TC04570

Appeal number: TC/2014/02450

EXCISE DUTY – application for approval of "general storage and distribution warehouse" – level of premises guarantee – requirement for minimum premises guarantee for new applicants of £250,000 – whether unreasonable – no– appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ATOM SUPPLIES LTD (t/a MASTERS OF MALT) **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
JOHN ROBINSON

Sitting in public at Fox Court, Brooke Street, London on 25 June 2015

Tristan Thornton, of TT Tax, for the Appellant

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

DECISION

1. The appellant appeals against decisions of HMRC to refuse its applications (i) for approval of a general storage and distribution warehouse ("GSDW") under s92 of the Customs and Excise Management Act 1979 ("CEMA") and (ii) for approval and registration as an "authorized warehousekeeper" under Regulation 3 of the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR"). HMRC's decisions were communicated in letters from Officer Caroline Ames of HMRC dated 25 November 2013. Both decisions were upheld following a review performed by Officer Angela Stewart of HMRC, the conclusions of which were set out in a letter dated 4 April 2014.

2. The parties were agreed that the refusal of the application for approval and registration as an "authorized warehousekeeper" was consequential on the refusal of the application for approval of a GSDW. For that reason, the main issues between the parties related to the GSDW application and this decision focuses on HMRC's decision in relation to that application.

Evidence

3. Mr Stefan Petszaft, a director of the appellant, submitted a witness statement on behalf of the appellant and gave some oral evidence. We found him to be a straightforward and reliable witness. His evidence was not challenged in cross-examination and we accepted it.

4. For HMRC, Officer Caroline Ames (the "local officer" dealing with the appellant's application), Officer Neill Brettell (in HMRC's Holding and Movement Policy Team) and Officer Anne Johnson (in HMRC's National Alcohol Approvals Team) all submitted witness statements, gave oral evidence and were cross-examined. We found them all to be straightforward and reliable witnesses.

Background and undisputed facts

The appellant's business

5. The appellant carries on the business of selling rare and fine spirits. In 1996, when it started its business, it operated mainly as a retailer, selling products over the internet. More recently, its business has expanded and it now additionally operates as a wholesaler and a distributor. The appellant sells both its own brand of spirits and those of third parties.

6. In 1997 the appellant applied for, and was granted, approval to operate a trade facility warehouse ("TFW"). This approval initially enabled the appellant to store spirits on which excise duty had not been paid for a limited period while they were repackaged or re-labelled. By 2004, the scope of its approval was much wider and the appellant was allowed to store spirits intended for export indefinitely. The appellant had initially been required to provide a financial security of £14,000 in connection

with the TFW but after a period HMRC agreed to dispense with financial security in view of the appellant's good compliance. However, in 2006, the appellant's business was struggling and a decision was taken to relinquish the approval to operate the TFW.

7. The appellant has a "rectifiers and compounders" licence under WOWGR. It is also registered as an "owner" of duty suspended goods under WOWGR. It is able to store third-party branded stock on a duty suspended basis in others' warehouses. However, the appellant needs to pay UK excise duty on spirits that it uses to blend, label and bottle its own brand of spirits even to the extent it is making exports outside the UK. While it can apply to HMRC for repayment of excise duty under the "drawback" procedure, it has experienced administrative difficulties in doing so.

The appellant's decision to apply for approval of an excise warehouse

8. The appellant instructed Alan Powell Associates to act on its behalf. On 11 March 2013, Alan Powell Associates, on behalf of the appellant, submitted a Form EX68 and covering letter to HMRC applying for approval of a new excise warehouse. In its application form, the appellant indicated that the average monthly amount of duty that would be suspended on goods held within the warehouse would be £240,000 and that the "business is already operating at these levels – this is not a speculative application".

9. HMRC's practice was that an excise warehouse had to be either a TFW or a GSDW. That gave the appellant the following dilemma:

(1) If its premises were approved as a TFW, it could conduct bottling, blending and labelling activities on non-duty-paid stock and could export its own-brand stock without having to pay excise duty. However, it would not be able to store third-party stock at its premises without paying excise duty. In addition, HMRC's policy was to impose an upper limit on the length of time for which spirits could be stored before and after the bottling, blending and labelling operations. The appellant was concerned that this policy on "dwell time" might be difficult to comply with in the context of its business.

(2) If its premises were approved as a GSDW the appellant would be able to store third-party stock on a duty-suspended basis. It would also be able to conduct bottling, blending and labelling activities on non-duty-paid spirits without any upper limit on the "dwell time" for which those spirits remained in the warehouse. However, HMRC's published practice set out in HMRC's Excise Notice 196 ("Notice 196") indicated that a new applicant for a GSDW would need to provide a "premises guarantee" covering at least £250,000 of financial risk as discussed below.

Notice 196 and the requirement for a premises guarantee

10. The relevant provisions of Notice 196 will be analysed in detail later on in this decision and we reproduce the material sections of Notice 196 in the Annex. In general terms when HMRC authorise a GSDW, they become exposed to the risk of

loss of excise duty. For example, as Officer Brettell explained, the operator of the GSDW could forget to lock the warehouse at night with the result that excise goods are stolen and released into circulation in the UK without excise duty being paid. HMRC would have a claim against the warehousekeeper in such a situation but the warehousekeeper may not be able to meet it. To address this nature of risk, HMRC's practice set out in Notice 196 is that, in order for premises to be approved as a GSDW, a "premises guarantee" must be provided "if needed". A premises guarantee is a guarantee under which a third party, typically a financial institution, agrees to pay HMRC an amount equal to excise duty on warehoused goods, if the person with primary liability for that excise duty fails to pay that duty.

