NCN: [2021] UKFTT 11 (TC)

TC07997

EXCISE DUTIES – refusal of approval under the Alcohol Wholesaler Registration Scheme – appeal allowed on basis that decision not reasonable – held not inevitable that HMRC would reach the same decision – HMRC directed to review decision

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/02903

BETWEEN

CASA DI VINI LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN
IAN SHEARER

The hearing took place on 2 to 3 November 2020. With the consent of the parties, the form of the hearing was a remote video hearing on the Tribunal Video Platform. A face to face hearing was not held because of the ongoing restrictions resulting from the COVID-19 pandemic. The documents to which we were referred are referred to in the decision notice.

David Bedenham, counsel, instructed by Rainer Hughes, for the Appellant

Richard Evans, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION AND SUMMARY

1. Casa di Vini Ltd ("CdV") applied for approval under s88C of the Alcoholic Liquors Duty Act 1979 ("ALDA 1979") to carry on the wholesale of alcohol under what is known as the Alcohol Wholesaler Registration Scheme ("AWRS"). That application was refused by HMRC on 29 March 2017 (the "Refusal Decision", which was set out in the "Decision Letter" of that date). CdV gave Notice of Appeal to the Tribunal against that decision on 4 April 2017 and, separately, obtained an injunction in the High Court to enable the business to continue pending determination of its appeal against HMRC's Refusal Decision.

2. Thus whilst wholesalers trading in alcohol have been required to be registered under the AWRS since 1 April 2017, and CdV's application to be so registered was refused by HMRC, CdV has been able to continue trading. The evidence before us concerned events both before and after the Refusal Decision.

3. For the reasons set out below, we concluded that the Refusal Decision was one which HMRC could not reasonably have arrived at and require that HMRC review that decision in accordance with the directions set out under Conclusion and Directions for Review.

BACKGROUND AND CHRONOLOGY

4. Whilst CdV has disputed some of the facts alleged by HMRC in the Decision Letter, the background and chronology set out below was common ground and we find these to be facts on the basis of the evidence before us. We deal with the evidence in relation to the reasons set out in the Decision Letter and matters relating to whether the decision was unreasonable in the Discussion below, and make additional findings there as to those issues.

5. CdV was incorporated on 4 February 2015. According to its Companies House filing, the nature of its business is "56101 – Licensed restaurants". The sole director of CdV is Ervin Islamaj, who was appointed on incorporation.

6. CdV registered for VAT with effect from 1 April 2015.

Application for AWRS Approval

7. CdV submitted an application for approval under the AWRS (the "AWRS Application") on 10 March 2016. The application form (the "AWRS Application Form") identified CdV as a wholesaler supplying to the trade. It was assigned to Officer Michaela Whiddington.

8. When an application is processed, HMRC must be satisfied that the business and persons of importance in the business are "fit and proper" to carry out a controlled activity. Officer Whiddington performed checks on CdV and Mr Islamaj against information held at Companies House, on HMRC's computer systems and on the internet.

9. During an initial background check, Officer Whiddington identified that CdV had a VAT input tax claim for the period 1 April 2015 to 30 June 2015 disallowed in relation to goods purchased from M&B Distribution. CdV's VAT input claim had been subsequently reduced by £3,834.

10. Officer Whiddington also identified during her initial checks that CdV had been assigned to Officer Laura Plant to check and establish its alcohol supply chain. Officers Whiddington and Plant agreed that a joint premises visit would be conducted.

11. Officer Whiddington contacted Mr Islamaj to confirm a visit on 20 September 2016, providing factsheets and Excise Notice 2002. She requested that he provide certain information, including copies of the company accounts.

12. The joint visit to CdV took place on 20 September 2016 (attended by Officers Whiddington and Plant), and they asked Mr Islamaj a number of questions concerning the business of CdV, including some relating to third-party storage and high value cash payments. We deal with what was said at that meeting in the Discussion.

13. Following the site visit, Officer Whiddington sent Mr Islamaj two emails chasing the company accounts (on 22 September 2016 and on 8 November 2016).

14. On 28 November 2016, a case conference was held within HMRC with Officers Plant and Whiddington, as wells as Officer Stuart Heath and Officer Anne Downham regarding a second site visit. This was a consequence of a reference from UK Border Force Revenue Fraud Detection Team ("RFDT") concerning a seizure of 28 pallets of mixed wine on 9 November 2016 at Dover Docks. The wine was destined for Edwards Beers & Minerals Warehouse ("Edwards") for the account of CdV. The Administrative Reference Code ("ARC") for these goods was the same as that used for goods brought into the UK the previous day and the goods were seized on the basis that they were liable for duty which had not been paid. It was agreed that Officers Plant and Whiddington would make a second visit to CdV.

15. The second site visit by Officers Whiddington and Plant to CdV took place on 29 November 2016, and (amongst other matters) they discussed penalties CdV had incurred for late returns, the November 2016 seizure and his account at Edwards.

16. On 6 December 2016 Officer Whiddington asked for:

(1) further information including a full list of CdV's customers and suppliers, a full list of transport companies and warehouses, copies of purchase and sales invoices for June 2016 to November 2016 and copies of all import documentation relating to alcohol and bank statements covering the same period;

(2) an explanation of duty payments or onward movements of duty-suspended goods; and

(3) an explanation of the compulsory strike-off of Terra Motus Ltd, a company of which Mr Islamaj had been a director.

17. Officer Whiddington had asked for CdV to provide the above by 20 December 2016. There was further contact with Mr Islamaj, but by 17 January 2017 the information had not been provided. On 17 January 2017 Officer Whiddington sent a "considering refusing" letter to CdV as it was now 28 days past the deadline to provide the requested information.

18. On 18 January 2017 Mr Islamaj called HMRC to say he would deliver the information the following day. The documents were delivered on 19 January 2017.

19. On 13 February 2017, a further case conference took place between Officers Plant and Whiddington, Officer Helen Chivers and Officer Heath, where CdV's fit and proper status was considered. That case conference is considered further in the Discussion.

20. On 9 March 2017 Officer Whiddington sent a "considering refusing" letter to CdV, requesting a reply by 23 March 2017 (the "Considering Refusing Letter").

21. On 16 March 2017 Officer Whiddington received a letter from Rainer Hughes on behalf of CdV in relation to the Considering Refusing Letter. On 20 March 2017 Officer Whiddington sent an email to Rainer Hughes asking them to resubmit their case as they had not answered all the points in the Considering Refusing Letter and also to review comments they had made on specified pages as they appeared to relate to a different company.

22. An amended letter was provided by Rainer Hughes on 21 March 2017 (although the letter was dated 20 March 2017).

Refusal of CdV's application for AWRS Approval

23. On 29 March 2017 Officer Whiddington wrote to CdV refusing the AWRS Application (this being the Decision Letter). The Decision Letter is set out more fully below, but it was sent by Officer Whiddington and stated that she had taken "key points" into account in reaching the decision which were: evidence of illicit trading; the application was not accurate and complete and there had been an attempt to deceive; the business did not have in place satisfactory due diligence procedures; and it had provided insufficient evidence of its commercial viability and/or credibility. These points were then particularised further in the Decision Letter. The letter stated that she had considered the representations received from Rainer Hughes in their letters of 16 March and 21 March 2017.

24. Officer Whiddington also sent a further letter to Rainer Hughes on that same date responding to the two letters containing representations.

Developments following the Refusal Decision

25. CdV gave Notice of Appeal to the Tribunal on 4 April 2017. The appeal was stayed behind *Hare Wines*.

26. Following the Refusal Decision, CdV obtained an injunction from the High Court allowing it to continue wholesaling alcohol pending the hearing of its appeal.

(1) The High Court order dated 11 April 2017 required that HMRC approve the listed claimants, one of which was CdV, as wholesalers of controlled liquor and add them to the register maintained by HMRC under s88D ALDA 1979. Paragraph 3 of that order provides that in the event that HMRC decide that a particular claimant should not, pending the outcome of that claimant's appeal to this Tribunal, be permitted approval and registration, HMRC have liberty to apply to the High Court for relief from that requirement on giving notice to the claimant.

(2) That order was extended by consent on 22 August 2017. Paragraph 4 of the Consent Order provides that:

> "The Defendant [HMRC] reserves the right to make a decision in relation to the continued approval and addition to the register of each Claimant pending determination of its appeal before the First-tier Tribunal on providing notice to that Claimant. If it decides to do so, the Defendant will provide a "minded to" letter to that Claimant and will allow 14 days for representations from that Claimant after which a decision will be made."

27. There have been three further seizures of CdV's goods:

(1) 9 November 2017 – The seizure was challenged but Mr Islamaj did not appear in the Magistrates' Court on 22 October 2018 believing the hearing was set for 24 October 2018. An adjournment application was refused. The court ordered the goods to be condemned as forfeit and there was no subsequent appeal.

(2) 25 January 2018 – A challenge to the seizure of the goods was made, but this application was refused by the Magistrates' Court and the goods were condemned as forfeit.

(3) 7 June 2018 – The parties do not agree as to whether this seizure was challenged – Mr Islamaj states that he had instructed his solicitors to challenge the seizure but HMRC state that no challenge was made to the seizure.

28. Officer Christopher Nash monitored CdV's conduct during the period following the Refusal Decision. The visits made by him addressed various matters relating to CdV's business but we focus below on the due diligence and discussions relating to these seizures.

29. On 30 January 2018 Officers Nash and Foss made their first visit to CdV. Matters discussed included:

(1) Officer Nash asked Mr Islamaj about what checks he undertook and what records the business kept on its suppliers, customers and transporters. HMRC explained that, as a temporarily approved AWRS business, CdV must continue to demonstrate that they are a fit and proper person to carry on a controlled activity, which includes having satisfactory due diligence procedures in place covering their dealings with those in the supply chain to protect them from trading in illicit supply chains. Mr Islamaj gave details including relating to London Wholesale and S&B Distribution.

(2) Officer Nash asked Mr Islamaj about the seizure of goods that took place on 9 November 2017. The vehicle was intercepted at Dover Eastern Docks carrying 14,166 litres of wine. The goods were coming from Wybo Transport Sarl's warehouse and destined for CdV's account in Edwards. The goods were seized as the goods listed on the ARC had previously travelled on a crossing from Calais to Dover on 7 November 2017. UK Border Force believed that the shipment was an illegal mirror load. Mr Islamaj said that he did not have any goods under the ARC reference delivered into his account and had no knowledge of the ARC number. He did, however, say that the goods seized were CdV's and had been purchased from S&B Distribution.

30. On 13 February 2018 Officer Nash and Officer Rehman visited CdV:

(1) Mr Islamaj was asked further about the seizure which took place on 9 November 2017. He said that the ARC number is raised by the sending warehouse and he is informed by email. Mr Islamaj stated that when the transporter, C J Mason, informed him of the seizure he called Edwards. After he had booked the goods into Edwards, they advised him that they did not have room.

(2) Mr Islamaj said that he had not imported a consignment of alcohol which entered the UK on 7 November 2017.

(3) Officer Nash asked Mr Islamaj whether he was aware of the seizure of CdV's goods on 25 January 2018 and, if so, why he did not declare it at the previous meeting. The goods seized did not match the ARC – the ARC related to 15,021 litres of mixed wine, whereas 15,183 litres were seized. Additionally, 3,537 litres of white wine were seized, but the ARC related to 3,375 litres. During the meeting on 30 January Mr Islamaj had stated that the sale of stock supplied from S&B Distribution destined for London Wholesale's account at Seabrooks had not yet taken place. He had provided invoices for transport and purchase. Mr Islamaj said he was aware of the seizures which was why he had provided the invoices previously. He said he takes ownership when the goods arrive in Wybo, and ownership transfers to London Wholesale when the goods arrived at the destination warehouse, Seabrooks. He had instructed C J Mason to move the goods and had booked the goods into Seabrooks. Officer Nash asked him to explain why the goods seized did not match the Excise Movement & Control System ("EMCS") records and paperwork provided – Mr Islamaj stated that Wybo were responsible for the entries on ECMS and he had no control over that. However, the details provided should match what was seized as far as he was aware.

(4) Officer Nash explained that the seizures on both 9 November 2017 and 25 January 2018 were due to the fact that goods had already travelled using the ARC numbers and asked what checks CdV had carried out on the transport company. Mr Islamaj advised that he did not plan to use the company again and had received a quotation from another company. Mr Islamaj stated that when he asked C J Mason they said that the ARCs had only been used once and he took their word for it.

(5) Mr Islamaj stated that the account at Wybo was opened in October 2017.

31. After the visit, Officer Nash emailed Mr Islamaj advising him to read specified excise notices and reminding him to provide further information which was later provided.

32. On 14 March 2018, Officer Nash contacted Mr Islamaj with respect to further questions concerning the seizures:

(1) In particular, Mr Islamaj stated that, in relation to the 9 November seizure, the transaction was carried out over the phone. Mr Islamaj said that he was given no reason why Edwards did not have room for the goods which he had booked in.

(2) In relation to the 25 January 2018 seizure, Mr Islamaj did not know there was a discrepancy between the goods seized and the goods declared on the invoice. He said he relies on the warehouses to ensure that goods are imported as expected and there has never been a discrepancy before.

