[2017] UKFTT 896 (TC)

TC06280

Appeal number: TC /2016/04345

Excise duty – alcoholic beverages – registered owner of dutiable goods – revocation of registration – Customs and Excise Management Act 1970 s 100G – Warehousekeepers and Owners of Warehoused Goods Regulations 1999

FIRST-TIER TRIBUNAL
TAX CHAMBER

UNIVERSAL DRINKS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE NICHOLAS PAINES QC
MRS JANE SHILLAKER

Sitting in public at Taylor House, Rosebery Avenue London EC1R 4 QU on 7 and 8 August and 28 September 2017

David Bedenham, barrister, instructed by Altion Law for the Appellant

Howard Watkinson, barrister, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal pursuant to section 16 of the Finance Act 1994 against HMRC's decision to withdraw the approval of the appellant ("UDL") as a registered owner of dutiable goods (alcoholic drinks) held in excise warehouses. The decision was taken on 11 April 2016 and upheld on internal review on 12 July 2016. The appeal is against the review decision.

2. We had five files of pleadings and documentary evidence, though we were not invited to read the majority of this material. Mr Hakan Salih and Mrs Ebru Salih gave oral evidence on behalf of UDL and HMRC Officer Paul Simpson gave oral evidence on behalf of HMRC. From the documentary and oral evidence we make the findings set out below and, for the reasons we give, we dismiss the appeal.

The legal framework

3. Section 92 of the Customs and Excise Management Act 1979 ('CEMA') provides for HMRC to approve warehouses as excise warehouses in which dutiable goods may be stored without payment of excise duty (these are often called bonded warehouses and movements between them as occurring under bond). Sections 100G and 100H of CEMA give HMRC power to make regulations which impose "powers, duties, privileges or liabilities" upon registered excise dealers and shippers – that is to say, people dealing in dutiable goods who are approved and registered by the Commissioners. Section 100H(1) empowers HMRC to make regulations providing for the approval and registration of registered dealers and shippers and for the variation or revocation of their approval and registration. Section 100G(5) provides that revocation or variation must be "for reasonable cause".

4. The relevant Regulations are the Warehousekeepers and Owners of Warehouse Goods Regulations 1999 ('WOWGR'). Regulation 5 of WOWGR provides for the approval of "registered owners", that is to say, owners of dutiable goods who wish to deposit them in excise warehouses. Regulation 12 sets out the privileges of a registered owner; these are essentially to buy, sell and hold dutiable goods in an excise warehouse without payment of duty. Regulation 18 provides that the approval and registration of a registered owner is subject to conditions and restrictions prescribed in a notice published by HMRC.

5. The relevant notice is Excise Notice 196. It was updated on 23 October 2014 and 21 January 2016 (and again in 2017). The October 2014 version was current at the time of the events giving rise to HMRC's disputed decision and the January 2016 version was current at the time of the decision itself. The Notice relates to warehousekeepers and warehouse premises as well as to registered owners. Section 5 of it deals with the registration of registered owners. It is only necessary to refer to section 5.4, which indicates that HMRC may apply individual conditions to a particular registration, and section 5.6, which explains:

We may cancel your registration at any time. If we do so, then we will inform you in writing and give our reasons for the cancellation. We will offer you a review of our decision or you can appeal direct to the independent tribunal (see section 11).

6. We discuss other relevant parts of the Notice below.

The context

7. The goods in which registered owners deal are held under duty suspension arrangements, which means a tax arrangement involving the suspension of payment of excise duty. Such arrangements involve measures designed to prevent the goods being "released for consumption" (the event that makes the duty payable) without duty being paid. The ability to buy and sell dutiable goods and to move them within the EU without duty having to be paid is a useful one, particularly given that rates of duty vary between member states, but the levels of excise duty on alcoholic drinks in the United Kingdom are such as to provide a strong incentive for unscrupulous traders to find ways of "diverting" goods onto the market without paying the duty.

8. One form of "diversion fraud" is known as inward diversion. In outline, it operates as follows. A set of paperwork is created for a movement of duty-suspended alcohol from an excise warehouse in what HMRC call the "near continent" (typically northern France or the Low Countries) to an excise warehouse in the United Kingdom. A consignment of goods moves between the warehouses under cover of that paperwork. That movement is legitimate in itself, but the paperwork associated with it is used twice: once to accompany the legitimate goods and another time to accompany a matching – but illegitimate – consignment of goods in their passage through the British port of entry.

9. We were told by Mr Watkinson, who appeared for HMRC, that the difference between United Kingdom and continental excise duty rates is so great that the illegitimate consignment can profitably be made up of goods on which continental excise duty has been paid. The objective is to bring the illegitimate consignment into the United Kingdom without payment of United Kingdom duty on the pretence that it consists of duty-suspended goods headed for an excise warehouse; the paperwork supports that pretence.

10. The paperwork that accompanies movements of duty-suspended goods includes an "Administrative Document" (nowadays an electronic document or "e-AD"). It bears a unique Administrative Reference Code ("ARC"). It may happen that a check of the paperwork at the port of entry reveals that a consignment has already entered the United Kingdom under cover of the same e-AD and ARC. If so, the goods being moved on the second occasion are seized by HMRC and, assuming no innocent explanation is forthcoming, are condemned as forfeited. But if the double use of the paperwork is not detected, one of the consignments can be sold (illegally) for home consumption. The other needs to proceed to the destination warehouse identified in the paperwork, in order to continue the pretence that all that has happened is a movement between excise warehouses.

11. Setting up the legitimate movement involves entering into a contract with a registered owner to sell a consignment of goods to it for delivery to an excise warehouse in the United Kingdom with which the registered owner has storage arrangements. HMRC expect registered owners and warehouses to take precautions to avoid becoming involved in movements that are intended to generate paperwork to be used for inward diversion fraud.

Due diligence

12. To this end, Section 10 of Excise Notice 196 contains a "due diligence condition" which was introduced in November 2014, as follows:

> Due diligence is the appropriate reasonable care a company exercises when entering into business relations or contracts with other companies, and how it responds in a deliberate reflexive manner to trading risks identified.
>
> Without effective safeguards in place, there are considerable risks to all businesses along alcohol supply chains of becoming implicated in illicit trading.
>
> From 1 November 2014 it becomes a condition of your approval as an excise warehousekeeper, registered owner, duty representative or registered consignor that you must:
>
> - objectively assess the risks of alcohol duty fraud within the supply chains in which you operate
> - put in place reasonable and proportionate checks, in your day to day trading, to identify transactions that may lead to fraud or involve goods on which duty may have been evaded
> - have procedures in place to take timely and effective mitigating action where a risk of fraud is identified
> - document the checks you intend to carry out and have appropriate management governance in place to make sure that these are, and continue to be, carried out as intended.

13. Section 10.2 gives guidance on assessing risks and carrying out checks. It says (we quote from the October 2014 version) that the fraud risks within a supply chain are unique to each business, and that "objective assessment of the likelihood of your trading activities contributing to fraud is an essential first step to developing effective due diligence procedures". It identifies the main risks as including inadvertently facilitating fraud by providing import or warehousing services, and continues:

> A key feature of the smuggling or diversion of alcohol to the UK market is the ability to source product … where the excise duty has been suspended…. To assess your exposure to this risk you will need to objectively assess if there is potential for duty evasion resulting from your trading activity. You will need to know who you are selling to and where the goods are destined for and

understand the market for these products. Without this, there is a risk of supplying goods directly or through a third party into illicit supply chains.

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

High level indicators of risk include goods being received from unusually complex or apparently uneconomic supply routes, for example, regular supplies of UK produced goods that have been shipped out to another Member State and then re-imported. If you are sourcing duty paid goods you will also need to consider the credibility of suppliers and the level of evidence you can obtain to demonstrate the provenance and duty status of goods.

14. The Notice says that once a trader has established the main risks of fraud they may be exposed to, regular checks during trading should be of a type and level sufficient to establish the integrity of the supply chains they are trading in. It adds that this level needs to be reasonable and proportionate to the risk. The acronym "FITTED" is used to indicate that checks should normally focus on Financial health and Identity of trading partners, Terms of contracts and payment, Transport details, the Existence and provenance of the goods and the Deal – whether the price is appropriate, why it is being offered, whether it is too good to be true and how it compares to the market generally.

15. Under the heading "Responses to identified risks" section 10.3 of the Notice states the expectation that, where checks indicate real concerns, suppliers or customers will be changed to address this, and that HMRC will be notified if the checks give rise to a suspicion of duty fraud.

16. Section 10.4 deals with HMRC's review of due diligence procedures. It says

As part of our enforcement and general audit programmes, HMRC will consider whether or not the steps you have taken to embed anti-fraud due diligence into your trading activity are sufficient and timely to address fraud risks in your supply chains. We will aim to establish whether you have objectively assessed the risks in your supply chain, and you must be able to demonstrate that you have put in place reasonable and proportionate checks and effective procedures to respond to fraud risks when they arise.

If your due diligence procedures are considered insufficient to address fraud risks, we will carefully consider the facts of the case before taking further action, but where appropriate we will seek to support you to strengthen your procedures.

In more serious cases such as a failure to consider the risks, undertake due diligence checks or respond to clear indications of fraud, we will apply

appropriate and proportionate sanctions. For serious non-compliance, such as ignoring warnings or knowingly entering into high risk transactions, we may revoke excise approvals and licences.

17. Section 10.5 lists some examples of risk indicators. These include companies with poor credit ratings still able to finance substantial deals; new companies with little or no trading history; little or no fixed assets; and unusual payment arrangements, such as those involving third parties.

18. In January 2016 the Notice was amended to provide clarification of HMRC's "fit and proper" criteria. The criteria are set out in section 3.2, relating to warehousekeepers, but they also apply to registered owners. New wording in section 3.2 said that

> 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 [that, among other things]:
>
> …..
>
> - the business has in place satisfactory due diligence procedures covering its dealings with prospective customers and suppliers to protect it from trading in illicit supply-chains (see section 10 for more information about due diligence)

UDL

19. Mr Hakan Salih has been the sole director and shareholder of UDL since 2004. The company has one employee, Mrs Ebru Salih. UDL was registered as an owner of duty-suspended goods in 2005. We do not have detailed information on the company's affairs prior to 2014, but Mr Salih told us that the company had established a good reputation as a trader in bonded alcohol, enabling it to source products from around the world at very competitive prices. The company has predominantly bought and sold under bond.

UDL's due diligence procedures

20. Both Mr and Mrs Salih are involved in carrying out UDL's due diligence procedures, sometimes involving a third party contractor. The procedures involve asking customers or suppliers for various documents including a company registration certificate, a certificate of registration for VAT, a certificate under the money laundering regulations, a recent utility bill addressed to the company's premises and some photographic identification of the company director and confirmation of the director's home address. These are scrutinised and also checked with Companies House and a business reference agency. The company's VAT number is checked with the European Commission website (this is done again before every transaction).

