[2018] UKFTT 161 (TC)

TC06414

Appeal number: TC/2017/02156

EXCISE DUTY – Revocation of Warehousekeepers and Owners of Warehoused Goods Registration (WOWGR) - whether Appellant "fit and proper person" to hold WOWGR - reasonable due diligence - whether review officer correctly approached review - whether review officer's decision unreasonable

FIRST-TIER TRIBUNAL
TAX CHAMBER

RURKEE TRADING COMPANY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

RUTH WATTS DAVIES

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 16 and 17 January and 2 February 2018

Mr David Bedenham, counsel for the Appellant

Ms Natasha Barnes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, counsel for the Respondents

DECISION

Introduction

1. This appeal is against the decision of HMRC to revoke the Warehousekeepers and Owners of Warehoused Goods Registration ("WOWGR") of Rurkee Trading Company Limited. The Tribunal can only interfere with this decision if it is "unreasonable" in the sense that the decision maker took account of irrelevant factors, failed to take account of relevant factors or reached a decision that no reasonable officer of HMRC could have reached.

2. The Appellant's WOWGR enabled it to hold and deal in duty suspended excise goods, that is, alcohol on which excise duty has not yet been paid and to carry on its business as a wholesaler of such goods. Without the WOWGR, the Appellant is unable to carry on its business.

3. We had before us extensive bundles of documents and we heard witness evidence, on HMRC's behalf, from Miss Hanrahan who was one of the caseworkers on this matter, Mrs Humphrey who took over from Miss Hanrahan and was the original decision maker, Mrs Elliot, the review officer, whose decision is under appeal and Mr Campbell, who was not involved with the Appellant's case, but gave evidence about a large scale excise duty fraud which, it was alleged, had affected goods traded by the Appellant. It was expressly acknowledged that there was no suggestion that the Appellant had been involved in the fraud. We also heard evidence on the Appellant's behalf from Mr Satwinder Singh, the sole shareholder and director of Rurkee Trading Company Limited ("Rurkee").

Outline of the regulatory regime

4. The duty suspension arrangements are an EU wide regime which allows alcoholic liquors including beers, wines and spirits to be moved, duty-unpaid between authorised warehouses ("bonded warehouses" or "bonds") until released for consumption on the wholesale duty paid market. A person is only permitted to buy and sell duty-suspended alcohol if they have been approved by HMRC under the Warehousekeepers and Owners of Warehouse Goods Regulations 1999 ("the Regulations"). A person who has been so approved is known as a "Registered Owner" and the registration is known as a WOWGR.

5. The Customs and Excise Management Act 1979 ("CEMA") provides for regulations to be made enabling HMRC to approve and revoke registrations of Registered Owners. Sections 100G and 100H CEMA provide, so far as relevant, as follows:

> **"100G Registered excise dealers and shippers]**
> [(1) For the purpose of administering, collecting or protecting the revenues derived from duties of excise, the Commissioners may by regulations under this section (in this Act referred to as "registered excise dealers and shippers regulations")—

(a) confer or impose such powers, duties, privileges and liabilities as may be prescribed in the regulations upon any person who is or has been a registered excise dealer and shipper; and

(b) impose on persons other than registered excise dealers and shippers, or in respect of any goods of a class or description specified in the regulations, such requirements or restrictions as may by or under the regulations be prescribed with respect to registered excise dealers and shippers or any activities carried on by them.

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

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

(4) The Commissioners may approve and register a person under this section for such periods and subject to such conditions or restrictions as they may think fit or as they may by or under the regulations prescribe.

(5) The Commissioners may at any time for reasonable cause revoke or vary the terms of their approval or registration of any person under this section.

100H Registered excise dealers and shippers regulations]

[(1) Without prejudice to the generality of section 100G above, registered excise dealers and shippers regulations may, in particular, make provision—

(a) regulating the approval and registration of persons as registered excise dealers and shippers and the variation or revocation of any such approval or registration or of any condition or restriction to which such an approval or registration is subject;…"

6. Section 1(1) CEMA defines a "revenue trader" as *"…any person carrying on a trade or business subject to the customs and excise Acts or which consists of or includes…the buying, selling, importation, exportation or dealing in or handling of [goods of a description chargeable to excise duty]…"*

7. Section 100G(5) permits HMRC to revoke or vary an approval or registration only "for reasonable cause".

8. The regulations made under CEMA are the Regulations.

9. Regulation 5 provides for the registration of registered owners:

"5 Registered owners

(1) For the purposes of section 100G of the Act, the Commissioners may approve revenue traders who wish to deposit relevant goods that they own in an excise warehouse and register them as registered excise dealers and shippers in accordance with section 100G(2) of the Act.

(2) A revenue trader who has been so approved and registered shall be known as a registered owner."

10. Regulation 12 sets out the privileges of a registered owner which are, essentially, to hold goods in a bonded warehouse and buy goods so held.

"12 Privileges of a registered owner

(1) Subject to regulation 14 below, a registered owner shall be afforded the following privileges in respect of relevant goods.

(2) A registered owner may—

(a) hold relevant goods that he owns in an excise warehouse; and

(b) buy relevant goods that are held in an excise warehouse."

11. Regulation 18 sets out the requirements and conditions that apply to the privilege of registration. These include, at subsection (1):

> "…(1) The approval and registration of every registered owner shall be subject to the conditions and restrictions prescribed in a notice published by the Commissioners and not withdrawn by a further notice…"

12. The Notice which was published in accordance with Regulation 18(1) is Excise Notice 196 ("the Notice"). We had before us the version updated on 21 January 2016 which was the version in force at the time of the decision. The Notice has the force of law, although the legal requirements are supplemented by guidance on satisfying those requirements, also set out in the Notice. The focus in this case was paragraph 10 of the Notice which dealt with the due diligence condition which was introduced on 1 November 2014. The condition is as follows:

> "From 1 November 2014 it becomes a condition of your approval as an excise warehousekeeper, registered owner, duty representative or registered consignor that you must:
>
> • 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"

13. The Notice goes on to provide guidance on how the due diligence should be carried out and sets out a series of suggested checks summarised by the acronym "FITTED":

> "As a general rule 'FITTED' checks should normally focus on:
>
> • financial health of the company you intend trading with
> • identity of the business you intend trading with
> • terms of any contracts, payment and credit agreements
> • transport details of the movement of the goods involved whether or not you are directly involved in this
> • existence/provenance of goods - where goods are said to be duty paid you should normally seek sufficient detail to satisfy yourself of the status of the goods
> • The Deal, understanding the nature of the transaction itself, including:
>
> - how the cost of the goods is built up, for example, whether it includes appropriate taxes, transport etc
> - why is it being offered
> - whether it is too good to be true
> - how the deal compares to the market generally"

14. Paragraph 5.10 of the Notice sets out examples of risk indicators falling within each category. HMRC's criticisms of Rurkee focussed in particular on aspects of risk under "the deal" which include:

> **"The deal**
>
> • **customer demand for specific brands in other countries exceeds expected levels of consumption there**
>
> • The goods are to be moved in an unusual supply route that in itself would add significant logistic costs and bring into question the economics of that trade (unless duty was to be evaded)
>
> • **supplies are offered via unsolicited emails or flyers received out of the blue**
>
> • goods are offered at incredibly low prices which seem too good to be true
>
> • free gifts of similar or other excise goods not fully documented and in themselves would place a question over the deal as a whole
>
> • there are other incentives such as contingency discounts which overall make the deal sound too good to be true"

We have highlighted the specific factors which particularly concerned the officers dealing with Rurkee

15. Paragraph 10.4 sets out HMRC's oversight procedures and how they will deal with perceived insufficiency in a registered owner's due diligence.

> **"10.4 Review of due diligence procedures**
>
> As part of our enforcement and general audit programmes, HMRC will consider whether or not the steps you have taken to embed anti-fraud due diligence into your trading activity are sufficient and timely to address fraud risks in your supply chains. We will aim to establish whether you have objectively assessed the risks in your supply chain, and you must be able to demonstrate that you have put in place reasonable and proportionate checks and effective procedures to respond to fraud risks when they arise.
>
> If your due diligence procedures are considered insufficient to address fraud risks, we will carefully consider the facts of the case before taking further action, but where appropriate we will seek to support you to strengthen your procedures.
>
> In more serious cases such as a failure to consider the risks, undertake due diligence checks or respond to clear indications of fraud, we will apply appropriate and proportionate sanctions. For serious non compliance, such as ignoring warnings or knowingly entering into high risk transactions, we may revoke excise approvals and licences."

16. So the Notice makes clear that HMRC will monitor Registered Owners to make sure that they implement appropriate anti-fraud procedures and respond to risks and if the Registered Owner is found wanting they will where appropriate take staged action ranging from help and support, through sanctions, to the last resort of revoking excise approval.

17. The system for approving those privileged to deal in duty-suspended goods is stringent and the conditions and restrictions imposed on those who are approved are onerous. It is a requirement that those registered are "fit and proper persons"

to be involved in the excise trade (para 2 of the Notice, pursuant to the Regulations). The reason for all this is not hard to find. The duty-suspended goods trade is particularly vulnerable to fraud and the amount of money involved is significant. The duty on a single load of spirits would amount to £120,000-£140,000. The registration and due diligence requirements are part of HMRC's strategy to combat alcohol fraud, an "industry" which evades an estimated £1.2bn of excise duty a year.

18. The most prevalent types of fraud in recent years are "inward diversion" and "outward diversion". These frauds are carried out by organised criminals with the assistance of dishonest hauliers and others in the supply chain. Inward diversion involves the import of alcohol, duty-unpaid, from continental Europe for sale on the black market in the UK. Outward diversion involves duty suspended goods, supposedly destined for a bond in the EU, being diverted onto the black market before leaving the UK. Both types of fraud may involve multiple imports and exports. Clearly, it is a serious problem.

19. We heard from Mr Campbell about the stringent procedures and records which apply to the transport of duty suspended goods from a bond in the UK to a bond in another country in the EU in an effort to keep track of all movements of the goods and prevent fraud.

20. When the goods are released from a bond, the sending bond enters the details on an EU wide computer system called the "Excise Movement and Control System" or "EMCS". Entry on the EMCS generates a unique reference number, the "ARC" which is specific to the goods and the movement and which appears on the documents which travel with the goods. When the goods arrive at the receiving bond, the recipient must check that they have received the goods which were sent by examination of the documents and the physical goods. The quantity would also be checked. The receiving bond would then enter a "Report of Receipt" on the EMCS which records the ARC, the date of receipt, whether the goods are accepted and satisfactory, the consignee (the customer) and the place of delivery (the bond). The system depends on accurate entries by the bonds. HMRC and authorised bonds can access the system, but owners of goods cannot. So Rurkee would itself have no access to the EMCS to check on goods sent by it.

21. Under the EU mutual assistance scheme, HMRC routinely checks if duty suspended goods have arrived in, or left the UK, at the request of other EU customs authorities. HMRC also reviews UK bonds regularly, with high risk establishments receiving visits from dedicated officers twice a month.

22. HMRC's case, in brief, is that Rurkee became, unwittingly, caught up in a major excise fraud because of the inadequacy of its due diligence and, having failed to improve the due diligence following visits from HMRC, represented such a threat to the revenue that the revocation of its WOWGR was the appropriate response.

The appeal regime and the Tribunal's jurisdiction

23. The Finance Act 1994 ("FA94") sets out the the rights of persons affected by "relevant decisions". Under section 13A(2)(j) relevant decisions include those specified in schedule 5 FA94. Paragraph 2(1)(p) of that schedule includes *"(p) any decision for the purposes of section 100G (registered excise dealers and shippers) as to whether or not, and in which respects, any person is to be, or to continue to be, approved and registered or as to the conditions subject to which any person is approved and registered"*.

24. Section 15B of FA94 gives a person a right to request a review of a relevant decision by HMRC. Section 16 gives a right of appeal to the Tribunal. Section 16(8) provides that decisions within schedule 5, which includes the decision to revoke a WOWGR, is an "ancillary matter". Section 16(4) sets out the Tribunal's jurisdiction in relation to an appeal against a decision on an ancillary matter:

> "(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."

