



TC06013

Appeal number: TC/2016/05869

EXCISE DUTY - Alcohol Wholesaler Registration Scheme - appeal against refusal of application for registration – whether Respondents could not reasonably have decided that Appellant not ‘fit and proper person’ to carry on activity of wholesale of dutiable alcoholic liquor - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BETWEEN

ROOHOP LIMITED

Appellant

- 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 on 24 March 2017

Nick Yeo, counsel, instructed by Kingsley Napley LLP, solicitors, for Roohop

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

DECISION

Introduction

1. The Appellant ('Roohop') appeals against a decision of the Respondents ('HMRC') to refuse Roohop's application to be registered under the Alcohol Wholesaler Registration Scheme ('AWRS') as an approved wholesaler of alcoholic goods. HMRC refused the application because they were not satisfied that Roohop was a fit and proper person to carry on the activity of the wholesale of dutiable alcoholic liquor.

2. For the reasons set out below, I have decided that Roohop's appeal must be dismissed.

Background

3. Roohop is a limited company and was incorporated on 18 May 2015 for the purposes of carrying on business in the United Kingdom in the sale of wine, beer, spirits and other alcoholic beverages wholesale. Mr Jaspreet Anand is the sole shareholder and director of Roohop. The day-to-day running of the business is carried out by Mr Anand and Mr Jas Dosanjh. Roohop was registered for VAT on 19 April 2016 with effect from 1 December 2015. It has leased premises, which include a warehouse, in Belvedere, Kent. In order to carry on business, it purchased a forklift truck, pallet trucks, extensive racking, alarm systems and CCTV. It also leased two vehicles.

4. Mr Anand is also the sole shareholder and director of Jassim Limited ('Jassim') as well as the company secretary. Jassim is a limited company which was incorporated on 11 August 2008. Jassim initially engaged in the import and export of alcoholic goods into and out of the UK. Jassim stopped trading in the UK in 2012 and now trades only in Europe. In 2016, Jassim's turnover was £21.3 million. The day-to-day running of Jassim is carried out by Mr Anand and Mr Dosanjh. Jassim stopped trading in the UK because Mr Anand considered that HMRC was taking an unfair and heavy-handed approach to the business including making unwarranted seizures of its goods. I discuss the seizures at [26] to [40] below.

Statutory test for approval

5. Part VIA of the Alcoholic Liquor Duties Act 1979 ('ALDA'), which was inserted by the Finance Act 2015 with effect from 26 March 2015, provides for the regulation of the wholesale of alcoholic liquor upon which duty is charged under that Act. The selling of alcohol wholesale is a controlled activity under that Part.

6. In so far as relevant to this appeal, section 88C ALDA provides:

"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.

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

Meaning of fit and proper

8. There is no definition of “fit and proper person” in ALDA. HMRC has published non-statutory guidance on whether a person is regarded as fit and proper in Excise Notice 2002: Alcohol Wholesaler Registration Scheme (‘EN 2002’). At the relevant time, section 6.10 of EN 2002 stated:

“6.10 The fit and proper test

Only applicants who can demonstrate that they’re fit and proper to carry on a controlled activity will be granted approval. This means HMRC must be satisfied the business is genuine and that all persons with an important role or interest in it are law abiding, responsible, and don’t pose any significant threat in terms of potential revenue non-compliance or fraud.

HMRC will assess all applicants (not just the legal entity of the business but all partners, directors, and other key persons) against a number of ‘fit and proper’ criteria to establish:

- there’s no evidence of illicit trading indicating the business is a serious threat to the revenue, or that key persons involved in the business have been previously involved in significant revenue non-compliance, or fraud, either within excise or other regimes, some examples of evidence HMRC would consider are:
 - assessments for duty unpaid stock or for other under-declarations of tax that suggest there’s a significant risk that the business would be prepared to trade in duty unpaid alcohol
 - seizures of duty unpaid products
 - penalties for wrongdoing or other civil penalties which suggest a business don’t (*sic*) have a responsible outlook on its tax obligations
 - trading with unapproved persons
 - previous occasions where approvals have been revoked or refused for this or other regimes (including liquor licensing etc)
 - previous confiscation orders and recovery proceedings under the Proceeds of Crime Act
 - key persons have been disqualified as a director under company law
- there are no connections between the businesses, or key persons involved in the business, with other known non-compliant or fraudulent businesses
- key persons involved in the business have no criminal convictions which are relevant for example, offences involving any dishonesty or links to organised criminal activity - HMRC will normally disregard convictions that are spent provided there are no wider indications that

the person in question continues to pose a serious threat to the revenue (an ‘unspent’ conviction is one that has not expired under the terms of the Rehabilitation of Offenders Act 1974)

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

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

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

Following an amendment to EN2002, the guidance on the ‘fit and proper’ test is now to be found in section 6.9 of EN2002 but is materially unchanged.

9. By ‘other key persons’, HMRC means those who play a key role in the operation of the business to the extent that they can be seen as one of its ‘guiding minds’, eg persons who have authority and responsibility for directing and controlling the activities of the business or day to day management.

Roohop’s application for AWRS approval

10. On 29 March 2016, Roohop applied to be approved and registered as a wholesaler of alcohol under the AWRS. On 6 May, HMRC officer Lauren Roberts wrote to Roohop to say that she would visit its premises in order to consider the application. The visit was carried out by Ms Roberts on 9 May 2016. Ms Roberts asked several questions in order to assess the application. In a letter on the same day, Ms Roberts requested the following information:

- (1) a list of the set-up costs of the business;
- (2) a list of the assets of the company, including cash in the bank;
- (3) a list of intended stock, including prices;
- (4) a copy of Roohop’s due diligence pack and details of what would be done with the information obtained;

(5) a copy of Roohop's business plan, including estimated annual turnover.

