[2017] UKFTT 78 (TC)

TC05596

Appeal number: TC/2015/7268

Revocation of excise duty approvals under the Warehousekeepers and Owners of Warehoused Goods Regulations (WOWGR) 1999 and s 92 CEMA– Excise Notice 196 due diligence requirement - Authority for requirement for movement security (s157 CEMA and WOWG Regulation 16 considered) - A1P1- proportionality - whether review decision of HMRC could reasonably have been arrived at.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SAFE CELLARS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
TOBY SIMON JP

Sitting in public at The Royal Courts of Justice on 21 to 25 November 2016

Geraint Jones QC instructed by Rainer Hughes for the Appellant

Jonathan Kinnear QC and Amy Mannion, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

The Appeals

1. Safe Cellars, a company which runs an alcohol warehouse in Manchester, appeals against a review decision of HMRC revoking excise duty approvals under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR", or the "WOWG Regulations") as an approved warehousekeeper (under regulation 11) and as a duty representative (under regulation13), and under section 92 Customs and Excise Management Act 1979 ("CEMA") for its warehouse. HMRC make no allegation of dishonesty or lack of integrity against Safe Cellars.

Excise Duty Approvals

2. The Excise Directive 2008/118 provides for excise goods, such as alcoholic beverages, to become subject to excise duty at the time of their production in, or importation into, the EU, but for the duty to be suspended where the goods are produced, held or moved under "duty suspension arrangements" and in those circumstances for the duty to become payable when the goods depart from such an arrangement. The Directive provides for Member States to make rules for tax warehouses where goods subject to duty suspension arrangements may be held.

3. In pursuance of the Directive in the UK has created what the Court of Appeal in *CC&C v HMRC* [2014] EWCA CIC 1653 described as a highly prescriptive scheme. CEMA provides: in section 92 that HMRC may approve (and for reasonable cause revoke approval of) an excise warehouse; in section 93 that regulations may prohibit the deposit of goods in a warehouse unless the warehousekeeper is approved; and in section 100G(1) that "for the purposes of administering, collecting or protecting" excise revenue HMRC may "by regulations…confer such powers, duties, privileges and liabilities as may be prescribed in the regulations" on approved, and registered revenue traders (which term by regulation1(1)(b) includes an occupier of an excise warehouse). Section 100G(5) provides that HMRC:

> "may at any time for reasonable cause revoke or vary the terms of their approval of any person under this section"

4. Section 100H provides that such regulations may, inter alia, regulate the approval (and revocation of approval) of persons as excise dealers, and require the keeping of records.

5. The WOWG regulations put flesh on these bones. Relevantly they provide:

(1) for the approval of authorised warehousekeepers who may receive excise goods at, and consign them from, their warehouses; and

(2) for the approval of duty representatives who may arrange for relevant goods to be held at an excise warehouse and may act as an agent for the buyer of goods held in such a warehouse.

6. Regulation 17 (1) provides that:

> "The approval and registration of every authorised warehousekeeper shall be subject to the conditions and restrictions prescribed in a notice published by the Commissioners and not withdrawn by further notice."

5 7. Regulation 19 (1) makes similar provision in relation to duty representatives.

8. On 1 November 2014 HMRC published a revised Excise Notice "EN196" which set out detailed conditions for approval. Those conditions included one in relation to "due diligence". We shall return to this shortly, but before doing so we should advert to two matters.

10 9. First, the power given by section 100G to make regulations is for the purpose of "administering, collecting and protecting" excise revenue. The secondary legislation must therefore be interpreted in the light of, but also limited by, that purpose. In this context we note that Mr Kinnear described the purpose of the additional requirements in EN 196 to us as to "ensure that the UK alcohol industry played its part in (i) 15 making it more difficult for criminals to operate, (ii) helping prevent unfair competition from the sale in the UK of diverted or smuggled goods, and (iii) preventing money-laundering". It seems to us that the requirements of EN196 relevant to WOWGR cannot be read as having such a broad scope or purpose. They must be read at least as far as excise approvals are concerned as confined to the purpose of 20 administering, collecting and protecting excise revenue.

10. Second, we have mentioned the authority given by section 100H for making regulations to regulate approval and registration. That section lists, in 14 subparagraphs, particular matters for which the regulations may provide. In relation to some of those matters the relevant subparagraph speaks of matters which may be 25 "prescribed"; section 100H(3) says that "prescribed" means prescribed in the regulations "or as prescribed by the Commissioners under any such regulation". The subparagraph dealing with the regulation of approval does not, however, use "prescribed": it merely says that regulations "may make provision (a) for regulating the approval and registration of persons as registered excise dealers ...". We have, 30 however, taking it as tacit common ground that section 100G and H permit the regulations to delegate the detailed conditions for the continuance of approval to HMRC (by its publication of notices) without the (albeit limited) Parliamentary scrutiny of regulations subject to annulment by either House of Parliament (see section 172 CEMA).

35 *EN196.*

11. This is a 50-page document dealing with many different aspects of excise approval. Inter alia it gives advice on the seeking of approval, sets out legislative requirements in relation to particular areas of excise trading, and describes how to appeal. We should record the following parts of this notice (the alphabetic lettering of 40 the paragraphs below is for the purposes of this decision and is not present in the notice):

"1.1 what is this notice about?

A. This notice explains the UK requirements for the warehousing of excise goods held in duty suspension within the UK ...

1.2 What has changed?

5 B. This notice has been amended to: provide information on the introduction of a due diligence condition on registered excise businesses (section 10). ...

2. Approvals, authorisation and registration. ...

C. Only persons who can demonstrate that they are fit and proper to carry out an excise business will be authorised or registered. ...

10 D. This notice contains our general requirements for the approval of premises, authorisation of warehousekeepers [and] duty representatives. ...

E. From 1 November 2014 registered excise businesses must make sure that they are carrying out appropriate due diligence checks on their suppliers, customers and supply chains. Further information can be found in section 10. ...

15 10. The due diligence condition.

10.1 General information

F. Due diligence is the appropriate reasonable care a company exercises when entering into business relations or contracts with other companies and how it responds in a deliberate and reflexive manner to trading risks identified.
20 Without effective safeguards in place, there are considerable risks to all businesses along alcohol supply chains of becoming implicated in illicit trading.

G. This condition requires that all excise registered businesses operating in the alcohol sector consider the risk of excise duty evasion as well as any commercial and other risks when they are trading. Doing so will help drive
25 illicit trading out of alcohol supply chains and reduce the risk to businesses of financial liabilities associated with goods on which duty has been invaded.

H. From 1 November 2014 it becomes a condition of your approval ... that you must:

- objectively assess the risks of alcohol duty fraud within the supply
30 chains in which you operate
- put in place reasonable and proportionate checks, in your day-to-day trading, to identify transactions that may lead to fraud or involve goods on which duty may have been evaded
- have procedures in place to take timely and effective mitigating
35 action where a risk of fraud is identified

- document the checks you intend to carry out and have appropriate management governance in place to make sure that these are, and continue to be, carried out as intended

10.2. Assessing the risks and carrying out checks

5 I. The fraud risks within a supply chain are unique to each business, and objective assessment of the likelihood of your trading activity is contributing to fraud is an essential first step to developing effective due diligence procedures. You will need to consider the full range of trading relationships you have established and the potential for fraud in each.

10 J. The main risks within the alcohol sector include:

- involvement in the supply of goods for fraud
- receiving goods that have been smuggled or diverted into the UK
- inadvertently facilitating fraud by providing import or warehousing services.

K. A key feature of the smuggling or diversion of alcohol into the UK market is
15 the ability to source product either where the excise duty has been suspended or it has been refunded under drawback provisions. To assess your exposure to this risk you will need to objectively assess if there is a potential for duty evasion resulting from your trading activity. You will need to know who you are selling to and where the goods are destined for and understand the market for these
20 products. Without this, there is a risk of supplying goods directly or through a third party into illicit supply chains.

L. Import and warehousing procedures are often exploited to provide cover for the illicit movement of goods. Fraudsters will seek to distribute duty evaded goods as well as counterfeit alcohol into legitimate retail supply chains. To
25 assess your exposure to this risk you will need objectively to consider whether the supply chain and trading activity is credible which includes knowing who you source goods from and provide a service to.

M. High level indicators of risk include goods being received from unusually complex or apparently uneconomic supply routes, for example, regular supplies
30 of UK produced goods that have been shipped out to another member state and then reimported. ...

N. Your regular checks during trading should be of a type and a level sufficient to establish the integrity of the excise transactions and supply chains you are trading in. This level needs to be reasonable and proportionate to the risk.

35 ... checks ... must be sufficiently sensitive, yet robust enough to pick up potential fraud risks.

10.3 Responses to risks

O. It is expected that your due diligence procedures will provide effective control over the risks of fraud within your supply chains. Where your checks indicate real concerns, we would normally expect aspects of your supply chain to be changed to address this, e.g. the supplier or the destination of the goods. However a decision of whether or not to trade with another party remains a commercial decision for your business to take. If your checks lead you to suspect duty fraud you should also inform our Customs Hotline…"

12. Section 10.4 of EN196 describes HMRC's review procedure and the help it may offer to strengthen procedures. Section 10.5 contains risk indicators which it is said should cause a trader to be concerned about a prospective transaction and lead to further enquiries. Section 10.6 contains examples of due diligence checks.

13. There is in EN196 a mixture of explanation, advice and conditions or requirements We do not read the passages giving examples of due diligence checks as a requirement that all such checks be conducted or as being exhaustive; the requirements in relation to due diligence are those introduced in paragraphs lettered A, D, E, G, H, I, J, K, L and N above. The central requirement is in paragraph H.

14. The emphasis (by volume of words) in section 10 of EN196 is on the kinds of checks which could be carried out and what concerns might arise from them. However, the words in para H above are in our view sufficient to make clear that the "due diligence" required by the notice consists, not only in making checks and in collecting answers, but in evaluating whether the information received indicates a risk of connection to excise fraud <u>and</u> in taking "mitigating action".

15. This last requirement, to take mitigating action, is, on a quick reading of the notice, obscured by the volume of material in the examples, and it is not elaborated on save as noted in para O. That failure to emphasise that something may need to be done - and that that something may mean not entering into a potential, and potentially profitable, transaction - is a lamentable presentational defect in the notice; but it does not detract from the fact that taking "mitigating action" where a real risk to the collection of excise duty is apparent, can only be construed as including not entering into a trade.

16. That requirement is part of the conditions for the completion of "due diligence" and therefore a condition for remaining an authorised person.

17. Of course, declining a trade may not be the only reasonable response to a perceived risk: further investigation may be called for and be possible. But there may come a time when further comfort cannot be obtained or the enterprise does not wish to seek it. In that case it may be that the only possible mitigation is not to enter that particular trade.

18. We were taken to nothing in EN196 which dealt expressly with the revocation of approval. It is clear to us, however, that as the notice prescribes conditions for approval, the breach of those conditions may constitute reasonable cause within section 100G(5) for revocation.

19. In para C of EN 196 it is said that only persons who demonstrate that they are fit and proper to carry out excise businesses will be authorised. This "fit and proper" requirement must, in our view, be read in the light of the purposes of the provisions in section 100G: for the administration, collection and protection of the revenue.

20. As a result, "fit and proper" does not in this context mean fine, upstanding, or well-connected; it means persons who demonstrate behaviours of a type likely to assist, and not to hinder, the proper administration, collection and protection of the revenue.

21. Para C does not expressly make being fit and proper a condition for the holding of an approval, but in our judgement the effect of the paragraph is that if a person cannot demonstrate that he is in this sense fit and proper, that will afford reasonable cause for revocation of an approval.

22. If a person fails to carry out "due diligence" (in the sense described in para H above, rather than merely collecting bits of paper) its actions will generally not assist and may hinder the achievement of that purpose. Thus generally such a person will not be fit and proper. There may however be reasons for the failure which permit such a person to be regarded as fit and proper; and conversely reasons why a person who does carry out required due diligence, may not be fit and proper.

Seizure, forfeiture and detention

23. Section 139 CEMA contains provisions which permit the seizure of anything liable to forfeiture. The Act provides a mechanism for challenging the legality of a seizure. It also provides that if the owner does not start proceedings to challenge liability to forfeiture in time, the thing which was seized is deemed to be duly forfeit. In *R (Eastenders Cash & Carry) v HMRC* [2014] UKSC 34 the Supreme Court held that the right to seize under section 139 was dependent on the thing seized being actually liable to forfeiture and so did not arise merely as a result of an officer suspecting that the goods were liable to forfeiture, but that HMRC had a power of detention which was available when they had reasonable grounds for suspecting that the goods were liable to forfeiture. Sch 2A CEMA contains provisions which convert detention for more than 30 days into seizure.

24. In our findings below we note several occasions on which HMRC have asserted that goods have been seized, and passages in the evidence in which it is asserted that they were seized on suspicion of being illegally trafficked. We did not regard the formal distinction between seizure, detention and lawful forfeiture as informing this evidence. It seemed to us that in ordinary language a thing is “seized” if it is detained and not returned, and that a reasonable suspicion for such “seizure” encompasses reasonable suspicion for detention.

