



TC06579

Appeal number: TC/2017/06116

EXCISE DUTY – Alcohol Warehouse Registration Scheme – appeal against refusal of application for registration – whether HMRC could have reasonably concluded that the Appellant was not “fit and proper” – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CRAFTY LEOPARD BREWING CO LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE AMANDA BROWN
MS CAROLINE DE ALBERQUERE**

**Sitting in public at Royal Courts of Justice, The Strand, London on 21 – 23 May
2018**

Mr Stacey Ayeh for the Appellant

**Mr Joseph Millington of Counsel, instructed by the General Counsel and
Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. The Crafty Leopard Brewing Co Ltd (“the Appellant”) appeals against a decision of HM Revenue & Customs (“HMRC”) taken on review, to refuse the Appellant’s application to be registered under the Alcohol Wholesaler Registration Scheme (“AWRS”) as an approved wholesaler of alcoholic goods. HMRC refused the application because they were not satisfied that the Appellant was a fit and proper person to carry on the activity of the wholesale of dutiable alcoholic liquor. The decision under appeal was dated 21 July 2017.

Background

2. The Appellant was incorporated on 8 April 2017. The nature of the business recorded at Companies House is “of business support service activities not elsewhere identified”. Mr Stacey Ayeh is the sole director of the Appellant.

3. Mr Ayeh was previously the sole director of BO Times 1 Limited (“BOT”), the company responsible for the introduction of Kopparberg cider into the UK. The Appellant and BOT shared a registered business address. On the VAT 1 form for the registration of BOT its business was stated to be “to import and distribute for sale cider from Sweden to bars/pubs and restaurants across the UK”.

4. Mr Ayeh had also been a director of Magicspells Brewery Ltd (“Magicspells”) between 27 October 2016 and 11 April 2017. Magicspells was also a business establish to import alcohol for distribution in the UK.

Statutory test for approval

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

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

"88C Approval to carry on controlled activity

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

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

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

Meaning of fit and proper

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

"6.10 The fit and proper test

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

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

- 15 • there's no evidence of illicit trading indicating the business is a serious threat to the revenue, or that key persons involved in the business have been previously involved in significant revenue non-compliance, or fraud, either within excise or other regimes, some examples of evidence HMRC would consider are:
 - 20 ○ assessments for duty unpaid stock or for other under-declarations of tax that suggest there's a significant risk that the business would be prepared to trade in duty unpaid alcohol
 - seizures of duty unpaid products
 - penalties for wrongdoing or other civil penalties which suggest a business don't (*sic*) have a responsible outlook on its tax obligations
 - 25 ○ trading with unapproved persons
 - previous occasions where approvals have been revoked or refused for this or other regimes (including liquor licensing etc.)
 - previous confiscation orders and recovery proceedings under the
 - 30 Proceeds of Crime Act
 - key persons have been disqualified as a director under company law
- there are no connections between the businesses, or key persons involved in the business, with other known non-compliant or fraudulent businesses
- key persons involved in the business have no criminal convictions which are relevant for example, offences involving any dishonesty or links to
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organised criminal activity - HMRC will normally disregard convictions that are spent provided there are no wider indications that the person in question continues to pose a serious threat to the revenue (an 'unspent' conviction is one that has not expired under the terms of the Rehabilitation of Offenders Act 1974)

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

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

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

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

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The Appellant's application for AWRS approval

10. The Appellant made an application for approval to be registered as an alcohol wholesaler under the AWRS on 23 April 2017. The Appellant provided information relevant to the application. The application was allocated to Officer Jane Matthews for consideration and, if appropriate, approval.

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11. The application identified Mr Ayeh as the sole director of the Appellant and sought prospective approval under AWRS in order to carry on business as a supplier

of beer, perry, cider, wine and spirits to private individuals and traders online, over the phone and from physical premises.

12. Upon receipt of the application Officer Matthews performed checks against information held at Companies House and on HMRC's internal systems in order to ascertain the veracity of the information provided on the AWRS application form. In particular Officer Matthews was seeking to establish whether the Appellant was a fit and proper person for the purposes of AWRS registration. In particular, as this was an intending trader application, to establish the compliance record of the key operators of the business, in this case Mr Ayeh, in connection with previous businesses in which he had been involved.

13. Through the Companies House checks it was established that Mr Ayeh was the sole director and 97% shareholder of the Appellant. He had previously been a director of BOT, Magicspells and Periana Oils Ltd and was still a director of Ayeh FMCG Ltd.

14. With this information and by reference to HMRC's tax records for both corporates and individuals Officer Matthews identified that BOT had been registered for VAT twice. The first registration was from 24 February 2003 to 22 October 2009. Registration had been sought by BOT on the basis of a proposed trade in cider which was to be imported from Sweden. The first VAT return for BOT declared £80 sales and £2000 of purchases. The VAT records showed that a new business questionnaire had been completed in respect of BOT. Mr Ayeh had indicated at the time of completion of that questionnaire that he expected trade to commence in earnest in period ending 09/03 and that he required no educational assistance with his VAT affairs.

