[2019] UKUT 0167 (TCC)

Appeal number: UT/2017/0044

MONEY LAUNDERING – penalty - whether appellant company a "tax adviser" – yes – whether it complied with the Money Laundering Regulations 2007 - no

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ONLINE TAX REBATE LIMITED	**Appellant**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL	**MR JUSTICE FANCOURT** **JUDGE JONATHAN RICHARDS**

Sitting in public at The Rolls Building, Fetter Lane, London on 8 May 2019

Andrew Young, instructed by Lexlaw Solicitors for the Appellant

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

DECISION

Introduction and overview of the appeal

1. Some employed taxpayers ("employees") are entitled to tax reliefs, of which they may be unaware. For example, employees who wear a uniform to work may be entitled to tax relief for the expenses they incur in washing or laundering their uniform. In many cases, HMRC have agreed to provide such reliefs on a "flat rate" basis, without the employee concerned being required to provide evidence of the actual expenditure incurred. The appellant company (the "Company") carries on a business that involves it assisting employees in this position to claim adjustments to their PAYE code and/or repayments of tax overpaid by reference to flat rate reliefs such as these.

2. The Company makes contact with employees who may be entitled to unclaimed tax relief primarily through its website, but also by direct mail. The Company's systems, with input from the employee, generate a "Tax Claim and Deed of Assignment" (a "TCDA") which operates as a request to HMRC to give effect to a claim for tax relief by (i) adjusting an employee's PAYE code for the current tax year and, (ii) in appropriate cases to repay tax for up to four previous tax years. The TCDA also operates as an assignment to the Company of any tax refund to which the employee is entitled.

3. The Company invites the employee to send the TCDA to HMRC on terms that the Company will receive a proportion of any tax refund that HMRC make. In around 75% of cases, an employee obtains a TCDA from the Company but does nothing with it. However, in 25% of cases, the employee sends the TCDA to HMRC and, where HMRC determine that a refund is due, they issue that repayment to the Company (given the employee's assignment of the right to that repayment set out in the TCDA). In such cases, the Company deducts its fee and accounts to the employee for the balance.

4. HMRC consider that the Company's business model makes it a "tax adviser" for the purposes of the Money Laundering Regulations 2007 (the "Regulations") and that the Company failed to comply with the requirements imposed by the Regulations to verify their customers' identity. Although HMRC accept that the Company's business gives rise to a low risk of money laundering or terrorist financing, they imposed a penalty of £14,641 on the Company in respect of the failures to comply they alleged. In a decision released on 8 March 2018 (the "Decision"), the First-tier Tribunal (Tax Chamber) (the "FTT") decided that a penalty was payable, but reduced the penalty to £2,500 (largely because the Company's business gave rise to a low risk of money laundering or terrorist financing).

5. With the permission of the FTT, the Company appeals against the Decision. HMRC do not cross-appeal against the FTT's decision to reduce the penalty.

Relevant statutory provisions

6. The detail of the Decision and the Company's grounds of appeal against it can only be understood in the light of the applicable regulatory regime. At the material times, that regulatory regime was set out in the Regulations which were made by the Treasury under powers set out in, among other provisions, the Financial Services and Markets Act 2000. The Regulations were made to implement the provisions of Directive 2005/60/EC (the "Directive"). Subsequently the Regulations were superseded by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 but those new regulations are not relevant to this appeal.

7. The Company is not arguing that the Regulations fail properly to implement the Directive, though it does suggest that aspects of the Directive should inform a proper construction of the Regulations. When setting out relevant provisions, therefore, we will quote primarily from the Regulations. We will refer to the Directive where necessary to explain the Company's arguments in the appeal.

8. Regulation 3 sets out the categories of person to whom the Regulations apply and provides, so far as relevant, as follows:

> **3. Application of the Regulations**
>
> (1) Subject to regulation 4, these Regulations apply to the following persons acting in the course of business carried on by them in the United Kingdom ("relevant persons")—
>
> …
>
> (c) auditors, insolvency practitioners, external accountants and tax advisers;

A "tax adviser" is defined in Regulation 3(8):

> (8) "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.

