[2018] UKFTT 125 (TC)

TC06381

Appeal number: TC/2017/03182

MONEY LAUNDERING – whether appellant was a "firm" – whether appellant was a "tax adviser" – whether appellant applied "customer due diligence measures" when establishing business relationships – whether penalty proportionate – appeal upheld to the extent that penalty reduced.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ONLINE TAX REBATES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MR MICHAEL BELL ACA, CTA

Sitting in public at Taylor House, Rosebery Avenue, London on 8 February 2018

Andrew Young of Counsel, instructed by Lexlaw Solicitors for the Appellant

Charles Bradley of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Online Tax Rebates Limited ("the Company") assists employees to claim tax refunds. Most claims are for low-value items, such as laundering uniforms and the cost of professional subscriptions. Since 2011, HM Revenue & Customs ("HMRC") has repaid over 400,000 such claims, totalling some £70m.

2. HMRC imposed a penalty of £14,641 on the Company on the basis that it had failed to comply with the money laundering requirements set out at Regulation 7 of the Money Laundering Regulations 2007 ("the Regulations").

3. The Company appealed on the grounds that:

(1) the Regulations did not apply to the Company, because it was neither a "firm" nor a "tax adviser" as defined;

(2) in the alternative, it had met the requirements of Regulation 7;

(3) HMRC had acted "with malice" in imposing the penalty; its true motive was "to discourage lawful tax rebates to customers which are rightfully due"; and

(4) the penalty was in any event disproportionate.

4. We decided the Company was within the scope of the Regulations, and had failed to meet the Regulation 7 requirements. However, we found that the penalty was disproportionate, and reduced it to £2,500. The Tribunal does not have the jurisdiction to decide whether HMRC acted with malice; that would be a matter for judicial review.

The evidence

5. We had the benefit of helpful Bundles prepared by Lexlaw on behalf of the Company, which included the following documents:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) screenshots of the Company's website;

(3) a document called a "Tax Claim & Deed of Assignment" ("TCDA"), which acted as the claim form;

(4) Part 5 of the money laundering Guidance issued by the Consultative Committee of Accountancy Bodies ("the CCAB Guidance" or "the Guidance"); and

(5) typewritten and handwritten notes taken by Mrs Welch, the HMRC Officer who imposed the penalty, when she visited the Company.

6. In the course of the hearing, an extract from Part 4 of the CCAB Guidance was added to the Bundle, with the consent of both parties.

7. Mrs Welch provided two witness statements with attached exhibits. These stood as her evidence-in-chief and she was cross-examined by Mr Young. The Tribunal found her to be an honest and credible witness. Mr Anthony Mills, the Company's director and a member of the Institute of Chartered Accountants in England and Wales ("the ICAEW"), also provided two witness statements with attached exhibits. He gave oral evidence-in-chief led by Mr Young, was cross-examined by Mr Bradley and answered questions from the Tribunal. The Tribunal found both Mrs Welch and Mr Mills to be honest and credible witnesses.

8. On the basis of the evidence summarised above, the Tribunal makes the findings of fact set out below, which are not in dispute. We make further findings of fact later in our decision.

The facts not in dispute

9. Some PAYE employees can claim a range of tax reliefs. These include the cost of laundering uniforms; capital allowances for small tools; the reimbursement of subscriptions to membership bodies and professional magazines, and the cost of licences which employees in some industries – such as security and gambling – have to purchase themselves. For some employees, HMRC has agreed "fixed rate expense" allowances, which allow them to claim a set amount without providing evidence of expenditure.

10. The Company has based its business on these tax reliefs. It trades under several names, including "Uniform Tax Rebate", "Tools Tax Rebate" and "Healthcare Worker Tax Rebate". Some 90% of its business is conducted online, the balance being by direct mail.

The online claims

11. Potential clients are attracted to the Company's websites by digital advertising. We were provided with printed copies of the web pages for the "Uniform Tax Rebate" and "Healthcare Worker Tax Rebate" sites; both parties agreed that these were typical of the other sites. The "home page" of the website for Uniform Tax Rebate reads (emphasis in original):

> Uniform Tax Rebate
>
> The easy way to get a tax refund…
>
> CLICK HERE TO ESTIMATE YOUR REBATE AND CLAIM.
>
> **Uniform tax rebate, are you entitled?**
>
> If you wear a uniform or protective clothing at work and you have to wash it yourself, you may be due a tax refund from HMRC, and if you don't claim it, you'll lose it. According to our statistics, 2 out of 3 employees who wear a uniform at work are entitled to a tax rebate.
>
> To claim your Uniform Tax Rebate claim [sic] just enter your details through the calculator on this page. You'll be able to print off the forms there and then return them. It doesn't matter if you don't have a

printer we'll also automatically send you the Uniform Tax Rebate forms through the post.

12. The next page is headed "Am I eligible for tax relief" and reads:

> "Do you have to wear uniform or protective clothing for work? Do you meet the cost of washing it yourself, without any assistance from your employer? Do you pay income tax on your earnings? If you answer yes to all of these questions you are eligible for tax relief."

13. The following page is divided into two. One half is headed "It's not just about uniform laundry" and continues:

> "We've identified more than 30 other things that you may also be able to claim tax relief on, depending on your job. These other reliefs can increase your tax rebate by £100s. If you enter a claim with us we can help you identify these reliefs and maximise your refund."

14. The second part of the page is headed "Purchase your own tools and equipment?" and continues (emphasis in original):

> "Chefs, hairdressers, mechanics and anyone who purchases their own tools or protective clothing can claim tax relief on those costs. We can help you claim 20-40% of what you paid for these items back in tax. You can claim here or by visiting our dedicated Tools Tax Rebate site."

15. The next page is also divided into two. The first half is headed "No refund, no fee promise" and states:

> "We will check if you are due a tax rebate without charging any upfront fee. It's easy to do, you can lodge a claim in 5 minutes. If we don't obtain a tax refund for you, you won't be charged".

16. The second half is headed "Police Officer?" It invites police officers to claim tax relief on subscriptions to the Police Federation, either via the link on that page or via the dedicated "Police Tax Rebate" site.

17. We were also taken to the web pages for the Healthcare Worker Tax Rebate site, which was very similar to that of the Uniform Tax Rebate site. It also includes the following additional paragraph:

> "We are the UK's leading experts in this type of claim and we've already obtained refunds for more than 100,000 UK taxpayers."

18. Other pages invite employees in the security industry, airline industry, gambling industry, in healthcare and in education to visit the dedicated sites set up for each of those industries.

