TC03938

Appeal number: TC/2013/05120

EXCISE DUTY – company applying to be a Registered Dealer in Controlled Oils – another company with same director previously registered but now in liquidation – company vehicles subject to forfeiture for misuse of rebated kerosene and aviation turbine fuel – HMRC refusal of registration – whether unreasonable – held, no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHELMAX LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS CLAIRE HOWELL

Sitting in public at the Tribunal Centre, St Catherine's House, 5 Notte Street, Plymouth, Devon on 21 July 2014

Mr Philip George, director of the Appellant, for the Appellant

Mr Matthew Donmall of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the appeal brought by Chelmax Limited ("Chelmax") against the decision of HM Revenue & Customs ("HMRC") to refuse to register it as a "Registered Dealer in Controlled Oils" ("RDCO").

2. For the reasons set out in this decision, the Tribunal decided that HMRC's decision to refuse registration was not unreasonable and **DISMISSED** the appeal.

Preliminary procedural issue

3. HMRC made their decision to refuse to register Chelmax on 24 April 2013 ("the first decision") and this was followed by a statutory review on 4 July 2013. Mr George appealed the first decision to the Tribunal on 2 August 2013. HMRC provided their Statement of Case on 3 October 2013.

4. On 23 December 2013 HMRC applied to the Tribunal to stay the proceedings. The Tribunal allowed the application and stayed the proceedings until 21 February 2014.

5. On 4 February 2014, HMRC withdrew the first decision and replaced it with another decision ("the second decision") made by Officer Dunn. The second decision, like the first, refused to register Chelmax as an RDCO. It carried its own appeal rights.

6. When he received the second decision, Mr George telephoned the Tribunal Centre in London and was told that he did not need to make a new appeal. For their part, HMRC applied to the Tribunal for permission to amend both their list of documents and their Statement of Case; the Tribunal consented to this application. Both Mr George and Mr Donmall told us that they wanted the case to proceed on the basis that it was Chelmax's appeal against the second decision.

7. Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2008 sets out the procedure that should be followed when an appeal is made. Rule 7 says that "if a party has failed to comply with a requirement in these rules, the Tribunal may take any action which it considers just" and that this includes waiving the requirement.

8. It appears to us that the Tribunal has already waived compliance with the procedures set out in Rule 20, but for the avoidance of doubt, this Tribunal confirms that the appeal before us is Chelmax's appeal against the second decision and that we waive any remaining procedural requirements with which either or both of the parties have failed to comply, such that the appeal is properly made.

Evidence

9. HMRC provided the Tribunal with a bundle of documents containing:

   (1) the correspondence between the parties and between the parties and the Tribunal;

(2) documentation arising from a visit by Officers Matthews and McColgan to Hovercam Limited ("Hovercam") on 2 October 2012, including: a visit summary; Officers' notebooks; test results; seizure information notices and a restoration agreement; and

(3) Companies House details for Chelmax and Hovercam.

10. Mr George provided two character references, as well as an email and a letter, both from the liquidator of Hovercam, dated 5 December 2013 and 11 July 2014 respectively. He gave oral evidence in the proceedings and was then cross-examined by Mr Donmall and answered questions from the Tribunal. We found him to be a generally honest witness, although (as discussed below) certain of his oral evidence contradicted contemporaneous documents and we found the latter to be more reliable.

The Facts

11. On the basis of the evidence summarised above, we find the following facts.

12. Hovercam was incorporated on 20 October 1993. It had two directors, one of whom was Mr George. It was based in Plymouth and supplied aviation turbine kerosene ("Avtur" or "JET1") to helicopters.

13. Avtur is an "unmarked" oil, meaning that it contains no Euromarker or other fiscal markers, such as are normally added to rebated oils to demonstrate that they have borne a lower rate of duty. In particular, rebated kerosene normally contains Euromarker.

14. On 16 November 2006 Avtur was classified as a "controlled oil," so suppliers of Avtur had to register with HMRC. Hovercam was approved as an RDCO.