25. So the Tribunal's jurisdiction in these matters is a supervisory one. The Tribunal can only interfere with HMRC's decision if it is "unreasonable" in the judicial review sense; that is to say, the decision maker failed to take account of relevant matters, took into account irrelevant matters or reached a decision which no reasonable officer of HMRC could have reached.

26. In the case of *Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ 267, the Court of Appeal considered the section 16(4) test in the context of the provisions relating to the restoration of vehicles which have been forfeited as a result of their use in a smuggling attempt. Lord Phillips MR said:

> "…the principal issue before the tribunal was whether the commissioner's decision not to restore Mr Lindsay's car to him was one that they "could not reasonably have arrived at", within the meaning of those words in section 16(4) of the 1994 Act. Since the coming into force of the Human Rights Act 1998 , there can be no doubt that if the commissioners are to arrive reasonably at a decision, their decision must comply with the Convention for the Protection of Human Rights and Fundamental Freedoms , as scheduled to the Human Rights Act 1998. Quite apart from this, the commissioners

> will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters: see Customs and Excise Comrs v J H Corbitt (Numismatists) Ltd [1981] AC 22 , 60 per Lord Lane. It was argued before the tribunal that the commissioner's decision fell at both hurdles. It violated the Convention in that it involved depriving Mr Lindsay of his rights under article 1 of the First Protocol to the Convention to the peaceful enjoyment of his possessions in circumstances which were disproportionately harsh…
>
> …the deprivation can be justified if it is "to secure the payment of taxes or other contributions or penalties". The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued: Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35 , 50–51, para 61 and Air Canada v United Kingdom 20 EHRR 150 , as cited above…
>
> 54 There are then references to Luxembourg authority. The judgment continues: "The administrative measures or penalties must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty …"

27. The *Lindsay* case emphasises that a decision of the Commissioners will only be considered reasonable if it satisfies the principle of proportionality. This is reflected in paragraph 10.4 of the Notice which provides for a staged response by HMRC commensurate with the behaviour of the Registered Owner.

28. Before going on to consider the facts of this case, we must consider the correct approach to be adopted by the Tribunal as a fact-finding body as laid down by the Court of Appeal in *Gora v Customs and Excise Commissioners* [2003] EWCA Civ 255. In that case, it was held that this Tribunal, as a fact-finding body, is required to determine the facts itself, and in the light of the facts as found (whether or not such facts were known to the decision maker), determine whether the decision in question was reasonable. *Gora* related to to a decision to refuse restoration of a vehicle used in smuggling. In *Safe Cellars v HMRC* [2017] UKFTT 079 (TC) HMRC sought to argue that the *Gora* approach was restricted to restoration appeals and did not apply to decisions concerning the withdrawal of a WOWGR. The Tribunal rejected that argument, saying:

> "We conclude that our obligation is to find the facts on the evidence presented to us and to determine, in the light of those facts, whether the relevant decision was reasonable. That, however, does not require us to assess the review decision in the light of events which occurred after it was made unless those events shed light on matters which were relevant to the decision at the time it was taken."

The trading history of Mr Singh and Rurkee Trading Company Limited

29. Mr Singh, the sole shareholder and director of Rukee has been in the alcohol trade since 1997. His first business was an off-licence in Ilford, which he ran from 1997 until he sold it in 2008. Ninety percent of the sales were of alcohol.

30. Rurkee was incorporated by Mr Singh in 2005 and has always traded in wholesale alcoholic beverages. Rurkee obtained its WOWGR registration on 21 December 2005 and has held it ever since. The company held accounts with a number of bonded warehouses over the years, including Safe Cellars Ltd, Seabrooks Warehousing Ltd and others. It has had a number of customers over the years.

31. Initially, the Appellant dealt in an Indian spirit called Desi. The spirit was produced in Germany by a friend of Mr Singh's who lived there. Rurkee imported the spirit, duty suspended, to a bonded warehouse (Edwards Minerals Ltd) then took it out of bond, paid the duty and distributed it all over Europe, mainly to the Indian market. In a few cases it was sold on a duty suspended basis. The customers were mainly cash and carry outlets. Initially, this business and the off licence ran in tandem.

32. In 2011, Mr Singh fell out with his friend and the trade in Desi ceased. From 2012 the Appellant dealt in beer imported in duty suspense from Belgium, Germany and Italy and sold, in duty suspense, in England. The Appellant found its new customer through contacts Mr Singh made via the cash and carry outlets whom he had supplied with Desi. Rurkee continued in the beer trade until 2015, when its sole customer died. Rurkee had a quantity of stock on its hands which it managed to clear by the end of July 2015, but it appeared it had no further customers. Mr Singh asserted that he continued to trade throughout and pointed to the fact that his September 2015 VAT return showed £28,000 of turnover. This would have covered the stock clearance period and is not evidence of trade after July 2015.

33. On 24 November 2015, a company called Delvistin Ltd (Delvistin) sent an email to Rurkee, referring to an earlier telephone conversation, and stating that Delvistin was very interested in the goods that Rurkee was able to supply under bond. Mr Singh began to conduct due diligence on Delvistin. He obtained confirmation of Delvistin's VAT registration and the VAT registration of at least one of the bonded warehouses at the end of November and enquired of Delvistin where its customers were located. We do not know the date of the enquiry, but Delvistin responded on 9 December declining to give customer names on commercial grounds, but saying it supplied customers throughout Europe. Delvistin provided a number of documents on 10 December relating to the identity of the company and its director. Mr Singh also commissioned a due diligence report on Delvistin from a third party. We will return to the due diligence later.

34. HMRC wrote to Rurkee on 11 December 2015, following a meeting on 8 December, stating that, as Rurkee had not traded since July 2015, they were considering deregistering Rurkee for VAT purposes and withdrawing its WOWGR. In each case it was agreed that HMRC would reconsider the matter in February, when they would require proof of trading or, failing that, documents showing an intention to trade. Essentially, Rurkee was given three months to find new customers. Mr Singh did not provide any evidence to show he was trading

in the period July to December 2015 and we find that Rurkee was not trading in this period.

35. Despite Mr Singh's assertions to the contrary, we accept Ms Barnes' suggestion that Mr Singh must have been under some pressure during that period to find new customers if his business was to survive. Whilst Mr Singh was doubtless very pleased when Delvistin approached him, we note that the approach and the commencement of the due diligence was before the meeting with HMRC and before he would have received the letter with the threat of de-registration.

36. Rurkee began to trade with Delvistin in January 2016. Rurkee's supplier was a company called Danco International General Trading LLC (Danco) a company based in Dubai. As Danco did not have a WOWGR, it needed to have a "duty representative" in the UK in order that it could store and trade in duty suspended alcohol in the UK. Seabrook Warehousing Ltd, a bonded warehouse in Rainham, Essex (Seabrooks), confirmed that it was Danco's duty representative for stock delivered to its warehouse. The person at Danco with whom Mr Singh dealt was a Mr Osman Iqbal, whom Mr Singh knew from the time when Mr Iqbal worked for Global Foods Ltd, a large, international drinks company. Mr Iqbal sent Mr Singh various due diligence documents on 8 December 2015, following an earlier request. Danco supplied Rurkee with two brands of spirits: High Commissioner Whisky and Glens Vodka. The spirits were supplied in both 1litre bottles and 20 cl miniatures.

37. When Delvistin ordered some whisky and vodka, Rukee bought it from Danco's account at Seabrooks and transported it to its own account at Safe Cellars, a bonded warehouse in Oldham. Once Delvistin had paid for the goods, they would be transported to Delvistin's accounts at a bonded warehouse in Sicily, Italy. Initially the goods were shipped to De Meersman warehouse. All these movements were in duty suspension. Mr Singh chose to send the goods from Seabrooks to Safe Cellars as he did not like Seabrooks because they had damaged some of his stock and Safe Cellars were cheaper. Delvistin paid for the goods before they were despatched from Safe Cellars. At the hearing, Mr Singh said that title then passed to the customer. The customer i.e. Delvistin paid for the transport costs, bur the Appellant arranged the transport via Safe Cellars. It seems there was no written contract between Rurkee and Delvistin. Mr Singh explained that the haulier and/or the bond would insure the load in transit. As title passed to the customer on payment, the customer would deal with any disputes with the bond e.g. as to whether the goods had arrived. We add hear that in his meetings with HMRC, Mr Singh had stated that title did not pass until the goods arrived at Delvistin's bond in Sicily. The pattern of payment for the goods and transport is perhaps more consistent with title passing on payment, but nothing turns on this.

38. Around 30/31 May 2016 Delvistin contacted Mr Singh to say they wanted their next consignment to be delivered to the La Cave bond, also in Sicily, rather than De Meersman as it was cheaper. Mr Singh recalled that the request was by email but we did not have a copy of it. The transport costs to Le Cave were indeed cheaper. The goods were despatched on 1 June.

39. On 31 May 2016, HMRC sent a letter to Rurkee (referred to below as the 31 May letter or HMRC's letter) informing the Appellant that a "Commissioner's Direction" had been issued in relation to goods owned by it and warehoused at Safe Cellars. Essentially, Rurkee was prohibited from despatching goods to De Meersman unless UK excise duty had been paid. The Commissioners' Direction was to remain in force for 30 days pending investigation and HMRC was to inform the Appellant of the outcome.

40. The letter stated that Glens Vodka destined for De Meersman had been seized at an "unauthorised location in the UK" and that the seized goods related to two ARC numbers which related to duty suspended stock removed from Rurkee's account at Safe Cellars on 15 April 2016 and bound for De Meersman. Mr Singh received this letter on 3 June 2016, after he had despatched the last consignment for Delvistin to Le Cave. Although he said he was concerned when he got the letter, he did not think the change of bond was particularly odd. La Cave was cheaper and he had checked that all of Safe Cellars, De Meersman and La Cave were authorised by the relevant authorities to deal in duty suspended goods on the Shared Exchange of Excise Data ("SEED") system. The SEED system is accessible by owners and Mr Singh routinely checked that all the relevant bonds were registered before despatching a load.

41. De Meersman's authorisation was revoked on 8 July 2016. HMRC learned, on the same day that Le Cave was no longer authorised by the Italian authorities, but the SEED system was not updated to reflect this until later.

42. Rurkee despatched a further consignment to Delvistin on 11 June 2016. The last transaction was on 5 July 2016. Mr Singh then advised Delvistin that he was reviewing the due diligence on them and a revised due diligence report from a third party was received on 12 July. Mr Singh was satisfied with the report and on 14 July sent an email to Delvistin asking if they required any more stock. No response was received.

The context of the enquiry

43. Excise fraud is big business, carried out by organised criminals and costing the taxpayer hundreds of millions of pounds a year in evaded revenue.

44. On 14 May 2016 a large quantity of whisky, vodka and other alcoholic beverages were seized at an "unauthorised location" near Slough-a so-called "slaughter site" where illicit alcohol was taken to be divided up and sold onto the black market. Some of the Vodka was alleged to be derived from Rurkee's account at Safe Cellars and was supposed to be on its way to De Meersman. The link, which we discuss further below, was that pallet labels and a goods inward note, relating to Rurkee's load was found at the site.This resulted in the Commissioners' Direction of 31 May 2016 prohibiting the despatch of alcohol to De Meersman unless excise duty had been paid.

45. On 4 July 2016, Mr Campbell was made aware that the Italian Tax Authority was investigating a number of Italian bonds, including De Meersman and Le Cave as it was suspected that these warehouses had been set up and registered solely to facilitate excise fraud. De Meersman's registration was revoked on 8 July 2016 and that of Le Cave on 9 July.

46. On 23 September 2016 Mr Campbell received further information regarding significant irregularities in movements of duty suspended alcohol between bonds in the UK and bonds in Italy. This was a report by the Italian prosecuting magistrate in Agrigento Sicily. He had headed the investigation which uncovered a large scale excise duty fraud involving the Italian warehouses making fictitious entries on the EMCS that goods had been received when the Italian authorities confirmed the goods had never been received. The Report was, of course, in Italian and HMRC had it translated. The translation was inadequate to be used in evidence, so a further translation was obtained. It seems that the Appellant's advisers did not receive a copy of the report until a few weeks before the hearing.

