A refreshing change

Indirect Tax



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Alan Powell explains the procedure in obtaining excise duty approval and welcomes HMRC’s recent change of tack

Key Points

What is the issue?

Following industry pressure, HMRC recently reviewed the timescales taken to approve applicants to operate excise businesses and the conditions imposed on

such approvals. The review found that the approval process often took too long and that the conditions applied were not always fit for purpose (and sometimes unjustly restricted business activity)

What does it mean for me?

Applications should now be processed by HMRC within 45 working days, rather than an indeterminate time. Conditions will not be imposed upon approvals unless fully justified. Approved persons may submit a request to HMRC to consider the revocation of existing conditions

What can I take away?

There should be certainty about approval timescales and we should expect HMRC to exercise their powers of discretion with regard to imposition of conditions and restrictions. HMRC have showed they can listen, if one pounds the door hard enough

Unlike other tax regimes, one cannot simply apply to HMRC for an appropriate registration to carry on an excise business. All licences, registrations and approvals are subject to the discretion of the commissioners of HMRC. Each approval may be subject to conditions (or restrictions) that the commissioners see fit to impose; either by a ‘direct’ statutory power or, commonly, by conditions made in a public notice under an enabling statutory instrument. HMRC’s various public notices state that a decision on an application will normally take 45 working days. As this statement is in a public notice and it is part of the approval process delegated to HMRC under statutory discretionary powers, it could be argued that this establishes a legal timescale. In any event, as a formal policy statement by HMRC, it should provide certainty to business.

The registration process can make the jaw drop. An application has to be made to HMRC’s National Registration Unit (NRU) in Glasgow using the appropriate form. The NRU allocates a local official to visit the applicant and a further barrage of questions is put to the applicant in person, with no exceptions. Many further questions may be asked afterwards, and usually are. The local officer eventually makes a recommendation via line management, which finds its way to a ‘centre of expertise’ in Middlesbrough. This ‘vets’ the approval decision for consistency and to evaluate the revenue risk; and often ‘bounces’ it back via the local officer with further

questions or requirements, not infrequently involving paradoxical situations. This is why the process is often labelled ‘chicken and egg’ by applicants. If an application is approved, the NRU processes the various bits of paper in due course.

Although the process is Kafkaesque, it is fair to reflect that there is significant fraud in the UK alcohol sector. Fraudsters have been trying to access the system of duty suspension by any means of approval (including what may be seen as the soft underbelly of less obvious excise regimes). There are also similarities with the way HMRC dealt with the registration of traders for VAT under the worst days of missing trader frauds.

Not surprisingly, however, the approval process had been taking longer than the 45 working day period effectively ‘promised’ by HMRC. Worse, HMRC have been applying conditions and restrictions to approvals without apparent thought as to whether such impositions are necessary or, crucially, reasonable. My belief is that HMRC have been acting in a way that is not only unreasonable, but is often downright capricious. I voiced my concerns to HMRC for at least two years from a number of different perspectives: in my capacity as excise representative for the United Kingdom Warehousing Association; on behalf of my own clients; and also with my CIOT hat on. I was (and am) also very concerned that approval letters were being issued which were not actually correct in law or which contained impositions that were irregular under both UK and EU law.

Things were probably at their worst last autumn. Applications for approval were grinding to a halt. Conditions were being imposed on approvals – such as restrictions on persons with whom the approved entities could trade – which meant that the business was thwarted by the length of time required to add another person to an approval document in order to do business. Bear in mind that most of the parties to be added to the approval were already approved by HMRC as excise businesses (revenue traders). They could, however, only be approved if deemed ‘fit and proper’ under the lengthy application process; while non-UK entities must have been approved by other member states’ authorities, or be third country suppliers into the UK. In an absurd variation, a business could not be approved by HMRC as an ‘owner of goods’ in a third party bonded warehouse until a warehouse keeper was approved to receive the goods from that entity by HMRC; but no warehouse keeper could be approved to do so unless the applicant owner had been already been approved as an ‘owner of goods in warehouse’ by HMRC! That’s some Catch 22.

Things came to a head at the meeting of the Joint Alcohol and Tobacco Consultative Group (JATCG) on 27 November 2014. I had put this matter on the agenda and it led to a lengthy and intense discussion. HMRC's minutes of the meeting state:

'(Industry) members communicated that there was a lot of anger and frustration within the industry about the impact of these issues on legitimate business, with the potential for judicial review action being instigated.'

HMRC undertook to:

'review the process for low-risk alcohol approvals to ensure that it is working correctly, and in particular look at the imposition of conditions on alcohol approvals to ensure these were being applied appropriately. HMRC to report back to members by the end of February.'

In fact, HMRC did just that. On 10 February 2015, HMRC promulgated a note of action points to the JATCG of November 2015 stating, inter alia:

'In order to make quick progress, an initial review of the time taken to process approval applications (across all alcohol regimes) was initiated in December 2014 following JATCG, and new measures were introduced from 1 January 2015 to accelerate the processing of "low risk" approvals and amendments to approvals.'

It is worth quoting almost in full Action Point 89:

'A review of the application of conditions on approvals was made in December 2014, finding that in some cases the conditions applied (particularly in respect of warehouse keepers and warehouses) *were not always fit for purpose* and in some cases *may unjustly restrict business activity*. (My emphasis added.)

'HMRC strongly believe there remains a need to use conditions/restrictions on approvals on certain cases, according to risks identified, and as an important tool in preventing alcohol duty fraud. For example, they may be used for a finite time on new businesses with no compliance history, or where there are genuine concerns about the 'fit and proper' nature of a person but insufficient justification to reject an application, or where there is reasonable cause for concern regarding the compliance of an existing business.

'In response to our internal review, however, HMRC do intend to take the following actions in response to the concerns raised, starting from 2 February 2015:

- Conditions will not be applied as a matter of course to all businesses and certainly not for existing businesses where there is evidence of good compliance.
- Where the review has identified conditions that are not fit for purpose (accepting that the review only examined relatively recent approvals), HMRC will contact the relevant business and amend the current approval as soon as practicable.

‘Businesses who feel their current approval unjustly restricts their activity may write to HMRC to request reconsideration of whether conditions applied are reasonable and fitfor purpose.’

This message was delivered promptly by HMRC and is exactly what industry wanted to hear, being in accord with the correct exercise of HMRC’s powers of discretion. In particular, if a person has jumped through a series of hoops and scaled immense barriers to get an excise approval as a ‘fit and proper’ person, there is no need for any further condition or imposition to be applied by HMRC without a very good reason.

It is not clear if the central message from HMRC has been fully and effectively promulgated to the operational officials, or whether there needs to be a culture change following such an important and welcome change of tack by HMRC in such a short space of time. In very recent discussions with policy, the signals from ‘on high’ are encouraging and I am aware that some approvals have ‘beaten’ the 45 day wait. In addition, it should be a case of pushing at an open door if you have solid grounds for the revocation of any condition attached to an approval from HMRC. Please note that the action point statements from HMRC refer to alcohol approvals, but they should also be applied to the approvals in the other excise regimes which are administered by the same HMRC personnel.