



TC05875

Appeal number: **TC/2016/00217**
TC/2017/00939
TC/2017/02532
TC/2017/01700
TC/2015/04298

PROCEDURE – appeal against refusal of application for approval under the Alcohol Wholesaler Registration Scheme - applications to amend directions for disclosure - application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BETWEEN

**OWD LIMITED T/A BIRMINGHAM CASH & CARRY
SMART PRICE MIDLANDS LIMITED
HARE WINES LIMITED
NEMESIS TRANSPORT LIMITED
DRINKS STOP CASH & CARRY LIMITED
(IN LIQUIDATION)**

Appellants

- and -

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

Respondents

Tribunal: Judge Greg Sinfield

**Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 8 May
2017**

Mr David Bedenham, counsel, instructed by Rainer Hughes, for the Appellants

**Mr Will Hays, counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs for the Respondents**

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DECISION

Introduction

5 1. With effect from 1 April 2016, persons selling alcohol wholesale to other business for onward sale or supply were required to be approved and registered under the Alcohol Wholesaler Registration Scheme ('AWRS').

2. The first three Appellants are all established businesses that sell alcohol wholesale. The fourth Appellant, Nemesis Transport Limited, does not currently sell
10 alcohol wholesale but wishes to do so. The fifth Appellant was an established alcohol wholesaling business but has recently gone into voluntary liquidation. I was informed by Mr Bedenham, who appeared for the Appellants, that the liquidator wished to continue with the proceedings for the moment.

3. Each Appellant had applied, separately, to the Respondents ('HMRC') to be
15 approved and registered under the AWRS. In separate decisions, HMRC refused those applications. The Appellants appealed to the First-tier Tribunal (Tax Chamber) ('FTT').

4. The FTT issued directions in relation to each of the Appellants' appeals which were materially identical. The directions provided for an expedited timetable for
20 HMRC to produce their statement of case, the exchange of lists of documents and the provision of listing information. Direction 2 included the following:

"2. Documents and information: Not later than [a date 28 days after the service of HMRC's statement of case]:

25 2.1. the Appellants shall send or deliver to the Tribunal and the Respondents a list of documents in their possession or control on which the Appellants intend to rely in connection with the appeal;

30 2.2. the Respondents shall send or deliver to the Tribunal and the Appellants a list of all documents which were considered by the Respondents' officer when reaching the decision at issue in this appeal together with any other documents on which the Respondents intend to rely in connection with this appeal;

2.3. each party shall provide to the other party copies of any documents on that list which have not already been provided to the other party;

35 ..."

5. In all cases save one, HMRC applied to the FTT immediately to vary the directions, principally direction 2 concerning disclosure, and issue revised directions.

In relation to the third Appellant's appeal, HMRC initially agreed to the directions but, when it became apparent to the relevant HMRC officer that HMRC were challenging identical directions in other appeals, HMRC withdrew their agreement to the previously agreed direction relating to disclosure and applied to amend the directions in line with HMRC's position in the other appeals. Apart from in relation to disclosure, HMRC's applications do not seek to change the other directions in any material way and HMRC state that, if their applications are granted, they will attempt to agree any remaining directions with the Appellants. The Appellants oppose HMRC's applications.

10 **Legislative framework**

6. Part VIA of the Alcoholic Liquor Duties Act 1979 ('ALDA') provides for the regulation of the wholesale of alcoholic liquor on which duty is charged under that Act. The selling of alcohol wholesale is a controlled activity under that Part. Section 88C ALDA provides:

15 "88C Approval to carry on controlled activity

(1) A UK person may not carry on a controlled activity otherwise than in accordance with an approval given by the Commissioners under this section.

20 (2) The Commissioners may approve a person under this section to carry on a controlled activity only if they are satisfied that the person is a fit and proper person to carry on the activity."

7. A person who knowingly contravenes section 88C(1) by selling alcohol wholesale is guilty of an offence under section 88G(1) and is liable on conviction to imprisonment, a fine or both. Alternatively, HMRC may impose a civil penalty on such a person.

8. A decision to refuse an application for approval under Part VIA ALDA is a decision as to an ancillary matter for the purposes of section 16 Finance Act 1994. Section 16(4) provides that the FTT has a supervisory jurisdiction in relation to decisions as to ancillary matters as follows:

30 "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -

35 (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

40 (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be

taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.”

9. Section 16(6) Finance Act 1994 provides that the burden of proof in an appeal under the section is on the appellant.

5 10. In so far as is material, rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (‘the FTT Rules’) states:

“2 Overriding objective and parties’ obligation to co-operate with the Tribunal

10 (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes -

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

15 (b) ...

