



TC03832

Appeal number: TC/2013/06960

Money Laundering Regulations – penalty for failure to register – whether the Appellant had taken all reasonable steps and exercised all due diligence to ensure that it complied with its obligations – whether HMRC were precluded from issuing a penalty – appeal dismissed and penalty confirmed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PAYEDOC PAYROLL SERVICES LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL S CONNELL
MR RICHARD CROSLAND**

**Sitting in public at Civil and Family Court Building 35 Vernon Street, Liverpool
on 14 April 2014**

Mr Leslie Isaacs and Mrs R Isaacs, joint proprietors of the Appellant company

Ms Caine, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

5 1. Payedoc Payroll Services Limited (“the Appellant”) appeals the Respondents’ decision to issue a penalty for a breach by the Appellant of the Money Laundering Regulations 2007 (‘the MLR 2007’). The amount charged to the Appellant is £930.41, made up of £430.41, being the fees which the Appellant would have paid had it been registered at the right time and a fixed penalty of £500. The Appellant only appeals the penalty.

10 2. The MLR 2007 state that an Accountancy Services Provider (‘ASP’) must be registered under the MLR 2007. The Appellant is a payroll agent. HMRC say that the Appellant is caught by the provisions of the MLR 2007 and failed to register when it should have done.

3. The issues in the case are:

15 (1) Whether HMRC had complied with its statutory obligation to take “reasonable steps” to bring the ‘register of relevant persons’ to the attention of those affected;

(2) Whether the Appellant had taken “all reasonable steps and exercised all due diligence” to ensure that it complied with its obligations.

20 Background

4. The Appellant began trading as a sole trader payroll provider from 1 November 1998 and was subsequently incorporated as a limited company.

5. In 2008 the Appellant registered for VAT.

25 6. From 1 January 2009 the Respondents established a register under the MLR 2007 and pursuant to the Regulations any ASP business or profession which was not already registered with another supervisory body was required to be registered with the Respondents.

30 7. On 25 September 2012 the Respondents wrote to the Appellant to inform it of the requirement for ASP businesses to be registered with the Respondents. The letter also informed the Appellant that failure to register at the correct time may render the business liable to a penalty.

8. On 2 November 2012 the Respondents processed an application from the Appellant for registration as an ASP which confirmed that the Appellant began trading as an ASP on 1 November 1998.

35 9. By a letter dated 15 March 2013 the Appellant was advised that, after a period of 30 days, the Respondents intended to issue a demand for unpaid registration fees and a penalty in the total sum of £930.41 for its failure to register with the Respondents.

The letter explained the penalty calculation and invited the Appellant to say what steps, if any, had been taken to comply with the Regulations and/or give any reasons for disagreeing with the penalty.

5 10. On 24 April 2013 the Appellant was issued with a penalty notice by the Respondents under paragraph 42 MLR 2007.

11. On 17 May 2013 the Appellant wrote to the Respondents requesting a review of the penalty decision. The Respondents undertook a local review of the penalty and by way of letter dated 5 June 2013 the Appellant was notified that the penalty decision stood.

10 12. On 1 July 2013 the Appellant requested a further review of the penalty. The review was carried out by an officer not involved in the original decision to issue the penalty and by way of letter dated 12 August 2013 the Appellant was notified of the conclusion of the review to uphold the penalty.

15 13. By notice of appeal dated 9 October 2013 the Appellant appealed the penalty of £500 to the Tribunal on the grounds that it considers the Respondents did not take reasonable or adequate steps to notify the Appellant of the regulatory requirement for registration. The Appellant asserts that the Respondents were aware of the Appellant's business activities but failed to communicate the need for registration.

The Law

20 14. The MLR 2007, 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.

15. Article 39(1) of the Directive is headed "Penalties" and reads as follows:-

25 "Member States shall ensure that natural and legal persons covered by this Directive can be held liable for infringements of the national provisions adopted pursuant to this Directive. The penalties must be effective, proportionate and dissuasive."

16. The MLR 2007 require that "relevant persons" should be registered. By virtue of Regulation 3 "external accountants and tax advisers" are "relevant persons".

30 17. Regulation 3(7) defines an "external accountant" as "a firm or sole practitioner who by way of business provides accountancy services to other persons, when providing such services". The term "accountancy services" is not defined. Regulation 3(8) defines a "tax adviser" as "a firm or sole practitioner who by way of business, provides advice about the tax affairs of other persons, when providing such services".

