he had no specific or structured role or responsibilities. The statement by JSH that

KSH had no "specific" or "structured" role implies that he did indeed nonetheless have a role. The Tribunal sees nothing implausible in this evidence. It would presumably not be an uncommon situation, where day to day responsibility for the running of a family business is taken over by the founder's child with the founder remaining sole shareholder, for the founder to continue to feel entitled to be actively involved in the business whenever they wish and without any particular responsibilities, and for the founder's child to accept this.

(3) The evidence and picture referred to in (1) and (2) above are consistent with, and not contradicted by, the other evidence relied on by HMRC that on various occasions KSH was at the Appellant's premises on the phone, looking through alcohol leaflets and making notes, and that KSH on occasion placed orders with suppliers, or received due diligence documents.

(4) Nor is the evidence and picture referred to in (1) and (2) above contradicted by the evidence relied on by HMRC of visits undertaken on 21 October 2016 and 12 December 2016. At these visits it was confirmed that KSH was the 100% shareholder of the Appellant, that KSH was the signatory on the Appellant's bank account, and that the Appellant company had a directors' loan from KSH. At the second of these visits, KSH himself said that he was no longer a director, that he was "only at the premises 3 or 4 days and sometimes takes a month off", and that he sat in the little office where he would talk to the customers. It is not clear from that evidence whether KSH said that he was in the office 3 or 4 days a week, or 3 or 4 days a month. In any event, on that occasion he was talking about the situation as it pertained in December 2016, not in September 2019.

(5) The Tribunal is not satisfied that any evidence it has been referred to establishes that KSH in fact played any greater role in the Appellant's business in September 2019 than that set out in (1) and (2) above.

(6) The Tribunal is not satisfied that any evidence it has been referred to establishes that JSH or any other key person involved in the Appellant's business actively sought to persuade HMRC that KSH only ever came to the Appellant's premises for social reasons and that he had no role in the business itself, or that his role was otherwise significantly less than that depicted in (1) and (2) above.

(7) At the 5 September 2019 meeting, JSH said that KSH received a salary of £2,000 from the Appellant. HMRC contend that their PAYE records show that in fact KSH received from the Appellant payments of £4,333.33 per month (£3,224.85 after statutory deductions). The Tribunal is not satisfied that this establishes that KSH had a more active role in the Appellant's business at the time than that referred to in (1) and (2) above.

50. If JSH did not deliberately seek to understate the role of KSH in the Appellant's business, there can be no question of him having sought to do so with intent to deceive HMRC.

51. In any event, there is no evidence of an intention to deceive HMRC.

(1) The witness statement of Officer Bone acknowledges that it is "unclear" why JSH would have deliberately given an incorrect figure for the amounts paid by the Appellant to KSH (see paragraph 49(7) above). From those brief visit notes, it is unclear exactly what words were spoken by JSH at that visit, or what words from the HMRC officers preceded his statement, and impossible to conclude that incorrect information was deliberately given with intent to deceive.

(2) HMRC have made it clear in this appeal that they would have had no problem with KSH holding a position of responsibility within the Appellant company, and that HMRC do not rely on any aspect of KSH's conduct or character as a reason for refusing the Appellant's AWRS application. HMRC state that their only concern is that the Appellant's key personnel were not forthcoming about the role of KSH in the business, and that they consider that such reticence speaks directly to the Appellant's honesty and truthfulness in its dealings with HMRC.

(3) Given that HMRC would have had no problem with KSH holding a position of responsibility within the company, the Appellant had nothing to gain by deliberately downplaying the role of KSH, and much to lose if caught out deliberately giving false information to HMRC. It is therefore difficult to see any motive for the Appellant deliberately giving false information to HMRC about KSH's role.

(4) The only possible motive identified is that the Appellant may have been under the incorrect impression that HMRC would have had a problem with KSH holding a position of responsibility. As evidence of this theory, HMRC refer to the MTR response, in which the Appellant's solicitors suggest that "HMRC's ill-judged prejudices against [KSH] … are still feeding into the decision making processes of HMRC".