ECMS, ARCs and eADs

25. Article 21 of the Excise Directive makes it a condition of a movement under a duty suspension arrangement that the movement takes place under the cover of an electronic Administrative Document (an “eAD”). The Article provides for the

consignor to submit details of the intended movement to the authorities in the member state of dispatch, for the member state of the consignee to confirm that the consignee is an authorised warehouse keeper, and for the system to assign a unique administrative reference code (an "ARC") and notify it to the consignor. The consignor is required to provide a printed copy of the eAD including the ARC to the haulier.

26. The Computer system which administers this system is called the "ECMS". We understood that (a) status as an approved person (or the equivalent in other member states) permits a warehousekeeper access to the system, (b) the consignee will access the system to record the arrival of the goods at its warehouse, and (c) the consignor will access the system to obtain an ARC and details of the status of the delivery.

27. Whilst this system may provide some comfort for a consignor that, in the absence of fraudulent or incorrect entries into ECMS by the receiving warehouse or fraud by the haulier, the goods despatched have arrived, it does not provide certainty that any particular movement is not connected with fraud. For example:

> (i) in relation to a duty-suspended movement leaving the UK, it leaves open the possibility that the lorry is emptied before leaving the UK (and its load sold in the UK without payment of duty) and then picks up a matching load (on which lower say French duty has been paid) which it delivers to the warehouse abroad. Such a movement would have to be detected at the port to catch the fraud; and
>
> (ii) in relation to a movement into the UK, the system does not catch the use of duplicate copies of the eAD or other document bearing the ARC. If such copies are made the tractor unit, whose vehicle registration number is given on the eAD, might travel more than once into the UK with trailers (which are not uniquely identified) each with a load matching the details on the eAD. If any one is stopped the documentation will be found to be in order. But those trailers which are not stopped need not be unshipped at the warehouse named on the document; only one need go there: the other load(s) may go to a "slaughterhouse" site to be unloaded and be sold in the UK without payment of duty.

The nature of this appeal.

28. By section 15 FA 1994 read with section 13A(2)(j) and paragraph 2(1)(p) schedule 5, if HMRC notifies a person of a decision to revoke an excise authorisation under section 100G CEMA they must offer a review of the decision. By section 15C HMRC must conduct a review if the offer is accepted in time. Section 15F provides:

> (2) The nature and extent of the review are to be such as appear to be appropriate to HMRC in the circumstances.
>
> (3) For the purposes of subsection (2) HMRC must, in particular, have regard to steps taken before the beginning of the review-
>
> > (a) by HMRC in making the decision, and

(b) by any person who is seeking to resolve disagreement about the decision.

(4) The review must take into account any representations made [by the trader].

29. Subsection (6) requires HMRC to provide their reasoning with their conclusions on the review.

30. By section 16(1) an appeal against a review decision may be made to this tribunal. The decision which must attract our attention is therefore that made on review, not the original decision.

31. By section 16(9) read with section 16(4) the power of this tribunal on any such appeal is confined to a power, if we are satisfied that the decision could not reasonably have been made, to

(a) direct that the decision is to cease to have effect;

(b) require HMRC to conduct a further review in accordance with our directions; and

(c) where the decision cannot be remedied, to give directions to secure that repetition of the unreasonableness does not occur in future.

And by the tailpiece of section 16(6) the burden of proof in any such appeal is on the appellant.

32. It was thus common ground that the jurisdiction given to this tribunal is of a similar nature to that of judicial review. A decision could not reasonably have been made if relevant facts were ignored, irrelevant factors were taken into account, a material error of law was made or the decision was otherwise such that no reasonable body could have made it.

33. An issue arises as to the facts by reference to which the reasonableness or otherwise the decision should be judged. There are three possible answers:

(1) the facts available to the person who made the original decision;

(2) the facts available to the person who makes the review decision, and

(3) the facts as found by this tribunal.

34. *Balbin Singh Gora v HMCR* [2003] EWCA Civ 255 concerned an appeal against a decision not to restore goods seized under CEMA. The provisions of FA 1994 applied to that appeal in the same way as they apply in the circumstances of the current appeal.

35. Two preliminary points were considered by the Court of Appeal. One of these was whether the jurisdiction of the tribunal was sufficient to satisfy the requirements of Article 6 of the European Convention on Human Rights. In the course of argument,

it emerged that HMRC took a broader view of the jurisdiction of the tribunal than had originally appeared. HMRC said that, although "strictly speaking" it appeared that section 16 limited the tribunal to considering whether there was sufficient evidence to support the appealed decision; in practice the tribunal could make findings of fact and then in the light of its factual findings decide whether the decision was reasonable. Pill LJ, with whom the other members of the Court agreed said, at [39] that he would accept that view of the jurisdiction of the tribunal subject only to doubting whether "strictly speaking" was correct once it had been accepted that the tribunal had a fact-finding jurisdiction.

36. Thus, in restoration cases, the job of the tribunal is to determine whether, by reference to the facts it finds (rather than the facts before the decision maker), the decision was reasonable.

37. Mr Kinnear suggests that the same principle does not apply to the jurisdiction of the tribunal in this case. He says: (1) restoration appeals are different, since certain findings of fact are prohibited and Pill LJ's remarks are not necessarily applicable across the range of section 16(4) decisions, and (2) that Pill LJ's statement derives from a concession made in terms relevant to the matters in that case.

38. We do not accept these suggestions. It is true that in restoration appeals the effect of the legislation in CEMA is that where a request for condemnation proceedings is not made, or the seizure is determined to be lawful by the courts, the tribunal may be prohibited from considering whether, for example, goods were imported for the importer's own use. But the issue which was being considered in *Gora* was whether section 16 satisfied the requirements of Article 6 of the Convention. That involved a construction of section 16. 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*.

39. In relation to Mr Kinnear's second point, it is true that Pill LJ's findings originated in a view expressed by HMRC, but not only is his conclusion more robust than that view, but that view was not merely a concession by HMRC for the purposes of that appeal but an acceptance of a view of the law.

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.

41. That of course leaves the question of the period between the initial decision and the making of the review decision. We have noted that section 15F(2) provides that the nature and extent of the review are to be such as appear appropriate to HMRC. Mr Kinnear accepted that in our assessment of the review decision we could take into account the reasonableness of HMRC's decision as to the extent and nature of the review, that is to say including whether the review decision was reasonable or unreasonable in its rejection or acceptance of events occurring after the initial decision but before the review decision.

The Decisions

42. On 23 September 2015 Miss Gillian Wood, a Senior Officer of HMRC, wrote to Safe Cellars saying that each of its three approvals would be revoked. The letter revoking the warehouse approval gave detailed reasons, and the letters revoking the warehousekeeper and duty representative approvals gave the reason for the revocation that as the warehouse approval was revoked the other approvals would no longer be required. The revocation of the duty representative approval took effect immediately, and the other two revocations took effect after a grace period of just over three months during which additional conditions, including a prohibition of the receipt of any further duty suspended goods into the warehouse or of export therefrom, were imposed.

43. After the receipt of these letters Safe Cellars instituted proceedings in the High Court and obtained an interim order directing the suspension of the revocation of two of the approvals - the warehousekeeper and the warehouse authorisation. We shall return to this later.

44. Then, on 22 October 2015 Safe Cellars sought a review of these initial decisions. It was not suggested to us that the effect of the injunctive suspension of the revocation of the two authorisations affected the effectiveness of the requests for review or the review decision.

45. On 3 December 2015 the reviewer, Mrs Linda Cunningham, a Higher Officer of HMRC, wrote to Safe Cellars saying that she considered that the initial decision should be upheld. The letter set out her reasons.

46. Between the request for review and 3 December 2015 there was correspondence between the parties in relation to conditions attached to the injunction relating to due diligence, to due diligence material, and in relation to five particular duty suspended movements (the 5 “ACC-LOG movements"). On 19 November 2015 Mrs Cunningham wrote to Safe Cellars to ask whether it wished the material relating to the additional due diligence documents sent to HMRC and Safe Cellars response to the ACC-LOG loads to be included in her review (this was not however an invitation to make representations generally). There was no evidence of a response to this letter and we conclude that none was made.

The Evidence

47. We had bundles which included copies of correspondence and meeting notes. We heard oral evidence from Mrs Kath Ramsden, the Higher Officer of HMRC who was Safe Cellars' principal excise duty contact, and who was the prime contributor to the initial decision: from Mr Piers Ginn, a Higher Officer of HMRC who attended a meeting with Safe Cellars on 8 July 2015 to discuss due diligence, in which he specialised; and from Mrs Cunningham. Miss Wood attested to the truth of her witness statement.

48. Prior to the hearing the Appellant had served witness statements made by Mr Andrew Taylor, the director of the appellant, and from Mr Darren Shaw and Mr Mohammed Kaleem both of whom worked for the Appellant. After we had heard the evidence of HMRC's witnesses, Mr Jones told us that he would not be calling Mr Taylor, Mr Shaw or Mr Kaleem to give evidence. He accepted that we could therefore ignore the contents of their statements.

49. Mr Kinnear submitted not only that the lack of evidence in the Appellant meant that there was no evidence from which we could find certain facts on which the Appellant might seek to rely (in particular because the onus of proof was on the appellant), but that we could also draw adverse inferences from the Appellant's failure to expose those witnesses to cross-examination.

50. In *HMRC v Sunico* [2013] EWHC 941, as in this appeal, a potential witness had made a witness statement which had been read by the judge before the hearing. In that case the judge, referring to CPR 32.5, said that the witness statements could not be taken into account and that she would disregard her pre-reading of them. The rules of this tribunal do not require us to disregard the contents of the statements but we have given them no weight.

51. In *Sunico* Proudman J reviewed the authorities relating to the drawing of adverse inferences from the absence or silence of a witness. She recalled the principles in *Wisniewski v Central Manchester Health Authority* 1998 PIQR 324 at 340:

> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call a witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If on the other hand there is some credible explanation given, even if it is not wholly satisfactory, the potential detrimental effect of his/her absence or silence may be reduced or nullified.

52. In *Sunico*, Proudman J was concerned with a case where the absence of evidence was from the defendant who did not have the burden of proof. In this appeal the absence of evidence is from the appellant and the appellant does have the burden of proof. These differences do not seem to us to affect the principle. To the extent the Appellant's case depends upon the need for any factual finding and if there is some evidence against that finding, then the absence of evidence from the relevant witness may weigh in favour of a conclusion against such a finding.

53. Proudman J noted in particular that the inferences must be specific and in relation to specifically pleaded matters. This tribunal does not have the same formal pleadings but we have limited our application of this principle to matters which were part of the argument before us.

54. In this case no convincing reason for the absence of the Appellant's witnesses' evidence was given to us. At places in this decision we have drawn inferences from the absence of those witnesses which support conclusions based on weak evidence (for example second-hand evidence or inferences) from other sources in relation to particular matters. Where we have done so we have done so expressly.

Our Findings of Fact.

Excise fraud

55. In her review letter Mrs Cunningham asserted that excise fraud deprived the UK of some £1 billion per annum. She was not asked whence that figure derived. In the forward to HMRC's 2016 paper "The HMRC Alcohol Strategy", the Exchequer Secretary says that alcohol excise duty generates £10.5 billion per annum and that the illicit alcohol market costs the taxpayer approximately £1.2 billion per annum. The paper indicates that the biggest problem is with inward diversion fraud in which loads of genuine alcoholic drinks are brought in from the continent.

56. We find that it is likely that alcohol excise fraud is a serious and costly concern and that the associated loss of duty is some £1 billion per annum, and that Safe Cellars was aware of this.

57. In *CC&C Ltd v HMRC* [2014] EWCA Civ 1653 Underhill LJ at [1] said that there is a recognised problem of dishonest traders manipulating the system typically by so-called duplicate loads moving under the cover of paperwork generated by legitimate movements. We find there are at least two common types of alcohol excise duty fraud:

(i) outward fraud in which a load moves under cover of an ARC created by a UK warehouse, but the goods do not in fact leave the UK (see para 27(i) above), and

(ii) inward fraud (see para 27(ii) above). Inward fraud is particularly prevalent with goods which have previously been exported under duty suspension from the UK: such goods may be particularly suitable for sale in the UK market (having evaded duty).

Safe Cellars

58. Safe Cellars operates a warehouse in two buildings in the Manchester area where it has held alcoholic beverages under duty suspension arrangements. It has been approved as a warehousekeeper and duty representative since 1999, and the buildings have been approved as authorised warehouses since December 2008. In 2015 it had about 50 customers.

59. Safe Cellars receives loads of duty suspended alcoholic beverages belonging to others into its warehouse, and dispatches them from it. It also acts as a duty representative for non-UK entities, arranging for duty suspended goods to be held at warehouses, including its own, in the UK.

60. In late 2014 Safe Cellars, which had been owned by International Bonded Warehouses, was acquired by Mr Taylor who became the sole beneficial shareholder and director of the company. Mr Taylor told HMRC in 2014 that he was intending to build up the business and had his eye on a number of potential new customers.