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) ...; and

20 (e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) ...

25 (4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.”

11. Rule 5 of the FTT rules relevantly provides that

“5 Case management powers

30 (1) ... the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time ...

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—

35 ...

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;”

12. Rule 6 of the FTT Rules provides that the FTT may give a direction on the application of one or more of the parties or on its own initiative.

13. Rule 27 of the FTT Rules provides:

“27 Further steps in a Standard or Complex case

(1) This rule applies to Standard and Complex cases.

5 (2) Subject to any direction to the contrary, within 42 days after the date the respondent sent the statement of case (or, where there is more than one respondent, the date of the final statement of case) each party must send or deliver to the Tribunal and to each other party a list of documents

10 (a) of which the party providing the list has possession, the right to possession, or the right to take copies; and

(b) which the party providing the list intends to rely upon or produce in the proceedings.

15 (3) A party which has provided a list of documents under paragraph (2) must allow each other party to inspect or take copies of the documents on the list (except any documents which are privileged).”

14. The reference in rule 27 to Standard cases is a reference to one of the four categories described in rule 23. On receipt of a notice of appeal, the FTT allocates the appeal to one of the categories. The Appellants’ appeals were all allocated to the Standard case category. Rule 23(2)(c) states that Standard cases will usually be subject to more detailed case management and be disposed of after a hearing.

Grounds for the applications to vary the directions

15. In their applications, HMRC made the general objection that, as the appeals have been categorised by the FTT under rule 23 as ‘standard’, it should follow that the directions should be ‘standard’. It was accordingly not appropriate in these cases to extend the scope of disclosure beyond that prescribed by rule 27 of the FTT Rules which only requires HMRC to supply a list of documents which HMRC intend to rely on or produce in the proceedings.

16. HMRC’s specific objections to the direction that HMRC list all documents “which were considered by the Respondents’ officer when reaching the decision at issue in this appeal...” were, in summary, that the direction:

(1) requires HMRC to disclose documents which were not taken into account by HMRC in reaching the decision because

(a) the decision maker concluded that they were irrelevant to the decision; or

35 (b) the documents are adverse to the Appellant’s case but HMRC do not propose to rely on them in connection with the appeal;

(2) does not take into account whether or not documents are in HMRC’s possession or control; and

40 (3) does not treat the parties equally in that the Appellant is simply directed to provide a list documents in its possession or control which the Appellant intends to rely on or produce in the appeal.

17. Mr Hays, who appeared for HMRC, expanded on these objections in his submissions which I discuss below.

Discussion

18. Whether HMRC are satisfied that a person is fit and proper to carry on the activity of a wholesaler of alcoholic goods is a matter for the administrative discretion of HMRC. The FTT's powers to interfere with a decision by HMRC that a person is not fit and proper are limited and can only be exercised where the decision is one which could not reasonably have been arrived at (see *CC & C Ltd v HMRC* [2014] EWCA Civ 1653 at [15] – [17]). The House of Lords in *Customs & Excise Commissioners v JH Corbitt (Numismatists) Ltd* [1980] STC 231 set out the approach for the FTT (then the VAT Tribunal) to follow where it has a supervisory jurisdiction at page 239 where Lord Lane stated that the tribunal could only review the decision if it were shown that the commissioners had acted in a way which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight.

19. The issue ultimately to be determined in each appeal is whether the Appellant, who bears the burden of proof, has established that HMRC's decision to refuse to approve and register the Appellant under the AWRS was a decision that no reasonable officer of HMRC could have reached. In order to do so, the Appellant must show, on the balance of probabilities, that the HMRC officer who made the decision failed to consider matters which should have been taken into account or took into account some irrelevant matters or otherwise reached a decision that was so plainly wrong that no officer of HMRC, acting reasonably, could have reached it.

20. HMRC's overarching point is that the direction requiring HMRC to list all documents which were considered by the officer who made the decision under appeal goes beyond what is normally envisaged by the FTT Rules and is inappropriate in a 'standard' case. Mr Hays submitted that the FTT Rules were made by the Lord Chancellor following a period of consultation and came into force having been laid before Parliament where they were subject to annulment in pursuance of a resolution of either House. He contended that rule 27 contains the rules as to disclosure which apply to standard and complex cases and those rules apply regardless of the nature of the FTT's jurisdiction (ie whether it is supervisory, as here, or appellate) in any given appeal. Mr Hays acknowledged that the opening words of rule 27(2) state that it is "Subject to any direction to the contrary" but he submitted that there must be sufficient reason to depart from the default position contained in Rule 27 before a contrary direction can be made. Mr Hays submitted that it did not appear that there were sufficient reasons in these appeals to justify departing from the default position.