11. After some extensions and delays in the post, Ms Roberts received the information from Roohop on 9 June. In a letter dated 21 July 2016, Ms Roberts refused Roohop's AWRS Application. In the letter, she said that Roohop did not meet the requirements of the AWRS fit and proper criteria. The letter stated that Ms Roberts had reached her view about Roohop having taken the following matters into account:

“1. Director Jaspreet Anand is connected to Jassim Limited which has been involved in significant revenue non-compliance and is still the sole director of this business.

2. Jassim Limited have had goods seized and destroyed by the UK Border Force, for illegal importation of wines from the European Union, including:

- on 07/10/2010 15750 litre (*sic*) of Italian wines were seized and destroyed under our reference number 1172/10(E1895173).
- On 28/04/2010 7876 litres of Italian wines were seized and destroyed under our reference number 0089/10(E1719769).
- on 20/10/2011 15750 litres of Italian wines were seized and destroyed under our reference number 1582/11(E2580785).
- on 26/08/2011 2553.28 litres of Beer was (*sic*) seized and destroyed under our reference number 1023/11(E2492878).

3. During my meeting in your office on 13 May 2016, I asked you to confirm whether you had any outstanding debts with HMRC for Roohop Limited, Jassim Limited or any other associated business. You disclosed one PAYE debt of £17,126.57 which has now been paid, however you failed to disclose that you have significant unmanaged VAT and Self-Assessment debts outstanding.

4. You failed to disclose Jassim Limited was refused a WOWGR approval on 30 November 2012 because you did not meet the fit and proper criteria.

5. The business has not provided evidence of a customer base.

6. Your business plan provided on 9 June 2016 which included prices, contradicts your statement that no prices had been agreed with your supplier.”

12. If HMRC refuse an application for approval and the applicant wishes to challenge that decision then the applicant can either appeal immediately to the First-tier Tribunal ('FTT') under section 16 of the Finance Act 1994 ('FA94') or ask for the decision to be reviewed by another HMRC officer not previously involved in the matter and then, if the decision is confirmed on review, appeal to the FTT.

13. On 19 August 2016, Roohop's solicitors, Kingsley Napley, requested a statutory review of Ms Roberts's decision to refuse the application. In that letter, Kingsley Napley set out their response to the points made in Ms Roberts's letter and provided further information.

14. A review was carried out by HMRC officer Faisal Jahangir. On 30 September 2016, Mr Jahangir wrote to Mr Anand to confirm the decision of Ms Roberts to refuse

Roohop's application for approval under the AWRS. In the letter, Mr Jahangir stated that he had considered all the material that Ms Roberts had considered in reaching her decision except for evidence relating to the seizure of 2553.28 litres of beer on 26 August 2011. Mr Jahangir had decided that there was insufficient evidence to link Jassim to that seizure and so it should not have been taken into account. In his letter, Mr Jahangir stated that a person may be found not to be fit and proper for a number of reasons that include but are not limited to those listed in section 6.10 of EN 2002. He considered the representations made on behalf of Roohop by Kingsley Napley, in relation to each of the reasons relied on by Ms Roberts in refusing Roohop's application for approval under the AWRS. I discuss each of those reasons, grouped under four headings, and what the parties say in relation to them below.

15. Roohop appealed to the FTT against HMRC's decision, confirmed after review, to refuse its application for approval under the AWRS.

Jurisdiction of FTT on appeal

16. 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 FA94. Section 16(4) provides that the FTT has a supervisory jurisdiction in relation to decisions as to ancillary matters as follows:

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

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

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

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

17. Section 16(6) FA94 provides that the burden of proof in an appeal under the section is on the appellant, ie Roohop.

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. In *Balbir Singh Gora v Customs & Excise Commissioners* [2004] QB 93, [2003] EWCA Civ 525, Pill LJ accepted that the tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision was reasonable.

Issue

19. The parties agree that the issue to be determined in this appeal is whether Roohop, which bears the burden of proof, has established that HMRC's decision to refuse to approve and register it under the AWRS as a wholesaler of alcoholic goods was one which no reasonable officer of HMRC could have reached. In order to do so, Roohop 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. I consider at [26] to [71] below each of the factors which were relied on by HMRC in reaching the decision to refuse to register Roohop as a wholesaler of alcoholic goods.

Evidence

21. Mr Anand produced a witness statement which, with his answers to a few questions from Mr Yeo in clarification, stood as his evidence in chief. He was cross-examined by Mr Hays. The HMRC officer who initially refused Roohop's application for approval under the AWRS, Ms Lauren Roberts, provided a witness statement which stood as her evidence in chief. She was not cross-examined by Mr Yeo who reserved his questions for Mr Faisal Jahangir, the officer of HMRC who carried out the review of Ms Robert's decision to refuse approval under the AWRS. Mr Jahangir also produced a witness statement. There were also two bundles of documents to which both parties referred. On the basis of the evidence, I find the material facts to be as set out below in my discussion of the matters relevant to HMRC's decision to refuse to register Roohop under the AWRS.

Approach to the review

22. In cross-examination, Mr Jahangir stated that he assessed each of the key persons, i.e. Roohop, Mr Anand and Jassim, to determine whether they were fit and proper persons to carry on a controlled activity. He stated that he used the guidance contained in EN 2002 to assess Roohop for fitness and propriety. He said that he believed that Mr Anand was a key person and, as he was also a director of Jassim, he should also consider Jassim. He confirmed that, in section 1 of his letter of 30 September 2016, he had said that Roohop did not meet the fit and proper criteria, as noted in EN 2002, because it had the same director as Jassim, a company which had had serious compliance issues previously. Mr Jahangir explained that that was just one of a number of reasons, which were outlined in the rest of the letter, and that no one-point in isolation had led him to conclude that Roohop was not a fit and proper person to carry on a controlled activity.

