[2019] UKFTT 185 (TC)

TC07035

Appeal number: TC/2018/00307

MONEY LAUNDERING REGULATIONS – appellant registered as tax adviser - appellant failing to pay annual fees in protest against HMRC requirements for enhanced due diligence – registration cancelled – penalty imposed for carrying on business while unregistered – whether appellant's conduct penalisable – held no, as regulation 33 Money Laundering Regulations 2007 does not apply to tax advisers after 2009 – penalty cancelled

FIRST-TIER TRIBUNAL
TAX CHAMBER

DESMOND MARTIN **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
DAVID MOORE

Sitting in public at the Royal Courts of Justice, Belfast on 7 January 2019 and with post-hearing submissions by HMRC on 21 January 2019

The Appellant in person

Michael Neeson BL of Counsel, instructed by Crown Solicitor of Northern Ireland, for the Respondents

DECISION

1. This was an appeal by Mr Desmond Martin ("the appellant") who carries on business under the name "Coppergate International" in Coleraine, Co. Londonderry. That business is the provision of tax advice for those who are expatriates whether in the United Kingdom, or in other countries, in particular the United States of America.

2. The appeal is against a penalty of £1,000 charged on the appellant by the respondents ("HMRC") for a contravention of the Money Laundering Regulations 2007 ("MLR").

Facts

3. I take these from the witness statement of Kadeena Ford, an officer of HMRC involved in the investigation of the appellant's conduct and who gave oral evidence, and from the documents exhibited to that statement. Nothing concerning that evidence was challenged or contradicted by the appellant (unless otherwise indicated) and we find as fact that which I set out below.

4. The activities carried on by the appellant in his business are such that he was at all material times a "tax adviser" within the meaning in regulation 3(8) MLR and so was a "relevant person" within the meaning of regulation 3(1) MLR on foot of paragraph (1)(c)[1].

5. HMRC was designated by the MLR as a "supervisory authority" for, among others, tax advisers. HMRC were, by regulation 32 MLR, empowered, but not obliged, to maintain a register of tax advisers who were not supervised by any of the professional bodies listed in Schedule 3 to MLR.

6. HMRC decided to establish such a register in 2008. The appellant applied to be entered on the register and was so registered under number 12434553 on 3 December 2008.

7. On 30 September 2014 Ms Roisin McAnarney of HMRC's Anti-Money Laundering Supervision Team in Belfast carried out a routine money laundering compliance visit to the appellant's premises in Coleraine. In that visit she informed the appellant of his failure to comply with various requirements in the MLR relating to due diligence, including that he must carry out enhanced due diligence ("EDD") on some clients.

8. Next day Ms McAnarney sent the appellant a "penalty warning letter" with a list of his alleged failures to comply with the MLR, and said that a penalty may be charged if the changes recommended in the letter were not made.

[1] Ms Ford's witness statement said something slightly different. She said at [5] that the appellant was "an accountancy service provider and so is a 'relevant person' for the purposes of regulation 3(1)(c) MLR". I can find no reference to "accountancy service provider" in the MLR: it is a portmanteau term used by HMRC for those businesses falling within regulation 3(1)(c) namely auditors, insolvency practitioners and external accountants as well as tax advisers.

9. On 7 November 2014 HMRC wrote to the appellant seeking payment of fees for the year 1 January to 31 December 2015, requiring payment by 1 January 2015. This was an annual request.

10. During January 2015 there were discussions between the appellant and HMRC about the failures and how the appellant might comply with requirements about EDD.

11. On 10 February 2015 the appellant sought a review of Ms McAnarney's decision about certain aspects of EDD.

12. On 4 June 2015 a different team in the money laundering part of HMRC's operations informed the appellant that his registration had been cancelled because he had not paid the fee. He was also informed that he must not carry on any activity for which he required registration without being registered, and that if he did so after receiving the 4 June letter he might be liable to a civil penalty or prosecution. It added that if he disagreed with the decision to deregister him he had 30 days to ask for a review or appeal to the Tribunal.

13. On 27 July 2015 HMRC gave their response to the appellant's EDD query by saying that appellant's proposal was not sufficient. He was reminded that he should not carry out any activity within regulation 3(1)(c) MLR without either regulation or supervision by a recognised professional body.

14. On 19 October 2016 an Anti Money Laundering team in Birmingham invited the appellant to register, and warned him that if he did not he might be liable to a penalty or prosecution.

15. On 16 November 2016 the appellant responded saying he was aware he should be registered but had let his registration "lapse" while waiting for a response to a letter.

16. On 28 November 2016 the appellant was told on the phone by Ms Ford that he should register as he was operating as a relevant person.