61. In September 2014 HMRC sent individual letters to WOWGR firms drawing their attention to the forthcoming additional section (10) of EN196 which required them to make due diligence checks on customers and transactions.

62. Mrs Ramsden, by e-mail dated 4 November 2014 and at a meeting the next day, brought the new requirements in section 10 to the attention of Mr Taylor and staff at Safe Cellars. These were also drawn to the attention of staff at Safe Cellars in subsequent meetings on 24 March and 12 May 2015 and in an e-mail of 16 December 2014. At visits to Safe Cellars' premises in December 2014 and January, March and May 2015, Mrs Ramsden discussed the due diligence requirements of EN196, and the due diligence the company had actually undertaken, with Safe Cellars' staff. At those meetings she expressed concerns about the adequacy of the due diligence which had been undertaken in certain cases.

63. It was not completely clear to us that the full meaning of "due diligence" as that term is used in EN196 was explained at these meetings. Reference was made to EN196 but the emphasis at the meetings appears to have been collecting adequate documentation - application forms passports, credit checks, trade references, trading agreements etc - and on keeping records and an audit trail. Whilst Mrs Ramsden indicated her concerns that in relation to some customers due diligence had not been adequate, we found little evidence that it had been at all forcefully explained that the absence of material, or contradictions in it, or abnormal results in relation to a customer, indicated that there was a risk of connection to excise fraud; that as a result trading with that customer might lead to facilitating such fraud; and that, unless the matter was cleared up by further enquiries, that risk could only be avoided by not trading with or for that customer.

64. In her evidence to us Mrs Ramsden was at pains to say that she could not tell Safe Cellars not to trade with any particular counterparty. It seems to us that this proper reluctance to tell Safe Cellars how to trade had the effect that she did not

clearly say that her "concerns" meant that she regarded the risk of facilitating fraud by trading with that counterparty was such that it could, on the state of the information before her, only be avoided by not entering into the trade. This carried her reluctance further than was necessary.

5 65. To our minds the tenor of the reported responses of Safe Cellars' staff, and the actions they took, indicated that they saw "due diligence" as merely or principally the collection of information, and not as a process for deciding whether or not there was an unreasonably large risk of facilitating excise fraud as a result of transactions with or for a particular customer. This was evident in those cases in which Safe Cellars had 10 started to trade with a customer before collecting more than a modicum of information, and yet told Mrs Ramsden how further information was to be collected in the future. Thus Safe Cellars' staff seemed to view the collection of information as unconnected with a decision whether or not to trade. Yet without the information, the assessment of the risk was not possible, and there must have been a risk of facilitating 15 excise fraud.

66. However, even if this was the approach of Safe Cellars' staff, EN196 had been made available to them, and had they read it carefully they would, in our view, have appreciated that it required, not only greater collection of information, but an evaluation of risk and the taking of mitigating action. Mrs Ramsden's conversations 20 with Safe Cellars did nothing to indicate that something less was required.

67. We find that in relation to a number of customers Safe Cellars did not have information which would have enable it to assess whether or not the customer hoped to make its money from excise fraud, or by enabling others to evade duty, rather than from transactions whose economics were unassociated with such activity. One 25 customer, for example, was a recently constituted company without any evidence of association with an established alcohol trader and with a sole director who appeared to have no previous background in alcohol trading. There must to our minds be a real possibility that such a company would be associated with excise fraud, and that possibility could not be dismissed without quite a lot of further information.

30 68. In the meetings in December 2014 and January, March and May 2015 Mrs Ramsden also expressed her concern about specific customers and transactions. We set out our finding in relation to those specific matters later.

69. On 22 May 2015 these concerns came to a head. Following a visit that morning, where she explained the requirement orally, Mrs Ramsden wrote to Safe Cellars. In 35 that letter that she said:

> [HMRC] has concerns relating to the movements of duty suspended alcohol belonging to the following customers: FS Foods, EM Trade, KC Capital, Danco International General Trading LLC, Bluequest.
>
> Therefore to safeguard the revenue, the Commissioners have taken the decision 40 with immediate effect to impose a 100% Movement Guarantee to cover all movements of duties suspended goods exported to other Member States.

The Movement Guarantee should be lodged with HMRC prior to any movements taking place. Once HMRC are satisfied the goods have been confirmed as receipted into the destination warehouse the monies will be refunded to the guarantor."

5 70. She explained in that letter that this requirement was imposed under section 157 CEMA. In a telephone call with Mr Taylor the same day, Mrs Ramsden said that the money for the guarantee had to be sent to HMRC before any loads left Safe Cellars. (In that conversation Mr Taylor noted that the trade with those five companies was 50% of Safe Cellars' trade).

10 71. Blackfords, Safe Cellars solicitors at that time, replied to that letter on 27 May 2015. We did not see a copy of their reply.

72. On 29 May Mrs Ramsden and other HMRC officers visited Safe Cellars. They noted the delivery of a pallet of Oranjeboom (a Dutch lager brand) which had a sticker on it which indicated that it had been in Safe Cellars' warehouse before. That 15 indicated that it had been exported and then reimported.

73. In a letter of 5 June 2015 to Blackfords, Mr Imran Khan, Mrs Ramsden's then Senior Officer, said in relation to Mrs Ramsden's letter:

"HMRC would like to clarify ... that the requirement to deposit 100% of the duty applies only to movements made on behalf of those five customers."

20 74. On 9 June 2015 four HMRC officers visited Safe Cellars' premises. The note of the visit shows, and we accept, that:

(1) they were told by Mr Taylor that several loads were due to leave, on the Bluequest accounts, to go to Belgium;

(2) they were told by Safe Cellars' staff and by Mr Taylor that four duty 25 suspended loads had left for the continent on the previous day, 8 June 2015. The note records that the officers established that these were for Bluequest and EM Trade. We accept that they were;

(3) Mr Taylor told them that he had taken advice from Geraint Jones QC who considered that the Movement Guarantee demand was unlawful;

30 (4) Mr Taylor passed the officers a copy of a letter from Geraint Jones QC;

(5) Sanjay Panesar of Rainer Hughes (Safe Cellars' new solicitors) telephoned and spoke to one of the officers saying that an injunction would be sought against the Movement Guarantee demand.

75. Mr Taylor's responses and his possession of Mr Jones' letter indicate to us that 35 he was likely to have been aware of Mr Jones' advice on 8 June 2015. This is not a matter on which we can draw a contrary adverse inference from Mr Taylor's failure to give evidence since there was no scintilla of evidence that Mr Taylor was not aware of the advice and the evidence of the meeting is to the contrary.

76. On 10 June 2015 Rainer Hughes wrote to HMRC expressing the view that the demand for the Movement Guarantee was unlawful since section 157 CEMA did not confer power on HMRC to require payment of duty in advance, but merely the power to require security. They said that they had so advised Safe Cellars.

77. On 17 June 2015 Mr Khan wrote to Safe Cellars indicating that HMRC were minded to revoke its three approvals. They were minded to conclude that Safe Cellars was not a fit and proper person because the manner in which its business had been conducted exposed HMRC to risk. He referred in particular to two matters:

(1) that four loads had been dispatched on 8 June 2015 without the required Movement Guarantee being in place, and

(2) the concern that Safe Cellars' due diligence had been insufficiently robust to safeguard against risk to the revenue.

78. At about the same time Safe Cellars issued High Court proceedings for a declaration that the Movement Guarantee was unlawful.

79. The High Court proceedings came on for hearing on 23 June 2015 and were settled on 2 July 2015 in the terms of a Tomlin Order which included a replacement of the payment obligation under the Movement Guarantee with the provision of a guarantee by an insurer, and contained the following clauses:

> "4. [HMRC] will not revoke [Safe Cellars'] Excise Approvals prior to the meeting scheduled between the parties on 8 July 2015, at [Safe Cellars'] premises, and [Safe Cellars] has been given a reasonable period of time (no less than 28 days) to satisfy any demands made by HMRC at that meeting.
>
> 5. [HMRC] retains the right to revoke [Safe Cellars'] Excise Approvals if fresh evidence arises concerning their fitness or otherwise to hold those Approvals at any point before the expiry of that time."

80. A meeting was duly held on 8 July 2015. Mr Taylor described the purposes of that meeting in an e-mail to Miss Wood as being "to ascertain exactly what information is required to complete due diligence to meet HMRC's satisfaction". The meeting was attended by Mr Ginn. Mr Ginn had been told that the purpose of the meeting was to provide educational support to Safe Cellars in relation to due diligence. At that meeting Mr Ginn reviewed Safe Cellars' due diligence documentation for its duty representative customers and for one of its warehousing customers. At that meeting, Mr Ginn:

(1) expressed concern at the lack of documents addressing due diligence enquiries;

(2) said that there was no evidence of Safe Cellars assessing or addressing the risks which could be identified from the due diligence which had been undertaken;

(3) said that each piece of evidence should be tested;

(4) said that that Safe Cellars should document calls, meetings, decisions, visits, informal translations and keep copies of photographs;

(5) said in relation to one customer that, given the material available, he could not see how Safe Cellars had decided to trade with that customer;

(6) said that due diligence checks "were for the company to protect itself against commercial risk rather than to satisfy HMRC".

81. The last of the statements is plainly wrong and potentially misleading. The reason for the imposition of a due diligence requirement in EN196 is to protect HMRC from excise fraud - it is not to help the company make decisions about (other) commercial risks.

82. At the meeting Mr Taylor said that thenceforth Rainer Hughes would be undertaking the due diligence checks. Mr Ginn asked to take copies of the documents that had been discussed at the meeting. Mr Panesar declined to allow this but promised to send them to HMRC Solicitors Office within two days. He was told that Rainer Hughes would provide an overview of Safe Cellars' current due diligence and details of what would be done in future.

83. In a letter of 17 July 2015 Mr Ginn set out his conclusion from that meeting that there was no assessment of the risks undertaken, and no evidence of the contents of documents having been tested or followed up.

84. Mr Ginn told us, and we accept, that on 28 July 2015 some additional due diligence documents were sent to him by Rainer Hughes, but those documents contained no assessment or identification of risks and positives, and in any event were not the documents seen and requested by him at the meeting. They appeared generally to be documents obtained by Safe Cellars after the meeting rather than those seen by him at it.

85. On 23 September 2015 HMRC wrote to Safe Cellars revoking their approvals.

86. Mitting J made an interim order dated 6 October 2015 which suspended the revocation of the warehouse and warehousekeeper approvals (but not of the duty representative approval) and required that:

a. By 4 pm on 20 October 2015 [Safe Cellars] must provide to [HMRC] details of the due diligence that they propose to undertake in respect of their clients in connection with the ... approvals ...

b. By 4 pm on 20 October [Safe Cellars] must provide to [HMRC] in hard copy the due diligence that they have undertaken in respect of the clients mentioned in [a letter of 23 September]

c. By 4 pm on 10 November 2015 [HMRC] must state in writing whether in respect of these three approvals ... the due diligence that [Safe Cellars] has undertaken and proposes to undertake is acceptable, and if not acceptable give reasons why.

87. It appears that in October 2015 Rainer Hughes completed a review of Safe Cellars' due diligence procedures and of the documentation held. It prepared a document setting out in relation to a number of Safe Cellars' clients a list of documents provided to them and a declaration that the due diligence undertaken was satisfactory. It enclosed copies of the documents held. This report was apparently also signed by Mr Taylor. We believe it was provided to HMRC on 21 October 2015, in response to items a and b of the Order by Mitting J. However, we were not taken to this document. HMRC officers undertook a detailed review of the material provided for each of those companies later in October. The conclusion of that review made serious criticisms of the material provided, and in particular criticised the lack of any convincing assessment of excise fraud risk from the information available.

88. On 10 November 2015 in response to para c. of Mitting J's order, Mrs Ramsden wrote to Safe Cellars. She divided her letter into a consideration of the material provided in response to para a. of the order – the future proposals- and that in relation to para b. In relation to the proposals for the future she said:

> "On the basis that the due diligence proposed was properly and genuinely carried out, HMRC would have concluded that, in principle, it would have been satisfactory. Upon reviewing what the Claimant has actually done, however, HMRC can only conclude that the Claimant's due diligence is inadequate, and is being conducted in a way which is inadequate for the purpose of the warehousekeeper approvals ...
>
> "HMRC is of the opinion that the proposed process must be tested for effectiveness to ensure future compliance. Of significant importance is the need to proactively risk assess information received by Safe Cellars Limited from their clients. This has historically been a weakness and remains a concern to HMRC and is evidenced in part below.

89. Although the language of the quoted passage is a little obscure, it seems to us to be fairly clear that Mrs Ramsden means that *if* what had been proposed would in fact be done in the future then that would be satisfactory. But she says that they consider that Safe Cellars' history was such that HMRC did not have confidence that what was proposed would in fact be done, and therefore what was proposed was unsatisfactory.

90. In relation to para b. – the review of the past - she said: that HMRC were not satisfied that risks had been assessed (giving examples of export of UK beer to EU countries, and an absence of focus on transport details); that there was inadequate evidence of any response to the risks (for example further investigation of UK beer going to the EU); and that much of the documentation had been created after the date Mitting J's order was made (we note, however, that para b. of that order did not require that HMRC be provided only with due diligence material obtained before the date of the order) . She concludes that the due diligence undertaken was unsatisfactory.