23. Mr Yeo submitted that the first paragraph of section 6.10 of EN 2002 correctly stated the test, which was derived from section 88C(2) ALDA and was helpful. He said

that HMRC must consider whether the applicant poses a significant threat in terms of revenue non-compliance or fraud. He contended that the second paragraph of section 6.10 of EN 2002 was unhelpful in so far as it referred to “criteria” which appeared to supplant the statutory test in section 88C(2) ALDA. He submitted that it gave the impression that these were criteria which had to be met rather than simply examples of factors that must be taken into account. Mr Yeo submitted that, in this case, HMRC had treated the matters in the second paragraph of section 6.10 as determinative rather than considering the statutory question of whether Roohop was fit and proper to be authorised under the AWRS.

24. Mr Yeo submitted that although Mr Jahangir had stressed in cross-examination that he had looked at a basket of reasons in reviewing Ms Roberts’ decision, the language of Mr Jahangir’s letter was impossible to reconcile with the “basket” approach. Mr Yeo submitted that it was Roohop alone whose fitness and propriety must be considered and Mr Jahangir had paid insufficient regard to the statutory test in section 88C(2) ALDA but had relied, too much, on the criteria set out in section 6.10 of EN 2002.

25. The guidance in EN 2002 is no more than that and so the meaning of the phrase is left to the judgment and discretion of the HMRC officer making the decision subject to the supervisory jurisdiction of the Tribunal. The decision maker will have regard to a number of factors when assessing the fitness and propriety of a person to carry on a controlled activity. It is obvious that those factors will include the person’s honesty and integrity; their competence and capability; and the commercial viability or credibility of the business. In the case of a corporate entity, the enquiry will extend to those natural persons who are control or direct the entity.

Connection with Jassim and seizures of alcohol in 2010 and 2011

26. Section 6.10 of EN 2002 states:

“HMRC will assess all applicants (not just the legal entity of the business but all partners, directors and other key persons) against a number of ‘fit and proper’ criteria to establish:

- there’s no evidence of illicit trading indicating the business is a serious threat to the revenue, or that key persons involved in the business have been previously involved in significant revenue non-compliance, or fraud, either within excise or other regimes, some examples of evidence HMRC would consider are:

...

- seizures of duty unpaid products

...”

27. In making her decision, Ms Roberts took into account four seizures. On review, Mr Jahangir decided that one of these seizures (the seizure of a quantity of beer on 26 August 2011) should not have been taken into account on the basis that there was insufficient evidence to link it to Jassim. He concluded that the remaining three seizures of Italian wines on 28 April 2010, 7 October 2010 and 20 October 2011 should be taken into account. Mr Jahangir said in his letter that that the three seizures had been made and Jassim had not challenged them so the goods were condemned as forfeit. Mr

Jahangir stated that HMRC were entitled to take the seizures into consideration as Jassim and Roohop were directly linked. Mr Jahangir concluded that:

“The evidence shows that the seizure of excise goods noted above as part of this review ... were seized from the company you have been linked to as a director. Therefore I find the information stated by Officer Roberts in relation to these 3 seizures to be correct.”

28. There is no dispute that the goods were seized as HMRC state in the decision letters and that Jassim did not contest the seizures.

29. In relation to the seizure on 28 April 2010, which was of a half load of Italian wine, Mr Anand states that the supplier, Montelorenzone, was a small family-run vineyard which Mr Anand understood was new to exporting or, at least, to exporting to the UK. Montelorenzone, and not Jassim, was responsible for the shipping and associated paperwork. Montelorenzone, or its agent, completed the Accompanying Administrative Document (‘AAD’) for the shipment, giving the relevant details of the consignment. It appeared to Mr Anand at the time that the documentation should have listed the wine and water included in the load in separate columns but Montelorenzone had entered the wine in the wrong column which led to the seizure. Jassim was told it could not contest the seizure because it was not the owner of the goods. Montelorenzone asked for the wine to be restored and, when it was refused, tried to appeal against the refusal. It appears from HMRC’s Statement of Case in that appeal that:

“The AAD showed that the movement guarantee for the goods had been provided by IDC the receiving warehouse in the UK. Enquiries established that IDC had not, in fact, used or authorised the use of their movement guarantee for this movement, hence it had been used unlawfully. The address in box 7 of the AAD was Mr Anand’s home address. Further the wine had been declared on the ship’s manifest as ‘non-alcoholic drinks’”

It appears that the appeal did not proceed to a hearing.

30. Mr Anand’s evidence is that the AAD was exactly the same as that for the previous load (the first importation from Montelorenzone) which was successful so no one had identified the errors in the paperwork. Mr Anand stated that Montelorenzone was responsible for paperwork and the errors, which were due to its inexperience in exporting wine. Mr Anand stated that there was no intention to evade duty on the shipment and, if it had not been seized, duty would have been fully paid when the wine was taken out of bond. Following the seizure and the unsuccessful appeal, Montelorenzone lost the wine and Jassim lost a supplier because Montelorenzone said they could not sustain losses like that.

31. Mr Anand’s evidence in relation to the seizure of wine on 7 October 2011 is that he had no knowledge of this shipment and knew nothing about the seizure because Jassim did not import the wines. The wines were imported under a Single Administrative Document (‘SAD’) which named Jassim as consignee. Mr Anand states that Jassim would not use a SAD as it would have had to pay duty and VAT up front as opposed to on release from bond.

32. No further details of the shipment seized on 7 October 2011 were made available to me and I accept, as I must in the absence of any evidence to contradict it, Mr Anand's evidence that Jassim had nothing to do with that importation of Italian wines. In its notice of appeal, Roohop stated that Mr Anand had no knowledge of the seizure. In his witness statement, Mr Anand acknowledges that, after the appeal notice was drafted, he had found a copy of the seizure notice, which was addressed to Jassim, filed with the paperwork relating to the seizure on 28 April 2010. He stated that he had not seen the document at the time it was delivered or until he was preparing for this appeal. In cross-examination, Mr Anand said that the seizure notice was dealt with by a gap year student who was working for Jassim as an office junior. He said that this person did not tell him about the seizure notice seizure. Mr Anand was slightly vague about the identity of the office junior and gave two names.