19. A person who logs on to one of these sites and clicks on a "claim" link can complete and download a TCDA, but only after he has contracted with the Company. The contract states that the material on the website is "for general information and guidance purposes only". It commits the claimant to paying a fee if a refund is

obtained; the standard fee is £10 plus 24% (including VAT) of the refund. By that contract, the Company agrees to pay the refund to the claimant, net of its fee.

20. The TCDA is drafted in the form of a letter to HMRC's PAYE department. It requires the claimant to enter his name, National Insurance ("NI") number and postcode: software supplied by Royal Mail generates the address.

21. The pre-printed part of the letter to HMRC begins by saying "I would like to claim tax relief on the expenses of my employment as detailed below", followed by the relevant details: for example "I was required to wear a uniform or protective clothing at work and my employer provides no facility or allowance for the laundry of this workwear".

22. The related statutory provision is then cited, together with a reference to the appropriate chapter of HMRC's Employment Income Manual. Using the same example, the TCDA states that a deduction of £143 is due, made up of £125 for laundry, £12 for shoes and £6 for stockings/tights. A list of professional bodies relevant to healthcare workers follows, and subscriptions for the appropriate organisation can be claimed by clicking on the relevant box.

23. On the second page of the TCDA, the claimant inputs his industry type and occupation, and the number of years (up to four) for which the claim is to be made, his job title, employer, start and end dates for all employments during the claim period, and a tick box to confirm that protective clothing or uniform was worn in those employments. This paragraph then follows:

> "Note for HMRC – multiple claims for FRE [Flat Rate Expenses] – as per PAYE12045. An employee is entitled to receive FRE for each qualifying employment held, where they were required to maintain tools or special clothing, unless the tools or special clothing can be used for each employment."

24. When the TCDA is complete, the claimant prints it off and signs it. By doing so he "signifies agreement to all of the disclosures made in these forms and to assign the overpayment unconditionally" to the Company. The claimant sends the TCDA to HMRC's PAYE section, using the pre-printed address on the first page. Each TCDA has a different reference number, allocated by the Company.

25. HMRC check the claim. If it is valid, HMRC issue a notice to the claimant quantifying the amount and advising that repayment had been made to the Company. At the same time HMRC issue a one page document to the Company headed "Tax calculation". The text reads:

> "I am writing to let you know that a repayment of income tax is due to the person named above. You have been nominated by the person concerned to receive the repayment and a cheque for the sum of £XX is attached below. My calculation of this amount has been sent separately."

26. The bottom part of the document was a tear-off repayment cheque. During the hearing this document was referred to simply as a "Payslip" and we have used the same abbreviation. Some of the information on the Payslip is generated by HMRC, being the claimant's name, NI number and tax reference number. Other information originates from the TCDA, including the reference number allocated by the Company. The parties were unclear whether the postcode on the Payslip is generated by HMRC or simply copied by HMRC from the TCDA; we make no finding on that point.

27. Once the Payslip and refund have been received, the Company's software checks the information on the Payslip to the information it holds about the claimant. If a discrepancy is identified, the Company contacts HMRC and/or the claimant to clarify the position. For example, the Company might ask the claimant for a copy of his passport or driving licence.

The direct mail claims

28. The other 10% of the Company's business is generated by direct mail. The Company purchases data from a specialist information company called Data Broker Limited ("DBL"); this is categorised by type of individual, such as healthcare workers or teachers. The Company uses this data to send targeted direct mailshots, made up of a covering letter and a TCDA. The letter includes the following passages:

> "If you follow the checklist overleaf and complete the simple forms enclosed we can check to ensure that you are obtaining the correct amount of tax relief. We will ensure that your current year reliefs are correct and that your future year allowances are adjusted in line with the current year to ensure you are no longer being overtaxed. There will be no charge for this service. We will also check the earlier years you indicate on the form to determine if you can claim back previously overpaid tax…thank you for your time and we look forward to checking your tax soon."

29. The letter is signed by an individual (whose name was redacted on our copy of the letter) described as a "Senior Tax Expert". However, Mr Mills stated, and we accept, the name on the letter is not that of a real person.

30. The direct mail version of the TCDA is in the same format as that provided online. It is pre-populated with the name and address of the claimant; the name and address of the Company; a reference number issued by the Company and (if sent to a healthcare worker) the £143 annual deduction for uniform etc. Under "tax years applicable to claim", the last four tax years are specified. The recipient is instructed to send the signed and completed form to HMRC's PAYE department, at the address on the form. Attached to the TCDA is a detailed list of the subscriptions charged by relevant bodies for each of the last four tax years which allows the claimant to complete the subscriptions sections of the TCDA. After the individual has sent the TCDA to HMRC, the process is identical to that for online claims.

Subsequent contact and number of claims

31. Once the claimants have sent off the TCDAs, there is very little contact between them and the Company. As noted above, if there is a discrepancy between the payslip

and the information on its system, the Company may make contact, but this is uncommon. Claimants sometimes email or call the Company if the claimed refund has not been received; the Company tells them to call HMRC for an explanation.

32. HMRC have repaid over 400,000 claims, totalling some £70m, since the Company was incorporated in 2011. Mr Mill's unchallenged evidence was that none of the rebates had gone astray, and there was no indication that any claims were fraudulent, and we so find.

Money laundering compliance visit and penalty

33. In 2011, the Company registered with HMRC for money laundering, naming Mr Mills as the Company's nominated officer. The Company could have registered with the ICAEW, because that body is an approved money laundering supervisor, see Regulation 23(1)(c) and Schedule 3. HMRC is the default supervisory authority for "auditors, external accountants and tax advisers who are not supervised by one of the bodies listed in Schedule 3", see Regulation 23(1)(d)(iv). Subsequent to the decision under appeal, the Company changed its supervising authority to the ICAEW.

34. Mr Mills told the Tribunal that the Company had registered on a precautionary basis, but considered that the risks of money laundering were so low that "nothing we do should fall within that risk".

35. At some point in 2015, a manager within HMRC's risk targeting team instructed Mrs Welch to visit the Company to carry out a money laundering compliance visit. This took place on 14 August 2015. During the visit, Mrs Welch drew Mr Mills' attention to the CCAB Guidance, and said that the Company was not meeting the requirements there set out. Mr Mills' response was that the Company did not need to be registered for money laundering purposes.

36. Mrs Welch referred the case to HMRC's policy team and was told the Company was correctly registered. On 30 November 2015 she visited the Company again, and on 19 January 2016 issued a penalty warning letter. Correspondence ensued.

37. HMRC's then current penalty guidelines stated that a person who breached the Regulations would be subject to a fixed penalty of £5,000, plus a further penalty of between £2,500 and £25,000, depending on the number of "relevant clients". A relevant client was defined as "someone that the business provided regulated services or products to during the relevant period".