A credit check is also carried out. If the checks are satisfactory Mr Salih goes to meet the company director.

21. Mrs Salih has put together a due diligence form which is used to record the due diligence information. A copy was supplied to us. It asks for the business name, trading and registered addresses, VAT number, business registration number, registration certificate under WOWGR if applicable, money laundering registration certificate if applicable, business classification for VAT purposes, accountants' name and address, length of trading history, information "about your business", type of goods traded in, bank details, name of director, director's home address, any other shareholders or beneficial owner, geographical areas of operation (a question added in June 2016), number of staff employed, approximate turnover, borrowings, source of funds, company terms and conditions, transport arrangements, and method of payment; the form requires a number of documents to be provided.

UDL's relationship with Invartio Trading Ltd

22. Mrs Salih told us that UDL first received an approach from Invartio Trading Ltd in July 2014; Invartio had found UDL via its website and was interested in supplying beers and wines from warehouses in Europe. At that stage Invartio was still in the process of being set up. Mr and Mrs Salih had a trip to Cyprus – their country of origin – planned for August 2014 and in the course of the visit they met the proposed director at the company's intended offices in Limassol. They discussed, in very general terms, what Invartio would be able to offer UDL. They checked the director's personal due diligence documentation and enquired how the business was going to be funded. They were told that the director had some savings put aside.

23. In November 2014 Mrs Salih made a family visit to Cyprus; she met the director once more and was told the company would be up and running soon.

24. Invartio contacted UDL again in June 2015 confirming they were ready to trade. Mrs Salih wrote requesting due diligence documents, which were supplied. These confirmed the existence of the company and the identity of its director. No credit reference was available as the company had only just begun trading. UDL did not have a due diligence form at that stage, but in due course Invartio completed UDL's form; it is dated 19 October 2015.

25. It seems that Invartio first supplied UDL pursuant to an offer and acceptance on 1 June 2015. The warehouse's intake check sheet noted that the ARC accompanying the consignment was "incorrect". In July 2015 UDL began receiving notifications that consignments to it from Invartio had been seized at the port of entry. We discuss this below.

HMRC visit of 22 September 2014

26. On 22 September 2014 Mr Salih had received a visit from an HMRC officer; they discussed ten seizures of goods consigned to UDL that had occurred between July 2011 and September 2013. There was not any discussion of specific incidents; Mr Salih advised the officer that when the company received a notice of seizure of

goods consigned to it they would contact the supplier for an explanation. If UDL were happy with the explanation they would continue to trade with the supplier, but not otherwise. Mr Salih told us, and we accept, that he had quarterly meetings with this officer; they went through all UDL's transactions and looked at the due diligence paperwork. He added that HMRC had not raised any issues or queries with UDL at the time these seizures occurred; he also complained to us that when he asked the officer what else he could do, the officer declined to give any advice.

27. On 6 November 2014, however, the officer e-mailed saying "As discussed on my visit to your premises on 22/9/14, you were made aware that I have concern regarding the number of seizures (by Revenue Fraud Detection Team in Dover) of excise goods destined to your account in Seabrook from your suppliers in the EU. Please take this email as a **warning** that if any further discrepancies are identified on the imports of excuse goods from the EU, consideration will then be given to revoke your WOWGR approval". (The emphasis is in the original; Seabrook Warehousing Ltd ran an excise warehouse used by UDL.)

28. UDL consulted legal advisers, Altion Law, who wrote on 17 November asking for details of the seizures to enable UDL to respond. HMRC's immediate response on 5 December was that no action would be taken at that time to revoke UDL's approval. A longer reply by letter dated 10 December confirmed that the HMRC officer had not made any allegations of wrongdoing by UDL; the purpose of his visit had been to make UDL aware of HMRC's concern regarding the number of seizures UDL had had. It reiterated the warning that if further "discrepancies" occurred HMRC would consider imposing conditions on, or revoking, UDL's approval. It referred to examples of due diligence checks in HMRC public notices, including EN 196.

Meeting with HMRC of 19 June 2015

29. Further correspondence ensued between HMRC, UDL and its legal advisers regarding excise duty and VAT. This culminated in a meeting held on 19 June 2015 at the offices of UDL's legal adviser, attended by an HMRC VAT officer who had taken over responsibility for UDL's VAT affairs, by Officer Paul Simpson who had taken over responsibility for UDL's excise duty affairs, and by Mr Salih and his legal adviser. It was preceded by a letter of 14 May in which HMRC asked for copies of various documentation relating to UDL's trading.

30. Mr Salih has described the meeting to us as a very detailed one, with HMRC wishing to discuss every aspect of UDL's business. We accept that description. Mr Salih told HMRC (and we find) that UDL had five suppliers, including Invartio and Flux Global Logistics Ltd. Some 80% of UDL's purchases were from Invartio. UDL had three current customers, one of which was RVG Imports-Exports Ltd, with whom it had been trading for about a month. There were several questions about UDL's trade with Invartio; Mr Salih explained the history of the relationship, as set out above, and said that a full due diligence had been done.

31. There was some discussion of the commerciality of the trade in which UDL was involved. Officer Simpson questioned why UDL's customers were buying from it

drinks that had been produced in the United Kingdom, exported to excise warehouses on the continent and then re-exported to UDL in the United Kingdom. He suggested that all that UDL's role did was to add extra cost. Officer Simpson's note of the meeting records that Mr Salih did not appear to grasp the implication that the transactions were uncommercial and therefore suspect as being undertaken in order to generate paperwork for use in inward diversion fraud. He accepted in cross-examination that the discussion had been in general terms. It was his first visit to UDL and he was reluctant to cast aspersions on UDL's trading partners without evidence.

32. At the end of the meeting HMRC asked to be supplied with copies of documents on a monthly basis. UDL agreed to provide copies of documents including its accounts and bank statements. These were duly supplied.

Further seizures

33. Four further seizures of goods consigned to UDL occurred in the weeks following the June meeting. All concerned Invartio.

First seizure

34. In an email of 13 July 2015 Invartio offered UDL a consignment of beer at £5 per case. On the same date UDL accepted the offer for delivery to Safe Cellars Ltd, an excise warehouse used by UDL, and booked the consignment into Safe Cellars. The acceptance was on the basis that Invartio would be responsible for delivery to the warehouse. The load did not arrive on the due date, 20 July, and UDL asked Invartio when it would arrive. On 21 July Invartio replied saying that they had been told the load had been seized by UK Border Agency for inspection and were enquiring when it would be released for delivery.

35. UDL forwarded these emails to Safe Cellars. On 28 July 2015 Safe Cellars emailed UDL saying they had been informed that the load had been seized and asked UDL to establish why this had happened, adding that "seizures are not something we want to be involved with and your account will be looked at pending the outcome of the seizure". The email raised a separate issue about damaged stock and concluded "if you want to keep an account here at Safe Cellars, I suggest you treat these questions very seriously".

36. UDL forwarded the email to Invartio, who replied on 28 July that they would 'chase up' Altion Law, who were dealing with the seizure (the same firm as was representing UDL in their discussions with HMRC); Invartio said they were unaware of the reasons for the seizure. This reply was forwarded to Safe Cellars who replied "if you could let me know the outcome of the seizure load as this is most important".

37. On 3 August 2015 Safe Cellars forwarded to UDL the notice of seizure issued by the Border Force's Revenue Fraud Detection Team. The seizure had taken place on 16 July. The notice said that the ARC for the consignment had been already been sighted by Border Force officers in respect of a previous movement of excise goods and "it is believed that had these goods not been intercepted they would have been

diverted thus avoiding the payment of UK excise duty". The covering email from Safe Cellars said "Safe Cellars will not tolerate your supply chain 'potentially' acting fraudulently" and "as a warehousekeeper I need to be looking at the full supply chain and I would suggest you act on this quickly and think strongly about whether you want to continue sourcing from your supplier".

38. On 12 August 2015 Invartio forwarded to UDL an exchange of emails between them and Altion Law (we were told at the hearing that this correspondence related to one of the further seizures discussed below, but it is clear from its content that it relates to the first seizure). On 7 August Altion Law had advised Invartio to find out from the haulier what paperwork had been presented on the first occasion. Invartio had replied saying that on 11 August a consignment was inspected and the goods released. It was the same products and breakdown as the seized load, which Invartio had sold to UDL the previous week. Invartio commented "it looks like they have matched the goods together and assumed they were used on the same ARC" and added "if you need any further documents for the load sent the week earlier please do not hesitate to contact us".

39. Invartio's covering email to UDL said "both loads are the same but are for 2 separate orders". They added "I know that Safecellars have stated to you that your account will be closed if a seizure happens again but please could you ask them what procedures we should take to stop this happening? We have no control over goods being inspected and seized and we cannot guarantee that this will not happen again. We have done nothing wrong and intend to get our goods back as soon as possible. We have been sending you goods for months and never had an issue before and I state that nothing is wrong with this load. We have requested documents of proof that this number was used for a previous load from UKBA but still have had no response".

40. Altion Law had given notice triggering condemnation proceedings (the procedure by which forfeiture is challenged) on 28 July 2015. On 28 January 2016 Dartford Magistrates Court ordered condemnation. We have no further information about the condemnation proceedings. Invartio then sought restoration (a procedure by which forfeited goods can nevertheless be restored to their previous owner), but this was refused on 29 February.

Two seizures on 7 August 2015

41. By email of 4 August 2015 Invartio had offered UDL a consignment of wine. On the same day UDL had accepted the offer, for delivery to Seabrook, with Invartio responsible for transport. At 9.00 a.m. on 7 August Border Force seized the consignment at Dover and issued a seizure information notice and warning letter. On 22 August Invartio forwarded copies of the seizure documentation to UDL, saying "we have sent this to our law firm but have no reason yet from UKBA why this was seized". On 25 August UDL emailed Seabrook cancelling the warehouse booking. We have no further information, save that no notice triggering condemnation proceedings was given.

42. At the same time as offering the consignment of wine, Invartio had offered UDL "some more Polish beers available again at £5 per case". On the same day UDL accepted the offer, for delivery to Seabrook, Invartio to be responsible for transport. On 7 August Border Force seized the consignment at Dover, giving the driver a seizure information notice and a letter warning him of possible prosecution. On 12 August Border Force informed UDL of the reason for the seizure, which was that the same lorry and trailer had travelled to the United Kingdom on 5 August under the same e-AD and ARC.