15. On 30 September 2010 Chelmax was incorporated with Mr George as the director.

16. During October 2010, a bailiff acting for HMRC came to Hovercam's premises. He was told that Hovercam could not pay its VAT and that it was about to go into liquidation.

17. On 10 November 2010 a letter was sent to all Hovercam's creditors, including HMRC, advising of the intended liquidation. As at that date, Hovercam owed HMRC £47,750 in unpaid VAT.

18. The liquidation started on 25 November 2010 and Companies House was advised within the next four days. At some subsequent point, the liquidator sold the goodwill of Hovercam to Chelmax for £4,000. Hovercam's customers, supplies, and assets were also transferred to Chelmax, which trades under the name "Hovercam."

19. Mr George could not remember the date on which the goodwill had been sold to Chelmax. In answer to questions from the Tribunal he accepted that there was a gap between the date on which Hovercam had gone into liquidation and that on which Chelmax took over the goodwill. He said that the transfer had occurred during the

winter, which was always a quiet time but that he had filled up "a few" helicopters with Avtur during the gap period.

20. Chelmax continued to do business, effectively stepping into the shoes of Hovercam, supplying Avtur to helicopters.

21. On 2 October 2012, Officer McColgan and Officer Matthews from HMRC's Road Fuel Testing Unit ("RFTU") visited Hovercam's premises. Mr George told them he had been running a tractor on Avtur and that he used the tractor for cutting the grass around his site; he did not use it on the road. He also told them he had topped up the fuel in his tanker by using samples of fuel taken from each helicopter before it takes off. These samples have to be retained until after landing in case of problems during the flight; they are then normally discarded. Because Avtur has no fiscal markers, the Officers only knew about these uses of Avtur because Mr George told them.

22. The Officers seized the tractor and fuel tanker but returned them to Mr George without a penalty, advising him not to use Avtur in anything other than aircraft or helicopters.

The kerosene and the road vehicles: conflict of evidence

23. The Officers then tested the fuel in Mr George's two road vehicles, an Audi Quattro and a Volkswagen van. Both tested positive for Euromarker. Mr George was interviewed under the Police and Criminal Evidence Act 1984 ("PACE"). The account of this part of the interview, recorded in Officer McColgan's notebook, is as follows:

> PG: yes it's kerosene…
>
> JMc: where do you get the kerosene from?
>
> PG: I used to have it on site but not any more.
>
> JMc: What is it on site for?
>
> PG: For my helicopter. I had about 50 litres of kerosene left over.
>
> JMc: You were using kerosene in your helicopter?
>
> PG: Yes, it works, it actually said it [was] aviation fuel on the invoice. Occasionally when I run out of JET1 I use kerosene in my helicopter.
>
> JMc: Do you know it is illegal to use kerosene in a road vehicle?
>
> PG: Yes, I did it to try and save some money and because I had some spare.

24. However, in later correspondence with HMRC Mr George said that the kerosene was heating oil. He expanded this in the hearing, saying that he had drained heating oil from a redundant oil tank belonging to a building which had been converted into flats. He filtered the oil and reused it in the road vehicles. He said it was a one-off because he didn't want to waste the oil.

25. Mr Donmall drew Mr George's attention to the fact that he had signed the Officer's notebook. Mr George confirmed to the Tribunal that the Officers had completely and accurately recorded what had been said; he also confirmed that what he had said at that time was true.

26. Mr Donmall cross-examined Mr George as to why there was no mention of heating oil in the Officer's notebook. Mr George first said that he had thought it was mentioned; and then that he had been "under pressure and stress and was having a bad day." Specifically, he said that the reference to having "50 litres of kerosene *left over*" was a reference to the fuel left over from the heating oil tank.

27. The Tribunal prefers the original evidence given to Officer McColgan. We find it wholly implausible that at the time of his original interview Mr George completely overlooked mentioning that the kerosene had come from an old heating oil tank. This evidence is also inconsistent with Mr George's statement to Officer McColgan that the invoice for the kerosene used in the helicopter (and later used in the road vehicles) stated on its face that it was aviation fuel.