9. The above provisions differ slightly from their counterparts in Article 2 of the Directive which provide, so far as relevant, as follows:

> **Article 2**
>
> 1. This Directive shall apply to:…
>
> > (3) the following legal or natural persons acting in the exercise of their professional activities:
> >
> > > (a) auditors, external accountants and tax advisors

10. The reference to the exercise of "professional activities" is not present in the Regulations. We accept Mr Bradley's submission (with which Mr Young did not disagree) that the Directive is not suggesting that a "tax adviser" necessarily has to be a person with a recognised professional qualification. Rather, the reference to "professional activities" in the Directive is simply intended to ensure that persons

providing services outside the course of a business (for example an accountant who provides free advice and assistance to a friend) are not brought within the scope of the Directive.

11. Regulation 7 sets out the basic obligation on a relevant person to apply "customer due diligence measures". This appeal is concerned with the requirements applying when a relevant person establishes a "business relationship", to which the relevant provisions are as follows:

> **7 Application of customer due diligence measures**
>
> (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;
> >
> > (b) carries out an occasional transaction;
>
> …
>
> (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.

12. A "business relationship" for these purposes is defined in Regulation 2(1) as:

> 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.

The words "an element of duration" are undefined and derive from Article 3.9 of the Directive.

13. The "customer due diligence measures" themselves are specified in Regulation 5 which provides as follows:

> **5 Meaning of customer due diligence measures**
>
> "Customer due diligence measures" means—
>
> > (a) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;
> >
> > (b) identifying, where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the

> ownership and control structure of the person, trust or arrangement; and
>
> (c) obtaining information on the purpose and intended nature of the business relationship.

14. Therefore, the general obligation imposed by Regulation 7 is to apply the "customer due diligence" measures set out in Regulation 5. However, Regulation 7(1) makes it clear that this obligation is subject to, among others, Regulations 9, 13 and 14. (We do not deal with the other regulations specified in Regulation 7(1) since they are not relevant in the context of this appeal.)

15. Regulation 9 expands on the time by which due diligence measures must be conducted. The starting point, in Regulation 9(2) is that:

> (2) Subject to paragraphs (3) to (5) and regulation 10, a relevant person must verify the identity of the customer (and any beneficial owner) before the establishment of a business relationship or the carrying out of an occasional transaction.

16. The requirement to verify a customer's identity <u>before</u> the establishment of a business relationship is itself subject to exceptions. For example, Regulation 9(3) permits identity to be established "during" the establishment of a business relationship if certain requirements are met. However, before the FTT, the Company did not seek to argue that a relevant exception applied and it has not made such an argument in its grounds of appeal to this Tribunal.

17. A further qualification on the requirement to apply the customer due diligence measures specified in Regulation 5 is set out in Regulation 13. That permits a relevant person to perform "simplified due diligence" as follows:

> **13 Simplified due diligence**
>
> (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.

18. Therefore, where a relevant person has reasonable grounds for believing that the customer is a UK public authority (such as HMRC) then, whether or not the customer is <u>actually</u> a UK public authority, the relevant person has no obligation to perform any due diligence on the establishment of a business relationship.

19. Regulation 14 sets out a qualification to the general requirement to perform the standard customer due diligence specified in Regulation 5 by imposing a requirement to perform due diligence to a more exacting standard as follows:

> **14 Enhanced customer due diligence and ongoing monitoring**
>
> (1) A relevant person must apply on a risk-sensitive basis enhanced customer due diligence measures and enhanced ongoing monitoring—

> (a) in accordance with paragraphs (2) to (4);
>
> (b) in any other situation which by its nature can present a higher risk of money laundering or terrorist financing.
>
> (2) Where the customer has not been physically present for identification purposes, a relevant person must take specific and adequate measures to compensate for the higher risk, for example, by applying one or more of the following measures—
>
> (a) ensuring that the customer's identity is established by additional documents, data or information;
>
> (b) supplementary measures to verify or certify the documents supplied, or requiring confirmatory certification by a credit or financial institution which is subject to the money laundering directive;
>
> (c) ensuring that the first payment is carried out through an account opened in the customer's name with a credit institution.

20. Regulation 42 permits a "designated authority" (which includes HMRC by virtue of the definition of that term in Regulation 36) to impose a penalty on a person who fails to comply with, among others, the obligation to perform customer due diligence imposed by Regulation 7(1), the obligation to perform due diligence before establishing a business relationship imposed by Regulation 9(2) or the obligation to perform enhanced due diligence imposed by Regulation 14(1). Regulation 43 confers a right of appeal to the FTT.

The Decision and the grounds of appeal against it

The FTT's material findings of fact

21. The FTT made detailed findings of fact. Below we summarise only those factual findings that are important to the Company's appeal to this Tribunal. References in square brackets are to paragraphs of the Decision, unless the context requires otherwise.