15. HMRC's records showed that for periods from 06/07 through to 06/08 BOT had not rendered VAT returns. As a consequence BOT was issued with centrally issued VAT assessments totalling £4,301 and default surcharges totalling £612.60. For periods 09/08 through to deregistration, BOT filed nil VAT returns. HMRC cancelled BOT's VAT return on the basis of no evidence that BOT was trading.

16. HMRC's records show that attempts were made to recover the outstanding debts. The file showed that there was a letter from Mr Ayeh dated 30 November 2011 indicating that he intended to pay off the debts at a rate of £250 per month from 31 January 2012. Whilst attempts were made to contact Mr Ayeh concerning the offer following deregistration, the sum of £3,886.05 ultimately was written off as uneconomic to recover.

17. The computer records for BOT also showed that it applied to be re-registered on 9 May 2013. No VAT returns were rendered by BOT from registration. BOT was again subject to centrally issued assessments.

18. In addition, by virtue of records of a Swedish brewing company, it was identified that BOT had imported alcoholic goods into the UK in periods 06/13, 09/13, 12/13, 03/14 and 06/14. The total value of these acquisitions was £80,951. None of the

acquisitions had been declared by BOT with the consequence that on 12 February 2015 HMRC raised assessments associated with the intracommunity acquisition of these goods against BOT for those periods totalling £10,139 plus £335.64 interest and a wrongdoing penalty totalling £3,040. BOT had also not declared the sales of these imported goods, no assessments were raised against BOT in respect of any margin that may have been achieved on those sales. BOT was deregistered on 1 February 2016 with outstanding debts amounting to £14,175.74. The Debt Management Unit records show that a number of attempts were made to recover this sum with HMRC finally contacting Mr Ayeh on 11 May 2016. The log shows that at that time HMRC were informed that BOT had no assets or funds to discharge the debt. Despite Mr Ayeh having indicated that he would render the VAT returns to bring BOT's records up to date and make the appropriate payments he never did so.

19. BOT was dissolved at Companies House on 20 September 2016 at which time the outstanding VAT debt together with further accrued interest was written off by HMRC.

20. HMRC's records on BOT also revealed that in August 2015 it had been the subject of an enquiry into BOT's status under the Warehouse Keepers and Owners of Warehoused Goods Regulations ("WOWGR"). It had been identified under its first VAT registration BOT had held a WOWGR certificate (permitting them to store alcohol under duty suspension) but by 2015 that WOWGR was invalid as it was associated with deregistered VAT registration number. Written enquiries were initiated and on 8 September 2015 Officer Martin Hands visited BOT's business premises.

21. The documentary record of that visit confirms that at the visit two matters significant to the present appeal were discussed: firstly that Mr Ayeh was aware that VAT returns had not been rendered and should have been; secondly there was discussion of missing stock. The note records that at the time of the visit 55 cases of pale ale and 6 kegs also of pale ale were apparently missing. There was also a note that there had been two other stock losses in the Christmas period of 2014. Correspondence was on file concerning the stock losses.

22. Officer Hands sought the production of various information and documents concerning the stock losses. By email dated 1 December 2015 Mr Ayeh forwarded to Officer Hands an email from BOT's supplier. The email was a single line email stating "Our distributor found your two pallets, they were not delivered". By the same email Mr Ayeh informed Officer Hands that BOT had ceased trading. Officer Hands did not consider the information provided was sufficient to determine that any of the three incidents of stock loss initially referenced had been resolved. This was communicated to Mr Ayeh by email on 3 December 2015 and followed up on 15 December 2015

23. As a consequence of the failure to produce adequate material concerning the stock losses, on 8 January 2016 a £250 penalty for failure to produce was issued.

24. On 4 March 2016, following confirmation that BOT had gone into administration Officer Hands wrote to Mr Ayeh notifying that “As a result I have now closed my case. However I would point out that if further information comes to light in the matter of the potential loss stock referred to in my correspondence to you we may re-
5 open the matter and contact you again”.

25. Mr Ayeh was also a director of Magicspells. Officer Matthews conducted checks on that business seeking to ascertain its compliance history. Magicspells had been granted a conditional AWRS approval on 22 December 2016. The condition imposed restricted Magicspells to only purchase craft beers from a single supplier.

10 26. Officer Matthews noted that Magicspells application for AWRS had not noted that Mr Ayeh was a director of that company but the notes of the visit leading to the approval identified that Mr Ayeh was present in his capacity as a director. The notes of the visit did not identify that Mr Ayeh disclosed to the officer considering that application of his prior involvement in BOT though the note confirmed that he had
15 disclosed involvement with both London Fields Brewery and a dormant company Ayeh FMCG.

27. On 30 May 2017 Officer Matthews undertook a visit to the Appellant and met with Mr Ayeh. Shortly prior to the visit, on 18 May 2017, Mr Ayeh contacted Officer Matthews stating that he had previously been granted an AWRS in his capacity as
20 director of Magicspells but that he had relinquished his role there in order that he could have a “proper AWRS” and build a business of his own.