28. We thus find as a fact that the kerosene used by Mr George was not the filtered residue of a redundant heating oil tank, but from some other source.

Other facts relating to the visit

29. Mr George also told the HMRC Officers that he had put Avtur as well as kerosene into the road vehicles, even though he knew it was illegal to use Avtur in road vehicles.

30. The Officers seized the two road vehicles, which were then were restored to the company on payment of £1,000.

31. Officer McColgan asked Mr George if the company was registered as an RDCO and Mr George replied "I'm not sure I am to be truthful."

32. At the end of the meeting, Mr George said "the temptation was there. I thought using the red was the really bad thing." We understood that the reference to "the red" was to red diesel, which was not in issue in this case.

Subsequent events

33. On 10 December 2012, Mr George emailed HMRC's Mineral Oils and Relief Centre ("MORC") saying:

> "I would like to update the information you have on RDCO Number xxxxx. Hovercam Limited is in liquidation and ceased trading from October 20 2010. Chelmax Ltd t/a Hovercam took over the goodwill of the company/site as of that date and is trading normally…Please advise if I need to re-register as a new business or continue as is."

34. For the avoidance of doubt, we find that the date on which Chelmax took over the goodwill was not October 20 2010. In reliance on the information given by the

liquidator, and as set out earlier in this decision, the liquidation did not commence until 25 November 2010.

35. HMRC replied to Mr George's email on 13 December 2012, saying that Chelmax had to apply for registration as it was a completely different legal entity. Mr George completed the application on that same day. He ticked "no" in answer to the question "has any person controlling, managing, or otherwise involved in the business been convicted of an offence or had goods seized under the Customs & Excise Acts."

36. On 25 February 2013 HMRC began an audit of the company's fuel usage; they asked for information from 1 October 2010 to date. Mr George provided receipts and other details. The audit was closed on 24 April 2013 without HMRC taking any further action.

37. On 1 May 2013, HMRC refused to register Chelmax as an RDCO, for two reasons:

(1) Mr George had been a director of Hovercam. That company went into liquidation in October 2010, but Mr George failed to notify HMRC until December 2012, despite it being a condition of the RDCO scheme that HMRC be notified of any changes within 30 days.

(2) Chelmax had been detected using rebated fuel in road vehicles on 2 October 2012.

38. Mr George asked for a statutory review of the decision. The review letter dated 4 July 2013 refers to both of the above points and also states that it is very unlikely that HMRC would approve persons whose offences have been compounded in lieu of prosecution, as happened in the case of Chelmax on 2 October 2012. The letter concludes by saying that Chelmax is not "fit and proper to hold an RDCO registration."

39. Mr George appealed to the Tribunal on 2 August 2013. As already mentioned at the beginning of this decision, on 4 February 2014 HMRC issued a new review decision, made by Officer Dunn. This second decision:

(1) set out the facts, none of which is different from those found above;

(2) omitted the reference to the compounding of an offence, which had been incorrect;

(3) included Mr George's submissions that he was (a) unaware that he needed to notify the change from Hovercam to Chelmax and (b) he has been adequately punished for the misuse of fuel by the £1,000 penalty;

(4) set out the reasons for the decision as being (a) the failure to notify the relevant change in Hovercam, together with the fact that Chelmax had continued to trade without a licence for over two years and (b) the misuse of controlled oils by Chelmax in October 2012.

40. On 13 October 2013, Hovercam's liquidation was finally completed.

The relevant law and HMRC's Notices

41. The Tribunal's powers in relation to an appeal against a refusal to grant an RDCO are set out at FA 1994, s 16(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."

42. Avtur is a controlled oil as defined by s 27 of the Hydrocarbon Oil Duties Act 1979 ("HODA"). Under ss 100G and 100H of the Customs and Excise Management Act 1979 ("CEMA"), HMRC may make regulations which confer powers, duties, privileges and liabilities upon registered dealers in controlled oils, and may maintain a system of registration for dealers.