22. In 2011, the Company registered with HMRC for the purposes of Regulation 33, naming Mr Mills, the Company's director, as its nominated officer. That registration was on a "precautionary basis" as the Company did not then believe, and still does not believe, that it is a "relevant person" who is subject to the Regulations.

23. At [11] to [27], the FTT set out undisputed facts in relation to TCDAs generated online following an employee's visit to the Company's website. It supplemented those findings with other findings made elsewhere in the Decision. In summary:

> (1) An online TCDA would be generated after an employee has completed an online questionnaire that captures relevant information such as whether the employee wears a uniform and is required to meet the cost of washing it without assistance from the employer. The online questionnaire contains a list of other items for which the employee may be able to make a claim,

and the employee clicks on or completes the relevant box to include such a claim.

(2) An employee cannot obtain a TCDA without first entering into a contract with the Company ([19]). That contract commits the employee to paying the Company a fee if a tax refund is obtained.

(3) Once the employee has entered into a contract with the Company, a TCDA is made available which is drafted in the form of a letter to HMRC's PAYE department claiming tax relief on the basis of the responses that the employee gave to the online questionnaire. The employee is required to enter his or her name and national insurance number on the TCDA. Software supplied by the Royal Mail will generate the employee's address for inclusion on the TCDA by reference to postcode details that the employee inputs.

(4) Once the TCDA is completed, the employee is able to print it off, sign it and send it to HMRC.

(5) The Company's website includes some suggestion that the Company would "check" if the employee is actually due a refund (see [15]) and similar statements are made in the direct mail documentation referred to at para 25(3) below. However, the FTT accepted (at [76]) that this was just "marketing" and the Company does not perform any independent verification that employees are actually entitled to the tax reliefs claimed in a TCDA.

24. The FTT did not make an express finding as to how precisely the claim for tax relief set out in a TCDA (whether generated online or sent as part of a direct mailshot) was arrived at. However, at [59] it referred to evidence that Mr Mills gave to the effect that its systems obtained information on flat rate reliefs for employees from HMRC's Manuals, which are publicly available online. Since the FTT found Mr Mills to be an honest and credible witness ([7]), we have inferred that most, if not all, of the Company's knowledge as to the amount of flat-rate relief that its customers could claim came from publicly available sources.

25. At [28] to [30], the FTT dealt with TCDAs that were generated following a direct mail contact with an employee. In summary:

(1) The Company purchases contact details of employees who might be entitled to unclaimed tax relief from a specialist information company ("DBL").

(2) It contacts those employees by sending a covering letter and a TCDA. The TCDA is pre-populated with the employee's name and address and, where relevant, certain "standard" claims for tax relief. For example, if the employee has been identified as a healthcare worker a claim for flat-rate relief for the costs of cleaning uniform, shoes and socks/tights is included automatically on the TCDA. The covering letter includes instructions on how to complete the TCDA and on how to claim relief for professional subscriptions that might be relevant. For example, a healthcare worker

might be able to claim tax relief for their subscriptions to UNISON or the Royal College of Nursing. The covering letter informs the employee of the amount of tax relief that can be claimed for such subscriptions and instructs an employee who has paid such subscriptions to include the relevant amount in the appropriate box on the TCDA ([30]).

(3) The covering letter sent with the TCDA said that, if an employee submitted a TCDA, the Company will "check to ensure that you are obtaining the correct amount of tax relief". However, at [76], the FTT concluded that this was simply a "marketing" statement and no such checks are performed.

26. The FTT did not make an express finding as to when a contract came into existence between an employee and the Company following a direct mail contact. However, the FTT had available to it an example of the covering letter that the Company sent to its direct mail contacts (and quoted extracts from that letter at [28]). That covering letter included the following paragraph:

> HMRC will pay any rebate due directly to us and we will forward a cheque to you, in due course, net of our deductions, £10 payment processing charge and a further deduction of 20% plus VAT.

Mr Young and Mr Bradley seemed agreed that the effect of this was that if an employee sent a "direct mail" TCDA to HMRC then a contract came into existence between the Company and the employee when the TCDA was sent to HMRC. A term of that contract was that if, and only if, HMRC made a refund to that employee, the Company was entitled to be paid the fee set out in the letter.