91. Finally she says that HMRC were minded to apply for the lifting of the order.

The specific issues.

(i) re-export

92. In December 2014 Safe Cellars told Mrs Ramsden that two customers, Bluequest and EM Trade, which had recently been taken on by Safe Cellars, would not be re-exporting goods which they had imported through Safe Cellars.

93. On 19 January 2015 Mrs Ramsden received an e-mail from Safe Cellars saying that it would be re-exporting duty suspended goods for its customers while "working closely alongside Notice 196 ... to ensure each transaction is commercially viable". The e-mail said that Safe Cellars had had to turn down a number of business opportunities "because we had told them that we will not re-export goods ... Commercially we cannot allow our competitors to freely take business from us".

94. To that e-mail Safe Cellars attached a copy of their Terms & Conditions which contained a term indicating that they would not re-export to the same country that the goods came from and that it was necessary to prove the commercial viability of each movement.

95. We accept Mrs Ramsden's evidence that, whilst there could be good reasons for the import and re-export of alcoholic goods, such transactions could be associated with excise fraud. The cost of transport to, and then from, the UK suggests that transactions involving such movements of goods might be profitable only if subsidised by payments deriving from the evasion of duty. A blanket ban on re-exporting goods would avoid the risk of facilitating such fraud; in the absence of such a ban the risk could, in our judgement, be mitigated only by a detailed investigation of the circumstances of each relevant transaction, and where that investigation did not quash any reasonable concerns, not participating in it.

96. Despite the assurance that Safe Cellars would "ensure each transaction was commercially viable" there was no evidence that this was done, and we concluded that it was not.

(ii) seizures of goods destined for Safe Cellars.

97. By the beginning of June 2015 Mrs Ramsden had ascertained that since 30 April 2014 18 loads apparently destined for Safe Cellars had been seized by the Border Force or HMRC. Mrs Ramsden told us, and we accept, that some of these loads were accompanied by ARC numbers which had also accompanied another movement of goods – that is to say, the same ARC number had been used for more than one import. That, we accept, meant that it was likely that, whilst one of these loads may have found its way to Safe Cellars, one or more others were sold, or were intended for sale, in the UK without payment of excise duty. We accept Mrs Ramsden's evidence that Safe Cellars was notified of each seizure. There were five further seizures on 5 June 2015 of goods for Bluequest.

98. We accept that goods may be wrongly detained by the UK Border Force or HMRC, and that a seizure may subsequently be found to be unlawful. Nevertheless, if goods are seized or detained it indicates at least a conclusion that at the time of the seizure or detention an officer had a concern that there was some fraud or irregularity

connected with their movement. That in turn would suggest that the customer associated with those goods might have been unwittingly or knowingly connected to excise fraud.

99. In order to avoid the risk of facilitating such a fraud in future it would in our view be necessary properly to investigate the circumstances of the seizure. If the goods had been lawfully condemned, Safe Cellars should obtain a convincing, corroborated, explanation that the nature of the customer's involvement did not facilitate excise fraud; or that it had taken verified steps to avoid the practice which had permitted the fraud; or to cease to act for that customer. Although Mrs Ramsden was told that Mr Taylor had been told that Bluequest had ceased dealing with the supplier which had sold the goods which had been seized ostensibly on their way to Safe Cellars, there was no evidence that any investigation had been pursued by Safe Cellars, and we conclude that none was undertaken.

(iii) five loads destined for ACC-LOG in France

100. Between 4 and 12 December 2014 five loads, mainly vodka, left Safe Cellars' warehouse destined for ACC-LOG, a warehouse in St Etienne, central France. In August 2015 HMRC received an e-mail from the French customs authorities about their investigation into ACC-LOG. The company manager said, when interviewed, that all of the movements of goods recorded as received by the consignee on the ECMS system since ACC-LOG had begun its activity had been fraudulent. The French customs noted that during a period of surveillance of ACC-LOG's premises no lorries were seen arriving there even though numerous eADs were registered on ECMS as having been discharged.

101. This information was conveyed to Mrs Ramsden on 3 September 2015 but there was no evidence to indicate that it had been passed to Safe Cellars before Mrs Ramsden’s initial decision letter of 23 September 2015.

102. In response to a letter from HMRC of 11 November 2015 in relation to these loads, Safe Cellars replied on 17 November 2015 enclosing documentary evidence which was said to confirm that the five loads had indeed reached their destination. Those documents consisted of release notes, delivery instructions, invoices, Safe Cellars' goods inwards, picking and dispatch notes, copies of CMR's (without any recipients' acknowledgements), copies of accompanying documents, and for some loads printouts from the ECMS system on which the status of the load was declared as delivered. Whilst these documents provided clear evidence of dispatch from Safe Cellars, the only possible evidence of due delivery were the printouts from the ECMS system, which, on the information from the French Customs, derived from a fraudulent input into the system that the goods had been received by ACC-LOG.

103. We find it likely that the five loads which left Safe Cellars in December 2014 were not received by ACC-LOG and are likely not to have left the UK and to have been sold in the UK without accounting for the excise duty due.

104. Of these five loads, three were despatched for FS Foods, and one each for Bluequest and Fresh Trade.

105. In our view the following conclusions may be drawn from these events: (i) Safe Cellars' involvement had permitted excise fraud; (ii) it was possible that other such frauds might be perpetrated in the future relying on Safe Cellars' involvement; (iii) Safe Cellars' due diligence had not prevented these frauds, and (iv) given the number of loads which had gone astray, that Safe Cellars' due diligence had not been reasonable.

(iv) Bluequest.

106. On 16 December 2014 Safe Cellars told Mrs Ramsden that it was taking on Bluequest as a client, and gave her a copy of the Bluequest application form. This showed that the company had been incorporated in November 2014 but did not give a jurisdiction of incorporation. The only director was shown as Jason Hughes, whose address was given as the same as that of the company in Dubai (and who, Mrs Ramsden told us, and we accept, had been a plumber). The form named FS Foods and Gardner Shaw in the UK as potential customers of the company. Those companies were also offered as trade referees (which was odd if they were only potential trading partners of Bluequest.). No address or sort code was given for its bank. There was no evidence of any other due diligence activity and we conclude that at this time there had been none.

107. It appeared that by 12 December goods had already been received and dispatched for Bluequest as one of the five ACC-LOG movements was for that entity.

108. On 19 December 2014 Safe Cellars sent Mrs Ramsden copies of their terms and conditions. These included a requirement that a customer should do due diligence on its customers which included the collection of utility bills and the residential addresses of their directors. It appeared that Safe Cellars had not followed these steps in its own vetting of Bluequest before it started to act for them.

109. At a meeting on 20 January 2015 Mrs Ramsden was told that the Bluequest due diligence was only partly complete but that Mr Taylor and another member of staff were going to go to Dubai to see Mr Hughes. Safe Cellars were not certain how long Mr Hughes had been in Dubai. Mrs Ramsden said that she understood him to be based in Dudley, West Midlands.

110. The visit to Dubai took place in February 2015. From the notes of a meeting with HMRC in March 2015 it appeared that Mr Taylor and his colleague did not know, or had not asked, how long Mr Hughes had been dealing in alcohol or how he had got into that business. On 23 May 2015 Mrs Ramsden was told that Bluequest had ceased to use suppliers who had sold them the goods which had been seized on their way to Safe Cellars.

111. Between December 2014 and May 2015 Mrs Ramsden made a number of recommendations in relation to the due diligence for Bluequest: to do credit checks, to check the commercial viability of re-exporting transactions, to get utility bills and

tenancy agreements, to investigate the non-UK warehouses used and to check receipt. She advised them not to trade with a company which they did not think fit and proper.

112. We accept that acting as duty representative or receiving warehouse for a customer about which little is known carries with it a far greater risk of facilitating excise fraud than acting for one whose identity and business is well established and the economics of whose business is well understood. If a customer has an existing substantial excise trade the movements are more likely (although not certain) to be for the purpose of that trade; a new entrant to alcohol trading is more likely to be a front for an operation designed for example to obtain ARCs to duplicate to indulge in the inbound fraud described earlier. Of course a new entrant may be wholly unconnected to fraud (and might even be a new subsidiary of an established trader) but the increased risk means that to obtain the same level of comfort as that which would accrue to an established trader one would need to know for example how the trade was financed, where the profits were hoped or likely to be made, what expertise the entrant has, how that fitted into the market for alcoholic beverages, and whether the trade could be profitable without any direct or indirect association with excise fraud.

113. Bluequest had had several loads seized and, apparently, lawfully condemned. It was not clear how a sole trader, of no apparent means, based in Dubai, could withstand such losses and still be trading honestly.

114. It would not, in our view, be a reasonable response to the risk of connection to excise fraud posed by a newly established venture to enter into a transaction with it without acquiring this knowledge or obtaining detailed reliable evidence of the nature of the transaction and any associated transactions. This Safe Cellars did not do and thus it did not therefore satisfy the due diligence requirements of EN196.

(v) EM Trades.

115. Safe Cellars took on EM Trades as a client at about the same time as Bluequest (December 2014). EM Trades' activities with Safe Cellars had started by 18 December 2014. EM Trades was involved in re-exporting goods. In an email of 16 December 2014 Safe Cellars recorded its address as being in Bulgaria. (In March 2015 Mrs Ramsden was told that the recorded address was its accountant's address. It was also the address of KC Capital, another client taken on in 2015 by Safe Cellars.)

116. There was no evidence that Safe Cellars had conducted credit checks or had investigated its directors. Its director's address was reported as being in Malaysia. No translation was obtained of Bulgarian documents. Mrs Ramsden asked Safe Cellars on 23 January 2015) to conduct further investigations into how the business was conducted. On 24 March 2015 (three months after transactions had started) Mrs Ramsden was told that a member of Safe Cellars' staff would be going to Bulgaria to investigate. In April 2015 Mrs Ramsden asked for details of further due diligence on EM trade. It appears that none was provided. We conclude that none had been done.

117. There is nothing inherently suspicious about being based in Bulgaria or having a registered office at a firm of accountants, but this company had only one director,

apparently based in a third country outside the EU; and there was no evidence of its financial standing, its experience or whence its profits were expected. That lack of information meant that there was a risk that it was a front for or connected with excise fraud. In our view it was an unreasonable response to that risk to conduct transactions with it. Safe Cellars did not therefore satisfy the due diligence requirements of EN196.

(vi) KC Capital

118. As noted above KC Capital was recorded by Safe Cellars as sharing the same address as EM Trading. By March 2015 it was using Safe Cellars. On 15 April 2015 Mrs Ramsden sought Safe Cellar's due diligence report on KC Capital because, she told us what she had seen up until then did not establish even the existence of the company. She had no recollection of a response. We conclude (bearing in mind that the burden of proof is on the appellant and that there was no evidence to the contrary) that none was made. On 23 April 2015 Safe Cellars provided to HMRC a copy of KC Capital's rental agreement showing an address in Sofia (Bulgaria). On 12 May 2015 Mrs Ramsden told Safe Cellars that full checks needed to be undertaken as part of the forthcoming trip by a member of staff to Bulgaria. In a letter of 5 June 2015 Mr Khan stated his understanding that no trip was made. We conclude, in the absence of evidence to the contrary, that none was made. There was no record of any further checks and we conclude that none were made.

119. Again, in our view, it was not reasonable due diligence to conduct transactions with or for this entity without taking steps to mitigate the risk that Safe Cellars' involvement could, because so little was known about it and its transactions, be facilitating excise fraud

(vii) FS Foods.

120. On 9 December 2014 Safe Cellars was told that goods inbound for FS Foods had been stopped and seized at Dover. FS Foods was Safe Cellars' most active customer in that week. Mr Taylor said that he had advised FS Foods to be careful who they buy from and who they used as haulier. That seems to us to be a wholly inadequate response: it provided no comfort that the haulier they used in future would not be crooked or that FS Foods would exercise care to avoid connection to fraud in the transactions conducted through Safe Cellars.

121. Safe Cellars had refused to re-export for FS Foods in December 2015 but lifted its ban in January 2015. Mrs Ramsden told us that she was concerned that it was re-exporting after that date. In the absence of evidence to the contrary from Mr Taylor we find it likely that it was so doing. There was no evidence that the commercial basis of these transactions had been examined and we find that it had not been. That was an unreasonable response to the risk of connection to excise fraud.

(viii) Danco.

122. Mrs Ramsden told us, and we accept, that Danco was registered in Dubai and was a relatively new company. She regarded the materials obtained by Safe Cellars as

inadequate. We found no mention of Danco in the meeting notes or correspondence between November 2014 and May 2015. HMRC's letter of 5 June 2015 setting out its reasons for the imposition of the Movement Guarantee makes no reference to inadequacies in the Danco due diligence other than to say it was cursory.