33. Mr Hays submitted that even if the document was wrongly filed, which was not conceded, that was a cause for concern. He further submitted that Ms Roberts's and Mr Jahangir's reliance on this seizure was entirely reasonable on the evidence available to them. The SAD named Jassim as the importer and it was sent a seizure notice and did not respond. Accordingly, HMRC were entitled to rely on the seizure of wine on 7 October 2011 in their assessment of whether Roohop was fit and proper.

34. I accept that the seizure notice was misfiled and that Mr Anand was unaware of it until he came to prepare for the hearing of this appeal. The seizure notice does not require any response from the recipient unless the recipient wishes to challenge the seizure. I accept that the fact that Jassim did not respond to the notice and did not challenge the seizure does not, in the circumstances, indicate that Jassim accepted responsibility for the importation or that the wine had been lawfully seized. I do not accept, as Mr Hays suggested in his skeleton but did not press in submissions, that the misfiling of the seizure notice suggested that Roohop's identity was being hijacked for a fraudulent purpose but I have accepted that Jassim had nothing to do with the importation. That, in itself, raises questions about how and why Jassim's name came to be used in relation to the unlawful importation of wines. There may be a satisfactory explanation but, if so, Roohop did not provide it.

35. As to the seizure of Italian wines on 20 October 2011, Mr Anand's evidence is that it was an arm's length purchase of alcohol from a supplier, Glass, in France. It was seized by HMRC due to errors in the description of the goods. Mr Anand said that the wine was seized because a Pinot Grigio Blush was wrongly described as a white wine. Jassim was not responsible for the misdescription. In fact, there were other defects in the paperwork and issues relating to the movement of the goods. The notice of seizure stated that there were indications that the unique ARC number had been used on at least one other occasion previously, which is an indication of fraud, and the load had been manifested not as wine or alcoholic products but as foodstuffs. In addition, the notice of seizure asserts that the explanations given by the driver and haulier of a delay in the movement were not credible and suggested that the trip would not have been commercially viable. Jassim initially asked for the goods to be restored but ultimately, did not pursue the claim as the goods were worth £17,500 and it was advised that the legal costs of pursuing the claim would have exceeded £22,000.

36. In his witness statement and in cross-examination, Mr Jahangir confirmed that he considered he regarded it as significant that there were seizures that were linked with

Jassim and that the fact that Jassim and Roohop had a common director, Mr Anand, was relevant to Roohop's application.

37. In relation to the seizures generally, Mr Yeo submitted that it was not sufficient for HMRC to say that there had been seizures of goods connected with Jassim. He contended that HMRC were required to look into the facts of the seizures and to consider whether they showed revenue non-compliance or fraud by persons connected with Roohop, eg Jassim, or their counterparties. He submitted that the three seizures discussed above did not demonstrate significant revenue non-compliance or fraud on the part of Jassim. He further submitted that HMRC did not have regard to the fact that the seizures had occurred some five or six years before Roohop made its application for approval and did not demonstrate that Roohop was not a fit and proper person in 2016. He also submitted that Jassim no longer engages in any further imports to the UK and Roohop intends to engage solely in domestic trade so there would be no risk to the UK revenue due to the errors in relation to import documentation as neither business engages or will engage in imports.

38. Mr Hays submitted that Mr Jahangir had simply looked at the fact of the seizures and that was appropriate in the circumstances. He did not accept that HMRC officers should delve into the merits of each seizure to determine who was at fault or how much duty had been at risk. He contended that the officer was entitled to consider the number of seizures and ask why a person should be involved in so many. In this case, Ms Roberts and Mr Jahangir had looked at the fact of the seizures and they were entitled to do so. There may be a question of the weight to be attached to such seizures but the officer was not bound to go into the question of underlying merits of each seizure. He contended that the seizures have occurred because Jassim had chosen to contract with a supplier which had failed to ensure that the importation of the wine was lawful. The wines exported by Montelorenzone were seized because Montelorenzone had taken minimal steps to ensure that it complied with its obligations and Jassim could not avoid all responsibility simply because it was the importer rather than the exporter. Mr Hays also submitted that, in relation to the second seizure, there was an issue of credibility in relation to Mr Anand's explanation. In relation to the final seizure, Mr Hays submitted that it was a cause for concern that none of the matters raised as issues by HMRC in relation to the movement of the goods seemed to give Mr Anand any cause for concern.

39. In relation to the seizures, I consider that HMRC were entitled to take account of the fact that a number of seizures to which Jassim appeared to be connected had taken place. I do not accept that HMRC should not be required to consider the circumstances of the seizures and the blameworthiness to be attributed to the person under consideration. It seems to me that all the relevant circumstances should be considered. These will include the number of occasions on which goods have been seized, when the seizures occurred, the reason for the seizures and the involvement of the person under consideration, whether the applicant for AWRS approval or a connected person. Such matters go to the weight to be given to the seizures in considering whether the applicant is a fit and proper person to be authorised under the AWRS. Plainly, the seizure of goods on the ground that they were being imported with the intention of evading duty due on them would be relevant and prejudicial to an application for AWRS if a connection to the applicant could be established. On the other hand, seizure of goods on the ground of an error in the accompanying documentation, particularly if a one-off or occasional error, prepared by someone other than the applicant or a connected person

would seem to me to require further investigation before it could be said to be evidence of a lack of fitness and propriety in the applicant.