35 18. Regulation 32(4) states that HMRC may maintain a register of external accountants and tax advisers who are not otherwise appropriately supervised for money laundering purposes. Regulation 32(5) states that if HMRC maintains a register, they must "take reasonable steps to bring the decision [to maintain a register]

to the attention of those relevant persons in respect of whom the register is to be established”.

19. Regulation 33 states that a relevant person must not carry on “the business or profession in question for a period of more than six months beginning on the date on which the supervisory authority establishes the register, unless he is included in the register”.

20. HMRC have the power, by virtue of Regulation 42(1), to impose “a penalty of such amount as it considers appropriate” on a relevant person who does not comply with Regulation 33. Regulation 42(1C) states that “appropriate” means “effective, proportionate and dissuasive”.

21. Regulation 42(2) reads:

“The designated authority must not impose a penalty on a person...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.”

22. Regulation 42(3) reads:

“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.”

23. Regulations 43(2) and (6) gives a person on whom HMRC have imposed a Regulation 42 penalty a right to appeal that penalty to the Tribunal. Regulation 43(4) gives the Tribunal 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 evidence

24. We were provided with copy correspondence between the parties. HMRC provided extracts from Notice MLR9D, the Registration Guide for Accountancy Service Providers (approved by the Treasury as “relevant guidance” under Regulation 42(3)).

The extracts included the following:

2.3 Do I need to register with HMRC?

Yes, if you are an Accountancy Service Provider and are not already supervised for compliance with MLRs by the Financial Services Authority (FSA) or a professional body listed in section 8.

3. Accountancy Service Providers

5 3.1 Who needs to register?

What is an Accountancy Service Provider?

Accountancy Service Providers (ASPs) is the term used by us for auditors, external accountants and tax advisers...

10 An external accountant is any firm or sole practitioner who by way of business provides accountancy services to other persons.

A tax adviser is any firm or sole practitioner who by way of business provides advice about the tax affairs of another person.

3.3 What are Accountancy Services?

15 Accountancy Services include the recording, review, analysis, calculation or reporting of financial information and covers professional bookkeeping services, preparing or signing accounts or certificates of financial information concerning a person's or organisation's financial affairs, and advising on tax.

3.4 What is a tax adviser?

20 A person who by way of business assists in the completion and submission of tax returns in relation to any tax or duty or provides advice relating to the tax or duty liability or the amount of tax or duty on a particular commodity or service.

3.5 What is the difference between tax advice and tax information?

25 When you give a client information about tax and it is the same for everyone – so their particular situation is not looked at, this is tax information. For example: the rate of customs duty is ---% or the rate of inheritance tax is ---%.

When you give tax advice you will have studied a client's particular circumstances, and assessed and recommended a particular course of action or product that is suitable for them. For example: if you do this, your tax or duty liability will be X. If you do that, your tax liability will be Y.

30 3.6 What types of businesses will be covered?

Businesses covered include:

- Accountants...*
- Tax advisers*
- Book-keepers...*

- Payroll agents

3.17 I am an accountant/bookkeeper but I do not deal with cash or handle money. Do I need to register as an ASP.

5 Yes, if you are not already supervised by a professional body listed in Section 8 in this notice you will need to register with HMRC unless all your customers are ASPs supervised by HMRC or a designated professional body and you meet the requirements of paragraph 3.8.

10 3.18 I am a bookkeeper business and I only complete my clients' cash books and then pass the books onto the accountant, who does the accounts. Do I need to register as an ASP?

Yes. If you are a business supplying bookkeeping services such as completing the cash books for your clients you will need to register with HMRC. If all your customers are ASPs supervised by HMRC or a designated professional body and you meet the requirements of paragraph 3.8 then you will not need to register as an ASP.

15 3.19 Are all payroll providers covered by the MLRs?

Business will generally fall within the scope of the MLRs as ASPs when they undertake payroll functions for a third party. This is because the activities involved in carrying out payroll functions include accountancy services and tax advice as described earlier on in this section.

20 3.20 What are payroll functions?

These will include calculating tax liability; earnings or payments made to a business's employees or deemed employees/subcontractors.