(5) The Tribunal does not accept that the evidence establishes that the Appellant had such a motive, much less that the Appellant deliberately sought to deceive HMRC as a result of that motive. If the Appellant genuinely believed that HMRC would have had a problem with KSH being involved in the business, it is likely that the Appellant would have sought to conceal KSH's role to a greater extent than HMRC allege that they did. From what HMRC could see (see paragraph 49(3) above), it must have been evident that KSH had an ongoing role in the business, and there is no evidence that the Appellant sought to conceal any of this. Also, apart from anything else, as the 100% shareholder, HMRC considered KSH to be a "key person" in the business for purposes of EN2002. HMRC were always aware that KSH was the sole shareholder, and thus aware that he was a key person in the business.

**FINDINGS OF DISPUTED POINTS OF LAW**

## Consideration must be given to all circumstances in the round

52. It would be wrong in law and unreasonable for the decision maker to proceed on the basis (1) that all nine of the fit and proper criteria in section 6.9 EN2002 need to be met, such that the application necessarily falls to be refused if any one of them is not satisfied, and (2) that it is a binary question whether a given criterion is satisfied or not.

(1) The decision maker always remains subject to an overarching statutory obligation under s 88C(2) ALDA read with s 16(4) FA94 to act reasonably when determining whether the applicant is a "fit and proper person".

(2) It would be unreasonable to refuse an application for the sole reason that one of the criteria in section 6.9 EN2002 is not met, without any regard to the specific circumstances of the individual case.

(3) This would especially be so if the decision maker proceeded on the basis that it is a binary question whether a given criterion is satisfied or not. For instance, suppose that an applicant abundantly meets all fit and proper criteria apart from the fact that it has had one very small outstanding unmanaged debt with HMRC for a very short

period, due to an administrative oversight. It would be unreasonable to proceed on the basis that the application must necessarily be rejected out of hand, without further consideration of the circumstances of the case, on the sole ground that the eighth fit and proper criterion is not met.

(4) As section 6.9 EN2002 makes clear, the nine fit and proper criteria are not an exhaustive list of matters to be considered by the decision maker, and an application may be refused for other reasons even though all nine criteria are met. In the same way, it is possible for an application to be *allowed* notwithstanding that one or more of the fit and proper criteria are *not* met.

(5) That does not mean that an application can never be refused where the applicant meets all fit and proper criteria except one. However, such a refusal, like any refusal, would need to result from a consideration of all relevant circumstances of the individual case in the round.

**Consideration need not be given to the possible attachment of conditions to an approval**

53. A decision maker is not required, before concluding that an applicant is not a fit and proper person, to consider whether HMRC concerns could be allayed through the imposition of conditions under s 88C(3) ALDA and/or reg 7 of the 2015 Regulations.

(1) The imposition of conditions under s 88C(3) and/or reg 7 of the 2015 Regulations presupposes that the applicant has already been found to be a fit and proper person.

(2) Whether an applicant is a fit and proper person is a question that relates to characteristics personal to that applicant, such as their honesty, diligence, competence, and financial viability, as well as their attitude (paragraph 34 above). The imposition of conditions of approval will not bring about these characteristics in an applicant that otherwise lacks them. Rather, conditions under s 88C(3) and/or reg 7 of the 2015 Regulations will be aimed at mitigating risks that will exist notwithstanding that the applicant is a fit and proper person.

(3) This conclusion, which is not dependent on EN2002, is nonetheless correctly reflected in EN2002, which states at section 10.1 that "If HMRC considers a wholesaler is not fit and proper to be approved, they will refuse or revoke approval rather than allow that wholesaler to trade subject to added conditions", and that "HMRC may decide to apply specific conditions or restrictions in particular cases where they consider that a wholesaler is fit and proper to be approved but some additional controls are still needed". This is also implicit from a reading of ss 88C(2) and 88C(3) ALDA together.