11. The terms of a premises guarantee will limit the guarantor's liability to a maximum sum. Notice 196 sets out HMRC's policy on the level of cover that is required in different situations. In particular, it is stated that the "minimum level of security for new general storage and distribution warehouses is £250,000". Naturally a third party will charge a fee for the provision of a premises guarantee and will also wish to take steps to limit its own risk if the guarantee is called upon. As a term of providing the appellant with a guarantee for £250,000, the appellant's bank would require it to deposit £125,000 into an account with the bank and leave those funds unused. That would involve a cost to the appellant as it would not be able to use that sum in its business.

The suggestion of a reduced premises guarantee

12. On 20 June 2013, Mr Petszaft met with Officer Ames to discuss the appellant's application. During that meeting, Mr Petszaft invited Officer Ames to consider whether the warehouse could be approved as a TFW. There was also some discussion as to the level of premises guarantee that would be needed if the warehouse was a GSDW. The appellant has an excellent track record of compliance with all of its tax obligations and had operated its TFW until 2006 without any problems. For those reasons, and given that the first table in Notice 196 (viewed in isolation) suggested that a premises guarantee of £100,000 would be needed for the level of stockholding the appellant was proposing, Mr Petszaft asked whether HMRC would accept a guarantee of £100,000, even though the stipulated minimum for a new applicant was £250,000.

13. Following that meeting, on 24 June 2013, Officer Ames sent Mr Petszaft an email. She expressed the view that the appellant's application did not appear to meet the conditions necessary for approval of a TFW "due to the general storage and distribution part of your business". She included within that email extracts from Notice 196. On 3 July 2013, Mr Petszaft replied to express disappointment that Officer Ames did not consider approval as a TFW to be possible. He explained that Alan Powell Associates would contact Officer Ames with a fuller response.

14. On 8 July 2013, Alan Powell Associates sent Officer Ames a memorandum outlining a number of requests. The majority of that memorandum (taking up over eight of its ten pages) involved a request that, in the light of the appellant's particular facts, HMRC should consider granting it approval to operate a TFW but disregard or

modify its policy on "dwell time" outlined at [9(1)]. As an alternative, Alan Powell Associates submitted that HMRC had a public law duty to consider setting the level of premises guarantee for a GSDW at a level lower than £250,000.

15. On 9 July 2013, Officer Ames sent an email to Officer Brettell to ask for guidance on how to respond to the requests that Alan Powell Associates were making. She noted that:

> "In summary, they wish to register as an Excise warehouse but don't seem to fit entirely with a trade facility and can't meet the minimum £250,000 premises guarantee to a general storage and distribution warehouse
>
> …Normally I would just refuse but I have received the attached E-mail from their consultant Alan Powell and as you can see they are not going to accept this easily so would like some points of law to back me up".

16. On 15 July 2013, Officer Brettell replied in the following terms:

> "In principle, what Mr Powel [sic] says is correct. HMRC must not have a policy that is so strict that it prevents the free movement of goods that is envisaged by the EU Treaties. However, the policy detailed in Notices 196 and 197 do take this flexibility into account and should therefore be followed.
>
> The purpose of the premises guarantee for new business is to reflect the risk that such an unknown business creates on approval. The level of premises guarantee reflects the amount of duty suspended goods held at the month end. The minimum level of guarantee of £250,000 reflects the risk anticipated for a new business with no compliance history. This policy supports the EU requirements in Art 16(2) of Directive 08/118".

17. On 15 July 2013, Officer Ames sent an email to Mr Petszaft. She explained that, having taken advice from various sources and having looked at all the options, she believed that approval as a TFW would be unlikely as the appellant's business did not fit the criteria. However, she proposed that HMRC continue to proceed with the appellant's application for approval as a GSDW. In that context, she suggested that:

> "If you are unhappy to provide a £250,000 premises guarantee, you could apply for an immediate reduction to £100,000 (I will need evidence that you have financial backing for this). As I explained during our meeting the final decision is not made by myself and I therefore cannot promise that this will be granted but we can put a case forward based on the fact that Masters of Malt are not a new business and have a good compliance history with HMRC and are therefore low risk."

18. Mr Petszaft replied to that email on the same day and confirmed that the appellant would like to pursue the application for approval as a GSDW. He also confirmed that HSBC had indicated in principle that a £100,000 premises guarantee

could be provided although he noted that this would involve the appellant incurring significant cost.

The rejection of the application based on a £100,000 premises guarantee

19. Over the next few months the appellant gathered together and submitted various documents in support of its application. Officer Ames also prepared a 13-page "Pre-Approval Aide-Memoire". Officer Ames completed Sections 1 and 2 of that document that contained a large amount of information on the appellant and its application. In Section 3, Officer Ames confirmed that:

> "since the [appellant has] a good compliance record with HMRC in all aspects and regimes and after reviewing all of the information required I can see no reason to refuse their application for a GSD with a reduced premises guarantee of £100,000".

20. In the same document, Officer Ames's line manager, Officer Sue Holmes, supported her recommendation stating:

> "I support Caroline's recommendation that the approval for GSD and Warehousekeeper be approved. Revenue history is good so Premises Guarantee of £100,000 is acceptable".

21. Section 3 of the "Pre-Approval Aide-Memoire" document contained a box for the National Alcohol Approvals Team (and the National Registration Unit) to indicate whether they recommended approval of the application. The National Alcohol Approvals Team is responsible for quality assurance of applications for approval of excise warehouses. It therefore reviews decisions to approve or reject applications so as to ensure that all such decisions are consistently made across the UK and meet HMRC's internal quality standards.