3.21 What businesses providing payroll functions will not be within the scope of the MLRs as ASPs?

25 Businesses will not fall within the scope when they :

- provide software or hardware service support that enables the processing of payroll information providing they do not analyse or prepare financial information
- undertake payroll functions in relation to temporary workers they supply to or manage for a third party
- pay invoices service fees to self-employed individuals, umbrella companies, partnerships or other corporate service providers
- are umbrella companies, managed service companies, or similar bodies and undertake payroll functions for employees working on assignments for end user clients
- provide recruitment or human resources management services (such as employment business supplying or managing temporary or contract workers)

where payroll functions are incidentally undertaken as part of the provider's overall business

3.25.2 *When do I register?*

You must be registered with HMRC before you carry on any activity as an ASP.

5 25. HMRC also provided copies of :

(1) VAT notes 1/2008 (issued with VAT returns between April and June 2008)

(2) VAT notes 2/2008 (issued with VAT returns between July and September 2008)

10 (3) VAT notes 3/2008 (issued with VAT returns between October and December 2008)

(4) VAT notes 4/2008 (issued with VAT returns issued between January and March 2009)

15 (5) VAT notes 4/2009 (issued with VAT returns between January and March 2010)

The Respondent's case

26. In the application for registration dated 10 October 2012 the Appellant confirmed that it began ASP activities on 11 November 1998.

20 27. HMRC say that the Appellant breached Regulation 33 of the MLR 2007 during period 1 January 2009 to 1 November 2012 by not being registered.

28. The steps for calculating late registration penalties (Regulations 26 and 33) are contained in MLR1PP9410, and are calculated as follows:

Step 1 - The starting penalty is set at £5,000 for each breach.

25 Step 2 - Where appropriate, this starting penalty should be reduced to the simplified behavior-based reduced penalty sums which can be found at MLR1PP10150. Where the failure is deliberate the standard reductions table at MLR1PP10100 should be applied.

The basic steps for calculating late registration penalties (Regulations 26 and 33) are calculated as follows:

30 Step 1 - Unprompted Disclosure: £100 fixed penalty plus any unpaid fees by the business

Step 2 - Prompted Disclosure: £500 fixed penalty plus any unpaid fees by the business.

35 29. The £930.41 charged to the Appellant is made up of the fixed penalty of £500 due to the registration being prompted by the Respondents and £421.25 being the

equivalent fees which should have been paid had the Appellant registered at the correct time. The back fees cover period 1 January 2009 to 1 November 2012.

30. The Appellant confirmed in its appeal notice that only the penalty is under appeal. HMRC's case is therefore pleaded on that basis.

5 31. The Appellant's appeal is made on grounds that it was HMRC's responsibility to notify the Appellant, and other businesses, of the requirement to register under the MLR 2007 and that the measures taken by the Respondents to publicise requirements under the MLR 2007 were inadequate.

10 32. HMRC say that they have taken reasonable steps, under 32(5) of the MLR 2007, to bring the decision to maintain a MLR 2007 register to the attention of relevant persons. HMRC say that the following steps were taken to publicise the need to register under the 2007 MLR:

- (a) News and Updates pages from 2007 within the MLR 2007 section of the HMRC website;
- 15 (b) Advertisements in various national daily newspapers in December 2007;
- (c) Advertisements were published in:
 - Accountancy Age on 28th August 2008;
 - Taxation magazine on 28th August 2008;
 - 20 • Financial Times on Monday 1st and Monday 8th September 2008;
- (d) News and Updates pages from 2008 within the MLR 2007 section of the HMRC website;
- (e) VAT notes no 1 of 2008 (issued with VAT returns between April and June 2008);
- 25 (f) VAT notes 2 of 2008 (issued with VAT returns between June and September 2008);
- (g) VAT notes 3 of 2008 (issued with VAT returns between October and December 2008);
- (h) VAT notes 4 of 2008 (issued with VAT returns between January and March 2009);
- 30 (i) VAT notes 4 of 2009 (issued with VAT returns between January and March 2010);
- (j) Each copy of the VAT note includes a printed copy of the relevant extract from our internet site referred to in the note;
- 35 (k) Agent Update published September 2007;
- (l) Agent Update published November 2007;

(m) On 13 February 2008 HMRC advised in MLR 2007 Newsletter that a register of Accountancy Service Providers would be in place on 1 October 2008 and existing Accountancy Service Providers would be required to apply for registration;

5 (n) On 20 October 2008 HMRC advised in MLR 2007 Newsletter that all existing Accountancy Service Providers had until 1 January 2009 to register;

10 (o) HMRC's website at www.hmrc.ciov.uk publishes comprehensive MLR 2007 guidance under the 'Businesses and Corporations' section, which includes details of whether you need to register with HMRC for Money Laundering Regulations.

