TC03833

Appeal number: TC/2013/09350 & TC/2013/01010

CUSTOMS DUTY – appellant an approved registered owner of duty suspended goods under the Warehouse keepers and Owners of Warehoused Goods Regulations and so in possession of a "WOWGR" – HMRC imposing conditions on the WOWGR – HMRC revoking the WOWGR – statutory review of both decisions – appeals to Tribunal – applications by HMRC to strike out appeals – whether no reasonable prospect of success – applications allowed and appeals struck out.

FIRST-TIER TRIBUNAL
TAX CHAMBER

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

- and –

SAN MARCO LONDON LTD **Respondent**

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at the Tribunal Centre, 45 Bedford Square on 20 June 2014

Ms Ruth Hughes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Applicants

The Respondent did not appear and was not represented

DECISION

Introduction and outline

1. On 10 March 2010, San Marco Limited ("the company") became an approved Registered Owner of Duty Suspended Goods under the Warehouse Keepers and Owners of Warehoused Goods Regulations 1999. This is effectively a licence to trade in alcohol without paying customs duty and is known as a "WOWGR."

2. On 27 July 2012, HMRC placed conditions on the company's WOWGR ("the conditions decision"). The company sought a statutory review of the decision. The HMRC Review Officer upheld the decision on 23 November 2012 ("the conditions review decision"). On 18 December 2012 the company appealed that decision to the Tribunal ("the conditions appeal").

3. On 18 July 2013, HMRC revoked the company's WOWGR ("the revocation decision"). The company applied to the High Court for an injunction requiring HMRC to reinstate the WOWGR and sought judicial review of the revocation decision. On 8 August 2013 the High Court refused to grant an injunction and declined to exercise its judicial review jurisdiction.

4. The company also requested a statutory review of the revocation decision. On 8 November 2013 the HMRC Review Officer upheld that decision ("the revocation review decision") and on 4 December 2013 the company appealed to the Tribunal ("the revocation appeal").

5. On 20 January 2014, HMRC applied to the Tribunal strike out both appeals on the basis that the company had no reasonable prospect of success.

6. For the reasons given below, I allowed HMRC's applications. Both appeals are hereby STRUCK OUT.

The failure to attend

7. The company was informed of this Tribunal hearing by letter dated 8 April 2014 sent to the address on its appeals forms. The letter included the following sentences:

> "Please make sure you arrive half an hour before the hearing. If you do not attend the hearing the Tribunal may decide the matter in your absence."

8. The hearing was scheduled to begin at 10.00am. No representative of the company had arrived. The Tribunal clerk called the company using the phone number given on the appeals forms. The phone was not answered. The start time of the hearing was put back by 20 minutes but no-one arrived to represent the company.

9. I considered Rules 2 and 33 of the Tribunal (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), as well as Rule 8, which gives the Tribunal power to strike out an appeal.

10. Rule 33 reads as follows:

> **Hearings in a party's absence**
>
> If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal--
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing.

11. The company had been notified of the hearing. The question was therefore whether it was "in the interests of justice to proceed with the hearing." I considered this in connection with Rule 2, which says that the Tribunal's overriding objective is to "deal with cases fairly and justly."

12. Rule 2(2)(c) requires the Tribunal to ensure "so far as practicable, that the parties are able to participate fully in the proceedings." There is therefore no absolute obligation on the Tribunal to delay a hearing so that a party can send a representative. Nevertheless, if I decide to allow HMRC's applications, the appeals will be struck out, so this is a very serious matter. However, the company instructed solicitors and was represented by Counsel during the High Court proceedings, and it is therefore reasonable to assume that Mr Ghafoor would have understood the importance of the matter before this Tribunal. Finally, HMRC have attended, represented by Counsel: I have an obligation to deal "fairly and justly" with HMRC as well as with the company.

13. Rule 2(2)(e) specifies that the Tribunal must avoid delay "so far as compatible with proper consideration of the issues." HMRC provided the Tribunal with a comprehensive file of documents, including the correspondence between the parties, and the parties' submissions in relation to its High Court application. As that application sought judicial review of the revocation decision, and as the Tribunal has a quasi-judicial review jurisdiction in relation these appeals, it is reasonable to assume that the company's submissions before the High Court are substantially the same as those it would have made before this Tribunal, at least in relation to the revocation decision. The company also made detailed submissions in the Notice of Appeal forms submitted to the Tribunal. I am therefore confident that I have sufficient information to allow me properly to consider the issues raised by both appeals.