43. Regulation 4 of the Hydrocarbon Oil (Registered Dealers in Controlled Oil) Regulations 2002 ("the 2002 Regulations"), made under the powers given by s 100G CEMA, provides for the approval of any person who intends to buy, sell or deal in controlled oil as an RDCO.

44. Regulation 5 reads as follows:

> "**5. Conditions of approval and registration**
>
> (1) A registered dealer in controlled oil must give notice to the Commissioners of any change, or prospective change, in the information that he was required to furnish in his application for registration.
>
> (2) A notice given under paragraph (1) above must be given—
>
> (a) without delay, but in any event within 30 days of the change, and
>
> (b) in such form and manner as the Commissioners may require.
>
> (3) The approval and registration of registered dealers in controlled oil shall, in addition to any conditions or restrictions imposed on them by the Commissioners under section 100G(4) of the Management Act, be subject to such conditions as the Commissioners may prescribe."

45. Regulation 6 deals with "cessation of trade." Regulation 6(1) says that "A registered dealer in controlled oil who intends to cease the buying, selling, or dealing in controlled oil must notify the Commissioners without delay" and Regulation 6(4) that "without prejudice to paragraph (1) above, a registered dealer in controlled oil who has ceased to buy, sell, or deal in controlled oil must notify the Commissioners that he has so ceased within 7 days of cessation."

46. Notice 179A is concerned with Avtur. Paragraphs 4.2 and 4.3 of the version in force at the time of the second review decision gives MORC's address and says that registration forms can be obtained from them or by being downloaded from the HMRC website.

47. Paragraph 4.19 says that:

> "It is not the intention of the scheme to penalise you for genuine mistakes. In considering whether any action against you is appropriate, we will take into account your overall compliance with the scheme, the nature of the failing which led to you making the supply, and any other mitigating circumstances.
>
> Where your failings resulted from non-compliance with the scheme, for example, failure to obtain any of the information at paragraph 5.2 and/or failure to undertake any of the checks set out in paragraph 5.6, we will investigate the cause to establish any reasonable excuse. If, however, there are no mitigating circumstances or your failings persist, it is likely that we will take escalating action, such as the issue of warning letters followed by civil penalties. In the most serious cases we may also consider revocation of your RDCO approval.
>
> Section 7 sets out the penalties, sanctions and guarantees."

48. Part 7 of the Notice sets out various sanctions and penalties, including education based visits, warning (reminder) letters, civil penalties and withdrawal of approval which "is likely to arise where we are not satisfied, or are no longer satisfied, that you are a suitable person to be approved." At paragraph 7.5 it says:

> "We are likely to cancel your approval if:
>
> - It is considered necessary for the protection of the revenue because, for example, you have been involved in the misuse of controlled oil. In such cases, we are likely to prosecute you.
> - You persistently fail to meet the requirements of the scheme. However, this is likely to be the final step following a series of warning letters and civil penalties.
>
> We will notify you in writing of our intention to cancel your approval. Depending on the nature of the offence or contravention, we may consider allowing your approval to continue (subject to conditions) pending the outcome of any prosecution or appeal."

49. At 7.1 the Notice says:

> "In the majority of cases, the sanctions and penalties in paragraphs 7.3, 7.4 and 7.5, will be the final stages in an escalating scale of action against you. This will depend on the contravention but we would expect that withdrawal of approval would be the exception rather than the rule."

50. Notice 192 (again, in the version current at the time of the second review decision) says at paragraph 3.7:

> "If we are not satisfied with your application we may refuse to grant you approval to become an RDCO. However, refusing an approval is not a decision we will take lightly and such a decision would be based on evidence that could be put before a Tribunal…
>
> If you have been convicted of any offence (including the compounding of any offence in lieu of prosecution) under any of the Customs and Excise Acts it is highly unlikely that we will approve you."

51. Paragraph 4.2 sets out a list of matters which will be checked by HMRC before granting approval. It includes "checks on any previous history with us to ensure, for example, that you have no overdue debts owing, any previous convictions, a poor compliance record or any other identified difficulties." HMRC also check that there are "no known commercial problems with the company or its directors."