33. A third visit by Officer Nash and Officer Rehman took place on 17 July 2018 at new business premises.

(1) When asked if he had anything to declare, Mr Islamaj stated that he had 10 pallets of wine, 2 pallets of vodka and 2 pallets of Limoncello seized from an address in London about 3 weeks ago – this was later found to have been on 7 June 2018. He did not know why they had been seized. He stated that the goods were coming from a bonded warehouse in Germany, Maxifood, and that Maxifood had arranged the transport. The warehouse had contacted him and requested an alternative delivery address and he gave the address in London, of which he only knew the postcode. He said the warehouse was owned by a friend called Renzo, but he did not know his full name. He stated that Renzo had been arrested at the time of the seizure. During the meeting Mr Islamaj stated that a restoration request had been submitted by Rainer Hughes.

(2) Officer Nash asked what checks he carried out for due diligence. Mr Islamaj stated that he collected documents but did little with them. He was in the process of updating his due diligence policy and would send it to Officer Nash once completed. Officer Nash stated that he would discuss due diligence in more detail once he had received the updated policy.

34. Following the third visit, Officer Nash became aware of the involvement of HMRC's Fraud Investigation Service Criminal Team. A warrant had been obtained to search the premises of CdV and Officer Nash was asked not to contact CdV. By 18 October 2018, Officer Nash had received permission to make contact again. He requested a copy of the due diligence policy, which was sent on 23 October 2018. Officer Nash sought feedback on this from the due diligence team and prepared additional questions to ask Mr Islamaj.

35. A fourth visit took place by Officer Nash and Officer Bowers on 27 November 2018:

(1) Officer Nash asked a number of questions about transport arrangements for goods and payment of duty. Officer Nash said that if sufficient checks were not carried out, Mr Islamaj could be facilitating fraud by not checking whether transporters were bringing in mirror loads.

(2) Officer Nash examined the due diligence files for S&B Distribution, Da Castello and London Wholesale. Documents appeared to be restricted to ID verification. Officer Nash explained that there was no evidence in the packs that CdV had identified and assessed any risks.

(3) CdV's policy stated that little additional due diligence was required for very large suppliers. He advised that his tax adviser, Tristan Thornton (of TT Tax), had assisted him in drafting the policy. Officer Nash expressed concerns about the policy:

(a) The policy states that CdV assumes overseas warehouses are compliant, but without sufficient due diligence on transportation and suppliers Mr Islamaj could not know whether products were going through warehouses or not.

(b) The policy stated that CdV only uses well-established, reliable and sound approved persons with a proven history of compliance with HMRC. Officer Nash asked how Mr Islamaj could know about compliance with HMRC requirements and Mr Islamaj stated he couldn't – Officer Nash explained that he should not include general statements about information he cannot verify.

36. Following the visit, Officer Nash requested certain documents, which were provided by Mr Islamaj. Officer Nash had concerns about the due diligence packs and on 20 February 2019 Officer Nash sent CdV a due diligence warning letter (the "Due Diligence Warning Letter"). The letter identified the following failures:

(1) CdV had failed to assess objectively the risks of alcohol duty fraud within the supply chains in which it operates.

(2) CdV had failed to put in place reasonable and proportionate checks in its day-to-day trading to identify transactions that may lead to fraud or involve goods on which duty may have been evaded.

(3) CdV had failed to have procedures in place to take timely and effective mitigating action where a risk of fraud is identified.

(4) CdV had failed sufficiently to document the checks it intended to carry out and to have appropriate management governance in place to make sure that these are, and continue to be, carried out as intended.

37. The Due Diligence Warning Letter set out various specific concerns, which included:

(1) It is not possible for a business to identify reasonable and proportionate checks if they have not first identified what those risks are.

(2) CdV's policy set out intended checks indicating that there was some consideration to these risk areas. However, the only evidence documented relates almost exclusively to basic checks. There is very little evidence within the packs of any checks relating to financial health and no evidence of any checks relating to terms of contract, payment and credit agreements, transport, existence or provenance of the goods or the commerciality of deals.

(3) There is no evidence that CdV has made any attempt to analyse the information that has been obtained from its checks. Nor is there any evidence, despite what is written in the policy, that CdV has exercised any judgment about whether or not to trade with a trading partner.

38. Further correspondence was received by Officer Nash from TT Tax as well as an updated due diligence policy (received on 17 March 2019).

39. A fifth visit by Officer Nash and Officer Rehman took place on 19 March 2019. Additional officers (including Officer Khnanisho) attended to conduct a stocktake. Mr Islamaj stated he had read the Due Diligence Warning Letter and was in the process of improving and extending his due diligence. Officer Nash confirmed he had received the response from TT Tax but had not yet had time to review it fully. Mr Islamaj confirmed at that meeting that he

no longer was involved in duty-suspended movements (having indicated this previously to Officer Nash but this being followed-up on here as such movements were referenced in the due diligence policy).

40. On 10 June 2019 Officer Nash sent a letter to CdV regarding the due diligence response letter from Mr Thornton responding to the points raised summarising the information still required – he said he still required updated policy documents plus the files held for Da Castello, Matthew Clark, Customs Insights, Wineflow Group and Rolando Matteo Autotrasporti.

41. Further information was provided in August 2019 – this comprised due diligence files for various persons he traded with, but the due diligence policy provided on 28 August 2019 was that dated March 2019 – Mr Islamaj stated he was in the process of updating the policy.

42. The responsibility for monitoring CdV was taken over by Officer Georgia Khnanisho on 5 November 2019. No full review has yet been carried out by Officer Nash or Officer Khnanisho of the due diligence packs provided in August 2019.

EVIDENCE

43. We had a hearing bundle of 1544 pages, plus a bundle of authorities and skeleton arguments from both parties. After the hearing there were further emails from both parties dated 4 November 2020 addressing the number of AWRS applications (and approvals/approvals with conditions) and regulations relating to duty-suspended imports.

44. The hearing bundle included witness statements from three witnesses, each of whom attended the hearing and were cross-examined and answered questions from the Panel:

(1) Officer Michaela Whiddington dated 29 October 2019 – Officer Whiddington had made the Refusal Decision.

(2) Officer Georgia Khnanisho dated 27 November 2019 and 9 April 2020 – Officer Khnanisho's statements both address matters since the Decision Letter. Her first statement addressed the monitoring of CdV by Officer Nash and was based on her review of his files. The papers she had reviewed were exhibited to her statement. Officer Khnanisho's second witness statement dealt with the three seizures which had occurred in 2017 and 2018 and contained information she had obtained from checks with HMRC and Border Force.

(3) Ervin Islamaj (undated, but described as having been made in October 2019), the sole director of CdV.

45. Mr Bedenham criticised the evidence given by Officer Whiddington, submitting that it was unsatisfactory, defensive and sought to argue HMRC's case. Whilst we do disagree with some aspects of the decision-making (as set out in the Discussion), we do not accept Mr Bedenham's criticisms as generally fair. We address the decision-making process in the Discussion, but we have concluded that Officer Whiddington sought to obtain advice from colleagues where she considered appropriate. We considered that some of the matters identified by Mr Bedenham were as a result of Officer Whiddington being somewhat nervous as a witness, rather than evidence of her having been suspicious or giving contradictory evidence.

46. Officer Khnanisho was a credible witness. We were very aware that much of what she addressed was based not on her own knowledge but on her review of the papers of Officer Nash which were before us. She candidly acknowledged this. We rely on her updates of HMRC's position in respect of the due diligence.

47. Our assessment of Mr Islamaj's evidence is more mixed. He was sometimes vague, such as when discussing due diligence which had been undertaken (eg when he had conducted due

diligence on M&B Distribution). This cannot be explained solely by reference to English being his second language. Nevertheless, we could generally accept his other evidence about his business, eg as to his approach to pricing, and found his explanation of the pricing of house wine at £19 plus VAT per case to be helpful, as well as his explanation of changes to CdV's business.

RELEVANT LEGISLATION

48. The AWRS is set out in Part 6A (s88A-88K) ALDA 1979, and was inserted by s 54(3) Finance Act 2015. It created a requirement that wholesalers of alcohol be registered. The scheme came into force on 1 April 2016, subject to transitional provisions.

49. Section 88C ALDA 1979 provides as follows:

> "(1) A UK person may not carry on a controlled activity otherwise than in accordance with an approval given by the Commissioners under this section.
>
> (2) The Commissioners may approve a person under this section to carry on a controlled activity only if they are satisfied that the person is a fit and proper person to carry on the activity."

50. Relevant definitions are set out in s88A ALDA 1979, which provides (so far as relevant) as follows:

> "(2) A sale is of "controlled liquor" if -
>
> (a) it is a sale of dutiable alcoholic liquor on which duty is charged under this Act at a rate greater than nil, and
>
> (b) the excise duty point for the liquor falls at or before the time of the sale.
>
> …
>
> (8) "Controlled activity" means -
>
> (a) selling controlled liquor wholesale,
>
> (b) offering or exposing controlled liquor for sale in circumstances in which the sale (if made) would be a wholesale sale, or
>
> (c) arranging in the course of a trade or business for controlled liquor to be sold wholesale, or offered or exposed for sale in circumstances in which the sale (if made) would be a wholesale sale.
>
> (9) "UK person" means a person who is UK-established for the purposes of value added tax (see paragraph 1(10) of Schedule 1 to the Value Added Tax Act 1994)."

51. The decision to refuse AWRS approval is an "ancillary matter" for the purposes of Finance Act 1994 ("FA 1994"). Section 16(4) FA 1994 provides:

> "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

52. The burden of demonstrating this to the Tribunal's satisfaction rests on an appellant, pursuant to s16(6) FA 1994.

53. Relevant provisions in Schedule 3 of the Customs and Excise Management Act 1979 ("CEMA 1979") relating to seizure and forfeiture of goods are:

> "Notice of claim
>
> 3) Any person claiming that anything seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise.
>
> …
>
> Condemnation
>
> 5) If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of anything no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited."

RELEVANT CASE LAW

54. The approach to determining the question as to whether the decision concerned could not reasonably have been arrived at is that set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 653 at 663 which is to address the following questions:

i. Did the officers reach decisions which no reasonable officer could have reached?

ii. Do the decisions betray an error of law material to the decision?

iii. Did the officers take into account all relevant considerations?

iv. Did the officers leave out of account all irrelevant considerations?

55. Underhill LJ observed in *CC&C Ltd v HMRC* [2014] EWCA Civ 1653 at [15] that it may not be accurate to characterise the jurisdiction of the Tribunal as that of a "quasi-judicial review". This is because the Tribunal retains a primary fact-finding function when applying s16(4) FA 1994. The Tribunal must decide the issue of "reasonableness" by reference to the facts as the Tribunal finds them, rather than by the facts as the decisionmaker found them. That this is the case can be seen from *Gora v HMRC* [2003] EWCA Civ 525 in which Pill LJ stated:

> "38. In the course of argument, it emerged that the respondents took a broader view of the jurisdiction of the Tribunal than might have at first appeared. They were invited to set out in writing their views upon the jurisdiction of the Tribunal and Mr Parker provided the following written submission:
>
> "[…]
>
> e. Strictly speaking, it appears that under s 16(4) of the 1994 Act, the Tribunal would be limited to considering whether there was sufficient evidence to

> support the Commissioners' finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. The Commissioners would not challenge such an approach and would conduct a further review in accordance with the findings of the Tribunal."
>
> 39. I would accept that view of the jurisdiction of the Tribunal subject to doubting whether, its fact-finding jurisdiction having been accepted, it should be limited even on the "strictly speaking" basis mentioned at the beginning of paragraph 3(e). That difference is not, however, of practical importance because of the concession and statement of practice made by the respondents later in the subparagraph. As a "tribunal" to which recourse is possible to challenge a refusal to restore goods under section 152(b) of the 1979 Act, the Tribunal in my judgment meets the requirements of the Convention."

56. Judge Hellier in *Safe Cellars Ltd v HMRC* [2017] UKFTT 78 (TC) considered the temporal nature of the fact-finding jurisdiction as follows:

> "38. There is nothing in section 16 to suggest that it confers a different jurisdiction in restoration cases than it does in other appeals to which it applies. The construction of section 16 which ensures its operation satisfies the requirements of Article 6 in the case of restoration cases cannot then be ignored if the circumstances do not fall within Article 6 or if the case is not a restoration case. Further Article 6 applies to a trial of a person's "rights and obligations" which seems to us to encompass rights and obligations in relation to dealings with (or the proscription of dealings with) excise goods, and thus to invite the same construction of section 16 in cases concerning excise approvals as that adopted in *Gora*.
>
> […]
>
> 40. 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."

57. In *Behzad Fuels v HMRC* [2017] UKUT 321 (TCC), at [28], the Upper Tribunal formulated it as follows:

> "As the FTT also correctly identified at [93] of the FTT 2016 Decision, in *Balbir Singh Gora v C&E Comrs* [2003] EWCA Civ 525 Pill LJ accepted that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal. In our view, this principle is equally applicable in the case of a decision to revoke a supplier's RDCO status."