21. I consider that HMRC's position is based on a misreading or misunderstanding of the FTT Rules. Rule 27(2) does not (and does not purport to) set out a standard rule for disclosure that must be applied to all appeals that are categorised as Standard cases under rule 23. There is no 'default' or 'standard' rule of disclosure for appeals categorised as Standard cases that can only be departed from in exceptional cases. To my mind, that is clear from the following:

(1) rule 23 states that Standard cases will usually be subject to more detailed case management (ie specific directions under rule 5);

(2) rule 27 applies to appeals categorised as both Complex Cases and Standard cases (which may, and often will, require different case management); and

(3) rule 27(2) states that it is “Subject to any direction to the contrary”.

5 22. While the disclosure provided for by rule 27(2) may be appropriate in many
appeals, there is no presumption that it must apply in all Standard and Complex cases.
Whether the rule is varied in any particular appeal, as the opening words of rule 27(2)
make clear it can be, is a matter for the discretion of the FTT in that case. Any such
10 direction is made under rule 5 of FTT Rules which provides that the FTT may, among
other things, make directions in relation to the conduct of proceedings and the
provision of information and documents. The use of the word “may” in Rule 5 means
that it is also a matter of judicial discretion whether to make such directions. The
power of the FTT to make directions under rule 5 of the FTT Rules is a case
15 management power which must be exercised in accordance with the overriding
objective in rule 2 of the FTT Rules which is to enable the tribunal to deal with cases
fairly and justly.

23. In my view, the requirement in rule 27(2) to provide a list that only includes the
documents on which HMRC intends to rely and produce in the proceedings is not
adequate to ensure that the overriding objective is met in these appeals. In deciding
20 whether to approve and register a person for the AWRS, HMRC look not only at the
information provided by the applicant but also information gathered by HMRC. Mr
Hays submitted that, if an applicant believes that the decision was wrong and appeals,
the applicant should plead, with appropriate particularity, that irrelevant material has
been considered and, in an appropriate case, it might be appropriate for the FTT to
25 order disclosure of documents going to that issue. Mr Hays contended that it would
be unacceptable to require disclosure of all documents on the basis of an
unparticularised claim that the decision maker failed to take into account a relevant
consideration.

24. I cannot accept these submissions. In most appeals before the FTT, the
30 appellant taxpayer might be expected to hold or, at least, be aware of the existence of
all relevant materials. In these appeals, however, HMRC are likely to have material
that they have gathered from various sources which is not available to the applicant
for approval under the AWRS and of which the appellant has no knowledge. An
unsuccessful applicant can only form a view as to whether to challenge the decision
35 on grounds of unreasonableness if the applicant knows what matters were considered
by the decision maker. If the unsuccessful applicant only knows about materials that
were considered and are relied on by HMRC in support of the decision then the
applicant cannot plead, with any particularity, that any other documents, information
and other matters considered but not relied on should have been taken into account.
40 The role of the FTT is to decide whether the decision under appeal was reasonable. If
it is to determine that issue fairly and justly, the FTT must know not only the decision
arrived at and the reasons relied on to justify it but what matters were taken into
account and what matters were not taken into account by the decision maker. I
consider that, without the full picture, there is a real risk that the FTT will not be able
45 to make a fair and just determination of the reasonableness of the decision. In my
judgement, it is appropriate to require HMRC to provide a list of all documents that

the officer considered in making the decision under appeal and not just a list of documents that HMRC intends to rely on in the proceedings.

25. Mr Hays submitted that the direction requires HMRC to list and, if required, produce documents that are properly to be regarded as irrelevant, such as documents that the decision-maker had considered but concluded were irrelevant. He also contended that the direction required HMRC to list documents that are relevant to the appeal but, even though they are adverse to the Appellant's case, were not taken into account by the decision-maker and are not relied on by HMRC. Mr Hays submitted that there was no good reason why HMRC should disclose irrelevant documents and, indeed, identifying, compiling and serving them would expend resources for no useful purpose. Moreover, some documents that are relevant but not relied on may be material that should not be disclosed because, for example, it is confidential intelligence.

26. I find the submission that HMRC should not be required to include in the list of documents any documents that the decision-maker had considered but concluded were irrelevant astonishing. If accepted, it would allow the HMRC officer whose decision is being challenged to determine what materials the FTT should consider when reviewing that decision. That is not the role of the decision-maker and it would risk preventing the FTT from carrying out its role properly. Mr Hays' submission was necessarily limited to cases in which the decision-maker "ultimately (and correctly) concludes that it is irrelevant" but, if the document is not disclosed, how could the correctness of the officer's opinion ever be tested?