27. If an employee sent a TCDA to HMRC and HMRC agreed to make a tax refund, they would send that refund to the Company (because the employee assigned it to the Company pursuant to the TCDA). That document would be accompanied by what was referred to as a "payslip" generated by HMRC and addressed to the Company ([26]). Some of the information on that payslip was generated by HMRC (such as the employee's name, national insurance number and tax reference). Other information on the payslip would originate from the TCDA (such as the Company's reference number appearing on the TCDA). The Company's software would check the information on the payslip to confirm that it corresponded with information that the Company held.

28. At [125], the FTT found that the Company did not normally obtain from its customers any of the documents listed in Part 5B of guidance issued by the Consultative Committee of Accounting Bodies (the "CCAB") It also concluded that the only checks that the Company performed that had any bearing on its customers' identities were those referred to at [27] namely a check that the employee's name and address that HMRC quoted on the payslip tallied with the Company's own records.

29. At [92], the FTT concluded that HMRC was not the Company's customer for the purposes of the Regulations but, at [95], it accepted that Mr Mills genuinely (though mistakenly) believed that HMRC was the Company's "customer". At [97] it

concluded that a reasonable person with Mr Mills's background as a chartered accountant with business experience would not have held that belief.

The FTT's conclusions and reasoning

30. The FTT's decision and reasoning, insofar as relevant to the issues arising on this appeal, can be summarised as follows:

> (1) At [77], having considered the actions that the Company took in the course of its business, the FTT concluded that they involved the provision of advice about the tax position of the employees with whom it dealt. As such, the Company was a "tax adviser" and so a "relevant person" who was subject to the Regulations.
>
> (2) The Company did not have reasonable grounds for believing that HMRC was its customer. Therefore, it was not entitled to be excused from complying with Regulation 7 on establishment of a business relationship.
>
> (3) The Company did not make any due diligence checks at all until it received the payslip. By then the "business relationship" had been established and so these checks were necessarily incapable of satisfying the requirement of Regulation 9(2) to undertake checks <u>before</u> establishing the business relationship. The Company had not sought to argue that Regulation 9(3) applied (so as to permit it to perform customer due diligence during the establishment of the business relationship).
>
> (4) The FTT evidently thought that the Company was arguing that it was entitled to rely, under Regulation 17, on due diligence that third parties, such as Royal Mail, HMRC and DBL had performed in connection with the employees. It considered and rejected that argument at [106] to [110] because (i) the relevant third parties had not consented to being relied upon and (ii) because they did not fall into the category of person on whom the Regulations permitted the Company to rely. The Company bases one of its grounds of appeal on an argument that the FTT misunderstood the Company's position in this respect.
>
> (5) It followed from the above that the Company had not complied with either Regulation 7(1) or Regulation 9(2) and HMRC were entitled to charge a penalty. As we have noted, the FTT reduced the penalty from the amount that HMRC imposed.

The Company's grounds of appeal to this Tribunal

31. The Company has provided detailed Grounds of Appeal. Rather than summarising all those grounds separately, we will simply note that they involve challenges to the following aspects of the Decision which we will consider in turn. We will explain the Company's grounds in more detail when considering those grounds:

> (1) Ground 1 – Having regard in particular to the provisions of the Directive (which emphasise that it is not aimed at persons such as the Company that carry out businesses with a low risk of involvement in

money laundering or terrorist financing), the FTT was wrong to conclude that the Company was a "tax adviser" and so a "relevant person" subject to the Regulations. In reaching its conclusion, the FTT failed to give effect to the EU law principles of equality of treatment and proportionality since the FTT's conclusions brought the Company within the scope of Regulations whereas other similar businesses would not be.

(2) Ground 2 – The FTT was wrong to conclude that the Company established a "business relationship" with an employee prior to the point at which the Company received a payslip from HMRC indicating that a tax refund would be made to that employee.

(3) Ground 3 – As a consequence of Ground 2, due diligence performed at the time the Company received the payslip was performed before the establishment of the business relationship. Having regard to the Directive, which emphasised the importance of "risk-based" due diligence and the EU law principle of proportionality, the FTT was wrong to conclude that this due diligence was insufficient to meet the requirements of Regulation 7(1) or Regulation 9(2).

(4) Ground 4 – The FTT applied the wrong test when deciding whether the Company had reasonable grounds for believing that HMRC was its customer.

(5) Ground 5 – The FTT failed to appreciate that the Company was not arguing that it could rely on due diligence performed by third parties and so did not properly consider the arguments that the Company was advancing.