5 123. In Mr Ginn's meeting on 8 July 2015 he was told that the owner of Danco had sold up in the UK and gone to Dubai where he had the sole Budweiser rights. That however did not fit with the two movements through Safe Cellars which did not go to Dubai. In the absence of evidence to the contrary we conclude that it is unlikely that the owner had Budweiser distribution rights in Dubai.

10 124. In the absence of evidence to the contrary we find that its due diligence was cursory and thus insufficient to provide reasonable comfort that the movements undertaken for Danco did not risk facilitating excise fraud.

(ix) Safe Cellars' response to recommendations made by Mrs Ramsden

125. In the course of some of her visits Mrs Ramsden made recommendations for the 15 improvement of Safe Cellars' due diligence. For example, she recommended that it should use an application form for new clients, that the form should have questions about the entity's financial circumstances, that credit checks should be made, and obliquely that a visit should be paid to EM Trade in Bulgaria. Many, but not all, of these recommendations were adopted, in a limited fashion: there was no evidence for 20 example that Safe Cellars had followed the recommendation that the commercial viability of certain transactions should be investigated.

(x) Vodka to Italy

126. A meeting note of 24 March recorded that HMRC regarded the commerciality of certain movements as questionable. Mrs Cunningham told us that this related to an 25 export of vodka to Italy, where Diageo already had a bottling plant. We had no further documentary evidence of that detail, but in the absence of evidence from Safe Cellars accept that Mrs Cunningham had evidence of it before her.

The initial decisions - Miss Wood's letters of 23 September 2015.

127. Miss Wood signed three letters one revoking each approval. The letters had 30 been prepared by Mrs Ramsden. The letter revoking the section 92 warehouse approval set out full reasons. The other letters gave the reason for the revocation as being that the relevant approvals were no longer required as a result of the revocation of the warehouse approval.

128. Paragraph 4 of the letter revoking the section 92 warehouse approval set out a 35 summary:

(1) HMRC were not satisfied with the due diligence,
(2) there had been seizures of goods bound for the warehouse, and
(3) certain loads from the warehouse had not arrived at the destination.

Each of those grounds was amplified later in the letter.

129. In paragraph 5 of the letter, the 17 June 2015 "minded to" letter was recalled, together with its two stated reasons for potential revocation, namely, the contravention of the Movement Guarantee, and concerns over due diligence.

130. We noted that only one of the reasons cited in paragraph 5 was stated as a reason for the decision conveyed by Miss Wood's letter; the alleged contravention of the Movement Guarantee was not expressed as a reason for revocation.

131. In her evidence to us Mrs Ramsden said that "we took into account the 'minded letter' of 17 June". We understood this to mean, not that the reasons in that letter had been taken into account in the making of the revocation decision, but the fact that the company had been given notice that approval might be revoked had been taken into account before the revocation decision was made.

132. Mrs Ramsden also told us that she was aware at the time of the initial decision that the Movement Guarantee was being challenged by an action in the High Court, and the question of its lawfulness had not been finally determined.

Mrs Cunningham's letter – the review letter

133. In her review letter, after setting out the requirements of section 10.1 of EN196, Mrs Cunningham provides a history of the events leading to the revocation. This indicates that she had regard to: the loads apparently destined for Safe Cellars which were seized; the concerns Mrs Ramsden had expressed at the meetings in December 2014, and January, March , May, June and July 2015, the concern over re-exporting, the export of vodka by EM Trade to Italy; the imposition of the Movement Guarantee and the four loads despatched on 8 June which were not covered by such a guarantee, the application for an injunction and the Tomlin Order; and the meeting of 8 July 2015.

134. She says that after Mr Ginn's letter of 17 July 2015 Safe Cellars or its representative did provide further information, but HMRC remained unsatisfied. That could be a reference to the October information from Rainer Hughes and the later review by HMRC of that information. If that is right she took into account a matter which occurred after the date of Miss Woods' letter of 23 September. However, she makes no express reference to the document prepared by Rainer Hughes in October, and we conclude it is likely that she was referring to the limited information provided to Mr Ginn on 28 July 2015 only.

135. In a section headed Review Findings the letter explains that excise fraud is a serious problem and that the due diligence requirements were aimed at protecting supply chains from fraud. She says that HMRC had expressed the concerns noted above about Safe Cellars' due diligence, and records

(i) the contravention of the movement guarantee,
(ii) the inward seizures
(iii) the ACC-LOG loads
(iv) the Oranjeboom crate (see para 72 above)
(v) the lack of any extra conditions being imposed on Bluequest

136. Then in a section headed Review Conclusion the letter sets out extracts form relevant legislation and EN196 and concludes:

> "Despite the substantial efforts that HMRC have made to assist Safe Cellars to meet their obligations in respect of due diligence, I have found you have failed to meet these requirements.
>
> By failing to complete meaningful due diligence …the revenue has been exposed to an unacceptable risk of loss through fraud.
>
> I must therefore conclude that Officer Wood correctly found that the directors and management of Safe Cellars are not fit and proper persons to operate a [warehouse, to be an approved warehousekeeper or an approved duty representative]

(This last statement overlooks the fact that the earlier revocation letters for the warehousekeeper and duty representative approvals did not specify that reason.)

137. Finally, Mrs Cunningham says that she knows that Safe Cellars had applied for an injunction but had not taken account of it "as it is separate from my review and the findings of the High Court have not yet been made."

138. In her oral evidence Mrs Cunningham told us:

(1) She was aware that there had been no challenge to the seizure of the loads apparently destined for Safe Cellars which had been seized. If there had been a challenge it would have come to the team in which she worked. We conclude that there was no challenge;

(2) She was not aware that on 8 June 2015, when the four loads had been despatched in apparent contravention of the Movement Guarantee requirement, Safe Cellars had been advised the requirement was unlawful;

(3) Her practice was to access and make a copy of the electronic file at the point of beginning her review. But she would not routinely access the operational file after that. She would of course take into account any matters drawn to her attention by the firm.

(4) She had made a conscious decision not to find out about the progress of the Appellant's application for the injunction;

(5) She regarded herself as not making a fresh decision, but as reviewing the decision made by Mrs Ramsden. As a result, she had reviewed the material in the file which was available to Mrs Ramsden but had made no fresh enquiries. While she accepted that if she learned of a matter – such as for example a serious criminal conviction of a director – she could take it into account, she regarded her role as reactive not investigative;

(6) She had made no enquiry, for example, into the character of Safe Cellars' director or staff.

(7) Where Mrs Ramsden had expressed a "concern", she accepted the factual basis for that concern without further investigation, in view of the absence of any further representations from Safe Cellars.

The Appellant's arguments.

5 139. Mr Jones challenges the reasonableness of each revocation decision on the following grounds:

(1) the regulatory regime lacks certainty. Both EN196 and HMRC's application of it are so unclear that a trader cannot know what his obligations are. The basis for the decision is thus uncertain and so the decision is unlawful 10 and thus unreasonable;

(2) the sanction applied by HMRC did not satisfy the principle of proportionality - either as a matter of EU law or under Article 1 of Protocol 1 of the Human Rights Convention (A1P1); it was therefore unlawful by reason of section 6 Human Rights Act 1998 and thus unreasonable; and

15 (3) in making the decisions (initial or review as appropriate) HMRC ignored relevant factors and failed to address relevant issues. The decisions were therefore unreasonable.

Discussion.

Preliminary Matter: The Movement Guarantee

20 140. We should address a preliminary matter before turning to Mr Jones' main arguments. This relates to the circumstances surrounding, and the legality of, the requirement for the Movement Guarantee.

141. Mrs Ramsden's letter of 22 May indicates that the power to require the giving of the guarantee was provided by section 157 CEMA. That provides:

25 "(1) Without prejudice to any express requirement as to security contained in the customs and excise Acts, the Commissioners may, if they see fit, require any person to give security (or further security) by bond, guarantee or otherwise for the observance of any condition in connection with customs or excise.

142. Three issues arose:

30 (1) First, Mr Jones contends that section 157 confers only a power to require "security" which he says does not extend to requiring payment of the duty (which was the meaning given to the requirement by Mrs Ramsden in her meeting with Mr Taylor on the same day as her letter).

(2) Second, section 157 permits a guarantee to be required for the observance 35 of a "condition": it was not clear for what "condition" the security was required, and, if it was for Safe Cellars' obligation to pay, whether it had such an obligation, and if so whether that was a "condition".

(3) Third, assuming that the imposition of the Movement Guarantee was lawful, whether what mattered for the purpose of assessing the reasonableness of Mrs Cunningham's decision (which relied in part on the breach of the guarantee requirement) was whether Mr Taylor believed it was lawful.

5

(i) "Condition"

143. We asked what was the condition for the observance of which the obligation to provide security had been imposed.

144. We now note that duty becomes due when goods are released for consumption. The Excise Goods (Holding, Movement & Duty Point) Regulations 2011 provide in regulation 6(1) that excise goods are released for consumption in the United Kingdom (so that duty becomes payable) at the time when the goods leave a duty suspension arrangement. Regulation 8(1) provides that, subject to regulation 9, the person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1) (excise goods leaving a duty suspension arrangement) is the authorised warehousekeeper, the UK registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement. Regulation 9(1) provides that "the person liable to pay the duty when excise goods are released for consumption by virtue of an irregularity in the course of a movement of the goods under a duty suspension arrangement which occurs, or is deemed to occur, in the United Kingdom is–

> (a) in a case where a guarantee was required in accordance with regulation 39, the person who provided that guarantee;
>
> (b) in a case where no guarantee was required–
>
>> (i) the authorised warehousekeeper of dispatch (where the excise goods were dispatched from a tax warehouse in the United Kingdom) …"

145. Thus the warehousekeeper of despatch may have an obligation to pay the duty on the goods.

146. If the potential obligation to make payment is "a condition in connection with customs and excise", then s157 permits the imposition of security for the observance of that condition. But we do not think that that obligation can be so described. A "condition" is normally something on the observance of which something else depends; the conditional obligation to make payment is not one on which anything was made dependent.

147. Mr Kinnear pointed us to regulation 16 of the WOWG Regulations which provides that HMRC:

> "may require [a trader] to provide such security …as they think appropriate for the payment of any excise duty that is or may become due from him".

Plainly excise duty may become payable as a result of regulations 6 and 8 quoted above. Thus regulation 16 provides authority for requiring security.

148. Thus in our view HMRC had power – under regulation 16, rather than under section 157 - to require security for the excise duty which could become payable on
5 the relevant movements.

149. If this is right, does it matter that Mrs Ramsden quoted section 157 rather than regulation 16? In our view that does not affect the lawfulness of the requirement. It is possible that it may have misled Safe Cellars' advisors, but there is no doubt that their advice was honestly given, and it seems reasonable for Mr Taylor to have believed it,
10 whether it was based on a misapprehension or otherwise. It does not therefore affect the view we should take of Safe Cellars' action in the light of the advice it received.

(ii) "Security"

150. Mr Jones says that making payment is not giving security. He points to *Cosslett Contractors Ltd* [1988] Ch 495 in which Millett LJ listed the four kinds of consensual
15 security known to English law: a pledge, a contractual lien, an equitable charge and a mortgage, and possibly to the "flawed asset" discussed by Briggs J in *Lehman Bros* [2012] EWCA 2997 at [47]; none of these he says encompass actual payment. Likewise, "bond or guarantee" did not encompass payment.

151. Neither, he says, does "or otherwise" in section 157 assist HMRC. It must be
20 construed ejusdem generis with "bond" and "guarantee", and relates to the way the security is given, not the nature of what is given.

152. We tend to the view that as a matter of construction of section 157 Mr Jones is right. The kind of security which is there envisaged is that which can be given by bond or covenant or something fairly similar, not by the outright transfer of cash: the
25 words following "security" limit its meaning.

153. However, regulation 16 is not phrased in the same way. The Commissioners are entitled to "such security" as they deem appropriate. There "security" seems to us to mean arrangements to make the Commissioners assured of receipt. The descriptor "such" suggests a wide range of methods of achieving that result and to our minds
30 payment to be repaid if liability does not crystallise, is, like a deposit, an assurance of receipt which falls within this provision. The payment is not an advance payment of a liability but an arrangement which assures receipt if the liability arises,

154. There is another way to approach this issue and that is to ask whether the letter requiring the Movement Guarantee in fact sought a guarantee stricto sensu, and to
35 regard Mrs Ramsden's remarks about cash payment as the offer of a relaxation of that requirement. That however was not explored in Mrs Ramsden's evidence and we can make no finding.

155. We conclude that the requirement was lawful by virtue of regulation 16.

(iii) Belief in the lawfulness of the requirement.

156. It seems to us that in assessing whether or not Safe Cellars was a fit and proper person regard may be had to the attitude it displayed to the requirement, whether or not it was lawful, because it may illuminate whether it was the kind of person which would assist rather than hinder the protection of excise revenue.

5 *1. Legal Certainty*

157. We accept that legal certainty is a fundamental principle of EU law which must apply to the domestic application of provisions of EU law such as the Excise Directive; and, in the form of a requirement for "adequately accessible and sufficiently precise" provisions, it is under A1P1 relevant to any provision of
10 domestic law interfering with a person's possessions.

