



[2020] UKFTT
00151 (TC)

TC07644

Appeal number: TC/2017/03224
TC/2017/04551

*ALCOHOL WHOLESALE – application under the Alcohol Wholesaler
Registration Scheme – whether refusal by HMRC was unreasonable – no –
appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**(1) MORGAN JAMES LTD
(2) EXETER DRINKS LTD**

Appellants

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
MR J ROBINSON**

Sitting in public at London on 7 and 8 November 2018

Mr Stephen Chinnery, Solicitor-Advocate, for the Appellant

**Ms Joanna Vicary, Counsel instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal against two decisions of HMRC:
 - (1) a decision dated 30 March 2017 to refuse the application of the first appellant, Morgan James Limited (MJL), to be approved to carry on a controlled activity, being the wholesale of alcohol, under the Alcohol Wholesaler Registration Scheme; and
 - (2) a decision dated 28 March 2017 to refuse the application of the second appellant, Exeter Drinks Limited (EDL), to be approved to carry on a controlled activity, being the wholesale of alcohol, under the Alcohol Wholesaler Registration Scheme
2. As the appellants have the same sole director, the appeals were directed to be heard together.
3. At the beginning of the hearing the appellants requested leave to admit a further witness statement and further documentary evidence regarding the question of whether Mr Packer, the director of both EDL and MJL, was a key person in connection with another company, Exeter Wine Company Limited (Exeter Wine). HMRC disputed the application on the grounds that it was made very late, with no explanation for the delay. Further, the majority of the witness statement as hearsay evidence.
4. We decided to allow the late submission of the documentary evidence but concluded that the witness statement should only be admitted as to the first three paragraphs on the basis that the remainder of the witness statement was either hearsay evidence or referred to information in the documents which had been admitted as evidence.

Background

5. The Alcohol Wholesaler Registration Scheme (AWRS) was introduced on 1 April 2016, under s88C(1) of the Alcohol Liquor Duties Act (ALDA) 1979. The effect of the scheme is that the selling of alcohol wholesale is a controlled activity persons are prohibited from carrying out that controlled activity unless they are approved by the respondents (HMRC) and registered under the AWRS.

6. For EDL and MJL it was submitted that the introduction of this regime means that traders who have built up a successful wholesale duty-paid alcohol business are exposed to their business suddenly being converted to an illegal activity.

7. EDL was incorporated on 6 August 2015 and registered for VAT in the same month. It is owned by Julian Packer. MJL was incorporated by Mr Packer in February 2017. He is the sole shareholder, director and company secretary of both companies.

Reasons given for refusals

8. The AWRS applications of EDL and MJL were refused for the same reasons, as the companies are connected by their shared director, Mr Packer. These reasons were:

(1) that there was evidence of links to illicit supply chains, indicating a serious threat to the revenue. Purchases made from three companies were deemed to be connected to a fraudulent evasion of VAT commencing with a defaulting UK trader.

(2) Mr Packer had known links to other non-compliant businesses. He had been the director of Bin Ends Booze Ltd, which had been dissolved on petition of HMRC. He was a key person in Exeter Wine, which was also liquidated owing money to HMRC.

(3) Mr Packer has a history of poor payment of Crown debts. HMRC has previously successfully petitioned for his bankruptcy.

(4) An additional reason was also given for the refusal of the application of EDL, which was that due diligence checks had not met the required standards.

Relevant law

9. s16(4) Finance Act 994 sets out the jurisdiction of this tribunal in these appeals:

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

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

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

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

10. s16(6) Finance Act 1994 sets out the burden of proof as relevant in this appeal:

“On an appeal under this section the burden of proof ... [shall] be for the appellant to show that the grounds on which any such appeal is brought have been established.”

Tribunal jurisdiction

11. It was not disputed that the Tribunal’s jurisdiction in respect of AWRS appeals is set by s16(4) FA 1994 and is supervisory. The tribunal powers are therefore constrained to requiring HMRC to conduct a further review, by sub-sections (a)-(c) of s16(4).

12. Case law has established that, where the Tribunal’s jurisdiction is supervisory, the Tribunal can only require a review of the decision where HMRC have acted in a way in which no reasonable panel could have acted. That is, if they have taken into account some irrelevant matter or have disregarded material to which they should have given weight (*JH Corbitt (Numismatists) Ltd* [1980] STC 231). However, where the disregarded material would not have altered the decision, the tribunal can dismiss the appeal (*John Dee Ltd* [1995] STC 941). It has also been accepted by that the tribunal can decide primary facts for itself and then go on to decide whether, in the light of its findings of fact, the decision was reasonable (Pill LJ, in *Balbir Singh Gora* [2004] QB 93, [2003] EWCA Civ 525).

Burden of proof

13. It was not disputed that s16(6) FA 1994 provides that the burden of proof is on the appellant and that the standard of proof is the balance of probabilities.

Fit and proper person test

14. Under s88C(2) ALDA 1979, approval will only be given where HMRC are satisfied that the applicant is a fit and proper person to carry out the controlled activity.

15. Although the definition of a “fit and proper person” is not defined in ALDA 1979, the term has been considered in case law, particularly with regard to licensing applications.

16. *In R v Warrington Crown Court, ex parte RBNB (a company)* [2002] UKHL 24, Lord Bingham stated that “... it takes its colour from the context in which it is used. It is an expression directed to ensuring that an applicant for permission to do something has the personal qualities and professional qualifications reasonably required of a person doing whatever it is that the applicant seeks permission to do”.

17. In *Safe Cellars Limited* [2017] UKFTT 78 (TC), the Tribunal considered that

“‘fit and proper’ does not in this context [the *Warehouse Keepers and Owners of Warehoused Goods Regulations 1999*] 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 ... if a person cannot demonstrate that he is in this sense fit and proper, the will afford reasonable cause for revocation of an approval.

If a person fails to carry out ‘due diligence’ ... 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”.

18. In *CC&C Ltd* [2014] EWCA Civ 1653, Underhill LJ stated that “... the management of the excise system is a matter for the administrative discretion of HMRC. The decision whether a registered owner remains a fit and proper person to trade in duty-suspended goods is a good example of the kind of decision which HMRC are peculiarly well-fitted to judge, since it requires what is necessarily to some extent a subjective - albeit evidence-based - assessment of such matters as the attitude of the trader and its principal employees to due diligence issues and their sensitivity to the risk of becoming involved, albeit unintentionally, in unlawful activities”.

Evidence and submissions of the parties

19. Several lever arch files of documents were provided to the Tribunal and witness evidence was given by:

- (1) Mr Packer, sole director, company secretary and shareholder of EDL and MJL, who provided three witness statements and gave oral evidence at the hearing;
- (2) Officer Jolliffe of HMRC, who provided a witness statement and gave oral evidence at the hearing;
- (3) Officer Midgley of HMRC, who provided a witness statement and gave oral evidence at the hearing;
- (4) Officer Ricketts of HMRC, who provided a witness statement and gave oral evidence at the hearing;
- (5) Officer Paschal of HMRC, who provided a witness statement and gave oral evidence at the hearing;
- (6) Officer Weston of HMRC, the decision maker in respect of EDL, who provided a witness statement and gave oral evidence at the hearing;
- (7) Officer Woods of HMRC, the decision maker in respect of MJL, who provided a witness statement and gave oral evidence at the hearing;

20. The evidence and submissions made by the parties are set out below in accordance with the reasons given in the decisions to refuse.

