[2015] UKFTT 0461 (TC)

TC04629

Appeal number: TC/2014/03845

EXCISE DUTY – application for registration as an "owner" of excise goods under WOWGR – whether refusal of application unreasonable – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HURA LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
MICHAEL SHARP

Sitting in public at The Royal Courts of Justice, Strand, London on 1 September 2015

Kara Cann, instructed by Messrs Rainer Hughes, for the Appellant

William Hays, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. In this appeal, the appellant appeals against the decision of Officer Sarah Coote dated 25 October 2013, confirmed following a review by Officer David Paton on 12 February 2014, to refuse to register the appellant as an owner of excise goods under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR").

Procedural matters

2. At the beginning of the hearing, Ms Cann explained that Mrs Sarah Hussain, the sole director of the appellant, who was due to give evidence to the Tribunal, was unable to attend the hearing as her dog had been involved in an accident over the bank holiday weekend. Ms Cann stressed that Mrs Hussain had not voluntarily absented herself from the hearing and submitted her absence would make it difficult for Ms Cann to conduct the proceedings as, since her instructing solicitors had never been planning to attend, there was no-one from whom she could take instructions. She accordingly applied for a postponement of the hearing.

3. Mr Hays opposed this application. He said that he did not take issue with anything that Mrs Hussain said in her witness statement (apart from one small point which he and Ms Cann had clarified between themselves). Therefore, he was happy for Mrs Hussain's witness statement to be admitted as evidence even though she was not available for cross-examination. He noted that Officer Sarah Coote, HMRC's sole witness, was due to retire from HMRC on 1 November 2015, it was unlikely that the hearing could be re-listed before then and that there would therefore be real prejudice to HMRC, which could not be dealt with by a costs award, if the hearing were postponed. He argued this would outweigh any prejudice the appellant would suffer if the hearing proceeded in Mrs Hussain's absence, not least since, even if it lost this appeal, the appellant could always choose to renew its application under WOWGR.

4. There was no doubt that the appellant had received notice of the hearing. Given that there was no objection to Mrs Hussain's witness statement being admitted as evidence in her absence, we considered that the prejudice to HMRC of postponing the hearing would outweigh the prejudice to the appellant of proceeding in Mrs Hussain's absence. We concluded that it was in the interests of justice to proceed with the hearing even though no officer or employee of the appellant was present and we therefore refused the application for a postponement. We did, however, offer to adjourn the hearing for a short period so that Ms Cann could take instructions over the telephone from either her instructing solicitors or Mrs Hussain but Ms Cann chose not to avail herself of this offer.

Evidence

5. We heard evidence from Officer Sarah Coote and Ms Cann cross-examined her. We found Officer Coote to be a reliable and honest witness. We admitted Mrs

Hussain's witness statement as evidence in her absence. As noted at [3] above, none of that evidence was disputed.

Background and undisputed facts

6. None of the facts set out at [7] to [19] below were in dispute.

7. The appellant carries on business as a retailer. At the time it made the application leading to HMRC's disputed decision it owned three shops selling alcoholic beverages. Mrs Hussain is the sole director of the appellant. She has considerable experience in the retail arena and previously ran 15 shops before selling that business prior to the birth of her child.

8. On 9 April 2013, Mrs Hussain submitted an application on behalf of the appellant for the appellant to be registered as an owner of excise goods under WOWGR. If approved, that application would enable the appellant to purchase excise goods for storage in a bonded warehouse on terms that the excise duty would become payable only at the point at which the goods left the warehouse. The appellant would, therefore, derive a cash flow benefit if its application was approved (as it could defer the point at which excise duty became due). However, it would also incur additional costs including, but not limited to, the additional fees charged by the bonded warehouse to store goods as well as the costs of transporting goods from the warehouse to the appellant's stores.

9. Mrs Hussain attached a business plan to the appellant's application. In that business plan she stated that she considered that the approval under WOWGR would allow the appellant to secure the right quantities of goods for its off-licences without having to worry about adversely affecting its cash flow. She stated that previously in her business career she had experienced difficulties in obtaining a regular and guaranteed supply of products for seasonal promotions and offers and she believed that obtaining the WOWGR approval would enable the appellant to overcome this difficulty.