43. On 17 August UDL emailed the seizure documentation to Invartio, saying "please explain what steps you are taking to resolve this matter and info me asap". We have no further information, save that no notice triggering condemnation proceedings was given.

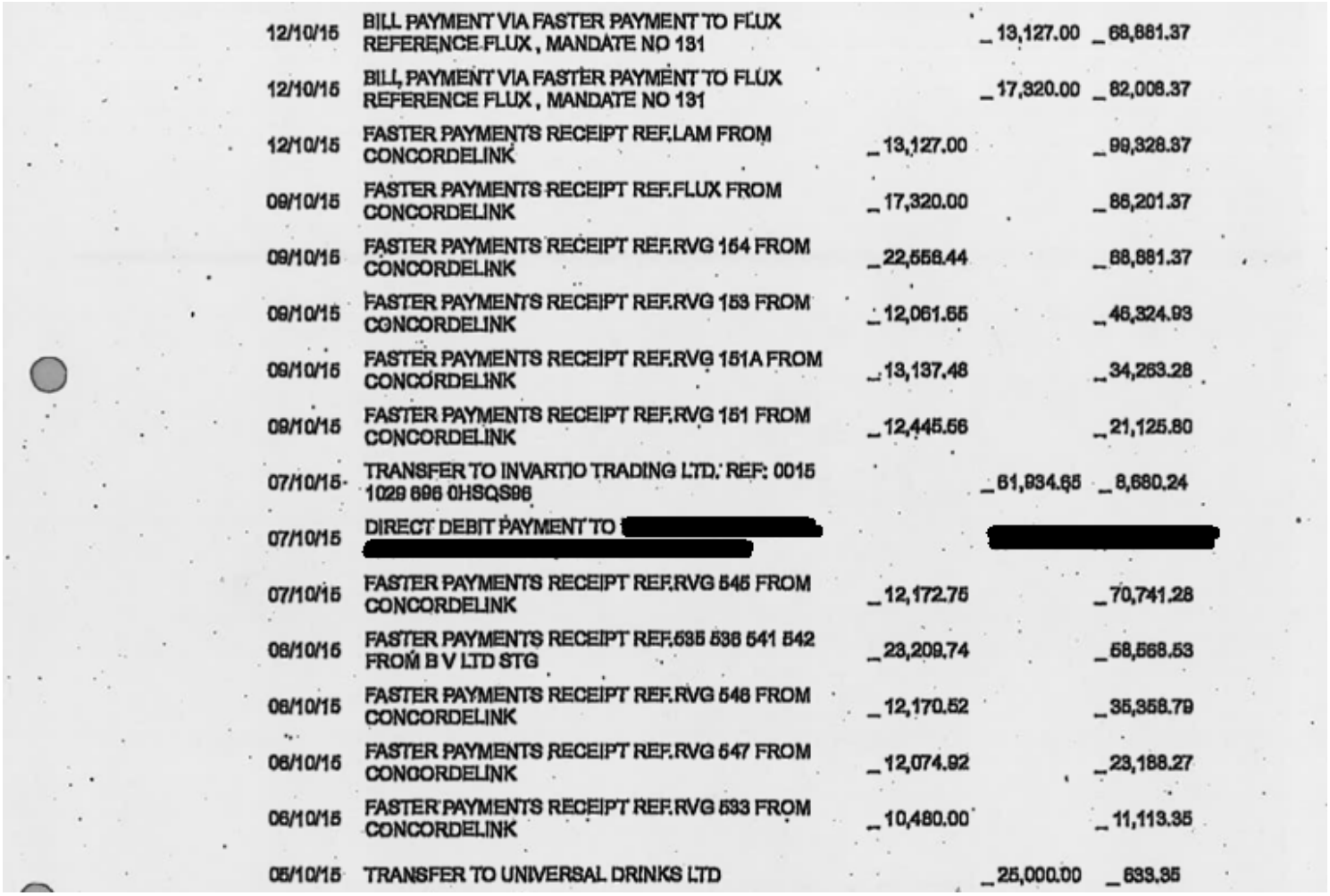
Fourth seizure

44. On 28 September Invartio offered UDL a consignment of beers, which UDL accepted the same day for delivery to Seabrook. On 8 October Border Force wrote to UDL saying that the consignment had been seized at Dover on 2 October. The letter said that the same vehicle had travelled to the United Kingdom on 30 September carrying goods covered by the same ARC. On 20 October Invartio told UDL in an email "we have sent all info regarding this seizure to Altion Law who are trying to see where we stand in regards to this seizure. Please bear with us and we will send further info once we obtain this from UK Customs". We have no further information, save that no notice triggering condemnation proceedings was given.

45. Mr Salih told us in cross-examination that he was prepared to go on trading with Invartio pending a court decision on the seizures, which he expected to take three to six months. He pointed out that other loads from Invartio were not being seized.

Payments received by UDL in October 2015

46. At the meeting of 19 June 2015, UDL had undertaken to provide HMRC with copies of its bank statements, and had done so. In November 2015 HMRC requested further copies of bank statements, from 29 August 2015 onwards. A copy of a printout of UDL's online bank statement covering September and October was supplied. The September entries included electronic payments received from RVG Exports-Import and Wholesalers Ltd. The October entries included a number of payments relating to purchases by RVG but paid by a company named Concordelink Couriers Ltd. A facsimile of part of the printout is reproduced below.



12/10/15	BILL PAYMENT VIA FASTER PAYMENT TO FLUX REFERENCE FLUX , MANDATE NO 131		£13,127.00	£68,881.37
12/10/15	BILL PAYMENT VIA FASTER PAYMENT TO FLUX REFERENCE FLUX , MANDATE NO 131		£17,320.00	£82,008.37
12/10/15	FASTER PAYMENTS RECEIPT REF.LAM FROM CONCORDELINK	£13,127.00		£99,328.37
09/10/15	FASTER PAYMENTS RECEIPT REF.FLUX FROM CONCORDELINK	£17,320.00		£86,201.37
09/10/15	FASTER PAYMENTS RECEIPT REF.RVG 154 FROM CONCORDELINK	£22,556.44		£68,881.37
09/10/15	FASTER PAYMENTS RECEIPT REF.RVG 153 FROM CONCORDELINK	£12,061.65		£46,324.93
09/10/15	FASTER PAYMENTS RECEIPT REF.RVG 151A FROM CONCORDELINK	£13,137.48		£34,263.28
09/10/15	FASTER PAYMENTS RECEIPT REF.RVG 151 FROM CONCORDELINK	£12,445.56		£21,125.80
07/10/15	TRANSFER TO INVARTIO TRADING LTD. REF: 0015 1029 696 0HSQS96		£61,934.65	£8,680.24
07/10/15	DIRECT DEBIT PAYMENT TO [redacted]		[redacted]	
07/10/15	FASTER PAYMENTS RECEIPT REF.RVG 545 FROM CONCORDELINK	£12,172.75		£70,741.28
06/10/15	FASTER PAYMENTS RECEIPT REF.535 536 541 542 FROM B V LTD STG	£23,209.74		£58,568.53
06/10/15	FASTER PAYMENTS RECEIPT REF.RVG 548 FROM CONCORDELINK	£12,170.52		£35,358.79
06/10/15	FASTER PAYMENTS RECEIPT REF.RVG 547 FROM CONCORDELINK	£12,074.92		£23,188.27
06/10/15	FASTER PAYMENTS RECEIPT REF.RVG 533 FROM CONCORDELINK	£10,480.00		£11,113.35
05/10/15	TRANSFER TO UNIVERSAL DRINKS LTD		£25,000.00	£633.35

47. It can be seen that as at 5 October 2015 the balance in UDL's current account stood at some £600. On 7 October UDL made an electronic payment to Invartio of some £61,000. Prior to that payment being made, six payments had come into the account from an entity described as Concordelink. On 9 and 12 October, a further six payments were received from Concordelink. The payment references generally mention RVG followed by the invoice number of UDL's invoice to RVG. However, one of the payments received on 9 October contains the reference "Flux" (and that of 12 October contains the reference "Lam"). In addition, the payment on 6 October with the reference RVG 533 is for £10,480 whereas invoice 533 (which we have seen) was for £12,261.60. £10,480 was the price at which UDL had purchased the consignment from Invartio. It is also notable that the amount received on 9 October under the reference Flux is the same amount as UDL paid to Flux (one of the suppliers mentioned in the June meeting) on 12 October; the amounts received under the reference Lam on 12 October and the amount paid out that day to Flux are also the same.

48. Five more payments from Concordelink were received on 19 October. These had the reference "UNI/FL".

The review of UDL's approval

49. On 13 October 2015 Officer Simpson wrote to UDL notifying it of his intention to review UDL's approval as a registered owner, warning that the review could lead to civil penalties and/or revocation of the approval, and offering a meeting. The letter referred to alleged deficiencies in UDL's due diligence checks on new suppliers and customers and lack of commerciality of UDL's transactions, to the seizures referred to at the meeting of September 2014 and the four more recent seizures, and to UDL's failure to query unusually long delivery times and discrepancies between goods contracted for and goods delivered. Not all of these matters found their way into HMRC's eventual decision.

50. In relation to UDL's due diligence, the letter pointed to the alleged absence of evidence of trade references and of initial meetings taking place or of their content; it pointed to the lack of enquiries by UDL as to suppliers' sources, customers' intended markets and the supply routes followed by the goods, saying "all of these would have provided you with further evidence on which to make an assessment of the commercial reality behind the supply chains". It further said that UDL had not followed up anomalies revealed by the due diligence material that it had collected, such as that Flux's VAT registration described its activity as "human resources provision" and its accounts showed that it was insolvent, while RVG's VAT certificate described its trade as "non-specialised wholesale trade".

51. The letter went on to repeat points said to have been made at the June meeting as to the circular movement of goods, UDL's failure to enquire into the nature of the onward supply, the matching of suppliers and customers – all of UDL's purchases from a particular supplier being sold on to the same customer – and consistent markups applied by UDL with no evidence of attempts to negotiate the prices or obtain more favourable terms with alternative suppliers or customers.

52. In addition the letter complained of UDL's failure to explain, following the meeting, its role in the supply chains involved and that "the factors mentioned above" still applied: all purchases of beer from Invartio between June and mid August had been at the same unit price regardless of the brand, type or strength of the beer, and UDL's selling price had included a uniform mark-up. All purchases and sales had been from and to wholesalers and involved the movement of goods from excise warehouses in other EC member states followed by sale in bond in the United Kingdom to another wholesaler. It also referred to "evidence produced" to HMRC that consignments bought and resold by UDL had found their way back to the country from which UDL had bought them.