52. Paragraph 4.5 is headed "changes affecting your approval." It reads:

> "If any of the information contained in your original application changes you must notify details of the changes to the Mineral Oil Reliefs Centre within 30 days of the date of the change.
>
> If there is a change in legal entity (for example, you currently operate as a partnership but decide to change the business status to a limited company or transfer it as a going concern) or other material change the existing approval will be cancelled and the new legal entity will have to seek its own approval.
>
> Changes that do not materially affect your approval, such as a change of trading name, change of address, the addition or closure of depots, etc will result in an amendment being made to your approval particulars.
>
> If you are in doubt whether the change requires a new approval or amendment to your existing approval you should seek advice from the Helpline."

53. Paragraph 4.7 repeats paragraph 7.5 of Notice 179A.

Submissions of Mr George on behalf of Chelmax

54. Mr George provided a written skeleton argument shortly before the hearing and also made other oral submissions. He said that the decision not to register Chelmax was unreasonable because:

(1) HMRC had been informed by the liquidator that Hovercam had ceased trading and gone into liquidation. It was the liquidator's responsibility to tell HMRC, as he was the person then in charge of the company.

(2) In any event, since the liquidation was not completed until October 2013, the 30 day time limit ran from that date and not from the date on which the liquidation commenced.

(3) Hovercam had two directors, but HMRC is only taking Mr George to task. Mr George confirmed to the Tribunal that the other director of Hovercam is no longer involved in the supply of controlled oils.

(4) Mr George had thought that the RDCO transferred to Chelmax from Hovercam with the goodwill, and submitted that this was a reasonable mistake to make.

(5) Notice 192 says "If you are in doubt whether the change requires a new approval or amendment to your existing approval you *should* seek advice from the Helpline" – it does not say "must." Under cross-examination Mr George accepted that he had not checked the position with the Helpline.

(6) Chelmax has already been penalised for the failures detected on 2 October 2012, by way of a £1,000 penalty, and it is not fair to punish twice for the same offence.

(7) The 2 October 2012 seizures arose following the decanting and filtering of the heating oil and were therefore a "one off."

(8) The HMRC audit had been closed down without any penalty, showing that Chelmax was not regularly using rebated fuel in its road-going vehicles.

(9) HMRC has failed to follow the guidance in its own Notices, by withdrawing approval without going through an escalating process, involving warning letters and education visits. Mr George cited paragraphs 7.1 of Notice 79A, set out above, in his support.

(10) Chelmax's business depends on its RDCO approval. The Tribunal asked Mr George how the company's business had fared since HMRC had refused to register the company, and he said that he had continued to sell Avtur. This was in reliance on the final paragraph of both review letters, which say that if the decision is not appealed the officer "will then make arrangements to give effect to my decision." Mr George had read this as meaning Chelmax could continue to sell Avtur until the appeal had run its course.

(11) Chelmax provides services to visiting helicopters such as air ambulances, police and military aircraft. Under cross-examination, Mr George accepted that that the police and ambulance services have their own fuel supplies, but said that they do store those supplies on his site.

Submissions of Mr Donmall on behalf of HMRC

55. Mr Donmall said that Chelmax could not demonstrate that the decision was not unreasonable. In his skeleton argument he relied in particular on the following:

(1) "The Appellant" failed to notify HMRC of the liquidation of Hovercam, despite being required to do so under Regulations 5 and 6 of the 2002 Regulations. Further, this requirement is spelled out in the HMRC Notices 192 and 179A.

(2) Chelmax failed to register as an RDCO for over two years, relying instead on the approval given to a company which was in liquidation. Again, the Notices make the obligation to register clear.

(3) Four vehicles were seized and restored at the time of the visit on 2 October 2012, because offences involving the misuse of rebated fuels had been committed.

(4) HMRC relies heavily on "the probity and integrity of the RDCOs" and the company had shown disregard for the purpose of the regime by misusing rebated fuels, and had shown disregard for the obligations placed on RDCOs by failing to notify the changes, and by continuing to operate without approval.