28. The notes of the meeting on 30 May 2017 indicate that Mr Ayeh explained that the main business activity would be to act as a contract brewer using a company called Altarnun t/s Firebrand Brewery a company with whom he had a previous
25 relationship when working for London Fields Brewery. Mr Ayeh provided a business plan for the Appellant’s proposed business. The notes also confirm that Mr Ayeh had left Magicspells because of the conditions imposed on the AWRS approval. Officer Matthews had queried his continued involvement with the Magicspells business but Mr Ayeh confirmed he was no longer either a director or shareholder as at that date.

30 29. Officer Matthews is recorded as having asked Mr Ayeh about BOT, and its debts and compliance history and why it had not been disclosed as part of the application for registration of Magicspells. Mr Ayeh is noted as having answered that he would have told HMRC about BOT at the meeting for approval of Magicspells. As to the compliance failures the note indicates that Mr Ayeh accepted that he had been
35 negligent in terms of record keeping for BOT but that he had learned his lesson.

30. At the meeting certain additional information was requested and that information was provided by the Appellant.

31. Officer Matthews reviewed the material available and concluded that the application would be refused on the grounds that Mr Ayeh was not a fit and proper
40 person and as the sole director of the Appellant that thereby precluded approval for the Appellant on the same grounds.

32. By a letter dated 7 June 2017 HMRC notified the Appellant of the refusal to approve identifying the following key points for the refusal:

- (1) Mr Ayeh's failure to disclose his involvement with BOT at a meeting concerning the application by Magicspells to be registered under AWRS
- 5 (2) The VAT debts incurred by BOT in respect of the first period of registration
- (3) The issue of unresolved missing stock during the second period of registration by BOT and the associated wrongdoing penalty
- 10 (4) The failure to render VAT returns and to incur wrongdoing penalties vis a vis the acquisition of stock from Sweden together with the VAT debt so arising during the second period of registration by BOT
- (5) An alleged failure to disclose to the officer considering the approval for the Appellant of a 15% shareholding in Magicspells.

15 33. The Appellant requested a review of the decision. There was a dispute between the parties as to precisely which of Mr Ayeh's emails properly constituted the request for a review and thereby the chronology of events leading up to the review. That dispute was (by reference to the jurisdiction of the Tribunal set out in paragraphs 36 - 38 below) irrelevant to the issue to be decided by the Tribunal. However, there was no doubt that a review had been requested.

20 34. The review was undertaken by Officer Jordan Danks and the outcome of the review communicated to the Appellant by letter dated 21 July 2017. On review HMRC upheld the decision that Mr Ayeh and thereby the Appellant were not fit and proper persons justifying registration under the AWRS however, the basis of that decision excluded factors 1 and 5 identified in paragraph 32 above.

25 35. The Appellant appealed that decision.

Jurisdiction of the FTT on appeal

30 36. A decision to refuse an application for approval under Part VIA ALDA is a decision as to an ancillary matter for the purposes of section 16 Finance Act 1994 ("FA94"). Section 16(4) provides that the FTT has a supervisory jurisdiction in relation to decisions as to ancillary matters as follows:

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

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

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

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

10 37. Section 16(6) FA94 provides that the burden of proof in an appeal under the section is on the Appellant.

15 38. Whether HMRC are satisfied that a person is fit and proper to carry on the activity of a wholesaler of alcoholic goods is a matter for the administrative discretion of HMRC. The FTT's powers to interfere with a decision by HMRC that a person is not fit and proper are limited and can only be exercised where the decision is one which could not reasonably have been arrived at (see *CC & C Ltd v HMRC* [2014] EWCA Civ 1653 at [15] - [17]). The House of Lords in *Customs & Excise Commissioners v JH Corbitt (Numismatists) Ltd* [1980] STC 231 set out the approach for the FTT (then the VAT Tribunal) to follow where it has a supervisory jurisdiction at page 239 where Lord Lane stated that the tribunal could only review the decision if it were shown that the Commissioners had acted in a way which no reasonable panel of Commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. In *Balbir Singh Gora v Customs & Excise Commissioners* [2004] QB 93, [2003] EWCA Civ 525, Pill LJ accepted that the tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision was reasonable.

The Issue

30 39. The issue to be determined by this Tribunal is whether the Appellant can establish that HMRC's decision to refuse to approve and register it under the AWRS as a wholesaler of alcoholic goods was one which no reasonable officer of HMRC could have reached. In this case the relevant decision is that of Mr Jordan Danks the reviewing officer. In order to satisfy the burden of proof which rests on it the Appellant must show, on the balance of probabilities, that Mr Danks failed to consider matters which should have been taken into account or took into account some irrelevant matters or otherwise reached a decision that was so plainly wrong that no officer of HMRC, acting reasonably, could have reached it.