158. We accept that the principle of legal certainty requires that "rules imposing charges on a taxpayer must be clear and precise so that [the taxpayer] may know what are his rights and obligations and take steps accordingly".

159. We address this question in relation to both the terms of the statutorily
15 prescribed actions and in relation to how they were conveyed to Safe Cellars by HMRC.

(1) Are the conditions required by the legislation (and the subordinate instruments) adequately clear and certain?.

160. Mr Jones says that the effect of section 100G & H, and WOWGR is that the
20 only place where the obligations of the holder of a relevant excise approval (or the conditions it must fulfil to retain its approval) are set out is in EN196. But he says that the provisions of that notice are vague and in general terms only. Mr Jones points to section 10.5:

> "10.5 examples of due diligence risk indicators.
>
> 25 You should be concerned about a prospective transaction where you identify one or more of the following indicators in both suppliers and customers, the presence of which may lead you to make further enquiries. Please note this list is not exhaustive:
>
> Financial health of the company you are trading with
>
> 30 • there is no, or poor, credit ratings but it is still able to finance substantial deals
>
> • there are high levels of debt
>
> ...
>
> Identity of the business
>
> 35 • there is a lack of detail ... e.g. no address details

- they are dealing in high-value goods from short term lease accommodation and/or residential addresses

- there is no general visibility of the company ... for example they do not appear to advertise or have a website ..."

161. Mr Jones says that this is permeated by imprecision: how concerned is "concerned"? If the list is not exhaustive what else might be relevant? What is a "poor credit rating": is it AAA- or CCC-? What is a "substantial deal"? He accepts that there may be extreme cases where, for example an undischarged bankrupt enters into a multi-million-pound transaction, or a FTSE 100 company enters into a £100 transaction where the position is clear, but he says that in the middle is an imprecise area of judgement - a sphere of uncertainty where subjective judgements will differ.

162. Mr Jones regards the part of EN196 §10.1 we set out at para 11 letter H above as an objective, not a requirement. He says that even if that it is a requirement then that for "reasonable and proportionate" checks in the second bullet point is ill-defined and imprecise.

163. It seems to us that application and meaning of the requirements or conditions in EN196 must be construed in the light of their statutory objective, namely, the administration, collection or protection of excise revenue. Consistently the opening paragraphs of 10.1 make clear that the purpose of the later requirements of section 10 is to protect excise revenue by reducing illicit alcohol trading. It is clear to us that the requirements imposed on the trader by the Notice are not to take the steps in the examples but to take the steps in paragraph 11 letter H above, namely-

(1) to assess the risk of alcohol fraud. This plainly involves discovering how such fraud takes place and what actions or omissions of a duty representatives or warehousekeeper could permit or assist a fraud.

This prescribes the nature of what has to be done, not the precise method by which it is to be done. Its prescription, though, is precise and clear.

(2) to make "reasonable and proportionate" checks. In our view what is reasonable is a well understood and precise standard, as is proportionate. This provision does not require any particular specific checks or action to be undertaken but it requires such checks, consideration and actions as in the circumstances are reasonable and commensurate with the identified risk.

The test relates to the <u>nature</u> of the action to be taken and does not prescribe the precise action. The nature of what has to be done is precisely defined;

(3) procedures to take "effective mitigating action" where a risk is identified. Again to our minds this is a precise test: the action must mitigate - not necessarily eliminate - the risk of connection to, or facilitation of fraud. Such action is “effective” if it can reasonably be expected to reduce the risk of facilitating the identified possible fraud to an extent proportionate to the risk.

(4) To document what is done. That is clear and precise.

164. These requirements are not the same as saying that the trader must take such steps as HMRC considers should be taken or as HMRC consider reasonable. If the trader identifies the risks, makes reasonable and proportionate checks, makes a reasonable assessment, and takes effective mitigating steps in the light of that assessment, it satisfies the due diligence requirements; if no reasonable person would consider that what has been done satisfies those requirements, then the requirement is not satisfied.

165. Mr Jones says that the provisions of EN196 lack any indication of the concept of the minimum action required. He argues that if it is impossible to state the nature of the minimum requirement, the trader cannot know how to meet it and there is no legal certainty. He notes, and we accept, that neither in EN196 nor at HMRC's visits to Safe Cellars was there any reference to a conceptual minimum standard of due diligence.

166. We accept the principle, but to our minds the *nature* of the minimum requirement is made clear. The precise actions to be taken are not, but the nature is: in round terms it is such enquiry, assessment and action which affords a reasonable degree of comfort that a transaction will not facilitate excise fraud.

167. As a result, we do not find that the relevant requirements lacked legal certainty.

(2) Did HMRC's actions have the effect that in fact a less certain or precise test was applied?

168. Whilst we tend to the view that some of the advice given by Mrs Ramsden to Safe Cellars was a little timorous, perhaps concentrated too much on obtaining information rather than explaining how the lack of information could indicate a connection with excise fraud (something which would require an explanation of how the various frauds worked), and lacked, except on occasion, the forthright advice "well, in this situation I don't think it's reasonable to trade with them because the risk is ...", she made it perfectly clear that the source of the obligations and their nature and extent were set out in EN196. There was nothing we saw in which she said which diluted the precision of the requirements of that notice.

169. As a result, we do not find that HMRC's decision(s) were unreasonable on the basis that they had relayed an imprecisely formulated provision or had so explained it as to convey an imprecise regime.

2. Proportionality.

170. As Lord Reed explained in *Bank Mellat v HMT* [2013] UKSC 39, proportionality has become one of the general principles of EU law, expressed as a principle that the lawfulness of a prohibition of an economic activity is subject to the conditions: that the prohibitory measures are appropriate and necessary to achieve the objects legitimately pursued by the legislation; that where there is a choice between measures the least onerous should be used; and the disadvantages caused must not be disproportionate to the aim pursued. The concept is also applied in the ECHR and in *Bank Mellat* Lords Sumption and Reed were in agreement in summarising the

principles to be applied: it was necessary to determine in relation to a measure which limited fundamental rights:

> (1) Whether its objects were sufficiently important to justify the limitation of the right;
>
> (2) Whether the limitation was rationally connected to the objective;
>
> (3) Whether a less intrusive measure could have been used without unacceptably compromising the objective. This was an awkward test, because effectiveness and interference may not be absolute but inversely related variables and only an unimaginative judge would be unable to come up with something a little less restrictive in any situation. Some margin must be allowed; and
>
> (4) Whether a fair balance had been struck between the rights of the individual and the rights of the community.

171. In *HT & Co* Cobb J rejected [55] an argument that the WOWGR were ultra vires the Directive and perhaps in the light of that Mr Jones does not challenge the proportionality of the domestic legislation as a matter of EU law. But he argues principally that, by virtue of the third and fourth principles, the revocation of the licence was not proportionate and thus unlawful as a result of the application of the Convention. This raises the prior question as to whether the revocations affected rights protected by the Convention.

A1P1

172. Section 1 Human Rights Act 1998 incorporated into domestic law Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms 1950 ("A1P1"). Section 6 makes it unlawful for a public body to act in contravention of a Convention right, subject to exceptions not relevant in this appeal. A1P1 provides for what have been described as three interrelated protections:

> "*Protection of property*
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

173. Mr Jones argues that both Safe Cellars' excise approvals, and the goodwill of its business were possessions within the meaning of A1P1, so that any interference than with them was required to be proportionate.

174. Mr Kinnear says that the approvals are not possessions and that the only goodwill to which the appellant can point is the expectation of future income which the authorities show is not a possession. As a result, he says that the provisions of A1P1 are inapplicable.

175. In *Tre Traktörer Aktiebolag v Sweden* (1989) 13 EHRR 309 the ECHR considered whether the revocation of a licence to serve alcoholic beverages at a restaurant engaged the provisions of A1P1.

176. The court found that the economic interests connected with the running of the restaurant were possessions for the purposes of A1P1 and that the withdrawal of the licence in circumstances where it had an adverse effect on the goodwill value of the restaurant was an interference with possessions [53]. It then turned to consider which of the two particular instances of interference in the second and third sentences of A1P1 was applicable: (i) the deprivation of possessions)("limb (i)"), or (ii) the exercise of control over property ("limb (ii)").

177. The court found there had been no deprivation of property within (i) because the applicant retained the ownership of the restaurant (in this context noting that the lease and the contents had later been sold), but that the withdrawal of the licence constituted a measure of control over the use of the restaurant so fell within the ambit of limb (ii) of A1P1: the interference could be justified as being in the general interest or to secure the payment of taxes.

178. We see in this reasoning no clear conclusion that the licence was property for the purposes of the Convention; indeed if the licence had been property it would have been impossible for he court to conclude that there was no deprivation of property within limb (i). But the court makes a clear finding that the revocation of the approval of the restaurant interfered with the use of the property constituted by the restaurant business and so was a measure of control over the use of property falling within the third category A1P1. The court was cognisant that that property encompassed the lease of the premises and the property therein, but there is no finding in the judgement that it included goodwill.

179. In *HMRC v Vicky Construction Limited* 2002 EWHC 2659 (Ch), Ferris J considered the application of A1P1 to the refusal to renew a certificate under the Construction Industry Scheme ("CIS") which permitted the receipt of payments by the taxpayer without deduction of tax. He referred to *Tre Traktörer* and said:

> "[44] ... The European Court of Human Rights held that the economic interests connected with the running of the restaurant were possessions. In accordance with that decision I would accept that a subsisting [CIS certificate] is ... a possession."

180. But he went on to hold that the case concerned, not the revocation of a certificate, but the refusal to grant a fresh one. That meant that whether or not the certificate was a possession was irrelevant. (He later held that the interference with the right to receive gross payment was interference with a possession which brought into effect the Convention protections).

181. In *Rozenweig v Poland* 2006 43 EHRR 43 the Polish customs had revoked the licence to run a bonded warehouse. The ECHR, citing *Tre Traktörer,* held that the withdrawal of a valid permission to run a business was an interference with the peaceful possession possessions within A1P1, which constituted a measure of control over the use of property falling to be examined under limb (ii) of A1P1. There is nothing in this judgement to suggest that the licence was property.

182. In *Nicholds, Hancock, Thorpe v Security Industry Authority* 2006 EWHC 1792 Kenneth Parker QC considered the application of A1P1 to the denial of licences to work as door supervisors. He discussed the meaning of "possessions" and distinguished between the goodwill of the business, which was a possession, and the expectation of future income which was not [71]. He regarded the businesses having goodwill only if the future cash flows could be capitalised, by which it seems to us he meant they could be realised or sold [73].

183. He applied that approach in finding that a licence or permission was property if it had a monetary value and could be marketed for consideration, but found difficulty in applying that criterion to licences acquired for value which could not be assigned. He held that licences which were not realisable for value or acquired for value were not assets having monetary value in the sense of A1P1. He said that he considered that it was not clear that in *Tre Traktörer* the ECHR was saying that a licence "as such" was a possession.

184. *Trent Strategic Health Authority v Jain* 2007 EWCA 1186 related to the cancellation of the registration of a nursing home. Lord Scott considered, obiter, what the effect of the HRA would have been if it had applied at the relevant time. He said that the benefit of registration of a property enabling its use as a nursing home would qualify as a possession for the purposes of the convention.

185. Mr Jones relies on this as high authority that an approval is property. However, there was no issue before the House of Lords as to whether the property was the licence or the building and the business- either way there would have been a possession to which A1P1 could apply. We do not therefore regard this as conclusive in Mr Jones' favour.

186. *R (oao New London College) v Secretary of State for the Home Department* 2012 EWCA Civ 51 concerned the suspension of a licence to provide visa letters confirming the acceptance of students who wished to study in the UK. The issue arose of the applicability of A1P1 to that suspension. At first instance the judge had held that the non-transferable licence was not "property" but by analogy with *Tre Traktörer* A1P1 was engaged. In the Court of Appeal Richards LJ (with whom the

others agreed) said [94] that the judge had been plainly to correct plainly correct to find that the non-transferable sponsor licence itself was not a possession and that the analysis of Kenneth Parker in *Nicholds* strongly supported that conclusion; but he considered that the distinction had not been made by the judge between loss of goodwill and a loss of future income [95]:

> "the distinction is far from clear but one has to decide on which side of the line the case falls since the relevant possession is the goodwill in the business ..."

187. In other words if the only 'asset' which might be affected by a measure of control was something which might loosely be called goodwill, it was a possession which brought A1P1 to bear only if it was marketable goodwill. In *Tre Traktörer* there was no need to consider goodwill. This indicates that in this appeal that the question of whether or not there is marketable goodwill affected by the revocation of an approval is relevant to the application of A1P1 only where the relevant approval does not affect the use of Safe Cellars' premises.

188. We note that in the passage from *R (oao Ahmad)* quoted below Mitting J considered that the revocation of a licence was a measure of control over economic interests within the third sentence of A1P1.

189. *JP Whitter (Waterwell Engineers) Limited v HMRC* 2016 EWCA Civ 1160, related to the cancellation of a CIS certificate. Henderson LJ who gave the only judgement said:

> "[37] It is common ground that registration for gross payment under the CIS constitutes a possession for the purposes of A1P1. It is also common ground that the contractual rights of a subcontractor to receive from the contractor and be paid the full contract price, without any deduction in respect of tax ... is in principle another such possession: see *Vicky* at [47], per Ferris J."