15 33. HMRC submits that the Appellant did not take 'all' reasonable steps or exercise due diligence to ensure that the requirement to register would be complied with. The Appellant did not follow any relevant guidance at the time, such as the MLR9D which was approved by the Treasury and published on the HMRC website.

34. HMRC accepts that the Appellant was unaware of the MLR 2007 requirements and that the failure to register was a genuine misunderstanding. However, satisfying the Respondents that it was unaware of the statutory requirements is not the test under Regulation 42(3).

20 35. It is submitted that any reasonable payroll service provider, running a business involving accountancy and tax, would have taken regular steps to check the regulatory obligations to which it is subject. The Appellant filed VAT returns online and in 2008 notified HMRC that it was trading as a payroll agency. HMRC considers that in taking 'all reasonable steps' a business filing online returns and notifying HMRC of
25 its payroll services would have, as a minimum, checked HMRC's website for any obligations associated with the services it provided.

36. HMRC therefore contend that the Appellant contravened Regulation 33 of MLR 2007 and is liable to a penalty under the Regulation 42(1) of the MLR 2007. The Respondents contend that the penalty has been correctly calculated and is
30 'appropriate' within the meaning of 42(1) of the MLR 2007, being effective, proportionate and dissuasive.

37. In the absence of any grounds of appeal contesting the calculation of the penalty, HMRC submits that the penalty amount is 'appropriate'.

The Appellant's case

35 38. Mr Isaacs, a director of the Appellant company, says that the proprietors were not aware of MLR 2007 until the penalty notice was issued. He argues that this lack of awareness was because measures taken by HMRC, to make known the need for registration to 'relevant persons' caught by the regulations, were ineffective and that
40 the company's failure to register was not due to any lack of diligence on the part of the company.

39. Mr Isaacs argues that a fundamental aspect of the appeal turns on the nature of the Appellant's business activity. The company is a specialist Payroll Agency for GP Practices, and its service is restricted to using in-house software to calculate employees' pay and deductions according to prevailing rates and thresholds. It also provides employee pay slips and other payroll reports. The Appellant has no access to client bank accounts, and never handles any client funds. It does not deal with payment of employees' wages, and does not provide any tax or accounts advice to clients. The company is not involved in any aspect of the clients' bookkeeping, and does not carry out any audit work.

40. The Appellant's business activities do not include those of "external accountants and tax advisors", and therefore it is reasonable to conclude that the Appellant is not a "relevant person", within the meaning of Regulation 3.

41. He asserts that because of the limited scope of the company's payroll services, the proprietors, if and when they became aware of the regulations, would reasonably have been entitled to assume that the company did not need to register under MLR 2007. On learning that this assumption was not correct, the company immediately completed its MLR 2007 registration.

42. HMRC were required to take reasonable steps to publicise the MLR 2007 to affected persons. Mr Isaacs submits that the measures referred to by HMRC (in paragraph 32 above) were ineffective, for the reasons given below, and it is unreasonable for HMRC to rely on the measures listed as being adequate.

(a) News and-Updates pages (from 2007) within MLR section of HMRC website.

There is no reference to MLR on the HMRC home page, and so there would be no reason for the Appellant to search for the MLR section of HMRC's website. In addition, even if the MLR section of HMRC website had been accessed, the information provided there would reasonably be interpreted as establishing that Payroll service providers are not covered by MLR 2007: (paragraph 48 below).

(b) Advertisements in various national daily newspapers (December 2007).

As a personal decision, none of the proprietors regularly reads any national newspaper.

(c) Advertisements in Accountancy Age (28 August 2008), Taxation magazine (28 August 2008) and Financial Times (1 and 8 September 2008).

None of these publications are relevant to the business activity of the Appellant company. Accordingly the proprietors do not subscribe to the publications.

(d) News and Updates pages (from 2008) within MLR section of HMRC website. As item (a) above.