Evidence

40 40. The Tribunal were provided with significant documentary material. Evidence was taken from: (1) Officer Jane Matthews (the officer responsible for the original decision to refuse the Appellant's AWRS application); (2) Officer Martin Hands (the officer responsible for a WOWGR inquiry into BO Times No 1 Ltd); (3) Officer

Thamilarasi Chinnaswamy (officer responsible for granting a conditional AWRS in respect of MagicSpells); Officer Jordan Danks (reviewing officer); and (4) Stacey Ayeh (director of the Appellant).

5 41. The Tribunal found Officers Matthews, Hands and Danks to be truthful, coherent and compelling witnesses. Officer Chinnaswamy struggled with recollection and gave inconsistent testimony; however, for the reasons set out in paragraph 68 below the inconsistencies in her evidence were irrelevant to the matters falling within the jurisdiction of the Tribunal. Mr Ayeh too gave evidence so inconsistent with the position taken by him in correspondence that the Tribunal had to conclude that certain
10 aspects of either the correspondence or the evidence were untruthful.

Approach to the review

15 42. Officer Danks undertook the review of the original refusal of the AWRS by Officer Matthews. He explained to the Tribunal that his role as an independent review officer was to review decisions taken by other officers within HMRC; he confirmed that he had no involvement in the original decisions and rarely knew any of the original decision making officers. He approached his review by considering all the material that had been available to the original officer together with anything subsequently provided by the intending AWRS registrant. Determining, by reference to the material available, whether the key persons were fit and proper persons to carry
20 on a controlled activity in accordance with the provisions of section 88C(2) ALDA was critical to his role. He told the Tribunal that he undertook the review by considering the factors set out in the Notice referenced at paragraph 8 above.

Additional material provided by Mr Ayeh

25 43. Mr Ayeh's email of 7 June 2017 acknowledging receipt of the AWRS rejection and raising the possibility of an appeal stated:

"I'm more than happy to address all the points you raised to put your mind at ease and reverse this decision.

I was not aware that I was still a share holder of Magic Spells Brewery. I have nothing to do with that company or anyone involved in it.

30 I'm researching how to hand back those shares with immediate effect today.

I informed HMRC on 5th of April of my decision to leave Magic Spells. This was based on HMRC telling me that my only option was [sic] to leave the company as I was not the problem in getting the restrictions removed. This advice was on a number of occasions.

35 I did tell the officer that I had been a director of BO Times1 Ltd. And also told them about Kopparberg's cider and the other brands that I bought into the UK.

How have you been able to find out that I had been a director of BO Times1 and they didn't??

What would I have had to gain from that, it is on public records.

I thought I had made it clear to you when we met that I humbly apologies [sic] for past mistakes in paper work and that is why I have an accountancy firm over look this company”

5 44. By email dated 8 June 2017 Officer Matthews responded to the above points. She
acknowledged the position re Magicspells directorship and shareholding. She
confirmed that she had reviewed the notebooks of Officer Chinnaswamy and that
there was nothing in them regarding BOT. She accepted the apologies for the
mistakes but highlighted that it was the fact of the lack of adherence to record keeping
10 conditions which had led to the rejection of the AWRS. It was indicated that if Mr
Ayeh was able to sort out the problems from his previous company he could re-apply
for AWRS.

45. Mr Ayeh responded by email proving the following information:

15 (1) In respect of his failure to disclose BOT when Magicspells was
registering: “To the best of my recollection I was asked if I was a current
director of any other companies. At the time I was director of a company
called “Ayeh FMCG LTD (a dormant company) and of course Magic
Spells Brewery. I spoke extensively of my ownership and experience at
BO Times 1 and how that qualified me to make the business a success. I
20 do hope this has offered clarification on this miscommunication. I have
never tried to mislead anyone and if that had been the impression then I
apologise.”

25 (2) In respect of the first debts incurred by BOT: “as I explained to you at
our meeting an HMRC Officer (Jacinta French) came to our premises and
took all our records and to this date it has not been returned¹. This whole
regrettable issue is also underpinned by the mistakes made by Marstons
Brewery who were the Bond where my Stock was kept. I was held ransom
and unable to get my stock out to sell and keep the company going. This
is the reason the company folded. As you have also confirmed, the matter
30 is closed by HMRC until any new information comes to light and there is
no new information so again I hope we can reside the issue to the past.”

35 (3) As to the missing stock: As I explained to you at our meeting. The
HMRC Officer who came here was (Mr Martin Hands). He overheard a
conversation I had with Marstons Brewery in which there [sic] were
unable to locate stock I had believed was in their warehouse. I then
subsequently resolved this as there was no missing stock and provided Mr
Hands with the confirmation of that. Something which you have also
acknowledged in your email. The only officer who was privy to that
40 conversation about “missing stock” was Martin Hands and I reverted back
to him after checking and confirmed to him that there was no missing

¹This allegation was subsequently withdrawn by the Appellant it being established that Jacinta French was based in Northern Ireland and had never visited the Appellant’s premises.

stock. So again I hope that matter is closed as there is no new information on it.”