17. On 17 June 2017 the appellant sought an extension of time to reply to Ms Ford's letter.

18. On 26 June 2017 Ms Ford issued a "penalty decision notice" informing the appellant that on foot of the powers in regulation 42 MLR she was charging a penalty of £1,000 for trading as an "accountancy service provider" without being registered with HMRC.

19. On 25 July 2017 the appellant asked for a reconsideration of the penalty, saying he was not aware that he needed to keep up his registration while in dispute about the due diligence requirements. He said he had no objection to being registered but he could not comply with the requirements the Belfast officers had said he needed to. He also said that he was told by the HMRC Belfast team that from the nature of his business he could not be involved in money laundering.

20. On 22 September 2017 Ms Ford said that her reconsideration had not led to a change of opinion but the appellant could request an "independent" review.

21. On 20 October 2017 the appellant requested a review, and on 29 November 2017 the conclusion was given to him that the penalty was upheld.

22. On 5 March 2018 the appellant sent his notice of appeal to the Tribunal.

Law

23. Cancellation of a registration in the register for tax advisers, a register maintained under regulation 32 (as distinct from regulation 25 which applies to certain other types of businesses) is governed by regulation 34:

> "**Applications for and cancellation of registration in a register maintained under regulation 32**
>
> 34.—(1) Regulation[ ] … 30(2), (3) and (4) apply to registration in a register maintained by the Commissioners under regulation 32 as they apply to registration in a register maintained under regulation 25."

24. As for those paragraphs of regulation 30 they say (with appropriate modifications in [ ]):

> "**Cancellation of registration in a register maintained under regulation [32]**
>
> 30.—(2) The Commissioners may cancel a person's registration in a register maintained by them under regulation [32] if, at any time after registration, it appears to them that they would have had grounds to refuse registration under regulation 29(1).
>
> (3) Where the Commissioners decide to cancel a person's registration they must give him notice of—
>
> (a) their decision and, subject to paragraph (4), the date from which the cancellation takes effect;
>
> (b) the reasons for their decision;
>
> (c) the right to require a review under regulation 43A; and
>
> (d) the right to appeal under regulation 44(1)(a).
>
> (4) If the Commissioners—
>
> (a) consider that the interests of the public require the cancellation of a person's registration to have immediate effect; and
>
> (b) include a statement to that effect and the reasons for it in the notice given under paragraph (3),
>
> the cancellation takes effect when the notice is given to the person."

25. And regulation 29(1) (applied by regulation 30(2) as modified in accordance with regulation 34) says:

> "29.—(1) … the Commissioners may refuse to register an applicant for registration in a register maintained under regulation 25 only if—
>
> …

(c) the applicant has failed to pay a charge imposed by them under regulation 35(1)."

26. Regulation 35 MLR provides:

> "**Costs of supervision**
>
> 35.—(1) … the Commissioners may impose charges—
>
> (a) on applicants for registration;
>
> (b) on relevant persons supervised by them.
>
> (2) Charges levied under paragraph (1) must not exceed such amount as … the Commissioners …. consider will enable them to meet any expenses reasonably incurred by them in carrying out their functions under these Regulations or for any incidental purpose.
>
> (3) Without prejudice to the generality of paragraph (2), a charge may be levied in respect of each of the premises at which a person carries on (or proposes to carry on) business.
>
> …"

27. HMRC's guidance for tax advisers, Document MLR9d, provides that a fee is charged on all applicants for registration, but is only payable if the application is successful, and thereafter annually on those relevant persons (which includes tax advisers) who are registered.

28. Penalties are charged under regulation 42 as follows:

> "**Power to impose civil penalties**
>
> 42.—(1) A designated authority may impose a penalty of such amount as it considers appropriate on a person who fails to comply with any requirement in regulation … 33 … .
>
> …
>
> (1C) In paragraph[ ] (1) … "appropriate" means effective, proportionate and dissuasive.
>
> (2) The designated authority must not impose a penalty on a person under paragraph (1) where there are reasonable grounds for it to be satisfied that the person took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with.
>
> (3) In deciding whether a person has failed to comply with a requirement of these Regulations, the designated authority must consider whether he followed any relevant guidance which was at the time—
>
> (a) issued by a supervisory authority or any other appropriate body;
>
> (b) approved by the Treasury; and
>
> (c) published in a manner approved by the Treasury as suitable in their opinion to bring the guidance to the attention of persons likely to be affected by it.

(4) In paragraph (3), an "appropriate body" means any body which regulates or is representative of any trade, profession, business or employment carried on by the alleged offender.

(5) Where the Commissioners decide to impose a penalty under this regulation, they must give the person notice of—

(a) their decision to impose the penalty and its amount;

(b) the reasons for imposing the penalty;

(c) the right to a review under regulation 43A; and

(d) the right to appeal under regulation 43.

(8) A penalty imposed under this regulation is payable to the designated authority which imposes it."