Links to illicit supply chain

21. HMRC submitted that, in order to satisfy the ‘fit and proper person’ test, an applicant must show that there is no evidence of illicit trading.

22. HMRC made it clear that they were not alleging that Mr Packer or the appellants were knowingly involved in excise duty fraud, but submitted that there were links between the appellants and supply chains which related to non-compliant or fraudulent businesses and that the due diligence procedures of the appellants were inadequate.

23. HMRC stated that EDL was placed on the Alcohol Trader Monitoring project on 19 May 2016. EDL was informed by letter that it could be at risk of involvement in supply chains that are connected with fraud, and provided with advice and information on how to avoid becoming connected to such fraud.

24. Tax loss letters were issued to EDL in relation to a number of companies from which it purchased wholesale alcohol between 1 March 2016 and 27 September 2016. These companies were Soft Stream Limited, Halo Trading Limited, Southern Drinks Deliveries Limited, and The Crystal Cash and Carry Limited. The cumulative gross total of the transactions which HMRC considered to be connected to tax loss in this period was £416,006.65. During October 2016, prior to the appealed decisions being made, EDL traded with another company, SmartPrice South West Limited. EDL was sent a tax loss letter in respect of this company in May 2017.

25. HMRC submitted that an examination of EDL’s trading records showed that 70-80% of purchases were from traders who were found to have tax losses in their chains.

26. HMRC submitted that this demonstrated that EDL repeatedly traded with businesses and supply chains which lead back to non-compliant or fraudulent business and, as such, it was linked to such traders and also had inadequate due diligence procedures.

27. In addition to the tax loss letters, HMRC submitted that they had visited Mr Packer on twelve occasions, with regard to both EDL and MJL. HMRC submitted that the tax loss letters were evidence of sustained failures of due diligence, and stated the following timeline as an example:

(1) on 26 September 2016, HMRC visited EDL and provided Mr Packer with a tax loss letter in respect of purchases from Soft Stream Limited. Mr Packer assured HMRC that he had undertaken due diligence on all of his current suppliers and some suppliers that he was considering doing business with.

(2) the following day, on 27 September 2016, Mr Packer had made more than thirty purchases of stock with an aggregate value of £103,095.66 from Halo Trading Limited, which was a company connected to fraudulent evasion of VAT.

(3) two days after the HMRC visit, on 28 September 2016, Mr Packer purchased stock for the first time from SmartPrice South West Limited, another defaulting trader, and made further purchases in October and November 2016 after an HMRC visit on 25 October 2016.

28. For EDL it was submitted that it had not been shown that any of the suppliers which HMRC had mentioned had been engaged in any type of fraud and suggested that the tax losses had in fact arisen from HMRC refusing applications by those suppliers to be approved under the AWRS regime. Further, it was submitted that EDL ceased to trade with the relevant suppliers as soon as the tax loss letters were provided to them.

29. EDL has paid all VAT and tax due on time. HMRC have visited EDL on a quarterly basis and had full access to all information and documents. Consequently, the conduct of Mr Packer in relation to EDL is that of a fit and proper person.

Prior history of poor payment

30. The appellants denied that there was a history of poor payment: the sole allegation was the bankruptcy of Mr Packer in 2014. Mr Packer had been in business for over 30 years, employing many people and paying taxes. At the relevant time, Mr Packer had committed £100,000 to his business and was left exposed when the bank withdrew overdraft facilities overnight.

31. Mr Packer explained that a visit by HMRC had led to the business changing its VAT periods at the suggestion of HMRC. In the course of this, whilst returning a four month return to adjust the periods, HMRC had also issued a quarterly return to a former address of the business despite having been informed that the company no longer operated from that address. The company was deemed to be a late payer because it failed to submit that quarterly return and, as HMRC were not responsive, fines quickly escalated. Mr Packer stated that had been in contact with the VAT office and further stated that HMRC had said that the amounts were a mistake, but non-one had remedied the assessment. He had appealed to the HMRC officers directly. The default did not involve any dishonesty on the part of Mr Packer. In his second witness statement, Mr Packer stated that the bankruptcy was brought about by HMRC's failure to explain that he should have sent in a nil return for the usual quarterly return and their refusal to waive the default surcharges and fines.

32. HMRC stated that Mr Packer was made bankrupt on 29 January 2014 at the petition of HMRC in respect of Crown debts for National Insurance Contributions, PAYE, income tax, VAT and various surcharges and penalties. The petition sum claimed was £42,848.93; the penalties element of this amounted to £2,231.61. A complete statement of liabilities at the time showed total Crown debts of approximately £72,000.

33. HMRC stated that almost half of the bankruptcy debt to HMRC consisted of unpaid National Insurance Contributions which had been deducted from payments to staff (approximately £18,000). A further £17,000 (approximately) was PAYE which had been deducted but not paid to HMRC. Approximately £9,500 related to VAT, and

approximately £8,500 related to self-assessment income tax and National Insurance Contributions.

34. Mr Packer commented that he would say that some of these figures were assessments and not the real amounts. It was put to Mr Packer that there was no reasonable explanation given for the failure to pay the National Insurance Contributions to HMRC; he responded “if you say not” and could not remember whether he had failed to pay over the National Insurance Contributions in order to use the money to fund the business. When it was put to him that he had not appealed the self-assessment income tax and national insurance amounts, Mr Packer responded “if you say so”.

35. Mr Packer stated that it was incorrect to say that there had been no successful appeal against the VAT amounts, although he agreed that there was no ongoing appeal against these and stated that it was because of the bankruptcy.

36. HMRC issued a number of warnings to Mr Packer prior to pursuing insolvency proceedings, starting in 2012, advising him to seek independent advice and assistance. Mr Packer stated that he believed he had communicated with HMRC, and did not know why letters from HMRC stated that he had not contacted them. He said that maybe he was late in calling them.

37. HMRC’s correspondence warning of insolvency proceedings continued until the time of the petition; a letter in October 2013 stated that HMRC would commence bankruptcy proceedings.

38. Mr Packer acknowledged that the correspondence had taken place but stated that he “wouldn’t agree” that in January 2014 he obviously knew that he was going to be made bankrupt. He had agreed to sell off a shop and the proceeds would have paid off the debt, and accepted that he had to take responsibility for the bankruptcy although, if HMRC had let the sale conclude, it might have been different. The HMRC charge notice at the Land Registry had made the purchaser pull out.

39. HMRC submitted that Mr Packer’s bankruptcy showed a recent clear and sustained history of poor payment and the evidence showed a failure to engage with HMRC at the time. Mr Packer’s explanation as to the changing VAT quarters related only to a very small element of the bankruptcy: the VAT surcharge and interest of approximately £2,000 did not explain a bankruptcy petition for approximately £42,000. This showed a clear failure to accept or acknowledge responsibility and relevant to the ongoing threat to the revenue, as the failure to reflect means that there can be no confidence that the circumstances will not be repeated.