47. The report ran to some 439 pages and included a list of 174 ARCs relating to fictitious deliveries to De Meersman which had been fraudulently entered on the EMCS. The list did not contain the two ARC numbers relating to the goods inward note and Pallet labels found at the slaughter site. This was not surprising as the list went up to 15 April 2016 and Rurkee's load was reported as arriving on 22 April 2016.

48. In oral evidence of both Mr Campbell and Mrs Humphrey initially said that the Italian information confirmed that Rurkee's goods had not arrived, indeed that no goods sent from UK bonds to De Meersman had arrived. They subsequently admitted they were wrong. Some goods had in fact been received and the report did not, and could not, have proved that Rukee's goods were not amongst them.

49. Safe Cellars was also involved in the fraud. HMRC revoked Safe Cellars' WOWGR on 23 September 2015, before Rurkee started trading with Delvistin. However, Safe Cellars instituted proceedings in the High Court as a result of which the revocation was suspended pending the outcome of Safe Cellars' appeal. That appeal was dismissed in January 2017. Until the disposal of the appeal Safe Cellars remained registered and Rurkee could not have known about the suspension of the approval. The SEED checks they conducted would have indicated that Safe Cellars was an approved bond and there was nothing to indicate that Rurkee should not use them.

50. So, looking at the time line:

- At the time of the seizure HMRC did not know about the large scale fraud although it triggered concerns about De Meersman

- De Meersman's and Le Cave's authorisations were revoked a few days *after* Rukee's final deal with Delvistin. So the checks that Rurkee carried out before despatch would have shown that all was in order.

- The details of the fraud were not received until September 2016, two months after Rurkee had ceased to trade with Delvistin.

The history of HMRC's enquiry leading to the revocation of the WOWGR

Officer Hanrahan's visit on 25 May 2016

51. The initial contact by HMRC was a visit to Rurkee's premises by Officer Hanrahan on 25 May 2016. Officer Hanrahan was asked to visit Rurkee in April. She was aware that there was some issue with loads sent by Rurkee ie the seizure, but she did not know the details and did not raise it at the meeting. She had taken over the case from another officer who had obtained Rurkee's due diligence. She had reviewed the due diligence before the meeting and concluded that the due diligence was inadequate. Although the Appellant had obtained a lot of information including a report by a third party, Ms Hanrahan was not satisfied that Mr Singh had reviewed the information and considered the risks.; carrying out a risk assessment being a specific requirement of the Notice 196 due diligence condition. It seems she did not specifically advise Mr Singh about the need for a risk analysis at the meeting, although she intended to afterwards. She did raise concerns about the viability of the transactions and movements and suggested that Mr Singh should ask questions about which countries the goods had come from and gone to. She was also concerned about the route taken as the goods moved from the south of England to the north before going to Italy. She did not think it made commercial sense, but she did not ask Mr Singh about it. In fact, this route was Mr Singh's choice, not that of the customer. The reason was that it was cheaper to go via Safe Cellars and he preferred the service to that of Seabrooks.

52. Ms Hanrahan expressed concern that Mr Singh did not check that a movement guarantee was in place. A movement guarantee is an insurance against any liability to pay the duty that might arise on a movement. In fact it is a legal requirement that the bond puts a movement guarantee in place, so Mr Singh assumed that Safe Cellars had done so.

53. Ms Hanrahan acknowledged that Mr Singh had engaged with her questions during the visit. She did not recall any issue with Mr Singh's ability to speak and understand English. It seemed to us that although Mr Singh command of English was good it was far from perfect and there was scope for misunderstandings. Ms Barnes made much of the fact that the meeting notes of Ms Hanrahan's visit and the note of two other visits recorded that Mr Singh said he did not know how Delvistin had heard about the company. Mr Singh, in his witness statement and in oral evidence said that he was well known in the industry and Delvistin had come to him by word of mouth. This was also recorded in the due diligence report of 11 January 2016 where it said "How was the business introduced?: Recommendation/word of mouth". Officer Hanrahan had seen this due diligence before the meeting. Mr Singh did not ask Delvistin who had referred them to Rurkee and this might have given rise to his response to Ms Hanrahan that he did not know how the company had heard about Rurkee.

54. There were other aspects of the meeting notes which were misleading. When discussing Danco, the notes record *"SS [Mr Singh] stated that the director's name was Osman "something". SS later remembered that Danco had two directors but he did not know the other one"*. And *"Delvistin's main contact was "Dave" who contacted SS in January 2016 to order spirits. SS did not know how Dave had heard about the company and did not ask. Delvistin are Cypriot based, do not have a UK base and SS could not remember the director's full name."*. The clear implication of these comments is that Mr Singh was dealing with a "bloke called Dave" and a "bloke called Osman" and he did not know anything about his customer. In fact, all the identity information was in the due diligence report: copy passports, proofs of address etc. The director of Delvistin was called Mr Yiannakis Economides. It was perhaps not surprising that Mr Singh could not recall this off the top of his head. Ms Hanrahan had reviewed the due diligence and would have known that the identity information had been obtained.

55. During her preparation for the meeting Officer Hanrahan had considered giving Rurkee a warning and further advice during and following the visit. Her meeting notes indicate that she raised her concerns with Mr Singh and she explained that his due diligence was inadequate. In particular she referred to the lack of information about where his customer was selling the goods and the questionable transport movements. She specifically referred Mr Singh to Notice 196 section 10. She said Mr Singh must revisit his due diligence and warned him that if he did not meet the criteria, the WOWGR could be revoked. She told Mr Singh that she was giving him a verbal warning and would be confirming this in writing, also that she would email "detailing the risks".

56. The day after the visit Officer Hanrahan become ill and was indisposed for six weeks. She was unable to follow up on the meeting and did not write to Mr Singh with the intended warning and advice. Nor was she able to provide a hand over note for Officer Humphrey who took over the case.

Officer Humphrey's visits

57. Before the first meeting, on 7 June 2016, Officer Humphrey was informed of the seizure of two loads of alcohol connected with the Appellant at a location in the UK. The seizure information notice, dated 14 May 2016, scheduled the alcohol which had been seized. Included in the total of 54,514.35 litres of alcohol were 13,380.8 litres of "vodka 37.5%". There was no mention of brands or sizes.

58. Officer Humphries had seen the 31 May 2016 letter but had no other information. At some later date it seems she saw the Goods Inward Note and a series of pallet labels which had been found at the slaughter site "with" the goods which had been seized. Mr Campbell had explained that the Goods Inward note showed the arrival of goods belonging to Rurkee at Safe Cellars' premises. There were 26 pallets, each consisting of 42 cases. The goods were 20cl miniatures of Glens Vodka. The pallet labels, which would normally have been stuck onto the pallets for stock control purposes, matched the Goods Inward note. A colleague of Mr Campbell had made enquiries at Safe Cellars and had linked the information on

the Goods Inward note to the two ARCs mentioned in the 31 May letter. There was no evidence as to exactly where the documents had been found, other than that they were at the "unauthorised location", a farm near Slough from which the goods had been seized.

59. The Seizure Notice did not identify the brand or bottle size of the vodka which had been seized. It only stated that it was vodka and its strength In cross-examination, Mrs Humphrey said that she did not check that the seized vodka was in fact the same brand and bottle size as Rurkee's goods, but, having seen the pallet labels and the letter, assumed that others had checked that the goods seized were, in fact, part of the Rurkee consignment. Her task was to go and speak to Mr Singh about the seizure.

60. At the time of the first meeting, Officer Humphrey had not read Ms Hanrahan's meeting notes and was unaware that she had been intending to write to Mr Singh with guidance to improve his due diligence.

61. Officer Humphrey raised a number of concerns at the meeting.

62. In general, Officer Humphrey did not consider that Mr Singh had taken a proactive approach to the receipt of the 31 May letter and had not appeared to be concerned about the seizure. Her own notes indicate that when asked how he felt about the irregular movements that it was "not good". Mr Singh, in his evidence, said that he had been concerned.

63. Mrs Humphrey's meeting notes record that so far as Mr Singh was concerned, the goods had arrived in Italy and that he did not know anything about the circumstances of the seizure. In other words, Mr Singh wanted to know more about how the seized goods had been linked to him, when he believed the goods to have arrived. Mrs Humphrey was unable to give him that information. She had asked him what enquires he had made of his customer "when he found out the goods he had supplied had been found in the UK". The meeting notes record that he had emailed Safe Cellars a copy of HMRC's letter and had had an acknowledgement but had heard nothing further. He had not contacted Delvistin as he knew the goods had been delivered from the EMCS and Delvistin had not complained that they had not received the goods. The picture painted by the notes and by Mrs Humphrey's evidence is that Mr Singh ignored the letter and did very little in response. Mrs Humphrey had, however, seen the correspondence mentioned below.

64. On 5 June 2016 Mr Singh sent an email to Safe Cellars which referred to a previous (presumably telephone) discussion, enclosing a copy of the HMRC letter. This was chased by email on 19 June and again on 21 June. Safe Cellars responded on 22 June confirming that the loads had been despatched in accordance with Rurkee's despatch note and was accepted by De Meersman on the EMCS system. The email referred to the screen shots previously sent. We heard from Mr Singh that it was routine for him to check the SEED registration of the bonds before despatching any goods-which showed that they were

authorised to receive duty suspended goods-and that Safe Cellars routinely sent him screen shots from the EMCS showing receipt by the receiving bond. It seems that the SEED checks are often carried out by the bond, but Mr Singh did this himself. Rurkee did not have access to the EMCS, but he obtained confirmation from the bond, which did have access, that the goods had been received.

65. On 19 June 2016, Mr Singh emailed Delvistin, attaching a copy of the 31 May letter, and saying that HMRC had advised that the loads of Glens Vodka represented by the ARCs had been seized in the UK, whereas he, Mr Singh, believed they had arrived at De Meersman. He asked for confirmation of arrival and also for some proof, for example, bond charges for the loads. Delvistin replied on 21 June confirming receipt by De Meersman on 22 April and stating it had asked De Meersman for any other documents that could be forwarded on. The email also stated that the goods had been sold on immediately on receipt, but Delvistin could not give customer details in order to protect its trade. The implication is that Delvistin received the goods and it may have been its customers who were responsible for the illicit movements. Considering the timing, it was a plausible statement. The goods were sent on 15 April and it takes seven days to arrive in Italy. They were received on 22 April and immediately sold on. The goods were not seized at the unauthorised location until the middle of May, several weeks later. It was therefore possible that there might have been an inward diversion fraud, rather than an outward diversion fraud, as HMRC assumed.

66. It may well have been that Mr Singh's more assiduous pursuit of information was a result of Office Humphrey's visit, but this illustrates that he did, contrary to HMRC's assertions, respond to their concerns to some extent.

67. Office Humphrey did not consider that a responsible trader would have continued to believe that the goods had arrived when HMRC said they had not, and Mr Singh did not appear to have contemplated the possibility of fraud or that organised criminals might have created a convincing, but fictitious, paper trail to cover up the fraud.

68. So far as Mr Singh was concerned, he had evidence that the loads had arrived in Italy: the bonds involved were all properly authorised, he had evidence from the computer system that his loads had arrived, his customer had confirmed that they had arrived and HMRC had not provided details linking his goods to the goods seized especially in the light of the substantial time lag between the date the goods were sent and apparently received and the seizure. Despite HMRC's explanation that there was *some* fraud going on and it could involve false entries on the computer systems, Mr Singh refused to accept the possibility that his goods had been involved.

69. When asked what Mr Singh should have done in the face of his customer's assertions that the goods had been received, Mrs Humphrey said he should have "robustly challenged" Delvistin. She also told Mr Singh that at the 17 June meeting, but gave no guidance on what exactly he was meant to do. On being

asked this at the hearing, it seemed to amount to little more than asking the question again.

70. Officer Humphrey raised some specific concerns about the due diligence on Delvistin at the June meeting.

71. First there was the question of how he first came to trade with Delvistin. As we have seen, the initial approach was by email "out of the blue". Mr Singh did not ask Delviston how they came to approach him, but assumed they must have been told about him as he is well known in the alcohol business. We also heard in oral evidence that, when he was selling Desi, he had widely distributed flyers advertising it which had his email address on.