29. Regulation 33 (the requirement the appellant is said to have failed comply with) says:

"**Requirement to be registered**

33 Where a supervisory authority decides to maintain a register under regulation 32 in respect of any description of relevant persons and establishes a register for that purpose, a relevant person of that description may not carry on the business or profession in question for a period of more than six months beginning on the date on which the supervisory authority establishes the register unless he is included in the register."

30. Regulation 32 says:

"**Power to maintain registers**

32.—(1) The supervisory authorities mentioned in paragraph (2) … may, in order to fulfil their duties under regulation 24, maintain a register under this regulation.

…

(4) The Commissioners may maintain registers of—

(a) auditors;

(b) external accountants; and

(c) tax advisers,

who are not supervised by the Secretary of State, DETI or any of the professional bodies listed in Schedule 3.

31. Under regulation 2(1) "the Commissioners" means the Commissioners for Her Majesty's Revenue and Customs.

32. As to appeals regulations 43 and 44 provide:

"**Appeals against decisions of the Commissioners**

43.—(1) This regulation applies to decisions of the Commissioners made under—

…

(b) regulation 30, to cancel the registration of a registered person; and

(c) regulation 42, to impose a penalty.

(2) Any person who is the subject of a decision to which this regulation applies may appeal to the tribunal in accordance with regulation 43F.

(3) The provisions of Part 5 of the Value Added Tax Act 1994 (appeals), subject to the modifications set out in paragraph 1 of Schedule 5 to these Regulations, apply in respect of appeals to a tribunal made under this regulation as they apply in respect of appeals made to the tribunal under section 83 (appeals) of that Act.

(4) A tribunal hearing an appeal under paragraph (2) has the power to—

(a) quash or vary any decision of the supervisory authority, including the power to reduce any penalty to such amount (including nil) as it thinks proper, and

(b) substitute its own decision for any decision quashed on appeal.

(5) The modifications in Schedule 5 have effect for the purposes of appeals made under this regulation.

(6) For the purposes of appeals under this regulation, the meaning of "tribunal" is as defined in section 82 of the Value Added Tax Act 1994.

Appeals

44.—

…

(8) The modifications in Schedule 5 have effect for the purposes of appeals made under this regulation."

33. The relevant provisions of Schedule 5 are:

"**1**. Part 5 of the Value Added Tax Act 1994 (appeals) is modified by omitting sections 83A to 84, 85A and 85B.".

Grounds of appeal

34. In his letter asking for a review the appellant said he was asking for the penalty notice to be reconsidered for these reasons:

(1) He was not aware that he needed to keep up his registration while in dispute with the team in Belfast.

(2) He has no problem with being registered but if he was registered he would be unable to fulfil his obligations as explained by the Belfast team.

(3) His letter of 2 February 2015 about the difficulties with compliance were not addressed for many months and when they were the reply was not from Belfast and did not address the points he had made.

(4) HMRC know that there cannot possibly be money laundering in his business and so are requiring him to spend extortionate amounts of money and time for a pointless activity.

35. In his Notice of Appeal to the Tribunal the appellant admits the facts that he had been registered, that following his meeting and subsequent dealings with the HMRC team he deliberately did not "renew" his registration and that he received a penalty for not renewing it. He remarked that he received the penalty even though he was waiting for a response to a letter he had written to HMRC about simplifying their requirements.

36. He says that "supposedly" he was told that he should not let his registration lapse while negotiations were proceeding but he does not have a copy of this instruction and despite his request for it has not been sent.

37. In an email of 1 August 2018 to HMRC copied to the Tribunal he says:

> "My main reason for wanting to attend the tribunal is that so far I have had no one explain to me how anything I do in my business could involve money laundering and therefore because of that that is why you Desmond Martin need to take a different approach that you have done previously. … I am hoping that the Tribunal can indicate to me why I need to spend serious amounts of time and money following rules that, although unnecessary in many cases, will achieve nothing in my situation except allow some HMRC officer the satisfaction of knowing that some small business owner is spending a lot of time, or paying someone else to spend a lot of time, doing stuff that doesn't help his business or the economy or in any way assist with the detection of money laundering.
>
> Thank you"

HMRC's response

38. In relation to the penalty HMRC say in their statement of case that pursuant to regulation 33 MLR the appellant may not carry on the business of providing services as an ASP (HMRC jargon for "accountancy service provider" - see fn 1) for more than 6 months beginning with 1 April 2009, the date HMRC decided to establish a register of ASPs, unless he is included in that register. The cut off date was therefore 30 June 2009.

39. The appellant's assumption that he did not need to be registered while in dispute is not a credible or reasonable excuse for not renewing his registration.

40. Mr Neeson's skeleton/position paper says a bit more. He says that despite being deregistered the appellant continued to trade, so in consequence became liable to a penalty under regulation 42 MLR. HMRC have legitimately exercised this power.