5 (4) On the issue of the second BOT debts: “I have reached out to an independent accountancy firm ... Given the situation I find myself in, I have requested additional account management, including regular quarterly meetings at their office to go through financial details.”

10 46. Officer Danks reviewed: (1) the AWRS application, (2) details of the VAT assessments issued to BOT both in respect of the non submission of returns and in connection with the non-declaration of acquisitions of alcohol, (3) the correspondence with Officer Hands regarding lost stock and the penalty notification for failure to produce information and documentation concerning the loss, (4) the information produced by the Appellant in connection with its due diligence on its customers and
15 (5) the email correspondence between Officer Matthews and Mr Ayeh including those referenced at paras 43 and 45 above.

47. Officer Danks considered each of the factors which Officer Matthews had concluded formed a justification for rejection of the AWRS registration.

20 48. He noted that Officer Matthews had relied upon the fact that Mr Ayeh had apparently not disclosed his involvement in BOT when applying for the AWRS approval for Magicspells. Officer Danks was of the view that each application under AWRS was required to be considered on its own merits. As it was clear that Officer Matthews had been aware of BOT he did not think it appropriate to take into account what may or may not have been said in connection with the Magicspells application.

25 49. Office Danks also determined that Mr Ayeh’s continuing shareholding in Magicspells was not a factor relevant to the Appellant’s AWRS application as on 22 June 2017 Officer Matthews had received confirmation from one of the directors of Magicspells that Mr Ayeh had resigned as a director and had transferred his 15% shareholding when he left the company².

50. On the basis of the information before him he was satisfied that:

30 (1) BOT had failed, under both registrations, to render VAT returns and had thereby been subject to the default surcharge regime.

(2) BOT had failed to account for acquisitions received from Sweden requiring them to be the subject of assessments.

35 (3) BOT had ceased to be registered on the first occasion resulting in uncollected VAT debts

(4) BOT had gone into administration resulting in further VAT debts

(5) BOT had suffered stock losses that had been unresolved

² This information conflicts with Mr Ayeh’s email of 7 June 2017 but as it did not form part of Officer Danks reasons for upholding the rejection of the AWRS application it is not necessary for this Tribunal to resolve the conflict

(6) BOT had been subject to a £250 penalty for failure to produce information and documents in connection with the stock losses

51. Having discounted the factors identified at paras 48 and 49 above, and taking into account only those referred to at 50 above Officer Danks considered that Mr Ayeh was not a fit and proper person and that therefore the Appellant's AWRS registration had been properly refused. This was notified by letter dated 21 July 2017.

Magicspells

52. As indicated above Officer Matthews considered Mr Ayeh's involvement in the application for AWRS by Magicspells was relevant. Officer Danks determined not to take it into consideration. However, it remained relevant in the context of the Appeal.

53. In summary, the terms of the Appellant's grounds of appeal asserted that the decision to refuse were spurious the real reason for refusal being that Mr Ayeh had been associated Hare Wines and Eastenders Cash and Carry. The Appellant also contended that the allegations of risk specified in the letters of refusal and forming the basis for the decision that he was not a fit and proper person were unsubstantiated.

54. However, at hearing of the appeal Mr Ayeh's case centred on an assertion that as he had been found to be a fit and proper person in connection with the Magicspells application and should therefore be considered to be fit and proper for the purposes of the Appellant's AWRS application. He perceived a great injustice had been done because (as set out in the emails reference at para 43) he asserted that he had been told by HMRC that the conditions associated with the Magicspells AWRS had been imposed as a consequence of issues identified with the other director Mr Jasdip Hare and not as a consequence of any issue identified in connection with him or his previous business enterprises. He appeared unable to conceive that having been given approval whilst a director of Magicspells any of the factors concerning BOT could be relevant to whether he was a fit and proper person for the purposes of the refusal to grant the Appellant a registration under AWRS. He believed that he had resigned from Magicspells to free himself of the restrictions associated with the Magicspells AWRS registration and to enable him to earn the living he wanted to earn importing and selling alcohol.

55. Given that this was the Appellant's case it was appropriate (though for the reasons set out below in paragraph 68 not ultimately relevant to the outcome of the appeal) to consider the circumstances of the Magicspells approval.

56. Officer Chinnaswamy was the officer allocated the Magicspells AWRS application as a consequence of the previous officer having gone on sick leave. At the time she took over the file there had been an email exchange between the previous officer and Jasdip Hare which stated: "I have copied in Mr Stacey Ayeh to this email. He is the other director and co-owner of the business".

57. Companies House checks were carried out and only one director, Jasdip Hare, was identified.

58. Officer Chinnaswamy contacted Magicspells to undertake a visit to verify the application. In response to that contact Mr Hare emailed Officer Chinnaswamy on 21
5 November 2016 and arranged the visit and informed her that Mr Ayeh would be in attendance; the meeting was arranged for 25 November 2016. On 22 November 2016 Mr Ayeh emailed Officer Chinnaswamy providing information on Magicspells proposed customers. He notified her that “I’m not sure if you know but I bought
10 Kopperbergs and Rekorderlig ciders into the UK. Two companies which are now between them generation [sic] in excess of half billion Pounds so I’m very experienced in brand building and intend to make Magic Spells a great success”.