72. She had also enquired how Mr Singh knew that there was a market for High Commissioner Whisky and Glens Vodka. He responded that his customer told him that there was a demand. He had not done any independent research. At the hearing he remarked that there was always a market for cheap alcohol. When Officer Humphrey was asked what he should have done, she suggested that he should have done some research on the internet. She did not suggest this to him at the meeting.

73. At the end of the June Meeting Mr Singh said that he would review his due diligence and if he was not satisfied with it, he would cease trading with Delvistin.

74. The second, follow up, meeting was held on 17 August 2016.

75. Mrs Humphrey asked Mr Singh what he had done about Delvistin and was shown the email correspondence mentioned in paragraph 65 above. She reiterated that the goods had never arrived in Italy because they had been seized. Mr Singh continued to believe, on the evidence he had that the goods had arrived. At the time of the meeting, Mrs Humphrey believed that a report given to HMRC by the Italian authorities confirmed that *no* duty suspended goods sent to De Meersman and Le Cave had ever arrived. In fact, the report indicated that there had been many fictitious movements, but that loads had been properly received. Mrs Humphrey accepted at the hearing that she had been mistaken in asserting there was *proof* that Rurkee's goods never arrived in Italy.

76. Mr Singh mentioned that he had been reviewing his due diligence. He had received an updated due diligence report on Delvistin from the Due Diligence Exchange Limited on 12 July 2016. He had despatched a further load to Delvistin on 5 July 2016, before he had carried out the updated due diligence, saying that there is a lead in time with deals and he had not been able to get out of it. This load was supposed to be delivered to Le Cave, but Delvistin asked Rurkee to send it instead to another bond because of "technical issues" at Le Cave. Mr Singh insisted on obtaining details of the substitute bond included its SEED registration, VAT details and address before agreeing to this. He also asked Safe Cellars to arrange for the haulier, Top Logistics, to take photos of the goods being unloaded as further evidence of arrival. There was an email chain showing that this was

done and copies of the EMCS screen showing the delivery of the goods. Officer Humphrey had suggested in her evidence that obtaining photos was the sort of additional due diligence that a trader could undertake, although it was acknowledged that photos could be taken anywhere. She was unaware that Mr Singh had asked for photos to be taken and obtained them. She also said in evidence that she was unaware of the revised due diligence report dated 12 July. However, her own meeting notes expressly refer to the revised due diligence pack stating Mr Singh had confirmed it was prepared by the Due Diligence Exchange Limited and that Mr Singh's informal query whether Delvistin wanted any more stock was after receipt of the revised due diligence pack. Mr Singh indicated that Mrs Humphrey had not asked for it. He said that he put the report on the table and invited her to look at it but she refused to do so. He offered to post or email her a copy and she said if she needed to see it she would let him know. We find that Officer Humphrey was aware that Mr Singh had carried out further due diligence but had not reviewed it and had not taken it into account when she made her decision.

77. Again, Officer Humphrey raised some specific issues on due diligence- presumably in relation to the original pack. She again discussed the concerns about Delvistin's initial email contact and the fact Mr Singh had taken his customer's word for it that there was a demand for the goods they had ordered.

78. In addition, she pointed out that the pack said that there was a website, but she had been unable to find one. Mr Singh said he had asked the director of Delvistin about this and been told it was not working. Not, perhaps, a very persuasive answer, but Mr Singh had asked the question.

79. Office Humphrey also queried why the goods were sent from Seabrooks in the south to Safe Cellars in the north and then despatched to Italy. At the hearing, she said that any additional movement increased the risk of diversion and this was an "unnecessary movement". She initially said that Mr Singh had given no reason for the movement but agreed she had been mistaken when it was pointed out her meeting notes showed that it was Mr Singh who had chosen to send the goods to Safe Cellars (not Delvistin) because he did not like using Seabrooks as they had previously damaged some of his goods when he had been dealing in beer. In addition, Safe Cellars was significantly cheaper, even taking account of the additional transport costs.

80. There was a third meeting, with Mr Singh and his advisors, on 29 November 2016. The meeting had been cancelled twice before owing to illness or unavailability of the advisor. This largely covered the same ground as the other meetings: essentially, the initial contact had been suspicious and Mr Singh had not done enough. He believed that, on the evidence he had, his goods had been delivered, despite what HMRC said. Mr Singh was considered to be an ongoing risk to the excise.

The "minded to revoke letter" and revocation

81. Before the final meeting, Officer Humphrey had sent Rurkee a "minded to revoke" letter, that is, a letter stating HMRC is intending to revoke the company's WOWGR and giving it the opportunity to make representations. The letter stated "The Commissioners are minded to conclude that you are not a fit and proper person to hold a registration because the manner in which you have conducted your duty suspended business *over a very significant period of time* has exposed the Revenue to an unacceptable risk of loss through fraud" (our emphasis). It was admitted that this part of the letter, and in particular the reference to the risk being "over a very significant period of time" was a "cut and paste" exercise. In the present case, Rurkee had only dealt with Delvistin between January and August and the period after HMRC had raised their concerns in the 31 May letter was only a couple of months, clearly not a very significant period of time. We infer from this template that normally, where HMRC are minded to revoke a trader's WOWGR, the non-compliance *will* have been of a significant duration.

82. The letter then set out Officer Humphrey's concerns:

- The Italian authorities had confirmed that goods sent to De Meersman and Le Cave did not arrive. As we have seen, that was not entirely true; some loads were duly delivered.

- Goods from his account at Safe Cellars bound for De Meersman had been seized at an unauthorised location in the UK.

- Ms Hanrahan had identified deficiencies in his due diligence. She had addressed these in the June meeting. In particular, he had not applied the "FITTED" criteria and had failed to address risks in the supply chain, the initial contact with Delvistin came "out of the blue" and he had failed to ascertain independently that there was a demand for High Commissioner Whisky and Glens Vodka in Italy.

- The action taken following the 31 May letter as discussed at the June meeting. The letter stated that he had sent Safe Cellars an email but had not chased it up. (This was incorrect.) He believed his goods had arrived, so the seized goods could not be his and he had not carried out additional risk assessments.

- Additional concerns discussed at the August meeting were the supply route, for which "you failed to come up with a satisfactory explanation", his continued belief that the goods had arrived in Italy and the fact that he had contacted Delvistin to offer them more stock, though they had not responded.

83. The letter concluded *"…you are an ongoing risk to the department in dealing in duty suspended goods. You have not demonstrated a proactive or positive approach to dealing with the issues raised. Your due diligence in respect of your only customer was inadequate and you have failed to deal with concerns raised by HMRC officers. You appear to have every intention to continue to do business*

with your only customer, Delvistin Ltd, in spite of all the issues and concerns raised by HMRC officers. In light of the above, the Commissioners are minded to revoke your registration…".

84. Rurkee's WOWGR was revoked by a letter dated 13 December 2016 which gave as the grounds that Rurkee:

- was no longer considered to be "fit and proper"
- Was considered to be an ongoing risk; and
- Had failed to address HMRC's concerns and its due diligence was inadequate.

85. In each case, it referred to the minded to revoke letter for the detail which we have set out above.

86. It was put to Officer Humphrey that the revocation of the WOWGR was a disproportionate response to the Appellant's failings. PN 196 section 10 sets out a staged response to inadequate due diligence: help and guidance, the imposition of conditions in more serious cases and revocation only in situations where there had been "serious non-compliance".

87. There was evidence that Ms Hanrahan had intended to offer guidance and help on improving due diligence, but owing to her sudden indisposition, this had never been provided. Mrs Humphrey had raised concerns but had not offered any practical suggestion as to how they could be addressed. When asked to explain what Mr Singh should have done to satisfy his due diligence obligation, in relation to the initial contact and market concerns, she was somewhat vague in identifying action which would have satisfied her. Further, given Mr Singh's perceived lack of engagement and concern about the situation she did not think that he would engage with any attempts to help him improve his due diligence.

88. Nor did Mrs Humphrey consider that conditions would be appropriate in this case, such as a condition that Rurkee could only trade through specified bonds or with specified customers. He had become involved with an illicit supply chain and she considered that he had ignored warnings and intended to continue to trade with Delvistin and so was an ongoing risk to the revenue. She did not feel that any conditions could be imposed which would satisfy her that it would not happen again.

The review

89. On 5 January 2017 Mr Singh's advisors asked for a statutory review of Officer Humphrey's decision to revoke the WOWGR. They did not provide any grounds for review or additional information.

90. The review was conducted by Officer Elliott. She issued her decision on 22 February 2017. The introduction to the Review Letter stated *"Having considered*

all the information presented to me, I have concluded that the decision in dispute is reasonable, legally correct and that it should therefore be upheld." The Review Conclusion was "*...I agree that there was reasonable cause for the revocation of Rurkee Trading Company Ltd's approval. I believe the decision [of Officer Humphrey] was legally correct and should be upheld*".

91. We pause here to note that it is this decision, the decision of Officer Elliott, which is the subject of the present appeal and that our task is not to determine what decision we would have reached, but to consider whether Officer Elliott's decision was flawed in the sense referred to above.

92. The role of the review officer was set out in the *Safe Cellars* case, where the Tribunal said:

> *"In our opinion, when the statute uses "review" it means looking again at the decision rather than examining the decision making process.* ***It requires a fresh decision to be taken*** *rather than a decision as to whether or not the initial decision was reasonable."* (Our emphasis).

93. In her witness statement, Officer Elliott set out the information she had considered in her review and she elaborated on this in oral evidence.

94. *The information from the Italian Authorities:* Officer Elliott had considered only the Request for Mutual Assistance document from the Italian authorities which had said that the bond was fictitious. She had not read or considered the full report. Mrs Elliott was under the same impression at the other officers that *no* consignments destined for De Meersman arrived whereas a reading of the full report would have made it apparent that this was not the case. The Italian report did not "prove" that Rurkee's consignments had not arrived but the review letter states "It is clear your goods did not reach their intended destination".

95. *The seizure of alcohol "connected to the Appellant" at the slaughter site*: The connection was regarded as established by the presence of the pallet labels and goods inward note found at the site, although neither Officer Humphrey nor Officer Elliott had checked that the vodka actually seized was 20cl bottles of Glens Vodka. The real issue is, however, not whether the Appellant's vodka was seized, but his response to the possibility that it, at the very least, might have been.

96. *All the documents and items considered by Officer Humphrey when making her decision*: Mrs Humphrey had sent Mrs Elliott a "decision template" and background information and Mrs Elliott then has access to documents considered which are "on the system". It was apparent that not all of the documents were on the system. In particular, the Italian report and the Due Diligence reports were not on the system. Mrs Elliot did not review the initial due diligence herself. As we have seen, although Mr Singh offered the revised due diligence pack to Mrs Humphrey, she did not take it and had not reviewed it, so it was not available to Mrs Elliott and she did not review it either. It appears she was unaware of its

existence although it was mentioned in the meeting notes. In general, Mrs Elliott relied largely on the visit reports by the various officers and the information provided by them. Officer Hanrahan for example, had reported that Mr Singh had not completed the comments section in the Due Diligence pack.

97. *The fact that the Appellant continued to trade with Delviston having been warned by HMRC about problems in the supply chain.*

98. *The due diligence undertaken by the Appellant particularly around the supply of Glens Vodka and High Commissioner Whisky to Sicily via Oldham and the way in which contact was made by Delvistin*. So this is the initial contact, the demand for those brands and the route used via Safe Cellars.

99. *The guidance issued by HMRC as well as Excise Notice 196.* The review letter focussed on the "deal" part of the FITTED criteria as Mrs Elliott considered this most pertinent and in particular, the issues of customer demand and the unusual supply route.

100. The crux of the matter is set out in the review letter: *"It was clear your goods did not reach their intended destination and that the lack of due diligence and action to ensure they were handled and delivered correctly to an authorised destination in unacceptable. The fact that the attitude to your procedures did not change when you were made aware of the fraud and seizure presented an ongoing risk to the duty suspended regime"*. In essence, HMRC's issue was Mr Singh's perceived lack of response to the 31 May letter and the events after the seizure indicated a casualness in the way Rurkee's business was conducted, which presented a risk to the revenue. They would have expected him to respond more positively to HMRC's concerns. This impression was gained from the visit reports and information about the dealings. Mrs Elliott would have expected a much more positive reaction. The underlying perceived problem with the due diligence was a failure to carry out a proper fraud risk assessment based on the FITTED criteria examples of which are the specific issues raised by the officers.