41. HMRC also consider that the appellant cannot have had any objectively reasonable belief for the grounds that he did not need to be registered while corresponding with HMRC about the requirements of the MLR in his case.

42. HMRC have followed their own guidance in setting the sum of the penalty at £1,000.

Discussion

43. Before considering the matter which is actually under appeal and before the Tribunal, the penalty of £1,000, we wish, primarily for Mr Martin's benefit, to set out the matters which we cannot adjudicate on and which he has raised or referred to.

44. We cannot make any decision about whether HMRC were right to say the appellant had failed to comply with the requirements of MLR relating to his customers and which were set out by Ms McAnarney in her penalty warning letter of 1 October 2014 and to an extent in the statement of case at paragraph 11. This is because that letter was what it said, a "warning letter", and was not a document notifying the appellant of a penalty that had been charged on him and thus giving him appeal rights to apply to this Tribunal.

45. The second matter with which we cannot deal is the cancellation of the appellant's registration by the HMRC Customer Operations Team in Southend-on -Sea by letter of 4 June 2015. It is not clear to us that a decision to cancel a registration is appealable at all where that registration was effected under regulation 32 MLR, since regulation 43(1)(b) only refers to a cancellation under regulation 30 which is the provision for those businesses falling to be registered by HMRC under regulation 25, whereas tax advisers are registered under regulation 26, for whom the cancellation power is in regulation 34(1).

46. But even if it is an appealable matter, something we do not have to decide, the appellant had to appeal against it to be able to bring any dispute on it to the Tribunal. But he did not. If he had done so, and it was an appealable matter, he could have made all the points that he wished to make (and which we did allow him to make) before us to a Tribunal that might have been able to take them into account in arriving at any decision about the cancellation.

47. Nor can we deal with any complaints by him that HMRC ignored communications from him, failed to reply in good time, or that a reply did not come from a particular officer or team. Nor can we decide whether any statements that were made by HMRC about the impossibility of his business being involved in money laundering gave him any sort of reasonable expectation that the rules would be applied with a light touch or waived, nor whether what HMRC expected him to establish about his clients was disproportionate. Those would be a matter for judicial review, and this Tribunal has no supervisory role in the sphere of the MLR.

48. But what we can do is to decide on the question of his appeal against the penalty for carrying on business without being registered, and to this we now turn. The question here is whether the penalty was validly, or as Mr Neeson put it, legitimately, imposed. It was not mentioned in the statement of case or the skeleton, but we have no doubt that article 6 of the European Convention on Human Rights applies in this case, as the penalty is punitive, not restorative. It is intended to be "effective" and "dissuasive" (and also proportionate). Because of this there is a presumtion of innocence so that the burden of showing that the penalty is valid or legitimate rests on HMRC.

49. In the context of regulation 42 we think that this requires HMRC to show that:

(1) the appellant's conduct was such as to amount to a contravention of regulation 33 MLR so as to be within regulation 42(1).

(2) there were reasonable grounds for HMRC to be satisfied that the appellant did not take "all reasonable steps and exercised all due diligence to ensure" that the requirement in regulation 33 would be complied with (see regulation 42(2)).

(3) HMRC considered whether the appellant followed any relevant guidance which was at the time issued by them which had been approved by the Treasury and published in a manner approved by the Treasury as suitable in their opinion to bring the guidance to the attention of persons likely to be affected by it (see regulation 42(3)).

(4) HMRC gave the appellant notice of their decision to impose the penalty and its amount; the reasons for imposing the penalty; the right to a review under regulation 43A MLR and the right to appeal to the Tribunal under regulation 43 (see regulation 42(4)).

50. HMRC's statement of case suggested that if the appellant showed that he had a "reasonable excuse" he would not be liable to the penalty. There is nothing in the MLR that allows a "reasonable excuse" to cancel liability to a penalty such as is found in the penalty legislation apply to eg income tax and VAT. Regulation 42(2) is not an absolution from liability on grounds of "reasonable excuse". We do think however that, even if we are satisfied that the appellant did not take all reasonable steps and did not exercise all due diligence, if he is able to show that he had a reasonable excuse for his failure we could take that into account in making our decision as to the amount of the penalty. We note in this connection that regulation 43(4) gives the Tribunal extensive and unrestricted powers to do as it thinks proper.

51. Taking the four requirements on HMRC in reverse order, we have no reason to doubt that Ms Ford did give notice of her decision to impose a penalty (and the appellant did not argue to the contrary) and gave the reasons and explained the right to a review and to appeal (again the appellant does not argue to the contrary, and indeed he exercised both rights).