Links to other non-compliant businesses

40. HMRC submitted that Mr Packer had a history of involvement with non-compliant businesses, including:

Bin Ends Booze

41. Mr Packer was director of Bin Ends Booze Limited (Bin Ends Booze), which was wound up on 7 February 2007 by the High Court on the petition of HMRC. Mr Packer's contention that the winding up was the end result of a fire at his warehouse, but no evidence of this has been produced. Even if such a fire did occur, HMRC submitted that his lack of insurance highlighted a lack of risk analysis and was an indication that he did not negate risks.

42. The appellants submitted that these events took place over a decade ago and the there were no real outstanding debt due to HMRC other than a non-submitted VAT return at the time the company was being wound up.

43. Mr Packer stated that the directors of the warehouse company had told him that there was insurance in place to cover any stock loss, but this turned out not to be the case. He could not remember the names of the directors, as it was some years ago. The fire had been well-known in Bristol, as a number of other companies had lost stock, including a well-known animation company.

44. Mr Packer stated that the stock stored at the warehouse had been wine and lager, within the amounts which the company had said they were insured for. He could not recall the exact levels, nor the value of the stock stored with them. He had taken the directors at their word and did not ask to see the insurance schedule. It was the only time in thirty years that his business had been affected by fire; it was not a usual occurrence.

Exeter Wine Company Limited

45. HMRC submitted that Mr Packer was connected with Exeter Wine although he was not a director of the company.

46. Exeter Wine entered creditor's voluntary liquidation on 23 May 2016 and was dissolved on 6 May 2017; HMRC had assessed the company for VAT in excess of £86,000 in respect of under-declared sales for the period to 31 January 2016. HMRC compulsorily deregistered the company on 15 July 2016 and an inaccuracy penalty was issued on 7 September 2016. This penalty was reduced in March 2017.

47. Exeter Wine was incorporated on 7 January 2014; HMRC noted that Mr Packer was made bankrupt 22 days later. It was common ground that an undischarged bankrupt cannot be the director of a company.

48. Mr Packer's evidence, as noted above, was that he did not agree that he knew in early January 2014 that he would soon be made bankrupt. HMRC's evidence was that, on 7 January 2014 (the date of incorporation of Exeter Wine) Mr Packer sent a letter to HMRC with an offer to avoid bankruptcy but had not substantially communicated with HMRC in respect of the bankruptcy before that. On 27 January 2014 he wrote to HMRC stating that he was no longer seeking an adjournment of the bankruptcy petition.

49. Mr Packer agreed the dates but his evidence was that his wife set up the business as a source of income. She had spoken to him about setting the company up.

50. HMRC submitted that Mr Packer had agreed to the bankruptcy petition because he knew that Exeter Wine had been set up and could carry on the business.

51. Mr Packer denied this, and stated that he agreed to the petition because, although he had planned to dispose of property in order to pay off the debt, the potential purchaser had seen the HMRC charge against the property and decided to wait and see if they could get the property at a lower price once he was bankrupt. Mr Packer stated that Exeter Wine was an alcohol wholesaler, whereas his business at the time was retail so that it was not the case that Exeter Wine could carry on his business.

52. HMRC submitted that although Mr Packer's wife was the director of this company, he was actually acting as the de facto director of this company and was therefore a 'key person', as defined by Excise Notice 2002. Mr Packer was unable to be appointed as director of the company when it was established as he had been made bankrupt on 29 January 2014 and was not discharged until a year later. Mr Packer had told HMRC that he might become a director of the company in future.

53. HMRC submitted that a key person is one who plays a key role in the operation of a business, to the extent that they can be regarded as one of its 'guiding minds'. A person who, for example, has authority and responsibility for directing and controlling the activities of the business or its day to day activities. HMRC submitted that the fact that Mr Packer was a key person of Exeter Wine is shown by the following, set out in evidence provided by Officer Jolliffe and Officer Midgley:

(1) he was present at all meetings between Exeter Wine and HMRC. In the second meeting he was described as the manager of the company;

(2) at these meetings, he had the working knowledge of the company rather than his wife, who provided few explanations: he explained the process of purchasing goods, the mark up achieved, the levels and value of stock and overall profitability; the company appeared to be trading using Mr Packer's contacts and experience;

(3) although the company was funded by the sale of a property owned by Mr Packer's wife, she was unable to say how much investment had been made in the company;

(4) his wife appeared to be shocked when it was disclosed that the company had made a loss of approximately £500,000 since beginning to trade and did not appear to be fully aware of the business figures including staffing costs, company drawings and Mr Packer's earnings. Mr Packer was aware of all of these figures;

(5) in the initial meeting, Mr Packer first stated that he did not receive an income from Exeter Wine. Later in the meeting he agreed that he received £1,000 per month. Subsequently, in October 2015 he stated that he had been receiving £2,000 per month. Both figures indicate a considerably higher wage than his wife (£600 per month).

54. Mr Packer denied that he had had any control over Exeter Wine. He stated that his only involvement with that business was towards the end, a year after it was incorporated and as his bankruptcy was ending. He had been employed by Exeter Wine for January 2015 but he did not want to run the company as he was bruised by the bankruptcy, and it was his wife's company. He would provide help if she asked for it, but he did not work there full time. He did not have a specific role in the company.

55. With regard to the initial inconsistency as to whether he was paid by Exeter Wine, Mr Packer suggests that perhaps he had not yet been paid by the company at the time of the HMRC visit. He also suggested that, although he had not seen the notes, perhaps it was a view of how HMRC wanted things to be and not perhaps the way things were. He could not recall what he had or had not received at that time, and could not recall whether his income was £1,000 or £2,000 at the time. He would need to check what Exeter Wine had paid although he thought it might have been £1,000; he did not think it had been much. He did not know why his wife's salary was lower.

56. With regard to the first HMRC visit to Exeter Wine in February 2015, he recalled the visit but stated that he did not remember whether he was there as an employee at that time. He lived five minutes away from the premises and might have been there for a cup of tea. Although the meeting notes indicated that he was wearing high-visibility clothing, he explained that this was a site requirement imposed on all visitors and employees by the haulage company that owned the premises.

57. Mr Packer accepted that he was at the second visit in May 2015 but could not recall details; he had visits from HMRC every two weeks and it was all a blur. He agreed that he was at the meeting in October 2015, and that he was responsible for Exeter Wine at that business as his wife was not present. He had attended meetings because his wife was feeling harassed by HMRC, having received thirteen calls from HMRC the day before a meeting and because of the number of officers in attendance at some of the meetings.

58. Mr Packer explained that he had answered questions because his wife was intimidated by the arrival of the HMRC officers, although he also did not think that he gave any useful or substantial help to his wife. The information he was able to provide came from four days of employment in the business and the discussions with his wife over the previous year. He knew some of her suppliers, but not all of them, and would have given her some contacts.

59. Officer Jolliffe disputed that there had been thirteen calls on the day in question. She agreed that there had been some calls, and explained that the calls had been made to try to ensure that the business would provide invoices in respect of stock, because there was a risk that goods would be otherwise be seized for failure to provide information about the origin of stock. Officer Jolliffe also stated that Mr Packer's wife did not appear to feel harassed by HMRC and had specifically provided HMRC with information, not always in the presence of Mr Packer.