38. The maximum further penalty of £25,000 applied where there were between 2,000 and 2,999 relevant clients. The guidelines also capped the total penalty at 10% of the person's annual turnover. If it was the person's first offence, the resulting penalty was then halved.

39. On 3 August 2016, Mrs Welch calculated the penalty according to those guidelines. It was made up of the fixed £5,000 penalty and the maximum £25,000 further penalty. The resulting £30,000 was then capped at £29,282, which was understood to be 10% of the Company's turnover, and further reduced by 50% as it

was the Company's first offence. The penalty was therefore £14,641; it was issued the same day.

40. Under cross-examination Mrs Welch accepted that in setting the penalty she had followed HMRC's guidelines and had not considered whether the Company was low, medium or high risk in the context of money laundering, and we so find.

Complaint to the ICAEW

41. On 9 August 2016, HMRC wrote to the ICAEW. The letter included the following passage (where "OTR" is the Company):

> "between July and September 2015, OTR…sent 4.1m unsolicited letters to potential clients encouraging them to make a claim for employment related expenses against their taxable income under a contingent fee arrangement…[these letters] stated... 'we will check that the claimant is obtaining the correct amount of tax relief, checking current year's relief, in addition to current and future years.' However, the envelopes that OTR provided to potential clients were addressed directly to HMRC, so that potential clients sent their claims directly and only to HMRC. OTR provided a form for potential clients to complete, which included an instruction that HMRC should make any payment to OTR. That would have been the first that OTR knew about any claim. Where HMRC made no rebate or a claim was rejected, OTR would not have been notified and would not have been in a position to investigate."

42. Attached to the letter were pages from the Company's website, and a copy of Mrs Welch's meeting notes from the 14 August 2015 visit. The ICAEW sought HMRC's permission to copy that letter to Mr Mills, and it took some time before permission was given. The ICAEW finally wrote to Mr Mills on 21 February 2017, stating that "the ICAEW have received a complaint against you from HMRC". Its letter summarises the complaint and states that the matter will be referred to the ICAEW's Investigation Committee. That investigation has been put on hold pending the outcome of the Company's appeal to the Tribunal.

The relevant legal provisions

43. In this decision, the relevant legal provisions are cited so far as relevant to the issues engaged in this appeal.

44. With effect from 26 June 2017, the Regulations were replaced by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("the 2017 Regulations"), but the Regulations continue to have effect if the offence began before that date, see Regulation 110 of the 2017 Regulations.

45. The Regulations implement in part the European Parliament and Council Directive 2005/60 ("the Directive") which seeks to prevent the financial system being used for the purpose of money laundering and/or terrorist financing. Neither party referred to the Directive. At the end of the hearing, the parties' representatives offered to make further submissions on whether, and if so how, the Directive might be

relevant to the issues in this appeal. The Tribunal decided that we would not invite further submissions unless our decision would not have been the same, had we not relied on the Directive. That is not the position, and no further submissions have been made.

The scope of the Regulations

46. Regulation 1 defines a "relevant person" as "a person to whom, in accordance with Regulations 3 and 4, these Regulations apply".

47. Regulation 3(1)(c) provides that relevant persons include "auditors, insolvency practitioners, external accountants and tax advisers". Regulation 3(8) reads:

> "'Tax adviser' means a firm or sole practitioner who by way of business provides advice about the tax affairs of other persons, when providing such services."

48. HMRC's position was that the Company was a tax adviser, and so a relevant person for the purposes of the Regulations. Mr Young submitted that the Company was not a "tax adviser" because (a) it was not a "firm" and (b) it did not "by way of business provide advice about the tax affairs of other persons when providing such services".

Whether the Company was "a firm"

49. For HMRC, Mr Bradley relied on the definition of "firm" in Regulation 1, which reads:

> "'firm' means any entity, whether or not a legal person, that is not an individual and includes a body corporate and a partnership or other unincorporated association."

50. It was not disputed that the Company was "a body corporate"; it was therefore, in his submission, clearly "a firm".

51. Mr Young said that "firm" was invariably understood to mean an unincorporated practice, as in a "firm of solicitors". He submitted that the Regulations could not take a well-known term, such as "firm" and redefine it so as to include bodies corporate. The definition included in the Regulations was therefore a breach of common law and *ultra vires*. However, he did not cite any authorities for these submissions.

52. Bennion's *Statutory Interpretation* (6th edn) classifies this type of statutory definition as a "labelling definition", namely "using a term as a label that can then be referred to merely by use of the label". It goes on to state that such definitions cannot be rejected because they have an "unexpected or unlikely" meaning, and it cites by way of example the Factories Act 1961, which defined "factory" as including a film studio". We agree with Bennion, and find that Parliament is not precluded from defining "firm" to include a company. If the common law was thereby breached – although Mr Young did not explain how or why that would be the case – it is trite law that statute takes precedence.

53. Mr Young also submitted that the definition was "*ultra vires*" but did not cite the *vires* under which the Regulations were made. These are the European Communities Act 1972 ("ECA"), s 2(2) and certain sections of the Financial Services and Markets Act 2000. The ECA s 2(2) gives "any designated minister or department" power to make regulations which implement any UK obligation arising out of the Treaties between the UK and the EU.

54. The UK is a member of the EU and was therefore obliged to implement the Directive. Article 2(3)(a) states that it applies to "auditors, external accountants and tax advisors" who are "acting in the exercise of their professional activities". By defining "firm" to include "tax advisers" the Regulations are clearly *intra vires*.

55. As set out at §43 above, the Tribunal agreed at the end of the hearing to allow further submissions if our decision would have been different had we not relied on the Directive. However, that does not extend to allowing further submissions on a point where (a) no authority was cited, (b) had an authority been cited, it would have been obvious that the Directive was engaged, and (c) where the Directive shows that submission to be plainly wrong.

Whether the Company is "a tax adviser"

56. HMRC's case, in a nutshell, was that the Company is a "tax adviser" because it advises clients based on their individual circumstances, telling them what tax reliefs they can claim and in what amounts; it assists them to complete claim forms and charges a fee for that service.

57. Mr Young submitted that the Company is not a "tax adviser" as defined. Instead, it sets out general information about tax reliefs, and supplies a form used by individuals to make claims. The Company was no more a tax adviser than:

(1) authors of books explaining tax reliefs;

(2) WHSmith, which sells proforma will-writing documents ("will packs");

(3) Citizens Advice Bureaux ("CABs"), which provide tax information to the public; or

(4) Trades Unions, which provide tax advice to members.