27. I do not accept that requiring HMRC to list and, if required to do so, produce all documents that the decision-maker had considered would impose an unreasonable burden on HMRC's resources. In the case of appeals in relation to refusals of authorisation under the AWRS, the file should already contain all the materials that the decision-maker considered or a record of them and so compiling a list of such materials should be a simple task. If a document that was considered as part of the decision-making process is no longer in HMRC's possession or control, it should be included in the list of documents and, if it is required to be produced, its availability can be dealt with as a separate issue.

28. In relation to the disclosure of material adverse to the Appellants, Mr Hays referred me to *SOCA v Namli* [2011] EWCA Civ 1411 ('*Namli*'). That case concerned a claim for civil recovery and the standard disclosure under the CPR applied. The Court of Appeal held that it was appropriate to vary standard disclosure under the CPR so that SOCA, the claimant, was not required to disclose to the defendant documents which adversely affected the defendant's case where SOCA did not propose to rely on them. I do not regard *Namli* as relevant to the present appeals. First, the case concerned whether to exercise a discretion to limit standard disclosure under the CPR whereas we are concerned with the discretionary powers under the FTT Rules to provide for disclosure that is, on HMRC's case, wider than the standard disclosure under those Rules. Secondly, the application in *Namli* was made because SOCA did not wish to disclose materials in order to protect its confidential sources of information and HMRC have not suggested that any of the documents in issue in these appeals are or contain confidential information. Finally, it is not clear that the documents that HMRC do not wish to list and, if required, produce in these appeals are adverse to the Appellants' appeals as HMRC have made no assertions and

produced no evidence to that effect. I accept that, in some cases, there may be some material that is considered but ultimately not relied on because to do so would reveal confidential information. Mr Bedenham submitted that the Applicants are entitled to see such material as it may be relevant to the decision maker's decision. I do not
5 entirely agree with that submission. If material contains intelligence or other genuinely confidential material that could have an impact on HMRC's operations then, in my opinion, HMRC should not be required to produce it or, at least, not in unredacted form. As it was part of the material that was considered by the decision maker and, given its nature, it is very likely to have influenced the decision, I consider
10 that it should be included in the list of documents described in general terms, if necessary, but marked as confidential. HMRC could apply, on a case-by-case basis, to exclude such material from further disclosure or production.

29. I can deal briefly with the objection that the directions requiring disclosure do not treat the parties equally in that they impose different obligations on the parties.
15 HMRC submit that it is neither fair nor just, and as such not in accordance with the overriding objective of the FTT Rules, to impose differing obligations on the Appellants and HMRC. This submission is really an argument in support of the overarching submission that the FTT should not require disclosure that goes beyond what is required by rule 27(2) of the FTT Rules which provides for disclosure in the
20 same terms for both parties. I accept the directions impose different requirements on the Appellants and the Respondents but I do not accept that means that the directions are unfair or not just. I do not see any principled reason why there should not be different requirements as to disclosure given that the parties are in very different and unequal positions, for example the Appellants have the burden of proof.

30. In conclusion, I consider that it is appropriate to require HMRC to list all documents (which HMRC accept includes electronic information) which were considered by the officer when reaching the decision at issue in the appeal together with any other documents on which the Respondents intend to rely in connection with this appeal. Having considered submissions by Mr Bedenham, I am now of the view
30 that the list should state which of the documents shown, if any, HMRC do not intend to rely on for the purposes of the appeal. Accordingly, I consider that direction 2.2 should be amended to read as follows:

35 "the Respondents shall send or deliver to the Tribunal and the Appellants a list of all documents which were considered by the Respondents' officer when reaching the decision at issue in this appeal and indicating which, if any, of those documents the Respondents do not rely on in this appeal, together with any other documents which the Respondents intend to rely on in this appeal."

31. I should point out that, notwithstanding the nature and subject of the applications, HMRC accepted that, independent of any direction, they are under a
40 duty to ensure that any documents which materially undermine their case or which materially assist the Appellants' cases are disclosed to the Appellants.

Decision

32. For the reasons set out above, HMRC's applications to amend the directions in
45 these appeals are refused.

33. Notwithstanding the fact that I have refused HMRC's applications, it is clear that the directions, which were stayed pending this decision, must be amended in order to take account of the fact that the timetable has slipped. Accordingly, I direct that the parties are to submit agreed draft directions in relation to the appeals (or, if
5 agreement proves not to be possible, separate draft proposed directions) for approval by the FTT within seven days of the date of release of this decision.

Right to apply for permission to appeal

34. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's decision has a right to apply for permission to
10 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.

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**GREG SINFIELD
TRIBUNAL JUDGE**

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RELEASE DATE: 15 May 2017