53. That evidence does not appear to have been shown to UDL at the time, but a spreadsheet was attached to Officer Simpson's witness statement containing information gathered by HMRC in respect of slightly over 100 consignments purchased and resold by UDL between June 2014 and January 2016. In about 40 cases the spreadsheet includes UDL's customer, that customer's downstream customer and the warehouse to which the consignment moved from the warehouse used by UDL. In the majority of those 40 cases the supplier was Invartio, the

customer was RVG, RVG's customer was another Cyprus-based company and the destination warehouse was in France.

54. We are not in a position to gauge to what extent consignments purchased by UDL consisted of beverages produced in the United Kingdom, as suggested by Officer Simpson at the June meeting. It is highly unlikely that any wine was British-produced, and the beers in the very limited amount of documentation that we have seen are primarily of foreign brands. In cross-examination on the issue of commerciality Mr Salih told us that even British-produced beverages were available at lower prices on the continent than a small trader like UDL could obtain by purchasing direct from British breweries, so that the purchases made commercial sense from his point of view. No evidence of British breweries' prices was given to us.

55. Altion Law responded to the letter of 13 October 2015 in a letter of 4 December. That letter complained of the generalised nature of some of Mr Simpson's allegations, such as that due diligence had been raised on a number of occasions, and of misrepresentation of the meeting of 19 June. At that meeting HMRC had asked specific questions, which had been answered; it was wrong to suggest that any questions remained unanswered. The letter enclosed prints of Flux and RVG's Companies House registrations, which described their businesses accurately. Also enclosed were exchanges of emails between UDL and Flux and Invartio in October 2015. In response to queries by Mr Salih, Flux had replied that its accounts were erroneous and that it was investigating its VAT registration, which had not been picked up by VAT officers at a recent meeting. Invartio wrote that its price structure had been on a full load basis as Invartio's supplier had excess stock; Invartio had subsequently notified UDL of a price increase, and a current price list was attached.

56. Altion Law did not specifically challenge the assertion that these matters had been discussed in June, though it did complain of misrepresentation of the terms of that meeting. We are not sufficiently well informed to make a finding that the matters were specifically discussed, but we do find – Altion Law not having disputed this – that the anomalies that HMRC referred to were apparent from the due diligence documentation and were not investigated until October 2015.

Meeting on 8 December 2015

57. A meeting took place at HMRC's offices in Chelmsford on 8 December 2015, attended by Mr and Mrs Salih, their legal adviser, Officer Simpson and two other officers. At the meeting Mr Salih told HMRC that UDL then had four customers for duty-suspended alcohol, one of whom was RVG, and four suppliers, including Invartio and Flux. There was discussion of the payments from Concordelink, which HMRC had by then seen in the bank statements. Mr Salih gave the explanation that the payment had been arranged by the proprietor of RVG, who had fallen ill while on holiday in Sri Lanka and had been unable to arrange payment from RVG's bank account. UDL had conducted due diligence on Concordelink; the paperwork was produced. UDL had suspended dealing with RVG pending further enquiries into the matter. Mr Salih was asked to explain why one of the payments made by

Concordelink was of the same amount as UDL's purchase price from Invartio, but was unable to explain this.

58. HMRC also asked Mr and Mrs Salih how RVG knew the identity of Flux. At that stage they could not explain this. In the course of her evidence, Mrs Salih produced a copy of a letter from RVG to UDL dated 11 December 2015, which she said Altion Law had supplied to HMRC. We discuss this below.

59. There was discussion of UDL's due diligence; HMRC asked whether UDL enquired about the ultimate destination of goods they sell. Mr Salih said that UDL's checks were consistent with the FITTED criteria and included a question about the destination of the goods.

60. HMRC also made reference to circular movements of excise goods between the near continent and the United Kingdom, saying that they had evidence of goods being supplied to the United Kingdom from France by a Cyprus-based company and passing through the hands of a number of United Kingdom businesses before being sold for export to France for the account of another Cyprus company. This is consistent with the spreadsheet referred to in paragraph 53 above, though the spreadsheet does not appear to have been produced at the meeting.

61. There was discussion of the four seizures. Mr Salih said that in each instance he had contacted the supplier to query the circumstances of the seizure. Mr Simpson observed that UDL had continued to trade with Invartio nevertheless and that, given the new due diligence requirement he would have "expected a critical eye to have been cast over this issue".

62. Following the meeting Officer Simpson asked for documentation and information about the seized loads. Documentation was provided, on the basis of which we have made the findings set out at paragraphs 34 to 44 above.

The "minded to revoke" letter and response

63. On 11 March 2016 Officer Simpson wrote to UDL that HMRC were minded to revoke its registration and offered an opportunity to make representations. HMRC were proposing to find that UDL was not a fit and proper person to hold a registration on the basis that its manner of trading exposed HMRC to an unacceptable risk of loss of revenue through fraud. Three matters were relied upon.

64. The first was that UDL had continued trading with Invartio despite the four seizures, and in doing so had failed to conduct meaningful due diligence on Invartio and disregarded the indications that multiple movements of excise goods may have taken place under the same ARC numbers.

65. The second was the receipt of third party payments on behalf of RVG. Two issues were raised: first that UDL had provided no explanation of how its customer knew the price charged to UDL by its supplier (see paragraph 47 above); secondly, that the due diligence carried out by UDL upon Concordelink had been defective.

66. The third matter was that UDL's due diligence had failed to reveal that goods acquired by UDL from the near continent had been subsequently re-exported to the continent by UDL's customer. Reference was made to paragraph 10 of EN 196.

67. Altion Law replied on UDL's behalf on 23 March 2016. After reminding HMRC that the legislation required reasonable cause for deregistration, and complaining that UDL had answered all of HMRC's requests for information without receiving any further queries from HMRC, their letter dealt with HMRC's grounds as follows.

68. As regards the four seizures, the letter said that UDL had answered all HMRC's requests for information and documentation, providing comprehensive documentation regarding its dealings regarding the seized loads and Invartio in general. There was no evidence that multiple movements of goods had taken place under the same ARC; this was pure conjecture. It added that HMRC misunderstood the law of ownership; UDL only acquired title to the goods upon delivery and payment and had no standing to initiate condemnation or restoration proceedings in respect of goods which did not arrive. In any event, the four seizures represented a tiny fraction of the movements undertaken by UDL. Finally, HMRC were wrong to describe Invartio as a current supplier; in that regard the letter said both that UDL had "not carried out any trade with Invartio in the period since the 8 December 2015 meeting" and that Invartio was "not a current trader and has not been since October 2015". It went on to day that UDL confirmed it would not conduct further trade with Invartio "as Invartio has clearly been 'blacklisted' by HMRC".

69. In relation to Concordelink, Altion Law's letter said that UDL had made it clear at the 8 December meeting that it was in the middle of conducting investigations into the unauthorised use by RVG of Concordelink to make payments to UDL. As to the payment of £10,480, the letter said that HMRC had not asked any specific question in relation to this and were wrong to judge UDL for failing to answer a question that had not been asked. The letter went on to say that the explanation was simple and was contained in emails of 6 October 2015 that were enclosed with the letter.

70. The explanation was that "As a result of a clerical error [UDL] inadvertently sent RVG the value of the payment that [UDL] owed to Invartio. The enclosed emails clearly record the exchange of correspondence regarding this error, and the fact that RVG had understandably paid the lower sum, before RVG then tried to agree that no further payment would be due. Our client clearly instructed RVG that the full sum was payable and we are instructed that those sums have now been paid. This is therefore a simple case of clerical error, and had it been raised in HMRC's previous correspondence it would have been dealt with quickly".

71. Enclosed with the letter were two emails dated 6 October between UDL and RVG. The first was from RVG, timed 6.29 am, and had a document attached to it entitled "Universal Drinks Ltd Stock Offer Ref UDL0109151". The email read

Dear Sir

This load was originally offered to us at £5.00 a case and has been subsequently sold on that basis to our customer with our additional on cost.

We have paid your company for this load £10480.00 and not £12261.60.

Please can you amend your invoice to £10480 and send it to us.

Seabrooks have an HMRC audit and this load is one of 3 that is being checked.

Regards

72. UDL's reply timed at 11.56 read

Hi Siva

After checking your query I must apologise for making a mistake on the price of the stock offer.

I can't change the invoice because the invoice price is the correct price even though the offer was incorrect.

And also I have already submitted the A/C to the HMRC.

Sorry for inconvenience.

73. A further enclosure was a letter from RVG to UDL dated 29 October 2015. This read

Dear Hakan

Re Concorde Link Couriers Ltd Payments

I have recently returned from holiday in Sri Lanka. I was delayed in returning following an illness that I had whilst on holiday.

At the time I was unable to process payments to you due to the remote area where my family live.

I managed to contact Concorde Link Couriers Ltd and asked them to transfer monies that were due to you from my company as a temporary measure. I hope that this action helped you.

I appreciate that this is not normal business practice but under the circumstances it was all that I could do.

If you require additional information, please do not hesitate to contact me.

Yours sincerely

74. The enclosures also included a copy of stock offer UDL0109151 addressed to RVG and dated 9 September 2015 (the stock offer referred to in the emails of 6 October). Contrary to what was stated in the emails, the stock offer priced the beverages at £5.85 per case, with a total price of £12,261.60.

75. Altion Law's letter went on to say that the allegations of inadequate due diligence in relation to Concordelink bore no resemblance to the requirements of FITTED. Moreover, UDL had never had any intention of trading with Concordelink and had no opportunity to conduct due diligence on Concordelink before the unexpected payments arrived. UDL had conducted due diligence on Concordelink, including a visit to its premises, with a view to checking whether there was evidence of fraud that should be reported to HMRC. UDL had received correspondence from RVG explaining its relationship with Concordelink. Moreover, RVG was no longer a current customer and no trade had been carried out with it in the period since the 8 December meeting.

76. The enclosures included UDL's due diligence documentation in respect of Concordelink. This included a letter from RVG dated 18 November "further to my letter dated 29 October and our recent discussions". It enclosed a copy of a document entitled "Master Services Agreement" between Concordelink and RVG, expressed to have been entered into on 15 July 2015. RVG's letter went on:

> I decided to enter into this agreement as I spend time in Sri Lanka, my native country, where I deal with local children's care homes and most of these homes are located in very remote areas. As a result of this I have no internet access or means of communications.
>
> It was unfortunate that I was taken ill on my last visit and that is why I had to use the Master Service Agreement that I had with Concorde Link Couriers Ltd.

77. The services to be provided by Concordelink under the agreement are specified as follows:

> 1. CLC shall if required accept funds from RVG's clients and transfer those funds to either supplier's account.
>
> 2. Such other functions as the parties may agree.

