

The Alcohol Wholesaler Registration Scheme – fit and proper?

David Bedenham considers HMRC's AWRS scheme which commences on 1 January 2016*

(*previously due to commence on 1 October 2015)

Introduction

Alcohol duty fraud costs the treasury an estimated £1 billion per annum. HMRC has stated that

*'the wholesale sector is the major point where illicit alcohol is diverted by organised criminals into retail supply chains...this link in the supply chain is vulnerable because it is the only activity not required to be authorised by HMRC...Introducing a requirement for wholesalers to register with HMRC will address this and reduce opportunities for fraud...'*¹

In response to this perceived vulnerability, the Government has introduced the Alcohol Wholesaler Registration Scheme ('AWRS').

Under the AWRS, anyone who wishes to engage in the wholesale trading of alcohol must register with and be approved by HMRC. To become registered, the trader will need to satisfy HMRC that he is a 'fit and proper' person to hold such an approval. But what does 'fit and proper' mean in this context? And what does a trader do if he disagrees with

HMRC's decision as to whether he is fit and proper?

The Alcohol Wholesaler Registration Scheme – a brief introduction

The legislative provisions underpinning the AWRS can be found in Part 6A of the *Alcoholic Liquor Duties Act 1979* (ALDA) (inserted by s.54 of the *Finance Act 2015*) and the *Wholesaling of Controlled Liquors Regulations 2015*.

All alcohol wholesalers (including those who already hold excise approvals under, for example, the *Warehousekeepers and Owners of Warehoused Goods Regulations 1999* ['WOWGR']) must apply for approval in the window 1 January 2016 to 31 March 2016. Wholesalers who apply in this window will be able to continue to trade until HMRC determine their approval application. This may take some time given that HMRC anticipate in excess of 20,000 applications (although HMRC has said that all applications will be determined by 1 April 2017).

¹ *Explanatory Memorandum to the Wholesaling of Controlled Liquors Regulations 2015.*

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For those who wish to commence trade after 31 March 2016, an application must be made no later than 45 days before the date on which trading is due to start. Such new entrants to the market must not begin trading until HMRC has given its approval.

Knowingly trading without requisite approval will be a criminal offence. Significant civil penalties can also be imposed. Where a penalty is imposed on a company, officers of the company may be personally liable to pay up to 100% of the penalty. There will also be powers to seize alcohol (even if it is duty paid) from unapproved wholesalers.

From 1 April 2017, it will also be a criminal offence for businesses (wholesalers and retailers) to purchase alcohol from unapproved UK wholesalers where the buyer knew or had reasonable grounds to suspect that the seller was not approved. Again, significant civil penalties are applicable and company officers may be liable. There will also be powers to seize alcohol (even if it is duty paid) if it was purchased from an unapproved UK supplier. To assist those purchasing from wholesalers HMRC will launch an online 'look up' service where a check can be made as to whether a wholesaler has the requisite approval.

Fit and proper

HMRC have given guidance on their approach to the issue of 'fit and proper' for the purposes of the AWRSThis has

come in the form of 'detailed guidance' that was issued in 23 March 2015 and in Public Notice 2001 published 30 November 2015. The guidance sets out 10 factors that HMRC will consider when assessing whether a business is 'fit and proper'.

The listed factors fall into two broad categories being (1) those that relate to current activity and (2) those that relate to past events. Factors in the first category include: (a) there is no evidence of illicit trading; (b) there are no connections between the applicant (or key persons involved with the business) and any other non-compliant or fraudulent business; (c) the application is complete and accurate; (d) the business has provided sufficient evidence of its commercial viability and its credibility; (e) there are no outstanding unmanaged HMRC debts; and (f) the business has in place satisfactory due diligence procedures to protect it from trading in illicit supply chains. Factors in the latter category include: (a) key persons involved in the business have no relevant unspent convictions; (b) the applicant (or a person involved in the business) has not previously been involved in significant non-compliance or fraud; (c) there has not been persistent or negligent failures to comply with HMRC record keeping requirements; and (d) the applicant has not previously been involved in unauthorised wholesaling.

Public Notice 2002 provides:

'Only applicants who can demonstrate that they're fit and proper to carry on a

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controlled activity will be granted approval. This means HMRC must be satisfied the business is genuine and that all persons with an important role or interest in it are law abiding, responsible, and don't pose any significant threat in terms of potential revenue non-compliance or fraud.'

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

- *there's no evidence of illicit trading indicating the business is a serious threat to the revenue, or that key persons involved in the business have been previously involved in significant revenue non-compliance, or fraud, either within excise or other regimes, some examples of evidence HMRC would consider are:*
 - *assessments for duty unpaid stock or for other under-declarations of tax that suggest there's a significant risk that the business would be prepared to trade in duty unpaid alcohol*
 - *seizures of duty unpaid products*
 - *penalties for wrongdoing or other civil penalties which suggest a business don't have a responsible outlook on its tax obligations*
 - *trading with unapproved persons*
 - *previous occasions where approvals have been revoked or refused for this or other regimes*

(including liquor licensing etc)