32. Some of the points that Mr Young made in his oral arguments were outside the scope of the grounds on which the Company has permission to appeal. We pointed those out to Mr Young during his submissions and he made no application to amend the Company's grounds of appeal. We have therefore not taken the following submissions into account in determining this appeal:

(1) At one point in his oral submissions, Mr Young argued that each arrangement with a particular employee embodied a "one-off" transaction (so that it would be an "occasional transaction" as defined in Regulation 2 but for the fact that it involved an amount less than EUR 15,000). However, the FTT had found at [77] that the Company had a "business relationship" with employees which, because of the way that term is defined, necessarily involves the conclusion that the relationship had an "element of duration". The Company has not appealed against that conclusion. Indeed, before this Tribunal the Company does not deny the existence of a "business relationship" (and so cannot deny the existence of an "element of duration") but instead argues that the business relationship came into existence later than the FTT found.

(2) Mr Young also briefly sought to argue that the Company was entitled, by virtue of Regulation 9(3) to verify customer identity "during the establishment" of a business relationship and not "before" its

establishment (as required by Regulation 9(2)). However, the Company had expressly disavowed this argument before the FTT and it did not form part of its grounds of appeal to this tribunal.

Discussion

Ground 1

33. Mr Young referred us to a number of the recitals to the Directive in support of his argument that neither the Directive, nor the Regulations, should be construed as applying to the Company, which both parties agree to have a low risk of being involved in money laundering or terrorist financing.

34. We will not list all of the recitals to which Mr Young referred since, for reasons that follow, we consider that they are of relatively little assistance in deciding whether the Company was a "tax adviser". Nevertheless, we do accept Mr Young's general points based on these recitals that the Directive (and so the Regulations) were enacted because of a concern within the EU of "massive flows of dirty money" (Recital 1). We also agree that the recitals to the Directive emphasise the importance and proportionality of a "risk-based approach" such that simplified due diligence is appropriate in cases of low risk (Recital 22 and Recital 24). Recital 19 explains that the services of legal professionals were brought within the scope of the Directive because of a perception that, when they participate in financial or corporate transactions or give tax advice, there is the greatest risk of their services being misused to launder money or finance terrorism. The recitals to the Directive also emphasise EU doctrines of proportionality and equality of treatment.

35. However, Mr Bradley is correct to observe that the question whether a person is subject to the provisions of the Directive or the Regulations is not answered by reference to the degree of risk that its business is considered to represent. Rather, the Directive (in Article 2) and the Regulations (in Regulation 3) set out a prescriptive definition of the persons who are in scope that is framed by reference to the <u>nature</u> of the businesses they conduct and not the degree of risk those businesses present. If a person is within the scope of the Directive or Regulations but carries on a "low risk" business, that is relevant to the degree of due diligence that is expected and not the threshold question of whether the person is subject to the Directive or Regulations in the first place.

36. Moreover, Mr Young made it clear that the Company is not arguing that the UK failed to implement the Directive properly when enacting the Regulations. Therefore, we see no error in the FTT's approach of giving the Regulations their ordinary and natural meaning so as to ascertain whether the Company was a "tax adviser" as defined in Regulation 3(8). The definition in Regulation 3(8) did not require the FTT, when deciding whether the Regulations applied to the Company, to consider the degree of risk of the Company being involved in money laundering.

37. The Company makes a number of points in support of its argument that it was not a "tax adviser". For example:

(1) The Company is offering no different service from that of tax calculation websites (such as MoneySavingExpert.com) or authors offering “tax tips”.

(2) The essence of the Company’s business was that it was providing a document (the TCDA) and a service of collecting cash from HMRC. That is not “tax advice”.

(3) The Company simply provides generic information that is readily available in HMRC’s public manuals or that an employee might obtain by asking his or her employer. It is then up to the employee whether to make a claim or not.

(4) Until the Company knew that an employee had submitted a TCDA and HMRC had agreed to make a refund, the Company was not entitled to be paid anything by that employee. Indeed, until then the Company did not know that any contract had come into existence. Therefore, everything that the Company did up to that point was simply “marketing” (and not the provision of tax advice).

38. Mr Bradley characterised these arguments as challenges under the provision of *Edwards v Bairstow* to the FTT’s findings of primary fact. We do not accept this submission. We understand the Company’s arguments to involve a proposition of law namely that the activities the Company carried on were not, in law, sufficient to make it a “tax adviser”. We do not, therefore, consider that we are entitled to interfere with the FTT’s conclusion only if the high hurdle identified in *Edwards v Bairstow* is overcome.