60. The evidence of both Officer Midgley and Officer Jolliffe was that Mr Packer's wife had approached them during a visit in July 2015 whilst Mr Packer was not present

and had stated that she had not seen the company's finances and was concerned about figures discussed in the meeting.

61. Officer Midgley's evidence was that Exeter Wine's trading pattern by May 2015 was concerning, as the business was buying more stock than it was selling and was in a VAT repayment position, with no obvious reason for this. Mr Packer suggested that perhaps stock was offered at a good price, and that might have been the reason for buying more stock than was being sold.

62. HMRC submitted that other factors for concern from the meeting in May 2015 included the fact that the company had no explanation for the poor sales at Christmas, when a peak would normally be expected in this type of sale, and that the company had no stock control system.

63. Mr Packer said that the poor Christmas sales might have been because of Brexit, and perhaps supermarkets were putting out loss leaders. He said that there was always a reason for sales to go up or down. He considered that the company did not require a stock control system because it was a small company with limited lines. Instead, it would operate on a visual check of stock: if a lot had been sold, one could see that the pile was down and that it was necessary to re-order.

64. It was put to Mr Packer that he had said at a meeting in July 2015 that the company had stock in hand of approximately £300,000 in May 2015, at a time when it had a loss of £500,000. Mr Packer did not accept those figures although he stated that obviously the accounts showed differently. He did not explain why the company was trying to increase stock. Mr Packer also stated that at the time of that HMRC visit in July 2015 the company accounts had not yet been finalised because HMRC had the accounts information and the company was waiting for that information to be returned in order for matters to be finalised. He did not believe that the quoted loss figure of £500,000 had been true.

65. Officer Jolliffe stated that the loss figure of £500,000 had been derived from the VAT returns rendered by Exeter Wine. She considered that she had not been given enough evidence to be sure that Mr Packer's wife was running the company: their concern was with the day to day running of the company rather than the underlying initial funding or set up of the company. Officer Jolliffe stated that she had concluded that Mr Packer was running the business because, although questions were asked of his wife, Mr Packer had answered the questions instead.

66. HMRC submitted that Exeter Wine appeared to be trading using Mr Packer's contacts and experience: for example, the landlord of the trading premises had been known to him for 20 years. Invoices to the company were marked "For Julian". Some invoices appear to refer interchangeably to Exeter Wine and EDL.

67. Mr Packer stated that he had provided contacts to his wife. He did not agree that the companies were interchangeable but stated that the customer must have mistakenly put the wrong name on, having forgotten which company they were dealing with.

68. HMRC submitted that although Mr Packer denied financial or other involvement in Exeter Wine, a bank account in his sole name showed significant transfers to and from Exeter Wine in the three weeks before Christmas 2015, over £11,000 was transferred by Mr Packer from this account to Exeter Wine. The same bank statement also shows payments were made to his wife, marked as “EDC wages” and payments were received from a wholesaler.

69. Mr Packer could not recall what one of the payments to Exeter Wine was for, but also stated that the payments to Exeter Wine were for the purchase from Exeter Wine by EDL. He could not recall how much stock had been purchased from Exeter Wine. He explained that by this time, December 2015, EDL was operating. Money relating to EDL was paid into his personal account because the account numbers had been mixed up and the wholesaler had paid into his account and not the business account.

70. The business of Exeter Wine was sold to EDL as a transfer of a going concern on 2 November 2015, so that no assets were left for distribution on the subsequent liquidation of Exeter Wine.

71. Mr Packer stated that he had limited knowledge of the Exeter Wine liquidation, although he knew it was because of a VAT assessment and he was aware that the company was said to have under-declared sales, and the inaccuracy penalties.

72. Evidence indicated that the under-declaration was identified by Exeter Wine’s accountants. It was suggested that the under-declaration arose as a result of mistakes made by a junior member of staff between April 2014 and November 2015, although this was not confirmed in evidence.

73. HMRC stated that the value of the stock transferred from Exeter Wine to EDL was in excess of £200,000 (net of VAT) but no payment for the stock was retained by the company. Mr Packer was listed as a creditor of Exeter Wine on the liquidator’s statement of affairs, owed £1,600.

74. Mr Packer’s evidence was that he could not recall what was paid for the stock of Exeter Wine. When told that he had given a value of £215-220k in a meeting with HMRC, he stated that this would have been what he believed was accurate at the time. He could not recall when the stock was transferred, but HMRC had had the relevant invoice.

75. Mr Packer stated that the money had been used by Exeter Wine to pay off outstanding creditors, but did not know how he could show that. He also could not recall any of the creditors, as it was quite a few years ago at a time when he was trying to establish another business. He had not been asked to provide evidence of the payment by EDL to Exeter Wine. He could not remember why Exeter Wine owed him £1,600 on liquidation.

76. Mr Packer denied that he had any involvement in the operation or management of Exeter Wine; his wife had been responsible for the company, and it was submitted that this was demonstrated by the fact that she had agreed with the Insolvency Service to be disqualified from being a director for five years and that all correspondence from

the Insolvency Service was with her. Mr Packer stated that the Insolvency Service did not communicate with him at all and in particular did not allege that he was in any way connected with the running of Exeter Wine.

77. The appellants submitted that the decisions to refuse approval had failed to take into account Mr Packer's wife's significant investment in Exeter Wines when considering "who ran the show" and that this investment was inconsistent with their reasoning. Further, they had not taken into account the fact that no proceedings had been brought against Mr Packer by the Department for Business, Energy and Industry Strategy in respect of Exeter Wines.

78. HMRC submitted that Mr Packer's wife's investment in Exeter Wine was not relevant to the question of whether Mr Packer was a key person, and the investment had further not been substantiated by bank statements or other evidence. HMRC submitted that the evidence and chronology shows a clear connection between Mr Packer and Exeter Wine: the business was incorporated on the date when Mr Packer made contact with HMRC about his bankruptcy.

79. HMRC submitted that it was not a coincidence that Mr Packer's wife set up a wine trading company three weeks before her husband was made bankrupt although she had no previous experience in the trade and had not previously been a company director. Mr Packer was at every meeting between HMRC and Exeter Wine and his explanation that he was assisting his wife was not supported by the evidence of the HMRC officers at those meetings. He answered all detailed questions; company purchases were made from his long-lasting contacts; he was paid more than his wife, and funds movements in sample bank statements show substantial dealings with Exeter Wine and no clear explanation was given for this. His acquisition of Exeter Wine's stock for EDL had not been properly explained: the stock was worth approximately £217,000 but no receipt of that amount was shown in Exeter Wine and no evidence was provided to explain where any payment had gone. The insolvency of Exeter Wine led to a further loss to HMRC as the creditors were unable to realise any amounts in the liquidation.

Wine Case

80. Mr Packer agreed that he had been the director, secretary and sole shareholder of Wine Case Limited from October 2015 until 7 April 2016 when he had sold the company to an individual called 'Singh'. Mr Packer could not remember his full name although, when the name 'Ranjit Singh Khumra' was suggested to him, he said it sounded right. He knew that Mr Khumra was a director of 'Global' and confirmed that this was a company trading as 'Global Cash & Carry' which was a supplier of both Exeter Wine and EDL.