40. It was clearly reasonable for Ms Roberts and Mr Jahangir to take account of the fact that Jassim had been involved in three importations where goods had been seized and condemned as forfeit because of irregularities. The sole director of Roohop, Mr Anand, was also the sole director of Jassim. Any indications that Jassim was not a fit and proper person would, because they had a common director, reflect on Roohop. However, the fact that Jassim was linked to three seizures is not by any means determinative. Mr Jahangir only had regard to the fact that there had been three seizures involving Jassim. He did not consider the underlying facts of the seizures, whether Jassim was at fault or an innocent party and whether, if at all, Jassim's compliance had improved since the most recent seizure in October 2011. In my view, a consideration of such matters was necessary before Mr Jahangir could reasonably conclude that the seizures supported a decision that Roohop was not a fit and proper person to carry on a controlled activity in 2016. It follows that I consider that the failure of Mr Jahangir to consider such matters was a flaw in the decision-making process. It does not follow, however, that Mr Jahangir's conclusion that Roohop is not a fit and proper person was unreasonable if one or more of the other matters that he took into account justifies such a conclusion.

Failure to disclose outstanding unmanaged debts owed to HMRC

41. Section 6.10 of EN 2002 states:

“HMRC will assess all applicants (not just the legal entity of the business but all partners, directors and other key persons) against a number of ‘fit and proper’ criteria to establish:

...

- there are no outstanding, unmanaged HMRC debts or a history of poor payment.”

42. In relation to the outstanding unmanaged debts, Ms Roberts said in her letter of 21 July 2016:

“During my meeting in your office on 13 May 2016, I asked you to confirm whether you had any outstanding debts with HMRC for Roohop Limited, Jassim Limited or any other associated business. You disclosed one PAYE debt of £17,126.57 which has now been paid, however you failed to disclose that you have significant unmanaged VAT and Self-Assessment debts outstanding.”

43. In the letter requesting a review, Kingsley Napley explained that, at the time of the letter, neither Jassim nor Roohop had any outstanding debts to HMRC. The letter also explained that Roohop was expecting a substantial VAT refund. In his letter of 30 September 2016, Mr Jahangir said in relation to the outstanding debts:

“Whether the debts are now paid in any way being managed through agreement with the banking arm of HMRC is something that I cannot consider. I can only review the evidence at the time the decision was made to determine whether a correct decision was made using the information available. Although I would be inclined to find merit in your representations if there was one debt, the fact that the matter is, there

were, at that time at least three outstanding debts. Although Roohop Limited may now have a VAT refund due, there is still evidence of unmanaged debt by a company that you, the applicant, are linked to in your capacity as director of Jassim Limited. This again, fails to satisfy the fit and proper criteria as described in Excise Notice 2002.”

44. In his witness statement, Mr Jahangir stated at [15] to [17]:

“15. I considered these outstanding debts with HMRC within my review and concluded that they constitute a history of poor payment which is relevant in terms of assessing whether the appellant is fit and proper as stated in excise notice 2002.

16. ... These VAT and Self-assessment debts were settled after the decision was made. In my review, I took account of the fact that it had been established that, at the time the decision to refuse was made, Jassim Ltd had outstanding debts which demonstrates a history of poor payment.

17. Within my review I could only take into account the decision made by Officer Roberts and the evidence available at the time of her decision evidencing why the decision was made. During my review I stated that at the time of the Decision made by Officer Roberts the appellant had three outstanding debts. As a review officer, it is my job to review Officer Roberts’ decision. I also take into account the representations made against these refusal decisions by the appellant and view if they are of any merit and if the decision made at the time by Officer Roberts was technically valid and correct.”

45. Mr Yeo accepted that there could be no objection to HMRC considering the existence of any unmanaged VAT and direct tax debts as a factor. He submitted that EN 2002 went further and appeared to impose a condition that there should be no outstanding, unmanaged debts owed to HMRC or any history of poor payment if a person were to be regarded as fit and proper. Mr Yeo also submitted that Mr Jahangir should have taken into account the fact that the two outstanding VAT returns had been submitted and, at the time of the review letter, neither Roohop nor Jassim had any outstanding tax debts. In cross-examination, Mr Jahangir said that the existence of outstanding debts was one of the requirements to be met when assessing whether a person was fit and proper and that it was a requirement that an applicant does not have any debts. He said that he took into account the fact that Roohop had outstanding debts. He stated that he could only consider the evidence available at the time of the decision of Ms Roberts. In reply to a question from Mr Hays in re-examination, Mr Jahangir accepted that, in her letter, Ms Roberts had offered Roohop the opportunity of providing any further information that it wanted her to consider and the opportunity to have its case reviewed by a different officer.

46. Mr Hays submitted that HMRC were entitled to take the existence of the debts into account and the amount of those debts. Mr Hays acknowledged that Mr Jahangir did not consider that, at the time of his review, the debts did not exist.

47. I consider that Mr Jahangir was wrong to say in his letter of 30 September 2016 and witness statement that he could only take into account the evidence available Ms Roberts at the time of her decision and so was not able to consider the fact that, at the time of his review, the debts referred to by Ms Roberts as one of the factors that justified her decision had been paid. That does not appear to be the position taken by

HMRC which was made quite clear by a letter dated 27 August 2016 from HMRC to Kingsley Napley acknowledging their request for a review. In that letter, HMRC stated that:

“if there is any further information you would like to be considered, please send this as quickly as possible for the attention of the Review Officer...”

48. There would have been no point in including such a sentence in the letter if the review officer, Mr Jahangir, was not able to consider further information. Although it is clear that Mr Jahangir had some regard to the representations made by Roohop, it seems to me that his view that he was precluded from considering the fact that the debts had been paid by the time of his review revealed another flaw in his decision-making process. The significance of Mr Jahangir’s view of the restricted scope of his review is shown by the fact that he stated that if Roohop had had only one debt then he would have been inclined to find merit in Roohop’s representations but he did not find any merit in them because there were three outstanding debts. Had Mr Jahangir had regard to the position at time of his review, he would have noted that there were no outstanding debts and, applying his own assessment, have found merit in Roohop’s representations.