22. Therefore, in due course, Officer Anne Johnson of the National Alcohol Approvals Team came to consider the application. On 5 November 2013, Officer Johnson sent an email to Officer Ames (copied to her line manager, Officer Holmes). That email included the following paragraphs:

> "I've just reviewed the GSD approval and premises guarantee you submitted for [the appellant].
>
> The approval part of this is fine, it's the guarantee part that we have a problem with!
>
> Its [*sic*] regarding the reduction from £250000 to £100000.
>
> I've spoken to Carole Cook in NRU who deals with the financial security and we can't reduce a premises guarantee on previous good compliance
>
> If it was based on the traders [*sic*] previous registration as a Trade Facility warehouse, this would not be taken into account as the warehouse was closed in 2006 and the new application is for a GSD and therefore has different requirements. I know he is registered as a rectifier and compounder but this wouldn't be taken into account.

> PN196 does state the following (which I know you'll be aware of):
>
> The minimum level of security for new general storage and distribution warehouses is £250,000".

23. On 7 November 2013, Officer Ames sent Officer Johnson an email as follows:

> "As discussed if we are to refuse the premises guarantee for Atom Supplies does this mean that we have to refuse the whole GSD and warehousekeeper approval?
>
> If so, do I have to put my name on the letter?"

24. On 11 November 2013, Officer Johnson sent Officer Ames an email as follows:

> "I've discussed this with Kath and yes you will have to reject the GSD application on the grounds that they are not providing the full guarantee and the warehousekeeper on the grounds that the GSD application has been rejected.
>
> We've checked the guidance and there is definitely no scope for a reduction of a financial guarantee and the minimum level is £250,000 for a new GSD".

25. On 25 November 2013, Officer Ames sent Mr Petszaft a letter explaining that the application for GSDW approval had been refused on the grounds that the appellant was only able to provide a £100,000 premises guarantee. On the same day she sent Mr Petszaft a letter explaining that the application to be registered under WOWGR as a warehousekeeper had been refused at present on the grounds that the appellant's application for a GSDW had been refused.

26. Officer Angela Stewart of HMRC reviewed both of these decisions. Prior to issuing her decision, Officer Stewart asked Officer Brettell to provide policy advice. By letter dated 4 April 2014, she upheld both decisions.

Findings of fact

27. The facts set out at [5] to [26] were not in dispute. We have, in addition, made findings on the factual matters set out at [28] to [36] below.

28. HMRC's general policy is that the greater the quantity of excise goods held in a GSDW, the greater the amount of excise duty at risk and the greater the level of premises guarantee that is required. However, with new applications, HMRC will often have no data available as to the actual amount of excise goods to be held in the GSDW and the only figures available will typically be estimates supplied by the taxpayer. Therefore, with new GSDWs, HMRC are exposed to the risk that a significantly greater quantity of goods are held within it than HMRC had anticipated when granting approval and HMRC require a minimum £250,000 premises guarantee for new applicants to address this risk.

29. We found that the policy on the £250,000 minimum premises guarantee was not influenced by any wish to reduce the amount of work needed to verify the actual level of stock held in new GSDWs. In addition, although Officer Brettell had received

representations from trade associations to the effect that the right to operate GSDWs should be "earned", we found that HMRC's policy was formulated in order to protect the exchequer from risk and not with a view to creating barriers to entry for new operators of GSDWs.

30. We accepted Officer Brettell's evidence that HMRC would consider accepting a premises guarantee of less than £250,000 for a new GSDW in appropriate cases, although those cases would be exceptional. A request for departure from guidance (including guidance as to the £250,000 premises guarantee) could be made by an HMRC officer filling in a Form PG1 ("PG" standing for "policy guidance"). Officer Brettell or a member of his team would consider any such request submitted and had authority to permit deviations from policy if appropriate. No Form PG1 was submitted in relation to the appellant's request for a reduced premises guarantee. However, neither Officer Brettell nor his team would insist on a Form PG1 in all cases and would be prepared to discuss possible deviations from policy more informally, for example by email or telephone.

31. For the reasons set out in this paragraph, we determined that, when he sent his email of 15 July 2013 to Officer Ames, Officer Brettell was not aware of all aspects of the appellant's application. Officer Brettell said in evidence that he was not sure whether he spoke to Officer Ames about the email of 9 July 2013 she had sent requesting his advice and we find that he did not. Officer Ames's email did not itself mention factors such as the appellant's good compliance history, its previous operation of a TFW or the proposed level of stock to be held in the warehouse. While she had forwarded Officer Brettell the memorandum from Alan Powell Associates dated 8 July 2013, and Officer Brettell read it, that memorandum was primarily concerned with the request that the HMRC approve a TFW (rather than with the level of premises guarantee). In addition, the memorandum simply contained legal submissions on HMRC's public law duties when considering the level of premises guarantee and did not contain any material factual evidence on the appellant's situation to justify the assertion that a £100,000 guarantee should be acceptable.

32. We found Officer Brettell's email to Officer Ames of 15 July 2013 to be somewhat equivocal. On one hand it indicated that HMRC's policy could not be unduly strict (but did not say that this was necessary to comply with HMRC's public law duties). On the other hand, it concluded that Notice 196 did contain the necessary flexibility and should be followed. Despite this ambiguity, we find that Officer Ames concluded from her email exchange (correctly given Officer Brettell's statements at [30]) that there was sufficient flexibility for her to consider accepting a £100,000 premises guarantee from the appellant although she considered that needed to take the form of a reduction in the guarantee to £100,000 taking effect immediately after the application was approved[1]. Shortly after receiving her email from Officer Brettell, on

[1] It was not clear to us why Officer Ames thought there was a distinction between an immediate reduction in the guarantee to £100,000 and a decision to accept a guarantee of only £100,000. We find that the overall effect of both of these routes was the same and in the remainder of this decision refer to Officer Ames's suggestion as involving a reduced premises guarantee of £100,000.