81. HMRC stated that Global was a suspect trader and had been deregistered for VAT in April 2017 and subsequently struck off. Mr Packer thought that he had had a letter from HMRC about that. He explained that he bought stock and sold stock back to them; he sold back to them goods that he could not sell or which had something wrong with them. When asked why the goods were sold back and not returned for credit, Mr Packer stated that “maybe they didn’t want to give me a credit note, I don’t know”. He said that this happened on occasion, he knew that he had sold to his suppliers but could not recall the specific circumstances, although he speculated that they might have been short of stock.

82. Mr Packer stated that at the time that he was dealing with Global, he did not know that they were a suspect trader. Mr Packer stated that at all times he had asked HMRC if there were people he should not deal with.

Morgan Jones Limited

83. Mr Packer’s evidence in the hearing was that he set up MJL as a new company and that the business operated by MJL was acquired by MJL as a going concern from an individual trading as Totnes Wines. Mr Packer stated that he had known this individual for more than twenty years, since the purchase of a shop in Teignmouth.

84. HMRC stated that the vendor had not filed any VAT returns in the three years before selling the business. Mr Packer stated that he had no knowledge of this, he had not seen the previous owner’s accounts as he did not take over the debts, and that he trusted the seller. The business sold single estate wines, mostly imported by the individual directly. Mr Packer stated that as it was a retail shop, with no branded products, he was happy with the due diligence.

85. Mr Packer then stated that MJL had acquired the premises, the name and stock only and had not taken over the business from the individual, so that “his trading is not my trading”. Mr Packer did not think that the previous owner’s VAT debt was relevant to him. HMRC stated that the website for MJL trading as Totnes Wine described the individual as a “vital part of the team”.

86. HMRC submitted that Mr Packer had explained in a visit in February 2017 that MJL had been set up as a backup business because he did not know whether the EDL AWRS application would be granted.

87. Mr Packer stated that he had set up MJL because he thought it would be easier to move to sell better single estate wines and move away from the branded mass-produced wine market. He denied that MJL had been set up because he knew that EDL would not meet the ‘fit and proper’ test. He had applied for AWRS authorisation for MJL because customers included restaurants and pubs which would want to buy on an ongoing basis.

Poor due diligence

88. HMRC submitted that the fact that EDL had repeatedly traded in tax loss chains illustrated that the due diligence procedures used had not presented the company from becoming involved in fraudulent supply chains and thereby posing a risk to the revenue.

89. Mr Packer's evidence was that he had put in place a system of due diligence which involved the appellants producing a due diligence pack which would be requested from prospective trading partners. The pack would include the following information:

- (1) VAT registration certificate or number
- (2) company registration number
- (3) utility bill of the company directors
- (4) copy passport or driving licence
- (5) headed paper of the relevant company

90. The trader would also be checked with HMRC's Wigan office, and VAT registrations would also be checked with the Europa website. Mr Packer stated in his second witness statement that this due diligence information had been given to HMRC, who had not returned it. His evidence in the hearing was that HMRC had returned the information, although there had been delays in doing so.

91. In the hearing Mr Packer stated that he did not accept that he had failed to give proper regard to HMRC's warnings and that he had followed all of HMRC's suggestions as to ways in which due diligence could be improved. With regard to purchases from SmartPrice South West Limited, for example, Mr Packer stated that he had visited the business and could clearly remember meeting with the directors.

92. In his second witness statement, Mr Packer stated that HMRC had continually said that they could not advise him with regard to what he could do to ensure that EDL and MJL were compliant and that he considered that their actions appeared designed to frustrate and catch people out. Officer Paschal's evidence was that it was not reasonable for officers to give specific information about due diligence processes as that was a matter for traders to decide upon. Relevant information was provided in HMRC notices and guidance.

93. On 15 October 2015, Officer Paschal's evidence was that the MTIC team visited EDL and explained to Mr Packer the importance of ensuring the integrity of supply chains, to reduce the risk of alcohol diversion fraud. They also explained the nature of the due diligence required in the alcohol industry, including:

- (1) the need for meeting with traders, and keeping a record of such meetings, not just collecting documents regarding the directors of businesses;
- (2) undertaking checks to ensure the integrity of traders, and not relying on the face value of documents provided by traders.

94. HMRC submitted that, at this meeting, Mr Packer was advised to consider the due diligence checks described in section 10 of Excise Notice 96. Following the meeting, an MTIC awareness letter was issued to EDL, with advice on risks associated with MTIC fraud and procedures for validating a trader's registration. Mr Packer stated that he did not recall the visit, although he knew of the notices.

95. A further visit took place on 11 April 2016. Mr Packer was again advised of the required due diligence measures and Excise Notices 727 and 126. The tax loss chains in which EDL had been involved were also discussed.

96. Further visits by HMRC took place in July and September 2016. Shortly before the visit in July, EDL had requested a "due diligence pack" from Halo Trading. Mr Packer explained that this was an updating request as the utility bills they held for Halo were too old and so he needed to "swap bits of paper", although he did not dispute that he had not previously stated this.

97. HMRC submitted that this was not supported by the evidence, as EDL had been trading with Halo Trading for three months by July 2016. If EDL had obtained due diligence information at the start of trading, the information would not be out of date by July. In each case the trader had supplied a "due diligence pack" rather than information specifically requested by EDL.

98. HMRC further submitted that the only due diligence information for Halo held by EDL had been a number of documents, such as VAT registration, energy bills and passport copies, some of which pre-dated the existence of EDL, and submitted that the due diligence on Halo had been inadequate. Mr Packer stated that he believed the due diligence undertaken was good enough, as he had visited the premises, all goods were collected via Parsons Haulage and paid for by cheque so that there was a trail of collection of goods and payments. He stated that he always expected that duty had been paid, and that there was no instance where he could not verify the duty status.

99. HMRC submitted that in summary the due diligence documents provided by EDL in respect of suppliers amount to document gathering only. This was clearly ineffective, as shown by the fact that two of the suppliers alone had been responsible for defrauding the revenue of more than £2,500,000 between them. HMRC submitted that there was no evidence that any information collected was assessed and risk managed, as shown by the repeated trading in tax loss chains.

100. The appellants contended that the due diligence procedures were robust and that defaulting traders may not have defaulted due to fraud but, instead, due to losing AWRS approval applications. Mr Packer's evidence was that he, his wife, and the companies had asked for guidance from HMRC on how to improve their due diligence processes and had made changes when recommended by HMRC. Mr Packer explained that some of the checks did not seem reasonable: for example, the credibility of low prices did not seem to be relevant when alcohol can be bought cheaply in supermarkets. He did appreciate that other further checks would be important if the price was not credible. Nevertheless, he had given HMRC all papers at all meetings and asked what else he could do.

Making of the decision to refuse approval - EDL

101. HMRC agreed that the applications for approval were made promptly, but that no weight was attached to the timing of the application. That application had been made online and provided no information as to the business, so that investigation was needed to determine whether the application was a “fit and proper” person.

102. The decision officer, Officer Weston, provided a witness statement and gave evidence at the hearing. He considered that he was sufficiently experienced to make the decision having been in post ten months at the relevant time and having had substantial training and practice visits beforehand.