78. HMRC's third ground of revocation was said to consist of a number of generalised statements that provided no basis for a conclusion of excise wrongdoing. At the December meeting UDL had asked for specific allegations of fact that it could address. None had been provided. Nevertheless, UDL had inferred that HMRC were concerned about its possible involvement in circular movements and had added a question to its due diligence form requiring companies to specify the territories in which they trade, as a precursor to follow-up questions in the event that the answer raised a risk of goods returning to their territory of origin. It had also amended its stock offer form to indicate the excise warehouse from which the goods had come, so as to enable the parties to assess whether there was any risk of a circular movement. Two examples of the new form of stock offer were enclosed; they indicated the

United Kingdom warehouse in which the stock was stored and the warehouse or country from which it had come.

79. HMRC replied to Altion Law on 7 April 2016, pointing out that in three of the four seizures Border Force had said that the ARC had been sighted before, and that the only documented reaction of UDL was to cancel the warehouse reservation for one of the consignments seized on 7 August. It added that UDL were aware of the issue of alleged multiple movements from 3 August 2015 and failed to take timely and effective mitigating action. With regard to the Concordelink payments the letter pointed out that the explanation did not accord with the paperwork. With regard to the circular movement of stock, the letter drew attention to paragraphs 10.2 and 10.4 of EN 196.

The revocation letter

80. In a letter of 11 April 2016 Officer Simpson notified UDL of the revocation of its registration. The letter first recited the fact of the four seizures and continued

> As already notified, the above seizures indicate that multiple movements of excise goods have taken place under the same ARC numbers, and given that UDL were aware of this issue from the 3rd August 2015, they failed to take timely and effective mitigating action when this risk of fraud was clearly identified.
>
> I would add that the ownership of the goods at this point is not of issue, but rather that in each instance UDL have facilitated the commencement of the movement through their raising of a purchase order to their supplier. Without this fundamental step no movement would have taken place and the multiple loads of excise goods would not have been identified.

81. In respect of the Concordelink payments the letter repeated what had been said in the 7 April letter, with the same conclusion that

> Given the unauthorised use of UDL's business bank account, and UDL's failure to take timely and meaningful action to address the risks which were apparent from the 6th October 2015 when the first third party payment was received, I reiterate that UDL has failed to meet HMRC's due diligence requirements.

82. The third ground of revocation was that UDL's due diligence had failed to reveal that goods sourced by it on the near continent had been subsequently despatched back there by UDL's customers. Reference was made to paragraphs 10.2 and 10.4 of EN 196.

83. On 14 April 2016, prior to UDL's receipt of the revocation letter, Altion Law had responded on UDL's behalf to the letter of 7 April. In relation to the seizures they referred to the email from Invartio "confirming that it is pursuing legal action". In challenging the seizures Invartio had, they said, acted as would be expected of a legitimate trader. As the proceedings had not been determined, it was a fundamental mistake for HMRC to assume that there would be a finding of fraud. Moreover, only

the owner of goods could commence legal proceedings in respect of their seizure; all that UDL could do was to check that legal action had been commenced, and confirmation of that had been provided.

84. In respect of the Concordelink payment of £10,480, Altion Law said that they had been able to obtain additional information that resolved the confusion over the email correspondence. The reference to sending the stock offer had been a mistake of terminology. Altion Law's letter enclosed "the document that was inadvertently sent by UDL to RVG and that caused the entire problem"; it was the goods intake note, also dated 9 September 2015, that had been prepared for submission to Invartio. The letter explained that, owing to an administrative error, this was inadvertently attached to an email to RVG, thereby disclosing both the identity of the supplier and a price of £5 rather than £5.85; it was not in dispute that UDL intended to charge £5.85, hence the details contained in the stock offer that should have gone to RVG had the clerical error not been made.

85. The enclosed goods intake note and the stock offer are both dated 9 September 2015. Both of them contain a table listing the stock. The goods intake note is addressed to Invartio; it sets out the buying in prices (at £5 per case) opposite the stock items and says "I can confirm I have the following stock now in my account at Seabrook Bonded Warehouse. Can you please send invoice for the below stock." The stock offer is addressed to RVG. It sets out the offer price at £5.85 per case and says "I have the following stock available in Seabrook Bonded Warehouse. If you are interested to purchase this stock UNDER BOND or DUTY PAID please send me purchasing order." RVG's purchase order for the consignment lists the stock without referring to any price.

86. In response to HMRC's observation that invoice 533 had been stamped "paid" although no payment of £12,261 had been received, the letter referred to RVG's habit of sending lump sum payments, which it was UDL's practice to attribute to invoices in order of issue. They said that this had been done to invoice 533 on 24 September, and it was that which had led to a dispute about the value of the invoice and had caused RVG to make a separate payment of £14,480 and to confirm that that sum should be allocated to invoice 533.

87. This explanation was not accurate. UDL's bank statement shows that the payment on 24 September referred to by Altion Law as a lump sum payment was in fact four separate payments made on the same day, each payment carrying a reference referring to a particular UDL invoice; none of the references was to invoice 533. The four Concordelink payments made on 6 October also referred to invoice numbers, and the payment of £10,480 referred to invoice 533.

88. Regarding UDL's due diligence on Concordelink, the letter pointed out that the payments had been made without UDL's consent. UDL had behaved properly in informing RVG that third party payments should not be made and carrying out checks on the factual matrix behind the payment. The purpose of the due diligence on Concordelink was to establish whether there was any risk of fraud that should be notified to the authorities. But that point became moot given that HMRC knew of the

Concordelink payments and they were discussed at the 8 December meeting. It was difficult to see what else a responsible excise trader could have done. In any event, UDL ultimately stopped trading with RVG.

89. Regarding the issue of circular movements, the letter referred to UDL having enhanced its due diligence by asking in what jurisdictions its trading partners trade and disclosing the previous location of goods it offered for sale. The letter concluded by threatening judicial review.

90. Officer Simpson responded on 27 April 2016. His letter largely reiterated the contents of the decision letter. He added that the points made in the letter raised further queries about UDL's allocation of payments to invoices; given those, and the fact that the business paperwork did not reflect the version of the events contained in the letters of 23 March and 14 April, he adhered to what he had said in his letter of 7 April. In relation to the circular movements, he commented that the additions to UDL's due diligence form were belated. He concluded that "the issues identified remain outstanding and nothing provided would lead me to deviate from HMRC's course of action in respect of the WOWGR approval".

The review

91. By letter dated 20 April 2016 Altion Law on UDL's behalf sought a review of the decision. Their letter pointed to the requirement to show reasonable cause for the revocation. It attached copies of the relevant correspondence for the attention of the review officer and complained that Officer Simpson had not properly considered the evidence. The outcome of the review was communicated in a letter of 12 July 2016. The review officer was a Mr McCann, who did not give evidence to us – a matter commented on by Mr Bedenham who appeared for UDL.

92. The review decision letter summarised the history of the matter, set out Altion Law's letter of 20 April and summarised the three reasons given by Officer Simpson as to why UDL was not a fit and proper person to remain a registered owner. In relation to the Concordelink payments the review letter summarised Officer Simpson's rejection of the explanation given by Altion Law in their letter of 23 March 2016 (paragraph 69 above) but did not refer to the further explanation given in the latter of 14 April (paragraph 81 above).

93. In relation to the four seizures, the decision on review and the grounds for it were as follows. UDL had been advised by HMRC in September 2014 of previous seizures and warned in the email of 6 November 2014 that revocation of the approval would be considered if further seizures occurred. UDL was informed on 23 July 2015 that a consignment from Invartio had been seized for multiple use of an ARC. UDL continued to trade with Invartio and was advised of three more seizures. UDL then continued to trade with Invartio until 8 December. Officer McCann accepted that UDL contacted Invartio on each occasion, but UDL could have stopped placing orders with Invartio. The alcohol in the first seizure had been condemned on 28 January 2016 and no proceedings challenging condemnation had been instituted in respect of the others. Officer McCann concluded "Taking into account all of the

above, I am in agreement with the DM [decision-maker] that this reason would have been sufficient, on its own, to cancel your company's WOWGR registration".

94. Regarding the Concordelink payments, the letter began by saying "Altion Law have confirmed that your company provided in error to RVG Imports-Exports Ltd a copy of the invoice from Invartio to your company". It noted that UDL had not supplied RVG since the meeting on 8 December 2015 and that the difference between £10,480 and £12,261.60 had been paid. It then went on to assert that UDL had allowed Concordelink to access its account without permission and that the due diligence carried out on Concordelink was inadequate: the financial checks were carried out belatedly, they had shown Concordelink's credit rating to be poor and UDL had made no effort to establish how Concordelink was able to fund payments of over £200,000 in one month.

95. This part of the letter concluded "Given the unauthorised use of your company's business bank account, and the failure to take timely and meaningful action to address the risks that were apparent from 6 October when the first third party payment was received. Your company has failed to meet HMRC's current due diligence requirements. Taking into account all of the above I am in agreement with Officer Simpson that this reason was correctly included in the reasons used to cancel your company's WOWGR registration".

96. Regarding the circular movements, the letter noted that UDL enquired about customers' areas of operation and "informs your company of the origins of the goods when issuing stock offers". But Officer McCann found this basically reactive in nature. In addition, the question about areas of operation did not address the issue of where individual loads were despatched; nor did anything else produced by UDL. He agreed with Officer Simpson that this was correctly included as a reason for cancelling the registration.

The appeal

97. UDL's grounds of appeal (some having been withdrawn) are, in summary: (1) that UDL had been told by Invartio that the four seizures were being challenged; that UDL had ceased dealing with Invartio and that the seized goods formed a very small percentage of UDL's trade with Invartio; (2) that the Concordelink payments were made without UDL's knowledge or consent; when the payments came to UDL's knowledge it investigated the situation and no longer trades with RVG; (3) the accusation that UDL's loads had subsequently been re-despatched to the continent was vague and unsubstantiated; (4) that HMRC had ignored information and documentation and (5) had decided that they would revoke UDL's registration whatever evidence was provided; (6) the decision to revoke was unreasonable and/or disproportionate.

98. Mr Bedenham invited us to make certain specific findings in relation to the three grounds of revocation, and made a number of submissions. We address the submissions relating to particular grounds of revocation in our conclusions on the individual grounds below. Overall, he submitted that the decision took into account

irrelevant matters, failed to take into account relevant matters, did not properly apply the policy in EN 196 and was disproportionate.

99. In particular, he submitted, the decision failed properly to apply the fit and proper person criteria as set out in paragraph 3.2 of EN 196. The decision-maker failed to appreciate that the test required an assessment of whether UDL was fit and proper as at the date of the decision, rather than being a penal test that simply punished a trader for past errors. It also failed to take into account that, as per paragraph 10.4 of EN 196, HMRC should normally support a trader to strengthen its procedures.