**REASONS FOR DECISION**

**The Refusal Decision could not reasonably have been arrived at**

54. The Refusal Decision was a decision that could not reasonably have been arrived at, due to the following errors.

(1) The Refusal Decision erroneously proceeded on the basis (1) that all nine of the fit and proper criteria in section 6.9 EN2002 needed to be met, such that the application necessarily fell to be refused if any one of them was not satisfied, and (2) that it was a binary question whether a given criterion was satisfied or not (see paragraph 52 above).

(a) In his witness statement, Officer Bone said that the Refusal Decision was "based on a comprehensive assessment of the entire AWRS application", and that "it did not come down to one specific issue". The Refusal Decision

contains a passage stating that "In reaching my decision, I have considered the collective, and individual weight of the matters raised in my [MTR letter] and your responses to them".

(b) Nevertheless, at the hearing, Officer Bone acknowledged that in making the Refusal Decision, he proceeded on the basis that an applicant for approval under the AWRS had to meet all nine fit and proper criteria.

(c) Furthermore, it is apparent from the wording of the Refusal Decision itself that it considered each of the nine fit and proper criteria in turn, and made a binary decision in relation to each as to whether it was satisfied or not. It then ultimately concluded that the Appellant had "met 3 out of the 9 fit and proper criteria".

(2) The Refusal Decision was based in part on a finding of a material fact that was erroneous (paragraphs 39-40 above), namely a finding that JSH had, with intent to deceive HMRC, deliberately understated the role of KSH in the business. The Tribunal has made its own finding of fact to the contrary (paragraphs 48-51 above). Such a finding of fact would have weighed heavily in the consideration of any reasonable decision maker, and a decision based in part on an erroneous fact of such significance cannot be reasonable.

**But for the errors, the decision would not inevitably have been the same**

55. The Tribunal is not satisfied that, but for these errors identified in paragraphs 54 above, the Refusal Decision would inevitably have been the same (see paragraph 46 above).

56. Of the nine fit and proper criteria, the Refusal Decision had no concerns in relation three, and but for the erroneous finding of fact referred to in paragraphs 48-51 above, would have had no concerns in relation to a fourth.

57. In deciding to refuse the application, the decision maker also took into account the four primary facts in paragraphs 58-61 below (which were not in dispute in the appeal). However, in light of the considerations set out in the sub-paragraphs to those paragraphs below, it is unclear from the Refusal Decision what weight the decision maker would have given to these primary facts if all circumstances had been considered together in the round.

58. The Appellant failed to pay corporation tax on time for the accounting periods ending 30 April 2016, 2017, 2018 and 2019 respectively.

(1) Given that the whole purpose of the AWRS is to ensure compliance with tax obligations, HMRC would be entitled to treat non-compliance by an applicant with its own tax obligations as a serious matter. Furthermore, failure to pay corporation on time tax four years in a row is not a single one-off incident, but a pattern of behaviour. The MTR letter quite reasonably took the view that "such behaviour indicates that [the Appellant] does not have a responsible outlook on its tax obligations".

(2) By the time of the MTR letter, the outstanding amount for the accounting period ending 30 April 2016 had been cleared. By the time of the Refusal Decision, the outstanding amount for the accounting period ending 30 April 2017 had also been cleared, and the total outstanding amount had been reduced from what it had been at the time of the MTR letter. Nevertheless, at the time of the Refusal Decision, there was still a "history of poor payment" for all four years, and outstanding unmanaged debts for two of them.

(3) The MTR response stated that the HMRC position was "untenable", that the Appellant had "always engaged with HMRC to manage its debts and has sought time to pay agreements where necessary", and that the amount of the outstanding corporation tax had now been reduced. It does not appear that the decision maker sought to confirm whether or to what extent the Appellant did have time to pay agreements in place with HMRC in respect of these outstanding payments. However, it is noted that the Appellant does not in fact say that any time to pay agreements were *granted* by HMRC, but only that the Appellant "engaged" with HMRC, and that time to pay agreements were "sought". The Appellant had the opportunity to provide further details in the MTR response, but did not do so.