103. Officer Weston’s evidence was that he was required to assess the application by reference to HMRC’s published criteria in Excise Notice 2002, which includes:

- (1) no evidence of illicit trading, or that key persons in the business have previously been involved in significant revenue non-compliance, or fraud, either within excise or other regimes;
- (2) no connection between the business, or key persons involved in the business, with other known non-compliant or fraudulent businesses;
- (3) key persons involved had no criminal convictions;
- (4) the application is accurate and complete and there has been no attempt to deceive;
- (5) no persistent or negligent failures to comply with HMRC record-keeping requirements
- (6) the applicant, nor key persons, have previously attempt to avoid being approved and traded unapproved;
- (7) sufficient evidence of commercial viability;
- (8) no outstanding unmanaged HMRC debts or a history of poor payment;
- (9) satisfactory due diligence procedures covering dealings with customers and suppliers to protect it from trading in illicit supply chains

104. Officer Weston stated that he had refused the AWRS application for the following reasons, having taken into account Mr Packer’s representations:

- (1) on the balance of probability, purchases made by EDL from a number of companies had been connected to fraudulent evasion of VAT by other traders;
- (2) Mr Packer, director of EDL, had been connected to non-compliant businesses: firstly, he had been a director of Bin Ends Booze which had been wound up at the petition of HMRC, and secondly he had been a key person in relation to Exeter Wine which had been issued with VAT assessments for under-declared sale and had been made insolvent owing money to HMRC;
- (3) Mr Packer had a history of poor payment with regard to tax obligations, as shown by his bankruptcy in January 2014;

(4) due diligence checks had not met required standards as they had not reduced exposure to fraudulent supply chains.

105. Officer Weston stated that he considered that the investigation had been thorough and strongly disagreed when it was put to him that he had not undertaken a proper investigation. The decision making process in this case had involved more investigation than most, and had taken longer than usual as a result.

106. The business had been initially treated as having no negative compliance history on which to base a decision and Officer Weston agreed that, at the time of the application there was no VAT owing. The risk rating of the business had changed in May 2016, to show the business as being 'high risk'; Officer Weston agreed that this did not remove the need to investigate to consider whether the approval should be given.

107. Officer Weston agreed that he had incorrectly thought that EDL had continued to trade with Halo after a tax loss letter regarding Halo was issued, but stated that this did not have a significant influence on his decision: he stated that EDL had not received only one tax loss letter, but had received several tax loss letters. Officer Weston had been dealing with ten cases at any one time, but EDL was the only case he had dealt with where tax loss letters had been issued. He accepted that it was not necessarily possible for a trader to eliminate the risk of being involved in tax loss, but would expect traders to undertake proper due diligence to minimise that risk.

108. Officer Weston disputed a suggestion made by the appellants' that the traders for whom tax loss letters had been issued had defaulted due to loss of AWRS approval as the relevant investigations would have taken place some time before any AWRS application could be considered. Officer Weston also stated that, even if the tax loss letters had not been issued, he would have made the same decision to refuse the application on the basis of the other factors taken into account.

109. For EDL it was submitted that no meaningful examination of the due diligence had been made and that Mr Packer had not been "taken to task" on any due diligence failures.

110. Officer Weston confirmed that he had requested and been given access to EDL's due diligence information and purchase orders held by other officers within HMRC. He was aware that other areas off HMRC had concerns over EDL, and this was a requirement of the standard working procedure which requires the caseworker to consider any current or recent relevant work or interest of other HMRC teams, but did not consider that this influenced his decision to any great extent.

111. Officer Weston stated that he had discussed the case with another officer, who had advised that the evidence indicated that the due diligence undertaken by EDL was weak, and that this was evidenced by the number of tax loss letters received by EDL. Those tax loss letters also indicated that EDL had links to fraudulent supply chains. Officer Weston stated that he had reached the same conclusion from the tax loss letters. During a visit with EDL in October 2016, Officer Weston formed an initial view that due diligence was not taken very seriously, and that deals were not properly considered

by the business, and that the business had not adjusted its processes despite the discussions with HMRC.

112. With regard to the history of poor payment criterion, Officer Weston agreed that he had not specifically discussed the bankruptcy or Bin Ends Booze liquidation with Mr Packer as it was a historical fact. Officer Weston agreed that there could be a range of reasons for the insolvency of a company but considered that explanations would not change the position that the company had been put into liquidation and Mr Packer had been made bankrupt owing money to HMRC and disagreed that he should have investigated the circumstances of the bankruptcy and liquidation.

113. For EDL, it was submitted that Officer Weston's failure to consider the background to the liquidation of Bin Ends Booze amounted to a perverse decision.

114. HMRC submitted that the fact of the insolvency of Bin Ends Booze was sufficient to raise a concern and that it was one piece of the evidence, and not something considered in isolation. The reasons for the insolvency had been given by Mr Packer to HMRC before the decision was made and this was confirmed by Mr Packer in his second witness statement. The reason given was the loss of uninsured stock due to a fire, but the fact of the insolvency made it clear that there had been poor decision making on the part of Mr Packer.

115. For EDL it was submitted that the investigation had taken place over a long period of time with very little activity, and no real engagement with EDL. It was submitted that Officer Weston was relatively inexperienced and that he had been led by and influenced by other officers and had not made a truly independent judgement.

116. It was put to Officer Weston that he had been influenced by other HMRC investigations. He did not agree with this, and stated that although other reports from other investigations are relevant to AWRS, the AWRS approval process is considered separately. He stated that he was not concerned whether he would be "rocking the boat" by making a particular decision.

Making of the decision to refuse approval - MJL

117. Officer Woods, the decision maker for MJL, provided a witness statement and gave oral evidence at the hearing.

118. Officer Woods stated that the decision in respect of EDL was the starting point for his investigation, in part because the deadline for the decision was approached. Although he came to the same conclusion as Officer Weston in respect of EDL, Officer Woods stated that he had considered all the facts and the representations made by Mr Packer. Officer Woods stated that the facts in MJL's case were the same as those for EDL.

119. Officer Woods considered that the representations made by Mr Packer as to the circumstances of Bin Ends insolvency showed that he had not mitigated risk, and as a result had left debts to HMRC. This formed a relevant part of the history of poor payment and was relevant to the ‘fit and proper’ test.

120. Although the conclusion, to refuse, was the same the reasons for that refusal were slightly different as no evidence as to due diligence had been provided for MJL, Mr Paker had stated that he would put due diligence into place, and Officer Woods had no evidence to say that such due diligence would not be adequate. He had taken into account the tax loss letters issued to EDL with regard to the connection with illicit trading.

121. MJL submitted that it was perverse to take into account the tax loss letters issued to EDL as evidence of links to illicit trading but not to consider anything in respect of due diligence. If the company’s approach to due diligence could not be determined, the tax loss letters to EDL were not relevant.

122. For MJL it was submitted that Officer Woods’ investigation had been undertaken very quickly and lacked independence. They submitted that his decision had been copied and pasted from Officer Weston’s decision.

123. HMRC stated that Officer Woods’ decision was not made for the same reasons as that made by Officer Weston, clearly demonstrating that he had reached his decision independently.