52. As to whether HMRC considered that the appellant followed guidance, we find that the relevant guidance is the publication "MLR9d: registration guide for Accountancy Service Providers". We note that MLR9d was withdrawn from 17 July 2017, but when Ms Ford made her decision on 26 May 2017 it was still in force and she was required to consider whether the appellant had followed the guidance in force from the time he was deregistered until the date of her decision. We are satisfied from the evidence of Ms Ford and the documents in the bundle that HMRC did consider whether the appellant had followed the guidance and came to the clear and obvious conclusion that he hadn't (and the appellant did not argue to the contrary).

53. As to regulation 42(2) MLR we think it must follow that before the penalty is imposed HMRC must consider whether they are satisfied on the question of all reasonable steps and due diligence by the appellant. We are satisfied from the evidence of Ms Ford and the documents in the bundle that HMRC did consider whether the

appellant took all reasonable steps and applied due diligence. We find that it was objectively reasonable for them not to be so satisfied. In fact we would say that it would have been unreasonable for them to be so satisfied in the circumstances of this case, given that among other things we do not believe the appellant when he said he thought he did not need to be registered if he was in dispute with HMRC.

54. Finally we come to the question whether the terms of regulation 42(1) are met on the basis that the only regulation in issue is regulation 33. At the hearing we raised with Mr Neeson some concerns we had about whether regulation 33 did in fact apply. Valiantly though he tried to answer the point on the hoof, we decided it would be better if we gave him some time for consideration with HMRC, and we made post-hearing directions accordingly. HMRC supplied a response, but although we had allowed the appellant time to make any comments he wished, he did not do so.

55. What our concern was can best be explained if we set out a comminuted version of the text of regulation 33 as it applies to tax advisers and the particular register for tem (and other businesses within regulation 3(1)(c) MLR):

> "**Requirement to be registered**
>
> 33 If HMRC establishes a register
>
> a tax adviser not otherwise supervised may not carry on that business
>
> *for a period of more than six months beginning on 1 April 2008*
>
> unless he is included in the register." [Our emphasis]

56. Had the italicised words been omitted, we would have had no difficulty in saying that with effect from the date on which the appellant was treated as deregistered, he was contravening regulation 33 in that form if he continued to carry on his business as tax adviser after the cancellation of his registration and when doing so he was not supervised by a relevant professional body. We should say that the appellant has never suggested that he was at any time so supervised.

57. But our provisional reading of the regulation including the italicised words was that the prohibition on carrying on business only applied if the tax adviser was carrying on business on 1 April 2008 and was still carrying it on without being registered on 1 October 2008. Thus the italicised words seem apt only to punish those businesses which, being in existence at the date the register was established, do not take advantage of a "period of grace" of 6 months from that date to make an application for registration and become registered, do not do that and so contravene regulation 33 and become liable for a penalty (or for prosecution). It looks quite like a transitional provision, but is not a typical transitional provision dealing just with the position of businesses existing at the date legislation comes into force, since different registers may be established at different times and new types of business may be prescribed as falling within the ambit of HMRC's supervisory discretion.

58. Indeed while we know from this case that the register for what HMRC call ASPs was established in 2008, Judge Thomas knows from HMRC's submission to him in

Blackhorse Property Management Ltd v HMRC [2016] UKFTT 720 (TC) that HMRC's register for estate agents was established in 2014[2].

59. The regulation then does undoubtedly allow a period of grace for businesses existing at the date of the start of the relevant register, and where businesses fail to take the benefit of that period, allows for penalties and prosecution for contravention, but it seemed to us that that was all it does. It does not on our provisional reading apply to any of the following cases:

(1) A business which was set up after the start of the register relating to the type of business concerned but which fails to register.

(2) A business carried on on the date the register was established but which was not registered within the six month period but which had applied to be registered a within that period and had not had its application either approved or refused within that period.

(3) A business which ceased to be supervised by a relevant professional body and which continued to carry on the business without registering.

(4) A business which was compulsorily deregistered but which continued to carry on the business (ie this case).

60. HMRC's response was on this question as follows:

> "8. It is respectfully submitted that each and every component of Regulation 33 has been satisfied and the Respondent has correctly invoked the regulation in imposing the fine upon the Appellant. There is little difficulty with the first part of the regulation in that it is common case that the register has been created and was being maintained by the Respondent. The Respondent further contends that, at the date of the imposition of the civil penalty and at periods before that time, the Appellant, by reason of the cancellation of his registration, was not included in the register. The only remaining aspect of the regulation which must be satisfied therefore is whether the Appellant carried on the business or profession in question for a period of time following the end of the 'grace period,' which ended on 30th June 2009. The Respondent contends, respectfully, that this is adopting the natural meaning of the regulation and to adopt any other meaning would give rise to anomalies.
>
> 9. If Regulation 33 cannot be invoked in circumstances such as this, the Respondent would be unable to invoke any other part of the 2007 Regulations to impose a civil penalty. The only other reference to a failure to register is contained within Regulation 26 and the regulation does not include in the proscribed list of persons an ASP. Regulation 26 provides the Respondent with the ability to impose penalties in respect of high value dealers, money services business or trust and company service providers. Given that one of the objectives of the

[2] Estate agents are in a slightly different position because they had been previously regulated by and registered with the Office of Fair Trading which, like HMRC, had the power but not the duty to register (regulation 32(3) MLR. For a sorry tale on that transfer see *Jackson Grundy Ltd v HMRC* [2016] UKFTT 223 (TC) (Judge Nowlan and Mrs Debell).