101. When Officer Elliott made her decision, she concluded that Mr Singh's approach to his relationship with Delvistin was quite casual. Mr Bedenham pointed out that the goods did not go to the customer; they went to the bonds. Mr Singh, as a matter of routine, checked the SEED registration of the sending and receiving bonds (which not all traders do) to ensure that the bonds were currently entitled to receive duty suspended goods. So he had taken steps to ensure they reached their intended destination. Mrs Elliott was unaware of this.

102. Officer Humphrey's initial visit report suggests a lack of follow up to Mr Singh's email to Safe Cellars following the receipt of the 31 May letter. As we have seen, there was an initial telephone call, then an email, then several chasers until an answer was received-that the goods had arrived. Officer Elliott was unaware of this.

103. Following Mrs Humphrey's first visit, and before entering into new deals with Delvistin, Mr Singh obtained an updated due diligence report on Delvistin. In addition, he instructed his bond to ask the receiving bond to take photos to prove the arrival of the goods, which they did and which he received. Mrs Elliott was unaware of this.

104. It was noted that Notice 196 provides a staged approach of working with traders to improve due diligence, considering sanctions and only revoking the WOWGR for serious non-compliance. Mrs Elliott thought that help had already been given. She thought that Miss Hanrahan had tried to help by telling Mr Singh he should have made comments on the initial due diligence report showing he had analysed it. In fact that advice had never been given to Mr Singh. Ms Hanrahan's said she was going to write to him about it, but owing to her sudden indisposition, she did not. Nor did Mrs Humphrey. Mrs Elliot did not pick that up.

105. Nor did Mrs Elliott herself consider whether it was appropriate to impose sanctions such as conditions. She considered that the fact that the goods had ended up at the slaughter site created a high risk to the revenue so that prompt action was needed and the risk was so great that the correct decision to revoke was made at the time. There was no assurance that any conditions would be complied with.

The due diligence and what Mr Singh did

106. We now turn to the actual due diligence carried out by Mr Singh and we will then draw together his actions and responses.

107. Delvistin contacted Mr Singh by email on 24 November 2015 referring to an earlier telephone conversation and expressing an interest in buying underbond goods from Rurkee.

108. Mr Singh emailed Delvistin, referring to Excise Notice 196, asking Delvistin where it would be selling its stock. It replied "*We will be supplying our customers across Europe. Unfortunately we cannot share further information as this is confidential to our business/trading purposes"*. Whilst one would not expect them to volunteer the names of customers, one might have expected them to explain which countries they would supply, given that they were a Cypriot company asking for goods to be delivered to Sicily. Mr Singh did not follow this up. He was satisfied with his customer's response and considered that there was always a demand for cheap alcohol and it would always sell anywhere.

109. The first consignment was sent to Delvistin on 5 January 2016. Mr Singh had commissioned the Due Diligence Exchange Ltd (DDEL) to undertake the due diligence on Delvistin and Mr Singh carried out his own due diligence on Delvistin and his proposed supplier, Danco International General Trading LLC. There was no suggestion that Danco was involved in the fraud and we will focus on Delvistin. Essentially, he stablished that the company had been incorporated and he checked its directors and shareholders. The sole director and shareholder

was a Mr Yiannakis Economides and he obtained proof of Mr Economides' identity and proof of address. He also obtained confirmation of the company's address and that it was properly registered for VAT. The only evidence relating to financial health (the "F" in "FITTED") was a bank statement for the period August to October 2015 which showed the account balance fluctuated between 20 Euro and nearly 250,000 Euro. The bank at which the account is held is unclear. The copy statement shows an incomplete name: "*irstrate*". The payments from Delvistin came from Bank of Cyprus. Mr Singh also checked the VAT registration and SEED status of De Meersman, the proposed recipient bond. Whilst this addressed the identity of Delvistin (the "I" in "FITTED"), it was clearly not due diligence of the sort which was required under section 10 of Notice 196.

110. The DDEL report on Delvistin was dated 11 January 2016. Mr Singh said that he had spoken to the director of the Due Diligence Exchange on 15 December 2015 and had been told that the report was ready and signed. We doubt this, given the dates on some of the documents in the report. Mr Singh did not receive the report until around 15 January 2016, which was after he had started trading with Delvistin. The report included a money laundering regulations telephone interview which took place on 16 December 2016, after the date Mr Singh says he was told the report was ready. The interviewee was a person named "John". Mr Singh said in evidence that he had mainly dealt with a person called Dave but had spoken once to Mr Economides, whose English was not good, and been told the only employees of Delvistin were himself, Mr Economides and Dave. Mr Singh did not notice the reference to John and did not follow it up.

111. The covering letter to the report stated that Delvistin had passed the vetting procedures. It also stated that they were awaiting receipt of references. Delvistin were unwilling to provide trade references because these were commercially sensitive. Nor would they provide a landlord or bank reference, saying they did not have an address or phone number for their Bank; Bank of Cyprus. They offered a bonded warehouse and accountant as referees. The references never arrived and Mr Singh did not follow them up.

112. The report included much of the same identification information as Mr Singh had obtained. It included a "Trade Information Form" for overseas dealers in alcoholic goods. This asked, among other things about the experience in the industry of the main contact. This stated that Mr Economides had been involved with wholesale industries and had gained contacts in the alcohol industry. This is, he had not had previous experience in the alcohol industry. The company was only set up in January 2015. The report stated that the anticipated annual turnover for this new company selling to small and medium sized wholesalers was between three and four million Euro. It also stated that the business was introduced to Rurkee by "recommendation/word of mouth".

113. At the time of this report, Delvistin had a website and it appeared DDEL had visited it.

114. Although the report included the section on dealers in alcoholic goods, the due diligence seemed to be focussed on identification and money laundering considerations. There was no reference to the FITTED criteria as such and the report did not seem to cover most of them (other than identity).

115. At the end of the report was a "Report Review Form" which had a "white space" with the heading "Review the full due diligence report in respect of the above business and note here any action to be taken and how these points have been resolved". Underneath that was a further box stating "I confirm I have reviewed the full due diligence report prepared by the Due Diligence Exchange Ltd in respect of the above business and addressed all action points: Signature…Date". The white space was blank and the report unsigned although Mr Singh insisted he had read and considered the report. This was a particular concern of Miss Hanrahan as she considered it indicated that, although Mr Singh had obtained information, he had not analysed it and used it to make a risk assessment of the proposed business. Due diligence was not just about getting information, it required consideration of it and a proper risk analysis. Ms Hanrahan had been going to write to Mr Singh and advise him of the need for more analysis but had been unable to do so.

116. Deliveries for Delvistin had always been made to De Meersman. Delvistin then asked Rurkee to send a consignment to Le Cave instead because it was cheaper. A few days after that, Rurkee received the Commissioners'Direction forbidding the despatch of duty suspended alcohol to De Meersman. Mr Singh did not find this suspicious, even with the benefit of hindsight. He simply accepted that Le Cave was cheaper and that was sufficient to explain the change. He had checked the SEED verification of all the bonds and they were all authorised at that time.

117. Following receipt of the 31 May letter, Mr Singh did contact Safe Cellars immediately and, contrary to the impression given by Mrs Humphrey's meeting note, did pursue the matter until he got an answer, to the effect that the goods had been delivered. He did not at that point contact Delvistin.

118. Following the meeting with Mrs Humphrey in June, Mr Singh did contact Delvistin about the HMRC letter and Delvistin confirmed that it had received the goods and immediately sold them on to customers. Mrs Humphrey suggested that Mr Singh should have "robustly challenged" Delvistin, but she did not say what extra he could have done, other than reiterate HMRC's assertion that the goods had not arrived.

119. Mr Singh also asked Safe Cellars to arrange for photos to be taken to confirm the arrival of future loads. He ensured that he received such photos.

120. Rurkee sent a further consignments to Delvistin on 11 June 2016 and, the last one, on 5 July 2016. At the August meeting Mrs Humphrey asked Mr Singh why he had continued to trade with Delvistin after the May letter. The meeting note records that Mr Singh said that it takes time to set up the deals and he could not get out of them as the alcohol had already been ordered. In other words, he was

committed to buy the stock and he did not want it left on his hands if he had ceased trading with his only customer. He did not carry out any further due diligence before sending these loads, despite the 31 May letter, the change of recipient bond and the concerns expressed by Mr Humphrey at the June meeting.

121. Mr Singh did, however, commission DDEL to carry out revised due diligence on Delvistin and received a written report dated 12 July 2016. The report did not specifically refer to the seizures but did have an additional section, not present in the first report, addressing the FITTED criteria. The covering letter stated that Delvistin had passed the vetting procedures. The letter went on to say:

> "Information relating to FITTED due diligence checks has been provided…This information should be reviewed with consideration to your commercial knowledge of this business (i.e. Delvistin)…The report review and risk assessment form in Section 8 should then be completed to finalise your due diligence checks."

122. The report ran to some 94 pages. It covered the same identification material as the original report and included further telephone interviews in relation to money laundering and the business. In addition, Section 7 included information related to the FITTED criteria and additional documents including a credit report (in connection with "F": financial health).

123. The business information interview was with Mr Economides and contained the same information as the earlier report. We would comment that "Yiannakis", Mr Economides' first name is the Greek equivalent of "John" which may explain the apparent additional employee in the first report. On the other hand, the Money Laundering Regulation report interview on the same day was stated to be with "John" who was described as "Operations Manager" whereas Mr Economides was described as "director". In any event, Mr Singh seemed unconcerned by this despite having been told by Mr Economides that the only employees were himself and Dave and did not check the position. Again Delvistin was not willing to provide trade, landlord or bank references. Although it gave names for a bond reference and accountant reference, no references were ever received.

124. The report stated that Delvistin's website was inactive. Mr Singh said he had been told by the director it was not working. It did not seem to concern him.

125. The "FITTED due diligence information" section of the report begins with the following preamble:

> "Notice 196, section 10 "The Due Diligence Condition" require that businesses apply a FITTED approach to due diligence checks. This approach requires businesses to take a risk based approach to FITTED checks and therefore makes all checks bespoke to the trading relationship in question.
>
> Businesses must therefore consider their own internal procedures and commercial considerations in light of any due diligence information gathered on their behalf. A risk assessment based on the due diligence information available must then be made by the business to ensure any relevant risks have been mitigated and that information is consistent with the commercial information available only to them.

This section of our report provides a summary of all information pertaining to FITTED due diligence checks in order to support and further enhance any of your own internal controls."

126. This makes it abundantly clear that the report is simply providing information based around the FITTED criteria and it is for the trader to carry out the risk assessment required by the Notice and take any appropriate action.

127. The Financial health section reports that a credit check had been carried out but Delvistin had no credit rating as it had not yet filed any financial statements. Mr Singh said that he had read this but did not really understand it. The attached credit report said that a Cyprus company was obliged by law to submit financial statements on a yearly basis. No statements had been submitted so no financial information was available. The credit check also stated that Delvistin's Articles of Association provided that it was an investment/holding company although other activities were permitted. Under "line of business" it stated "Delvistin Holdings Ltd is the owner of …a UK agency that deals in all theatre, concert and sporting event tickets worldwide". There was no mention of dealing in wholesale underbond alcohol. Other comments in the credit check included:

- They had made written requests for information by email but had received no response
- They had been unable to trace a local office in Cyprus and therefore believed the company was an international business company. The report commented that this type of company usually has a foreign beneficial owner with nominees holding the shares for anonymity
- The telephone/fax numbers provided belonged to the company's legal administrator: Y Economides & Co LLC.
- The telephone number on the company's website was unobtainable.

128. Much of the information in the updated report was the same as in the original report and the responses of Mr Economides to the business information interview were also the same. So the concerning facts outlined above in relation to the first report appeared here also.