39. The Company told employees with whom it dealt, both online and via direct mail, that certain categories of employee had a prospect of being able to claim relatively small amounts of tax relief. They provided employees with information on the types of relief they might claim (for example a flat rate allowance for the costs of laundering a uniform or the costs of being a member of the Royal College of Nursing). They also told those employees that sending a duly completed TCDA to HMRC was the correct procedure to follow in order to secure any tax relief to which they might be entitled. The FTT was correct to conclude at [77] that this involved the Company providing “advice about the tax affairs of” the employees. That conclusion is not altered by the fact that employees could have found information necessary for their claims in HMRC’s published manuals.

40. Nor is the conclusion altered by the undoubted fact that the advice was an aspect of a wider transaction that ultimately involved the Company providing employees with a TCDA or that the Company would only be paid if the employee submitted a TCDA and secured a tax repayment. A person can be a “tax adviser” for the purposes of Regulation 3(8) even if it also provides services other than tax advice. Moreover, it is not a requirement that any fee that a “tax adviser” receives must be paid for tax advice and nothing more. It is sufficient if the person provides tax advice “by way of business” and the Company clearly did so.

41. Like the FTT, we consider the analogy with tax calculation websites or authors offering "tax tips" to be of limited utility. As the FTT rightly observed, the question before it was whether the Company (and not other categories of person) was a "relevant person". We will not, therefore, speculate on how the Regulations might, or might not, apply to categories of person who are not party to this appeal.

42. Finally, we consider that the submission at para 37(4) above is at odds with the FTT's findings as to the nature of the Company's business. The Company was not simply agreeing to act as a recipient of a cheque from HMRC and charging for that service. Rather, it is quite clear from the FTT's findings that the Company knew that employees might be entitled to tax relief of which they were unaware. It was prepared to tell those employees (i) how much relief they might obtain and (ii) how they should claim it provided that the employees in return agreed to pay the Company a fee if the process resulted in HMRC making a refund. To describe the "advice" element of that service as mere "marketing" understates the importance of it.

43. The FTT was correct to conclude that the Company was a "tax adviser" and we dismiss the appeal on Ground 1.

Ground 2

44. Ground 2 can be dismissed briefly.

45. The FTT found that, where a TCDA was generated online, a contract came into existence between the Company and the employee before that TCDA was generated. There has been no appeal against that conclusion.

46. In his oral submissions, Mr Young argued that a contract came into existence between the Company and employees when an employee sent a TCDA to HMRC. Given the point at para 45 above, we consider it is only open to him to make that submission in relation to TCDAs sent as part of a direct mailshot. Mr Bradley did not disagree with this submission and therefore we will proceed on the basis that, in a direct mail situation, the contract between the Company and an employee came into existence when the employee sent the TCDA to HMRC.

47. Therefore, in the case both of online TCDAs and direct mail TCDAs, the Company is arguing that a business relationship with its customers came into existence only when it received a payslip from HMRC which was after the point at which a contract was formed. We reject that argument. Once the Company entered into a contract with its customer, it clearly entered into a "business, professional or commercial relationship". The Company accepts that this relationship had an "element of duration". Therefore, the FTT was correct to conclude that the Company had a "business relationship" with a particular employee before the point at which it received a payslip from HMRC.

48. The Company seeks to escape the conclusion at para 47 by arguing that it would have no means of knowing whether any particular employee would submit a TCDA to HMRC. The first occasion on which it would know whether an employee had

submitted a TCDA would be when HMRC sent the Company a payslip. Therefore, it could not know, until it received a payslip from HMRC, whether it had a "business relationship" with a particular employee and, accordingly, the Regulations should be construed so as to give the result that there was no "business relationship" until the payslip was received.

49. We reject that submission. First, at least in relation to online TCDAs, it is at odds with the FTT's finding, against which there has been no appeal, that a contract was established (online) before the employee downloaded and printed a TCDA. The contract is a unilateral contract that does not depend on communication by the employee of acceptance of the Company's offer but is accepted upon the employee downloading the form or (in the case of direct mail) posting it to HMRC. In any event, the Company clearly had the means of knowing which employees were accepting its standard terms and conditions over its website. Moreover, the argument is at odds with the plain meaning of Regulation 9(2), which requires identity to be established before the business relationship is established and not before the point in time at which the Company becomes aware of that business relationship. Even if the Company were correct that it did not know precisely when the "business relationship" was established, the way to control that risk was by completing identity checks at a sufficiently early point in the process such that, whenever the business relationship was established, those checks were made in time.