49. I do not mean to suggest that the decision maker can only have regard to the current state of affairs. The existence of any debts at the time of the decision or in the past will be a relevant factor to take into account in assessing whether an applicant is a fit and proper person. I consider that the decision maker is entitled to have regard to any history of indebtedness of the applicant and any associated persons as well as the amount of debt as one of the factors in deciding whether an applicant is a fit and proper person. A history of unmanaged tax debts or even current outstanding payments is, however, no more than a factor to be taken into consideration and is not determinative of an application for approval.

50. Ms Roberts also considered that Mr Anand’s failure at the interview to reveal that he had an outstanding self-assessment tax to pay demonstrated a lack of candour which could be evidence of a lack of integrity. I agree that it was reasonable to take this into account (see my comments at [60] below). I note that the failure to disclose the debts (as opposed to the fact that they were outstanding at the time of Ms Roberts’ decision) was not mentioned in either Mr Jahangir’s letter of 30 September 2016 or his witness statement and so it appears that HMRC did not give it any or, at least, any significant weight in assessing the fitness and propriety of Roohop on review.

Failure to disclose refusal of Jassim’s WOWGR approval

51. Section 6.10 of EN 2002 states:

“HMRC will assess all applicants (not just the legal entity of the business but all partners, directors and other key persons) against a number of ‘fit and proper’ criteria to establish:

- there’s no evidence of illicit trading indicating the business is a serious threat to the revenue, or that key persons involved in the business have been previously involved in significant revenue non-compliance, or fraud, either within excise or other regimes, some examples of evidence HMRC would consider are:

...

- o previous occasions where approvals have been revoked or refused for this or other regimes (including liquor licensing etc)
- ...”

52. Jassim applied for a licence under the Warehousekeepers and Owners of Warehoused Goods Regulations (‘WOWGR’) in May 2012. The application was refused on 30 November 2012 on the ground that HMRC were not satisfied that Jassim was fit and proper to hold a WOWGR approval. The refusal letter stated that account had been taken of the fact that Mr Anand had not disclosed that his former name was Jaspreet Singh and, in that name, he had been declared bankrupt in September 2006 and was discharged in 2010. The letter also referred to the same four seizures subsequently relied on by Ms Roberts. Mr Anand’s evidence was that he asked for a review and chased a response in August 2013. It appears that HMRC never carried out a review. Jassim later stopped trading in the UK and only traded in Europe so did not need WOWGR approval.

53. In her letter to Mr Anand of 21 July 2016, Ms Roberts said:

“You failed to disclose Jassim Limited was refused a WOWGR approval on 30th November 2012 because you did not meet the fit and proper criteria.”

54. In his letter of 30 September 2016, Mr Jahangir stated:

“The very fact that there was a refusal for the company that you are linked to, as a director, on this occasion leads me to conclude that you have not met the ‘fit and proper’ criteria as detailed Excise Notice 2002 where it states that HMRC will consider previous occasions of where approvals have been refused. In your capacity as Director of Jassim Limited, you have had WOWGR refused and therefore I find this has failed to satisfy the criteria as part of the fit and proper test.”

55. In his witness statement, Mr Jahangir justified his decision by reference to three matters:

- (1) Jassim Limited was refused a WOWGR approval;
- (2) the fact that the refusal had not been disclosed to Ms Roberts during her visit; and
- (3) the fact that Mr Anand was previously known as Jaspreet Singh and his failure to disclose the change of name was a reason for refusing his WOWGR application.

Mr Jahangir also said that the notification was not the critical point but, rather, the fact that a WOWGR application had been refused was key in determining whether the Appellant is fit and proper for AWRS. When he gave evidence, Mr Jahangir said that he took both things, i.e. the failure to tell Ms Roberts about the refusal of the WOWGR application and the fact of the refusal itself, into account as part of the basket of evidence.

56. Mr Anand accepted in cross-examination that he did not tell Ms Roberts that Jassim had been refused a WOWGR approval. He explained that he had asked for a review of the decision to refuse approval but nothing had come of it. He said that he did

not pursue it further because he did not want to incur further costs. In relation to the alleged change of name and bankruptcy, Mr Anand explained that Singh was commonly used as a middle or last name by male Sikhs. It is his middle name. The debts had been incurred by his brother who had used Mr Anand's name, without his consent, to obtain credit. Mr Anand said that, as a result, he had lost everything but he had to accept it as it was a family matter. He said that his brother had given the name "Jaspreet Singh" to the petitioner. The Insolvency Service knew him as "Jaspreet Singh (Anand)".

57. Mr Yeo submitted that Mr Jahangir wrongly treated the refusal of Jassim's WOWGR approval as if it was determinative of the application for approval under the AWRS. Mr Yeo said that Mr Jahangir's letter stated that the refusal of WOWGR of itself means that the fit and proper criterion has not been met in the current application. He contended that, in fact, it added nothing to the reasons for refusing the AWRS application because the reasons underlying the WOWGR refusal were the same, apart from the bankruptcy, as those relied upon in relation to the AWRS application so were incapable of lending any additional weight to the refusal. The WOWGR refusal, was in any event, subject to a request for review, which was never carried out so the decision could not be relied on as definitive of the position at the time. He contended that the bankruptcy did not take matters further as it did not show fault on the part of Mr Anand and was not referred to in section 6.10 of EN 2002. Further, Mr Anand had explained his use of the name Singh.

58. Mr Hays accepted that the WOWGR refusal was based on many of the same elements as had been considered by Ms Roberts in refusing the AWRS application. He submitted that Mr Anand had not told Ms Roberts that the WOWGR application had been refused. Ms Roberts and Mr Jahangir were entitled to take that into account as well as the fact that a WOWGR application had been refused (where the issue is also whether the person is 'fit and proper' in the context of alcohol trading). In relation to the bankruptcy, Mr Hays did not take any point on the use of the name Singh but submitted that Mr Anand's explanation that his brother had obtained credit using his name showed that Mr Anand was "someone who becomes involved in situations".