15 July 2013, she contacted Mr Petszaft to suggest that an immediate reduction of the guarantee to £100,000 might be acceptable, although she emphasised that the final decision on this issue would not be hers. She would not have done that if she considered Officer Brettell to be saying that the guarantee had to be of at least £250,000 for a minimum period.

33. During the hearing, Officer Brettell gave evidence that, in his view, having by then considered all relevant aspects of the appellant's situation, the appellant did not have exceptional circumstances that justified a premises guarantee of only £100,000. The reasons for Officer Brettell's view were that the appellant's operation of a TFW had ceased in 2006, too long ago to be relevant to its ability to operate a GSDW. In any event, since 2006, an electronic process had been introduced to deal with duty suspended movements which was central to the operation of a GSDW but not to the operation of a TFW. Following those changes, Officer Brettell considered that the differences between operating a GSDW and operating a TFW were as great as the differences between driving a car and riding a bicycle. Moreover he considered that good compliance with tax obligations generally did not demonstrate that an applicant was equipped to deal with the particular and onerous associated with operating a GSDW. Finally, Officer Brettell considered that, while the appellant had based its application on historic actual levels of stockholding, there was still a risk that levels of stock held would increase if the appellant was operating a GSDW. (These findings are simply as to the views that Officer Brettell held at the date of the hearing. Later in this decision we will consider the extent to which they were reasonable and informed the decisions that HMRC ultimately took.)

34. We concluded that Officer Johnson, when she reviewed the appellant's application, did not consider that there was any flexibility to accept a guarantee of less than £250,000 from the appellant. In cross-examination, she accepted that she did not consider the specific factors of the appellant's case and simply applied the figure set out in Notice 196.

35. We found that both Officer Brettell and Officer Johnson considered that their role was to offer advice and that Officer Ames was the "decision maker" in relation to the appellant's application. In cross-examination, Officer Ames admitted that she had asked Officer Johnson, in her email of 7 November 2013 whether she needed to sign the decision letter because, at that point, she considered that the ultimate decision had been taken out of her hands. We considered that this email demonstrated that the contents of any HMRC decision being sent out in her name were important to her. Officer Ames ultimately did sign the decision letters and we have concluded that this demonstrates that she was herself content with the decisions that had been made.

36. Although Officer Stewart did not give evidence as to how she reached her conclusion on review, Officer Brettell's evidence that he provided policy guidance to Officer Stewart when she was performing her review was not challenged. We infer that, in giving that policy guidance, he would have said, as he said in his evidence, that there was flexibility to accept a premises guarantee of only £100,000 in relation to a new GSDW in certain exceptional cases, but that, for reasons given at [33], the appellant's situation did not amount to an exceptional case.

The law

Excise Directive

37. The approval of authorized warehousekeepers and any conditions applicable to such an approval are governed by Article 16 of Directive 2008/118/EC (the "Excise Directive"). Article 16, so far as relevant, provides as follows:

> **Article 16**
>
> 1. The opening and operation of a tax warehouse by an authorised warehousekeeper shall be subject to authorisation by the competent authorities of the Member State where the warehouse is situated.
>
> 2. An authorised warehousekeeper shall be required to:
>
> (a) provide, if necessary, a guarantee to cover the risk inherent in the production, processing and holding of excise goods;
>
> …
>
> The conditions for the guarantee referred to in point (a) shall be set by the competent authorities of the Member State in which the tax warehouse is authorised.

Provisions relating to the approval of warehouses and warehousekeepers

38. Section 92 of CEMA relates to the approval of warehouses. Insofar as relevant, it provides as follows:

> **92 Approval of warehouses**
>
> (1) The Commissioners may approve, for such periods and subject to such conditions as they think fit, places of security for the deposit, keeping and securing—
>
> (a) of imported goods chargeable as such with excise duty (whether or not also chargeable with customs duty) without payment of the excise duty…

39. Section 93(1)(a) of CEMA authorises the making of regulations dealing with the approval of warehousekeepers. Insofar as relevant it provides as follows:

> **93 Regulation of warehouses and warehoused goods**
>
> (1) The Commissioners may by regulations under this section (referred to in this Act as "warehousing regulations")—
>
> (a) prohibit the deposit or keeping of goods in a warehouse except where the occupier of the warehouse has been approved by the Commissioners in accordance with the regulations and where such conditions as may be prescribed in relation to that occupier are satisfied;

40. The relevant regulations are WOWGR. Article 3 of WOWGR provides that:

> **3 Authorized warehousekeepers**

> (1) For the purposes of sections 93(1) and 100G of the Act the Commissioners may approve occupiers of excise warehouses in accordance with the provisions of … these regulations and register them as registered excise dealers and shippers in accordance with section 100G(2) of the Act.
>
> (2) An occupier who has been so approved and registered shall be known as an authorized warehousekeeper.

Rights to require a review and to appeal against HMRC decisions

41. Sections 15A to 15F of the Finance Act 1994 ("FA 1994") set out certain provisions relating to reviews of HMRC decisions. Such reviews are internal to HMRC and do not involve the Tribunal. However, it is necessary to understand some aspects of these provisions in order to understand the nature of the rights of appeal to this Tribunal. Somewhat confusingly, sections 14 and 15 of FA 1994 also contain provisions dealing with HMRC's internal reviews of their own decisions. However, those provisions are not relevant in the context of this appeal since s14 and s15 are concerned with reviews of decisions to restore goods seized or forfeited, and related matters.