190. Later at [79] he said:

> "Mr Chacko was right to say that A1P1 had to be considered ... if only for the simple reason that the cancellation of the certificate indubitably involves an interference with the two possessions identified by Ferris J in *Vicky*."

Those two possessions were the certificate and the right to gross payment.

191. As we have said we consider the reasoning in *Tre Traktörer* to be that A1P1 bit on the premises and possibly other assets such as goodwill but not the licence itself. Given Henderson LJ's recitation that it was common ground that the registration was a possession, and the reasoning in *New London College*, we do not consider that *Whitter* compels a finding that the approvals themselves were property or possessions for A1P1 purposes.

A1P1 Our Conclusions

192. Each of the approvals under appeal are conferred on a particular person. They are not assignable or acquired for value. We conclude that on their own they are not possessions or property protected by A1P1.

193. There was no suggestion that, and no evidence of, the revocation of the approvals affected assets other than Safe Cellars' goodwill and premises which might be possessions for the purpose of A1P1. Our enquiry is thus limited to the effect on the use of the premises and any goodwill.

194. The premises at which Safe Cellars conducted its business are clearly possessions and property. The warehouse licence controlled the use of that property. The revocation of that licence must therefore be considered under A1P1.

195. If the business of the appellant had realisable goodwill that would be property for the purposes of A1P1. However, as Mr Kinnear submitted, we had no evidence that the business of Safe Cellars had realisable goodwill, or that, if it did, it would be damaged by the loss of approval. As a result, we find that A1P1 is engaged only in relation to the revocation of the warehouse licence.

196. Section 100G(5) bestows a discretion on HMRC: for reasonable cause HMRC "may" revoke an approval. The exercise of that discretion is thus the matter which engages A1P1 and may require an assessment of whether the revocation decisions were proportionate.

4. Proportionality

197. Neither party relied on the common law doctrine of proportionality to which Henderson LJ referred in *Whitter*. There [71] he had accepted that there were contexts in which this doctrine required proportionality between ends and means. He held that in the context of a regime which struck a balance between ends and means, the common law requirement was satisfied if the matters which HMRC were required to take in to account were to be confined to matters relevant under the statutory regime but with a wider margin of discretion than the regime would otherwise permit. But the effect of cancellation of the certificate on the trader's business was an extraneous factor. It seems to us that similar reasoning applies in this case.

198. HMRC say that if the revocation were a deprivation of possessions within the first sentence of A1P1, then if those possessions were "property" it would be permitted under the third sentence as being to secure the payment of taxes, but any interference with possessions was in any event justified in the public interest being HMRC's legitimate and justified purpose of preventing the evasion of duties and in accordance with the law.

199. Mr Jones mounts a number of attacks. First, he says that the protection of the third sentence of A1P1 is not available: the regime does not fall within the exceptions granted by the phrase "to secure payment of taxes". The exemption for securing the payment of taxes was limited to control taken over property as security for the payment of taxes.

200. We understand "securing the payment of taxes" to include ensuring that taxes are paid, and to include taking steps to ensure that a person other than the person who would be directly makes payment. On that construction "securing" is not limited to taking security in a technical English law sense.

5 201. As Mr Kinnear and Miss Mannion say, that appears to have been the view of Mitting J when in *R (oao Ahmad) v HMRC* [2015] EWHC 3954, a case dealing with the revocation of a WOWG regulation approval, having recited A1P1 and held that the "revocation of a non-transferable state licence or approval which interferes with economic interests is a measure of control under the third sentence of Article 1 and 10 not deprivation under the second sentence": see *Tre Traktörer*. He then said

> "[13] When control to secure the payment of taxes is in issue, the Strasbourg Court grants as wide margin of appreciation to contracting states."

and noted that in *Gasus Dosier- und Fördertechnik GmbH v the Netherlands* (1995) 20 EHRR 403 the Dutch tax authorities had seized property belonging to one 15 company to cover the tax debts of another and the court dismissed an application by the company whose property had been seized. That to our mind indicates a wide meaning to "securing the payment of taxes".

202. That was also the view of Henderson LJ in *Whitter* where in relation to the CIS scheme he said

20 38. In summary, the reasons why the legislative scheme as a whole is agreed to be compatible with A1P1 are that:

(a) the second paragraph of A1P1 expressly preserves the right of a State to enforce such laws as it deems necessary "to secure the payment of taxes", and a State enjoys a wide margin of appreciation as to how it chooses to do so;

25 (b) the purpose of the … regime is to counter serious tax evasion, and thus to secure the payment of taxes; and

(c) there is a reasonable relationship of proportionality between the means employed in the legislation and the aims pursued.

203. The action of revoking a licence to secure the payment of taxes seems to us well 30 within the relevant margin of appreciation. In our judgement the control over the appellant's warehouses is permitted by this exception. However, both in case we are wrong in our conclusion that the relevant possession was the premises only and therefore that it may have included goodwill which was not subject to "control" within limb (ii) and so outwith the exemption in that limb for the securing the 35 payment of tax, and because it appears[1] that a specific deprivation must also be proportionate we turn to the other arguments.

[1] See eg National & Provincial Building Society and Others v The United Kingdom [1997] 25 EHRR 127. at [80] "According to the court's well established case law an interference including one resulting from a measure to secure the payment of taxes must strike a fair balance between the demands

204. *Second,* Mr Jones valiantly attempted to pour cold water on the legitimacy of the aim of the regime by suggesting that the figure of £1bn pa in lost duty was unsubstantiated. We have accepted that figure, accept that reducing it is a legitimate aim, and that the scheme of approvals, and with it the due diligence requirement, are rationally connected to it.

205. *Third,* Mr Jones mounts a more detailed attack in relation to the third aspect of proportionality, that the measure should be the least restrictive. HMRC he says could have taken different actions to stem the fraud. They have an array of powers and a wealth of resources which could be applied. For example, they could have instigated a more rigorous checking regime at ports, or they could have imposed a different sanction on the Appellants (for example, issuing directions to Safe Cellars or entities with which it dealt to control and secure duty on the movement of goods), or imposed further conditions on the Appellant's business.

206. So far as the first limb of this argument is concerned it is in effect an attack on the proportionality of the approvals system. But there was no material evidence before us that even suggested that some other actions could have achieved the same aim, let alone a less restrictive action. So far as the second limb, the attack on the specific revocation, is concerned our answer is much the same. There was no evidence that the exercise of any other power would achieve the aim of reducing the risk of excise fraud to the same degree as depriving Safe Cellars of its approval.

207. *Fourth,* and in relation to the fourth aspect of proportionality Mr Jones argues that Mrs Cunningham did not seek a balance between the objects of the excise regime and the protected rights of the appellant.

208. We had no direct evidence on the effect of the revocations on the Appellant's business but we accept that it is likely that they would substantially reduce its income. But even if it was significantly detrimental to that business it does not seem to us to be wholly unfair in the context of a regime which is intended to address such serious fraud. In this context we note that in *Whitter* Henderson LJ considered proportionality on the context of the exercise of the discretion in the CIS regime to revoke a certificate. He said:

> "[79]… It by no means follows, however, that the proportionality review at this stage always needs to go beyond the proportionality of the CIS regime as a whole. On the contrary, in all save the most exceptional cases it will in my judgment be a complete answer that the discretion as I have construed it forms an integral part of a Convention-compliant statutory regime. And in the circumstances of the present case, I see no more scope for a successful argument based on A1P1, as a ground of challenge to the cancellation of the Company's registration, than I do for a challenge based on the common law principle of proportionality. In particular, the adverse effect on the Company's

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of the general interest of the community and the requirements of the protection of the individual's fundamental rights".

business is in my view an entirely predictable consequence of the Company's non-compliance, for which it has only itself to blame.

Accordingly, although I would not rule out the possibility of exceptional circumstances justifying a wider proportionality review at the stage of exercise of the power of cancellation, I do not consider that the impact on the Company's business, as found by the FTT, comes near to satisfying such a test. Given the practical and cash-flow advantages of registration for gross payment, it is always probable that cancellation of the registration will seriously affect the taxpayer's business. Far from being exceptional, such consequences are likely to be the norm, and taxpayers must be taken to be well aware of the risks to their business which cancellation will bring. In individual cases, of which this may perhaps be one, the result may seem harsh; but a degree of harshness in a regime which is designed to counter tax evasion, and where continued compliance is within the power of the sub-contractor, cannot in my view be characterised as disproportionate. Both deterrence, and ease of compliance, are important factors which help to make the CIS scheme as a whole clearly compliant with A1P1. …

209. It seems to us that the same reasoning applies in this appeal. The revocation of the approval is harsh but in the context of a justified regime does not seem to us to be wholly unfair.

210. In this context Safe Cellars note that nowhere in the review letter is there any mention of balance; they say it is not enough to say it is implicit. Without consideration of that principle the decision is unreasonable. We disagree. What is required by proportionality is not that it has been considered, but that the measure taken strikes the necessary balance. If Mrs Cunningham's decision exhibits that balance, it does not fail the test even if she did not explicitly consider it.

211. Further, in this connection, Mr Jones says that that HMRC should have honoured their commitment under the Tomlin Order to tell Safe Cellars what they needed to do and monitor its performance. In particular, he says that HMRC were in default of that order: it is not proportionate to punish Safe Cellars for HMRC's default.

212. We were by no means convinced that HMRC were in default, but even if they were, the requirements of the regime were in our view made clear in EN196 and Safe Cellars plainly did not satisfy them. That failure justified the sanction.

213. *Lastly* and by contrast with *Whitter,* Mr Jones says compliance with the requirements of HMRC in this case is a matter of uncertainty so that the trader does not have the power to comply. In those circumstances the balance between the rights of the individual and those of the community has not been fairly struck.

214. For the reasons we have already set out, we do not consider that the conditions imposed by EN196 were uncertain. We do not therefore accept this argument.

215. In summary we consider that: the regime for excise approval addresses a legitimate aim, it is rationally connected to that aim, that there was no evidence that a less restrictive regime would achieve the same ends, and that the sanction of revocation on reasonable cause does not strike an unfair balance and lies within the margin afforded to the state. The application of that sanction to Safe Cellars was a stringent and not unfair application of that regime, which did not fall within the type of exceptional category envisaged by Henderson LJ in *Whitter*.

216. We therefore reject the argument that any interference with Safe Cellars' possessions or property breached the Convention.

(3) The Review letter: relevant factors, unreasonableness

217. Safe Cellars makes the following criticisms.

218. *First*, Mr Jones says that section 15 FA 1994 gives HMRC the power on review to confirm, withdraw or vary a decision. The power to vary the decision he says indicates that a fresh decision should be made. There is no power given to the review officer to 'send the decision back'. The action of the reviewing officer should not be limited to a judicial review style review of the original initial decision.

219. We agree that the power to vary indicates that the nature of the review need not be simply to confirm or withdraw (even though those are the only alternatives in circumstances such as this: we do not regard the imposition of a different constraint or condition as being a "variation" of the decision). However section 15F(2) provides that the nature and extent of the review shall be such as HMRC consider appropriate. That might indicate that HMRC are not compelled to treat the nature of the review as requiring a fresh decision, although, as Mr Kinnear accepted, the extent and nature of the review are issues which affect whether the review decision is, in the circumstances, reasonable.

220. In our opinion when the statute uses "review" it means looking again at the decision rather than examining the decision-making process. It requires a fresh decision to be taken rather than a decision as to whether or not the initial decision was reasonable: if the meaning of "review" was limited to the latter, the legislature would have used words similar to those used in section 16 in relation to this tribunal's powers on appeal. That construction limits but does not emasculate section 15F(2): there are other aspects of the nature and extent of a review which remain within that discretion..

221. But although Mrs Cunningham spoke of her role as being limited to considering the initial decision, and spoke of "sending it back" to be remade, it was clear to us from her evidence and from her letter that she had not merely considered whether the initial decision was within the range of reasonable decisions which could have been made, but that in fact she came to her own conclusion on the material before her: she came to her own conclusion that the due diligence requirements had not been adequate, that HMRC had been exposed to risk of loss and as a result she concluded

that the initial decision correctly found Safe Cellars was not fit and proper (or, as she phrased it, its directors and management were not fit and proper).

222. Indeed, Mrs Cunningham's reasons for her conclusion were, in relation to the warehousekeeper and duty representative revocations different from those of Mrs Ramsden and Miss Wood. Mrs Cunningham found that Safe Cellars was not fit and proper and therefore that those approvals should be revoked; Miss Wood decided that they should be revoked because in the light of the revocation of the warehouse approvals they were no longer needed.

223. Mr Jones makes a related point. He says that the reviewer must look critically at the underlying material and cannot rest upon another person's conclusions in relation to that material. The review requires a serious application of judgement. Yet he notes that Mrs Cunningham told us that when the material before her indicated that Mrs Ramsden had expressed "concerns" about due diligence, Mrs Cunningham accepted that there was a concern, "didn't think it [was] necessary to investigate" and knew nothing about the quality of Mrs Ramsden's concern.