59. I consider that it is clearly appropriate to take into account previous refusals of applications for approval or authorisation. A refusal of an application to be authorised under WOWGR is obviously particularly relevant in this case because of the close similarities between the AWRS and WOWGR authorisation processes but the one is not necessarily determinative of the other. Although the review letter might perhaps have been better expressed, it does not appear to me that Mr Jahangir treated the fact that Jassim had been refused authorisation under WOWGR as determinative of Roohop's application for AWRS authorisation. However, insofar as the refusal of Jassim's WOWGR application was based on the seizures discussed above, the same points as I make in [40] apply and I consider that they do not support a conclusion that Roohop was not fit and proper without further consideration of the facts of the seizures. In relation to the use by Mr Anand of the name Singh in relation to his bankruptcy, I accept his explanation and I do not regard that as supporting the decision to refuse AWRS authorisation. The fact that Mr Anand became bankrupt as the result of the actions of his brother does not show that Mr Annand and, through him, Roohop are not fit and proper to carry on a controlled activity.

60. I consider that it was reasonable of Mr Jahangir to take account of the fact that Mr Anand failed to disclose to Ms Roberts that Jassim had been refused a WOWGR approval. No satisfactory explanation was given for the failure to disclose that information, which Mr Anand must have known was relevant to the application for AWRS approval, to Ms Roberts during her visit. Such a lack of frankness and transparency is relevant to an assessment of Mr Anand's integrity. I consider that a person who lacks integrity is unlikely to be regarded as a fit and proper person to carry on a controlled activity. It is for the decision maker to evaluate whether, in the circumstances, the failure to disclose relevant information shows a lack of integrity and, if so, whether it is sufficiently serious that HMRC cannot be satisfied that the applicant is a fit and proper person to carry on a controlled activity. In this case, I consider that both Ms Roberts and Mr Jahangir were entitled to take Mr Anand's failure to disclose that Jassim had been refused authorisation under WOWGR into account and to conclude that, in light of that non-disclosure of a relevant matter, they were not satisfied that Roohop is a fit and proper person to carry on a controlled activity.

Business plan and viability issues

61. Section 6.10 of EN 2002 states:

“6.10 The fit and proper test

Only applicants who can demonstrate that they're fit and proper to carry on a controlled activity will be granted approval. This means HMRC must be satisfied the business is genuine and that all persons with an important role or interest in it are law abiding, responsible, and don't pose any significant threat in terms of potential revenue non-compliance or fraud.

...

- the business has provided sufficient evidence of its commercial viability and/or credibility - HMRC won't approve applicants where they find that they cannot substantiate that there's a genuine plan to legitimately trade from the proposed date of approval

...”

62. In her letter of 21 July 2016, Ms Roberts stated as reasons for the refusal of the AWRS application:

“5. The business has not provided evidence of a customer base.

6. Your business plan provided on 9 June 2016 which included prices, contradicts your statement that no prices had been agreed with your supplier.”

63. In her witness statement, Ms Roberts states that Mr Anand was unable to supply a pricing structure from his sole supplier, Drinks Inc. Limited, a company based in Belfast, because no prices had been agreed. She also refers to the fact that the business plan showed a cash-flow forecast and costs but that it was not clear to her, and Mr Anand did not explain, how these matters had been established given that there appeared to have been no research conducted that would show a business demand.

64. In his letter, Mr Jahangir relied on two points relating to commercial viability:

“5. The business has not provided evidence of a customer base

You contend that Roohop Ltd does not have a customer base at present due to the fact Roohop Ltd has not commenced trading as of yet, and that Roohop Ltd intends to target local retailers such as pubs, restaurants, shops and nightclubs.

Due to the fact that you have no other commercial relationships for HMRC to evaluate it is difficult HMRC to ascertain or even evidence business viability.

During your meeting with Officer Roberts you were unable to give details of agreed prices to purchase and sell your goods despite having prepared a business plan, a profit and loss account and an estimated turnover.

You also plan to use Drinks Inc as your supplier who in addition, but there are no contracts or pricing structures in place for supply between yourself and your supplier.

Section 6.10 Excise Notice 2002 states that HMRC will assess whether applicants have provided sufficient evidence to demonstrate this. HMRC won't approve applicants where they find that the application cannot substantiate that there is a genuine business plan.

I believe that due to the basket of evidence collected here, the business is not viable. I am unable to assess how you have forecasted cash flow if you cannot establish demand for goods nor provide any evidence of any research you may have undertaken therefore I find merit in HMRC's explanation. On this basis you have not satisfied the due diligence requirements of the fit and proper criteria as stated in Excise Notice 2002.

6. The business plan contradicts the statement that no prices have been agreed with the supplier

...

You have put forward that it is impossible for Roohop Ltd to agree prices for future trade due to price fluctuations. In addition, you also refer to a business plan being submitted to Santander which contained indicative prices for the budgeted stockholding.

I have reviewed whether the evidence gathered is sufficient to demonstrate whether the business is not credible viable. You contend that you have no customer base due to the fact that the company is new and has not commenced trading. On this basis, I am then unable to assess how you have forecasted cash flow if you cannot establish demand for the goods, nor provide the evidence of any research undertaken. It is difficult for HMRC to ascertain or assess credibility of a pricing mechanism that remains unsupported.