58. In *John Dee Ltd v Customs and Excise* [1995] STC 941 at [952(f)-(h)] the Court of Appeal outlined the principles in a similar fashion to *J H Corbitt* but went on to acknowledge a caveat at [953]:

> "It was conceded by Mr Engelhart, in my view rightly, that 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 …
>
> I cannot equate a finding 'that it is most likely' with a finding of inevitability."

POLICY GUIDANCE

59. HMRC's Excise Notice 2002: Alcohol Wholesaler Registration Scheme contains guidance on the AWRS.

60. The question of whether a person is "fit and proper" is dealt with at paragraph 6.10:

> "**6.10 The fit and proper test**
>
> Only applicants who can demonstrate that they're fit and proper to carry on a controlled activity will be granted approval. This means HMRC must be satisfied the business is genuine and that all persons with an important role or interest in it are law abiding, responsible, and don't pose any significant threat in terms of potential revenue non-compliance or fraud.
>
> HMRC will assess all applicants (not just the legal entity of the business but all partners, directors and other key persons) against a number of 'fit and proper' criteria to establish:
>
> - there's no evidence of illicit trading indicating the business is a serious threat to the revenue, or that key persons involved in the business have been previously involved in significant revenue non-compliance, or fraud, either within excise or other regimes, some examples of evidence HMRC would consider are:
>
> o assessments for duty unpaid stock or for other under-declarations of tax that suggest there's a significant risk that the business would be prepared to trade in duty unpaid alcohol
>
> o seizures of duty unpaid products
>
> o penalties for wrongdoing or other civil penalties which suggest a business don't have a responsible outlook on its tax obligations
>
> o trading with unapproved persons
>
> o previous occasions where approvals have been revoked or refused for this or other regimes (including liquor licensing etc)
>
> o previous confiscation orders and recovery proceedings under the Proceeds of Crime Act
>
> o key persons have been disqualified as a director under company law
>
> - there are no connections between the businesses, or key persons involved in the business, with other known non-compliant or fraudulent businesses
> - key persons involved in the business have no criminal convictions which are relevant for example, offences involving any dishonesty or links to organised criminal activity - HMRC will normally disregard convictions that are spent provided there are no wider indications that the person in question continues to pose a serious threat to the revenue (an 'unspent' conviction is one that has not expired under the terms of the Rehabilitation of Offenders Act 1974)
> - the application is accurate and complete and there has been no attempt to deceive

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

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

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

61. The guidance states that HMRC will refuse an application "if they have reasonable cause and there's a potential threat to the tax revenue" (paragraph 9.1).

SUMMARY OF PARTIES' SUBMISSIONS

62. We have summarised here the approach taken on behalf of each party.

63. CdV's Grounds of Appeal are that:

(1) HMRC had not made clear the reasons for the decision, only referring to the "key points";

(2) the allegations made in the Decision Letter were disputed;

(3) CdV disputed that the facts as alleged in the Decision Letter meant it was not a "fit and proper" person for approval purposes in any event; and

(4) any matters which did touch upon whether CdV was fit and proper were not sufficient to justify a blanket refusal of AWRS approval, and such a blanket refusal was disproportionate. A reasonable body of Commissioners would have approved CdV subject to appropriate conditions.

64. Mr Bedenham drew attention to:

(1) There is an established approval system for trading in duty-suspended stock, both by way of approvals required for bonded warehouses, ie those facilities which are approved by HMRC to hold goods in duty suspense, and the regime applicable under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 to those owning duty-suspended goods (other than wine) in a bonded warehouse.

(2) Movements of duty-suspended goods between bonded warehouses must be recorded on the EMCS before the goods leave the sending warehouse, thus giving the UK real-time information on movements in duty-suspended goods. The EMCS is accessible to other tax authorities, bonded warehouses and persons who are registered consignees. The sending bonded warehouse enters the movement on the EMCS, which

generates an ARC number valid for a specified number of days. Under the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, the driver of the vehicle moving goods into the UK must have documentation clearly showing that number with them.

(3) The registered consignee scheme enables goods which are held duty-suspended in one Member State to be moved to the UK without payment of the duty in that other Member State, provided that the UK recipient of the goods pays the UK duty in advance. Movements of such goods are also entered on the EMCS by the sending warehouse.

(4) There is no approvals system for warehouses that store duty-paid goods (which may be goods that were never in bonded warehouses, have been taken out of a bonded warehouse, or have been brought into the UK by a registered consignee which has paid the UK duty).

(5) Historically there was no approvals system for those who traded in duty-paid goods, until the AWRS was introduced.

65. Mr Bedenham submitted that the decision-making was flawed – the officer had approached matters with suspicion, and assumed that the re-use of the ARC meant that CdV was party to the fraud or otherwise culpable, and that inaccuracies identified in the AWRS Application Form were an attempt to deceive rather than mistakes. He submitted that if any one of the reasons relied upon by Officer Whiddington was found to be an irrelevant consideration then the Refusal Decision must then be found to be one that could not reasonably have been arrived at.

66. If the appeal is allowed, in his submission, it is not inevitable that the same decision would be made again – Mr Bedenham drew attention to the time which has passed since the making of the Refusal Decision and changes in the industry and to CdV's business in that time.

67. Mr Evans submitted that:

(1) The Refusal Decision was reasonable in view of the Considering Refusing Letter, the Decision Letter and the response to CdV's representations in relation to the Considering Refusing Letter. The evidence in relation to whether CdV was a fit and proper person, and which was considered by Officer Whiddington, properly led her to the conclusion that approval should not be granted.

(2) Officer Whiddington had regard to possible conditions that could be imposed to mitigate any risk that CdV may pose to HMRC, however she was entitled to conclude that there were none.

(3) Even if the Tribunal were to find errors in relation to aspects of the criteria considered in the Decision Letter, none of these errors would have been material and the decision would inevitably have been the same.

68. Mr Evans relied on developments since the Refusal Decision was made, submitting that these developments shed light on matters relevant to the decision. In particular, they demonstrated that:

(1) CdV's involvement with illicit trading was not confined to an isolated incident but occurred on several occasions. CdV's goods were seized on a further three occasions, none of which have been successfully challenged. This significantly undermines any contention by CdV that its involvement in illicit trading, unwitting or otherwise, evidenced by the seizure of its goods on 9 November 2016 was an excusable isolated incident; and

(2) CdV's inadequate due diligence is borne out in its written policies, documented checks, and failure to prevent itself becoming involved in illicit trading.

69. Mr Evans submitted that regardless of any errors which the Tribunal may find in the original decision, taking into account these further developments, the decision would inevitably have been the same.

70. We have not found it necessary to set out the parties' submissions in full in this Decision Notice nor all of the evidence which was before us. We have, however, taken it all into account in reaching our decision.

DISCUSSION

71. It was common ground that the decision by HMRC to refuse approval is an ancillary matter. The burden of proof in an appeal against such a decision is on the appellant. CdV has to establish that, on the balance of probabilities, the decision was one which no reasonable officer could have arrived at.

72. We remind ourselves that in *CC&C* at [15] and [16] Underhill LJ had noted that the fact that the criterion for the tribunal's intervention is formulated in terms of unreasonableness reflects the fact that the management of the excise system is a matter for the administrative discretion of HMRC, as HMRC are "peculiarly well-fitted to judge" the relevant matters. He said that this "careful calibration" of the powers of the tribunal under s16(4) plainly represents a deliberate balance between HMRC's need to take effective management decisions in relation to excise matters and the interests of those affected by such decisions.

73. As set out in *J H Corbitt* at [663] in relation to a review of a restoration decision, the questions we must address are: (1) Did the officer reach a decision which no reasonable officer could have reached? (2) Does the decision betray an error of law material to the decision? (3) Did the officer take into account all relevant considerations? (4) Did the officer leave out of account all irrelevant considerations? We note that a decision may be unreasonable if inappropriate and unjustified weight is given to particular factors, such that no reasonable decision-maker could have acted in such a fashion (*MOTO Transport SP Z OO v. Director of Border Revenue* [2016] UKFTT 719 (TC) at [42]).

74. We have set out below the relevant paragraphs of the Decision Letter. We have then assessed the reasons specified by HMRC therein and made findings of fact and reached conclusions in relation thereto.

75. In the Decision Letter Officer Whiddington explained her decision as follows:

> "I have taken the following key points into account in reaching this decision:
>
> 1. **There is evidence of illicit trading** –
>
> a) A seizure took place at Dover Docks in November 2016 of wine destined for Edwards warehouse. This wine was marked as belonging to Casa Di Vini Ltd and was seized as it was believed to have been an illegal mirror load. You were notified of the seizure, but didn't dispute it within the given timescale. In addition, you had not declared your use of Edwards warehouse at the first premises visit, although you had only just set up the account with them and already used the warehouse shortly before the visit. Your failure to disclose this information indicates that you are hiding your storage locations and hence your true business levels. You have failed to give a satisfactory reason for not declaring this storage facility.
>
> b) There are indicators that you are selling under-priced wine when taking into account purchase price, duty price, transport/storage costs and VAT. You have

failed to give a satisfactory reason for this. Both these issues indicate that your business is a serious threat to the revenue.

2. **The application was not accurate and complete and there has been an attempt to deceive** –

a) The application form did not show that 3rd party storage was used. As discussed on the premises visit, you were already using Plutus for storage before you applied for AWRS, so this should have been declared on the application form.

b) As covered in 1 above, you failed to disclose use of Edwards warehouse for storage; this is an indicator of hiding your storage locations and hence your true business levels.

c) On the premises visit, you stated you didn't accept large sums of cash as payments from customers, but we have subsequently seen evidence that you are, in fact, trading in large sums of cash with a customer, London Wholesale. Because of this, you should be registered as a High Value Dealer but are not. This is seen as an attempt to hide the fact that you are a high risk trader, dealing in large sums of cash, hence an attempt to deceive.

3. The business does not have in place satisfactory due diligence procedures covering its dealings with customers and suppliers to protect it from trading in illicit supply chains –

a) Insufficient Due Diligence was carried out on M&B Distributions, resulting in a claim for input tax by yourselves being disallowed. M&B Distributions were de-registered for VAT prior to you purchasing wine from them and hence prior to your input tax claim. Lack of sufficient due diligence meant you were not aware of this, when you should have been.

b) Insufficient Due Diligence was carried out on the transportation company that was involved in the seizure of wine in November 16 (covered in 1. above). On the premises visit you stated that instructions to the transportation company were given over the phone and there had been no details given to you of the driver and vehicle beforehand. You had not, therefore made sufficiently careful enquiries regarding transportation of the goods, which is a key step in the supply chain.

4. The business has provided insufficient evidence of its commercial viability and/or credibility –

a) The accounts indicate that the business' viability is marginal, but with an extremely small net current asset position. The amount of long term creditors seem likely to cause financial problems if profit is not increased. You have failed to provide sufficient evidence as to how you intend to cover your long term liabilities so as to ensure that the company remains profitable.

b) Credibility of the company is in doubt when there is evidence of illicit trading, under- priced goods and insufficient due diligence. You have failed to provide sufficient evidence of how you intend to ensure that these issues are not repeated and of those processes you plan to put in place to give assurances for future compliance visits.

I have considered the representations as covered in the letters from Rainer Hughes Reference SSP/NW/S003210009 dated the 16th and 20th March 2017 and a copy of the response is attached."

Stated reasons given by HMRC for the Refusal Decision

76. We consider below each reason stated by Officer Whiddington in the Decision Letter. Mr Evans emphasised that these reasons had been assessed against the criteria at paragraph 6.10 of Excise Notice 2002 and we refer to those criteria as we consider necessary.

Illicit trading – Seizure in November 2016, believed to be mirror load and to an undeclared warehouse (Edwards)

77. The first of the relevant criteria from Excise Notice 2002 which HMRC relied upon not having been met was "there's no evidence of illicit trading indicating the business is a serious threat to the revenue, or that key persons involved in the business have been previously involved in significant revenue non-compliance, or fraud, either within excise or other regimes".

78. The first factor relied upon by Officer Whiddington as evidence is stated as:

> "A seizure took place at Dover Docks in November 2016 of wine destined for Edwards warehouse. This wine was marked as belonging to Casa Di Vini Ltd and was seized as it was believed to have been an illegal mirror load. You were notified of the seizure, but didn't dispute it within the given timescale. In addition, you had not declared your use of Edwards warehouse at the first premises visit, although you had only just set up the account with them and already used the warehouse shortly before the visit. Your failure to disclose this information indicates that you are hiding your storage locations and hence your true business levels. You have failed to give a satisfactory reason for not declaring this storage facility."

79. There are thus two components to this – the seizure in November 2016 and the non-disclosure of the use of Edwards warehouse at the first site visit. We address here the reliance on the seizure, and consider separately the disclosures relating to warehouses (as HMRC's position is that the use of Plutus UK Warehouse ("Plutus") should have been disclosed on the AWRS Application Form and Edwards should then have been disclosed at the site visit in September 2016).

80. It was common ground that a seizure took place at Dover Docks in November 2016 of wine travelling to Edwards warehouse, for the account of CdV, and that this wine belonged to CdV. CdV were notified of this seizure. CdV did not challenge the fact alleged by HMRC that the ARC had previously been used by another movement of goods.

81. Where the parties disagreed was as to the significance of this seizure in the context of reaching a conclusion that it was evidence of illicit trading linked to CdV indicating that CdV's business was a serious threat to the revenue, and also as to whether CdV had challenged the seizure within the required timescale.