59. In her witness statement Officer Chinnaswamy asserted that she was not expecting Mr Ayeh to be present. In oral evidence she claimed that she had never heard of Mr Ayeh before her visit on 25 November.

15 60. The officer’s witness statement also states:

“14) I asked Mr Ayeh if he had any experience in the wholesale of alcohol. He advised me that he joined Magicspells in October 2016 as a director and had previously been employed by a number of breweries including London Fields Brewery where he was employed full-time for about five months. He informed
20 me that he was not associated with any other companies but was a director of Ayeh FMCG, which was a dormant company and never traded.

15) I can confirm that Mr Ayeh did not inform me of his association with BO Times 1 Ltd either during the meeting or during my subsequent dealings with Magicspells. As such, I was unaware of this associated company”

25 61. Following the visit Officer Chinnaswamy asked a colleague to conduct checks against Mr Ayeh’s name on HMRC’s self-assessment and PAYE databases to confirm whether Mr Ayeh had any outstanding payments owing to HMRC. She did not carry out a Companies’ House Search on Mr Ayeh. Officer Chinnaswamy asserted that she
30 was therefore unaware of Mr Ayeh’s previous directorships and the associated VAT and excise compliance failures when she took her decision to approve Magicspells, subject to conditions.

62. It is clear from the documentary material available that HMRC had been told that Mr Ayeh was a director of Magicspells, they were also aware that he had been involved in other businesses involving the importation of alcohol. It is also clear that
35 Officer Chinnaswamy’s recollection as set out in her witness statement and in oral evidence was inaccurate as regards her knowledge of Mr Ayeh before the verification visit and thus it must call into question her account of whether she knew he was a director prior to the visit.

63. The meeting notes taken by Officer Chinnaswamy and a colleague do however,
40 make it absolutely clear that at the visit Mr Ayeh was introduced as a director of the business.

64. The meeting notes record that Mr Ayeh said that he was not associated with any other company but was a director of Ayeh FMG and had lots of working experience in the breweries.

5 65. No explanation was given by Mrs Chinnaswamy as to why, despite the fact that no later than 25 November 2016 she was aware that Mr Ayeh was a director, she did not conduct Companies' House checks on him.

66. Mr Ayeh's accounts of the Magicspells verification visit are equally ambiguous:

10 (1) At the verification visit for the Appellant's AWRS undertaken by Officer Matthews he told her that he would have told Officer Chinnaswamy of his past association with BOT if he had been asked.

(2) In the email dated 7 June 2017 (as referenced at para 43) he said "I did tell the officer that I had been a director of BO Times1 Ltd"

15 (3) In the email dated 8 June 2017 (referenced at para 45) he said "To the best of my recollection I was asked if I was a current director of any other companies. At the time I was director of a company called "Ayeh FMCG LTD (a dormant company) and of course Magic Spells Brewery. I spoke extensively of my ownership and experience at BO Times 1 and how that qualified me to make the business a success."

20 (4) When cross examining Officer Chinnaswamy he said that he had no reason to withhold that he was a director of BOT and that he had been asked whether he was associated with any other company which he had understood to be a present tense question rather than asking if he had, in the past, been associated with other companies.

25 (5) When, in cross examination, Mr Millington put to Mr Ayeh the discrepancy between the case put to Officer Chinnaswamy and that in the emails Mr Ayeh sought to avoid the questions but ultimately admitted that, contrary to the emails, he had not told Mrs Chinnaswamy of his involvement in BOT.

30 67. The Tribunal finds that Mrs Chinnaswamy's evidence was unreliable and that she must have known of Mr Ayeh and, no later than 25 November 2016, also knew he was a director of Magicspells. A further criticism can also be levelled that in knowledge of the fact that he was a director had she carried out the Companies' House check as Officer Matthews did the existence of BOT and the associated compliance failures would have been known to her.

35 68. However, Mr Ayeh certainly sought to mislead HMRC when the failure to disclose BOT in the context of the Magicspells application was raised. It seems unlikely that he was wholly unaware of the impact the compliance failures of BOT would have had on Magicspells' AWRS application and that may explain why he was not fully open. Officer Chinnaswamy's question does appear to have been slightly
40 ambiguous but Mr Ayeh apparently chose to take a very narrow interpretation of the question with the consequence that Magicspells AWRS approval cannot be said to

have been made on full facts and was not therefore an approval of Mr Ayeh as a fit and proper person. The registration of Magicspells with conditions is therefore irrelevant for the purposes of this appeal and in determining whether Mr Ayeh is a fit and proper person in the context of the Appellant.