(e) Four editions of VAT notes issued with VAT returns (between June 2008 and March 2010). The Appellant company has always submitted VAT returns

5 online. Mr Isaacs says that after logging into 'HMRC online' there are a total of six screens through which to proceed in order to reach the point at which it is possible to complete a VAT return. Each of the six screens includes many links to other information/facilities. The fourth of the six screens is the 'busiest' of the six, and contains twenty six links to other information/facilities: the link to VAT notes is one of the twenty six, but it is at the very bottom of the screen and so is not visible unless the user scrolls down the screen. The link to 'Submit a return' is prominent at the top of the screen, and so is immediately selected.

10 (f) Agent Update (September 2007 and November 2007).

15 Agent Updates are one of many sources of information relating to the Payroll industry, and the majority of their contents comprise very general and wide-ranging articles. The Appellant is a specialist Payroll agency dealing with General Medical Practices, and so most of the information provided in the Agent Updates is not relevant to the company. It uses specialist Payroll software that is developed in-house, and so subscribes to HMRC's 'Notes for Payroll Software Developers' which are used as the source for all the statutory Payroll information that is needed.

(g) Articles in MLR Newsletters (13 February 2008 & 20 October 2008).

20 The proprietors of the Appellant company would not have been aware of any reason to subscribe to MLR Newsletters, and so they would not have accessed these articles.

(h) Businesses and Corporations section of HMRC website.

25 The Businesses and Corporations section of HMRC website contains no link to MLR 2007. After the direct links that are given there is a link to 'More topics', but this link leads to a page with many more links, none of which contains any reference to MLR 2007.

30 43. HMRC refer to 'MLR9D' being available on the HMRC website. There is however no reference to 'MLR9D' on any of the HMRC website pages that the Appellant could reasonably have been expected to access.

35 44. HMRC argue that there is a need for a diligent business proprietor to have "checked for any obligations on the HMRC website". It would be entirely unreasonable to expect any business to search blindly, to the apparent extent necessary, in order to discover information that it has no reason to expect exists or is relevant to it.

40 45. Mr. Isaacs submits that if any of the measures listed by HMRC or a general search for "any obligations" had been successful in alerting the Appellant to the existence of MLR 2007, the proprietors would have sought further information from the HMRC website. However, guidance on the HMRC website could reasonably have been interpreted as establishing that Payroll service providers are not covered by MLR

2007 unless they also provide accountancy services and/or tax advice, which the company does not. At no point in the relevant sections of the web pages is there any reference to 'MLR9D'. This negates any assertion by HMRC that the Appellant did not exercise due diligence, even if any of the measures listed by HMRC could be regarded as adequate.

46. If a Payroll services provider accessed the MLR section of the HMRC website to establish whether or not the MLR regulations applied to them, they would come to the following at <http://www.hmrc.gov.uk/mlr/getstarted/intro.htm#2>:

“Who do the Money Laundering Regulations apply to?”

The Money Laundering Regulations apply to a number of different business sectors, including financial and credit businesses, accountants and estate agents.

Every business that's covered by the regulations must be supervised by a supervisory authority. Your business may already be supervised, for example because you belong to a professional body like the Law Society. But if it's not, and your business falls into one of four business sectors, you're likely to have to register with HMRC.

HMRC supervises the following four business sectors:

- Money Service Businesses
- High Value Dealers
- Trust or Company Service Providers
- Accountancy Service Providers

Do you need to register under the Money Laundering Regulations?”

Mr Isaacs says that the business activity of Payroll agencies is distinct from that of accountants, and so it would be natural to assume from the above that Payroll agencies are not covered by the regulations.

47. If further confirmation was sought by clicking the link 'Do you need to register ..' the next page provides the following:

“Which businesses are covered by the Money Laundering Regulations?”

The regulations apply to a number of different businesses, including:

- most UK financial and credit businesses such as currency exchange office, cheque cashers or money transmitters
- independent legal professionals
- accountants, tax advisers, auditors and insolvency practitioners

- estate agents
 - casinos
 - High Value Dealers’ businesses that accept cash payments for goods worth 15,000 euros or more either in a single transaction or in installments
- 5 • Trust or Company Service Providers.”

As “accountants” is given in this list and “Payroll agents” is not, it would again be reasonable to assume that Payroll agencies are not covered by the MLR regulations.