100. If the correct approach had been adopted, HMRC would have worked with UDL to improve its due diligence or at most have imposed conditions. HMRC did not consider whether any concerns about UDL might be met by imposing conditions such as that UDL should only trade with parties approved by HMRC or should submit its due diligence to HMRC on a regular basis.

101. He submitted that the decision failed to take into account the policy that a due diligence failing should only result in revocation where there was serious non-compliance such as ignoring warnings and knowingly entering into high risk transactions. These were not present in this case – no tax loss letters were sent to UDL or specific warnings given, and there was no suggestion that UDL had knowingly entered into high risk transactions.

The law governing this appeal

102. A trader affected by a decision to revoke its registration is entitled to a review of the decision and/or to appeal against the decision. Appeals are governed by section 16 of the Finance Act 1994. Where (as here) there has been a review, the appeal is against the decision on review. A decision about registration is on an "ancillary matter" within the meaning of section 16(8); section 16(4) only gives us power to interfere with such a decision where we are satisfied that HMRC could not reasonably have arrived at it. The burden of satisfying us of this rests with UDL.

103. The section 16(4) test has two components; these are broadly: (1) HMRC's decision must take into account all relevant matters, must not take into account irrelevant matters, must be taken with an open mind and must not be one that no reasonable person could have arrived at; and (2) it must comply with the European Convention on Human Rights.

104. In the event that we find that HMRC could not reasonably have arrived at the decision, our powers are either simply to direct that the decision is to cease to have effect (with the result that UDL's registration is reinstated) or to require HMRC to conduct a further review of the decision in accordance with directions that we give. We do not have power to remake the decision, or substitute a decision of our own. We could leave the decision in place even if we concluded that HMRC could not reasonably have arrived at it, but we could only do that if we thought it was inevitable that any fresh decision by HMRC would be a decision to revoke the registration.

105. The first component of the test involves applying the traditional grounds of judicial review to the decision, having regard to the information available to the decision-maker. The second of them requires us to form our own view of the proportionality of the decision, on the basis of facts that we find. Mr Bedenham stressed to us that we could, and in this case should, make findings favourable to UDL's case that were justified by the evidence, and assess the proportionality of HMRC's decision on the basis of them, even if they were not known to the decision-maker. We investigated with counsel what the position was if the evidence supported findings of facts that were adverse to UDL's case but had not been taken into account by the decision-maker. Mr Bedenham accepted (rightly in our view) that we could take such matters into account, but only for the purpose of deciding whether it was inevitable that any fresh decision by HMRC would be a decision to revoke the registration.

106. Mr Watkinson drew our attention to the Underhill LJ's observation in *CC&C v HMRC* [2014] EWCA Civ 1653 that:

> The decision whether a registered owner remains a fit and proper person to trade in duty- suspended goods is a good example of the kind of decision which the HMRC are peculiarly well- fitted to judge, since it requires what is necessarily to some extent a subjective – albeit evidence-based – assessment of such matters as the attitude of the trader and its principal employees to due diligence issues and their sensitivity to the risk of becoming involved, albeit unintentionally, in unlawful activities.

Our decision

(1) The four seizures

107. The review officer concluded (see paragraph 93 above), that UDL's conduct in relation to the four seizures was sufficient reason on its own to cancel its registration. Mr Watkinson submitted to us, correctly, that unless we found this part of the decision to be flawed in public law terms or disproportionate, we must affirm the decision.

108. Mr Bedenham invited us to make the following findings: UDL was not complicit in any diversion fraud; on being notified of the seizures UDL enquired of Invartio and was told the seizures were being challenged; UDL ceased trading with Invartio in the last quarter of 2015 and had not traded with Invartio for at least four months by the time of the revocation decision.

109. HMRC have not alleged that UDL was complicit in any fraud and we proceed on the basis that it was not. There is email evidence that UDL enquired of Invartio about three of the seizures, and we think it more likely than not that there was an oral enquiry about the fourth.

110. There is email evidence that UDL were made aware of Altion Law's investigation of the first seizure (see paragraph 38 above). There is no evidence that UDL was updated about progress. We consider that, if this had been done, it would have been done by email and the email would have been produced to us. We

conclude that UDL was at that stage prepared to go on trading with Invartio on the basis that Altion Law had been engaged to investigate that seizure, and that Mr and Mrs Salih did not press for any information about progress.

111. There is email evidence that UDL queried one of the 7 August 2015 seizures with Invartio. There is no email evidence that UDL received any answer; we consider that the most that can have happened was that UDL was told orally that those matters were in the hands of Altion Law. There is email evidence that UDL were told that the fourth seizure was in the hands of Altion Law, but no evidence that the promised follow-up information was provided. Overall, we conclude that UDL did not view the seizures as casting doubt over Invartio as a supplier, simply on the basis that Altion Law were challenging them.

112. In our view Officer McCann did not take into account any matters that were irrelevant or materially wrong. He found that there was documentary evidence that UDL had queried each of the four seizures, whereas we have only seen documentary evidence in relation to three of them. But if that was an error it was an error in UDL's favour and cannot have affected the decision.

113. Secondly, it was debated at the hearing before us when UDL "ceased trading" with Invartio. Mr Salih told us that it was in late October or early November 2015; in cross-examination he said in was November. It was because of the seizures and HMRC asking a lot of questions. Mrs Salih told us that it was at the beginning of November; we asked her why, and she too said it was because of the seizures and HMRC. We have found no evidence that UDL placed new orders with Invartio after an order dated 28 September, which is referred to in Mr McCann's letter and appears to have given rise to the fourth seizure. Altion Law had told HMRC (see paragraph 68 above) that Invartio had not been a current supplier since October 2015. Mr Salih had said in his witness statement that UDL only resolved not to do further business with Invartio following the 8 December 2015 meeting with HMRC "as I was concerned about the way that HMRC kept raising issues about trade with that supplier". His oral evidence was that the decision was taken earlier than that.

114. It may be that no trade took place from October or November onwards (we asked both counsel about this but did not receive a clear indication of when the last trade took place); it may be that the decision not to trade was taken in November rather than after the 8 December meeting. But it has never been UDL's case that it decided to drop Invartio as a supplier as a result of the seizures, themselves; we find that it was as a result of HMRC's questions in relation to them. We in any event find that Officer McCann was entitled to interpret Altion Law's letter of 23 March 2016 as saying that the decision had been taken in December.

115. Mr Bedenham submitted that this part of the decision did not give adequate consideration to the facts that UDL had ceased trading with Invartio several months before it was made and that HMRC had not raised any issue with UDL's due diligence in relation to Invartio or raised any other concerns. This, he said, was relevant to assessing the reasonableness of UDL's initial decision to continue trading

with Invartio on the basis that Invartio was challenging the seizures, using the services of a law firm known to UDL.

116. It was for Mr McCann to decide what if any weight to give to the fact that Invartio and UDL had not traded for some months by the time of the review decision. He was not legally required to give any weight to it: the issue was the fitness of UDL to be a registered owner in the light of its response when the seizure problem surfaced. Nor was he required to give any weight to the fact that HMRC had not specifically criticised UDL's due diligence into Invartio. However satisfactory Invartio may have looked on paper, the fact of the repeated seizures cast new doubt on its suitability.

117. We cannot conclude that Officer McCann was irrational in regarding UDL's reaction to the seizures as showing it not to be a fit and proper person to be a registered owner. He could rationally conclude that the cumulation of seizures should have alerted UDL to a serious risk that inward diversion fraud was being engaged in by Invartio or those involved in the movement of Invartio's goods, and that UDL was unwittingly facilitating it by engaging in the (in themselves legitimate) transactions that generated the e-ADs and ARCs, and that in being prepared to go on accepting supplies from Invartio on the basis of little more than assurances that lawyers were on the case, UDL had fallen below the standard of vigilance set by EN 196.

118. We think that Notice 196 could be clearer in alerting traders to the particular risk of becoming involved in trades where the paperwork is also used for an illegitimate importation. The risks of becoming implicated in illicit trading are referred to rather generally in section 10.1, as is the risk of "supplying into" illicit chains in section 10.2. There is reference to uncommerciality of deals. Counsel explained inward diversion fraud to us during the hearing, and we have set out our understanding of it earlier in this decision. We do not believe we could have derived that understanding from the Notice. But Mr Salih told us that he did know about inward diversion fraud, and that it involved two loads moving under the same ARC. He said that he did checks to find out if his supply chain was a good one. We take that to be a reference to UDL's due diligence.

119. We also share the view of the tribunal (Judge Hellier and Toby Simon JP) in *Safe Cellars Ltd v HMRC* [2017] UKFTT 78 (TC); they said

> 14. The emphasis (by volume of words) in section 10 of EN 196 is on the kinds of checks which could be carried out and what concerns might arise from them. However, the words in [paragraph 10.1 setting out the due diligence condition] are in our view sufficient to make clear that the "due diligence" required by the notice consists, not only in making checks and in collecting answers, but in evaluating whether the information received indicates a risk of connection to excise fraud and in taking "mitigating action".
>
> 15. This last requirement, to take mitigating action, is, on a quick reading of the notice, obscured by the volume of material in the examples, and it is not elaborated on save as noted in [section 10.3]. That failure to emphasise that

something may need to be done – and that that something may mean not entering into a potential, and potentially profitable, transaction – is a lamentable presentational defect in the notice; but it does not detract from the fact that taking "mitigating action" where a real risk to the collection of excise duty is apparent, can only be construed as including not entering into a trade.

120. We also consider that the Notice makes it sufficiently clear that due diligence is not merely a matter of vetting a trading partner at the outset of a relationship. The due diligence condition requires a trader both to "put in place reasonable and proportionate checks *in your day to day trading* to identify transactions that may lead to fraud" and to "have procedures to take timely and effective mitigating action where a risk of fraud is identified".

121. Though the Notice refers mainly to "checks" to be done by traders, on any sensible reading it includes reacting to warning signs of unwitting involvement in fraud. In addition, UDL cannot have been unaware of how seriously seizures and double use of ARCs were regarded by HMRC and by others handling duty-suspended alcohol. Seizures were the subject-matter of the meeting with HMRC in September 2014 and the subsequent warning email of November 2014; the paperwork relating to three of the four 2015 seizures referred to double use of ARCs, and Safe Cellars had made their concern about the first 2015 seizure clear in July and August 2015 (paragraphs 35 and 37 above). If UDL did not already know by August 2015 why seizures and double use of ARCs were a problem, they could be expected to find out.