56. Before the Tribunal he amplified these submissions by saying:

(1) This was an appeal against a refusal to *approve* an RDCO. The escalating penalties which are set out in the guidance apply only to existing RDCOs. In answer to a question from the Tribunal, he said that the threshold for withdrawal and approval was the same.

(2) Although the liquidator had told "HMRC" about the change to Hovercam, it is clear from the Notices that changes to the RDCO position must be notified to MORC. Regulation 5 of the 2002 Regulations allows HMRC to set such conditions as they consider reasonable; it is clearly reasonable that HMRC require MORC to be notified.

(3) In any event, Mr George had a legal obligation to notify an impending change. As director of Hovercam, he knew it was about to go into liquidation.

(4) Further, even though the liquidator had notified "HMRC," Chelmax continued to operate for around two years without approval.

(5) Mr Donmall did not accept that Mr George genuinely believed that the RDCO had transferred with the goodwill. He drew the Tribunal's attention to Mr George's answer to Officer McColgan's question about whether or not the company was registered, to which Mr George had replied "I'm not sure I am, to be truthful."

(6) In answer to Mr George's submissions that HMRC had acted unreasonably by going straight to withdrawal rather than using one of a number of intermediate steps, Mr Donmall referred to *McGleenan v HMRC* [2007] E01046, a decision of Sir Stephen Oliver QC and Mr Hennessey. It was clear from the background to that case that the trader had received previous warnings and penalties before having the approval withdrawn. However, the Tribunal had concluded that "there is no prescribed regime. The Customs are simply required to take such action as is reasonable."

(7) In the same context, Mr Donmall also said that both Notices 192 and 179A specifically said that HMRC was "likely" to cancel an approval if "it is considered necessary for the protection of the revenue, because, for example, you have been involved in the misuse of the controlled oil," and that had been the case here.

57. The Tribunal asked Mr Donmall to comment on HMRC's two decisions and the difference between them. Mr Donmall said that the removal of the reference to compounding the penalty did not change the position; that either the misuse of controlled oils on 2 October 2012, or the trading without authorisation taken together with the failure to notify the change to Hovercam, or both together, were more than sufficient for HMRC's decision to refuse registration to Chelmax to be within the range of possible reasonable decisions. Officer Dunn had properly considered Mr George's submissions but had come to the conclusion that Chelmax should not be registered.

58. Mr Donmall said that for the avoidance of doubt he wished to clarify that the review decision did not depend at all on either (a) the VAT debt owed by Hovercam; or (b) Mr George's failure to disclose the seizures when he completed the application form for Chelmax.

Discussion and decision.

59. Our starting point is the Tribunal's jurisdiction. We can only allow the appeal if Officer Dunn's decision is one which he "could not reasonably have arrived at." That is a high threshold. It is not enough that a tribunal might have made a different decision.

60. Officer Dunn based his decision on:

(1) Mr George's failure to notify the change to Hovercam, together with his two year delay in applying for RDCO approval for Chelmax ("the first reason"); and

(2) the misuse of controlled oils which gave rise to the October 2012 seizures ("the second reason").

61. We end our decision by considering proportionality in the context of the Notices.

The first reason

62. Officer Dunn based his decision, first, on the failure to notify Hovercam's liquidation, together with his two year delay in applying for RDCO approval for Chelmax.

63. The italicised sections of the following paragraphs summarise Mr George's reasons for submitting that Officer Dunn acted unreasonably, followed by our discussion of those submissions.

(1) *Informing HMRC was the obligation of the liquidator and not of Hovercam's director*. That is not the legal position. Regulation 5 requires that a registered dealer "give notice" to HMRC of "any change, or prospective change in the information he was required to furnish in his application for registration." Mr George, as Hovercam's director, was fully aware that the company was about to go into liquidation: he told the bailiff that this was the position in October 2010, before any letters were sent to creditors on 10 November 2010 and before the liquidation started on 25 November 2010. Mr George was therefore legally obliged to notify HMRC and he failed to comply with that obligation. It may well be that the liquidator also had an obligation, but that is not a relevant matter for this appeal.