129. There were further matters which might have been expected to alert a trader to the fact that further investigation was needed. In response to a question whether Delvistin was required to be registered with the authorities to comply with money laundering legislation, the answer was simply "the company does not accept cash payments as a matter of policy". It indicated the company, whose owner had no previous experience in the alcohol industry, and which had no bank financing and had built up a turnover of Euro 3-4m in a year using only operating profit. No information was available about the company's operations. It was represented by a law firm-Y Economides & Co LLC. Mr Economides had been asked for information in writing which was not forthcoming.

130. Delvistin said the company did not require a registration to deal in duty suspended alcohol in Cyprus. Given that the duty suspension regime together with the EMCS and SEED systems are EU wide, this last statement seems somewhat implausible. Indeed, a simple search on Google will reveal that in Cyprus "*if you wish to receive, to produce, to process, to possess, or to send harmonized products which are under suspension of payment of excise duty, you must submit a written request to the Director of Customs, for an Authorized Warehouse Keeper license.*"

131. There was a "Report Review and Risk Assessment Form". The Report Review white space and confirmation of review boxes were the same as in the first report. In addition, there was a "white space" taking up most of one page headed "Risk Assessment based on review of full due diligence procedures and commercially available information".

132. All the boxes were blank. The report was unsigned.

133. After the receipt of this report and before the August meeting with Officer Humphrey, Mr Singh had emailed Delvistin to enquire whether it wanted more stock. The August meeting note records him saying that he would look at his due diligence again before deciding whether to trade with Delvistin but confirmed the report had been received before he sent the email. The implication is that he was prepared to trade again on the basis of the revised report. At the hearing, Mr Singh stated that he had asked for the revised report because, when he received the HMRC letter, he needed to take precautions. He said the he had reviewed the due diligence and expressly confirmed he was satisfied with the second report. When asked whether he understood what the report meant he said that the report complied with the requirements of Notice 196 and that "it covered the risks which he must look at and there was no risk left".

Submissions of the Appellant

134. In considering the appeal against Officer Elliott's decision, the Tribunal must find the facts for itself and consider the reasonableness of the decision in the light of those facts, whether or not they were before the decision maker.

135. Officer Elliott's decision failed to take into account relevant matters, took into account irrelevant matters and was disproportionate. It was therefore a decision that no reasonable officer of HMRC could have arrived at.

136. The appeal must therefore be allowed unless the Tribunal concludes that even without the flaws, the result would *inevitably* have been the same. This is a very high hurdle and it cannot be said, in the present case, that another officer, taking account of all the relevant facts would inevitably decide to revoke Rurkee's WOWGR. This is derived from the Court of Appeal case of *John Dee Limited v Customs & Excise Commissioners [1995] STC 941.* In that case, the Court was considering the approach of the Special Commissioners to a case where the Commissioners had failed to consider the financial position of the appellant in considering whether to require security for the purposes of VAT. The Court said:

> "It follows from the conclusion of the Tribunal that the Commissioners had failed to have regard to the possibility of seeking relevant financial information from the company that the Tribunal found that the Commissioners had misdirected themselves in law. This finding by the Tribunal has not been subsequently challenged by the Commissioners. The Tribunal went on to consider, however, what the position would have been had a reasonable body of Commissioners asked for and been given and had taken into account the material financial information which was available as at 10 January 1992. In this context the Tribunal referred to the following passage in the judgment of Sir John Donaldson MR in Commissioners of Customs and Excise v. Secretary of State for Social Services, ex parte Wellcome Foundation Ltd. [1987] 1 WLR 1166 at 1175:
> "The jurisdiction of the courts to entertain applications for judicial review is a supervisory jurisdiction of an essentially practical nature designed to protect the citizen from breaches by decision makers of their public law duties. That there will be such a breach if the decision maker takes account of irrelevant matters or fails to take account of relevant matters, in the sense that his decision is affected thereby, is not in doubt. But, if his decision is not affected thereby, there is no reason why the jurisdiction should be exercised and every reason why it should not."
> In the Tribunal's Decision the chairman understood this passage to indicate that where a decision maker fails to take into account a relevant matter the court or tribunal must look to see whether or not the decision maker's decision would have been affected if he had taken such matter into account."

137. The Court of Appeal concluded:

> "where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal."

138. Officer Elliott's decision was flawed for the following reasons.

139. She was confused about her role as a review officer and appears to have adopted a supervisory role. Even if she took a fresh decision, it was still flawed.

140. She failed to consider the updated due diligence report. Indeed, no officer reviewed the updated report despite Mr Singh offering it to Officer Humphrey.

141. She did not consider the full report from the Italian authorities. She relied on a summary document which she took to confirm that Rurkee's goods had not arrived at De Meersman when it was clear from the full report that it did not confirm that.

142. Mrs Elliot understood that Rurkee had not responded positively or proactively after being notified of the seizure. In fact, it had obtained an updated due diligence report, updated its SEED checks on the bonds, required photographs to be taken confirming the receipt of further loads and had contacted Safe Cellars about the seizure and followed up its enquiry until it received a response.

143. Officer Elliott believed that Officer Hanrahan had already provided assistance to Rurkee by advising it to produce an analysis document in relation to the due diligence. This was not the case and no further assistance was offered.

144. She did not consider whether it was appropriate to impose sanctions such as conditions.

The Respondent's submissions

145. The decision to revoke was one which Officer Elliott was entitle to take and to the extent that there were errors in the decision, they were not material and did not vitiate it. On the basis of Mr Singh's evidence, HMRC could not have reached any other decision.

146. The decision must bee seen in context. The duty suspension regime creates a real risk of fraud. In consequence, the WOWGR approval is not a right but a privilege and carries with it the obligation proactively to assess the risks in the trade. The Appellant lacked this proactivity.

147. It is clear that Officer Elliott took her own fresh decision on the review.

148. The Tribunal's jurisdiction is supervisory and Ms Barnes submitted that Officer Elliott's decision was neither unreasonable nor irrational for the following reasons.

149. The Appellant's due diligence was wholly inadequate. Delvistin did contact Rurkee "out of the blue". The due diligence did not adequately address the FITTED criteria.

150. Mr Singh did not sign the report and there was nothing to show he had read it or conducted a risk analysis on the basis of it. The system imposes an obligation on the trader to assess the risks; it is not for HMRC to do that for the trader.

151. Whatever the adequacy of the initial due diligence, Rurkee's response to the seizure gave HMRC no confidence that the Appellant was a fit and proper person. In particular, Mr Singh refused to countenance the possibility that he had been caught up in an excise fraud. Although the evidence of seizure did not include the brand of vodka nor the bottle size, the presence of the pallet labels and the goods inward note showed that Rurkee's goods sent from Safe Cellars to De Meersman had ended up at a slaughter site near Slough. The only explanations were that the goods had been involved in an outward diversion or they had reached De Meersman and had then been involved in an inward diversion fraud.

152. Even if Officer Elliott had considered the full Italian report, it would have made no difference. The report showed De Meersman was involved in a widespread fraud which involved the false receipting of goods which never left the UK. This undermined reliance on De Meersman's entries on the EMCS.

153. The fundamental point is not the seizure itself, but Mr Singh's response to the seizure. He refused to countenance the possibility that his goods were caught up in a fraud or that his customer and the receiving bond might be duping him, even though he was operating in an area which was known to carry a high risk of fraud. This fundamental failure to consider the risks of fraud meant there was nothing

to stop this happening again and Rurkee was not a fit and proper person. HMRC were entitled to conclude that the imposition of conditions would not remedy this failure and the only course was to revoke the WOWGR.

154. Ms Barnes accepted that the updated due diligence was not considered on review and, in accordance with *Gora*, the Tribunal must consider the reasonableness of the decision in the light of the actual facts. However, she submitted that the updated due diligence would have made no difference as it raised more concerns that answers.

155. In summary, the Appellant's due diligence was inadequate such that it represented a significant risk to the revenue which conditions could not remedy and the only appropriate response was revocation of the WOWGR.

Officer Elliot's approach to the review decision

156. The review letter dated 22 February 2017 states at the outset *"Having considered all the evidence presented to me I have concluded that the decision in dispute is reasonable, legally correct and that it should therefore be upheld."* The Review Conclusion was in similar terms: "*On the basis of the information detailed above, I agree there was reasonable cause for the revocation of Rurkee Trading Company Ltd's approval. I believe the decision was legally correct and therefore should be upheld."*

157. The language used could be interpreted as meaning that Officer Elliott had conducted a sort of "judicial review" exercise and concluded that as the decision by Officer Humphrey was reasonable it should be upheld. It could also be interpreted as meaning that she had herself come to the same decision as Officer Humphrey and so agreed it was reasonable and legally correct. As we have seen in the *Safe Cellars* case, the proper role of the review officer is to consider the evidence and materials before the decision maker anew and reach a fresh decision on the matter.

158. Mrs Elliott was challenged as to the basis of her decision and asked to explain her role by Ms Barnes, Mr Bedenham and the Tribunal at various times. Her answers were not altogether clear and at times reflected the ambiguity of the decision letter. However, She made the following statements:

- She would look at the evidence which was before the original officer and anything else arising from the request for review and would make her own decision.

- When asked if she had considered herself whether Mr Singh remained a fit and proper person or whether Mrs Humphrey's decision that he was not a fit and proper person was reasonable, she said that she had considered herself whether he was fit and proper.

- When asked if she had considered the imposition of conditions, she said that if she thought she should have considered conditions she would have said so but

she thought the risk to the revenue was so great, that the correct decision was to revoke the WOWGR.

- When asked what she would do if she agreed the decision was reasonable but thought Mr Singh was fit and proper, she said she would cancel the decision, and if she thought the decision was reasonable but disagreed with it she would cancel it.

159. On balance, we conclude that Mrs Elliott applied the correct test on review, and her statements in the review letter are to be interpreted to mean that having reviewed the evidence she had arrived herself at the same decision as Officer Humphrey and therefore upheld that decision as she agreed it was reasonable and legally correct.

The correct approach for the Tribunal

160. The role of the Tribunal, in contrast to that of the review officer *is* a "judicial review" role. It is our task to consider whether the decision made by Officer Elliott was reasonable or unreasonable in the sense set out above and it is not relevant that we or another officer might have done something different. The question is whether Officer Elliott's decision was within the range of reasonable decisions that could be made on the facts as we have found them.

161. The Upper Tribunal gave guidance on the approach to take in appeals of this nature in the case of the *Commissioners for HMRC v Riaz Ahmed t/a Beehive Stores* [2017] UKUT 0359 (TCC). We have taken into account the following comments of the Upper Tribunal in that case:

> "50. First, the tribunal should be aware of the purpose of the regulatory regime and the business environment within which it operates and ensure that its decision-making takes account of that issue. It is well known that there continues to be a high-risk of excise fraud in the alcohol sector and the regulatory regime established pursuant to WOWGR and the relevant guidance in EN 196 is designed to minimise such fraud, particularly fraud in the supply chain. In particular, EN 196 highlights the risk of a trader receiving goods that have been smuggled or diverted into the UK, noting that a key feature of the smuggling or diversion of alcohol to the UK market is the ability to source a product where the excise duty has been suspended. Another common fraud is committed by non-UK suppliers who have made a legitimate delivery of duty suspended goods to a registered owner in the UK subsequently using the same documentation for another delivery which purports to be sent to the same registered owner but, in reality, is destined to be diverted and "slaughtered" with the result that dutiable goods on which excise duty has not been paid unfairly compete with the legitimate market.
>
> 51. The due diligence condition introduced in November 2014 was clearly designed to address the problem of fraud in the supply chain and is therefore a crucial tool in tackling excise duty fraud. As Ms Mannion submitted, the regulatory regime is structured so that registered owners, who have the privilege of holding excise duty goods in an excise warehouse, are given the responsibility for assessing the risk of fraud in the supply chain. EN 196 gives registered owners detailed guidance as to how

they might undertake proper due diligence on their suppliers, which we have set out in some detail at [14] to [17] above.

52. As the failure to carry out proper due diligence, taking account of this guidance, 40 can result in a high risk of excise duty fraud in the supply chain, it is no surprise that EN 196 clearly states that serious cases of failure can result in the revocation of a registered owner's approval under WOWGR.