42. By virtue of s13A(1)(2) of FA 1994 and paragraph 2(1)(n) of Schedule 5 of FA 1994, any decision whether to approve any place as a warehouse for the purposes of s92 of CEMA is treated as a "relevant decision". Similarly, any decision whether to authorise or approve a person as a warehousekeeper is treated as a "relevant decision" by virtue of s13A(2)(j) of FA 1994 and paragraph 2(2)(b) of Schedule 5 of FA 1994. In addition, s16(8) of FA 1994 provides that both types of decision are decisions as to an "ancillary matter".

43. Since the decisions at issue are "relevant decisions" and are not review decisions relating to the restoration of goods, the appellant's appeal rights are set out in s16(1A) of FA 1994. That section provides that an appeal may be brought to the Tribunal. Where, as here, HMRC have been required to perform a review under s15C FA 1994 the appellant is, by s16(1C) of FA 1994, required to bring an appeal to the Tribunal in the period beginning with the "conclusion date" (that is the date of the document setting out HMRC's conclusions on the review) and ending 30 days later.

44. In addition, since both of the decisions relate to an "ancillary matter", s16(4) of FA 1994 applies and provides as follows:

> (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.

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

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

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

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

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

The challenges to the decisions

46. Mr Thornton submitted that the Tribunal should be satisfied that the decisions could not reasonably have been made. He had four grounds for this argument:

(1) He submitted that the policy set out in Notice 196, if invariable, is incompatible with the Excise Directive.

(2) He submitted that the policy set out in Notice 196 is fundamentally irrational.

(3) He submitted that HMRC's decisions were unreasonable as they were made following a blind application of a fixed policy without considering whether that policy was suitable to apply to the appellant.

(4) He submitted that there had been real and serious confusion at every stage of the decision making process. He said that the effect of this confusion had been to "cloud the identity of the decision maker" with the result that the ability of any decision maker properly to carry out the functions required of HMRC was compromised.

47. As regards grounds (1) and (2), Mr Evans submitted that the appellant should make an application for judicial review if it wished to challenge the lawfulness of HMRC's policy and that, since the Tribunal has no jurisdiction in matters of judicial review, we could not consider these grounds of challenge. More generally, Mr Evans supported the decisions in question as being entirely reasonable.

48. We have not accepted Mr Evans's submissions relating to grounds (1) and (2). It is, of course, true that the Tribunal has no judicial review jurisdiction. We could not, therefore, issue a declaration to the effect that HMRC's policy is unlawful or an order requiring HMRC to amend their policy. However, if HMRC have applied a policy that is "irrational", it seems to us that this would be highly material to the question of whether a particular decision made in applying that policy is reasonable. Moreover, if the policy itself was unlawful, that would be relevant to the question of whether the actual decision contains an error of law. We have, therefore, considered all of Mr Thornton's challenges to the decisions.

49. In addition to the four main grounds of challenge set out at [46], Mr Thornton made some observations on the review process in his written skeleton argument, although there was no argument on these during the hearing.

Preliminary point – against which decision is the appellant appealing?

50. Officer Stewart did not give evidence as to how she had reached her decision on review. At the hearing, both the appellant and HMRC approached the appeal by analysing the decisions communicated in Officer Ames's letters of 25 November 2014 as opposed to Officer Stewart's decisions on review. We were told that there was no authority as to the approach that appellants' and HMRC should take in situations where decisions such as the one at issue in this appeal are confirmed following a review. In particular, we were told that there was some uncertainty as to whether the appeal was against the original decision, or the review decision.

51. We have been able to decide this appeal by reference primarily to evidence dealing with the background to Officer Ames's original decision. However, it does seem to us that, by virtue of s16(1A) of FA 1994, the right of appeal is against a relevant decision, not against a particular decision letter. Moreover, the effect of s15F(5) of FA 1994 is that, following a review, there is not a fresh "decision", but rather the original "decision" is upheld, varied or cancelled. Therefore, we consider that in principle, where an HMRC decision is upheld following a review under sections 15A to F of FA 1994, the Tribunal is entitled to have regard to the way in which the review decision is reached as the appellant's appeal is against the "decision" as it stands following completion of the review process.

52. Support for this view can be found in s16(1C) of FA 1994. As we have noted at [43], this provides that where HMRC are required to undertake a review in accordance with s15C of FA 1994, a taxpayer is not able to appeal to the Tribunal until the outcome of that review has been communicated. This can only be because Parliament regards the outcome of the review as being relevant to the Tribunal's assessment of the "reasonableness" of the "relevant decision" as a whole. That, moreover, is consistent with common sense since if, following a review, a decision to refuse approval is varied so as to become a decision to grant approval but subject to conditions, a taxpayer should be entitled to challenge the "reasonableness" of the decision to impose conditions.

53. Of course, common-sense will have to prevail. If it is clear in all the circumstances that the review has simply resulted in the original decision being upheld for precisely the same reasons, it may well be that detailed evidence on the review is not necessary. However, there will be cases in which the process by which the review decision is reached is relevant.

Mr Thornton's first challenge – compatibility with Excise Directive

54. Mr Thornton noted that Article 16(1) of the Excise Directive provides that an authorised warehousekeeper can only be required to provide a guarantee "where necessary". He noted that, by contrast, Article 18(1) of the Excise Directive provides that Member States "shall require" that the risks inherent in the movements of duty suspended goods be covered by a guarantee. He submitted that the difference between the wording of Article 16(1) and Article 18(1) made it plain that national authorities are required, in relation to premises guarantees, to turn their minds to the question of whether a premises guarantee is "necessary". He submitted that HMRC have a policy of requiring a premises guarantee in all cases, and that, since this does not involve consideration on a case by case basis of whether the guarantee is "necessary", it was contrary to the Excise Directive. Therefore he submitted that there was an inevitable error of law in HMRC's decision such as to make it unreasonable for the purposes of s16(4) FA 1994.