(4) No penalties were imposed on the Appellant for the late payments for two of the years in question, and only £100 penalties were imposed for the other two years.

(5) The MTR response does not acknowledge the seriousness of the failure to pay corporation tax on time four years in a row. This in itself is a matter which the decision maker would have been entitled to consider as relevant to the Appellant's attitude, but the Refusal Decision does not do so.

59. The sole director of the Appellant was also the sole director of another company, which had failed to file VAT returns on time.

(1) JSH, the sole director of the Appellant, was also sole director of MagicSpells Brewery Ltd ("**MagicSpells**"), which was licensed under the AWRS. MagicSpells filed its VAT returns late for all seven periods between 06/17 and 12/18. The length of the periods of default ranged between 37 days and 190 days. The only information in relation to this matter is a 22 March 2019 warning letter issued by HMRC to MagicSpells.

(2) Given that the whole purpose of the AWRS is to ensure compliance with tax obligations, HMRC would be entitled to treat as a serious matter the non-compliance with tax obligations by another company whose sole director is the same person as the sole director of the applicant. Furthermore, failure to file VAT returns on time seven periods in a row is not a single one-off incident, but a pattern of behaviour.

(3) Having said that, HMRC took no AWRS action against MagicSpells in relation to this late filing of VAT returns, other than to issue a warning.

(4) No default surcharges were imposed on MagicSpells in respect of five of the periods in question, suggesting that in those periods either no VAT was payable or that the amount payable was below the threshold for imposition of a default surcharge. In the other two periods, the default surcharges were only £86.92 and £30 respectively.

(5) The MTR response stated that "Any delays in the submission of VAT returns have not caused prejudice or risk to HMRC and have been as a result of the accountants and or bookkeepers of the Company collating the information to provide accurate returns to HMRC". This is clearly is not a valid justification for failure to file VAT returns on time. The MTR response does not acknowledge the seriousness of the fact that another company with the same sole director failed to file VAT returns on time seven periods in a row. This in itself is a matter which the decision maker would have been entitled to consider as relevant to the Appellant's attitude, but the Refusal Decision does not do so.

60. The sole director of the Appellant was also the sole director of another company, which had failed to inform HMRC of changes of directorship.

(1) MagicSpells also failed to inform HMRC of several changes of directors within the time prescribed under section 10.4 EN2002 (which has the force of law). Again, the only information in relation to this matter is a 22 March 2019 warning letter issued by HMRC to MagicSpells.

(2) It is unclear how many changes of directorship were not notified to HMRC within the prescribed time (although the words "certain changes" in the 22 March 2019 warning letter may suggest more than one), and the length of the period(s) of default is unclear. From the wording of the 22 March 2019 warning letter, it is possible that there was a single occasion on which one director resigned and a new director was appointed, in respect of which the changes were notified to HMRC only a day late.

(3) It appears that HMRC took no AWRS action against MagicSpells in relation to the failure to notify changes of directors within time, other than to issue a warning. Even the warning letter treats this as a matter subsidiary to the late filing of the VAT returns (see paragraph 58 above).

(4) The MTR response said that neither the Appellant nor JSH was aware of the need to notify HMRC of the changes of directorship, and that JSH was now aware of this. The fact that the MTR response does not acknowledge the seriousness of the fact that another company with the same sole director failed to notify a change of directors, and the fact that the sole director of the Appellant was unaware of one the legal obligations of approved persons under the AWRS, are in themselves matters which the decision maker would have been entitled to consider, but the Refusal Decision does not do so. (See paragraphs 43 to 45 above.)

61. The sole director of the Appellant was the majority shareholder of another company that had transferred significant funds to bank accounts of missing traders.