58. Mr Young also said that HMRC's position was fundamentally inconsistent. It had imposed the penalty on the basis that the Company was a "tax adviser". However, it had also written to the ICAEW, complaining that the Company was *not* providing tax advice.

59. Mr Mills' evidence was that the Company simply "helps the taxpayer and HMRC to communicate" and its aim was "to make the claim easy". He contrasted the Company's methodology with that in HMRC's Manuals, saying that the Company focuses on type of job, whereas the Manuals are organised by type of allowance. He said, by way of example, that HMRC lists over 3,000 tax-allowable subscriptions, but a nurse does not want to search through those 3,000 possibilities to find the ones which might be relevant.

60. Under cross-examination, he agreed that:

(1) the Company first classified potential clients as belonging to a particular industry or profession, in reliance on information provided by DBL, or via the targeted "claim" pages for each industry/profession on the Company's web pages;

(2) the Company told those individuals, either via the direct mailshot or via its web pages, that they were "very likely" to be entitled to the deductions set out on the TCDA;

(3) the individuals were told how much they could claim for each item; they would not have known that information had the Company not provided it to them;

(4) the TCDA cited ITEPA and the HMRC Manual; had it not done so, claimants would not have been able to support their claims with those references; and

(5) the Company provided the above services by way of business.

61. Mr Bradley summarised Mr Mills' evidence by saying: "You tell each of your customers what they can claim, the precise amounts and provide a claim form they can complete", to which Mr Mills responded:

> "HMRC tell them what they can claim – we tell them what they might claim. We are not advising them – it is HMRC who advise them if they are entitled to these things".

62. Mr Mills accepted that he was distinguishing between "advising" clients of their entitlement and "informing" them that a specific tax refund is available. He added that "if the Company was advising a person on his entitlement, we would have to know that it was relevant; we'd have to know enough about their personal circumstances".

63. Mr Bradley submitted that this attempt to distinguish between (a) *informing* a nurse that nurses can get deductions for uniform and laundry and can claim those deductions using a specific pre-populated claim form and (b) *advising* the same nurse she is entitled to those deductions, was a "distinction without a difference".

64. Mr Bradley also took Mr Mills to the wording on the direct mail letters, in particular to the statements set out earlier in this decision that:

> "we can check to ensure that you are obtaining the correct amount of tax relief. We will ensure that your current year reliefs are correct and that your future year allowances are adjusted in line with the current year…the earlier years you indicate on the form to determine if you can claim back previously overpaid tax…we look forward to checking your tax soon."

65. Mr Bradley asked Mr Mills to confirm that the Company was here expressly promising to provide clients with advice. Mr Mills responded by saying that these statements were merely "marketing"; he denied that the Company was holding itself

as providing tax advice. The Tribunal asked what he meant by "marketing", and Mr Mills replied: "we are not actually checking that they are due a refund". On re-examination, Mr Young asked Mr Mills whether the letters "appear to be saying you are giving tax advice but you are not, are you?", to which Mr Mills responded "no, that's right".

Discussion on whether the Company is a "tax adviser"

66. We begin with the definition in Regulation 3(8), repeated here for ease of reference:

> "'Tax adviser' means a firm or sole practitioner who by way of business provides advice about the tax affairs of other persons, when providing such services."

67. It is a complex definition. A tax adviser must provide "advice"; that advice must be "about the tax affairs of other persons" and it must be provided "by way of business".

68. The Oxford English Dictionary ("OED") has a number of definitions of "advice", of which the most relevant in this context are "opinion given or offered as to what action to take; counsel; recommendation", and "information conveyed or imparted". Both require two (or more) parties to have communicated with each other.

69. Regulation 1(2) defines "business relationship" as being:

> "a business, professional or commercial relationship between a relevant person and a customer, which is expected by the relevant person, at the time when contact is established, to have an element of duration."

70. The term "business relationship" is used in Regulation 5(c), which states that customer due diligence measures include "obtaining information on the purpose and intended nature of the business relationship".

71. Reading the definition of a "tax adviser" in its statutory context, we find that it requires a "relationship" between the customer and the firm, which is both a "business" relationship and one which has "an element of duration"; and that, in the course of that relationship, the firm conveys information about tax to customers, and/or offers opinions to customers as to what actions to take in relation to tax.

72. Mr Young referred to tax books and will packs. These may contain "advice" about tax, and tax books and will packs are sold by way of business. However, the author of a tax book cannot reasonably be described as having a "relationship" with its purchaser, certainly not one which has an "element of duration".

73. Mr Young also compared the Company to CABs. CABs may provide tax advice in the course of a relationship with their customers, and those relationships may have an element of duration. But CABs do not provide that advice "by way of business" because they are charities and their charitable purpose is to provide advice. Similarly, Trades Unions may provide tax advice in the course of their relationships

with members, but they are not doing so "by way of business", because the union is a collective body made up of the members.

74. In any event, even if authors, CABs and Trades Unions were "tax advisers" as defined, that would not affect the outcome of this appeal. The issue we have to decide is whether *the Company* is a tax adviser.

75. We agree with Mr Bradley that if the Company does what it promises to do in its direct marketing letters, it clearly falls within the definition of "tax adviser": Being paid to check a person's tax claims is clearly the provision of advice by way of business about the tax affairs of other persons. We note that similar, albeit less explicit, promises are made on the website, such as "if you enter a claim with us we can help you identify these reliefs and maximise your refund".

76. However, we accept Mr Mills' evidence that the Company does not check any of the claims, and find as a fact that the claims are checked only by HMRC, not by the Company.

77. So what does the Company do? It tells clients the precise amounts they can claim, and provides a claim form for them to complete and submit to HMRC. It does this by way of business: the clients sign a contract with the Company and agree that part of their refund can be retained as the price of the service provided by the Company. There is a relationship between the client and the Company, which begins when the client receives the direct marketing letter, or accepts the online contract, and ends when he receives the net refund. The relationship therefore has an element of duration. It follows that the Company is a "tax adviser" within the meaning of Regulation 3(8).

78. We reject Mr Mills' suggestion that the clients received tax advice from HMRC rather than from the Company. When it decides whether to allow a claim, HMRC is not giving tax advice; but is performing its public duty. HMRC may also respond to queries from taxpayers, and this is "advice about the tax affairs of other persons", but that advice is not provided "by way of business" but as part of its same public duty.

79. We noted the tension between (a) HMRC's complaint to the ICAEW to the effect that the Company is not providing tax advice, despite holding itself out as doing so, and (b) the imposition of this penalty. The Tribunal's task, however, is to decide whether the Company's activities come within the statutory definition, not to rule on whether HMRC has adopted an inconsistent approach to the Company.