Regulations was to enable the Respondent to monitor the activities of the specified classes of persons who are required to register, it would fly in the face of the intentions of the legislation if there was a requirement to register but no enforcement mechanism for a failure to register, or, as here, to maintain registration. Similar language to that used in Regulation 33 appears in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 which replaced the 2007 Regulations. Although it appears that the 'grace period' has been extended to 12 months, the wording is largely retained and provides that, at Regulation 56,

> *'a relevant person of that description must not carry on the business or profession in question for a period of more than 12 months beginning with the date on which the registering authority establishes the register unless that person is included in the register or (b), that person has applied for registration in the register but that application has not yet been determined'*

10. The Respondent is unable to locate an authority in the First Tier Tribunal or Upper Tribunal relating to the validity of a civil penalty imposed in circumstances where the subject has failed to maintain his registration and therefore has not appeared upon the register when he has been carrying out the specified activities. Equally, the Explanatory Memorandum to the Regulations does not assist in this regard. If, however, the Regulation 33 were read in such a way as to restrict the ability of the Respondent to impose a civil penalty to circumstances where the subject failed to register within 6 months of June 2009 would *potentially* lead to more favourable treatment to persons who deliberately failed to register or maintain the registration. A person may have been ignorant of the requirement to register within the period of 6 months and therefore unwittingly breached the regulation, whereas, if the Respondent were toothless in respect of a later failure to renew a registration, the subject would be in a better position than the unaware even though, by reason of his initial registration, he must have known of the requirement to register and consciously decided not to take such steps as were required to appear on the register.

11. In the event that the effect of Regulation 33 is suggested to have ceased to have effect after June 2009, being 6 months after the creation of the register, it is not clear or easily understood why the regulation was not repealed or amended. The Regulations were amended by reason of the 2007 and 2012 Amendment Regulations and if Regulation 33 had become redundant by 2009, one would anticipate that the Regulation would have been repealed or amended.

12. The Respondent contends that the penalty was properly imposed and respectfully seeks that the appeal is dismissed."

61. We need to make some clarificatory remarks. From statements in this submission it seems that the register for ASPs was indeed established on 1 April 2008 and that the six month period ended on 1 October 2008, but HMRC extended to 1 January 2009 the deadline for registering, no doubt because of the heavy workload generated or because many businesses had not sought to register. We do not understand the reference in [11] to June 2009, but it makes no difference in this case. We also note that HMRC also refer to the six months as a "grace period".

62. At [8] HMRC contend that the only issue for consideration in regulation 33 is whether carrying on business without being registered at a time which is after the grace period is contrary to the requirements of the MLR and that to read the regulation as providing that such conduct does contravene the regulation is a "natural" one, and that any other would give rise to anomalies.

63. The first suggested anomaly is that there is a clear rule against carrying on business without being registered applying to other types of business such as high value dealers who are supervised by HMRC. These are businesses where HMRC has a "duty" to keep a register (regulation 25) rather than a "power" as in the case of tax advisers and others. Regulation 26 which applies to these regulation 25 bodies is indeed very clear:

> "**Requirement to be registered**
>
> 26.—(1) A person in respect of whom the Commissioners are required to maintain a register under regulation 25 must not act as a—
>
> (a) high value dealer;
>
> (b) money service business; or
>
> (c) trust or company service provider,
>
> unless he is included in the register.
>
> (2) Paragraph (1) and regulation 29 are subject to the transitional provisions set out in regulation 50.

64. This clear and unequivocal provision is subject to regulation 50 which says:

> "**Transitional provisions: requirement to be registered**
>
> 50.—(1) Regulation 26 does not apply to an existing money service business, an existing trust or company service provider or an existing high value dealer until—
>
> (a) where it has applied in accordance with regulation 27 before the specified date for registration in a register maintained under regulation 25(1) (a "new register")—
>
> (i) the date it is included in a new register following the determination of its application by the Commissioners; or
>
> (ii) where the Commissioners give it notice under regulation 29(2)(b) of their decision not to register it, the date on which the Commissioners state that the decision takes effect or, where a statement is included in accordance with paragraph (3)(b), the time at which the Commissioners give it such notice;
>
> (b) in any other case, the specified date.
>
> (2) The specified date is—
>
> (a) in the case of an existing money service business, 1st February 2008;

(b) in the case of an existing trust or company service provider, 1st April 2008;

(c) in the case of an existing high value dealer, the first anniversary which falls on or after 1st January 2008 of the date of its registration in a register maintained under regulation 10 of the Money Laundering Regulations 2003.