(1) The Refusal Decision found the following facts. At material times, Jurby Ltd ("**Jurby**") was 55% owned by JSH, and 45% owned by Agnieszka Kosiorek ("**AK**"). On 11 March 2008, JSH and AK were appointed directors of Jurby. On 17 March 2008, JSH, as director of Jurby, made an application for Jurby to be registered for VAT. On 23 June 2008, JSH resigned as director of Jurby, but retained his shareholding. Thereafter, AK was the sole director. No VAT returns were submitted by Jurby covering the period 30 March 2010 (the date of its first invoice) until 28 October 2010 (the date of its last invoice). Between March and December 2010, Jurby received some £1.7 million from its sole customer, and in the same period spent some £1.7 million, of which some £1.6 million was transferred to the UK bank accounts of two UK missing traders. Jurby was dissolved on 27 November 2012. (It is also noted that AK was subsequently a director of the Appellant for a period.)

(2) It is unclear from the Refusal Decision exactly how the decision maker considered these facts to be relevant to the question of whether the Appellant was a fit and proper person. In particular, it is unclear whether the decision maker considered that JSH (who was in the period from March to December 2010 the majority shareholder of Jurby but not a director) can be considered responsible for the actions or omissions of Jurby during this period. It is also unclear whether or to what extent the decision maker considered that JSH and/or AK knew or ought to

have been aware of risks that the two companies to which funds were transferred by Jurby might be missing traders.

(3) The Refusal Decision states elsewhere that the Appellant itself was involved in illicit trading (knowing or not) on various dates in 2016, but then goes on to say that "We acknowledge that these are aged, they didn't form part of my [MTR letter] nor do they impact on my decision". This 2016 matter that the decision maker chose to leave out of account was more recent than the matter involving Jurby, and involved the Appellant directly, making it all the less clear what weight the decision maker would have attached to the Jurby matter.

62. The decision maker further concluded that the Appellant did not meet either the due diligence requirements or the record keeping requirements in EN2002.

63. The finding that the Appellant did not meet the due diligence requirements in EN2002 was reasonable.

(1) The ninth fit and proper criterion requires the applicant to have in place satisfactory due diligence procedures, more detailed requirements of which are set out in section 12 EN2002.

(2) Section 12.2 EN2002 provides as follows:

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

(3) As to the first dot point in section 12.2 EN2002, section 12.3 EN2002 states that "You'll need to consider the full range of trading relationships you have established and the potential for fraud in each one". The Tribunal finds as a fact that the Appellant did not ever undertake a general exercise in which it considered the full range of trading relationships it had established and the potential for fraud in each one. There is insufficient evidence to establish on a balance of probability that it ever did so. The Tribunal also finds as a fact that the Appellant did not as a general practice, in relation to each individual customer or supplier, consciously consider the potential for fraud in that particular trading relationship. Again, there is insufficient evidence to establish on a balance of probability that it generally did so. On some of the due diligence packs in evidence in relation to individual trading counterparties, the person undertaking the due diligence has written words to the effect of "no risks identified", but there is no evidence that this person, before writing these words, consciously addressed their mind to what risks could potentially exist in relation to that counterparty, and to why they were satisfied that no risks existed.

At the hearing, it appeared to be common ground that purchases from established drinks manufacturers were low risk transactions, and that it might have been

sufficient compliance with due diligence for the Appellant to conclude on that basis alone that it could proceed with purchases from such manufacturers. The Tribunal rejects the Appellant's argument that it should therefore be treated as having complied with due diligence in relation to all purchases from drinks manufacturers. Due diligence is not about whether or not a transaction is low risk. It is about whether the Appellant, before entering into a transaction, consciously addresses its mind to the question whether or not it is low risk.