10. Officer Coote was asked to deal with the appellant's application. On 6 June 2013, Officer Coote visited Mrs Hussain at her home to go through the application. During that meeting, Officer Coote told Mrs Hussain that there were some aspects of the application on which more detail was needed. For example, she questioned whether Mrs Hussain's estimate of costs that would be incurred in transporting goods from a bonded warehouse to the appellant's shops was realistic. She wanted to understand better why the appellant could not stock its stores with duty-paid goods and whether the proposal was cost-effective taking into account the additional transport costs and warehouse charges that the appellant would incur. Officer Coote also wanted more information on the appellant's proposed suppliers and on the arrangements with the bonded warehouses that the appellant was proposing to use. Officer Coote was concerned that Mrs Hussain had not looked properly into the "payment side of the duty", namely whether the appellant would be required to deposit some part of the duty payable on excise goods with the warehouse owner even

before the goods left the warehouse. It was agreed that Officer Coote would telephone Mrs Hussain a few weeks later to see what progress she had made on these issues.

11. On 5 July 2013, Officer Coote called Mrs Hussain, but Mrs Hussain missed her call. On 10 July 2013, Mrs Hussain sent Officer Coote an email apologising for missing the call and responding to some of the points that Officer Coote had raised in the meeting of 6 June 2013. Officer Coote did not consider that this email dealt with all of her points. On 16 July 2013, she sent Mrs Hussain a letter listing further information required to enable the application to be considered properly. That letter included the following paragraph:

> Please provide a business plan that takes into account the overheads associated with the intention to hold goods in a warehouse (RHD[1], duty, transport etc) with throughput figures and a cash flow forecast.

12. On 2 August 2013, Mrs Hussain wrote to Officer Coote to deal with points raised in her letter of 16 July 2013. She attached to that email a "cash flow for 12 months which takes into account the new business venture". The document attached was a cash flow forecast for the company's retail business.

13. On 9 August 2013, Officer Coote sent an email to Mrs Hussain. That email contained the following paragraph:

> The document looks like cash flow projections for the retail business, rather than a business plan for the proposal to hold goods in a warehouse. To evaluate your application, we need to understand how the WOWGR will be used and the effects of the different cost factors. I hope you will be able to produce something along these lines.

14. On 28 August 2013, Mrs Hussain sent Officer Coote an email stating that she, together with her accountants, was "going to review the cash flow as this should have incorporated the new venture of the wowgr". On 19 September 2013 Mrs Hussain sent Officer Coote a "revised copy of the cash flow forecast for Hura Ltd showing the inclusion of the licence for the business".

15. Officer Coote looked at the revised cash flow forecast but concluded that it still did not answer her questions. On 26 September 2013, she sent an email setting out some observations on the document. She concluded her email with the following paragraph:

> In view of these issues, and the lack of a credible business plan that demonstrates a commercial need, I am going to recommend that your application for registration as an owner of goods in warehouse be rejected, and will process this accordingly. My decision will be reviewed by my manager and, if supported, a letter of confirmation will follow.

[1] This acronym stands for "receipt, handling and despatch" and refers to charges levied by bonded warehouses for processing pallets of goods received into, and despatched from, the warehouse in question.

16. Just over an hour later, Mrs Hussain replied to this email saying that she could answer each point raised and asking Officer Coote not to reject the application.

17. On 27 September 2013, Officer Coote replied to Mrs Hussain's email stating simply that "I will be discussing this with my manager w/b 7/10/13".

18. There was no further material correspondence between Officer Coote and Mrs Hussain. Officer Coote's manager duly endorsed her decision and on 25 October 2013, Officer Coote sent Mrs Hussain a letter advising that the appellant's application had been rejected and that the "[f]ailure to demonstrate the commercial need for the WOWGR registration" had been taken into account in reaching that decision. That letter advised that:

> If you do not agree with my decision, you have three options. Within 30 days you can:
>
> - Send any further information you want me to consider;
> - Have your case reviewed by a different officer; or
> - Have your case heard by an independent tribunal.

19. The appellant duly requested a review and, by letter dated 12 February 2014, Officer David Paton upheld Officer Coote's conclusion.

Statutory provisions and HMRC guidance

Section 100G of the Customs & Excise Management Act 1979

20. Section 100G of the Customs & Excise Management Act 1979 ("CEMA 1979") provides as follows:

> (2) The Commissioners may approve, and enter in a register maintained by them for the purpose, any revenue trader who applies for registration under this section and who appears to them to satisfy such requirements as they may think to impose.

21. The appellant reserved the right to argue in a different context that the requirement that a person should be a "registered owner" before being allowed to deposit duty suspended goods into a bonded warehouse was not compatible with the law of the European Union. However, subject to that point, the parties were agreed that s100G of CEMA 1979 conferred a broad discretion on HMRC, albeit a discretion that was constrained by the usual principles of public and administrative law.

22. HMRC have published guidance on the procedure for making applications for registration in their published Excise Notice 196 ("Notice 196").