5 **Consideration of the reasons justifying rejection of the Appellant's AWRS application**

Matters arising in connection with BOT

69. In connection with this ground, as set out a paragraph 8 above, Notice EN 2002 states that relevant to the fit and proper test is a requirement that:

- 10 • there's no evidence ... that key persons involved in the business have been previously involved in significant revenue non-compliance, or fraud, either within excise or other regimes, some examples of evidence HMRC would consider are:
- 15 ○ assessments for duty unpaid stock or for other under-declarations of tax that suggest there's a significant risk that the business would be prepared to trade in duty unpaid alcohol
- ...
- penalties for wrongdoing or other civil penalties which suggest a business don't (*sic*) have a responsible outlook on its tax obligations
- 20 • there haven't been persistent or negligent failures to comply with any HMRC record-keeping requirements, for example poor record keeping in spite of warnings or absence of key business records
- there is no outstanding, unmanaged HMRC debt or history of poor payment

25 70. Officer Danks reasons for upholding the decision of Officer Matthews in connection with the compliance history of BOT as set out in the letter dated 21 July 2017 were:

30 “Unmanaged HMRC debts and a history of poor payment are evidenced here. The fact you ran another company and did not take your tax obligations seriously increases the risk this could re-occur. You owed HMRC £10,139 plus interest but this was never paid. [BOT] instead entered administration leaving behind these debts, there is a real risk that this could occur with [the Appellant]. If this company was the [*sic*] go down the same route as [BOT] it could eventually fold leaving behind significant HMRC debts, this would leave HMRC out of pocket once again and further damage to the public purse”....

35 “You have a well-established history of failing to supply documents and failures to submit returns online I consider you to be a risk to the revenue and you are yet to evidence any improvements. I note that you have stated you have

5 instructed accountants to take over your financial requirements, although this may help remedy the issue the onus is still on you to check over any work done by the accountants and submit it to HMRC. The appointment of an accountant does not immediately relieve you of your responsibilities and for that reason I consider you still present a risk to the revenue. I have seen sufficient evidence to come to the conclusion that you do not take your tax obligations seriously and as a result present a significant risk to the revenue.”

10 71. Mr Millington submitted where a key person associated with the Appellant had previously been involved in a business that had (1) failed to render VAT returns for its entire period of trading, (2) failed to account for VAT on acquisitions and (3) incurred a wrongdoing penalty, it was entirely justified to conclude that they were not a fit and proper person.

15 72. Mr Ayeh did not deny that BOT had failed to render VAT returns thus incurring centrally issued assessments. In correspondence he asserted that “[BOT] experienced unsurmountable difficulties which HMRC were well aware off [sic]. The company has folded does not exist anymore. There is nothing that can be done about the past” and “I have taken on board your concerns about my past. I maintain circumstances were beyond my control and I shouldn’t be forever penalised.”

20 73. In oral evidence Mr Ayeh acknowledged the non-compliance, the penalties and the debt. He explained that the second period of registration had been prompted by proposed trading with Tesco but he had imported alcohol for onward sale to Tesco but had not been paid by them. He asserted that his inability to pay drove his decision not to render returns. He did however accept that he was aware of the need and importance of rendering returns.

25 74. On the basis of the evidence it is clear that Mr Ayeh was sole director of BOT. He was aware of his compliance obligations and effectively chose to ignore them. In these circumstances it was clearly reasonable for firstly Officer Matthews and subsequently Officer Danks to take account of this extended period of complete failure to comply with the statutory obligations associated with VAT accounting and the consequent estimated VAT debts when concluding that Mr Ayeh was not a fit and
30 proper person.

Missing stock and associated penalty

75. As regards this issue and, as set out a paragraph 8, above Notice EN 2002 states that relevant to the fit and proper test is a requirement that:

- 35
- there's no evidence ... that key persons involved in the business have been previously involved in significant revenue non-compliance, or fraud, either within excise or other regimes, some examples of evidence HMRC would consider are: ...
- 40
- penalties for wrongdoing or other civil penalties which suggest a business don't (*sic*) have a responsible outlook on its tax obligations ...

- there haven't been persistent or negligent failures to comply with any HMRC record-keeping requirements, for example poor record keeping in spite of warnings or absence of key business records

5 76. Officer Danks reasons for upholding the decision of Officer Matthews as set out in the letter dated 21 July 2017 were:

10 “Officer Matthews discovered an incident regarding missing stock. You were asked for supporting information for this missing stock on 3 separate occasions, having given you sufficient chance to supply the documents requested the officer was forced to issue a £250 penalty for non-production of records. You eventually provided the information but not in line with the officer’s detailed request, the information did not satisfy the officer’s detailed request.

15 This refusal reason shows multiple risks that you represent as not only have you been involved with unexplained missing stock you are also failing to provide information when asked by and HMRC officer. The fact that a £250 penalty had to be issued to prompt a reply shows that you do not take your tax obligations seriously and as a result are a risk to the revenue. No formal action has been taken in the missing stock as the company in question was entered into administration.

20 You clearly do not have a reasonable approach to your tax obligations and represent a significant risk to the revenue.”