(4) As to the fourth dot point in section 12.2 EN2002, the Tribunal is not satisfied on the evidence that the Appellant ever documented the checks that it intended to carry out by way of due diligence, or that the Appellant had appropriate management governance in place to make sure that they were carried out as intended. As the MTR letter and Refusal Decision observe, compliance with this requirement in practice by a business such as the Appellant's would almost necessarily require a written due diligence policy. The due diligence packs in evidence typically include a proforma questionnaire called "Due diligence report", with a list of information to be filled in. If the blank proforma questionnaire was intended to be a statement of the checks that the Appellant intended to carry out, then it is evident that the intended checks were not properly carried out in practice, because in many of the completed questionnaires many of the items in these forms are left blank. If the questionnaires themselves were not intended to be a statement of the checks that the Appellant intended to carry out, then the Tribunal is not satisfied on the evidence that the Appellant had documented anywhere else what due diligence checks it intended to carry out in what circumstances.

(5) As to the third dot point in section 12.2 EN2002, the Tribunal is not satisfied on the evidence that the Appellant had procedures in place to take timely and effective mitigating action where a risk of fraud is identified.

(6) In the light of the above, the Tribunal considers that the second of the dot points in section 12.2 EN2002 was not satisfied.

64. However, it is not clear from the Refusal Decision that the failure to have adequate due diligence procedures would in the circumstances of this case have been sufficient, of itself or in combination with other considerations, to make the refusal of the application inevitable.

(1) Section 12.5 EN2002 in effect distinguishes between three separate categories of failures to comply with due diligence requirements:

  (a) less serious cases, where it is appropriate for HMRC to "seek to support you to strengthen your procedures";

  (b) more serious cases, where HMRC will "apply appropriate and proportionate sanctions"; and

  (c) the most serious cases, where HMRC may refuse an AWRC application or revoke an existing AWRS approval.

(2) It is implicit in section 12.5 EN2002 that a failure to comply with due diligence requirements would, in and of itself, only justify refusal of an application if it fell within the third of these categories. However, failures falling within the first two categories would still be relevant considerations which, in combination with other relevant considerations, could justify a refusal.

(3) Section 12.5 EN2002 states that cases falling within the second of these categories include "a failure to consider the risks, undertake due diligence checks or respond

to clear indications of fraud". It states that cases falling within the third of these categories include "ignoring warnings or knowingly entering into high-risk transactions".

(4) The Refusal Decision itself focuses on findings that the Appellant failed properly to consider the risks or undertake due diligence checks, suggesting that this case fell at most into the second of these categories. However, there is no suggestion in the decision letter that HMRC ever applied "appropriate and proportionate sanctions" to the Appellant in respect of this non-compliance. The Refusal Decision refers to communications from HMRC to the Appellant advising how the due diligence procedures needed to be improved, which could be consistent with the case falling within the first of the categories. Letters from Officer Idziak advising that due diligence procedures needed to be improved stated that sanctions could be imposed if due diligence was not improved, but it seems that ultimately no sanctions were imposed. The Refusal Decision does not consider whether the Appellant's failure to act sufficiently on those letters amounted to "ignoring warnings" that would have placed this case in the third category.

(5) The Tribunal is therefore unable to determine exactly what weight the decision maker would have attached to the failure to meet the due diligence requirements in EN2002.

65. Aspects of the finding that the Appellant did not meet the record keeping requirements in EN2002 were unreasonable.

(1) Section 11.1 EN2002 (which has the force of law) requires a person approved under the AWRS to keep and make available to HMRC any document referred to in Annex A EN2002 (which also has the force of law). Annex A EN2002 required the Appellant to keep, amongst other records, "an auditable stock control system".

(2) From some time before 24 June 2019 until the end of October 2019, the Appellant did not have an auditable stock control system.

(a) On 24 June 2019, JSH advised Officer Idziak that the Appellant's accountancy system had recently collapsed, that the Appellant had not yet decided between two new computer systems, and that installation of the new system would take about a week.