23. Paragraph 5.2 of Notice 196 gives the following guidance:

> You must send an up to date business plan with your application. You may be requested to send further additional business papers to substantiate your application. When all the requested information is

> held by HMRC we intend to process your application within 45 working days.
>
> If you are unable to provide a business plan or other requested information you should contact the NRU. Failure to do this will result in your application not being processed until this information is received.
>
> …
>
> In considering your application, HMRC will follow the guidelines set out in paragraph 3.2 of this notice.
>
> …
>
> As a part of our registration procedure we will ask for further information about you and your business. If you fail to supply this information we will place your application on hold until this information is received.

24. Paragraph 3.2 of Notice 196 is referred to in the extract quoted above and states as follows:

> It is important that all applicants receive a pre-approval visit so that HMRC may obtain information to assist in the processing of the application.
>
> During the visit we will examine all the business' activities and may enquire about your suppliers, customers, business plans, accounting systems, premises, financial viability, and so on. Only when we are satisfied the business is a genuine enterprise which is commercially viable, with a genuine need for authorisation and that all key persons are fit and proper to carry on such a business, will we process the application.
>
> Reasons for refusing an application may include circumstances where:
>
> - the legal entity (this includes the directors or any of its key employees) has been involved in revenue non-compliance or fraud
> - the application is incomplete or inaccurate
> - you (the directors in the case of a limited company) have unspent convictions
> - there are proven links between the legal entity or key employees with other known non-compliant or fraudulent businesses
> - the business is not commercially viable
> - you have not been able to demonstrate the business is genuine
> - you have outstanding HMRC debts
> - the legal entity applying for authorisation has been involved in significant revenue non-compliance

- you are unable to provide adequate financial security as required by us
- you do not have an accounting system that satisfies us
- if you are a warehousekeeper or registered consignor intending to make supplies for which an eAD is required, you do not have adequate IT systems in place to enable you to register and enrol, and use the Excise Movement and Control System (see paragraph 3.3.1).

The above list is not exhaustive. If we are not satisfied with the information provided to us, we may refuse to authorise you. In addition, if you fail to provide us with the information requested, we will place your application on hold until the information is received. We will notify you of the reason or reasons for the refusal.

Section 16 of the Finance Act 1994

25. It is common ground that this appeal relates to a "decision as to an ancillary matter" for the purposes of s16(4) of the Finance Act 1994 ("FA 1994"). It follows, therefore, that this Tribunal's powers in relation to this appeal are limited by s16(4) as set out below:

> (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.

26. Therefore, it is only if we are satisfied that the Commissioners could not reasonably have reached the decisions they did that we can interfere with them. Applying the approach set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 753 at 663 we consider that we must address the following questions in order to assess the reasonableness or otherwise of the decisions:

(1) Were the decisions ones that no reasonable officer could have reached?

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

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

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

The appellant's grounds of appeal

27. The appellant contends that HMRC's decision was unreasonable within the meaning of s16(4) FA 1994 in the three respects set out below.

28. Firstly, Ms Cann submitted that HMRC's perception that there was no "commercial need" for the appellant to be registered as an owner under WOWGR could not amount to a valid reason for refusing the application. She pointed out that "commercial need" does not appear in the list of factors set out in paragraph 3.2 of Notice 196, but that "commercial viability" does. While she acknowledged that that list was stated not to be exhaustive, she submitted that there had to be reasonable certainty as to the factors that HMRC would take into account. She submitted that, in purporting to assess "commercial need", Officer Coote was usurping the function of the appellant's directors and was making commercial value judgements (for example as to whether the appellant could continue to run its business without the approval requested) which she, and HMRC officers generally, lacked the commercial expertise to make. In her submission, Officer Coote should have focused on whether the appellant's business was "commercially viable".

29. Secondly, Ms Cann submitted that, even if HMRC were entitled to take into account "commercial need", Officer Coote did not give Mrs Hussain a sufficient opportunity to satisfy her that there was such a need. She submitted that Officer Coote referred to "commercial need" for the first time in her email of 26 September 2013 but that no sooner had she sent that email than the "drawbridge came up" and Officer Coote refused to hear any further submissions from Mrs Hussain on the issue.

30. Thirdly, Ms Cann submitted that it was, in any event, obvious that the appellant had a commercial need to be registered under WOWGR given the obvious cash flow benefits that it would obtain if registered.