(3) In the case of an application for registration in a new register made before the specified date by an existing money service business, an existing trust or company service provider or an existing high value dealer, the Commissioners must include in a notice given to it under regulation 29(2)(b)—

(a) the date on which their decision is to take effect; or

(b) if the Commissioners consider that the interests of the public require their decision to have immediate effect, a statement to that effect and the reasons for it.

(4) In the case of an application for registration in a new register made before the specified date by an existing money services business or an existing trust or company service provider, the Commissioners must give it a notice under regulation 29(2) by—

(a) in the case of an existing money service business, 1st June 2008;

(b) in the case of an existing trust or company service provider, 1st July 2008; or

(c) where applicable, 45 days beginning with the date on which they receive any further information required under regulation 27(3).

(5) In this regulation—

"existing money service business" and an "existing high value dealer" mean a money service business or a high value dealer which, immediately before 15th December 2007, was included in a register maintained under regulation 10 of the Money Laundering Regulations 2003;

"existing trust or company service provider" means a trust or company service provider carrying on business in the United Kingdom immediately before 15th December 2007."

65. These provisions are genuinely transitional as they apply only to businesses in existence on 15 December 2007, when MLR came into force[3]. It doesn't however follow that because there is a clear rule forbidding unregistered trading, subject to transitional provisions, for one type of business (where there was a duty to establish a register) that there had to be a clear rule to exactly the same effect for the other type (were there was merely a power). Another obvious difference is that those tax advisers and others called ASPs by HMRC who were required to register with HMRC are a residual case because very many of those providing the services that ASPs provide are not required to be registered, because they are supervised by a professional body, which in the tax advice field includes the ICAEW, ACCA, CIOT and the Law Society and

[3] See regulation 1(1) MLR.

their Scottish and Northern Irish equivalents. Another difference is that HMRC recognise that ASPs and other businesses falling within HMRC's power rather than any duty to register are less susceptible to being involved in money laundering. This is stated in an HMRC Manual on penalties under the MLR (MLR1PP) at paragraph 8600:

> "For … ASPs the consequences of any breaches are likely to be that any potential money laundering will take place through their clients businesses, rather than directly through the … ASP's business. … ASPs are primarily included in the Regulations because they are gatekeepers, not because they are at high risk of being used directly to launder money."

66. This is consistent with what the appellant says HMRC told him. It is in our view not necessarily anomalous that regulation 33 and regulation 26 do not achieve the same thing.

67. In support of their view that regulation 33 must mean that it covers the same field as regulation 26 and is not simply providing a grace period when a new register is established, HMRC refer at [9] to paragraph (5) of regulation 56 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("MLTFTFIPR"). We do not see how this paragraph supports HMRC's view. It merely replaces regulation 33 so as to give, now, a 12 month grace period should it be decided that HMRC will become a supervisory authority for a new class of business, as they did for estate agents in 2014. And it is paragraph (1) of regulation 56 MLTFTFIPR which replaces regulation 26 MLR and that paragraph continues to put an absolute prohibition on trading while unregistered with no transitional provisions. Nothing material has changed.

68. At [10] the submission suggests that our provisional interpretation favours the knowing defaulter whose registration is cancelled against the simply unaware who failed to register in 2009 through ignorance. That may be true but it not a strong argument when set against other considerations.

69. As to [11] this point is of no weight. Regulation 50 which is clearly nothing but a transitional provision was not revoked in 2011 or later. Whether in primary or secondary legislation, transitional provisions are rarely repealed or revoked until the substantive rules are themselves repealed or revoked. Both regulation 33 and regulation 50 were revoked by regulation 110 MLTFTFIPR: it revoked the whole of the MLR subject to a saving in regulation 110(2):

> "where the conduct constituting a contravention of one of those Regulations, or an offence under one of those Regulations began before the date on which these Regulations come into force."

which is of course the case in this appeal.

70. Going back to HMRC's main submission on regulation 33 in [8] it seems somewhat muddled. It says:

> "The Respondent further contends that, at the date of the imposition of the civil penalty and at periods before that time, the Appellant, by

> reason of the cancellation of his registration, was not included in the register."

71. That is indeed true. On 26 June 2017 (the date of the penalty notice) and at periods before then, from 4 June 2015 (the date of cancellation), the appellant was not included in the register. The submission goes on:

> "The only remaining aspect of the regulation which must be satisfied therefore is whether the Appellant carried on the business or profession in question for a period of time following the end of the 'grace period,' which ended on 30th June 2009."