General submissions by the appellants

124. It was also submitted that neither officer had explained that there was any threat to the revenue in a rational sense, and that no known participation in illicit trading by Mr Packer had been alleged. Instead, there was only the rationale that EDL was involved in illicit chains because it had received tax loss letters and so there must have been inadequate due diligence, and that because there must have been inadequate due diligence, there must be a risk to the revenue. It was submitted that this was a perverse conclusion on the evidence.

125. It was submitted that the investigations were not seriously undertaken, as there was no consideration of the risk to the revenue, and that some consideration of revenue loss must be required. Further, although both officers acknowledged the need to investigate the circumstances, neither had considered the circumstances of Mr Packer’s bankruptcy and had simply concluded that the fact of the bankruptcy was enough information.

126. It was submitted that as a result of all the factors noted in submissions, the decisions were such that no reasonable officer could have arrived at those decisions.

127. For EDL, it was submitted that HMRC have not adduced any evidence to show non-compliance on the part of EDL at any time beyond 2016, which is presenting

trading with the benefit of a Consent Order. It was submitted for both EDL and MJL that HMRC's decision to refuse the application for approval is unreasonable.

General submissions by HMRC

128. HMRC submitted that the decision was wholly reasonable: the test of whether EDL and MJL, and their sole director, secretary and shareholder, was a fit and proper person for the purposes of AWRs approval had not been met. The decision did not depend upon a single factor but a basket of evidence which indicated a significant and ongoing threat to revenue due to non-compliance which was repeatedly demonstrated by the liquidation of Bin Ends Booze of which Mr Packer was a director, the bankruptcy of Mr Packer, and the compulsory de-registration and liquidation of Exeter Wine, in respect of which Mr Packer was a key person.

129. HMRC submitted that the tax loss letters were part of the basket of evidence, not the single deciding factor. HMRC submitted that the letters clearly show inadequate due diligence by EDL and Mr Packer. At each visit, HMRC notices and guidance were discussed with Mr Packer, and the importance of due diligence and ensuring the legitimacy of supply chains in which he traded. HMRC noted that there were eight visits before a tax loss letter was issued and that Mr Packer's assertion that he ceased trading with the relevant traders as soon as he received a tax loss letter failed to acknowledge that he could not continue to trade with them as the issue of a tax loss letter in respect of a particular trader will generally bring about the end of trading for that trader, as they will be deregistered for VAT following the issue of the letter.

130. HMRC submitted that MJL also had a somewhat chequered history, its business having been acquired from an individual who failed to render VAT returns for three years but remains involved with the business. The lifespan of the business was shorter but, as Mr Packer was the sole director, shareholder and secretary, his history was relevant to the decision and the circumstances gave reason to believe that there would be a significant threat of non-compliance in relation to this business.

131. HMRC submitted that this could not all be explained away as a series of unfortunate events external to Mr Packer but that it was indicative of a pattern of events which showed losses to HMRC and his companies. Mr Packer's failure to address those failings meant that there was an ongoing risk to HMRC.

Discussion

132. We note that our powers in this appeal are established by s16(4) Finance Act 1994, and as such the first question to consider is whether the decisions to refuse the applications to be allowed to carry on the controlled activities are decisions that could not have been reasonably arrived at. It is only if we consider that the decisions could not have been reasonably arrived at that we have any power to act in respect of those decisions.

133. There was no dispute between the parties as to the approach to be taken, which case law has established to be as follows:

(1) the tribunal can only review a decision if it is shown that the commissions have acted in a way in which no reasonable panel of commissioners could have acted; if they have taken into account some irrelevant matter or have disregarded something to which they should have given weight (*JH Corbitt Numismatists Ltd* [1980] STC 231 §239)

(2) where the commissioners have disregarded material but it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a tribunal can dismiss the appeal (*John Dee Ltd* [1995] STC 941 §953(f)-(h))

(3) the tribunal can decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision was reasonable (*Balbir Singh Gora* [2003] EWCA Civ 525)

134. We note that the burden of proof is on the appellants, and that the standard of proof is the balance of probabilities.

135. There was no dispute as to the approach taken by HMRC in considering whether a person is a ‘fit and proper’ person for the purposes of the AWRS regime.

136. The appellants’ submissions are, in summary:

(1) the investigations were inadequately undertaken and may have been influenced by other HMRC investigations and so were not an independent consideration of the facts;

(2) that no clear threat to the revenue had in fact been demonstrated;

(3) that the conclusion that there was a risk to the revenue because there must have been inadequate due diligence because EDL had been issued with tax loss letters was perverse;

(4) there had been no meaningful consideration of the due diligence undertaken by Mr Packer;

(5) that neither decision maker had taken into account the circumstances of Mr Packer’s bankruptcy, and that Officer Weston’s failure to take into account the circumstances of the liquidation of Bin Ends Booze made his conclusion amounted to a perverse decision;

(6) for MJL, that it was perverse to take into account the tax loss letters to EDL but to conclude that there was insufficient evidence as to due diligence, where those letters formed the basis of the conclusion that there was inadequate due diligence by EDL

(7) HMRC were wrong to conclude that:

(a) Mr Packer was a key person in respect of Exeter Wines

- (b) there had been inadequate due diligence by Mr Packer in respect of EDL suppliers
- (c) any failures by the previous owner of Totnes Wines had any relation to Mr Packer

137. We note the initial submission by the appellants that the introduction of this regime means that traders who have built up an wholesale duty-paid alcohol business are exposed to their business suddenly being converted to an illegal activity, but consider that this would only happen where the business had inadequate due diligence and similar problems. A period of successful trading cannot be a guarantee that the business is properly operated, nor is it necessarily the case that the persons involved will be ‘fit and proper’ persons for the purposes of the regime.

Independence and adequacy of the investigations

138. The appellants made a number of submissions as to the independence and adequacy of the investigations which were specifically denied by the officers who made the decisions.

139. We consider that these were assertions by the appellants which were not established on the balance of probabilities from the evidence before us. We note, for example, that Officer Woods’ decision to refuse was not made on identical grounds to that of Officer Weston such that the assertion that he did not independently consider the facts which applied to MJL was not established.

Submissions as to risk to the revenue and tax loss letters

140. We consider the case law relating to ‘fit and proper’ person does not require that a clear threat to the revenue be demonstrated to refuse approval. For example, the decision in *Safe Cellars* is clear that what matters is a demonstration of behaviours of a type likely to assist and not hinder the proper administration, collection and protection of the revenue. It does not require that a clear threat to the revenue be identified.

141. The appellants submitted that no evidence had been provided that showed that the suppliers had been engaged in any fraud, and that the businesses concerned may have defaulted due to refusals in relation to AWRS applications. EDL had ceased to trade with the suppliers as soon as the tax loss letters were provided to them. The appellants therefore submitted that the tax loss letters did not demonstrate a failure of due diligence by EDL or Mr Packer.

142. HMRC’s evidence was that EDL could not have continued to trade with the suppliers because they were deregistered as a result of the tax loss letters, and that the investigations into those suppliers had commenced before the AWRS regime was implemented so that the speculation that a refusal of AWRS was the reason for default could not be supported. HMRC evidence was that the investigations had clearly shown links between those suppliers and illicit supply chains. HMRC also stated that the repeated tax loss letters were unusual and that it was not unreasonable to conclude that this reflected inadequate due diligence.