82. It is well understood that a "mirror load" is a movement of duty-suspended alcohol which uses the same ARC as a previous movement. One way of orchestrating excise fraud is to use the same ARC to cover multiple movements of duty-suspended alcohol - one of the loads arrives at its destination (an excise warehouse) and its arrival is logged on EMCS. The other load or loads are diverted and sold on the black market.

83. At the second site visit by Officers Whiddington and Plant on 29 November 2016 Mr Islamaj explained that he had bought the wine from Da Castello in Italy. The order had been delivered into Wybo warehouse in Belgium. He said that prosecco had been purchased from S&B Distribution (a London-based wholesaler) under bond in France – he had paid S&B Distribution £10,000 on 4 November 2016 and £7,280 on 8 November 2016 when the prosecco was in Wybo in Belgium. He had not yet paid for the wine. Mr Islamaj had arranged transport of the goods with Mensci Transporters over the phone – they charged £1,000 to transport the

goods from Wybo to Edwards. He had been recommended Mensci by a friend he had just met. Mr Islamaj said he was unsure of when the goods should arrive, and was unclear how the goods had been collected (if collected from France first or Belgium). He did not have details of the driver or the vehicle beforehand, nor did he have the ARC number.

84. Officer Whiddington considered that better or any due diligence on the transporter would have given a better understanding of what should have happened. The loss of revenue if the goods had not been seized was estimated at just over £40,000 (basing this on the lower rate of duty applicable to still wine, albeit that this was a mixed load). She did accept that there was no evidence that CdV or Mr Islamaj had knowingly been involved in smuggling.

85. Mr Bedenham submitted that:

(1) this was a single instance that occurred in November 2016, such that it cannot alone be regarded as posing a "serious threat" to the revenue; and

(2) no adequate consideration has been given to CdV's level of culpability in relation to this seizure. The very fact that this mirror loading occurs does not of itself mean that the owner of the goods was party to that fraud.

86. It was not challenged that this was the only seizure of CdV's goods that had occurred before the making of the Refusal Decision (although Mr Evans did submit that the later three seizures "shed light" on this or were relevant to the inevitability question – but those were submissions not challenges to this fact).

87. On the basis of the notes from the November 2016 site visit and Mr Islamaj's evidence at the hearing, we find as follows:

(1) Mr Islamaj had not used the transporter, Mensci, before and they had been recommended to him by someone he had just met;

(2) he conducted some verification of the ID of the transporter, and had checked with the bonded warehouse in France if they had used the transporter before, and they said yes;

(3) he did not have details of the driver or vehicle, or the ARC number; and

(4) he did not confirm the details of the movement of the goods with Mensci, ie he did not know whether they would be collecting goods first from France or Belgium or when they were expected to be delivered to Edwards.

88. The circumstances of the recommendation of Mensci do raise what we regard as a red flag – being recommended by someone Mr Islamaj had just met, in circumstances where he had not used them before. This should prompt CdV to conduct the fullest possible due diligence exercise. We are not satisfied that basic ID verification of the transporter itself satisfies this criterion. However, the most significant step he did take was asking the sending bonded warehouse about the transporter. This was clearly sensible.

89. We do accept Mr Bedenham's submission that it is difficult to see how due diligence checks could necessarily prevent the fraud occurring. In a movement of goods between bonded warehouses, where an ARC has been generated and both warehouses have access to the EMCS, there is necessarily going to be a gap of time between the goods leaving the sending warehouse and arriving in the UK, an "innocent party" cannot necessarily prevent another load entering the UK under "their" ARC number even if they have full details of the driver, vehicle, ARC and expected arrival date.

90. Mr Islamaj explained that after this seizure he did obtain ARC numbers when goods were moved. We accept this. The difficulty in the present instance is that we consider that the steps

taken by Mr Islamaj were inadequate, but at the same time there is no evidence before us to indicate that better processes would have led to any different outcome. Furthermore, there is certainly no evidence that he had knowledge of the mirror load.

91. Officer Whiddington also relied on CdV not disputing the seizure within the required timescale.

92. This is addressed further in Officer Whiddington's witness statement where she set out the checks she had made with the RFDT and National Post Seizure Unit ("NPSU"), both of whom had confirmed that no challenge was received by them within the 30-day appeal period. There were two separate sets of correspondence addressed in this context:

(1) In their letter of 16 March 2017, Rainer Hughes stated that they wrote to the RFDT on 21 November 2016 requesting that they commence condemnation proceedings as CdV wished to challenge the legality of the seizure and requested restoration of the seized goods. An unsigned copy of the letter was enclosed with the 21 March 2017 letter.

(2) On 19 December 2016, Rainer Hughes made a request to the NPSU that HMRC exercise their discretion to restore the forfeited goods to CdV.

93. Addressing first whether an appeal was made on 21 November 2016, and noting that RFDT did not receive that letter, we have regard to the fact that at the site visit on 29 November 2016 Mr Islamaj told Officer Whiddington that he had passed the details of the seizure to his solicitors, Rainer Hughes. We consider that this letter of 21 November 2016 was sent by Rainer Hughes and that an in-time challenge was made to the seizure.

94. However, no response was received to this appeal letter (unsurprisingly, as we accept that the RFDT did not receive it). It was followed by the letter of 19 December 2016 to the NPSU. That letter, viewed in isolation, was out of time. However, on 4 January 2017 the NPSU requested that Rainer Hughes provide confirmation that they were authorised to act for CdV, and proof of CdV's ownership of the goods before considering any request for restoration. No response has ever been received. Accordingly, the NPSU closed the case and the goods were signed-off for disposal.

95. On the basis of the above, we conclude that no successful challenge was made to the seizure or condemnation of the goods. This contrasts with Officer Whiddington's reference to the seizure not having been disputed within the given timescale. There is an inaccuracy, but given that CdV effectively abandoned the challenge which was made (by failing to respond to the request for information by the NPSU) we consider that in the circumstances the difference is of minimal significance.

96. Having regard to all of the facts as we find them, the seizure of goods in November 2016 was a relevant factor to be taken into account, but must be considered in the light of all the surrounding information (including that this was a single incident, that some due diligence had been undertaken albeit inadequate and that there is no evidence to support a conclusion that CdV had been party to the excise fraud). Furthermore, in assessing this seizure, regard must be had to the fact that the illicit trading criterion in Excise Notice 2002 expressly refers to there being evidence that the business is a "serious threat" to the revenue. We note that whilst the guidance in paragraph 6.10 includes in its introductory paragraphs a reference to whether key persons involved in the business are a "significant threat" to the revenue, the only criterion which includes its own qualification as to magnitude of threat is that for illicit trading (framed in terms of "serious threat").

Illicit trading – Indicators selling under-priced wine and lack of satisfactory reason

97. The second factor cited by Officer Whiddington as evidence of illicit trading by CdV is as follows:

> "There are indicators that you are selling under-priced wine when taking into account purchase price, duty price, transport/storage costs and VAT. You have failed to give a satisfactory reason for this. Both these issues indicate that your business is a serious threat to the revenue."

98. HMRC referred to invoices from CdV to customers showing that it was selling what was described as house red wine and house white wine for £19 or £20 per case (of six bottles). Officer Whiddington set out in her witness statement that at £19 per case, ie £3.16 per bottle, with VAT and duty at that time of £2.71, CdV would still need to cover the purchase price of the wine, transport and storage costs.

99. In their letter of 21 March 2017 Rainer Hughes explained that CdV had to take losses to circulate goods and match pricing offered by others. CdV had an agreement with one supplier, Da Castello, that if CdV ordered more than €150,000 stock per year they would give CdV a 10% discount off the total goods ordered. Rainer Hughes went on to state that the loss in the sale of wine is sometimes compensated by the sale of other goods, and vice versa.

100. We were taken to a selection of these invoices at the hearing. We find that in each instance the price of the case was £19 plus VAT or £20 plus VAT. Officer Whiddington was wrong to conclude that when assessing the profitability of these sales (or whether they resulted in a loss) she needed to "deduct" from the price of £3.16 per bottle any amount in respect of VAT. Furthermore, Officer Whiddington was not able to explain what she had estimated the transport or storage costs to be in reaching her conclusion that these sales were evidence of illicit trading. The only figure she was able to refer to was that CdV had paid £1,000 for the transport of the goods which had been seized in November 2016, but she did not know how many cases or bottles of wine it might be possible to transport for this price. She did not have any information as to the margins which other suppliers were realising for house wine. This decision-making was flawed.

101. Mr Bedenham put it to Officer Whiddington that the duty on a sale of a bottle of wine at £3.16 plus VAT would have been around £2.20. Officer Whiddington was not able to confirm this amount, but did suggest that might be about right. We agree. We were not provided with any evidence of rates of duty at the time, but are well aware that the rate of VAT would have been 20% and from this can estimate that if it had been calculated that a "VAT-inclusive" price of £3.16 per bottle would have had VAT and duty of £2.71 per bottle, once the price is accepted as being net of VAT then the duty would be around £2.20.

102. Mr Islamaj had referred in his witness statement to competition in the business being intense. At the hearing his evidence was that this was cheap wine - he bought at about 85 cents per bottle and could make a profit at this level. He was paying €5.10 per case, and applying a conversion rate of 1.35 this was a purchase price of £3.77 per case. Duty was around £13.50. In terms of transport costs, one pallet was 125 cases, which worked out about 5p per bottle. The warehouse costs included both food and wine. His evidence was that these sales were profitable for CdV. He added that in general he does not sell wine at a loss – the exception is if he has a line at the end of the year that has not sold.

103. We accept Mr Islamaj's evidence. We were not taken to any documents to corroborate his pricing (for the purchase price of the wine or as regards how the transport costs could be estimated) but were satisfied that he was credible and knew his business. He did not seek to argue that there was any significant profit here – but just that it was profitable. We accept that. This is consistent with the fact that at that time CdV was still a relatively new business seeking to become established.

104. The transactions to which Officer Whiddington referred in the Decision Letter are irrelevant and do not provide evidence of illicit trading. They should not have been taken into account in the decision-making process.

Application not accurate and complete – no mention of Plutus or Edwards

105. HMRC state that the second of the relevant criteria which had not been met was "The application is accurate & complete and there has been no attempt to deceive."

106. In the Decision Letter Officer Whiddington set out the following as two separate factors:

> "a) The application form did not show that 3rd party storage was used. As discussed on the premises visit, you were already using Plutus for storage before you applied for AWRS, so this should have been declared on the application form.
>
> b) As covered in 1 above [the November seizure], you failed to disclose use of Edwards warehouse for storage; this is an indicator of hiding your storage locations and hence your true business levels."

107. Officer Whiddington was thus taking account of Plutus not having been disclosed on the AWRS Application Form and Edwards not having been disclosed at the site visit on 20 September 2016. Giving evidence, Officer Whiddington confirmed she was saying that the inaccuracies were deliberate and an attempt to hide the storage position.

108. By way of outline findings of fact at this stage, and to set out the context, we find the following:

(1) CdV had an account at Plutus from the end of 2015, and in any event before 10 March 2016, the date on which it submitted the AWRS Application Form.

(2) On the AWRS Application Form, which asks "Does your Alcohol Wholesaler business use any 3rd party storage?", Mr Islamaj did not check the relevant box. An unchecked box was a "No".

(3) CdV later opened an account at Edwards and used that account in September 2016.

(4) At the site visit on 20 September 2016 Mr Islamaj re-iterated that he did not use third-party storage when asked that specific question. During the same meeting, he later mentioned that he had an account at Plutus. He did not mention that he had an account at Edwards.

109. Paragraph 6.3 of Excise Notice 2002 states:

> "**6.3 Applying for approval if you operate from more than one premises**
>
> As part of your application for approval, you'll need to submit details of all of your business premises from which you are, or will be, carrying on a controlled activity. The approval HMRC subsequently give would normally be for all of these premises.
>
> In some cases, HMRC may decide that it's necessary to place conditions or restrictions on your approval regarding the premises from which you can carry on a controlled activity. If HMRC do, they will explain the reasons to you. It's a condition of approval that you notify HMRC of all premises from which you carry on a controlled activity. Failure to do so would be a contravention of the conditions of approval and you would be liable to a regulatory penalty and seizure of any goods on those premises. It's also likely to lead to HMRC re-assessing whether you're fit and proper to be approved.
>
> Your trading premises are all those business premises from which you're carrying on or intend to carry on a controlled activity, whether these are owned

> by you or a third party. This includes any premises from which you're selling, arranging, exposing or offering alcohol for wholesale sales, except where the premises in question are authorised for retail purposes and the sales are only incidental in nature, see paragraph 4.3 for an explanation of incidental. It also includes any storage premises, including an excise warehouse or a third party brewery, from which you directly deliver or supply the alcoholic drinks you sell to your customers.
>
> If you use any other premises for storing alcohol, you're required to keep records of these and provide them to HMRC on request."

110. Officer Whiddington stated that the use of Plutus should have been disclosed on the AWRS Application Form.

111. It was common ground (and we have found as fact) that CdV had an account at Plutus before it submitted the AWRS Application Form.