14. Rule 8(3)(c) of the Tribunal Rules gives the Tribunal power to strike out an appeal if it "considers there is no reasonable prospect of the appellant's case, or part of it, succeeding." Rule 8(4) provides that the Tribunal may not strike out the whole or a part of the proceedings under that subparagraph "without first giving the appellant an opportunity to make representations in relation to the proposed striking out." The Tribunal notified the company of HMRC's application to strike out the conditions appeal on 8 October 2013, over eight months before the date of this hearing. The Tribunal notified the company of HMRC's application to strike out the revocation appeal on 23 January 2014, some five months before this hearing. On 8 April 2014 both parties were directed to file and serve skeleton arguments seven days before this

hearing; only HMRC complied. The company has clearly been given opportunities to make representations but none have been received.

15. Having taken all these matters into account, I decided that it was in accordance with the interests of justice, and in particular with Rules 2, 8(4) and 33, to continue with the hearing.

Whether the appeal against the revocation review decision was out of time

16. HMRC submitted in their skeleton argument and before the Tribunal that the company's appeal against the revocation review decision was out of time, being made more than 30 days after the revocation decision.

17. However, where a trader has asked for an HMRC review of a decision, the 30 day time limit for an appeal only begins to run from the date that review decision is issued, see Finance Act 1994 ("FA 1994") s 16. That was the position here, and as a result, the revocation appeal was made in time.

The law

18. HMRC have power under the Customs & Excise Management Act ("CEMA") s 100(5), to vary or revoke a WOWGR "at any time for reasonable cause."

19. Regulation 6(1)(m) of the Revenue Traders (Accounts and Records) Regulations 1992, made under the power given by CEMA s 100H, requires revenue traders to keep and preserve such records as HMRC may specify by notice. Notice 206 specifies that such a trader must keep all his business records, including import and export documents, orders and delivery notes, purchase invoices and copy sales invoices.

20. The Tribunal's powers in relation to an appeal against the variation or revocation of a WOWGR are set out at FA 1994, s 16(4) as follows:

> "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."

21. Rule 8(3)(c) of the Tribunal Rules gives the Tribunal power to strike out an appeal if it "considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

22. In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf MR said, in relation to the similar power at Rule 24.2 of the Civil Procedure Rules:

> "The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or…they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

23. In *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16 [2001] ("*Three Rivers*") the House of Lords gave further guidance on how a court or tribunal should approach an application made on the basis that a claim has no real prospect of success. Lord Hope said:

> "94. ...I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?
>
> 95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

The reasons for the conditions decision and the revocation decision

24. HMRC's reason for the conditions decision was that that their extensive enquiries had established that the company had been a party to circular movements of alcoholic goods in and out of the UK. Ms Hughes informed the Tribunal, by way of

background, that the reason HMRC is concerned with circular movements of duty suspended alcohol is that each movement generates accompanying administrative document ("AAD"). AADs are sometimes, but not always checked – rather like an open railway ticket. If not checked, they can be reused by smugglers to bring alcohol into the UK without the payment of duty.

25. The reasons given by the Review Officer for the conditions review decision were that:

(1) HMRC had established that the company had exported goods to France which had previously been imported from the same supplier; and

(2) this circular supply chain was not a normal commercial activity.

26. The reasons for the revocation decision were that:

(1) on 8 September 2010 HMRC had seized the company's goods and the vehicle transporting the goods as liable to forfeiture under CEMA s 139(1), following enquiries which showed, *inter alia,* that there were inconsistencies in the driver's account of collection and delivery instructions, duplication of the AAD and irregularities in the invoice for the purchase of the goods. Furthermore, the goods were not expected or booked in at the warehouse listed on the documentation as being the receiving warehouse; and

(2) the company had failed to provide an adequate explanation either about the ownership of the alcohol it held in a bonded warehouse, or about the commerciality of its exports.

27. The HMRC Review Officer considered the following factors when he confirmed the revocation decision:

(1) goods were seized on 8 September 2010, having been brought into the UK under "irregular circumstances";

(2) Mr Ghafoor failed after numerous requests to provide information to HMRC when requested;

(3) although not included in the revocation decision, the company was already subject to the conditions decision, which had been issued because there was evidence that the company was involved in the circular movement of alcoholic goods. That further substantiated HMRC's view that Mr Ghafoor was not a fit and proper person, so that his company should not hold a WOWGR.