143. We note that the burden of proof is on the appellants, rather than HMRC, and we do not consider that the appellants have established that HMRC's conclusion that the tax loss letters reflected behaviours that were not consistent with the 'fit and proper' test was unreasonable.

Was there meaningful consideration of the due diligence evidence provided by Mr Packer

144. The appellants submitted that the due diligence which had been undertaken by EDL, as set out in Mr Packer's evidence, had not been considered and that, instead, HMRC had concluded that due diligence was inadequate because a number of tax loss letters had been issued to EDL.

145. We consider that HMRC's evidence was that due diligence information was considered; Officer Weston specifically stated that he had requested and been given access to the due diligence held by HMRC. We consider that the evidence shows that EDL did not carry out adequate due diligence: as set out above, the information provided to us as due diligence includes out of date documents and inconsistencies in that documentation, with no evidence that these issues had been investigated. We do not consider that the evidence shows that adequate due diligence was undertaken in any systematic way without HMRC prompting.

146. Accordingly, we do not consider that the appellants have established that there was no meaningful consideration of the due diligence. Further, even if the due diligence had not been considered, we do not consider that the decision would have been different.

Whether the decision makers took into account the circumstances of Mr Packer's bankruptcy

147. Officer Weston agreed that he had not specifically discussed Mr Packer's reasons for bankruptcy; we note that neither decision letter sets out any consideration of the circumstances of Mr Packer's bankruptcy.

148. We consider, however, that the evidence before us was that Mr Packer's explanation for the bankruptcy was that HMRC had issued a surcharge for failure to submit a quarterly VAT return for a period that overlapped with a change of VAT period where a four month period return had been submitted.

149. We consider that this explanation does not explain the substantial majority of the debt owed to HMRC in the bankruptcy, which did not relate to VAT, and that Mr Packer did not provide any explanation for the non-VAT debts in that bankruptcy.

150. Accordingly, we find that little evidence has been provided for the bankruptcy and consider that the appellants have not established that the decision would have been different if that evidence had been taken into account.

Whether the decision makers took into account the reasons for the insolvency of Bin Ends Booze

151. Officer Weston's evidence was that he did not consider the underlying reasons for the insolvency of Bin Ends Booze and disagreed that such consideration was necessary, as the company had gotne into liquidation owing money to HMRC.

152. Officer Woods' evidence as that he had considered the representations made by Mr Packer as to the circumstances of the insolvency of Bin Ends Booze and had concluded that these showed that Mr Packer had not taken steps to mitigate risk and, as a result, had left debts owing to HMRC.

153. We consider that the appellant has established that, in relation to EDL, the underlying reasons for the bankruptcy were not considered. However, the evidence put to us indicated that the bankruptcy had arisen from a failure to undertake adequate due diligence which led to the company being uninsured for losses which occurred. We consider that this would be a relevant consideration in the context of determining whether the 'fit and proper' person test was met and so we consider that the appellant has not established that the decision would have been any different if that material had been considered.

Whether it was perverse to take into account EDL's tax loss letters in respect of MJL whilst concluding that there was insufficient evidence as to MJL's due diligence processes to regard them as relevant to the decision in relation to MDL?

154. The appellants submitted that it was perverse to take into account the tax loss letters as evidence of MJL's involvement in illicit trading but yet consider them as not relevant to tax due diligence, when they were considered to be relevant to both illicit trading links and due diligence as to EDL.

155. Officer Woods' evidence was that he considered that no specific evidence as to MJL's due diligence processes was available and MJL had not been trading long enough to be able to establish that its due diligence processes were not adequate. He had considered that the tax loss letters were relevant to the question whether there were links between MJL and illicit trading, as Mr Packer was a key person in both businesses.

156. We have considered the submissions and evidence and consider that the appellants have not established that this decision was perverse or unreasonable. We note that HMRC's criteria for assessment only considers the due diligence procedures of the applicant, and not the due diligence procedures of other businesses with the same key person involved whereas the question of evidence of illicit trading encompasses both the appellant business and key persons within that business.

157. We consider that the question of whether an applicant has satisfactory due diligence processes is therefore separate to the question of whether it, or any key person within the business, has any connection to illicit trading or significant non-compliance. The fact that the same evidence may support two factors for one business does not mean that that evidence cannot be evidence of a single factor in another business involving the same key person.

Whether HMRC were wrong to conclude that Mr Packer was a key person in respect of Exeter Wines

158. HMRC's evidence was that there were substantial reasons for concluding that he was a key person, a 'guiding mind' in relation to Exeter Wines. Mr Packer denies that he was a key person in Exeter Wines, and that he was an employee for a short time only; he stated that no proceedings were taken against him in relation to Exeter Wine although his wife accepted disqualification as a director. He disputed HMRC's evidence as to behaviour in meetings and documentary evidence and the chronology of events in respect of Exeter Wine and Mr Packer's bankruptcy.

159. We did not find Mr Packer's evidence to the hearing to be particularly helpful: he frequently failed to answer the questions put to him and instead suggested that something "might" be the answer or that "perhaps" something had happened without giving any evidence as to what had actually happened. He also frequently stated that he could not recall events. In some cases, his evidence was inconsistent: for example, having said that he could not recall details because matters were a blur due to the number of HMRC visits in 2015, he stated that there had been thirteen calls from HMRC on the day before one of those visits. Accordingly, we prefer HMRC's evidence of those meetings.

160. We do not consider that the fact that no proceedings were taken against Mr Packer in respect of Exeter Wine is clear evidence that he was not a key person in respect of Exeter Wine.

161. Having considered all of the evidence, we do not consider that the appellants have established that HMRC's conclusion that Mr Packer was a key person in relation to Exeter Wine was unreasonable.

Whether HMRC were wrong to conclude that there had been inadequate due diligence by EDL

162. We have addressed this point above. We would add that Mr Packer's evidence indicated that he expected HMRC to tell him what to do, but did not consider the information provided by HMRC to him in the notices and guidance which he acknowledged receiving.

163. We consider that the appellants have not established that HMRC's conclusion that there was inadequate due diligence undertaken by EDL is unreasonable.

Whether HMRC were wrong to conclude that failures by Totnes Wines' previous owner had relevance to the application by MJL

164. We consider that the decision letters do not show that the failures by Totnes Wines' previous owner had any significant influence on HMRC's decision to refuse the applications by MJL.

165. Even if the circumstances had been taken into account we consider that Mr Packer's evidence that the previous owner's VAT debt was not relevant to him, despite

the evidence of the continuing involvement of the individual in the business, would be a relevant factor for consideration in determining whether MJL was a fit and proper person as it would be evidence of a connection with a non-compliant business.

Conclusion

166. Having considered all of the evidence before us and the submissions of the parties, we find that the appellants have not established on the balance of probabilities that the decisions to refuse their applications for approval under the AWRs regime were unreasonable.

167. The appeals are therefore dismissed.

168. 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.

ANNE FAIRPO

TRIBUNAL JUDGE

RELEASE DATE: 19 MARCH 2020