112. Giving evidence Mr Islamaj stated that bonded warehouses are already approved and he thought that he was being asked to give details of other warehouses that were used to store goods. That was his understanding at the time of completing the AWRS Application Form. Bonded warehouses are already heavily controlled by HMRC. That remained his understanding at the first visit when he was asked a direct question (question 11, referred to below). He was then asked about imports and explained that he used Plutus. He said that he had nothing to hide.

113. Mr Bedenham made submissions as to the phrasing of the question on the form, its use of defined terms and whether the form actually required the use of bonded warehouses (which hold duty-suspended alcohol) to be declared. He noted that the AWRS is concerned only with trade in duty-paid alcohol, the form asks about the "Alcohol Wholesaler business", ie the business for which AWRS approval is sought, and he specifically sought to draw inferences from why the words "Alcohol Wholesaler" were capitalised within the question. When asked, Mr Bedenham did accept that the better view was that the form does require bonded warehouses to be declared. We agree.

114. The area of disagreement between the parties was really focused on the reasons for the non-disclosure of Plutus and Edwards at the specified points – was this a misunderstanding of the question, a mistake, or a failure to realise its relevance (as submitted by Mr Bedenham) or hiding of the storage, or an attempt to deceive (as relied on by Officer Whiddington).

115. We look at HMRC's records of its visits to CdV and then assess this question. When we do so we take account of the phrasing on the form, and the fact that bonded warehouses are known to be regulated by HMRC, as we consider these matters are potentially relevant for this purpose.

116. There had been a visit by HMRC (officer unspecified, but may have been Officer Jeremy Knight) to CdV on 10 September 2015. This was a pre-credibility premises visit, apparently prompted by the disallowance of input tax credit which had been claimed in respect of the supply from M&B Distribution. At that meeting, according to HMRC's record of that visit, the discussion about CdV's business had included "No goods kept in Bond but is considering this move" and later "no in bond supplies".

117. We had two versions of Officer Whiddington's notes of the visit on 20 September 2016 – her manuscript notes, the format of which is that this does not record the questions themselves as this was a pro forma list, only the answers to the numbered questions, and then a typed-up version which included the questions. They record the following:

> "11. Are third party storage premises used? If so where?

No.

…

22. Does the company source any excise goods from outside of the UK? If so why and how is the excise duty accounted for?

Manuscript: Yes. Better price, Bonded warehouse – Liverpool – Italian wine. Stay in warehouse and sometimes sells within the warehouse. Pays duty direct to HMRC. Plutus UK. Warehouse tell how much duty to pay and he pays online to HMRC. Plutus was only warehouse that would give him account at the time. Friend referred him to warehouse…Started using Plutus September last year…"

Typed: Yes Italian wine. They are a better price, they go into a bonded warehouse called Plutus UK in Liverpool. Generally it stays in the bonded warehouse but has made sales whilst under bond within the warehouse. When EI takes wine out of the warehouse he pays the duty direct to HMRC, Plutus tells him how much the duty is and he pays online…EI said that he started using Plutus back in September 2015 as it was recommended by a friend and they were willing to give him an account.

…

48. Where does the business keep its stock?

Here in the unit or in the bond warehouse if not duty paid."

118. We were taken to the manuscript notes of the visit on 29 November 2016, the notes in square brackets being added by us to set out the context:

"5…[Discussing the seizure]

EI said he's changed bonded warehouse and now used Edwards Bond – Since October. EI now left Plutus.

…[Explanation of transportation, discussion of CdV's customers and suppliers. Officer Plant asked about invoices from October 2016, which were with his accountant. Mr Islamaj had some invoiced on his laptop, which was with him, and they looked at those. Could be seen that some stock was in Edwards, being released from there on, eg, 27 September 2016, some arriving in Edwards from Wybo on 15 September 2016.]

LP ask about why he hadn't told us about this account on our 1st visit. EI said that he hadn't used the account. MW said you received goods on 15/9, 4 days before our 1st visit. EI said I must of forgot…

EI explains he uses Edwards because its near a cheese company he uses in Bedford."

119. Having considered this evidence carefully, we have concluded that whilst the use of Plutus should have been disclosed on the AWRS Application Form, and should have been referred to when asked directly (at question 11) in the September 2016 visit, the failure to mention this was not an attempt to hide the use of Plutus, or an attempt to deceive. We note that Officer Whiddington did not rely on the wrong answer having been given to this question in the site visit, but only focused on the form. We do, however, look at the whole of the site visit as we consider this is relevant to the assessment of honesty.

(1) The marker had been put down by Mr Islamaj in September 2015, in the course of what looks to have been a general discussion about CdV's business and its processes, that he was considering using bonded warehouses to store (by necessary inference) duty-suspended alcohol.

(2) Having heard Mr Islamaj's evidence, we accept that his failure to mention Plutus on the AWRS Application Form was not an attempt to hide its use. Whilst Mr Bedenham referred to the possibility of the use of capitalised terms meaning that someone could think they were only being asked about where they stored duty-paid alcohol, our view was that this is over-stating the level of thought which Mr Islamaj applied to that question. Our finding is that he gave little thought to the question, did not appreciate the extent to which an approvals process such as this would require absolute full and frank disclosure, and just did not see the need to disclose the use of bonded warehouses (which he knew to be regulated by HMRC).

(3) This then explains why he answered "No" to the question at first in the September 2016 visit.

(4) At the same visit, and what looks to have been shortly afterwards during the course of the discussion, Mr Islamaj then explained that he used Plutus to store imported goods, namely Italian wine. This was mentioned in the context of an open question about imports, rather than because, say, HMRC had put papers before him indicating that they knew he used Plutus. From reading the notes, our conclusion was that he was completely unaware, when explaining about Plutus in response to question 22 or mentioning bonded warehouses generally at question 48, that HMRC would take the view that this was relevant to question 11. He appears to have openly explained that Plutus was a bonded warehouse and that he imported, held and sold some goods under bond using this facility. He reiterated this information later in that same meeting when asked where the business stored its goods.

120. Looking at the factor as stated in the Decision Letter by Officer Whiddington, we consider that the facts that "The application form did not show that 3rd party storage was used. As discussed on the premises visit, you were already using Plutus for storage before you applied for AWRS, so this should have been declared on the application form" have been established. However, Officer Whiddington has stated that she had considered that this was deliberate. On the basis of the evidence before us, CdV has established that this failure to mention Plutus was not an attempt to deceive, nor an attempt to hide the use of Plutus.

121. We have found the assessment in relation to the failure to mention Edwards at the visit in September 2016 more difficult. This was referred to by Officer Whiddington in the Decision Letter in the context of both illicit trading and the application not being complete and accurate. The reasons in that letter state expressly that this failure was an attempt to hide CdV's storage locations and the true business levels, and that CdV had failed to give a satisfactory reason for not declaring this storage facility.

122. We find as facts that Mr Islamaj had not declared the use of Edwards at the visit in September 2016 and that he had at that stage both set up an account with Edwards and used that account shortly before the visit. In assessing the reasons for the failure to mention Edwards, we note:

(1) If Mr Islamaj was deliberately seeking to hide his use of bonded warehouses, it is odd to mention Plutus. However, if he was seeking to hide the volume of business he did, then that might be a reason for referring to one of two warehouses.

(2) When explaining about Plutus, Mr Islamaj had mentioned that it was in Liverpool (ie an inconvenient location for his business) but was the only warehouse that would give him an account at the time. We consider it would have been natural to go on to explain that he now had an account at a more convenient warehouse.

(3) It is difficult to understand how he might have forgotten about the account, given that he had only recently used it at that time.

(4) The notes taken by Officer Whiddington show that during both the meetings in September 2016 and November 2016 Mr Islamaj would try to pull up information for HMRC to answer questions – in the September visit he showed the officers payments of duty which had been made to HMRC on his phone; in November he showed copies of invoices on his laptop. This is somewhat uncontrolled and not prescribed and not consistent with someone trying to hide information from HMRC.

(5) English is not Mr Islamaj's first language. He gave his evidence in English at the hearing but we consider some allowance should be made for the possibility that he had misunderstood questions that were put to him or simply gave the short answer rather than a longer response.

123. On balance, we are satisfied that CdV have established that the failure to mention Edwards during the September 2016 visit was not an attempt to hide the use of that warehouse or to hide the business levels of CdV. Mr Islamaj had said in November 2016 that he had forgot. That is not a good reason, but it is not the same as dishonesty. We infer, from all of the evidence before us, that the reality is that this lack of complete disclosure was another example of Mr Islamaj's failure at that time to appreciate the extent to which he was required to apply his mind to everything possibly relevant and disclose this to HMRC.

124. Taken together, the facts relied upon by Officer Whiddington, namely that Plutus should have been disclosed on the AWRS Application Form and that Edwards should have been disclosed at the first premises visit, have been established, but the failure to disclose this when required was not an attempt to deceive. This non-disclosure was relevant to the decision-making process, but Officer Whiddington also took inaccurate information into account (namely her conclusion that there had been a deliberate attempt to hide the use of Plutus and Edwards).

Application not accurate and complete – trading in large sums of cash

125. Officer Whiddington also relied on the trading in cash as evidence of an attempt to deceive, stating in the Decision Letter as follows:

> "On the premises visit, you stated you didn't accept large sums of cash as payments from customers, but we have subsequently seen evidence that you are, in fact, trading in large sums of cash with a customer, London Wholesale. Because of this, you should be registered as a High Value Dealer but are not. This is seen as an attempt to hide the fact that you are a high risk trader, dealing in large sums of cash, hence an attempt to deceive."

126. The Money Laundering Regulations 2007 ("MLR 2007") required that high value dealers were registered with HMRC. Regulation 3(12) defined "High value dealer" as "a firm or sole trader who by way of business trades in goods…when he receives, in respect of any transaction, a payment or payments in cash of at least 15,000 euros in total, whether the transaction is executed in a single operation or in several operations which appear to be linked".

127. CdV was not registered as a high value dealer under the MLR 2007. However, we were taken to several invoices for amounts over £20,000 where Mr Islamaj accepted that he had received cash from the relevant customer in payment of the amount on the invoice, eg invoice 2227 dated 1 November 2016 from CdV to London Wholesale Ltd for £27,480, stamped as "PAID" with a balance stated as due of £0, invoice number 2137 dated 27 October 2016 from CdV to London Wholesale Ltd for £22,158.70, stamped as "PAID".

128. Mr Islamaj explained that these invoices had been paid as cash in instalments, none of which had exceeded £8,500.

129. We accept that evidence, but nevertheless CdV was required to be registered as a high value dealer, as these payments are linked and the total was at least €15,000. We address below the disclosure of these cash transactions to HMRC and whether the non-registration was an attempt to deceive.

130. The typed version of Officer Whiddington's notes from the site visit on 20 September 2016 record:

> "35. How does the business receive payment from their customers?
>
> Cash, cheque or cash transfer
>
> 36. Do you accept high value payments?
>
> No"

131. Officer Whiddington's manuscript notes for question 36 record "No – high cash value =". In her witness statement she amplified this:

> "I asked whether the business accepted high value payments. A high value payment is where a trader accepts or makes high value cash payments of 15,000 euros or more (or equivalent in any currency) in exchange for goods, this includes when customers deposit cash directly in a bank account or pays a third party. A business engaging in such transactions is required to be registered with HMRC under the Money Laundering Regulations 2007. Mr Islamaj said he does not."

132. Officer Whiddington agreed in evidence that she would not have said that payments which were linked can still be a high value.

133. On the basis of this information, we conclude that Mr Islamaj referenced the fact that some customers paid him in cash, and answered the question which was put to him accurately in the light of the explanation of such question which was given to him by Officer Whiddington. The reality is that Officer Whiddington was intending to ask about high value payments as defined by the MLR 2007, but she did not explain this definition fully. Both Officer Whiddington and Mr Islamaj were unaware at that time of the rules relating to linked transactions.

134. Mr Islamaj showed to Officer Plant in November 2016 various invoices from CdV to London Wholesale for amounts over £20,000 and informed her that these were paid in cash.

135. We were referred to the representations from Rainer Hughes dated 16 March 2017 in response to the Considering Refusing Letter. That letter states:

> "Our client has received cash payments of no more than £8,500 at any one time, therefore our client was not required to be registered as a High Value Dealer. Invoices over this amount, if paid in cash, are not paid in one lump sum payment.
>
> It should be noted that our client has last week made an Application to become registered as a High Value Dealer."

136. Officer Whiddington's evidence was that when she heard this explanation about splitting payments, she wasn't sure about this, and had asked HMRC's money laundering team who said that the business still needed to be registered. This explains why, when putting the question to Mr Islamaj in September 2016, her explanation of what she meant by high value payments did not include any reference to linked transactions (ie splitting of invoices).

137. Even in Mr Islamaj's witness statement (from October 2019) he said "there is no obligation…to register as a High Value Dealer as long as no single cash payment is greater than £8,500", and this threshold was never breached. He went on to add that where a customer is to pay more than £8,500 in cash, it is broken up into multiple instalments.

138. Giving evidence Mr Islamaj stated that he knew that cash payments over €15,000 needed to be registered. He acknowledged that he had not looked at the MLR 2007. Being taken to those regulations he accepted that linked transactions needed to be taken together – it did not matter that the payment was not made in one lump sum.