55. For the reasons set out at [56] to [58] below, we do not accept Mr Thornton's submissions on this issue.

56. Firstly, we accepted Mr Evans's submission that Article 16 of the Excise Directive leaves it to individual Member States to determine whether premises guarantees are "necessary" and, if they are, the conditions that should apply to them. In the UK, by a combination of the provisions of CEMA and WOWGR referred to at [37] to [40] above, Parliament has empowered HMRC to make decisions on these issues and HMRC, in turn, have formulated a policy set out in Notice 196 that deals with premises guarantees.

57. HMRC's policy does take into account whether guarantees are "necessary". Notice 196 itself contemplates that no premises guarantee is needed in the context of an existing warehouse if the average duty on month-end stock is less than £100,000. Moreover, Notice 196 itself contemplates that no guarantee will be required if a guarantee has been provided for four consecutive years, there have been no claims against that security and no significant irregularities in the operation of the warehouse have been identified. We do not, therefore, consider that HMRC do have a blanket policy of requiring a guarantee in all cases.

58. For a new warehouse, HMRC's policy is to require a minimum premises guarantee of £250,000. However, given the findings of fact we have made as to the reasons for that policy set out at [28], we consider that HMRC have turned their minds as to whether this level of guarantee is "necessary" for new warehouses.

Mr Thornton's second challenge – irrationality

59. Mr Thornton took us through the detailed wording of Notice 196 and submitted that the relevant provisions dealing with premises guarantees were irrational. For example:

(1) He noted that paragraph 4.1 of Notice 196 refers to a new applicant for a GSDW being required to provide a premises guarantee "if needed". If the policy truly was that "the minimum level of security for new general storage and distribution warehouses is £250,000" (as noted in the paragraph below the first table in paragraph 4.5), he said the words "if needed" would be redundant as a new applicant would always be required to provide a premises guarantee of at least £250,000.

(2) He noted that paragraph 4.5 of Notice 196 states that, in the context of a GSDW, HMRC "**will** base the level of security on the potential duty due on your average end of month stock calculated over a twelve-month period" (emphasis added). However, he submitted that if a new GSDW needed to be covered by a minimum £250,000 guarantee, this statement was not true as the £250,000 minimum guarantee would be needed even if a low quantity of stock was held in the GSDW.

(3) He submitted that the first three rows of the first table in paragraph 4.5 (dealing with guarantees where average duty on month-end stock is lower than £1,000,000) would be redundant if the true requirement was for a minimum guarantee of £250,000.

(4) He submitted it was "ludicrous" that the appellant who had, in its application, demonstrated by reference to actual historic figures that its average duty on month-end stock was £240,000 was being asked for the same level of guarantee as a warehouse in which the amount of monthly duty was £1,000,000.

(5) He pointed out that the first table in paragraph 4.5 of Notice 196 suggests that the guarantee of £100,000 was required where potential duty on month-end stock is between £100,000 and £400,000. The second table in paragraph 4.5 indicates that, after two years, the level of security would be reduced by 50%, broadly if there has been good compliance in that period. Given that HMRC considered that there was a minimum level of starting guarantee of £250,000, Mr Thornton queried how the £100,000 guarantee figure would ever be generally applicable as the guarantee would start at £250,000 and potentially be reduced to £125,000 (and not £100,000) after two years.

(6) He pointed out that following the second table set out in paragraph 4.5 there is a statement to the effect that, if a claim is made on a (reduced) guarantee, the amount covered by the guarantee will revert to "at least 100% of the amounts shown above". He submitted that this could only be a reference to the first table in paragraph 4.5 and that, since no reference was made to a minimum guarantee of £250,000, the inference was that the level of guarantee for new applicants should be set by reference to the first table in paragraph 4.5 with the result that the appellant, having demonstrated average duty on month-

end stock of only £240,000 should be entitled to provide a premises guarantee of only £100,000.

(7) Finally, he noted the statement following the second table in paragraph 4.5 of Notice 196 to the effect that "where the principal qualifies for a reduction in the level of security and the new security would be less than £100,000, no security is required". He submitted that, if there was a minimum starting level of guarantee of £250,000 this could never happen since after, two years the amount of guarantee would reduce to £125,000 and would then reduce to nil after four years.

60. We do not accept that the policy set out in Notice 196 is irrational. Mr Thornton's forensic examination of Notice 196 did demonstrate some oddities in its phrasing. We did not, for example, consider that there would be many situations in which a premises guarantee of only £100,000 would be required for the reasons outlined at [59(3)] above. However, Officer Brettell satisfied us that a guarantee of £100,000 was not impossible. For example, an operator of a GSDW with average monthly of "duty suspended" of £200,000 might be approved initially on the basis of a £250,000 guarantee. Small slip-ups in compliance might prevent it from benefiting from a reduction of that guarantee to £125,000 after two years but Officer Brettell satisfied us that an officer might nevertheless consider that the low level of stock held might justify a guarantee of only £100,000 after a period. Similarly, it was difficult to see how the operation of the second table in paragraph 4.5 could result in a reduction in the guarantee required to below £100,000 for the reasons that Mr Thornton submitted at [59(5)] above. However, at most Mr Thornton's submissions demonstrated to us that Notice 196 was not as precisely drafted as it could have been. It does not necessarily follow that the policy set out in Notice 196 was irrational.