Whether the Company breached Regulation 7

The relevant Regulations

80. Customer due diligence measures are defined in Regulation 5(a) as including:

> "identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source."

81. The penalty was imposed for a breach of Regulation 7, which is headed "Application of customer due diligence measures". It reads:

> "(1) Subject to regulations 9, 10, 12, 13, 14, 16(4) and 17, a relevant person must apply customer due diligence measures when he–
>
> (a) establishes a business relationship…
>
> (2) …
>
> (3) A relevant person must--
>
> (a) determine the extent of customer due diligence measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction; and
>
> (b) be able to demonstrate to his supervisory authority that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing."

82. Regulation 7 is therefore expressly "subject to regulations 9, 10, 12, 13, 14, 16(4) and 17". It was common ground that only Regulations 9, 13 and 17 were relevant to this appeal.

83. Regulation 9 implements Article 9 of the Directive. It is headed "Timing of Verification" and reads:

> "(1) This regulation applies in respect of the duty under regulation 7(1)(a) and (b) to apply the customer due diligence measures referred to in regulation 5(a) and (b).
>
> (2) …a relevant person must verify the identity of the customer …before the establishment of a business relationship or the carrying out of an occasional transaction.
>
> (3) Such verification may be completed during the establishment of a business relationship if–
>
> (a) this is necessary not to interrupt the normal conduct of business; and
>
> (b) there is little risk of money laundering or terrorist financing occurring…"

84. Regulation 13 implements Article 11. It is headed "simplified due diligence" and reads:

> "(1) A relevant person is not required to apply customer due diligence measures in the circumstances mentioned in regulation 7(1)(a), (b) or (d) where he has reasonable grounds for believing that the customer, transaction or product related to such transaction, falls within any of the following paragraphs…
>
> (5) The customer is a public authority in the United Kingdom."

85. Regulation 17 implements Article 14. It is headed "Reliance" and reads:

"(1) A relevant person may rely on a person who falls within paragraph (2) (or who the relevant person has reasonable grounds to believe falls within paragraph (2)) to apply any customer due diligence measures provided that–

(a) the other person consents to being relied on; and

(b) notwithstanding the relevant person's reliance on the other person, the relevant person remains liable for any failure to apply such measures.

(2) The persons are–

(a) a credit or financial institution which is an authorised person;

(b) a relevant person who is–

(i) an auditor, insolvency practitioner, external accountant, tax adviser or independent legal professional;

(ii) supervised for the purposes of these Regulations by one of the bodies listed in Schedule 3;…"

The parties' submissions in outline

86. Mr Bradley submitted that the Company had failed to comply with Regulation 7, because:

(1) it had not verified clients' identity when it established the business relationship;

(2) the Regulation 9 exception to that "timing" requirement did not apply, and

(3) neither did the Regulation 17 "reliance" exception.

87. Mr Young submitted that the Company was not in breach of Regulation 7 for one or more of the following reasons:

(1) the Company's customer was HMRC, and where the customer is a public authority, Regulation 13 provides an exception to the general rule;

(2) even if that submission were to be wrong, Regulation 7 was nevertheless satisfied because Mr Mills *believed* HMRC to be the Company's customer;

(3) HMRC is the Company's supervisory authority, and the clients send HMRC all their documents; thus, everything required by the Regulations has been done;

(4) the Regulations aim to prevent money *laundering*, namely to prevent criminals from "cleaning" money via legitimate financial products and services. Here, the source of all the money is HMRC, so no money laundering checks are required; and

(5) in any event, the Company carries out extensive due diligence checks which meet the requirements in the CCAB Guidance.

Whether HMRC is the Company's "customer"

88. Mr Young submitted that "as a matter of ordinary and natural English, a customer may be defined as a person of a specified kind whom one has to deal with". He said that the Company's "one constant relationship is that with HMRC. The Company only engages once with the individual, but it has continuous engagement with HMRC". Mr Mills added the Company was "helping HMRC" by assisting individuals to make claims for reliefs to which they were entitled.

89. Mr Bradley gave these submissions short shrift, dismissing them as "bizarre".

90. The Regulations do not define "customer". The OED provides a number of meanings, which include "a person with whom one regularly associates or has dealings", which is similar to the meaning of "customer" relied on by Mr Young. However, the OED classifies that definition as obsolete, with the last recorded usage being in 1621.

91. The OED also defines "customer" as "a person who uses a service offered or provided by a professional person or a business; a client". That is the normal, everyday meaning of the term, and from its usage in the Regulations we find it is also the correct meaning in the statutory context.

92. It is clear from the facts that the Company did not make any offer to HMRC; HMRC only makes contact with the Company because it is directed to do so by the claimants. Although Mr Mills is right that the Company makes it easier for employees to make claims, this is a service provided to the claimants, not to HMRC. It is the claimants who pay the Company, by way of a deduction from their refunds; they have agreed to that deduction because they have used the Company's services. Although HMRC pay money to the Company, they do so at the direction of the claimant and not in exchange for services provided by the Company. It follows that HMRC is not "a person who uses a service offered or provided by [the Company]", and so is not the Company's customer.

Whether Mr Mill's belief that HMRC was the Company's "customer" was sufficient

93. Mr Young further submitted that if he was wrong in his first submission, so that HMRC is not the Company's customer, Regulation 13 nevertheless applied. This was because it reads (emphasis added):

> "A relevant person is not required to apply customer due diligence measures in the circumstances mentioned in regulation 7(1)(a)…where *he has reasonable grounds for believing* that the customer… is a public authority in the United Kingdom

94. Mr Young said that Mr Mills believed HMRC was the Company's customer; Mr Bradley had not challenged that belief in cross-examination, and therefore the Tribunal was required to find it to be a fact.

95. Given the absence of any challenge, we accept that Mr Mills *genuinely* believed that HMRC was the Company's customer. But Regulation 13 does not require "genuine" belief, but "reasonable" belief. The word "reasonable" usually imports an objective test: in other words, would the reasonable person have thought HMRC was

the Company's customer? We have no hesitation in finding that the reasonable person would not have so decided. The reasonable person would have used the everyday meaning of "customer" and it is clear on the facts, as set out in the previous part of this decision, that HMRC is not the Company's customer.

96. We would come to the same conclusion were we to allow for an element of subjectivity. In *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234, a case about VAT default surcharges, but accepted as applicable more generally to other statutory "reasonable excuse" provisions, Judge Medd said:

> "…can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view it can not… that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

97. Using that approach, we find that a reasonable person in the same position as Mr Mills, namely a chartered accountant with business experience, would not have believed HMRC was the Company's customer.