122. We have borne in mind Mr Bedenham's submission that the issue for Officer McCann was UDL's fitness to be a revenue trader as at the date of his decision, and that by then these seizures lay some way in the past. We have also borne in mind his general submission that UDL was at all times willing to improve its procedures. There is some force in these points, but they cannot be taken to the length of enabling a trader to say that no past error affects its ongoing fitness since the trader will avoid repeating the error.

123. Section 10.4 of EN 196 distinguishes between cases in which it is appropriate to "support [a trader] to strengthen your procedures" and "serious non-compliance, such as ignoring warnings or entering into high risk transactions", which may justify revoking an approval. We consider that Officer McCann could justifiably regard UDL as having ignored warnings and having continued to enter into high risk transactions. Mr Bedenham accepted, as an abstract proposition, that a point is reached at which a falling short by a trader shows it to be someone on whom HMRC cannot rely to respond adequately to risks of innocent involvement in illicit trading. We cannot regard Officer McCann as having been perverse in concluding that UDL should have suspended trading with Invartio pending the resolution of these issues and that UDL's stance in relation to the seizures showed it not to be a fit and proper person to be a registered owner.

124. We do not consider that the sanction was disproportionate. The further facts in relation to the seizures that we have ascertained from the evidence only go to give further support to Officer McCann's conclusion: Invartio was a fledgling company

and a fairly new supplier of UDL, trading having begun at the beginning of June 2015. UDL learnt of the first seizure in late July 2015 and knew by 3 August that it was a case of suspected double use of an ARC. On 12 August Invartio told UDL that Invartio did not know how to stop seizures happening (paragraph 39 above). On about the same date UDL learnt of one of the 7 August seizures, including that it too was a case of suspected double use of an ARC; some ten days later UDL learnt of the other 7 August seizure and had cause to suspect that it too potentially involved double use of an ARC. Moreover, UDL had been warned of the seriousness of seizures not only by HMRC but also by Safe Cellars.

125. Mr Bedenham also submitted that Officer McCann failed to consider less onerous alternatives to revocation of UDL's approval, such as a condition that UDL could only trade with parties approved by HMRC. There is no evidence that HMRC considered this. But we do not consider that this was something that needed to be discussed in the decision, or something that makes the outcome disproportionate. In short, it was not a workable alternative since it would in effect transfer the responsibility for vetting UDL's trading partners from UDL to HMRC, contrary to the due diligence policy of EN 196.

(2) The Concordelink payments

126. We find the treatment of this topic in the review decision rather confused. Parts of the decision letter suggest that UDL had authorised the third party payments, though that is not HMRC's case in this appeal. Mr and Mrs Salih's evidence to us was that they had not agreed in advance to accept payments from Concordelink on behalf of RVG and had not known in advance of 6 October 2015 that payments would be made into UDL's bank account by Concordelink. That is consistent with what they said to HMRC at the meeting on 8 December 2015. HMRC have not suggested that that was not true, and we make no finding that UDL had agreed to receive payments from Concordelink.

127. The other part of HMRC's criticism is that UDL did not take "timely and meaningful" action to address "the risks that were apparent". Neither the risks nor the action are specified in the review decision or in Officer Simpson's decision letter of 11 April 2016. The review decision goes on to criticise UDL's due diligence enquiries into Concordelink as belated and also insufficient in not explaining how Concordelink was able to fund the payments.

128. That final criticism is also wide of the mark. If UDL had neither agreed to nor expected the Concordelink payments, it cannot be criticised for not having undertaken due diligence in advance. Issues of how Concordelink was able to fund the payments did not really arise in circumstances where RVG were presumably putting Concordelink in funds.

129. Moreover, the letter touched on the issue of RVG knowing Invartio's selling price but misstated UDL's position in relation to it (see paragraph 92 above) and did not state any conclusion on that aspect of the case.

130. Mr Bedenham invited us to make certain findings of fact in relation to the Concordelink payments. In relation to those, we do indeed proceed on the basis that the Concordelink payments were made without UDL's knowledge or consent and that UDL could not have conducted prior due diligence on Concordelink. We also accept that the due diligence obligation is focussed on intended trading partners.

131. Mr Bedenham's submissions in relation to Concordelink were in summary that the decision failed to take into account that UDL never planned to trade with Concordelink (the due diligence condition being focussed on intended trading partners) or that UDL investigated the payments with RVG and also made checks on Concordelink in order to understand more about the entity that had paid money to it – something that should have been treated as a factor in UDL's favour.

132. We fully accept the first of these points. Indeed, we do not find that this part of the review decision sets out a rational basis for finding UDL not to be a fit and proper person to be a registered owner. But this failing did not affect the decision as a whole, given the conclusion that UDL's reaction to the four seizures constituted adequate reason to revoke its approval.

133. We nevertheless find cause for concern in UDL's response to the Concordelink payments, which the review decision does not clearly set out. The concern relates not so much to the adequacy of UDL's due diligence in respect of Concordelink as to the deeper question of the doubt that the whole Concordelink episode cast upon the suitability of RVG, Invartio and Flux as trading partners, and UDL's response to that.

134. It is apparent from UDL's bank statement: (1) that Concordelink was making payments of money owed to UDL by RVG, (2) that Concordelink knew the amount that UDL had paid Invartio for the consignment that UDL sold to RVG under invoice 533 (suggesting that Invartio and RVG were in direct communication with each other) and (3) that Concordelink knew the identity of Flux as one of UDL's suppliers (also suggesting that they too were in direct communication). There is also some indication, in the pattern of payments on the bank statement, that Concordelink also knew Flux's selling prices.

Concordelink as the payer

135. It was Mrs Salih who logged on to the company bank account to make a payment to Invartio on 7 October 2015. It is apparent that she knew that sufficient money had come into the account for her to make the Invartio payment without transferring money from UDL's deposit account. She was asked when she realised that the money had come from Concordelink. Her evidence was that she only noticed at first that payment had arrived in respect of sales to RVG; it was around 9 or 10 October that she noticed that the payment was from Concordelink. We proceed on the basis that UDL was aware by at latest 10 October that Concordelink was the payer.

136. It was common ground between UDL and HMRC that third party payments are unacceptable. Mrs Salih told us that UDL decided to contact RVG urgently to protest

about the use of Concordelink to make payments and ask for an explanation. She produced an email dated 20 October 2015 from UDL to RVG; this said "I have received payment from a company called Concorde who have paid your invoices but different ref UNI/FL. Who is this company and why are you sending payment from them instead of your own bank account. I am waiting for URGENT reply before we do any more business." This was at least ten days after UDL became aware that Concordelink had made the payment. RVG's reply, sent as an email attachment, is the letter we have set out at paragraph 73 above.

137. UDL replied to that letter on 30 October, saying "as you should know I have to do a due diligence check on the company to satisfy myself of the legitimacy of Concorde Link. With respect to the above can you please give me a contact name and number and passport copy so my due diligence company can do all relevant checks ASAP. We will no longer do business with your company until this matter has been resolved. In the meantime I will only accept money from RVG bank account as soon as possible, as I want all outstanding monies paid URGENTLY".

138. On 2 November 2015 RVG sent UDL a copy of RVG's due diligence on Concordelink. Mr Salih contacted Concordelink on 10 November 2015 asking for a name and contact number to pass to UDL's due diligence company. The Salihs carried out some searches into Concordelink and on 25 November the director of Concordelink completed UDL's due diligence form. Mrs Salih attached some documents to her witness statement. They include a Companies House search, a VAT number validation and a check of Global Business Register. These are also dated 25 November 2015.

139. Meanwhile, UDL had attempted to refund the payments to Concordelink and obtain payment from RVG, but Concordelink would not reveal their bank details, saying "if you want to send it back send it back to RVG" and asking not to be contacted again.

140. One oddity surrounding the Concordelink payments is that RVG apparently emailed UDL on 6 October 2015, the day of the first payment, to say that they were paying £10,480 and not £12,261.60 in respect of invoice 533 (see paragraph 71 above). The email did not mention that payment was coming via Concordelink. Secondly (as Mr Watkinson pointed out to us), the director of RVG was apparently able to send an email, and was aware of Seabrook's audit and the HMRC check on the load in question, despite apparently being in too remote an area to operate RVG's bank account. We would have expected the fact that RVG had arranged the payments by Concordelink and had not forewarned UDL, despite having an opportunity to do so, to raise further suspicions in Mr and Mrs Salih's minds.

RVG knowing the amount of invoice 533

141. RVG must have known UDL's buying-in price in respect of the load covered by invoice 533. It can only have learnt this from UDL or from Invartio. UDL's evidence is that UDL inadvertently disclosed the buying-in price, but there have been varying explanations of how this happened. The first, consistent with the emails at paragraphs

71 and 72 above, is that UDL had mistakenly sent RVG an incorrectly priced stock offer. But the stock offer subsequently produced to HMRC stated the correct price. The second explanation given (see paragraph 84 above) was that UDL had inadvertently sent RVG the goods intake note instead of the stock offer.

142. We have mentioned that the attachment to RVG's email of 6 October 2015 was a document which had the filename "Universal Drinks Ltd Stock Offer Ref UDL0109151"; presumably this was the document on which RVG relied to justify paying UDL £10,480 only. We have not seen the attachment. We cannot exclude the possibility that UDL did inadvertently save the goods intake note under a filename that described it as a stock offer, and sent it to RVG. But if UDL did send the goods intake note to RVG, incorrectly labelled as a stock offer, it would have been obvious to RVG that that mistake had been made. If that is what happened, it was at best a slim foundation for RVG's assertion that the stock was offered to it for £10,480. One would expect UDL to have said as much in its reply, rather than wrongly admitting to having drawn up an incorrect stock offer. It is also unclear why, in those circumstances, UDL's records would also contain both a correctly drawn up (and presumably correctly filed) intake note and a correctly drawn up and filed stock offer.

RVG knowing the identity of Flux as UDL's supplier

143. UDL was asked by HMRC at the meeting of 8 December 2015 for an explanation of how RVG knew of Flux, and could not give one. But in the course of her evidence Mrs Salih produced a copy of letter from RVG dated 11 December 2015. It read:

> Further to our telephone conversation earlier today, where you wanted to know how our courier Concordelink knew your suppliers name Flux Global as he used it as a reference.
>
> As I stated to you, I have known you for quite some time, we both work in a very small industry and both use the same bonds and as you know with this industry everyone seems to know everyone else's business.
>
> I do not poach clients or suppliers from friends as we all need to earn a living and I have an agreement with you that my word is my bond.
>
> I only used Concordelink as I was ill in Sir Lanka at the time and I wanted to make sure that you received the monies that were due to you. I told Concordelink via my secretary to use the reference Uni/Flux to guarantee that you knew that it was from me.
>
> I hope the above information satisfies your request.