(2) *The change only had to be notified 30 days after the ending of the liquidation*. Again, this is not correct. Regulation 5 states that the change must be notified by the registered dealer "without delay" and at the latest within 30 days of the change. There was clearly a change when the company ceased trading and went into liquidation.

(3) *The notification requirement had been satisfied by telling one or more of the bailiff, HMRC's VAT office and/or Companies House.* Although Regulation 5(1) of the 2002 Regulations requires that "the Commissioners" be informed of a change, Regulation 5(2) says that this must be given "in such form and manner as the Commissioners may *require*." Paragraph 4.5 of Notice 192 explicitly requires that changes be notified to MORC. We also observe that when Mr George finally contacted HMRC on 10 December 2012, he did so by emailing MORC

(4) *Mr George thought that the RDCO approval transferred with the goodwill*. We reject this submission. We prefer the evidence of Mr McCormick's notebook, which shows that Mr George was, at best, unsure whether the approval had transferred: otherwise he would have answered "yes" to Mr McColgan's question as to whether Chelmax was a RDCO.

(5) *The guidance only tells those who are in doubt of their position that they "should" seek advice, not that they "must" seek advice.* We were unpersuaded by this distinction. Although there is no statutory obligation to seek advice, the Notice is in effect warning that a failure to seek advice will not protect a person from the consequences of getting it wrong. In any event, Mr George cannot have relied on this paragraph, because it is immediately preceded by clear guidance on what to do when there is a change of legal entity. As a result, there was no need to seek advice, because if he had read and relied on the guidance he would have realised that it answered his question.

64. Finally, given that this is an appeal against a refusal to register Chelmax, we therefore considered we also considered whether it was reasonable of Officer Dunn take into account Mr George's failure to notify a change relating to a separate company, Hovercam.

65. In this context we observe that Mr Donmall referred, incorrectly, to "the Appellant" having failed to notify this change, and that although paragraph 4.2 of Notice 192 implies that "compliance failures or any other identified difficulties" may cause an application to be refused, it makes no explicit reference to these being the failures or difficulties of the director in a previous role, as distinct from failures or difficulties of the company itself.

66. Nevertheless, we find that it must be reasonable for HMRC to be able take into account an earlier compliance failure made by an applicant's director at a time when he was an officer of a previous company. To find otherwise would mean that any defaulter could simply set up a new company and obtain approval; this would frustrate the purpose of the legislation.

67. As a result, we find that it was reasonable for Officer Dunn to refuse to register Chelmax, in part because of Mr George's previous failure to notify HMRC that there had been a relevant change in Hovercam's business.

68. We agree with Mr Donmall that the RDCO regime depends heavily on the "probity and integrity" of those approved. Mr George failed to inform MORC that Hovercam was about to go into liquidation, and Chelmax then continued to sell Avtur for over two years without authorisation.

69. On the basis of the foregoing, we find that it is entirely reasonable for HMRC to decide, on the basis of the first reason, that Chelmax was not a "fit and proper person" to be approved as an RDCO.

The second reason

70. Officer Dunn's second reason for refusing to register Chelmax is that four of the company's vehicles were seized on 2 October 2012. Mr George submits that:

(1) *The company has already been punished once, and this further punishment is unfair.* Whether or not to register a company is a separate question from whether or not to restore seized goods on payment of a fee. In our judgment it is entirely reasonable that HMRC should refuse registration to a company whose vehicles have been seized for breaches of HODA. The fact that the vehicles were restored on payment of a penalty does not change that.

(2) *The kerosene used in the road vehicles was the result of a one-off incident arising from the reuse of recovered heating oil.* As stated in the facts part of this decision, we do not accept that this was what happened.

(3) *HMRC's audit gave Chelmax a clean bill of health, but they failed to take into account.* The audit is mentioned in the facts part of Officer Dunn's letter, although we accept that it is not given any weight in his decision. However, we do not find that to be unreasonable. An audit is a one way check. If it identifies a misuse of rebated fuels, non-compliance is proved. The opposite is not necessarily true.