The task of the Tribunal

28. The Tribunal's powers over HMRC's decisions to vary or revoke a WOWGR are supervisory: FA 1994, s 16(4), set out earlier in this decision, states that:

> "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."

29. This is broadly equivalent to a judicial review jurisdiction. To succeed at trial, the company would have to show that HMRC's conditions review decision and/or its revocation review decision were illegal, irrational, disproportionate, vitiated by procedural impropriety and/or constituted a breach of its Convention rights.

30. HMRC are seeking to strike out the company's case on the basis that it has no reasonable prospect of showing that the HMRC review officers "could not reasonably have arrived at" the conditions review decision and/or the revocation review decision.

31. If I find that the company has "no reasonable prospect" of succeeding in either or both appeals, then I may strike out the appeals under Rule 8(3).

32. The threshold before a strike out application can succeed is high: as Lord Hope says in *Three Rivers*, the normal legal process involves a full trial. To strike out a case before trial is therefore exceptional, and an applicant must show that the other party's chances of success are so low as to be "fanciful." This will be the position if "the factual basis is…entirely without substance", for instance because "the statement of facts is contradicted by all the documents or other material on which it is based."

33. Putting the two parts together, HMRC must show that the company has no reasonable prospect of succeeding in showing that the HMRC review officer could not reasonably have arrived at his decision. If I agree with HMRC on this, I have the power, but not the obligation, to strike out the company's appeal(s).

The evidence

34. The Tribunal was provided with a bundle of documents which included :

(1) the correspondence between the parties and between the parties and the Tribunal;

(2) a "summons for condemnation" issued by East Kent Magistrates Court and dated 3 March 2011, in relation to a seizure of 23,338 litres of mixed beers at Dover on 2 July 2010;

(3) the report of an HMRC site visit to the company's premises, dated 21 February 2012;

(4) a Commissioner's Direction to the company, dated 9 May 2012; and

(5) copies of the witness statements provided for the purposes of the High Court proceedings by Mr Ghafoor and Ms Sarah Coote, officer of HMRC.

The facts

35. In making these findings of fact I bear in mind the guidance of Lord Hope, set out above, that it is not appropriate for this Tribunal to conduct a mini-trial, without discovery and without oral evidence.

36. However, the basis of HMRC's application is essentially that this is a case where, in the words of Lord Hope "it is possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance."

37. The factual basis of the company's case relies on Mr Ghafoor's responses to HMRC's questions, which he says were complete; as a result, he submits, the Review Officers' decisions were unreasonable. Findings of fact, in particular about the enquiries made by HMRC of the company and Mr Ghafoor's responses to those enquiries, are therefore essential if I am properly to assess HMRC's application. On the basis of the evidence provided, I therefore find the following facts.

38. On 5 March 2010, the company registered as a revenue trader.

39. On 2 July 2010, HMRC detained a load of 23,338 litres of mixed beers at Dover. It had been sent from the account of UK Food & Drinks Ltd of Essex ("UKFD") to the account of the company. The company has not denied that there were inconsistencies in the driver's account of collection and delivery instructions; duplication of the AAD; irregularities in the invoice for the purchase of the goods and that the goods were not expected or booked in at the warehouse listed on the documentation as being the receiving warehouse, and I find these to be facts.

40. Proceedings for condemnation of the goods were issued on 3 March 2011. The company appealed and the hearing was listed for 8-10 May 2012, but was adjourned *sine die*.

41. On 21 February 2012, an HMRC officer visited the company's premises. The meeting note sets out the following facts, none of which have been disputed by the company:

(1) The company's exports were supplied by UKFD and Cann-Do Beers Ltd of Chelmsford ("Cann-Do").

(2) Mr Ghafoor's contact at Cann-Do was a Mr Dean Cannon, whom he met by chance in his local pub in Redbridge. The company began trading with Cann-Do four weeks later, with Cann-Do supplying the company with beer. Cann-Do extended a line of credit to the company but no terms were set out in writing.

(3) All the beer supplied by Cann-Do was exported to Bourgas Limited, a company based in France. The company extended a line of credit to Bourgas, again without any documentation. Mr Ghafoor could remember only the first name of his contact at Bourgas, which was "Tony". He could not remember how the company came to deal with Bourgas but had held meetings with Tony in pubs and restaurants. The company conducted no due diligence on Bourgas. Bourgas was subsequently de-registered by HMRC as a missing trader.