50. Overall, the FTT was correct to conclude that Regulation 9(2) required the Company to verify its customers' identity before the point at which it received a payslip from HMRC and we dismiss the Company's appeal on Ground 2.

Ground 3

51. Our conclusion on Ground 2 also disposes of Ground 3. The Company was obliged to verify its customers' identity before it received a payslip from HMRC. However, the FTT found as a fact (see [128]) that the Company performed no identity checks at all until it received the payslip.

52. The Company argues against this conclusion by referring to the Directive and submitting that because its business involved such a low risk of money laundering or terrorist financing, in all the circumstances, the checks that it performed on receiving the payslip should be taken as sufficient to meet applicable requirements.

53. We reject that submission. There is a relaxation in the rules for "low risk" businesses that is contained in Regulation 9(3) but the Company chose to advance no argument before the FTT that it came within the scope of that provision and indeed specifically accepted that it did not (see [128]). There is no scope for an interpretation that low risk businesses are necessarily outside the scope of Regulation 9(2) not least since such an interpretation would render Regulation 9(3) largely redundant.

54. Strictly, therefore, we do not need to decide whether the nature of the Company's due diligence was sufficient to satisfy Regulation 9(2) since it was necessarily undertaken too late to satisfy that Regulation. We will say, however, that the FTT's

findings make it clear that, even at the time of receipt of the payslip from HMRC, it did not "verify the identity" of its customer as required by Regulation 9(2). All the Company did was to compare the address it held for an employee with that HMRC provided on the payslip.

55. The Company argues that letters from HMRC, like utility bills, are acceptable evidence of identity and therefore that the Company's checks on receipt of the payslip amounted in effect to verification of identity. We reject that argument because it ignores the fact that HMRC's payslip was generated following a process that involved no verification of identity. Suppose that a customer visits the Company's website and gives the Company a name (Ms Smith) and an address. The customer prints out a TCDA (making a claim for relief in the name of Ms Smith) and sends it to HMRC. A few weeks later, the Company receives a payslip from HMRC indicating that HMRC is prepared to make a refund to a Ms Smith and the address on HMRC's payslip tallies with the address the Company's customer provided. This is certainly good evidence that a Ms Smith exists and that she lives at the address the customer provided. But it is no evidence that the Company's customer is <u>actually</u> Ms Smith: conceptually the customer could be an impostor. Moreover, if the customer was an impostor, both HMRC and the Company would have been misled, so HMRC's payslip is not independent evidence corroborating the customer's identity as Ms Smith. We accept, of course, the FTT's finding at [32], based on unchallenged evidence, to the effect that since 2011 the Company has dealt with over 400,000 claims and there is no indication that any was fraudulent. However, that does not mean that, by checking the address details on the payslip, the Company was verifying identity.

56. Therefore, even putting to one side the fact that the Company performed its checks too late, those checks did not verify the identity of the customer. They did not, therefore, satisfy the requirements of Regulation 9(2) or amount to "customer due diligence measures" as defined in Regulation 5. Still less did they meet the requirement to perform enhanced customer due diligence (which applied by virtue of Regulation 14(2) since the Company never met its customers in person).

57. For all of those reasons we dismiss the Company's appeal on Ground 3.

Ground 4

58. The Company argues that, in considering whether the Company had reasonable grounds for considering that its customer was HMRC, the FTT applied the wrong test. In summary, the Company's case is that the FTT applied a test based on the defence of "reasonable excuse" that is found in many tax contexts, including the VAT "default surcharge". Properly understood, and proportionately applied, the Company ought to be regarded as being within the scope of Regulation 13 given the low risk of its business being involved in money laundering or terrorist financing.

59. We do not, however, consider that the FTT applied the wrong test. It found that Mr Mills genuinely (but wrongly) believed that HMRC was the Company's customer. Since the question was whether there were "reasonable grounds" for that belief, it

correctly concluded at [95] that an objective examination was needed as to whether a reasonable person would hold that belief. Its conclusion was that a reasonable person would not hold the belief so Regulation 13 did not apply. There is no error of law in that approach. In particular, Regulation 13 did not require the FTT, when considering the reasonableness of Mr Mills's belief, to have any regard to the fact that the Company's business involved a low risk of money laundering or terrorist financing. We dismiss the Company's appeal on Ground 4.