53. Clearly, however, there will be a spectrum of circumstances which HMRC will have to consider in each case when deciding whether revocation is the appropriate course. The guidance in EN 196 on this issue, which we reproduce at [19] above, takes account of that principle. In particular, the guidance makes it clear that a business whose procedures are found to be inadequate will in appropriate circumstances be given guidance as to how to improve those procedures and given the opportunity to demonstrate that improvements have been made. In our view, that would be a particularly appropriate course in cases where there is no evidence of the registered owner being implicated in any actual fraud and where there is evidence that the registered owner is both able and willing to make the necessary improvements.

54. Clearly, a decision to revoke registration should not be taken lightly and such a decision must be proportionate in all the circumstances. Section 100 G (5) CEMA provides that an approval may only be revoked where there is "reasonable cause". Therefore, in order for such a decision not to be flawed it will be need to have been made after considering all the relevant circumstances, including where revocation follows a warning to improve, what steps the registered owner has taken to demonstrate that he is able and willing to comply with the justifiable high standards that are expected of a registered owner who is on the frontline when it comes to tackling excise duty fraud.

55. Therefore, when a tribunal is considering an appeal against a revocation of a registered owner's approval on the grounds that the registered owner has failed to comply with the due diligence condition, as Ms Mannion submitted, the starting point for the tribunal must be to consider all the circumstances that have led to that decision and the factors taken into account by HMRC in making that decision. The tribunal should then consider how HMRC have dealt with any representations from the registered owner as to his compliance with the due diligence condition and the steps he has taken in that regard, both in relation to his initial procedures and any improvements made as a result of HMRC's intervention.

56. It follows that will then be necessary for the Tribunal to make findings of fact as 30 to the extent to which the due diligence condition has been complied with. Although it is not necessary for a registered owner to follow the guidance in EN 196 slavishly and it will be open to registered owner to demonstrate compliance with the condition by other means, it would be good practice to measure the procedures and steps that the registered owner has taken as regards due diligence against the detailed guidance set 35 out in EN 196. Having made those findings of fact, the tribunal should then consider the extent to which HMRC may not have taken into account other relevant factors or may have relied on irrelevant matters, because, as the FTT correctly identified in this case, if that is the case it will need to consider whether HMRC's decision should be set aside. The tribunal will also have to consider whether, in all the circumstances, the decision to revoke can be regarded as a proportionate response.

57. However, the fact that HMRC may have relied on irrelevant factors, or taken into account relevant factors, does not inevitably mean that the Tribunal should direct that the decision should be reviewed. The tribunal needs to have in mind the observations of the Court of Appeal in CC & C Ltd at [24] above to the effect that the assessment of the attitude of the trader to due diligence issues is primarily a matter for HMRC to judge. It follows that tribunal should be very slow to interfere with the decision purely on the basis that HMRC should or should not have given different weight to particular factors, unless it is clear that because of the weight given or not given to particular factors the decision to revoke must be regarded in all the circumstances as disproportionate. Consequently, the tribunal should bear in mind, as established in John Dee, as referred to at [25] above, that a direction should not be made to review a decision in circumstances where, despite flaws in the decision- making process, any review decision would inevitably come to the same result."

Discussion

162. The system of WOWGR approval is part of the battle against the evasion of excise duty which costs the revenue, and therefore the taxpayer, very large sums of money each year. We have noted that the excise duty on a single load of spirits exceeds £100,000. The stakes are high with a commensurate risk of fraudulent evasion of duty by well organised criminal gangs. As we have seen, the movement of duty suspended alcohol is a vulnerable part of the supply chain, open to a high risk of fraud. Those who have the privilege of dealing in duty suspended goods are also subject to obligations to do their best to prevent fraud.

163. We set out in paragraph 12 above the Due Diligence condition imposed by paragraph 10.1 of Public Notice 196 to which Rurkee was subject. This condition has the force of law and requires the trader objectively to assess the risks of alcohol duty fraud within the supply chains in which it operates, to put in place checks to identify transactions which may lead to fraud and to have procedures in place to take mitigating action if a risk of fraud is identified. Mr Singh stated several times that he had read section 10. These are not "box-ticking" requirements, although they may involve routine checks such as making sure a bond is registered on the SEED system or obtaining confirmation from the EMCS that goods have been sent and have arrived. The essence of the condition is that a WOWGR approved trader must be alive to the possibility of fraud and vigilant to spot the risks when they arise and he must take active steps to put in place checks and procedures to mitigate identified risks.

164. Paragraph 10 continues with detailed guidance as to how a trader can satisfy these obligations and we also set out in paragraph 12 the "FITTED" approach which HMRC suggest a trader should apply. The guidance provides examples of risk indicators. Some which are particularly relevant to this case and are set out below.

> **"10.5 Examples of due diligence risk indicators**
> You should be concerned about a prospective transaction where you identify one or more of the following indicators in both suppliers and customers, the presence of which may lead you to make further inquiries. Please note, this list is not exhaustive:
> **Financial health of the company you intend trading with**

- there is no, or poor, credit ratings but it is still able to finance substantial deals…

Identity of the business

…

- there is no general visibility of the company you intend trading with, for example, they do not appear to advertise or have a website…

Existence or provenance of goods

- …
- individuals in the company have little knowledge of your trade sector
- …
- the company has only been trading for a very short period of time but has managed to achieve a large income in that short period of time

The deal

- customer demand for specific brands in other countries exceeds expected levels of consumption there
- The goods are to be moved in an unusual supply route that in itself would add significant logistic costs and bring into question the economics of that trade (unless duty was to be evaded)
- …"

165. Paragraph 10.6 of PN196 sets out a non-exhaustive list of the sort of due diligence checks a trader can carry out. It is manifest from the guidance that it is not enough simply to obtain information, the trader must consider it critically and question anything that does not seem right, following up with enquiries of the customer or supplier where appropriate. Some examples are set out below.

"Financial health

- obtain, undertake credit checks or other background checks on the business you intend trading with
- where a poor credit rating is identified, establish how the transactions will be funded, what security can be offered that you will be paid?
- …

Identity

- check company details provided to you against other sources, eg website, letterheads, telephone directories etc
- …
- obtain copies of certificates of incorporation, VAT registration certificates and excise registration certificates where appropriate and where a trade class is quoted on these check whether or not it relates to the type of trade you are engaging in
- verify VAT and excise registration details with HMRC
- …
- obtain signed letters of introduction on headed letter paper and references from other customers or suppliers
- insist on personal contact with a senior official of the prospective supplier and where necessary, make an initial visit to their premises. You should use this opportunity to confirm the identity of the person you intend doing business with and keep a record of your meeting.
- establish what your customer's or supplier's history in the trade is. Can this be evidenced?
- …

Terms of any contracts, payments and credit agreements

- carefully consider the terms of any contracts and credit agreements before entering into these and challenge elements which appear unusual
- …
- are high value deals offered with no formal contractual arrangements?
- …

Existence or provenance

- how has the trader contacted you?

…

The deal

- the nature of the transaction, including

…

- Is the demand for the type of alcohol credible? If the demand is purportedly from abroad what is the real market (consumption) for them in that country?
- …
- if you are already established in a trading agreement we would also recommend that you continue to monitor correspondence and business paperwork to identify changes in those arrangements and take any follow up action as necessary"

166. Even where a trader is in an established trading relationship, there is still an obligation to "*monitor changes in those arrangements and take any follow up action as necessary*".

167. These are onerous obligations.

168. Officer Elliott's review decision letter of 22 February 2017 sets out three reasons for the revocation of Rurkee's WOWGR:

- Rurkee was no longer considered to be fit and proper because the manner in which it conducted its duty suspended business over a significant period exposed the revenue to an unacceptable risk of loss through fraud
- Rurkee would be an ongoing risk to the revenue if it was allowed to continue with its duty suspended business as it had not demonstrated a proactive or positive approach to dealing with concerns and issues raised by HMRC
- The due diligence which Rurkee carried out was inadequate and did not address concerns raised by HMRC officers.

169. The letter then set out the incidents and information which had led to that conclusion. These may be summarised as follows:

- The Italian information that the goods had not arrived
- The seizure of Rurkee's goods at the slaughter site
- The inadequacy of the due diligence identified by Officer Hanrahan

- The failure to addresss the risks in the supply chain applying the FITTED criteria
- The lack of follow up when Delvistin emailed Rurkee "out of the blue"
- The lack of independent research about demand for the goods
- The apparent lack of activity following receipt of the 31 May letter including lack of follow up to the email to Safe Cellars and failure to contact Delvistin
- Refusal to believe the seized goods were his
- Failure to carry out additional risk assessments or checks before sending goods on 11 June (after receipt of HMRC's letter) because he "trusted the warehouse"
- Concerns about the supply route from Seabrooks in the south to Safe Cellars in the north then on to Italy
- His refusal to accept that his goods had not arrived in Italy
- His willingness to continue trading with Delvistin.

170. Following the "minded to revoke" letter, Rurkee obtained professional representation, but the request for review submitted on 5 January 2017 was a bald request for review and apart from stating that Rurkee disputed the decision contained no grounds for dispute or other information.

171. As Mr Benenden has identified in his submissions, Officer Elliott's decision was flawed in a number of respects and in particular she failed to take account of various relevant matters. Some of these matters were things she was not aware of, but on the authority of *Gora*, the Tribunal is entitled to take account of the facts it has found and consider the reasonableness of the decision in the light of those facts.

172. Officer Elliott did not consider all the evidence and documents which were available.

173. The information from the Italian authorities was a brief summary which gave the misleading impression that *no* goods had arrived at De Meersman.

174. She assumed that the goods seized at the slaughter site were those despatched from Rurkee's account at Safe Cellars. This relied on the pallet labels and goods inward note which were found somewhere at the site. Neither Officer Humphrey nor Officer Elliot had obtained confirmation that the goods seized included miniature bottles of Glens Vodka which were the goods identified by the pallet labels. The seizure notice did not provide those details. There was no proof that the goods seized had been the Appellant's goods, although there was strong evidence that its goods had been at the site at some time.

175. Officer Elliot did not herself consider all the documents and in particular, she did not consider either the initial due diligence or the revised due diligence. She relied heavily on the various officers' meeting notes and their assessment of the due diligence carried out. Officers Hanrahan and Humphrey had read the initial due diligence document, but Office Humphrey had refused a copy of the revised due diligence and in evidence denied it had ever been offered, although her own meeting note showed it had.

176. She thought Officer Hanrahan had provided advice to Mr Singh and did not know that she had been prevented from carrying out her intention to do so.

177. We have pointed out that the meeting notes gave a misleading impression of Mr Singh's actions. Mrs Elliot was unaware of Mr Singh's pursuit of information from Safe Cellars following the May letter. She was unaware that Mr Singh had taken action in response to the June meeting with Officer Humphrey: he had asked for and obtained photos showing the arrival of his consignment, he had contacted Delvistin to ask what had happened to the April consignment, he had commissioned and obtained a further due diligence report from the Due Diligence Exchange.

178. However, mere action is not enough. We must consider the steps which Mr Singh took and his due diligence generally, based on the evidence of the hearing and the facts we have found in order to assess the adequacy of his response to HMRC's concerns.

179. Mr Singh stated that he had read PN196 and that he was aware of the due diligence condition in paragraph 10. When Delvistin contacted him, he carried out some due diligence of his own, mainly directed towards identifying the company and checking its VAT registration. Mr Singh said he was satisfied with his own due diligence and on the strength of it began trading with Delvistin. He had also commissioned a due diligence report from DDEL and he said he had spoken to the director of DDEL on 15 December 2015 and been told the report was ready and all was in order, although it was not sent because of the Christmas Break. We do not believe this was the case. The report was dated 11 January 2016, the money laundering telephone interview was carried out on 16 December 2015 some of the supporting documents were dated 11 January 2016 and the identity checks were stated to be finalised on 11 January 2016. It is cleat that the report had not been completed at the time when Mr Singh commenced trading with Delvistin on 5 January 2016. It is also clear that his own due diligence, at best, addressed the "I" for Identity element of the FITTED criteria, but no attempt was made to address the remaining matters. A concern of HMRC all along has been Delvistin's approach "out of the blue", one of the specific warning signs mentioned in the guidance. The DDEL report said Delvistin said it heard of Rurkee through word of mouth. There was no enquiry about who had recommended the company. It may well be that Rurkee was well known in the industry as Mr Singh said, but it had not previously dealt in whisky and vodka and Ms Hanrahan suggested that he should want to know more about why a Cypriot company should have approached him and why the company would not

say which countries the goods were going to as this would raise serious concerns about the viability of the transactions. Officer Hanrahan explained that she considered the movements questionable and specifically referred him to PN196 and said he must revisit his due diligence. Although not recorded in the meeting note Ms Hanrahan's evidence at the hearing was that her particular concern was the apparent failure to review the information obtained and carry out an assessment of the risks, as evidenced by the fact that Mr Singh had not completed the "action points" box at the end of the DDEL report and had not signed it to say that he had reviewed it and addressed the action points. The covering letter to the report said that references had not yet been received. This was surely an action point but was never followed up and no references were ever received. Again, this is one of the warning signs mentioned in paragraph 10.