144. It was established during the hearing that no copy of this letter had been supplied to Altion Law or to HMRC. Mr Watkinson accused Mrs Salih of forging it the night before giving evidence. Mr Bedenham objected to this on the grounds that no allegation of dishonesty had been pleaded. Mr Watkinson retorted that he had had no advance knowledge that the letter would be produced.

145. In *Ingenious Games LLP v HMRC* [2015] UKUT 105 (TCC), involving unpleaded allegations of bad faith, Henderson J cited the following passage from *George Wimpey Ltd v VI Construction* [2005] EWCA Civ 77:

> It is trite law that dishonesty must be pleaded with full particulars and put to the person alleged to be dishonest (see, for example, the remarks of Lord Millett in *Three Rivers District Council v Bank of England* [2003] 2 AC 1 at paras 183-186 in a speech, which although dissenting in the result was fully in accord with the views of other members of the House of Lords on this point). This is an essential procedural safeguard on which the courts insist. It is not open to the court to infer dishonesty from facts which have not been pleaded. Nor is it open to the court to infer dishonesty from facts which have been pleaded but are consistent with honesty.

146. Henderson J went on to explain:

> In cases where the burden of proof lies on HMRC to establish fraud or dishonesty, these principles undoubtedly apply in the same way as they would in ordinary civil litigation…..
>
> The present case, however, is not of that nature. It is common ground that the burden of proof lies on the Appellants to displace the closure notices issued to them by HMRC.…
>
> ….. The obligations which lay on HMRC were in my judgment of a different nature. First, as a matter of professional duty, counsel may not put questions to a witness suggesting fraud or dishonesty unless they have clear instructions to do so, and have reasonably credible material to establish an arguable case of fraud. Secondly, as the FTT rightly recognised, it is not open to the tribunal to make a finding of dishonesty in relation to a witness unless (at least) the allegation has been put to him fairly and squarely in cross examination, together with the evidence supporting the allegation, and the witness has been given a fair opportunity to respond to it. Important though these obligations are, they are quite different from, and do not entail, a prior requirement to plead the fraud or misconduct which is put to the witness. If it were otherwise, a party would be obliged to serve an amended statement of case before attempting to expose a witness as dishonest in cross-examination, and the element of surprise which can be a potent weapon in helping to expose the truth would no longer be available.

147. Since this is not a case in which HMRC bear the burden of proof, we do not consider that the allegation required to be pleaded. All that we shall say about it is that we reject any suggestion that Mr or Mrs Salih forged the letter. The only basis for so suggesting that is that the letter had not previously been shown to HMRC or even to UDL's legal advisers. But we cannot infer from that that the letter only came into existence the night before Mrs Salih gave evidence. It is common ground that HMRC asked at the 8 December 2015 meeting for an explanation of how Concordelink (and by implication RVG) knew Flux's identity. It appears that the

Salihs could not answer this question at the meeting and it is unsurprising if they followed the query up following the meeting. We have concluded that this is what happened, and that the letter arrived as a result. The Salihs' failure to supply it to Altion Law or HMRC at the time may be an oversight or a reflection of the letter's unsatisfactory features.

148. The explanation given in the letter of how RVG knew Flux's identity – "everyone seems to know everyone else's business" – is unconvincing as an innocent explanation of how one of two apparently unconnected traders knew the identity of the other. The suggestion that RVG directed Concordelink to refer to Flux in order "to guarantee you knew it was from me" is even less convincing: if the objective was to make it clear that the Concordelink payment related to RVG, a reference to RVG (which was indeed included) rather than a reference to Flux was called for. This statement also sits oddly with the terms of the email of 6 October. If RVG was concerned to make sure that UDL knew that the Concordelink payments related to RVG, and was in any case emailing UDL in relation to one of those payments (in respect of invoice 533), it becomes even more surprising that that email did not say that Concordelink were making the payments.

Conclusion

149. In the absence of a convincing explanation, evidence that RVG knew the identity of Invartio or Flux is evidence that the sales to UDL, and the onward purchases by RVG from UDL were being orchestrated by RVG and Flux or Invartio (possibly along with others). That would in turn suggest that these movements were being set up as legitimate movements in bond for the purpose of generating paperwork which could be used to cover illegitimate movements.

150. On the evidence before us, on 6 October 2015 UDL received payments from an unexpected source at the same time as an email from RVG which related to one of the payments but did not mention that Concordelink would be paying. UDL did not query the use of Concordelink until 20 October. On 29 October UDL received an explanation of RVG's use of Concordelink that was unconvincing in the circumstances; UDL's response was to suspend dealing with RVG, but possibly only pending investigations into Concordelink.

151. The further information received on 18 November (paragraph 76 above) was unsatisfactory: the rationale for using Concordelink was said to be that the director of RVG spent periods of time in areas without internet access; that does not seem to have been the position on 6 October 2015, when he could send an email. The sole specified function of Concordelink under the Master Services Agreement was to act as a conduit for payments due from and to RVG; there has been no explanation of why RVG wished to route these funds through another entity rather than arranging for some trusted person to operate RVG's bank account in the director's absence.

152. UDL's response to discovering that RVG knew the amount of Invartio's selling price to UDL was to admit that UDL had released the information, rather than to investigate whether Invartio and RVG were in touch with each other – UDL did not,

for example, make any enquiries of Invartio. Moreover, the explanation proffered to us of how UDL inadvertently released the information is unsatisfactory.

153. In addition, UDL does not seem to have made any enquiries into how RVG knew the identity of Flux until after the December meeting with HMRC. The explanation contained in the 11 December letter is not really an explanation at all. By that stage UDL had decided to drop RVG as a customer, but that seems to have been as a result of HMRC's concerns about RVG rather than concerns held by UDL. There is no indication that UDL ever raised the matter with Flux.

154. The most favourable assessment of UDL's conduct that we can make on the information available to us is that UDL was insufficiently vigilant in the face of information suggesting that it found itself in two chains of suspect transactions. We would have expected UDL to have begun questioning the situation rather earlier than 20 October, to have raised with all three of RVG, Invartio and Flux the issue of Invartio and Flux's identities apparently being known to RVG, and to have suspended trading with all of them unless and until satisfactory explanations were provided.

155. As these matters were not spelled out in the decision, they cannot save this part of it from our conclusion at paragraph 132 above. But they further support our conclusion that the outcome – revocation of UDL's approval – was proportionate.

(3) Failure to detect circular movements of stock

156. The third ground of revocation of UDL's approval alleged three shortcomings in UDL's due diligence. The first was that it had not detected circular movements of stock; secondly that the introduction into the questionnaire of a question about parties' areas of operation was "reactive"; and thirdly that the question did not address the issue of where goods sold by UDL were going.

157. HMRC have produced evidence that persuades us that some stock bought by UDL from the near continent was re-exported there by UDL's customers. Mr Watkinson said that there could be no logical commercial explanation for stock crossing the Channel twice before ending up at or close to its original location; the inference was that these movements were purely to generate paperwork for inward diversion fraud.

158. Mr Salih gave us an explanation of why he bought from the continent goods that were (in some cases) home-produced; it was that, as a small operator, UDL could not obtain sufficiently favourable terms for stock held in bond in the United Kingdom, but that more favourable prices were available for stock on the continent. We were not provided with any evidence of price levels and are unable to reject this explanation.

159. The fact that circular movements were not detected does not prove that UDL's due diligence was deficient. But we cannot avoid the conclusion that the due diligence was indeed deficient. Paragraph 10.2 of EN 196 tells registered owners that they need to know who they are selling to and where the goods are destined for, although the review decision letter does not refer to this. UDL does not seem to have made any enquiries related to that requirement until it amended its due diligence so as

to ask trading partners about their areas of operation and amended its form of stock offer so as to disclose the previous location of goods that UDL was offering.

160. Mr Bedenham pointed out (and we accept) that as at the date of the revocation decision UDL did do these things. Mr Bedenham asked us to find this to be to UDL's credit as showing its desire to improve its procedures, rather than deserving criticism as belated. There is some force in this, but it does not avoid the fact that the due diligence was still deficient. Stating the origin of stock did not assist UDL in monitoring circular movements engaged in by its customers and the question on the due diligence form about parties' areas of operation did not enable UDL to monitor where any particular consignment sold by it was destined.

161. Mr Bedenham also invited us to find that, if HMRC had suggested amendments to the wording of the question, UDL would have been willing to consider this. We do not doubt that. But that is not the issue, given the conclusion (which we cannot upset) that UDL's behaviour in relation to the four seizures showed it not to be fit and proper.

162. We bear in mind here UDL's general complaint that HMRC gave it insufficient guidance about due diligence. Mr and Mrs Salih said that their due diligence had not been criticised on quarterly visits. In re-examination Mr Salih acknowledged that HMRC had told him his due diligence was insufficient – we take it, in the June or December 2015 meetings. They told him to do more, but did not tell him what to do. He had done extra things, but Officer Simpson had not said anything about their adequacy. The Officer accepted in evidence that in June 2015 he had reviewed but not commented on the due diligence.

163. This is not a matter on which we need to make a definitive judgment. The issue in relation to the four seizures was not directly related to the quality of UDL's initial due diligence (we have rejected the submission was that UDL's initial due diligence on Invartio justified its decision to go on trading despite the seizures); we have rejected the criticisms of its due diligence specifically in relation to Concordelink. As far as the third ground of revocation is concerned, the flaw that we find in the decision letter is that it is left unclear what conclusion Officer McCann came to about the issue of due diligence.

164. It is not clear from the review decision whether Officer McCann regarded the shortcomings in due diligence as sufficiently serious in themselves to justify revocation. His conclusion was only that the shortcomings in due diligence were "correctly included as a reason" for the revocation. We do not know whether this means sufficient in itself to justify revocation, The officer also does not appear to have directed his attention to the reference in section 10.4 of the Notice to "serious non-compliance" as a precondition for revocation.

165. But we do not consider that this can be a ground upon which we can properly overturn the decision or require a further review of it. Officer McCann had already concluded – in a conclusion that we cannot upset – that revocation was justified on account of UDL's conduct in relation the four seizures.

Bias

166. One of UDL's grounds of appeal, though Mr Bedenham did not press it, is that HMRC had decided that they would revoke UDL's registration whatever evidence was provided. We understand this to be based upon the statement in Officer Simpson's letter of 27 April 2016 that "nothing provided would lead me to deviate from HMRC's course of action in respect of the WOWGR approval". Our reading of this letter is that Officer Simpson was referring to the additional information that had been provided since he wrote the original revocation letter. He was not saying that he would maintain the revocation come what may.

167. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NICHOLAS PAINES QC
TRIBUNAL JUDGE

RELEASE DATE: 20 DECEMBER 2017