48. If a Payroll services provider did continue to seek further information about whether or not they were considered to be an ‘Accountancy Service Provider’, after clicking another link, the next page provides the following at <http://www.hmrc.gov.uk/mlr/igetstartediregister/asp.htm>:

“What is an Accountancy Service Provider?

For the purposes of the Money Laundering Regulations, HMRC uses the term Accountancy Service Provider to describe:

- 15 • auditors who carry out statutory audit work
- accountants who are in business to provide accountancy services to clients
- tax advisers who are in business to provide advice to clients about their tax affairs

What are accountancy services?

20 Accountancy services cover recording, reviewing, analysing, calculating and reporting on financial information for other people. They include:

- professional bookkeeping services
- accounts preparation and signing
- tax advice

25 What is tax advice? Tax advice includes:

- helping with filling in and submitting tax returns or duty claims
- advising on whether something is liable to a tax or duty
- advising on the amount of tax or duty that is due”

30 49. Mr Isaacs says that Payroll agents are not mentioned at all. Payroll services are entirely distinct from any of the above activities. The Payroll services industry is a very substantial one, with its own professional bodies and qualifications, and so it would be reasonable to expect it to be listed in its own right, if relevant. Its omission

from the list of businesses referred to strongly suggests that a Payroll agency is not included in the provisions of MLR 2007, and so it would be entirely reasonable for a Payroll services provider to conclude that its business did not fall within the ambit of the MLR 2007.

5 50. In summary, Mr Isaacs argues that the guidance is ambiguous and that HMRC did
not meet its obligation to take reasonable measures to ensure that relevant parties
were informed about MLR. It is implicit in this obligation HMRC should take
reasonable measures to ensure that all, not just some, of the relevant parties were
10 informed about MLR. In order to show that it has met this obligation, HMRC must be
able to identify at least one measure that was taken which could reasonably be
regarded as having ensured that payroll agencies were informed about MLR 2007. Mr
Isaacs contends that HMRC have not done this.

15 51. In MLR9D ‘Accountancy Service Providers’, are defined as “auditors, external
accountants and tax advisers”. These three service providers are then further and more
clearly defined and their definitions are very specific in describing the work
undertaken by those businesses, which in each case is entirely distinct from the work
of the Appellant as a payroll provider.

20 52. Mr Isaacs submits that the critical web pages as referred to above provide at least
reasonable, if not absolute, confirmation that the MLR 2007 does not apply to payroll
agencies, and so it is not reasonable to expect a payroll agency to access any
information provided in subsequent pages. It is only in a subsequent page that a list is
provided of “businesses covered”, where ‘payroll agencies’ are mentioned, and this
list amounts to the only measure HMRC has taken to ensure that payroll agencies are
25 informed about MLR. It follows that the measure is not a reasonable one, as required
for HMRC to meet this obligation.

30 53. The Appellant therefore asserts that it took all reasonable measures to ensure that
it complied with its obligations. The assertion is by its nature impossible to prove, but
can only be rejected if HMRC can identify any reasonable measure that the company
has failed to take. The only possible measure that could be proposed, would be that
the proprietors should have viewed the HMRC web page that lists the “businesses
covered” by MLR, but given that it is not reasonable to expect a payroll agency to
access this page this is not a reasonable measure for the Appellant to have taken.

35 54. The Appellant’s case rests on the nature of the service that it provides, and on the
information provided on the HMRC website. The Appellant accepts that (at least
according to HMRC’s guidance) payroll agencies are intended to be covered by the
MLR 2007, but the information provided by HMRC fails to communicate this
adequately. Mr Isaacs suggests that this is due to a lack of appreciation by HMRC of
the nature of the work carried out by payroll agencies: the order in which the
information is provided assumes that the work carried out by payroll agencies
40 includes some of the work done by “auditors, external accountants and tax advisers”,
but in reality it does not.

55. Finally, Mr. Isaacs says that information obtained from HMRC under a Freedom of Information request, shows that during 2012 and 2013, 565 companies failed to register under MLR 2007, and that of these, 343 were issued with a late registration penalty. He asserts that these numbers support his contention that the measures taken by HMRC to notify companies about MLR 2007, and the information provided on its website, have been ineffective and cannot reasonably be relied upon as providing sufficient guidance and information to diligent businesses.