If the business is unable to demonstrate how the goods are to be priced and what the actual demand is, then any reasonable person cannot assume that the forecast of profitability to be valid. I therefore conclude that on this basis, the business has been unable to demonstrate it is commercially viable as detailed in Excise Notice 2002. ... ”

65. In his witness statement, Mr Jahangir says:

“20. I considered the evidence indicating that the Appellant may not be commercially viable. The Appellant’s agent had stated that the business does not have evidence of a customer base during the time of my review as it had not commenced trading. Furthermore, it did not have any other commercial relationships and there was, therefore, nothing to support an assertion that the Appellant was commercially viable. I also considered the decision by Officer Roberts that the business plan provided contradicted the Appellant’s statement that no prices had been agreed with the supplier. I analysed Officer Roberts’ notes dated 9 May 2016 where questions regarding prices were asked. Officer Roberts had established during her visit to the Appellant that there were no customers in place and there was no evidence of a contract of supply between the Appellant and his sole supplier Drinks Inc. Officer Roberts’ statement deals further with this aspect of the Appellant’s application.”

66. Mr Anand’s evidence was that, as a new company applying under the AWRS, Roohop could not begin trading and, therefore, did not have a customer base. He stated that he had been in contact with one customer which had stated that it would be willing to do business with Roohop. He considered that HMRC had not properly understood Roohop’s business or business plan. He acknowledged that a business plan is, by its nature, a somewhat aspirational document which will inevitably contain a number of uncertainties, especially for a new company. He stated that he had used very tight margins in the business plan. In cross-examination, he acknowledged that a reference in the executive summary of the business plan to “B&B drinks industry” was an error and said that he could not explain it. Mr Anand said that the business plan had been written by a colleague, Mr Mukesh Shah, who had retired in 2009. Mr Anand said that he had discussed the main points in the business plan with Mr Shah but he had not read it before it was sent to the bank.

67. Mr Yeo submitted that Roohop provided HMRC with a business plan for Santander Bank, which included indicative prices at which Roohop expected to be able to acquire stock and three years of projections. It was not possible to include actual prices as prices vary over time. Mr Anand had eight years of experience trading in wholesale alcohol across Europe and within the UK (when Jassim used to import to the UK) to which HMRC appear to have given no weight. Roohop had held discussions with its intended supplier, Drinks Inc. Mr Yeo submitted that it was unreasonable of HMRC to require Roohop, as a new business, already to have a customer base.

68. Mr Yeo also submitted that the fact that Roohop had made considerable investment into its business demonstrated its commitment and supported Mr Anand’s belief in its credibility. HMRC failed to take account of this. I do not accept that the level of investment demonstrates the viability of a business. History is littered with examples of large-scale investments that were poured into businesses that proved to be unviable.

69. Mr Hays submitted that the business plan lacked credibility, especially as Mr Anand had admitted that he had not read it before it was sent to the bank. He contended that the evidence presented by Roohop to HMRC was very thin. The business plan document did not contain any information in relation to who the customers would be and there was no analysis or detail about how Roohop would market the new business.

He contended that Ms Roberts' principal concern was the forecast cashflow because it was not clear how it had been established as there appeared to have been no research conducted that would show a business demand. Mr Hays submitted that the lack of evidence of customers and the lack of clarity about the prices at which Roohop could buy its stock created uncertainty about the cash flow projections and led Ms Roberts to conclude that the business was not viable. In short, Ms Roberts and Mr Jahangir were entitled to conclude that Roohop had not demonstrated that the business would be viable.

70. I accept that, as Mr Anand stated in his evidence, it would not be possible for a business starting up to provide firm figures for costs and turnover or identify its suppliers and customers unless and until it is granted approval under AWRS and can start trading. However, that does not mean that a business cannot provide a detailed and credible business plan. Such a plan might be expected to include an explanation of the new business and its strategy, its products or services and what distinguishes it from competitors (or that there are no competitors). The plan would probably identify future suppliers and potential customers as well as set out a marketing strategy to attract and retain customers. The plan would also contain detailed financial projections, based on realistic assumptions, to show that the business will be a commercially viable one.

71. Neither Ms Roberts nor Mr Jahangir was satisfied, having considered Roohop's business plan, that the business was commercially viable and/or credible. Having read the business plan, I consider that Ms Roberts and Mr Jahangir were entitled to form the view that there was a lack of evidence about who were the proposed customers and how they would be acquired as customers. It is understandable that a new business is not able to provide firm prices and turnover figures as it has not started trading and must base its projections on assumptions. However, I consider that Ms Roberts and Mr Jahangir were entitled to conclude that the statements about pricing and turnover in the business plan was not sufficient to demonstrate that the business would be commercially viable.

Overall assessment

72. I now consider the decision that Roohop is not a fit and proper person to carry on the activity of the wholesale of alcoholic liquor in light of all the circumstances taken into account by HMRC and my comments on them set out above.

73. HMRC may approve a person 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. In deciding to refuse Roohop's application, HMRC had particular regard to the four matters described above. Each matter was plainly relevant to the issue of whether Roohop is a fit and proper person to carry out a controlled activity and, as discussed above, each one raised serious questions about Roohop's fitness and propriety. However, I have decided that HMRC's decision making process in relation to two of the matters was flawed but that does not necessarily undermine the decision to refuse to approve Roohop under the AWRS. I have concluded that HMRC correctly took account of Mr Anand's failure to disclose that Jassim had been refused authorisation under WOWGR and the unsatisfactory nature of the business plan. On the basis of those two factors, which seem to me to be significant in the context of a fit and proper test, I consider that HMRC were entitled to conclude that they were not satisfied that Roohop is a fit and proper person to carry on the activity of the wholesale of alcoholic liquor and the

decision to refuse to approve Roohop under the AWRS was not so plainly wrong that no officer of HMRC, acting reasonably, could have reached it.

Decision

74. For the reasons set out above, Roohop's appeal against HMRC's decision to refuse to approve Roohop under the AWRS is dismissed.

Right to apply for permission to appeal

75. 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 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.

**GREG SINFIELD
TRIBUNAL JUDGE**

RELEASE DATE: 21 JULY 2017