139. Considering the reason as expressed in the Decision Letter, we accept the facts stated by Officer Whiddington that "On the premises visit, you stated you didn't accept large sums of cash as payments from customers, but we have subsequently seen evidence that you are, in fact, trading in large sums of cash with a customer, London Wholesale. Because of this, you should be registered as a High Value Dealer but are not."

140. However, that letter goes on to state that "This is seen as an attempt to hide the fact that you are a high risk trader, dealing in large sums of cash, hence an attempt to deceive".

141. CdV have established that Mr Islamaj did not seek to hide the receipt of large amounts of cash from customers from HMRC. He was open that this was how London Wholesale had paid invoices of amounts in excess of £20,000. There is then a follow-on question which arises as to whether splitting payments was an attempt to evade the need to be registered (albeit that in law this did not work).

142. Mr Islamaj gave evidence that the payments had not been split to avoid being registered – London Wholesale was paying what they could afford, ie £3,000, £4,000, never over £6,000. He had put the cash in the bank.

143. He had subsequently applied to be registered under the MLR 2007, but a planned visit by the relevant officer (in 2018) had to be cancelled. The application has not been pursued.

144. We note that London Wholesale was itself registered under the MLR 2007. As recipient of the cash, we recognise that Mr Islamaj was not necessarily the person in control of how much was paid at any one time. However, there was no evidence as to how much time was between instalments such as to enable us to reach a conclusion that means was a determining factor here. Instead, we consider that Mr Islamaj did not want not want to be required to register under the MLR 2007 and thought that the splitting of payments was a lawful way to ensure that he was not so required. This finding falls short of being an attempt to deceive.

145. CdV's failure to register under the MLR 2007 when required to do so was a relevant consideration to be taken into account in assessing the application. The fact that Mr Islamaj did not realise that he was required to be registered should also have been taken into account, alongside the facts that Officer Whiddington and Rainer Hughes did not appreciate this at the relevant time either (as this has a bearing on the reasonableness of the view taken by Mr Islamaj). Nevertheless, this is a matter on which Mr Islamaj should have taken specific advice, particularly as we consider that once a person knows that receiving, say, £20,000 in cash resulted in an obligation to register, the notion that receiving this in four instalments of £5,000 each did not should have prompted further enquiry.

Unsatisfactory due diligence – M&B Distribution

146. HMRC argued that CdV did not meet the requirement in Excise Notice 2002 that "The business has in place satisfactory due diligence procedures covering its dealings with prospective customers and suppliers to protect it from trading in illicit supply-chains."

147. The first instance relied on by Officer Whiddington in the Decision Letter is:

> "Insufficient Due Diligence was carried out on M&B Distributions, resulting in a claim for input tax by yourselves being disallowed. M&B Distributions were de-registered for VAT prior to you purchasing wine from them and hence prior to your input tax claim. Lack of sufficient due diligence meant you were not aware of this, when you should have been."

148. HMRC informed CdV by letter dated 22 October 2015 that its return for the period 06/15 contained an inaccuracy as M&B Distribution had not been registered for VAT at the time the supply was made. That letter set out HMRC's ability to charge a penalty.

149. It was common ground that:

(1) M&B Distribution had been deregistered with effect from close of business on 28 February 2015;

(2) CdV did not apply to be registered for VAT until February or March 2015, which registration then had effect from 1 April 2015;

(3) CdV bought goods from M&B Distribution in May 2015;

(4) CdV did not check the VAT status of M&B Distribution at any time after CdV itself was registered for VAT;

(5) CdV had thus claimed credit in its return for 06/15 for input tax on a supply from a de-registered supplier. This resulted in a claim for just over £3,000 being disallowed; and

(6) no penalty was issued. Officer Whiddington's explanation, which was unchallenged, was that this was due to the unplanned absence of the case officer.

150. The letter from Rainer Hughes in March 2017 stated that Mr Islamaj had carried out due diligence "some six months before the invoice" was raised. This reference to six months was reiterated in Mr Islamaj's witness statement. However, Mr Evans challenged this by reference to the facts that CdV only commenced business in February 2015 (according to Mr Islamaj's own evidence) and the invoice was raised in May 2015. Mr Islamaj stated that he had checked the VAT registration of M&B Distribution when he had started business, in February 2015. We accept that evidence.

151. The checking of the company several months before raising the invoice was clearly inadequate. Verifying ID and that a supplier is VAT-registered are basic processes which should be the starting-point of any thoughtful due diligence process. We consider that the facts as set out by Officer Whiddington in the Decision Letter are made out and that it was reasonable to rely on them as a relevant consideration.

152. Mr Bedenham drew attention to this being a single incident that had occurred before the AWRS came into effect (which, for established traders, was from 1 April 2017). We do not consider that the fact that the failure occurred in 2015 prevents this from being a relevant consideration – the question is whether adequate due diligence processes were in place, and a failure such as this was evidence of inadequate processes. We do not regard this as a single incident in the light of the conclusions we reach below in relation to the due diligence on Mensci.

Unsatisfactory due diligence - transportation company, Mensci

153. Officer Whiddington also relied on the following:

> "Insufficient Due Diligence was carried out on the transportation company that was involved in the seizure of wine in November 16 (covered in 1. above). On the premises visit you stated that instructions to the transportation company were given over the phone and there had been no details given to

> you of the driver and vehicle beforehand. You had not, therefore made sufficiently careful enquiries regarding transportation of the goods, which is a key step in the supply chain."

154. We have addressed the due diligence that was carried out on Mensci in the context of considering the November 2016 seizure. We concluded that the circumstances raised a red flag and that the basic ID verification conducted was not adequate, albeit that seeking what was essentially a reference from the sending bonded warehouse was sensible.

155. CdV have not established that they made sufficiently careful enquiries regarding the transportation of the goods – eg, asking further questions about the precise movement intended of the goods, conducting internet searches of the transporter. This may not prevent fraud occurring, but a more robust process would help to minimise the risk. This was therefore a relevant consideration to be taken into account.

Insufficient evidence of commercial viability or credibility – accounts

156. HMRC submit that the fourth criterion in Excise Notice 2002 which had not been met was "The business has provided sufficient evidence of its commercial viability and/or credibility". The first factor identified by Officer Whiddington in the Decision Letter states:

> "The accounts indicate that the business' viability is marginal, but with an extremely small net current asset position. The amount of long term creditors seem likely to cause financial problems if profit is not increased. You have failed to provide sufficient evidence as to how you intend to cover your long term liabilities so as to ensure that the company remains profitable."

157. The accounts which were considered by Officer Whiddington were those for the year ended 29 February 2016:

(1) The accounts show turnover of £398,008, cost of sales of £346,189 and gross profit of £51,819. After administrative expenses and interest there was a net profit of £4,841.

(2) The balance sheet as at 29 February 2016 showed current assets (comprising stock plus debtors) of £61,018, creditors (due within one year) of £60,399, thus net current assets of £619. Taking account of total assets and total liabilities (ie including fixed assets of £22,310 and long-term creditors of £17,988), the total net assets were £4,941.

158. Officer Whiddington expressed the concern that if creditors called in the amounts due, there was not enough cash or assets in the business to pay them off and keep business running.

159. The net profit realised in the year was small. However, this was a new business and it was a net profit, ie not a loss. Furthermore, it is wholly unrealistic to consider that businesses sit on a cash pile sufficient to cover all liabilities, both short-term and long-term, on the assumption that they would all be called in at once. CdV was a wholesaler – it sells stock and uses the money received to pay for that stock, hoping to realise a profit.

160. We do not consider that this reference to the accounts was a relevant consideration in the circumstances. No account should have been taken of this when considering the AWRS Application.

Insufficient evidence of commercial viability or credibility – illicit trading, under-priced goods and insufficient due diligence

161. This appears as a second factor in the Decision Letter:

> "Credibility of the company is in doubt when there is evidence of illicit trading, under- priced goods and insufficient due diligence. You have failed to provide sufficient evidence of how you intend to ensure that these issues

> are not repeated and of those processes you plan to put in place to give assurances for future compliance visits."

162. We address first whether this is a new or additional reason for the Refusal Decision, separate to those already considered.

163. The first sentence is certainly repetition, and cannot add or detract from our assessment above, or from the reasonableness or otherwise of the Refusal Decision.

164. The reference to failure to provide evidence of how CdV intends to ensure issues are not repeated, and of the processes to be put in place, could potentially be read as a stand-alone factor. However, we consider it is not appropriate to do so in this instance – giving evidence, Officer Whiddington did not draw attention to any facts which she relied upon under this heading of which she had not already taken account.

Were any other matters relied upon by HMRC?

165. We have also considered whether other factors were relied upon by Officer Whiddington in making the Refusal Decision, but not specified in the Decision Letter.

166. Mr Bedenham drew attention to the fact that the Decision Letter describes the factors identified therein as being the "key points" which had been taken into account, thus begging the question as to whether there were other "non-key" points which had been taken into account.

167. In *HMRC v Smart Price Midlands Ltd* [2019] EWCA Civ 841 the Court of Appeal considered the approach to directions for disclosure in an appeal by traders against the refusal of registration under the AWRS. One of those traders was Hare Wines and the refusal of its AWRS application also used this "key points" language. Rose LJ was critical of this approach, stating at [59]:

> "…Unfortunately this appeal has progressed in a way which makes it difficult at this stage to order disclosure that is tailored, even in a broad brush way, to the matters in dispute between the parties. The main problem is the opacity of the reasons given for the refusal of approval. If what happened in the Hare Wines appeal is at all typical of HMRCs process in determining applications, it reveals a chaotic decision-making process which is almost bound to generate appeals and create case management problems in any tribunal proceedings. I agree with the comment of the UT in Hare Wines UT that the Refusal letter is inadequate and incomplete. The obligation placed on HMRC in regulation 4(4) of the Wholesaling of Controlled Liquor Regulations 2015 is to give "the reasons" not the "key points" for the refusal. The applicant should be able to understand the reasons for the refusal of the application from the refusal letter as a self-standing document. The relationship in the Hare Wines appeal between the Refusal letter and the HMRC Response letter both sent on 20 March 2017 is not explained. The Refusal letter is from Ola Onanuga, who is presumably the decision-maker for the purposes of the global disclosure direction. It states simply that one ground for the refusal is that Mr Hare is involved as the guiding mind of the business but does not say anything about why his involvement is objectionable. The Refusal letter does not expressly incorporate everything in the HMRC Response letter and it does not say whether Ola Onanuga has seen or considered all the information that was available to Edward Fyle who wrote the HMRC Response letter. It is entirely unclear to me, for example, whether the tax loss letters have been relied on by Ola Onanuga as part of the reason why Hare Wines is not t and proper, or whether Mr Hares spent conviction has played any part in the decision to refuse as asserted by Mr Fyle but not mentioned in Refusal letter"

168. Officer Whiddington's evidence was that she had used this phrase because that was the approach taken by HMRC's template letter which she had followed. Her evidence was that there were no other reasons for the Refusal Decision. In particular:

(1) Being asked by the Panel about whether she had taken account of late filing penalties incurred by CdV (at the meeting on 29 November 2016, Mr Islamaj had stated that he had been late submitting the VAT returns and had incurred a penalty and had received a late filing charge from Companies House for not submitting the company accounts on time), Officer Whiddington stated that she had not taken account of these matters.

(2) Officer Whiddington had repeatedly asked CdV for copies of the cash books. These were never received and in March 2017 Mr Islamaj confirmed that he did not keep a cash record book. Whilst Mr Evans referred to this as an example of poor record-keeping, Officer Whiddington had not taken account of this in her decision.

(3) In response to a question from the Panel, Officer Whiddington confirmed that the questions in relation to the compulsory strike-off of Terra Motus Ltd had not led to anything and this was not a factor in her decision.

169. We accept Officer Whiddington's evidence that the only factors taken into account were those specified in the Decision Letter.

170. We consider that HMRC officers taking decisions as to ancillary matters, whether in respect of AWRS applications or otherwise, should not set out just the "key points" or even use such terminology when giving reasons for a decision – they should set out all of the reasons for their decision, and may choose to indicate whether some were thought to be of minor significance. This is needed to enable taxpayers to assess whether to challenge the decision and to enable the tribunal to assess whether the decision was reasonable. Nevertheless, on the basis of our finding that the factors taken into account by Officer Whiddington in deciding to refuse the AWRS Application were those set out in the Decision Letter, this criticism of the approach has no bearing on the reasonableness or otherwise of the decision.

Events subsequent to the Refusal Decision

171. Mr Evans submitted that subsequent events "shed light" on matters addressed in the Decision Letter. (He also submitted that, if we were to conclude that the Refusal Decision was unreasonable, these events supported a conclusion that it was inevitable that HMRC would reach the same decision upon review.)

172. The potentially relevant events are set out below.

Discrepancies in sales of Limoncello

173. Officer Whiddington's witness statement addressed one additional matter, namely that following further review in October 2017 of the invoices provided she had identified that there had been more sales than purchases made of Limoncello – "in total there have been 10 cases purchased and 99 cases sold". She identified that in 15 instances (of the 20 sales invoices) the sale price was £14 per case, less than a third of the purchase price. However, she had not been able to follow-up on these questions at that time as the application had been refused.