(4) *HMRC had failed to take into account the damage which would be caused to his business.* Withdrawal of an RDCO will almost inevitably cause damage

to the trader's business: if it was unreasonable for HMRC to withdraw an RDCO on those grounds, a trader could block withdrawal by the simple device of proving that it would damage his business. This would be an impermissible fetter on HMRC's discretion and prevent proper policing of the system.

Proportionality and the guidance on escalation

71. Mr George also submits that the decision is disproportionate, especially given the guidance, which he says clearly shows that withdrawal of approval will be the final stage in an escalating scale of actions, and constitute "the exception rather than the rule." Mr George suggested that a probationary period would have been appropriate.

72. Mr Donmall said that this guidance does not apply in an approval case but is only relevant to withdrawal. However, he conceded that the threshold for both was the same. We accept that in most approval cases this escalating scale has no relevance, because the applicant is not yet dealing with Avtur. This case is somewhat different. Mr George's previous company had been approved, although Chelmax has to apply for registration, the responsible person in both companies is Mr George. For him, it feels like a withdrawal – and even Officer Dunn, in his review letter, speaks of "the withdrawing of the approval." We therefore find that the fact that this is a "approval" case rather than a "withdrawal" case does not of itself mean that HMRC should not consider whether it would have been reasonable to respond by imposing some intermediate sanction.

73. Mr Donmall also drew our attention to paragraph 7.5 of Notice 179A (repeated at paragraph 4.7 of Notice 192). This gives "misuse of controlled oil" as the paradigm situation in which approval will be withdrawn, and continues "in such cases, we are likely to prosecute you."

74. Although there was no prosecution in this case, we agree with Mr Donmall that paragraph 7.5 gives due warning of the approach HMRC are likely to take when an RDCO misuses controlled oils. We also observe that an RDCO has many obligations, including making checks on customers and suppliers, extensive record-keeping, retention of those records and notification obligations. At paragraph 4.19 HMRC refer to "genuine mistakes" and "escalating action such as the issue of warning letters followed by civil penalties" in the context of failing to obtain information and failing to make checks. That paragraph then cross-refers to Section 7, the part on which Mr George seeks to rely.

75. We find that the natural reading of the Notice, taking into account both paragraphs 4.19 and 7.5, does not provide any support for Mr George's submission that in a situation where the company has misused controlled oils, HMRC normally does not withdraw approval without first going through a series of intermediate steps. Rather, the intermediate steps are set out in the context of failures to comply with administrative obligations, not in relation to a deliberate flouting of the rules.

76. Instead, we respectfully agree with the Tribunal in *McGleenan* that neither the legislation nor the Notices set out a "prescribed regime." HMRC may therefore go

straight to withdrawal/refusal, providing only that this is reasonable in the circumstances.

Other points

77. Mr George also said that only he, and not the other director of Hovercam, were "in the frame." But this isn't an appeal against a penalty imposed on Hovercam for failure to notify, it is an appeal by Chelmax against HMRC's refusal to grant approval, and as far as we are aware, Chelmax has only one director. This submission is misplaced.

78. Finally, we also considered whether the change in the basis of the decision made any difference. HMRC's first decision contained a further reason – the compounding of the penalty – which was wrong on the facts, and it is not present in the second decision. But that does not make the second decision unreasonable. We have considered that decision on its own, and found it to be well within the bounds of HMRC's discretion.

79. Mr Donmall encouraged us to find that either (a) the failure to notify the cessation of Hovercam together with the delay in applying for registration of Chelmax, or (b) the misuse of controlled oils, would each have been sufficient for HMRC's decision to refuse approval to have been reasonable. It will be clear from the above analysis that we do so find.

Decision

80. For the reasons set out above, we find that it was reasonable for HMRC to refuse Chelmax's application for registration as a RDCO. As a result, we dismiss the appeal.

Appeal rights

81. 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.

82. 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 REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 20 August 2014