(4) Mr Ghafoor's contact at UKFD was a Mr Zahid, whom he met by chance when he was at Sainsbury's supermarket in Ilford. UKFD extended credit to Mr Ghafoor without documentation, on the basis that the goods would not be paid for until they were sold on.

(5) All the goods supplied by UKFD were exported from Chichester Bond, a warehouse, to an Italian company, Tutto Per De Italia SNC ("Tutto"). Mr Ghafoor's contact at Tutto was a Mr Yasir, but Mr Ghafoor said at this meeting that he had never met Mr Yasir or anyone else from Tutto. Credit was extended

by the company to Tutto without fixed terms and also without any formal agreements.

(6) The due diligence documents held by the company in respect of Tutto consisted of that company's bank details, a blank stock offer page, and a document written in Italian stamped "validity unknown." Mr Ghafoor was unable to read Italian and did not know what was written in the document. He told the HMRC officer that "it was an Italian company and [he] expected their documents to be in a foreign language."

(7) On 29 July 2011 the company received a payment of £29,276 from a company called Petrich Limited. That company had the same director as Bourgas. The payment related to goods supplied by Cann-Do and exported to Bourgas. The same goods had previously been exported to the UK by Bourgas.

(8) The HMRC officer explained to Mr Ghafoor that this was a non-commercial transaction and had the hallmarks of alcohol diversion fraud. Mr Ghafoor did not accept this explanation.

42. On 9 May 2012 a Commissioner's Direction was issued preventing removal of goods held by the warehouse "Chichester Bond" to the account of the company, unless certain documentation and evidence was provided to HMRC.

43. At some subsequent date, but before 16 May 2012, Mr Ghafoor responded to the Direction by sending HMRC a bundle of documents, some of which were in Italian.

44. Ms Coote replied, pointing out various problems with the documents. In particular she asked for evidence that the company had paid its supplier, and that the company had been paid by its customer. On 17 May 2012 Mr Ghafoor said that no payments would be made until the goods had been received by the customer. Ms Coote responded on 21 May, asking "please can you explain why nobody has paid for these goods…is it your usual practice to despatch loads to a haulier with a warehouse in France without receiving payment?"

45. On 27 May 2012 Mr Ghafoor emailed Ms Coote, saying that title to the goods passed to him when they entered his account at Chichester Bond; he added that the fact that no payment was required by him until the customer had received the goods was helpful to his cashflow. On 30 May 2012 he added that if the customer did not pay, he would "take normal legal action through the civil court for claim…it is not unlikely to happen [sic] as I would get paid I am confident my customers would honor payment." On 1 June he said that he had a "verbal agreement" with his customers but attached the invoices, saying "the tax point has been created and payment would be made accordingly."

46. Ms Coote replied on the same day, pointing out that the invoices state on their face that the goods remain the property of UKFD until paid for in full and that there were no details of the duty status of the goods or their location or delivery. Mr Ghafoor emailed by return, saying that two of the invoices from the supplier had been

settled by the company; that "this makes my company legal owner" and asking that the Commissioners' Direction be lifted urgently.

47. On 12 July Ms Coote wrote to Mr Ghafoor, raising a number of questions about the documentation and his explanations. These included a request for evidence of payment from the company's other customer, Tutto, and for copies of the company's bank statement evidencing the payments from UKFD. Ms Coote also asked Mr Ghafoor to explain why the purchase order he had supplied from Tutto was in English rather than Italian, and invited him to comment on the similarity in format between that document and that from the company to Tutto advising that the goods were now available. She said "the lay-out and formatting of the documents are the same, and the table of goods appears to have been cut-and-pasted into the second document, with the same headings. She also asked:

> "You link the sale of these goods with EURO 2012, which is being held in Poland and Ukraine…are you suggesting the ultimate destination is Eastern Europe? If so, why have they been sent to Calais? And why do the loads include Polish beer?

48. The final paragraph of her letter said that HMRC were aware that these goods had already been imported into the UK from the EU and "this continuous movement does not make commercial sense and therefore I am not convinced that these transactions are legitimate." At the very end of the letter is a line reading "WARNING: Failure to comply with the regulations may result in forfeiture."