180. In any event, the DDEL report did not address the FITTED criteria or otherwise address the matters set out in paragraph 10. It was mainly concerned with identification of the company although there was an information section concerned with "trade information; overseas dealers in alcoholic goods". The DDEL report cannot possibly be regarded as adequate due diligence satisfying the requirements of paragraph 10 and Mr Singh had not carried out any sort of risk assessment based on the limited information provided. We have pointed out some of the many and serious risk factors above.

181. At the hearing, Mr Singh said he was satisfied with this due diligence.

182. A few days before receiving the 31 May letter, Delvistin verbally requested Rurkee to send the next consignment to the Le Cave bond instead of De Meersman as it was cheaper. At the time, that might not have been particularly suspicious as both bonds were registered on SEED and apparently authorised. However, having received the letter, it did not occur to Mr Singh that the timing of the change might have been significant and merited further investigation.

183. Contrary to the impression given in Mrs Humphrey's first meeting note, Mr Singh did take proactive steps to find out from Safe Cellars what was going on and following up his enquiries until he got an answer. He had carried out SEED checks on all the bonds, including Le Cave, which were satisfactory and the EMCS showed that the goods had arrived. He had not had any complaint from Delvistin that the goods had not arrived and had not made any enquires of Delvistin.

184. He did not carry out any further checks before sending the next consignment which was after receipt of the letter but before Mrs Humphrey's first visit.

185. Mrs Humphrey also expressed concerns about the due diligence and in particular Delvistin's initial approach and the acceptance of the customer's assertion that there was a demand for the product. Mr Singh specifically confirmed that he had read PN196 paragraph 10 and said that DDEL "undertake due diligence on his behalf". This suggests that he thought he was delegating due diligence to DDEL

and did not have to consider it himself, although as this is simply a statement in the meeting notes, we do not attach great weight to it.

186. Following that meeting, Mr Singh did take further action in response to HMRC's concerns. He contacted Delvistin and was told the goods had arrived and accepted that without question. He obtained an updated due diligence report from DDEL which he was satisfied with. He asked Safe Cellars to get the receiving bond to provide him with photographs showing the arrival of the goods.

187. At the August meeting with Officer Humphrey, she raised the same concerns as before about Delvistin's approach, the market for the goods and the route of supply. As we have commented, Mr Singh, not the fraudsters, determined the route via Safe Cellars as it was significantly cheaper. This was an irrelevant factor that Mrs Humphrey and so Mrs Elliott took into account.

188. The main additional feature of this meeting was Mr Singh's refusal to believe that his goods had been seized at the unauthorised location. So far as he was concerned, the EMCS confirmed that goods had arrived at the bond and his customer said they arrived, therefore they reached Italy and it could not be his goods which had been seized. We have pointed out that HMRC have not shown conclusively that that the goods seized *were* those deriving from Rurkee. They relied on an erroneous understanding of the Italian report and the pallet labels and goods inward note which were found "somewhere" at the slaughter site over a month after the goods had been despatched (and apparently had arrived). The seizure notice did not specify the brand of vodka seized or whether they were miniatures, to which the pallet labels related. However, whether or not the seized vodka had belonged to Rurkee is not really the point. There was, to put it at its lowest, some evidence that goods of Rurkee had at some time been at a farm near Slough when they should have been in Sicily. By this time, Mr Singh was aware, from the 31 May letter, that there was a problem with De Meersman, the bond to which that load had been sent, and Mrs Humphrey had explained that frauds like this would be covered up with very credible paperwork to make the movements appear genuine. The EMCS system is only as good as the information put on it and whilst, other things being equal, confirmation that goods had arrived on the EMCS would be proof of arrival, other things were not equal in this case. The real problem was Mr Singh's attitude and his absolute refusal to contemplate that his goods might have been caught up in a fraud and his insistence that if the EMCS said they arrived, that was the end of the matter.

189. Astonishingly, Mr Singh persisted in this belief even at the hearing. He insisted that the load could not have been diverted as it could not be sold in the UK because the duty stamps would have been cancelled. When asked directly whether he now accepted that his goods were involved in a fraud or at least appeared to be, he answered "no".

190. One of the most serious flaws in HMRC's decision was the failure to take account of the updated due diligence report which Mr Singh obtained from DDEL on 12 July 2016.

191. In the light of *Gora*, we are able to take account of the updated report and consider the reasonableness of the decision in the light of it. It has to be said that had HMRC considered the new report, it would have exacerbated their concerns, not allayed them.

192. The covering letter dated 12 July 2016 stated that Delvistin had passed the vetting procedures. It is not clear exactly what checks it had passed. The short letter then went on to say that the report provided information relating to FITTED due diligence checks and *"This information should be reviewed with consideration to your commercial knowledge of the business of this business. The report review and risk assessment form ...should then be completed to finalise your due diligence checks."*

193. The "FITTED" section of the report was headed in bold type **"Businesses must…consider their own internal procedures and commercial considerations in the light of any due diligence information gathered on their behalf. A risk assessment based on the due diligence information available must then be made by the business to ensure any relevant risks have been mitigated and that information is consistent with the commercial information available only to them. This section of our report provides a summary of all information pertaining to FITTED due diligence checks in order to support and further enhance any of your own internal controls"**. The letter and this introduction makes it abundantly clear that DDEL was providing ***information***, based around the FITTED criteria to enable Rurkee to carry out its own risk assessment. The report did not constitute a risk assessment. The report review and risk assessment boxes at the end of the report were blank. Mr Singh had not signed the report to say he had reviewed it and dealt with the action points.

194. Although Ms Hanrahan was unable to follow up her meeting with written advice about the need to make a risk assessment, Mr Singh must have been aware that he was required to do this. Mr Singh said he had read section 10 of the Notice and Ms Hanrahan and Mrs Humphries expressly drew his attention to it. Section 10 clearly sets out that an assessment of the risks of fraud and consideration of fraud prevention procedures is the essence of the due diligence required by law. Both DDEL reports and especially the second report and its covering letter make quite clear that the reports provide information and the trader must review the report and carry out a risk assessment. It is equally clear that Mr Singh did not do so. Both reports were full of the sort of warning signs referred to in section 10 and Mr Singh took no action.

195. Following the meetings with HMRC and their expressions of concern, Mr Singh had the opportunity to improve his procedures. He did not do so. Although he asked some questions and obtained the revised due diligence report, he seemed to consider that obtaining the report was sufficient and again failed to consider the risks disclosed, or make any further enquiries. Mr Singh stated at the hearing that at the 17 August meeting with Officer Humphrey he told her he had reviewed his due diligence and was satisfied with it and invited her to look at it. On more

that one occasion in oral evidence Mr Singh stated that he was satisfied with the updated due diligence and when asked what the report meant he replied "Article [sic] 196 was covered. It dealt with all the risks he must look at. There was no risk left". On the basis of the revised due diligence report Mr Singh considered that Rurkee could continue to trade with Delvistin and without further enquiry emailed to ask if they wanted more stock.

196. The fundamental reasons for HMRC's revocation of the WOWGR were Mr Singh's response (or lack of response) to the seizure, his refusal to contemplate the possibility of fraud in an industry rife with it, his failure to carry out adequate due diligence and, critically, to carry out proper risk assessments and take action accordingly. As a result of these failings, HMRC considered, "Rurkee was no longer considered to be fit and proper because the manner in which it conducted its duty suspended business over a significant period exposed the revenue to an unacceptable risk of loss through fraud". Apart from the "cut and pasted" reference to the behaviour continuing for a "significant period" when it was only a few months, on the basis of our findings above, we conclude that HMRC's decision on review of Mr Singh's risk of loss to the revenue and his fit and proper status was entirely reasonable. Although there were flaws in that decision we do not consider that they vitiate the ultimate conclusion. Mrs Elliott did not consider the action which Mr Singh in fact took following the seizure and following the meetings with Mrs Humphrey; seeking information from Safe Cellars and Delvistin, requesting photos and obtaining new due diligence etc,. Those steps were largely reactive i.e., Mr Singh took them in response to HMRC's comments-which shows he did take some note of HMRC's concerns-which was positive. However, Mr Singh did not do anything with the information he obtained. He accepted it all at face value and did not apply his mind to the risk of fraud or even the possibility of fraud. Those actions did not address the fundamental issues set out above. Indeed, as we have remarked, a consideration of the revised due diligence would have made matters worse for Rurkee as it clearly demonstrated a failure to consider obvious risks and take any sort of action to mitigate them.

197. Throughout, the officers have commented on Mr Singh's attitude to the seizure as being "unconcerned" and his approach to due diligence as "casual". The *Riaz Ahmed* case indicated that the assessment of the attitude of the trader to due diligence is primarily a matter for HMRC to judge. We saw nothing to convince us that HMRC's assessment was wrong.

198. We turn now to the question whether HMRC's response: immediate revocation of the WOWGR was proportionate.

199. PN196 provides for HMRC to take a staged approach, *where appropriate* to inadequate due diligence (our emphasis).

> *"If your due diligence procedures are considered insufficient to address fraud risks, we will carefully consider the facts of the case before taking further action, but where appropriate we will seek to support you to strengthen your procedures.*

In more serious cases such as a failure to consider the risks, undertake due diligence checks or respond to clear indications of fraud, we will apply appropriate and proportionate sanctions. For serious non compliance, such as ignoring warnings or knowingly entering into high risk transactions, we may revoke excise approvals and licences."

200. At the outset, Officer Hanrahan was planning to provide advice and support to Mr Singh in connection with risk assessment but she did not have the opportunity to do so. Others did not realise this and thought advice had been given. This was also a failing by HMRC. Having said that, it would have been apparent to Mr Singh from PN196 and from both the due diligence reports that he personally has an obligation to consider the risks in his supply chain and must be alert to the possibility of fraud. Paragraph 10 itself gives a great deal of guidance. It sets out in some detail the information which a trader should consider, the risk factors to watch out for and possible enquiries to make. Mr Singh simply did not address the issues.

201. Officer Humphrey did not believe that sanctions such as conditions were an appropriate response in the light of Mr Singh's attitude and actions (or lack of them) and that the risk to the revenue was so great that revocation was the appropriate action. Mrs Elliott agreed that the level of risk justified revocation and there was no assurance that any conditions would be complied with.

202. Both officers were mindful of the fact that revocation of the WOWGR will deprive Mr Singh of his livelihood and that it was not a decision to be taken lightly.

203. Even had Officer Elliott taken account of all the relevant matters we cannot see that her decision would have been any different. We are mindful that the *John Dee* test sets a high bar but when the additional matters are considered, they only serve to reinforce HMRC's view that Rurkee's due diligence was inadequate and that its failures to consider the possibility of fraud and carry out any risk assessment made it such a serious risk to the revenue that the revocation of its WOWGR was the appropriate and proportionate response.

204. Officer Elliott's decision was clearly reasonable in that it was within the range of reasonable decisions which she could have made.

Decision

205. For the reasons set out above we have concluded that it cannot be said that Officer Elliott's decision to revoke Rurkee's WOWGR was one which she could not reasonably have arrived at, notwithstanding the flaws in the decision making process.

206. Accordingly we dismiss the appeal.

207. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 27 MARCH 2018