Findings of fact

31. We make the findings of fact set out at [32] to [35] below.

32. The cash flow forecasts that Mrs Hussain supplied were not "business plans" of the kind that Officer Coote had requested. The cash flow forecasts set out projections as to the monthly cash receipts and expenses of the appellant's retail business as a whole for a period of one year. Officer Coote was requesting a business plan that focused specifically on the application for registration under WOWGR, assessed the business benefits of obtaining such a registration and compared those benefits with associated costs (such as warehouse fees and transportation costs) in order to determine whether there would be a positive benefit from registration under WOWGR as compared with simply purchasing excise goods duty paid. We find that Officer Coote made that distinction clear in her letter of 16 July 2013 referred to at [11] and her email of 9 August 2013 referred to at [13].

33. We find that Mrs Hussain had a genuine belief that registration under WOWGR would benefit the appellant's business but that none of the documentation she submitted to Officer Coote explained why, in her view, the benefits of registration would outweigh the associated costs.

34. We find that Officer Coote intended her email of 27 September 2013 referred to at [17] above to warn Mrs Hussain that, since Officer Coote would be meeting her manager in the week beginning 7 October 2013, Mrs Hussain had only a limited period of time in which to supply the information Officer Coote was requesting. However, the email was curt and we find that it could be read as indicating that Officer Coote's mind was made up and all that remained was for her to meet her manager in the week beginning 7 October 2013.

35. We find that Officer Coote considered that the "commercial need" of the appellant for a registration under WOWGR was an important consideration as, if HMRC granted approvals under WOWGR where there was no commercial need, the exchequer would be exposed to a greater risk of goods being removed from bonded warehouses without excise duty being paid on them.

The appellant's first argument – whether "commercial need" is a relevant factor

36. We have not accepted Ms Cann's submission that the fact that "commercial need" is not listed specifically in the list of factors set out in paragraph 3.2 of Notice 196 means that HMRC are precluded from taking "commercial need" into account. The extracts from Notice 196 set out at [23] and [24] above make it clear that HMRC are interested in the detail of how an applicant's business works. Moreover, paragraph 3.2 of Notice 196 states specifically that HMRC need to be satisfied, *inter alia*, that the business is "commercially viable, **with a genuine need for authorisation**" (emphasis added) before they will grant approval. Ms Cann sought to persuade us that there was a distinction between "genuine need" and "commercial need" but, despite her valiant efforts, we saw no such distinction. We therefore concluded that it was abundantly clear from Notice 196 that, before registering an applicant as an "owner" under WOWGR, HMRC need to be satisfied that the applicant has a commercial need to be so registered and that HMRC would assess whether such a need exists by looking at the applicant's business plan together with other supporting evidence.

37. There is then the separate question of whether, by basing their decisions on their conclusions as to the appellant's "commercial need" for the registration, Officer Coote (and Officer Paton) were taking into account an irrelevant factor. We think not. By registering an applicant as an "owner" under WOWGR, HMRC expose the exchequer to the risk that, for whatever reason, excise goods that the owner holds in a bonded warehouse will be removed without excise duty being paid. It is entirely right that HMRC should wish to assess both (a) the magnitude of the risk that they are running and (b) the benefit, whether to the particular applicant, or to society as a whole, that will flow if the application is approved. If there does not appear to be any "commercial need" for an application then HMRC would be exposing the exchequer to risk, without any countervailing benefit. This is not an irrelevant consideration.

38. Nor do we consider that, by assessing "commercial need", Officer Coote or Officer Paton were usurping the functions of Mrs Hussain. Mrs Hussain was absolutely entitled to form her own opinion as to whether a WOWGR registration would benefit the appellant's business. Officer Coote and Officer Paton had to address a different issue, namely whether they were satisfied (based on information that Mrs Hussain supplied) that the risks to the exchequer were outweighed by a positive benefit of granting the application. We do not accept that, in doing so, the relevant HMRC officers were making a commercial value judgement which they lacked the industry experience to make. On the contrary, they were drawing on their experience as HMRC officers and applying it to the commercial information that Mrs Hussain supplied.

39. In the appellant's Notice of Appeal, it was submitted that, by considering why the appellant could not achieve its commercial objectives by buying duty paid goods, Officer Coote was taking into account an irrelevant consideration. We do not agree. In formulating that question, Officer Coote was addressing the question of "commercial need" as, if the appellant could achieve its stated commercial objectives by buying duty paid goods, it would follow that there would be no "commercial need" for it to be registered under WOWGR.

40. For all of those reasons we reject the appellant's first argument.

The appellant's second argument – whether appellant given sufficient opportunity to establish "commercial need"

41. The appellant's second argument involves two distinct propositions: firstly that "commercial need" was mentioned as a relevant factor for the first time in Officer Coote's email of 26 September 2013 referred to at [15] and secondly that Officer Coote gave the appellant insufficient opportunity to address the question of "commercial need".