49. On 15 June 2012 Mr Ghafoor replied, sending Ms Coote some documents from HSBC and saying:[1]

(1) The goods are not being sent to Poland or Ukraine, but "people in all over Europe would watch this [match] and drink Beer and enjoy the game…there is large Polish communities the EU and would will drink Polish beer."

(2) "Cut and paste is normal in the commercial environment, as it saves time to re-write everything."

(3) "No customer would pay in advance as there is no grantee customer in the EU would receive these goods."

(4) He was not aware that the goods had been imported into the UK from the EU.

50. Ms Coote wrote again on 18 June 2012, saying that the HSBC documents were not bank statements and "did not illuminate the payment/ownership situation" and asking for the names of the warehouses where the company had accounts, and for details of the deposit and invoicing arrangements for any goods held to the company's account in those warehouses, as well as for information about the source of goods held there.

[1] All extracts from correspondence are verbatim

51. She also asked nine specific questions, which she highlighted as indicating a risk that "this supply chain is caught up in MTIC fraud." The key questions are set out below, followed in italics by Mr Ghafoor's brief responses, received on 26 June 2012:

(1) Lack of history of customer – *we are selling goods.*

(2) No credit checks – *I am stratified [satisfied] payment will be honoured*

(3) No third party checks – *commercial matter*

(4) The poor condition the goods are in – *with all due respect Sarah but this is a very subjective matter. Customer has shown no objection to purchase it.*

(5) Lack of formal contractual arrangements for both purchase and sale – *contractual agreement address as before in my correspondence…will forward to you a signed agreement.*

52. Mr Ghafoor added the following phrase to each of these responses: *I am happy to answer it but in law it has no standing and is not relevant.* He said that he was unable to send the company's bank statements to HMRC because they would take a month to arrive from the bank. On the same day he sent HMRC a letter from Mr Zahid Ali of UKFD saying that the company had received payment for two loads, which were now the property of the company.

53. On 12 July 2012, Ms Coote wrote again, asking questions about the company's customers, suppliers and warehouses. On 16 July, Mr Ghafoor informed HMRC that he had been to Italy twice and met the directors of Tutto personally, and attaching boarding passes for journeys to Milan on 25 March 2011 and to Turin on 12 June 2011. He also sent some sales invoices.

54. In her reply on 25 July 2012, Ms Coote questioned why he had met the directors before Tutto was incorporated (which happened on January 2012) and why certain key information, such as the VAT number, location of customer and status of the goods, were omitted from the invoices. She refused to accept them as valid evidence of the legitimacy of the transactions.

55. On 27 July 2012, HMRC varied the company's WOWGR, by adding the condition that "goods held in duty suspension that have originated or have been purchased from OMS [other member states] cannot be despatched in duty suspension for re-export to OMS." This is the "conditions decision." The Commissioner's Direction was lifted on 16 August 2012.

56. The company asked for a statutory review of the conditions decision. On 23 November 2012 the HMRC review officer upheld the decision and on 18 December 2012 the company appealed to this Tribunal. These are "the conditions review decision" and "the conditions appeal" respectively.

57. On 28 May 2013, the company abandoned the goods held in Chichester Bond, saying "the stock is out of date now and can not be sold."

58. On 18 July 2013, HMRC revoked the company's WOWGR with immediate effect. The company applied to the High Court for an injunction requiring HMRC to reinstate the WOWGR and sought judicial review of the revocation decision.

59. On 8 August 2013 the High Court refused to grant the injunction. It also declined to exercise its judicial review jurisdiction because the company was able to challenge the revocation decision in this Tribunal. The judgment is published as *R (San Marco London Ltd) v HMRC* [2013] EWHC 3218 (Admin).

60. The company asked HMRC to carry out a statutory review of the revocation decision. On 23 November 2012 the decision was upheld by the HMRC Review Officer ("the revocation review decision"). On 18 December 2012 the company appealed to the Tribunal against that decision.

61. The decisions under appeal to the Tribunal are thus the conditions review decision and the revocation review decision. On 20 January 2014, HMRC applied to the Tribunal strike out both appeals.

Submissions by Mr Ghafoor on behalf of the company

62. In his appeal to the Tribunal against the conditions decision, Mr Ghafoor made the following submissions:

(1) HMRC did not have evidence of wrongdoing but proceeded on assumptions;

(2) the imposition was disproportionate and a breach of EU law;

(3) the transactions were commercially profitable; and

(4) other companies carrying on the same sort of business are being allowed to continue.