(b) On 8 October 2019, HMRC conducted an unannounced visit of the Appellant. The Appellant's accountant, Mr Patel, advised that the stock control system was still broken, that there were delays in implementing the new system, and that the new system was expected to be installed in November 2019 and to be fully functional by January 2020. At that meeting, Officer Idziak said that a collapsed system was not an excuse and that the Appellant should have an alternative stock control system in place. Mr Patel said that the Appellant had hired a person who would be responsible or stock control, a certain Mr Morgan. Officer Idziak asked Mr Morgan to produce a monthly (manual) stocktake as a substitute for the collapsed system, and said that he would check this during future visits. Mr Patel and Mr Morgan agreed to do this every 15th day of the month.

(c) It is necessarily implicit in the Refusal Decision that the decision maker considered that the Appellant did not have any stock control system other than the computer system that had collapsed, and the manual monthly stocktakes that the Appellant's accountant and Mr Morgan agreed on 8

October 2019 that the Appellant would produce in future. The Appellant has provided no evidence that it had anything else in place at the time that would satisfy the requirements of an "auditable stock control system".

(d) At the hearing, the Appellant noted that Annex A of EN2002 in fact states that the auditable stock control system "could include invoices, credit notes or other records that allow stock to be identified". The Appellant argued that it therefore would have satisfied this requirement through maintaining the relevant invoices, credit notes and other business records. The Tribunal does not accept this argument. Annex A says that the auditable stock control system may "include" invoices, credit notes and other business records, but does not say that these records of themselves would normally be *sufficient*. Annex A states that the system kept must "allow stock to be identified". The Appellant has not produced evidence to show that such other business records that it kept would have allowed stock to be identified. The Tribunal finds on the evidence that no other "auditable stock control system" existed at the time.

(3) From 8 October 2019, the Appellant agreed to provide monthly manual stock counts until its new computer system was operational, and each of these monthly reports was from then until the time of the Refusal Decision provided on time, other than that due for 30 November 2019 which was some 3 weeks late.

(a) On 8 October 2019, the Appellant agreed that monthly manual stock counts would be produced on the 15th of each month. The evidence does not indicate that the Appellant was required to send these every month to HMRC. Rather, it appears to have been the intention that the Appellant was required to keep them and to produce them on demand whenever requested by HMRC, including at announced and unannounced HMRC visits. Accordingly, the Appellant was not required to send the report for 15 October 2019 to HMRC immediately after that date.

(b) At the meeting on 11 November 2019, when asked for the report, the Appellant should have produced a report for 15 October 2019. Instead, it produced a report for 30 October 2019, with the explanation that it made commercial sense for the Appellant to produce the reports on the last day of the month rather than the 15th. Given that Officer Idziak accepted this at the time, it would be unreasonable for HMRC to treat this decision of the Appellant as a significant failure to comply with what had been agreed with HMRC. Given that this report was produced on demand at the meeting on 11 November 2019, there is no basis for treating it as late.

(c) On 7 December 2019, the Appellant should have been able to produce the report for 30 November 2019 when requested by HMRC, but could not do so. This report was provided to HMRC only on 19 December 2019. It was thus nearly 3 weeks late.

(d) There is no suggestion that the 31 December 2019, 31 January 2020 and 28 February 2020 stock counts were not produced on time.

(e) No further monthly stock counts were due to be prepared before the HMRC decision under appeal was issued on 11 March 2020.

(4) The Refusal Decision, unreasonably in part, concludes that there were "repeated failures of [the Appellant] to comply with its legal obligations, to provide HMRC with the requested information".

(a) The MTR letter, which is quoted in the HMRC decision, appears to identify three breaches of the legal obligation under section 11.1 and Annex A EN2002.