Conclusion

56. The proprietors of the Appellant company accept in retrospect that payroll agencies are covered by MLR. The grounds of their defence are that the information provided by HMRC, fails to adequately communicate this to payroll agencies.

57. Regulation 42 states that the designated authority must not impose a penalty on a person...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..

58. Regulation 42(3) states that in deciding whether a person has failed to comply with a requirement of the Regulations, the designated authority must consider whether he followed any relevant guidance. This is provided in MLR9D having been approved by the Treasury and published on the HMRC website.

59. The proprietors of the Appellant company were not aware of the guidance, but assert that because of the limited scope of the company's activities, the proprietors were reasonably entitled to assume that the company did not need to register under MLR 2007. They readily concede that they do not subscribe to various publications or read national newspapers where the existence of the new Money Laundering Regulations was drawn to the attention of possible ASPs. It is against this background that they do not accept they failed to take "all reasonable steps". They point to HMRC also having an obligation under Regulation 32(5): to "take reasonable steps to bring the decision [to maintain a register] to the attention of those relevant persons in respect of whom the register is to be established."

60. Similar arguments were raised in *Clarke & Co v R&C Commrs* [2012] UKFTT 300(TC). The Appellant says that, as HMRC knew the company was a payroll agent, it would have been a relatively simple matter to bring the money laundering obligations to their attention.. The Tribunal (Judge Hellier and Nigel Collard) said at [23] that:

"an e-mail to all known tax agents would have been a surer way to reach all those potentially affected. Such an e-mail could easily have indicated that those supervised by professional bodies were exempt: we had no evidence as to the cost of arranging such an e-mail, but we find it difficult to believe that it would have been much greater than the newspaper advertising campaign. Sending out such an email would in our view have been a reasonable step to bring the change to the attention of almost all those affected."

However, as that Tribunal points out at [24]:

“Regulation 32(5) does not require HMRC to take all reasonable steps; simply reasonable steps. That is meaner language. It seems to us that the steps which HMRC took were reasonable by reference to the required purpose even if they were not the best that could have been taken.”

61. Unlike HMRC, the Appellant was required to take “all” reasonable steps. It is only if they have taken all such steps that HMRC is precluded from levying a penalty.

62. HMRC say that “it would have been reasonable” for a person running a business involving a payroll agency to have considered whether they were within the scope of money laundering legislation, particularly given the extensive coverage in professional journals, VAT Notes issued between April 2008 and March 2010, and national newspapers. The same submission was made in *Christine Houghton v HMRC* [2013] UKFTT 716 (TC) (‘Houghton’) where Anne Redston [Tribunal Presiding Member] observed that although there is no “reasonable excuse” defence in the MLR, the issue is whether the Appellant’s behaviour was objectively reasonable.

63. In *Houghton* the Tribunal referred to *The Clean Car Co Ltd v Customs and Excise Comrs* [1991] VATTR 234, where in the context of “reasonable excuse” Judge Medd QC said:

“[Whether a taxpayer has a reasonable excuse] 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?”

64. Mr Isaacs accepts that the VAT Notes No 1, 01/08 make specific reference to the possibility that Payroll Agents may have to be registered, but says that he did not read or attempt to access the Notes. The reason for that was partly because the link to the Vat Notes, to someone submitting an on-line VAT return, was not readily obvious or accessible. He submits that if he had by chance or otherwise followed the links to HMRC’s on-line registration facility, in order to ascertain whether the company was required to be registered, the definition of ‘accountancy service provider’ by reference to ‘auditors who carry out audit work’, ‘accountants who carry out accountancy services’ and ‘tax advisors who provide advice’, was so different to the business activity of a Payroll agency it would have been natural to assume that Payroll agencies are not covered by the Regulations.

65. However on the same web page, in answer to the question ‘what are accountancy services?’ the guidance says that this includes, ‘recording, reviewing, analyzing calculating and reporting on financial information.’ At the very least this should have put the Appellant on notice that the company’s activities may have fallen within the ambit of the Regulations, thus requiring registration. This would then have prompted them to check their regulatory obligations. It was not objectively reasonable for the

proprietors of the Appellant company to simply assume that the Regulations did not apply to them.

66. We therefore find that the Appellant failed to take “all reasonable steps” and that HMRC are not precluded from levying a penalty.

5 67. For the above reasons we dismiss the appeal and confirm the penalty.

68. 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
10 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.

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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 22 July 2014