174. At the hearing, Mr Bedenham put it to Officer Whiddington that what she had taken to be signs of under-pricing was in fact a typo. There were invoices which showed Limoncello being sold at £14 plus VAT per 0.70cl bottle or £15 plus VAT per 0.70cl bottle. There were also invoices which described the Limoncello being sold as (6 x 0.70) (ie implying a case) but where the quantity was, eg, 3, at a rate of £14 plus VAT, with the price being stated as £42. Officer Whiddington readily accepted that the sales were in fact sales of bottles, not cases.

175. CdV had been buying cases of Limoncello and selling it by the bottle. There was no evidence of under-pricing in the invoices which Officer Whiddington had identified.

176. Mr Evans confirmed in closing that HMRC did not rely on the sales of Limoncello as matters which shed light on the Refusal Decision. He was correct to do so, but we do revert to this point when addressing submissions made by Mr Bedenham as to the decision-making process.

Seizures

177. There have been three further seizures of CdV's goods, as set out in the Background and Chronology above.

178. None of these seizures were successfully challenged. Those on 9 November 2017 and 25 January 2018 were challenged but the goods were condemned as forfeit. Mr Islamaj stated that he had instructed his solicitors to challenge the seizure made on 7 June 2018, but checks by Officer Khnanisho indicate that no such challenge was received by HMRC. On balance, we consider that no challenge was made as there was nothing to corroborate Mr Islamaj's recollection and he could have been remembering what had happened in relation to the earlier seizures.

179. Officer Khnanisho estimated that the potential loss to the revenue involved in the November 2017 seizure was just under £41,000 (based on the number of litres of wine and calculating the duty as if it were all still wine) and around £43,000 in respect of the goods seized in January 2018. She could not estimate the potential loss involved in the June 2018 seizure as she did not know the quantity of goods seized (which had in any event been a mixed load).

180. Officer Khnanisho confirmed in cross-examination that her evidence was not that CdV was knowingly involved in smuggling. It was a possibility – she didn't know either way.

181. We consider that the facts of these seizures do shed some light on the factors taken into account in making the Refusal Decision, in particular that we should be wary of too much emphasis being placed on the November 2016 seizure having been a single incident. However, any light which is shed is not solely in HMRC's favour. We note also that:

(1) The first two seizures both involved the same transporter, CJ Mason, and as a result of this Mr Islamaj no longer uses that transporter;

(2) Mr Islamaj states that he no longer uses bonded warehouses, and this evidence was not challenged;

(3) Officer Khnanisho confirmed that she was not aware of any seizures having been made of CdV's goods since June 2018 – and the other checks set out in her witness statement since she took over the monitoring of CdV in November 2019 do lead us to conclude that if there had been further seizures she would have been aware, and as a result we find that there have been no further seizures.

Due diligence

182. Mr Evans referred to what he described as the pattern of inadequate due diligence, as set out in Background and Chronology above, based on the monitoring of Officer Nash, which led to the Due Diligence Warning Letter being sent in February 2019.

183. Mr Evans submitted that this sheds light on what were being described as the single incidents set out in the Decision Letter (of which there were two in any event).

184. We do agree that the visit reports demonstrate ongoing failures of CdV to adopt and implement a robust due diligence policy. However, we also note that Officer Khnanisho's

evidence was that she has received further material from CdV which she had not reviewed as it was now quite old. In the light of this it cannot be said that HMRC's review of CdV's due diligence processes or policy is complete. We considered that it was very much work in progress.

Was the Refusal Decision reasonably arrived at?

185. In challenging the Refusal Decision, Mr Bedenham challenged the facts or matters relied upon by HMRC, the decision-making process, and the proportionality of the decision to refuse the application rather than grant approval subject to conditions.

186. We have already considered the reasons stated in the Decision Letter which were those that Officer Whiddington stated that she took account of in reaching the Refusal Decision.

187. It was reasonable for her to take account of the evidence of inadequate due diligence processes, illustrated by the facts in relation to both M&B Distribution and Mensci. However, her assessment of other factors should have been more nuanced:

(1) the seizure of goods in November 2016 should have been considered in the light of all the surrounding information (including that this was a single incident, that some due diligence had been undertaken albeit inadequate and that there is no evidence to support a conclusion that CdV had been party to the excise fraud) and then assessed having regard to the fact that the criterion in Excise Notice 2002 which relates to illicit trading refers to whether the business poses a "serious threat" to the revenue;

(2) whilst the use of Plutus should have been disclosed on the AWRS Application Form, and should have been referred to when asked directly (at question 11) in the September 2016 visit, the failure to mention this was not an attempt to hide the use of Plutus, or an attempt to deceive;

(3) the failure to mention Edwards during the September 2016 visit was not an attempt to hide the use of that warehouse or to hide the business levels of CdV. This lack of complete disclosure was an example of Mr Islamaj's failure at that time to appreciate the extent to which he was required to apply his mind to everything possibly relevant and disclose this to HMRC; and

(4) the failure to register under the MLR 2007 when required to do so was a relevant consideration to be taken into account. The fact that Mr Islamaj did not realise that he was required to be registered should also have been taken into account, alongside the facts that Officer Whiddington and Rainer Hughes did not appreciate this at the relevant time either (as this has a bearing on the reasonableness of the view taken by Mr Islamaj).

188. However, Officer Whiddington did not take account of certain areas which demonstrated poor compliance by CdV, notably the various late filings and its failure to maintain a cash book. Whilst the significance of such matters should not be over-stated, we consider that in the context of the criterion in Excise Notice 2002 that "there haven't been persistent or negligent failures to comply with any HMRC record-keeping requirements, for example poor record keeping in spite of warnings or absence of key business records", it would have been relevant to take these factors into account.

189. Furthermore, the three seizures since the Refusal Decision and the ongoing concerns expressed by Officer Nash in relation to the due diligence processes of CdV do shed light on the factors (reasonably) relied upon by Officer Whiddington.

190. Nevertheless, for the reasons expressed above, we consider that it was not reasonable to have relied on what was described as the evidence of illicit trading by way of selling under-

priced wine or Officer Whiddington's conclusion that the business' viability was marginal based on the February 2016 accounts. She thus took irrelevant considerations into account.

191. Mr Bedenham's challenge to the process also involved his submission that Officer Whiddington was an inexperienced officer of HMRC, had approached CdV's AWRS Application with undue suspicion, did not properly weigh the information before her, failed to make appropriate follow-up and had not properly considered whether it would be appropriate to grant approval subject to conditions.

192. Officer Whiddington had only been an excise officer since January 2016 – before that she had worked for the Office for National Statistics. (By the time of the hearing she had been seconded to the Coronavirus Job Retention Scheme.) She was therefore new to the team when CdV's AWRS Application was allocated to her. However, inexperience does not necessarily equate to an inability to make reasonable decisions. It was apparent from the evidence before us that at various times Officer Whiddington had either sought out advice from others or had otherwise had the benefit of discussions with more experienced officers, eg:

(1) there had been a case conference on 28 November 2016, the attendees at which included Anne Downham whom she described as a very experienced excise officer on Officer Plant's team with whom Officer Whiddington had discussed the seizure; and

(2) when the information she had requested from CdV on 6 December 2016 had not been received by 17 January 2017, she discussed with her manager (Officer Helen Chivers) and Officer Plant before deciding to send a "considering to refuse" letter on 17 January 2017.

193. The evidence before us also supports the conclusion that she took the representations received in response to the Considering Refusing Letter seriously. Having received the representations from Rainer Hughes on 16 March 2017, Officer Whiddington sent emails to Officer Plant, Officer Jeremy Knight and Officer Tracey Griffiths to ask for updates about specified matters and Officer Janet Jordan of UK Border Force in respect of the November 2016 seizure, and to the Money Laundering Regulations team. She also identified that the letter from Rainer Hughes had not addressed all of the points in the Considering Refusing Letter and contained some comments which appeared to relate to another taxpayer.

194. Furthermore, the submission that she had approached matters with suspicion was not supported by the evidence. Officer Whiddington estimated that she had dealt with 60-70 AWRS applications and this was the only one she had refused. We can see no reason, or evidence, as to why CdV's application would have been treated with suspicion from the outset.

195. We have already stated that that we do not agree with the use of the "key points" phrasing when giving reasons for a decision on an ancillary matter. However, the unchallenged explanation was that this was in HMRC's template decision letter.

196. Officer Whiddington did make mistakes, namely not identifying that the house wine which was being sold at £19 per case was being sold at £19 plus VAT per case (and thus that when assessing profitability, it was wrong to take account of the cost of VAT as well as the duty), and not realising that the Limoncello was being bought by the case and sold by the bottle. The latter mistake had no bearing on the decision-making process – she became concerned about the point afterwards and was not permitted to ask questions of CdV in relation to it, as by that time the decision had been made.

197. Mr Bedenham also challenged whether all of the documents which Officer Whiddington had relied upon had been disclosed. There were two particular areas of focus – what was described as HMRC's internal guidance, and any additional information in relation to a case

conference. Officer Whiddington stated that all documents that she relied upon were disclosed - she didn't consider anything else.

198. Officer Whiddington referred during her evidence to having considered the criteria set out in HMRC's internal guidance, which constituted an aide memoire for officers. This was not the same as Excise Notice 2002, although from the references made by Officer Whiddington we infer that it was very much based on this. She may have been referring to HMRC's manuals, as the Panel is aware that such manuals are published and the Alcohol Registration Scheme Manual sets out the criteria to be considered (as is to be expected). Having considered the cross-examination of Officer Whiddington carefully, we are satisfied that, whether the guidance to which she referred was HMRC's manual or a different source, the criteria which she applied when making the decision were those set out in Excise Notice 2002. However, the relevant material should have been disclosed and could then have been included in the hearing bundle. We are satisfied that in the circumstances there was no prejudice to CdV arising as a result of this failing on the part of HMRC.

199. Mr Bedenham also asked about whether there were notes of a case conference which had been held on 13 February 2017. The only record of that case conference was that set out in Officer Whiddington's witness statement, the relevant paragraph of which reads at [80]:

> "On 13th February 2017 a case conference was held between myself and Officers Helen Chivers, Stuart Heath & Laura Plant, where the trader's Fit and Proper status was considered. Invoices provided by Mr Islamaj following my original request of 6th December 2016 revealed that the trader may have been receiving large sums of cash without being registered as a High Value Dealer (HVD). A high value dealer is someone who accepts or makes high value cash payments of 15,000 euros or more (or equivalent in any currency) in exchange for goods, this includes when customers deposit cash directly in a bank account or pays a third party. High Value Dealers need to register with HMRC under the Money Laundering Regulations. A business must not trade without registering with HMRC. Trading while not registered is a criminal offence. The invoices we'd seen for CDV had exceeded the threshold on several occasions. In addition, even though asked for, we had never been sent copies of CDV's cash book confirming where the money has come from or went to. By splitting payments, the trader appeared to be trying to evade being registered and, therefore, monitored…"

200. Officer Whiddington explained that Helen Chivers was her manager and Stuart Heath was Officer Plant's manager. She had obtained the record that the meeting had taken place from "Caseflow" on HMRC's system – we infer that Caseflow says that a case conference was held on that date, and probably says it was a "fit and proper discussion". Her evidence was that there were no notes of the meeting – either on Caseflow or elsewhere.

201. Mr Bedenham challenged how, in a witness statement dated 29 October 2019, she could have recorded what was discussed at a meeting held on 13 February 2017 of which no meeting note had been made. Officer Whiddington's response was that she had looked at Caseflow and the emails. Those emails had all been disclosed.

202. Once the date and attendees of case conference are known (and Officer Whiddington stated that this was recorded) there is nothing surprising about the level of information recorded in the witness statement, ie we are satisfied that this paragraph can readily be prepared even in the absence of meeting notes having been made. Once the definition of high value dealer is ignored (as this is a matter of law and not specific to CdV), all this paragraph does is refer to invoices provided by Mr Islamaj (details of which had been contained in the meeting note of the second site visit) and that HMRC had not received the cash book even though they had

asked for it. It does not purport to recount in any level of detail the matters discussed or the views of particular officers. It is a very high-level summary of a couple of points which had arisen. We accept Officer Whiddington's evidence that there were no other notes of this meeting, and therefore there was nothing additional which should have been disclosed.

203. Mr Bedenham emphasised that at paragraph 6.10 of Excise Notice 2002 HMRC have stated that HMRC must be satisfied that the business is genuine, that all persons with an important role or interest in it are law abiding, responsible and "don't pose any significant threat in terms of potential revenue non-compliance or fraud".

204. Mr Bedenham submitted that the facts and matters relied on by HMRC in support of the decision go nowhere near establishing that CdV posed a "significant threat" to the revenue such as to warrant outright refusal (as opposed to granting the approval subject to conditions). There was, therefore, a failure to take into account and/or properly apply HMRC's own guidance and to consider the need to act proportionately. But for the High Court injunction, CdV's business would have been destroyed by HMRC's refusal to grant approval under the AWRS.