- *previous confiscation orders and recovery proceedings under the Proceeds of Crime Act*
- *key persons have been disqualified as a director under company law*
- *there are no connections between the businesses, or key persons involved in the business, with other known non-compliant or fraudulent businesses*
- *key persons involved in the business have no criminal convictions which are relevant for example, offences involving any dishonesty or links to organised criminal activity - HMRC will normally disregard convictions that are spent provided there are no wider indications that the person in question continues to pose a serious threat to the revenue (an 'unspent' conviction is one that has not expired under the terms of the Rehabilitation of Offenders Act 1974)*
- *the application is accurate and complete and there has been no attempt to deceive*
- *there haven't been persistent or negligent failures to comply with any HMRC record-keeping requirements, for example poor record keeping in spite of warnings or absence of key business records*
- *the applicant, or key persons in the business, have not previously attempted to avoid being approved and traded unapproved*
- *the business has provided sufficient evidence of its commercial viability and/or*

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credibility - HMRC won't approve applicants where they find that they cannot substantiate that there's a genuine plan to legitimately trade from the proposed date of approval

- *there are no outstanding, unmanaged HMRC debts or a history of poor payment*
- *the business has in place satisfactory due diligence procedures covering its dealings with customers and suppliers to protect it from trading in illicit supply-chains, see [section 12](#) for more information about due diligence.*

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

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

However, the presence of one or more of the 'negative indicators' set out in the detailed guidance and PN 2002 should not automatically mean that a trader's application is refused. HMRC is obliged to consider each case individually and should not adopt a blanket approach such as to give the impression that it has fettered its discretion as it was found to have done in *Eastenders Cash and Carry Plc v HMRC* (LON/2008/8113). In that case, Eastenders' application for registration under the WOWGR regime had been refused on the basis that its two

directors and shareholders had unspent convictions for offences involving the fraudulent evasion of duty. The First Tier Tribunal ('FTT') allowed the Appellant's appeal having found that '[the HMRC officer's] decision took account only of the

convictions... There is no evidence that any other factors were taken into consideration... It does not matter why he considered one factor and not others; it only matters whether he failed to take into account matter which he should have done'.

The guidance also makes clear that HMRC may refuse approval for reasons other than those listed if there are concerns that the applicant is a serious risk to the revenue. Of course, these concerns have to be objectively justifiable by reference to material that HMRC is willing to adduce before the FTT otherwise HMRC's decision is liable to be overturned on appeal. In *Grapevine Storage Services Ltd v HMRC* (LON/2003/8089), HMRC refused a WOWGR application ostensibly on the basis that the business was not commercially viable. However, in addition to finding that the officers had misunderstood the financial information presented, the VAT and Duties Tribunal found:

'the decision was in reality based on the perceived but mistaken view that there had been fraudulent activity at Oakwoods and the directors of Grapevine were more intimately connected with ... Oakwoods than was

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in fact the case...[the officers] took the view that there was insufficient evidence which could properly be used in a tribunal hearing to justify a refusal on the grounds of perceived fraudulent activity and therefore looked for other reasons to refuse the application’.

Further, HMRC must act proportionately and should consider whether any concerns that exist about an applicant could be allayed by granting an approval subject to conditions (see *Eastenders* cited above).

Challenging HMRC’s decision

If HMRC determine that a trader is not ‘fit and proper’ or impose conditions on the approval that the trader feels are unjustified, the first step will be to take advantage of the statutory review mechanism. Once such an application is made, an officer who was not involved in the original decision must decide whether that decision should be upheld, varied or overturned. In reaching that decision, the review officer must not confine himself to considering only whether the earlier decision was reasonable but rather should undertake a fresh consideration of all material before him (even if that material was not before the original decision maker): *Amazon Trading International Ltd v HMRC* (LON/05/8035).

If the review upholds the original decision (or varies it in a way that is not acceptable to the trader) or if no response is received from the review officer within the statutory period, an

appeal lies to the FTT. The role of the FTT in such cases was summarised in *Southern Drinks Ltd v HMRC* (TC/2012/03269) thus:

‘The Tribunal can only allow an appeal if it is satisfied that the decision...is an unreasonable decision....a decision will be unreasonable in particular if the decision-maker took account of irrelevant factors, or failed to take account of relevant factors, or if the decision is plainly irrational.’

But what happens if a trader applies for approval and HMRC does not reach a timeous decision? If the application was made on or before 31 March 2016, the trader will be able to continue to operate until HMRC reaches its decision. However, as set out above, the position is different for those who file an application after 31 March 2016 and, until HMRC grant their approval, such traders may not engage in wholesale trade. For traders in this position, HMRC delays could be seriously damaging and, as no decision has yet been reached, no appeal will lie to the FTT. The only avenue (other than negotiation with HMRC) open to a trader that finds himself in this position is to bring judicial review proceedings.

In conclusion

Wholesalers and retailers alike should take the AWRS very seriously. The consequences both of not doing so could be severe indeed. These consequences could extend beyond the duty paid business undertaken by a trader given that PN 2002 states:

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'Refusal of an AWRS approval may also lead HMRC to review whether you're fit and proper in relation to any other approvals you hold.'

Traders must, then, have proper regard to the relevant public notices and should engage with HMRC. That said, HMRC is not infallible and it may be that mistakes are made. In such circumstances, traders have options available to them and these should be explored expeditiously as they may otherwise become time barred.

David Bedenham has extensive experience of acting for HMRC and for Appellants in VAT, customs duty and excise related matters. Recent cases have included *Abbey Forwarding* and *Millennium Cash and Carry*.

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This article has been updated to reflect HMRC's delay in implementing AWRS.