25 77. By reference to the evidence received from Officer Hands and the associated documentation the Tribunal finds that Officer Hands was told by Mr Ayeh at the visit on 16 September 2015 that he was currently investigating stock loss of 55 cases and 6 kegs of pale ale and that there had been two further losses over the 2014 Christmas period. Officer Hands sought documentation and information concerning the losses.

78. The Appellant provided scant documentation which Mr Ayeh considered established that there had, in fact, been no stock losses. This documentation amounted to two excerpts of emails received from BOT’s Swedish suppliers and Marstons.

30 79. The email exchange with Marstons was initiated by a request from Mr Ayeh following the refusal of the AWRS approval. It stated that HMRC were still hassling him that there was missing stock for BOT but that he believed that it had never been sent from Sweden. Mr Ayeh provided Marstons with details of a SAP code line item from Sept 2015 but could not provide a delivery note when asked. He informed
35 Marstons that the Swedish supplier had not shipped it but after further correspondence provided SAP codes for 2x 30L kegs. Marstons confirmed that they had not received any stock in the period July to Sept 2015 and they did not recall any missing stock belonging to Mr Ayeh or BOT.

40 80. The email exchange from the Swedish supplier was a single line “Our distributor found your two pallets, they were not delivered!”

81. Officer Hands did not consider that the information provided was sufficient for him to satisfy himself as to whether there had, or had not, been missing stock. He had been given details of the stock missing in September 2015 and whilst the material provides may relate to it there was no means of correlating it. There was nothing to say what was on the two pallets and 6 kegs not 2 were stated to have been missing. There was also the question as to the losses which Mr Ayeh had not particularised from the Christmas 2014 period.

82. In evidence Officer Hands maintained his view that the information provided was insufficient. The Tribunal agrees. The emails supplied do not particularise the precise stock with which they are concerned, the order numbers etc. Nor do they establish whether there was or was not missing stock.

83. Mr Ayeh also challenged that it was inappropriate to take the missing stock into account on the basis that by his letter dated 4 March 2016, following BOT having been put into administration, Officer Hands had stated “As a result [of the administration] I have now closed my case. However I would point [sic] that if further information comes to light in the matter of the potential lost stock referred to in my correspondence to you we may re-open the matter and contact you again”. Mr Ayeh contended that there had been no further information and thus it was inappropriate for the lost stock to be considered as part of the AWRS registration, the matter had been closed.

84. During the hearing Mr Ayeh accepted that he had not provided Officer Hands with the documentary material he had sought. He asserted, as stated in emails from the relevant period, that he had not been looking at his emails as he had been trying to find a job, and as a consequence had not replied to Officer Hands. However, Mr Ayeh ultimately accepted that he had rendered himself liable to the £250 for non-compliance and he confirmed that he had paid the penalty.

85. The Tribunal considers that whether there was in fact missing stock has not been established but as Mr Ayeh told Officer Hands that there was missing stock on balance it was entirely reasonable for Officer Hands to conclude that there was no evidence to counter that open admission. It was therefore reasonable for both Officers Matthews and Danks to take account of the missing stock. Perhaps more significantly however, Mr Ayeh admitted that his documentary records were insufficient to be certain as to the loss of the stock and that, in and of itself, represents a risk to the revenue. A matter only corroborated by the fact that BOT were issued with a non-compliance penalty.

Conclusion

86. When the present case is pared back to only those issues pertinent to the task before the Tribunal the outcome was clear. The jurisdiction of the Tribunal is limited to assessing whether HMRC have acted reasonably in concluding that the Appellant should not be granted an AWRS authorisation on the basis that Mr Ayeh, as a key person (being the sole director) is not a fit and proper person.

87. The Tribunal must be satisfied that HMRC acted in accordance with the powers prescribed in s88C(2) ALDA and by reference to the framework provided in Notice 2002.

88. Mr Ayeh accepted that whilst he was a director of BOT, BOT had:

- 5 (1) failed to render VAT returns rendering itself liable under the default surcharge regime,
(2) failed to pay centrally issued assessments,
(3) received assessments for failure to account for acquisitions from Sweden and had failed to pay those assessments
10 (4) rendered itself liable to a non-compliance penalty

89. On the basis of these admissions there was ample evidence on which HMRC could reasonably conclude Mr Ayeh was not a fit and proper person and that the AWRS authorisation should be refused.

15 90. The Tribunal has considered and set out the basis of the Appellant's case and the perceived injustice felt by Mr Ayeh. As set out in paragraph 68 above the Tribunal concludes that there was no foundation on which Mr Ayeh could reasonably have believed that had HMRC had the full facts that they would have considered him a fit and proper person when Magic Spells was approved for AWRS.

20 91. For these reasons the Appellant's appeal against HMRC's refusal to approve the Appellant under AWRS is dismissed.

25 92. 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.

30 **Amanda Brown**

TRIBUNAL JUDGE
RELEASE DATE: 05 JULY 2018

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