63. Mr Ghafoor's submissions in relation to the revocation review decision are contained in his Notice of Appeal to the Tribunal and amplified in the skeleton argument for the High Court. They repeated submissions (2) and (4) above and added the following:

(1) HMRC could not rely on the September 2010 seizure because the company's appeal against that seizure was still live: the case remained adjourned before the magistrates. It was for that court to decide whether the seizure was lawful, and HMRC could not use this as a basis for deciding that Mr Ghafoor was not a "fit and proper person", such that his company's WOWGR should be revoked. Relying on this seizure amounted to an "irrelevant consideration" in the context of the reasonableness of HMRC's decision and was therefore illegal. Further, the seizure was three years ago.

(2) The company had complied with all HMRC's requests for information and had provided satisfactory evidence of ownership and payment details. This was a relevant consideration and HMRC's failure to take Mr Ghafoor's co-operation into account meant that the decision was vitiated for illegality.

(3) HMRC have set out in their guidance a list of factors which they will take into account when assessing whether someone is a "fit and proper person." Mr Ghafoor's company was granted registration, so he must have been a fit and proper person at that time, and nothing has changed. HMRC have not stated that he has failed to comply with any particular factor set out in the guidance, and he submits that he has not failed.

(4) The company had appealed the conditions review decision to the Tribunal in December 2012, but HMRC had repeatedly failed to file its Statement of Case. Had HMRC not "dragged its heels", that appeal might have been heard and decided in the company's favour before July 2013, the date of the revocation decision.

(5) The decision was procedurally unfair because HMRC did not provide the company with an opportunity to make representations.

(6) The revocation was not a proportionate response to the seizure, because that was still a live case; it was not proportionate to the company's actions in and around the holding of stock in the Chichester Bond because the company had fully complied with the conditions in the Commissioner's Direction; this could be seen from the fact that the Direction had been lifted.

Submissions by Ms Hughes on behalf of HMRC

64. Ms Hughes made the following submissions.

(1) The company's failure to provide adequate documents and information in relation to the goods held at Chichester Bond was the reason for the conditions decision and one of the reasons for the revocation decisions. It is clear from HMRC's published guidance that a WOWGR will be withdrawn if a trader is unable satisfactorily to answer HMRC's reasonable questions. On the evidence, it was obvious that Mr Ghafoor's responses were wholly unsatisfactory.

(2) It is a condition precedent of registration for HMRC to be satisfied that a trader is a "genuine enterprise which is commercially viable," and if they are no longer satisfied then it is entirely reasonable for HMRC to revoke the WOWGR. The evidence again shows that the company was not trading on a commercial basis.

(3) The company was wrong to assert that HMRC could not have regard to the seizure of goods in 2010. HMRC were entitled to conclude that a trader whose goods had been involved in a fraudulent transaction was not a fit and proper person to hold a WOWGA.

(4) The matters relied upon by HMRC in its revocation decision were relevant to the suitability of the Appellant to remain registered, were consistent with its guidance and entitled HMRC to conclude that the Appellant was not a fit and proper person.

Discussion

65. HMRC have the power under CEMA s100G(5) to revoke or vary the terms of a WOWGR with reasonable cause.

66. To succeed in its appeals, the company must show that the review officers acted unreasonably when upholding the conditions decision and/or the review decision.

67. To succeed in its application, HMRC must convince me that the company has no reasonable prospect of succeeding in showing that the review officers behaved unreasonably.

The conditions review decision

68. The reason for the conditions decision was that, following extensive enquiries, HMRC had established that the company was a party to circular movements of alcoholic goods in and out of the UK. The review decision essentially reiterated this, saying that this circular trade did not constitute normal commercial activity.

69. Mr Ghafoor submits that "HMRC did not have evidence of wrongdoing but proceeded on assumptions." I have found as a fact that HMRC had evidence that goods exported to Bourgas using the company's AAD had previously been imported from Bourgas, so they were not proceeding on assumptions. Although Mr Ghafoor denied knowledge of the earlier importation and I make no finding of fact as to his knowledge, the company's transaction was clearly part of that circular movement.

70. It is entirely reasonable that HMRC should impose conditions on a trader whose goods have been shown to be involved in this uncommercial circular trade, unless and until credible convincing explanations for that involvement were provided. The Review Officer thus acted reasonably in upholding the conditions decisions on these grounds and the company has no reasonable chance of showing otherwise.