205. Officer Whiddington confirmed that there was no challenge as to whether the business was genuine. Furthermore, she accepted that in making the Refusal Decision there were several aspects of the criteria set out that she was not considering to be in issue, namely:

(1) connections between the business and other known non-compliant or fraudulent businesses,

(2) key persons having relevant criminal convictions,

(3) persistent or negligent failures to comply with any HMRC record-keeping requirements,

(4) previous attempts to avoid being approved and trading unapproved, and

(5) outstanding, unmanaged HMRC debts or a history of poor payment.

206. Furthermore, of the various examples of evidence of illicit trading set out in the notice, the only one relied upon was that there had been a seizure of duty-unpaid products. She was not relying on there being assessments for duty-unpaid stock or penalties for wrongdoing, trading with unapproved persons, previous revocations or refusals of approval, confiscation orders or key persons having been disqualified as directors.

207. Being pressed as to what constitutes a significant threat, Officer Whiddington noted that the goods seized in November 2016 would have otherwise involved a loss of duty of over £40,000 and considered this significant. Officer Whiddington observed that there were "lots of one-offs" – one seizure, one instance of input tax credit disallowance, one failure to mention storage on a form, one failure to mention a different warehouse in a meeting.

208. We consider that it is not appropriate to regard a reference to "significant threat" as simply a reference to amounts of duty at stake in any one instance. Instead, we consider that a trader whose processes are such or whose behaviour is such that they (whether knowingly or otherwise) enable duty-unpaid goods to enter the UK market can potentially pose such a significant threat to the revenue.

209. We do note that Officer Whiddington had identified four criteria from Excise Notice 2002 which she concluded were not satisfied, whereas once no account is taken of those matters which we conclude were irrelevant, there cease to be any examples of insufficient evidence of commercial viability or credibility and, furthermore, the evidence of illicit trading is reduced to the fact of one seizure from November 2016 and the failure to disclose the use of Edwards at the site visit in September 2016. We consider that this is of some significance.

210. Mr Bedenham submitted that approval with conditions would have been more appropriate in this instance – eg due diligence conditions, specifying what steps should be taken. Officer Whiddington confirmed that she had considered whether to approve with conditions but had concluded that this was not appropriate.

211. After the hearing, HMRC provided information as to the number of AWRS applications made, granted, granted with conditions and refused. As at 1 November 2020 there had been 13,994 applications for AWRS approval (although 1,737 of these were for variations of approvals). Of these, 9,486 had been approved (66 of which with conditions) and 1,250 refused. We were not given any information as to the outcome of the 1,500 or so applications which do not appear in the numbers of approvals or refusals – we infer that they might be pending a decision, refusals which are being appealed to the Tribunal, or withdrawn before any decision was made.

212. Neither party made any submissions in relation to these statistics. At a very general level the Panel was somewhat surprised by how few applications have been granted with conditions. However, this does not assist with considering whether granting approval with conditions might have been an available, and more proportionate, way forward in the present instance such that the failure to pursue this route constitutes a flaw in the decision-making.

213. A difficulty we see with the approach proposed by Mr Bedenham is that the reasons identified by Officer Whiddington for issuing the Refusal Decision are somewhat disparate. They include matters related to due diligence (for the transporter of the goods that were seized, and M&B Distribution), non-disclosure of the use of bonded warehouses (on the AWRS Application Form and at the first meeting) and concerns over the business model of CdV (pricing of goods being relevant both to the under-priced wine and the concerns raised about the accounts). Each would arguably require its own type of condition to protect HMRC. There is thus a risk that a conditional approval would have required a multitude of conditions to deal with the matters which had been relied upon by Officer Whiddington.

214. In the light of the facts and matters as Officer Whiddington found them, we can understand why she concluded that approval with conditions was not appropriate. However, on the basis of the facts as we have found them, and particularly given that there is no evidence that CdV was knowingly involved in fraud, we would anticipate that approval with conditions might have been sufficient to protect the revenue. We note in this regard that the monitoring of CdV by way of the trader monitoring programme, including the regular visits by Officer Nash, has enabled HMRC to maintain good visibility of the business of CdV and the risks posed thereby since the Refusal Decision. This is a good indicator that the imposition of conditions may have enabled HMRC to reduce or control any potential threat to the revenue in a manner which is less destructive to CdV's business.

215. On the basis of all of the evidence before us, we have concluded that the decision to refuse approval to CdV under the AWRS was one which could not reasonably have been arrived at. As explained above, the Refusal Decision took account of irrelevant considerations (see [190]), some relevant matters were not assessed in the light of whether the failures identified were deliberate or reflected culpability on the part of CdV (see [187]) and the decision failed to take account of some relevant considerations (see [188]).

216. Section 16(4) FA 1994 requires that in view of our conclusion on the decision not being reasonable, we direct that HMRC conduct, in accordance with our directions, a review of the original decision. This is subject to the caveat from *John Dee* that 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.

Would the decision inevitably be the same?

217. Mr Evans submitted that even if we were to find that the decision was unreasonable, we should nevertheless find that it was inevitable that the same decision would be reached again on review – he pointed to the number of failures identified by Officer Whiddington, the three further seizures which had since occurred and the evidence of inadequate due diligence processes which had culminated in the Due Diligence Warning Letter.

218. Mr Bedenham submitted that if we were to conclude that HMRC's decision was unreasonable, we should be reluctant to reach the conclusion that it was inevitable that the same decision would be taken again. He made the following points:

(1) We should exercise caution as this would put the Tribunal in the position where it was asked to look at material which had not been before HMRC's decision-maker, and not considered by any other decision-maker. In deciding that approval would inevitably be refused the Tribunal is being turned by HMRC into the primary decision-maker.

(2) This inevitability jurisdiction is best-suited to the situation where a relevant factor had been left out of account; not where HMRC seek to rely on new matters that were not before the original decision-maker.

219. We do not agree with Mr Bedenham's submission. The constraints on the *John Dee* jurisdiction are that we consider it "inevitable" that the same decision would be made again. Inevitability is a very high hurdle. This is in line with Underhill LJ's assessment (in *CC&C*) of the extent of the Tribunal's jurisdiction in relation to ancillary decisions. However, where we are satisfied that this hurdle is met, we consider that it is appropriate for us to conclude that the decision would inevitably have been the same and dismiss the appeal, even if this does result in the Tribunal becoming the primary decision-maker in that instance. It is not helpful for us to try to prescribe, at a general theoretical level, how some types of flawed decision might be more susceptible than others to falling within this criterion. It depends on the facts in each case.

220. The Refusal Decision was made on 29 March 2017, and we have already addressed the events that have occurred since that date. We agree that the seizures and the concerns identified in relation to due diligence are relevant.

221. If we were to direct that HMRC review the decision, such a review would be conducted at the current time. We consider that it would be irrational to direct that the reviewing officer seek to go back and review the decision as at March 2017 (and neither party submitted that this would be appropriate). They would be reviewing the Refusal Decision at the beginning of 2021.

222. We have had some evidence as to developments since March 2017 (from both Officer Khnanisho and from Mr Islamaj). There are two points that were somewhat striking from this evidence, and they relate to changes in the business of CdV and the current position in relation to the review of CdV's due diligence processes. We consider these below, and then a submission as to the relevance of the terms of the High Court order (which has required HMRC to register CdV as an approved wholesaler), in particular HMRC's right to make a decision in relation to CdV's continued approval under the AWRS.

Business and risk profile of CdV

223. Giving evidence at the hearing, Mr Islamaj explained that before the pandemic, business had been very good.

224. The accounts for 2017 and 2018 show a strengthening of the net asset position:

(1) The accounts for the year to 28 February 2017 show net profit (before tax) of £30,249. The balance sheet at year end showed net assets of £18,049 and net current assets of £18,655.

(2) The accounts for the year to 28 February 2018 showed net profit (before tax) of £17,166. There were also net current assets of £20,332 and net assets of £21,740 at year end.

225. Mr Islamaj said that since then the business had gone from strength to strength. The most recent accounts (which were not before us) recorded a net profit of around £80,000. He had moved premises about two years ago and now had about triple the amount of storage space and whereas he used to be the only person working in the business he now had five employees.

226. Asked as to whether he was operating in the same way as before March 2017 he said that many things had changed:

(1) CdV no longer has accounts at bonded warehouses;

(2) alcohol is imported through registered consignees, so duty is paid before the wine leaves Italy; and

(3) he buys from a company in Italy he knows which brings the goods to the UK.

227. This evidence (as to the most recent accounts and the changes set out above) was not challenged, and we find as facts accordingly.

228. Mr Islamaj also stated that there had not been any seizures of CdV's goods since June 2018, and this was corroborated by the evidence of Officer Khnanisho.

229. Officer Khnanisho also explained that following the Refusal Decision CdV was placed on the trader monitoring programme, an excise programme which monitors traders that HMRC thinks might be operating where there is increased risk. Where traders are in such a programme, they are visited regularly by HMRC. Six months ago, the relevant excise officer informed CdV that it was no longer on the trader monitoring programme.

Due diligence

230. We agree with Mr Evans' submission that there had been a pattern of inadequate due diligence, even since the Refusal Decision. The first visit by HMRC (in September 2015) was prompted by the disallowance of input tax and at that meeting the notes record "Discussed Due Diligence in detail." Yet it is apparent from the evidence of Officer Khnanisho, which took us through the monitoring conducted by Officer Nash, that various inadequacies were identified at different times.

231. Mr Bedenham pointed out that CdV has engaged TT Tax to advise it on its due diligence policy and processes. He submitted that CdV has thus sought to remedy the failures identified by HMRC.

232. We do find that CdV had so engaged TT Tax. However, what is significant is that we do not know whether CdV has been successful in addressing the problems previously identified by HMRC – and, just as importantly for this purpose, neither apparently does HMRC. Officer Khnanisho records in her first witness statement dated 27 November 2019 that although she had taken over responsibility for the monitoring of CdV on 5 November 2019 from Officer Nash, neither she nor Officer Nash had fully reviewed the due diligence packs received from CdV in August 2019 and she had "not yet formed a view on whether the due diligence in these most recent packs is sufficient". At the hearing Officer Khnanisho confirmed that she has received an updated policy and due diligence packs – she has not yet looked at this material and it was not in the hearing bundle.

Registration pursuant to High Court order

233. Mr Bedenham drew attention to paragraph 4 of the consent order granted before the High Court, which provides that HMRC has the right to make a decision in relation to the continued approval and addition to the register of each claimant (which includes CdV) pending determination of its appeal before this Tribunal on providing notice to that claimant. Mr Bedenham submitted that if HMRC were so convinced that CdV's business presented a significant threat to the revenue, then they could have invoked this provision even ahead of the hearing of CdV's appeal and that their failure to do so was indicative of the fact that it was not inevitable that the same decision on approval would be made again.

234. We do not place any weight on HMRC's decision (if indeed there was a positive decision on this matter, on which we make no finding) not to invoke this provision. We had no evidence as to whether or not any officer of HMRC had considered exercising this right, and, in any event, we consider that there may be reasons for a failure to exercise this right which have no bearing on the likelihood of CdV's appeal succeeding, most notably in our view the likelihood that any attempt by HMRC to revoke the temporary registration would itself have been challenged by CdV with a further action before the High Court, thus adding to the plethora of proceedings.

Conclusion on inevitability

235. Given that CdV no longer uses bonded warehouses and instead alcohol is imported duty-paid and transported by or on behalf of the Italian supplier (ie without a need for CdV to use varying hauliers to move whole loads from European warehouses), we consider that there are grounds to conclude that the risk profile of CdV's business has changed since the Refusal Decision. This is supported by HMRC's decision that CdV no longer needs to be part of the trader monitoring programme. Furthermore, although there are clearly concerns as to the due diligence policies and processes of CdV, HMRC's own evidence is effectively that they have not yet reached a conclusion on whether or not this has improved, for the simple reason that they have not reviewed the updated material which was sent to them.

236. In these circumstances, we cannot and do not conclude that it is inevitable that HMRC would reach the same decision.

CONCLUSION AND DIRECTIONS FOR REVIEW

237. CdV's appeal is allowed and HMRC are directed to review the Refusal Decision. That review shall take into account:

(1) our findings of fact in relation to the matters relied upon by Officer Whiddington in the Decision Letter;

(2) our findings as to other potentially relevant considerations which were not taken into account in the reaching the Refusal Decision (see [188]);

(3) the changes to CdV's business since the Refusal Decision; and

(4) a review of the most recently available due diligence policy and packs provided by CdV.

238. The decision-making officer shall consider whether any concerns identified which might otherwise form reasons to refuse CdV's application could instead be dealt with by granting approval with specific conditions attached.

239. If, following such review, the decision-making officer considers that it remains appropriate to refuse CdV's application for AWRS approval, that officer shall, within 28 days of the date of release of this decision, write a "considering refusing" or "minded to" letter to CdV identifying the factors which they rely upon and any areas where additional information

or explanation is requested or required. Any such letter shall give CdV not less than 28 days in which to respond, and HMRC shall complete their review of the decision within 28 days of receiving any response from CdV (or, in the absence of any response, within 56 days of the date of the "considering refusing" or "minded to" letter).

RIGHT TO APPLY FOR PERMISSION TO APPEAL

240. 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.

JEANETTE ZAMAN

TRIBUNAL JUDGE

RELEASE DATE: 20 JANUARY 2021