The Regulations are satisfied because the claimants send everything to HMRC

98. Mr Young did not clearly articulate his submission that the Regulations have been satisfied because all the TCDAs are sent to HMRC. As we understand it, he was arguing that the Regulations do not apply because full disclosure has been made to HMRC, the Company's supervisory authority for money laundering purposes.

99. Assuming we have correctly understood the submission, it has no basis in law. The Regulations place certain obligations upon "relevant persons", with specified exceptions. No exception applies to cases where documents are sent directly by the customer to the supervisory authority. Moreover, the TCDAs are sent to HMRC as *claims;* HMRC check those claims in its capacity as the UK's revenue authority, not in its money laundering supervisory capacity.

Whether checks are not required because HMRC is the source of money paid

100. Mr Young submitted that the aim of the Regulations is to prevent criminals from "cleaning" their money via legitimate financial products and services. Here, all the money flowing through the Company is paid by HMRC, so no checks are required.

101. Mr Bradley said that the Regulations applied to all "relevant persons"; the Company is a relevant person, and is therefore in scope. Furthermore, the argument was factually flawed. He referred to the following paragraph in a letter from HMRC to the Company, dated 16 June 2016:

> "by not verifying the identity of each client before the refund claim is made, [the Company] is at risk of facilitating identity theft and payroll frauds, which seek to exploit tax payment and repayment processes to launder money through high volumes of tax overpayments and subsequent refund claims."

102. The letter went on to say that, although there was a "lesser likelihood" of this risk materialising given the nature of the Company's business, customer due diligence was still required.

103. We agree with Mr Bradley that the Regulations apply to all "relevant persons". No exemption is granted for situations where the relevant person receives all the money from a public body, or from its money laundering supervisory authority.

104. That is enough to dispose of this submission. However, we add that the aim of the Regulations is not only to make it difficult for criminals to launder "dirty money" but also to prevent "lawful" money being channelled to terrorists. That this is the case can be seen from the Second Recital to the Directive, which begins:

> "The soundness, integrity and stability of credit and financial institutions and confidence in the financial system as a whole could be seriously jeopardised by the efforts of criminals and their associates either to disguise the origin of criminal proceeds or to channel lawful or unlawful money for terrorist purposes."

105. Although the risk of these small refund claims being used to channel money to terrorists via identity theft and payroll frauds is extremely low, it remains the case that the Regulations are aimed not only at money flowing *from* criminals, but also at money flowing *to* terrorists.

Whether the Company can rely on due diligence carried out by third parties

106. The Company relies on the following third parties:

(1) Royal Mail, which supplies addresses when claimants enter their names and postcodes in the online TCDAs;

(2) DBL, which supplies the names and addresses for direct mail customers; and

(3) HMRC, which checks the claimant's name and NI number and the validity of each claim.

107. During cross-examination Mr Bradley referred Mr Mills to Regulation 17, which provides that third parties must have consented to being relied on for money laundering purposes. Mr Mills accepted that no third party had given consent for the Company to rely on the customer due diligence processes carried out by that third party.

108. Regulation 17 also specifies the types of third party on which reliance can be placed. So far as relevant to this decision, they are a "credit or financial institution which is an authorised person", and an auditor, insolvency practitioner, external

accountant, tax adviser or independent legal professional who is supervised for money laundering purposes. None of Royal Mail, DBL or HMRC come within those categories.

109. If a third party is not within the types specified by the Regulation, a person can nevertheless place reliance on that party if he had "reasonable grounds to believe" it came within one of the specified categories. Mr Young, rightly in our view, did not seek to argue that the Regulation was satisfied on that basis.

110. The Company cannot therefore be exempted from compliance with the Regulations on the basis that it relied on any of Royal Mail, DBL or HMRC.

Whether the Company carried out sufficient due diligence

111. The final question is whether the due diligence carried out by the Company was sufficient to meet the requirement of the Regulations.

Submissions on behalf of HMRC

112. Mr Bradley submitted that the Company was required to verify the customer's identity "on the basis of documents, data or information obtained from a reliable and independent source" when it "establishes a business relationship", see Regulation 5(a) and Regulation 7(1)(a). Although Regulation 9(3) provides an exception to that general requirement, allowing verification to be completed "during the establishment of a business relationship", that provision only applies where that approach "is necessary not to interrupt the normal conduct of business", which was not the position here.

113. Mr Bradley also referred to Regulation 42(d), which requires that, before imposing a penalty, HMRC must consider whether "relevant guidance" had been followed. Guidance issued by the CCAB was "relevant guidance", and Section 5 of that Guidance requires that "customer due diligence measures" be applied "when establishing a business relationship" and, specifically that (emphasis in original):

> "**Before** entering a business relationship, businesses must identify and verify the clients [sic] identity using documents or information from reliable and independent sources…"

114. Mr Bradley said that the Company had not complied with that requirement. Although the CCAB Guidance goes on to reflect the exception in Regulation 9(3), the Company does not verify the clients' identity "as soon as practicable after contact is first established", so that exception could not apply.

115. Moreover, the Company had also not complied with the CCAB Guidance on obtaining evidence of clients' identity. Part 5B of the Guidance sets out the following examples of what is required in low or normal risk cases where the client had not had a face to face meeting with the customer:

> (1) photo identity, such as a valid passport or photocard driving licence plus another document showing evidence of identity, such as a PAYE coding notice,

or a benefit notification letter from a local authority or government department; or

(2) non-photo evidence of identity as set out above, plus evidence of the person's address or date of birth, such as a utility bill; plus, in either case

(3) one further piece of acceptable evidence.

116. Mr Bradley accepted that these were examples, and not prescriptive, but said they provided "a rough standard", and the Company was very far from even approaching that standard.

Submissions on behalf of the Company

117. Mr Young submitted that the overriding requirement of the Regulations is that relevant persons must adopt a risk-based approach. This is explicitly stated in Section 5 of the CCAB Guidance, where the second "Key Point" states:

> "Businesses should take a risk-based approach to allow effort to be concentrated on higher risk areas (also see section 4). Risks must be assessed before the appropriate level of customer due diligence can be applied."

118. Another Key Point reads:

> "Businesses can use a variety of tools and methods to conduct customer due diligence; the onus is on them to satisfy themselves and to be able to demonstrate to their anti-money laundering supervisory authority the appropriateness of their approach"

119. Mr Young said that the Company's money laundering risk was extremely low and the measures it had taken were appropriate and sufficient. In particular:

(1) it checks claimants' addresses with Royal Mail for online cases, and with DBL for direct mail cases;

(2) HMRC is the only source of the money, and it checks that each claimant is entitled to the refund. It is unnecessary for the Company to duplicate HMRC's work;

(3) the Company only remits money to claimants after it has checked from its own records to the name and NI number HMRC has inserted on the Payslip;

(4) any mismatches are subject to more detailed checks, including contacting HMRC and/or obtaining copies of passports and/or driving licences from the claimant; and

(5) no refund has ever gone astray.