61. On the contrary, we found that the general policy as explained by Officer Brettell was perfectly rational. In addition, we consider that the conclusions Officer Brettell has given, summarised at [33], on the application of the policy to the appellant's situation are rational. Mr Thornton submitted that uncertainty about stock levels was not a good reason for requiring a £250,000 guarantee in relation to the appellant's premises since the appellant was submitting its application by reference to actual stock levels that, applying the first table set out in paragraph 4.5 of Notice 196, would have justified a £100,000 guarantee. We do not accept that submission. The £240,000 figure that Mr Petszaft referred to in the appellant's application was indeed based on actual historic holdings of stock in the appellant's current unapproved warehouse. However, as Mr Petszaft noted in his evidence, it was hoped that approval as a GSDW would result in an increase in the appellant's levels of business. Therefore, we consider that HMRC was exposed to the risk that Officer Brettell articulated, namely that the appellant's holdings of stock could turn out to be greater than anticipated.

Mr Thornton's third challenge – rigid application of policy

62. Mr Thornton referred us to a number of authorities in support of his submissions that HMRC's decision was unreasonable on the basis that it involved a rigid application of policy.

63. In *R v Secretary of State for the Home Department (ex parte Venables and Thompson)* [1998] AC 407 23 Lord Browne-Wilkinson concluded at 497 that a person on whom the power to exercise a discretion is conferred must not be precluded from departing from a policy or from taking into account the circumstances of a particular case.

64. In addition, in *British Oxygen Co. Limited v Board of Trade* [1971] AC 610, Lord Reid said:

> "But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could be called a rule. There can be no objection to that provided the authority is always willing to listen to anyone with something new to say – of course I do not mean to say that there need be an oral hearing."

65. Mr Thornton also referred to a decision of the VAT and Duties Tribunal in *TDG (UK) Ltd v HMCE* (E00346 16 October 2000) as well as decisions of this Tribunal in *Eastenders Cash and Carry Plc* [2011] UKFTT 25 and *Forth Wines Limited* [2012] UKFTT 74 which he submitted involved situations where decisions of HMRC had been found to be unreasonable on the basis that they involved an over-rigid application of policy.

66. In essence, Mr Thornton's submission was that, at no stage in the applications process was any proper consideration given to the question of whether, given the appellant's circumstances, a £100,000 guarantee would adequately cover the risks to the exchequer of approving the appellant's premises as a GSDW. He submitted that Officer Brettell did not take into account all relevant circumstances of the appellant when he sent his email to Officer Ames on 15 July 2013. He submitted that Officer Ames, supported by her line manager, did take into account relevant factors, and concluded that a £100,000 guarantee would be appropriate but that both were effectively overruled by Officer Johnson who did nothing more than apply the policy set out in Notice 196 without any consideration of the appellant's circumstances.

67. We have concluded that there were aspects of HMRC's decision making process that were unsatisfactory. For example, as we have found at [34], we agree with Mr Thornton that Officer Johnson did not even appreciate that there may be discretion to accept a guarantee of less than £250,000 and did not consider the appellant's specific circumstances before sending her email of 5 November 2013 to Officer Ames. There was, therefore, undoubtedly a flaw in the decision making process which was not insignificant given the senior role that Officer Johnson played within it. However, for reasons set out at [68] to [71], we have concluded that this flaw in the process was not sufficient to make HMRC's overall decision unreasonable.

68. Given that we have concluded that HMRC's policy was rational, we consider that HMRC's obligation was, as set out in *British Oxygen*, simply to "listen to anyone with something new to say". Officer Ames did that. In fact, she showed that she was a conscientious officer who went even further, put the appellant's case to her superiors

during the application process and successfully persuaded her line manager to endorse the application on the basis of a £100,000 guarantee.

69. It is true that Officer Johnson was not prepared to "listen". However, as we have found at [30], Officer Johnson was mistaken in her belief that £250,000 was the minimum amount of acceptable guarantee. Therefore, given the findings of fact we make at [32], when Officer Ames signed her decision letter of 25 November 2013, she did so in the full knowledge that there were circumstances in which HMRC would accept a premises guarantee of £100,000. Officer Ames had demonstrated that she was a conscientious officer. She had turned her mind to the appellant's specific circumstances and had spent time in persuading her line manager to endorse the appellant's application even though it involved a departure from policy. If she still disagreed with Officer Johnson's conclusion she could have taken the matter up with Officer Brettell again. She did not do so and we have concluded that this is because she ultimately came to the conclusion, following her discussions with Officer Johnson and others, that even though she had raised the appellant's hopes that a guarantee of £100,000 might be acceptable, on reflection the appellant's circumstances did not actually justify such a departure from policy.

70. If Officer Ames had, shortly after her meeting with Mr Petszaft on 20 June 2013 written to the appellant to say that she had considered the suggestion of a £100,000 guarantee but was not prepared to adopt it for reasons similar to those outlined by Officer Brettell in his evidence, the appellant could not have complained that its suggestion had not been listened to. We do not consider that conclusion is changed simply because it took Officer Ames some time to conclude, following discussions with colleagues, that the appellant's circumstances were not, after all, sufficient to justify a £100,000 guarantee.

71. Finally, as we have noted at [36], Officer Brettell was involved in the review of Officer Ames's decision. Given the findings we make at [36], we are satisfied that the review involved Officer Brettell, who had the authority to accept a guarantee of less than £250,000, listening to the appellant's request for a lower guarantee, albeit rejecting it for the reasons he gave at [33].

Mr Thornton's fourth challenge – "clouding the identity of the decision maker"

72. The essence of Mr Thornton's submissions under this heading was that no single HMRC officer could be identified as the "decision maker". He submitted that Officer Ames could not be regarded as the "decision maker" as she had been overruled by Officer Johnson, but that Officer Johnson had said in her own evidence that she did not regard herself as the "decision maker". Officer Johnson herself stated that she had consulted with other colleagues on the question of the premises guarantee. He submitted that, if no single officer could be regarded as the decision maker it would not be possible to apply the test of "reasonableness" set out in *J H Corbitt (Numismatists) Limited*. Therefore he submitted that the absence of a single identified decision maker is a strong indication that the decisions were not properly considered and/or that they contained an error of law.