71. Mr Ghafoor's other submissions do not displace that conclusion: the decisions were not disproportionate, the fact that a profit accrued to the company is irrelevant, and HMRC's decisions in respect of the company cannot be unreasonable simply because other companies remain engaged in this circular trade.

The revocation review decision: the company's response to HMRC's enquiries

72. The revocation review decision was based in part on Mr Ghafoor's failure to respond to HMRC's numerous requests to provide information. Mr Ghafoor says that the company complied with all HMRC's information requests and provided satisfactory evidence of ownership and payment details. However, it is transparently clear from the facts set out above that Mr Ghafoor's responses to HMRC's straightforward questions about ownership, customers, suppliers and payments were unsatisfactory. Further, no commercial import-export business operates without first checking the bona fides of its suppliers and customers and without proper documentation, as had happened in this case.

73. The information Mr Ghafoor supplied to HMRC was also contradictory and unreliable – for example, he initially said he had not met the directors of Tutto, but later that he had visited them before they started their business. He failed, despite HMRC's many requests, to produce bank statements which showed the company paying for the goods supplied, or receiving payment from its suppliers.

74. It was entirely reasonable for the Review Officers to take these matters into account, and the company has no reasonable chance of succeeding in showing otherwise. It is, as Lord Hope said in *Three Rivers*, "clear beyond question" that Mr Ghafoor's submissions on the facts are "contradicted by all the documents or other material on which [they are] based." It is fanciful for Mr Ghafoor to argue that HMRC's failure to take his supposed "co-operation" into account means that the officer's revocation decision (and the review officer's upholding of that decision) was "vitiated for illegality."

The revocation review decision: the seizure

75. HMRC's second ground for the revocation review decision was the seizure of the goods in September 2010. It is not in dispute that the goods were seized because of numerous irregularities. This alone is enough for HMRC, acting reasonably, to revoke the WOWGR.

76. Mr Ghafoor complains that it was unreasonable of HMRC to take the seizure into account because the company was contesting that seizure via court proceedings, and those proceedings were still live. If he were right, it would be an easy matter for a non-compliant trader to retain his WOWGR (however egregious his offence) by the simple expedient of appealing the seizure. That has to be wrong.

77. Mr Ghafoor also argues that HMRC's actions were unreasonable because there was a three year delay between the seizure and the revocation decision. Again, this cannot be correct: a reasonable decision does not become unreasonable simply by virtue of a three year delay; the company has no reasonable chance on appeal of convincing a Tribunal otherwise.

The revocation review decision: other matters

78. Mr Ghafoor also argued that the decisions were disproportionate because the Commissioner's Direction had been lifted "for full compliance with the conditions imposed." This is wrong on the facts: there was no full compliance. Moreover, the Direction was not lifted until after the conditions decision, ie when it was no longer needed.

79. Mr Ghafoor says that, because the company was granted registration, he must have been a fit and proper person at that time, and nothing has changed. In terms this means that it would never be reasonable for HMRC to withdraw a WOWGR because they must infer from its grant that the trader was a fit and proper person, a submission which is self-evidently wrong. So too is the argument that HMRC's delays in filing its Statement of Case in relation to the conditions decision was in some way procedurally unfair: those delays are irrelevant to the fairness of the revocation decision.

80. The fact that HMRC did not give Mr Ghafoor a chance to make representations on the revocation is not a procedural error: whether they do so or not is a matter for them. In this case, Ms Coote had been in frequent and largely fruitless correspondence with Mr Ghafoor for some months, so he was clearly on notice as to HMRC's concerns.

81. Finally, Mr Ghafoor argues that the reasons in the revocation notice are different from those in HMRC's guidance. HMRC have the discretion to revoke a WOWGR "at any time for reasonable cause" (CEMA s 100(5). HMRC's guidance does not operate as a constraint on that discretion.

Decision

82. On the basis of the foregoing, the company's chances of succeeding in its appeal on any of the grounds set out above are "fanciful." It has no reasonable chance of success in showing that either of HMRC's review decisions were unreasonable. To borrow the words of Lord Woolf, this is a case which is "not fit for trial at all." The appeals are struck out.

Reinstatement and appeal

83. Rule 8(5) allows the company to apply for the reinstatement of either or both of its appeals. Rule 8(6) states that an application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal send notification of the striking out to the company.

84. 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. 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 REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 22 July 2014