72. Whether the end of the grace period was 30 June 2009 or some earlier date in 2008 or 2009 does not matter: what matters is that the appellant was indeed carrying on the business in question for a period of time following 30 June 2009 and was doing so for some 6 years after that date *while registered*. But our main problem is that this reading assumes that the test is carrying on business for any period of time which starts after the end of the grace period while unregistered and not otherwise supervised. Our reading is that the period of contravention can only start at the end of the grace period because that is what the words "carry on the business … in question *for a period* of more than six months *beginning on* the date [of establishment of the register]" mean.

73. We note that HMRC do not seek to suggest that words need to be read in or omitted, eg on the *Inco Europe* principle[4], to give clear effect to what they say regulation 33 means: they rely on the "natural" reading of the words in the regulation[5]. As we have pointed out if the words in issue were omitted the contravention by the appellant would be clear: he would have contravened regulation 33 the day after cancellation. HMRC do not seek to say either that any of the cases described in §49(1), (3) and (4) get a 6 month grace period.

74. In our view the principle against doubtful penalisation that a person should not be put in peril upon an ambiguity (see *Bennion on Statutory Interpretation*, Part XVII)

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[4] See the speech of Lord Nicholls in the House of Lords in *Inco Europe Ltd and Others v. First Choice Distribution (A Firm) and Others* [2000] 1 WLR 586 at pp592c to 593a.

[5] We have out of interest though considered what extra words would be needed to give effect to HMRC's interpretation. We think that it would require something like this:

> "**Requirement to be registered**
> 33(1) Where a supervisory authority decides to maintain a register under regulation 32 in respect of any description of relevant persons and establishes a register for that purpose, a relevant person of that description may not carry on the business or profession in question unless he is included in the register.
> (2) Sub-paragraph (1) does not apply where the relevant person is included on the register no later than six months after the date on which the register is established."

Or, being a bit less interventionist:

> "33. Where a supervisory authority decides to maintain a register under regulation 32 in respect of any description of relevant persons and establishes a register for that purpose, a relevant person of that description may not carry on the business or profession in question *at any time after the end of* [for] a period of six months beginning on the date on which the supervisory authority establishes the register unless he is included in the register." (Our additions *italicised*, and [omissions] in [ ])

applies here[6]. This view is reinforced by the fact that under regulation 45(1) MLR failure to comply with regulation 33 can be a criminal offence punishable on conviction on indictment with up to two years imprisonment.

75. If we had felt that the provision was ambiguous, such that we could not decide which of the two competing interpretations was meant, then given the principle of doubtful penalisation, we would have said that our interpretation was the correct one.

76. But in our view the wording of regulation 33 is not ambiguous.

77. In coming to the conclusion that we have we recognised that certain situations such as that in the case before us would escape punishment if they were the type of contravention that HMRC, in its discretion[7], wished to penalise. But the fact that the appellant is not liable to a penalty for trading while unregistered does not mean that HMRC are without power to monitor the appellant's activities, and they can still impose penalties on him for the contraventions of provisions of Parts 2 and 3 MLR that they identified on their visit and for any contraventions they find in the future. Being unregistered does not cause a person to cease to be a "relevant person" for Parts 2 and 3 MLR.

78. We think that the appellant would be well advised to co-operate with HMRC, reregister and pay outstanding fees and enter dialogue with them. We also think HMRC should, as far as they appropriately can, recognise and take account of the points made the appellant about the way his business is run and the clients he has, many of whom are non-resident or not present in the UK, in the light of their apparent acceptance that the appellant's type of business and the way it is conducted is not such as to pose a serious risk of being exploited for money laundering.

Observations

79. We noted when reading the correspondence between the parties that the officer of revenue and customs in the case talked freely of the appellant having to "renew" his registration and letting it "lapse", language which not unnaturally the appellant used as well, as did Mr Neeson in his skeleton. We struggled to find in the MLR any such concepts expressed, although we did find them in HMRC's guidance. We consider they are wrong. Registration continues until it is cancelled. What a registered person is required to do is to pay any fees demanded of them whenever they are demanded, failure to pay which may lead to cancellation of the registration. HMRC have chosen to demand them in advance for a year as they are entitled to do, but there is no process of

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[6] It is also noticeable that in commenting in *Inco Europe* on the cases where the *Inco Europe* principle would not apply, Lord Nicholls said:

> "Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provisions in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd v Schindler* [1977] Ch 1, 18, Scarman LJ observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, **as in penal legislation**. None of these considerations apply in the present case. Here the court is able to give a construction of the statute which accords with the intention of the legislature." [**Our emphasis**]

[7] Regulation 42 says "may".

re-authorisation required. The use by HMRC of a different type of language is potentially misleading.

Decision

80. The penalty is cancelled.

81. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for leave 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 12 MARCH 2019