(b) The first is the failure of the Appellant on 8 October 2019 to produce stock reports. The Appellant said that this inability was due to its computer system being broken. The computer system had in fact been broken since before 24 June 2019, meaning that in the absence of any evidence that the Appellant had at the time any alternative auditable stock control system, the Appellant had been completely without any such system for at least some 3 and a half months. This was certainly a matter which the decision maker was entitled to attach considerable weight. However, the decision maker would also have had to take into account that this failure was now historic. On 8 October 2019, some 5 months prior to the date of the Refusal Decision, HMRC agreed with the Appellant that monthly manual stock counts could instead be produced until the Appellant's new computer system was operational, then anticipated to be in January 2020.

(c) The second is the unilateral decision of the Appellant on 11 November 2019 to change the date of the monthly stock counts from the 15th of the month to the last day of the month. It would be unreasonable to treat this as a significant failure (see sub-paragraph (3)(b) above).

(d) The third is the failure of the Appellant to produce the report for 30 November 2019 on demand at the 7 December 2019 meeting, the report being provided only on 19 December 2019. This was certainly a matter which the decision maker was entitled to consider. However, the decision maker would also have had to take into account that this report was ultimately provided before the Refusal Decision was issued, and that there were no issues of lateness in relation to any of the four other monthly stock count reports prior to the date of the Refusal Decision.

(e) The Refusal Decision unreasonably concludes that "Officer [Idziak] has still yet to receive these business records since March 2020". Given that the Appellant had at the date of the Refusal Decision provided the 30 November 2019 stock count and that there are no issues in relation to any of the other stock count reports prior to the date of decision, this statement is incorrect. Officer Idziak could not reasonably have still been waiting for monthly stock reports for earlier periods between July and October 2019, since it would be impossible for the Appellant to produce these retrospectively.

(f) While it was thus reasonable to conclude that there were failures to comply with record keeping obligations, it was unreasonable, on the basis of the above alone, for the Refusal Decision to express a generic conclusion that there had been "repeated" failures of the Appellant to comply with its legal obligations.

(5) There are other matters that the Refusal Decision might have considered, but as it did not, these cannot be relied on as justifications for its reasonableness (see paragraphs 43 and 45 above).

(a) At the hearing, it was suggested by HMRC that the manual monthly stock counts did not meet the definition of "an auditable stock control system", that HMRC was making a concession to the Appellant by agreeing to accept them on an interim basis, and that during this interim period the Appellant was therefore in continuing failure to comply with this obligation. This is not reasoning relied on in the Refusal Decision.

(b) On 24 June 2019, the Appellant anticipated that installation of the new computer system would take about a week. By 8 October 2019, it was expected to become operational only in January 2020. In fact, it seems that it became operational only after the Refusal Decision was issued in March 2020. Consideration was not given to whether this reflected on the ability or willingness of the Appellant to maintain adequate record keeping systems.

66. In any event, for the reasons above, it is not clear that failures in record keeping would have been sufficient, of themselves or in combination with other considerations, to make the refusal of the application inevitable.

**The appeal is therefore allowed**

67. The Tribunal therefore decides to allow the appeal and give directions pursuant to s 16(4)(a) and (b) FA94.

68. At the hearing, the parties agreed that if the Tribunal were to allow the appeal, and to direct a review of the decision, then it should direct that the subsequent review by HMRC should take place on the basis of the facts as they exist at the time of that subsequent review, but on the basis of the law and policy as it existed at the time of the Refusal Decision. The Tribunal finds that it has the power to direct that the review be conducted on this basis in circumstances where the parties so agree. Conducting the further review on the basis of the facts at the time of review is consistent with *R (Ace Drinks Ltd) v Revenue and Customs* [2016] UKUT 124 (TCC) at [11]-[19]). Conducting it on the basis of law and policy at the time of the original decision is consistent with *Revenue and Customs v Behzad Fuels (UK) Ltd* [2019] EWCA Civ 319 at [67], [71] and [72]. It is unnecessary to determine on what basis such a review would need to be conducted in the event that the parties did not so agree.

## RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. 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.

**DRCHRISTOPHER STAKER**
**TRIBUNAL JUDGE**

**Release date: 07 JUNE 2022**