224. We agree that a review process which accepted the original decision maker's evaluation of the facts as a basis for its conclusion would not be a reasonable review. If the basis for Mrs Cunningham's decision that due diligence was inadequate was merely that Mrs Ramsden had concerns about it, the nature of the review decision would be unreasonable (either because Mrs Ramsden's conclusions were irrelevant or because this approach unreasonably limited the extent or nature of the review).

225. However, it seems to us that the way in which Mrs Cunningham adopted Mrs Ramsden's reported concerns was not simply to accept them as evidence that due diligence was inadequate. Instead it appears to us that her letter refers to the occasions on which Mrs Ramsden's concerns were raised with Safe Cellars as support for an argument that Safe Cellars did not address failings in its due diligence process, rather than as conclusive that there were inadequacies. In relation to whether or not Safe Cellars' due diligence was adequate it appeared to us Mrs Cunningham accepted the information which appeared in meeting notes and letters and in many cases reached her own conclusion that the due diligence was inadequate.

226. Thus for example in her letter Mrs Cunningham says that the officers raised concerns about the commercial viability of exports of spirits by EM Trade to Italy where there was limited demand. Mrs Cunningham told us that she understood that this was vodka and that she knew that Diageo had a plant in Italy where vodka was made. She regarded the export of vodka to Italy as being unusual and something which should be challenged. That indicated to us that the conclusion that Safe Cellars' due diligence was inadequate in relation to this consignment was Mrs Cunningham's decision based on the evidence before her and not a reliance upon Mrs Ramsden's concerns. It is true that in reaching that conclusion Mrs Cunningham did not make any further enquiry and relied solely upon the report of the visit to Safe Cellars at which the issue was raised, but her conclusions were her own.

227. Likewise, she says that Safe Cellars' records showed only an accountant's address for some customers and "there is insufficient due diligence to enable the commercial bona fides of these customers to be established".

228. On the other hand, she recites without evaluation that the material provided after the 8 July 2015 meeting was found by HMRC to be inadequate – thus adopting the conclusions of other officers. This is a limitation on the nature and extent of the review which, in the absence of contrary representations, does not seem to us to be unreasonable, or to be a failure to "review" Miss Wood's decision.

229. We conclude that although in her letter the majority of Mrs Cunningham's references to due diligence are recitals of the conclusions of the officers that due diligence was inadequate, either she concurred with those conclusions on the basis of the information available to her, or her reliance on those conclusions did not unreasonably limit the scope of her review.

230. *Second*, Mr Jones says that Mrs Cunningham's decision was unreasonable because, although there was no material before Mrs Cunningham relating to this matter, it did not have regard to the integrity of Safe Cellars' officers: that was surely a relevant consideration in determining whether the company was fit and proper.

231. . This is an example of Mrs Cunningham's approach being, as she put it, reactive rather than investigatory. It is an application of section 15F(2) to limit the extent of the review to the information held by HMRC. In view of the requirement in section 15F(4) to take into account representations made by the trader (and none being made) we do not consider it unreasonable in the circumstances to adopt that approach.

232. *Third*, Mr Jones made two criticisms of Mrs Cunningham's decision under the heading of proportionality: (i) that there was no consideration in the letter of this factor, and (ii) there was no consideration of whether a different, lesser, sanction could be applied.

233. It seems to us that the test is not whether the decision made express references to proportionality. What matters is whether the decision breached that principle. That we have discussed under the heading of Proportionality.

234. *Fourth*, Mr Jones notes that Mrs Cunningham relies upon Safe Cellars' failure to comply with the requirement for the Movement Guarantee as one of the grounds for her conclusion. In her Review Findings Mrs Cunningham said that despite the guarantee requirement:

> "you allowed 4 loads to leave…on 8 June 2015, HMRC contest knowingly, in breach of this requirement."

Earlier in the letter she had described Safe Cellars' application to the High Court and the Tomlin Order.

235. He argues that the imposition of the guarantee was unlawful and that it was therefore unreasonable to treat it as a ground for revocation.

236. It seems to us that the review decision, whilst recognising the dispute over the lawfulness of the requirement, plainly treats the breach as one of the grounds justifying revocation. We agree with Mr Jones that, if the requirement was unlawful, it would be unreasonable to treat its breach as grounds for revocation and that, given the prominence of this factor, the review decision would unreasonable. However, we have concluded that the requirement was lawful.

237. I the imposition was lawful, it seems to us that the attitude Safe Cellars took to it is relevant to whether or not it was a fit and proper person, and therefore something which could be taken into account depending upon the scope of the review.

238. . If Safe Cellars contravened the requirement knowing it was lawful, then, given that there was no evidence of justifying circumstances, that would indicate that the Appellant was not the kind of person who was likely to assist in the collection and protection of excise revenue; if, however, it contravened the requirement having had respectable advice that the requirement was unlawful, that conclusion does not follow. We have found it likely that Safe Cellars did have such advice at the time of the 8 June movements. As a result, we would not regard its breach of the requirement on its own as a factor indicating that Safe Cellars was not fit and proper

239. However, the contravention of the ostensible requirement on 8 June 2015 was sneaky. The response of a person who was apt to assist in the protection of the revenue would have been to give HMRC notice of its view of the law and its intentions before the movement took place. We would thus regard that behaviour as indicating that Safe Cellars was not fit and proper.

240. Our conclusion that Safe Cellars had been reputably advised that the movement guarantee requirement was unlawful derived from HMRC's minutes of 9 June 2015. Those minutes indicate that at about 10.00am Mr Taylor had Mr Jones' advice to hand and that it was read by the officers. They also indicate that Rainer Hughes had told them that an injunction was to be sought. These minutes were available to Mrs Cunningham as part of her review. Thus there was evidence before Mrs Cunningham from which she should have concluded that Safe Cellars reasonably considered that the export of the four loads was not in contravention of the guarantee requirement, but that it had been sneaky is despatching them without telling HMRC.

241. These were relevant factors which fell within the scope of the review and which do not appear to have been taken into account. Instead Mrs Cunningham took into account her Review Finding that HMRC contested that the despatches had been "knowingly, in breach of [the] requirement". That in our view was a wrong and irrelevant consideration.

242. Nevertheless, we consider that had Mrs Cunningham taken into account the facts as we find them from the material before her she would inevitably have come to the same conclusion. Our finding points in the same direction as Mrs Cunningham's – both point to Safe Cellars not being likely to assist and not hinder the protection of excise revenue, although ours less strongly. But the overwhelming weight of the evidence in relation to due diligence and the connection with fraudulent activity is

such that even with the change in emphasis in relation to this matter the same decision would inevitably have been made.

243. *Fifth*, Mr Jones argues that Mrs Cunningham failed to take account of the circumstances following the Tomlin order.

5 244. We have recited paragraph 4 of the July Tomlin Order in which HMRC agreed not to revoke approvals until Safe Cellars had been given a reasonable period (of at least 28 days) to satisfy any "demands made by HMRC" at the meeting which was to be held on 8 July 2015.

245. Mr Jones says that HMRC did not comply with the requirements of that 10 paragraph, and in ignoring that failure, Mrs Cunningham's decision was unreasonable. Mr Kinnear's response is that if no "demands" were made by HMRC then paragraph 4 imposed no restraint on HMRC after 8 July; and that, if demands were in fact made, then Safe Cellars did not satisfy those demands within a reasonable time; so that in either case HMRC were, by late August 2015, not prohibited from revoking the 15 approvals. Thus he says Mrs Cunningham was not unreasonable in not referring to any failure by HMRC to comply.

246. We accept that the purpose of the compromise which resulted in the Tomlin Order was to enable Safe Cellars to improve its due diligence, and for it to have a reasonable period in which to do so. In that context we interpret "demands" to mean 20 suggestions as well as instructions made by HMRC for improving its due diligence. In this context a lack of "demands" would imply that Safe Cellars' due diligence was acceptable to HMRC, so that if no demands were made it would have been unreasonable to revoke Safe Cellars approvals on the basis of inadequate due diligence. We thus reject Mr Kinnear's argument to that extent.

25 247. Following the 8 July 2015 meeting Mr Ginn wrote to Safe Cellars on 17 July setting out three general observations: (1) there were no documented assessments of the risks Safe Cellars were undertakings; (2) there was no evidence of application forms and other sources of information being tested or queried, and (3) there was no evidence of translations of documents in foreign languages. These general 30 observations are reflected in the comments he made at the meeting.

248. In our judgement these three observations should, in the context of an arrangement in which Safe Cellars were looking to HMRC for help in improving their due diligence, be treated as "demands made at [the] meeting" for the purposes of paragraph 4 of the Order. Mr Ginn's letter, taken together with the comments he made 35 at the meeting, attended by the company owner and MD and its solicitor, properly satisfied HMRC's obligations under that paragraph.

249. The letter also contained a request for an overview from Rainer Hughes of what was currently being done and of what "enhanced due diligence that Rainer Hughes would be providing now that they are undertaking the due diligence on Safe Cellars' 40 behalf". He asked for this by 24 July 2015 but as far as we could see Safe Cellars did not provide a substantive reply by that date.

250. We conclude that Mrs Cunningham was not required to assume for the purposes of her decision that HMRC had been in breach of the order. Therefore, we find that she had not failed to take into account a relevant consideration in this respect.

251. *Sixth*, the 6 October order of Mitting J.

252. We have quoted the relevant part of this order at para 86 above. By paragraph 1c HMRC were required to state by 10 November: whether Safe Cellars' proposals proposed due diligence was satisfactory, whether the actual due diligence it had undertaken was satisfactory, and if not to give reasons why.

253. HMRC's response is in Mrs Ramsden's letter of 10 November 2015. In that letter, as we understood it, she said that Safe Cellars' proposed due diligence was satisfactory but that in view of its past history she did not believe that they would do what was proposed, and that their past due diligence was unsatisfactory because there had not been any proper assessment of the information collected.

254. Mrs Cunningham said that she was aware of Safe Cellars' application to the High Court but had ignored it. She said that the findings of the High Court had not been made. That was on 3 December, two months after Mitting J's interim injunction, and a month after Mrs Ramsden's letter. Mr Jones argues that to fail to have regard to that litigation was a failure to take into account a relevant factor.

255. It seems to us that in this respect Mrs Cunningham took an unreasonable approach to the nature and extent of her review. That litigation was something potentially serious of which she was aware and which might affect the core matters with which she was concerned. Whilst in general confining herself to the information which was before her she was in our view reasonable in her extent of her review, deliberately not taking into account potentially serious issues of which she had notice was not. What if one party had been alleging, or Mitting J had found, bad faith or worse on the part of either Safe Cellars or HMRC? In our view the only reasonable response would have been to seek and consider details of the action – a course of action which might well be described as due diligence.

256. Nevertheless, had Mrs Cunningham considered the High Court application and order and HMRC's response to it we have no doubt that it would have made no difference to her decision which would inevitably have been the same.

257. *Seventh*, Mr Jones says that no account was taken of Safe Cellars' compliance with Mrs Ramsden's recommendations

258. We have found that Safe Cellars did take up, to a limited degree, some of Mrs Ramsden's recommendations. That was evident from the notes of meetings. Mrs Cunningham's letter did not mention this and she was not asked about it. We were unable to conclude that she had ignored it.

Conclusion

259. We have rejected Mr Jones' challenges to Mrs Cunningham's decision.

260. Mrs Cunningham was concerned in the application of a regime whose purpose was to protect excise revenue. The purpose of the due diligence requirements in EN196 was to reduce the degree to which approved operators might unwittingly facilitate fraud.

261. It seems to us that the operation of the system of approvals may both look back at what was done and towards the future. A person's failure to comply with requirements may be a reason for revoking an approval, whatever the likelihood of compliance in the future The revocation of approval is a sanction to encourage continuing compliance.

262. It seemed to us that the due diligence that had been undertaken by Safe Cellars was such that no reasonable person would consider that it provided any reasonable degree of comfort that transactions in which Safe Cellars participated would not be linked to excise fraud. It did not comply with EN196. Mrs Cunningham was right in our view to regard it as inadequate. Such a failure to comply would in the absence of mitigating circumstances be sufficient grounds for revocation of approval.

263. There were no mitigating circumstances as regards the past. The reverse was the case. There was evidence that strongly suggested that Safe Cellars' transactions had been linked to excise fraud.

264. As regard the future, there was no comfort that Safe Cellars would in future operate a system which provided such comfort. Despite Mrs Ramsden's apparent acceptance of the proposals for the future the examples of what was proposed did not provide any reasonable degree of comfort.

265. Thus whether looking forward or back, we come to the same conclusion: the continuance of Safe Cellar's approval would not assist and could hinder protection of excise revenue. We not only find the review decision reasonable, but agree with it. The complete failure to exercise almost any rigorous due diligence about the traders of particular concern was a Nelsonian blind eye of elephantine proportions.

266. We reach the same conclusion in relation to each decision.

Decision

267. We dismiss the appeals.

Rights of Appeal

268. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

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RELEASE DATE: 10 JANUARY 2017