120. In relation to direct mail clients, Mr Mills gave unchallenged evidence that the Company has already verified via DBL that the named individuals lived at the address, and DBL has itself verified that address information to at least three independent sources. He said that using DBL was better than asking individuals for copies of passports or other documents because it was robust and reliable: that was

why commercial organisations such as the Company were prepared to pay DBL for addresses.

121. Mr Mills also stated that the Company complied with the CCAB Guidance at paragraphs 4.13 to 4.21. This section is headed "Developing and applying a risk based approach", and requires businesses to assess whether a client is higher risk, normal risk or "lower than normal risk". At 4.17 and 4.19 the Guidance says (Mr Mills' emphases):

> "4.17. This matrix [of higher, normal and low risk clients] *can then be incorporated into client acceptance procedures, and as step 1 of the customer due diligence process, allows a money laundering risk level to be assigned to ensure appropriate, but not excessive, customer due diligence work is carried out*…
>
> 4.19 In all cases, even where clients qualify for simplified due diligence under the terms of the 2007 Regulations, *or where they are considered low risk for other reasons*, to assist in effective ongoing monitoring businesses should gather knowledge about the client to allow understanding of:
>
> - who the client is
> - where required, who owns it (including ultimate beneficial owners – see section 5.6
> - who controls it
> - the purpose and intended nature of the business relationship
> - the nature of the client
> - the client's source of funds
> - the client's business and economic purpose."

122. In summary, the Company's position was that the CCAB Guidance allows relevant persons to (a) decide that a client is "lower than normal risk" and (b) take that into account at the outset of the business relationship by designing "appropriate, but not excessive" due diligence. That is what the Company has done.

Discussion of the checks carried out

123. The Company is within the Regulations, and the checks it carries out must be "appropriate but not excessive", as the CCAB Guidance states. On the facts of the case we agree that:

(1) there is no practical possibility of money laundering, because the money is sourced from HMRC; and

(2) the risk that funds will be diverted to terrorists is exceedingly small, because it would not be worth the time and trouble of making false claims in order to obtain such small refunds.

124. Despite this, there are two interlinked difficulties with the Company's position: the nature of the checks it carries out, and their timing, and we take those points in turn.

125. It is true that the Company does not normally obtain from its clients any of the documents listed in Part 5B of the CCAB guidance, such as copies of photo IDs, utility bills, driving licences or similar documents. It is also true that Part 5B is not prescriptive but sets out examples. Paragraph 5.42 of the Guidance emphasises this when it says:

> "The resources used to undertake effective customer due diligence are not prescribed. Various sources may be used to enhance a business' knowledge of their client, including direct discussion with the client, information (eg, websites, brochures, reports etc) prepared by the client and review of public domain information".

126. However, that lack of prescription cannot undermine the requirement in Regulation 5(a) that the checks are carried out "on the basis of documents, data or information obtained from a reliable and independent source". We have already rejected the Company's pleaded case that it meets this requirement via DBL, Royal Mail, and HMRC, because (a) none of these organisations gave the necessary consent, and (b) none is within a class of persons specified in Regulation 17(2).

127. In other words, although the CCAB Guidance permits flexibility as to the extent and nature of the checks carried out, that flexibility cannot extend to allowing a relevant person to delegate checks to third parties, unless Regulation 17 has been complied with, and that is not the position here.

128. The second, linked, issue is the timing of the checks. Regulation 9(2) requires checks to be carried out "before entering a business relationship". The Company carries out no checks at that point; it is only when the money is received from HMRC that it checks the name and address on the Payslip to the address details held on its system. It follows that Regulation 9(2) has not been complied with. Mr Young did not seek to argue that the exception in Regulation 9(3) applied, and we agree.

Conclusion on due diligence

129. For the reasons set out above, the Company has not complied with the requirement in Regulation 7 to "apply customer due diligence measures when he…establishes a business relationship".

Whether the penalty should be set aside because of HMRC's improper motive

The parties' submissions

130. Mr Young submitted that in conducting this money laundering enquiry and imposing a penalty, HMRC was acting maliciously and so with an improper purpose. Its true purpose was to prevent the Company from facilitating the legitimate claims of many thousands of low-paid employees.

131. He said HMRC were aware that the extra cost of carrying out the type of money laundering checks specified in the CCAB Guidance would either (a) make the

Company's business unviable, or (b) significantly increase its cost base and so its prices, making it less attractive for employees to use its services, and reduce the number of employees who claim entirely legitimate tax refunds.

132. Mr Mills' unchallenged evidence was that the penalty was part of a wider attack on the Company's legitimate business. HMRC had also:

(1) made the complaint to the ICAEW, and in doing so had relied on the minutes of Mrs Welch's visit to the Company on 14 August 2015; and

(2) previously told the Company that the TCDAs were "invalid" and would not be accepted unless specified changes were made. Although the Company obtained legal advice that the TCDAs were lawful, it would have been unable to operate had HMRC rejected all the TCDAs. The Company therefore decided to destroy over one million pre-printed letters, along with the then current version of the TCDAs. These were then reissued so as to include the minor amendment required by HMRC, at a cost of £160,000.

133. Mr Young robustly cross-examined Mrs Welch as to her motives for carrying out the money laundering checks, but as we have already found, she was simply following the instructions of HMRC's risk targeting team.

134. Mrs Welch also told Mr Young that she only became aware of the ICAEW complaint when she received the Bundle for this hearing, and it was also only at that point that she knew HMRC was relying on the minutes of her meeting with the Company to support the complaint. Mr Young did not challenge that evidence and we accept it.

135. Mr Young went on to say he was disappointed that HMRC had not tendered a witness who could explain the reasons behind its decisions to check the Company's money laundering compliance and impose a penalty.

136. In response, Mr Bradley submitted that, although the burden of proof in a penalty appeal is on HMRC, where an appellant makes an allegation such as this, it is for the appellant to prove its case. The Company had not shown that HMRC had acted improperly and he invited the Tribunal to reject this ground of appeal.

Discussion of the "malice" ground

137. There are two difficulties with the Company's submissions. The first is that HMRC's motive in initiating the compliance visit and imposing the penalty is being inferred from its other actions, including the ICAEW complaint and the earlier dispute over the legal efficacy of the letter and the TCDA. No direct evidence has been tendered as to the reasons why the Company was selected for a money laundering visit or what happened when Mrs Welch referred the case HMRC's policy team for further guidance. Although Mr Young was disappointed that Mrs Welch had no relevant knowledge, the Company made no applications for disclosure or for more pertinent witness evidence.