73. Mr Thornton accepted that he had not been able to find any authority to the effect that a decision of HMRC would necessarily be unreasonable if the identity of the decision maker was "clouded", although he submitted that a similar ground of challenge had been advanced in *Forth Wines Limited v Revenue & Customs Commissioners* [2012] UK FTT 74.

74. We do not accept Mr Thornton's challenges on these grounds. We would be surprised if any material decision on a taxpayer's affairs would be taken by a single officer without any input from colleagues. As we have said at [51], the question is whether the "relevant decision" as a whole is reasonable. If that decision was taken by a group of officers, it will be relevant to consider what was in each officer's mind and the way in which the collective decision was made. In the circumstances of this appeal, we are not satisfied that the ultimate decision was "unreasonable" in the sense set out in *J H Corbitt (Numismatists) Limited*. We found Officer Brettell's reasons set out at [33] as to why a minimum guarantee of £250,000 was needed in the appellant's case to be entirely reasonable. We are not satisfied that the ultimate decision was infected by any error of law and, in particular, as we have noted at [69] to [71], we have concluded that in reaching their decision HMRC did listen to the appellant's request for a £100,000 premises guarantee. We have concluded that HMRC took all relevant considerations into account (and did not take irrelevant considerations into account) when reaching their conclusion. Having reached those conclusions, we do not consider HMRC's decision can be characterised as "unreasonable" on the basis that Mr Thornton argues.

Mr Thornton's criticisms of the review process

75. In his written skeleton argument, Mr Thornton also criticised the review that Officer Stewart had performed, although we did not hear oral argument on these criticisms during the hearing. Mr Thornton's criticism centred on the following paragraph in Officer Stewart's review letter:

> "The Review Officer does not have the discretion to go outside current policy and practice. However, they should consider current policy and, as with any other matter, it is possible that as a result of a review HMRC may change their policy or practice. Any departure from the normal policy and practice should be with the prior knowledge and approval of the relevant policy and technical teams."

76. Mr Thornton argued that, since Officer Stewart had herself stated that she had no discretion to "go outside current policy and practice", she could not have considered the fundamental question at issue, namely whether HMRC should apply the stated policy of requiring a £250,000 minimum premises guarantee given the appellant's circumstances. He therefore submitted that Officer Stewart had made an error of law in her decision.

77. Officer Stewart did not give evidence and so Mr Thornton was not able to obtain support for his criticisms by cross-examining her. Therefore, Mr Thornton was not able to discharge the burden of satisfying us of the validity of his criticisms and they must fail. We would comment, however, that the paragraph of Officer Stewart's

letter quoted above suggests that the outcome of a review is not determined by existing policy and practice but that, following consultation with policy and technical teams, departures from policy are possible. That seems in principle to be perfectly capable of satisfying HMRC's duty to "listen to anyone with something new to say" as set out in *British Oxygen*.

78. In his skeleton argument, Mr Thornton invited us to draw inferences from the fact Officer Stewart was not giving evidence. We have not done so. As we have said at [77], we do not consider that her decision letter supports a *prima facie* case that she misdirected herself in law when performing her review and, in those circumstances, we do not consider that there is any inference to be drawn from the fact that she did not give evidence.

Conclusion

79. The appellant has not satisfied us that the "relevant decisions" at issue could not reasonably have been arrived at by the people making them. Therefore, the threshold set out in s16(4) FA 1994 is not reached and the appellant's appeal is dismissed.

80. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 31 JULY 2015

ANNEX – RELEVANT EXTRACTS FROM NOTICE 196

Paragraph 4.1 of Notice 196

"4.1 General storage and distribution warehouses

In order for HMRC to consider approving your premises as a general storage and distribution warehouse you must:

…

provide a premises guarantee (if needed)"

Paragraph 4.5 of Notice 196

"**4.5 Premises guarantees**

…

For general storage and distribution warehouses and motor and heating fuel warehouses, we will base the level of security on the potential duty due on your average end of month stock calculated over a twelve-month period, allowing for any seasonal variations. For trade facility warehouses we base our calculations on the proposed or current throughput levels.

Potential duty on month-end stock holding	**Level of security**
less than £100,000	Nil
more than £100,000 but less than £400,000	£100,000
more than £400,000 but less than £1m	25% of potential duty
more than £1m but less than £25m	£250,000
more than £25m but less than £100m	1% of potential duty
more than £100m	£1m

The minimum level of security for new general storage and distribution warehouses is £250,000.

We offer a reduction of the guarantee levels for established traders in certain circumstances. We only allow this if we have made no claim against the security and

no significant irregularities have been identified in the operation of the excise warehouse during a specified period.

In the following circumstances we may allow reductions for premises security:

If the principal has	And we have	The level of security is reduced
Provided security for the two previous consecutive years.	Made no claim against the security and no significant irregularities have been identified.	By 50%.
Provided security for the previous four consecutive years.	Made no claim against the security and no significant irregularities have been identified.	No guarantee is required.

Where the principal qualifies for a reduction in the level of security and the new security required would be less than £100,000, no security is required.

Should you be entitled to a reduction, please write to the FSC stating the grounds for your request.

Where we are obliged to make a claim against a reduced level of security, we will issue a ‘notice of withdrawal’ to the guarantor and principal. The level of cover provided by the replacement guarantee will revert to at least 100% of the amounts shown above for premises security.