Ground 5

60. It appears as though the Company's position before the FTT was somewhat unclear. Both Mr Bradley and the FTT thought that the Company was arguing that it was entitled to rely on due diligence performed by, among others, HMRC and Royal Mail. The Company has now said this was no part of its case. Therefore, at most, the FTT has considered a point that was unnecessary. On its own, that involves no error of law.

61. However, Mr Young submits that by focusing on the "wrong" argument, the FTT ignored the Company's true case which was that, by relying on information it received from HMRC, Royal Mail and DBL, the Company was effectively checking identity. However, there is no force in that argument.

62. First, in relation to information from HMRC, the Company only received that information when it obtained a payslip. We have already explained, in our decision on Ground 2 and Ground 3 first that any checks based on this information were made after establishment of the "business relationship" and so were too late to amount to compliance with Regulation 7(1) or Regulation 9 and second that they did not amount to verification of identity in any event.

63. The "checks" based on information provided by Royal Mail simply involved using Royal Mail's software on the Company's website to help to generate a full address from a postcode. That process will be familiar to anyone who has ever bought goods online and quite clearly involves no verification of identity.

64. The fact that the Company bought name and address details from DBL similarly involved the Company making no checks on its customers' identity.

65. We dismiss the Company's appeal on Ground 5.

Disposition and postscript

66. We have rejected all of the grounds of appeal which the Company has put forward. The appeal is therefore dismissed.

67. We will say, however, that we feel there may have been grounds, not argued before either us or the FTT, for concluding that, even though the Company is a "relevant person" (since it is a "tax adviser"), it was not obliged by Regulation 7 to apply customer due diligence measures and so no penalty could be charged by

reference to a failure to apply those measures. Given the acknowledged very low risk of money laundering or terrorism finance in the Company's business model, the requirement for enhanced customer due diligence is a little surprising.

68. As we have noted, HMRC rely on the Company's establishment of a "business relationship" with its customers as the trigger for application of Regulation 7. The Company has throughout accepted that it had a "business relationship" with its customers that had the requisite "element of duration". We are not convinced it was correct to accept that. It seems to us at least possible that the Company's relationship with its customers was essentially transactional: to achieve a particular one-off result including the adjustment of a tax code coupled with a possible repayment of tax. The fact that such a result could not be achieved instantaneously does not seem to us to compel the conclusion that the relationship had an "element of duration", since few, if any, transactions can be effected instantaneously.

69. There is support for the above interpretation in the Regulations themselves. Whereas Regulation 7(1)(a) sets a trigger for performing customer due diligence measures by reference to the establishment of a "business relationship", Regulation 7(1)(b) sets a different trigger: the carrying out of an "occasional transaction". An "occasional transaction" is defined in Regulation 2(1) as:

> A transaction (carried out other than as part of a business relationship) amounting to 15,000 euro or more, whether the transaction is carried out in a single operation or several operations which appear to be linked.

70. At least arguably, therefore, the Regulations establish that accepting an engagement in connection with a one-off, short-lived transaction is not of itself a "business relationship" (because the engagement lacks the requisite "element of duration"). Such engagements can still be "occasional transactions" (and so trigger the requirement to perform due diligence) but only if they involve a transaction with a value of EUR 15,000 or more. On that interpretation, the Company never established a "business relationship" with its customers and, because the tax reclaims in issue would in virtually all cases have involved considerably less than EUR 15,000, the Company was not carrying out an "occasional transaction" either and so had no obligation to perform due diligence.

71. We should not be taken as deciding that this alternative approach is the correct one. The Company has not argued it and HMRC has not had the opportunity to formulate considered argument in response to it. Moreover, since the Company has throughout accepted that its arrangements with its customers do have an "element of duration", it has never produced evidence to establish that they have no such element and the FTT made no finding in that regard. Factual findings would be necessary if such an argument were to be advanced.

72. We therefore simply note the point in case it is relevant in future cases of this nature.

73. It is also appropriate to note that the 2017 Regulations are in different terms and that a different analysis will be required where they apply, which they do where the relevant conduct began on or after 26 June 2017.

MR JUSTICE FANCOURT

JUDGE JONATHAN RICHARDS

RELEASE DATE: 24 May 2019