42. We do not agree that "commercial need" was a new issue raised for the first time in Officer Coote's email of 26 September 2013. Rather, that email makes it clear that "commercial need" was the conclusion she needed the business plan to establish. Discussions on the form of the business plan had been ongoing since at least 16 July 2013 when Officer Coote had explained in a letter the points that the business plan needed to address. Moreover, on 9 August 2013, Officer Coote had expanded on the distinction between the business plan that she needed and the cash flow forecast that had been supplied. "Commercial need", therefore, was not a new issue: it was an aspect of discussions on the business plan which had been ongoing for over two months.

43. Neither do we agree that, in her email of 27 September 2013, Officer Coote was "pulling the drawbridge up", to adopt Ms Cann's expression. We have found at [34] that Officer Coote's email could be read as saying that she had reached a final conclusion, although we accept that Officer Coote did not intend that meaning. However, her letter of 25 October 2013 rejecting the appellant's application made it

clear that HMRC would consider further information and she gave unchallenged evidence that no such further information was provided.

44. Even if Officer Coote had intended her email of 27 September 2013 as a communication that her firm conclusion was to recommend to her manager that the application be rejected, we would not regard that as unreasonable. By then, the application had been in progress for over five months and Mrs Hussain had still not provided the kind of business plan that HMRC required in order to progress the application. Officer Coote had, on at least two occasions previously, explained what was needed. It would have been perfectly reasonable for Officer Coote to conclude that the process had to be brought to a conclusion with a rejection, but that HMRC would continue to consider any new information that Mrs Hussain supplied, if necessary following a review of Officer Coote's decision.

45. We therefore reject the appellant's second ground of appeal.

The appellant's third argument – whether appellant had in fact established "commercial need"

46. The appellant's third argument is that it had, in any event, demonstrated "commercial need". Given the Tribunal's limited jurisdiction in this appeal as set out at [25] above, we have approached this argument by considering whether HMRC either (a) ignored relevant evidence of commercial need that Mrs Hussain supplied or (b) reached an unreasonable conclusion that the appellant had not established commercial need.

47. There was no evidence before us that Officer Coote had ignored any relevant evidence. On the contrary, we are satisfied that she considered all the material that was before her. That was evident from the fact that she was able to point out deficiencies in the material supplied, for example in her letter of 16 July 2013 and her email of 9 August 2013.

48. The true issue, therefore, is whether Officer Coote unreasonably failed to be satisfied that the appellant had a commercial need to be registered under WOWGR. Ms Cann submitted that the commercial need was "obvious" and flowed directly from the fact that, if registered as an "owner" under WOWGR, the appellant could make bulk purchases of excise goods without needing to account for duty until those goods left a bonded warehouse. She referred us to statements in the appellant's Notice of Appeal that expanded on what the appellant considered to be the commercial benefit:

(1) The appellant would "be the party controlling the supply chain, not a third party".

(2) In consequence, the appellant's business would be less susceptible to price fluctuation and bottlenecks in the supply chain.

(3) The appellant would be in a position to take advantage of larger economies of scale which would result in greater profit margins.

(4) As a result of those economies of scale, the appellant would realise a significant cash flow advantage.

49. We do not consider those commercial benefits were "obvious". Before concluding that these benefits exist, it would be necessary to address a number of issues. For example, the cash flow benefit of deferring the point at which the appellant pays duty would need to be compared with the additional warehouse fees and transportation costs that the appellant would incur. In addition, the appellant would already be buying goods in bulk for its retail shops and some data would be needed to establish the extent to which greater economies of scale could be achieved by buying in greater bulk. Moreover, the extent of the cash flow benefit the appellant could achieve would depend in part on the appellant's arrangements with its bonded warehouse. If the operator of that warehouse required the appellant to deposit part of the duty payable on goods stored in that warehouse that would reduce the appellant's cash flow benefit.

50. Officer Coote raised the issues referred to at [49] with Mrs Hussain during their meeting on 6 June 2013. We consider that it was entirely reasonable for Officer Coote to wish to be satisfied on those points, and requiring the appellant to produce a business plan in support of its application was a sensible way of going about this. The cash flow forecasts that the appellant produced failed to address the points and accordingly, we consider it was reasonable for Officer Coote to conclude that she had not been satisfied that there was a "commercial need" for the registration under WOWGR. We therefore reject the appellant's third argument.

Conclusion

51. For completeness, we have also considered the specific factors set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 753 and conclude that the decisions of Officer Coote and Officer Paton were reasonable, contained no error of law, took into account no irrelevant considerations and took into account only relevant considerations (insofar as the appellant had provided information on them).

52. For all the reasons set out above, the appeal is dismissed.

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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 15 SEPTEMBER 2015