138. The second difficulty is the nature and extent of the Tribunal's jurisdiction. If HMRC's dominant purpose in instigating the compliance review and imposing the penalty was to close down or significantly damage the Company's business, so as to reduce the number of entirely legal and proper rebates paid to taxpayers, HMRC would have acted *ultra vires* its powers. However, whether or not that is the position is a matter of public law.

139. The Tribunal has no statutory jurisdiction to decide matters of public law; neither does it have an inherent judicial review jurisdiction. However, as the Upper Tribunal recently confirmed in *Birkett v HMRC* [2017] UKUT 89 (TCC) at [30], that does not mean that the Tribunal can never consider public law issues, but that it can do so only if that jurisdiction is given by the relevant statute.

140. By way of example, in *Oxfam v HMRC* [2009] EWHC 3078, the appeal was about "the amount of any input tax which may be credited to a person" under Value Added Taxes Act 1994 ("VATA"), s 83(1)(c). Sales J decided that the statutory wording of that provision was broad enough to allow the appellant to bring the appeal on the public law ground of "legitimate expectation".

141. The Company's right of appeal in this case is at Regulation 43(2), which says that "a person who is the subject of a decision to which this regulation applies may appeal to the Tribunal…". The appeal is therefore against the penalty decision made under Regulation 42(1). That provision states that:

> "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 7(1)…"

142. Reg 43(2) read with Regulation 42(1) gives the Tribunal the jurisdiction to decide:

> (1) whether a person has failed to comply with any requirement in Regulation 7(1); and if the answer to that question is yes,
>
> (2) whether the penalty which has been imposed by HMRC is "appropriate".

143. The scope of this appeal right does not permit the Tribunal to decide matters of public law, including whether HMRC were acting with an improper purpose when imposing the money laundering penalty. A challenge to HMRC's decision on the basis of its motive can therefore only be raised by way of judicial review at the High Court.

Whether the penalty was appropriate

The relevant regulations

144. Regulation 42 is headed "power to impose civil penalties" and reads:

> (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 7(1), (2) or (3)…

(1C) In paragraphs (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 person."

145. Regulation 43 is headed "Appeals against decisions of the Commissioners". Paragraph 2 allows a person to appeal to the Tribunal against an HMRC money laundering decision, and paragraph 4 provides that:

"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."

The parties' submissions

146. Mr Young submitted that a "rigid policy" had been used to set the penalty; that he was right had been confirmed by Mrs Welch, who relied on the HMRC penalty guidelines without considering the negligible money laundering risk posed by the Company.

147. Mr Bradley submitted that the HMRC guidelines produced an "appropriate" penalty; he emphasised that it had been capped at 10% of the Company's profits, and subsequently reduced by 50% because it was the Company's first offence.

148. Both parties also made submissions on whether the Company had followed the CCAB Guidance, so as to bring it within Reg 42(3). We discussed those submissions earlier in our decision, and agreed with HMRC that the Company had not followed that Guidance.

149. We noted that the penalty was capped at £29,282 on the basis that this was 10% of the Company's turnover. HMRC did not ask us to revisit that finding, and we have not done so.

Discussion of the penalty

150. We first considered whether the Company was not liable to a penalty at all, on the basis that it came within Regulation 42(2), because there were:

> "reasonable grounds for it to be satisfied that the person took all reasonable steps and exercised all due diligence to ensure that the requirement [in Regulation 7] would be complied with…"

151. However, the heart of the Company's case was its reliance on third parties, particularly HMRC. Regulation 17 makes it clear that reliance is permitted only within the narrow confines there specified. The scope of that Regulation is also clearly explained in the CCAB Guidance, at paragraph 5.33ff, so there are no reasonable grounds for the Company to have been unaware of the statutory restrictions. It follows that Regulation 42(2) does not apply to the Company.

152. We next considered whether the penalty was "appropriate", namely "effective, proportionate and dissuasive", see Regulation 42(1C). As Mr Bradley said, it is proportionate to the Company's turnover, and HMRC also acted proportionality when reducing the penalty by 50% on the basis that it was a first offence.

153. However, to the extent that the penalty was calculated by reference to the number of clients, we agree with Mr Young that it was disproportionate. This is because each of those clients carries a negligible risk of money laundering or terrorist financing.

154. We note that our view is consistent with HMRC's public guidance on the calculation of penalties for "Accountancy Service Providers" or "ASPs", including tax advisers. At MLR1PP9150 of its Money Laundering Penalty Manual, HMRC advises its staff:

> "Remember that the risk of money laundering with ASPs…is in relation to the activities carried out by the client, not the…ASP… themselves."

155. At MLR3C10385, the Manual states that tax advisers are in good position "to identify suspicious activity in their clients' affairs, and this is because they get a fuller picture of their clients' business activity as they will have access to full trading records and bank accounts". Where that is the case, imposing a penalty which reflects the number of clients is entirely proportionate. But the Company does not have that type of relationship with any of its clients.

156. MLR3C10385 continues by listing the types of activities which are indicative of money laundering, being:

(1) the client is directly engaged in criminal activity;

(2) the client is supplying goods and services to criminals; and

(3) the client is involved in tax evasion.

157. There was no suggestion that the Company's clients were involved in any these activities; given the size of the refunds, HMRC also accepted that the risk of identity theft was extremely low, and we have agreed.

158. It follows that to increase the Company's penalty by reference to the number of clients who received refunds is disproportionate. In coming to that conclusion we have not overlooked the fact that the Company had more than the maximum number of clients (25,000) used in HMRC's then current penalty guidance.

159. We therefore remove the part of the penalty which relates to the number of clients. The residual penalty, as assessed by HMRC, is £2,500, being the £5,000 fixed penalty reduced by 50% for a first offence.

160. In deciding whether a penalty at that level would be "effective" and "dissuasive", we have taken into account the Company's approach to compliance. It is clear from the correspondence between the parties that the Company has always sought to co-operate with HMRC, and we are therefore confident that this penalty will be both effective and dissuasive.

161. The Company may now seek to discuss a way forward with the ICAEW, its new supervisory authority, with the aim of identifying money laundering checks which both allow it to remain in business, and stay within the Regulations. But that is a matter for the Company.

Decision and appeal rights

162. For the reasons set out above, we allow the Company's appeal to the extent that the penalty is reduced to £2,500.

163. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 08 MARCH 2018