



TC04063

Appeal number: TC/2013/07148

Money Laundering Regulations – penalty for failure to register – whether the Appellant provided accountancy services requiring registration – no – appeal allowed and penalty discharged

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THAMES VALLEY PAYROLL LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE TIMOTHY HERRINGTON
MR IAN ABRAMS**

Sitting in public at Aldershot County Court on 7 July 2014

Mr Donald Currie, Company Secretary, for the Appellant

Mr Ian Marshall, Pupil Barrister, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

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1. Thames Valley Payroll Limited (“the Appellant”) appeals the Respondents’ decision to issue a penalty for a breach by the Appellant of the Money Laundering Regulations 2007 (“the Regulations”). The penalty imposed is £957.91, made up of £457.91, being the fees which the Appellant would have paid had it been registered at the right time and a fixed penalty of £500.

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2. The Regulations state that an Accountancy Services Provider (“ASP”) must be registered. The Appellant carries out computations of employer’s PAYE and National Insurance liabilities. HMRC say that the Appellant is caught by the provisions of the Regulations and failed to register when it should have done.

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3. The issues in the case are:

(1) Whether the Appellant carried out an activity which required it to be registered as an ASP under the Regulations;

(2) If the answer to question 1 is positive, whether the Appellant had taken “all reasonable steps and exercised all due diligence” to ensure that it complied with its obligations;

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(3) If the answer to question 2 is negative, whether the penalty is disproportionate given the Appellant’s small annual turnover.

4. We gave an oral decision allowing the appeal and discharging the Appellant’s liability for the penalty following the substantive hearing held on 7 July 2014 and released a summary of the findings of fact and reasons for our decision on 14 July 2014. On 8 August 2014 in accordance with Rule 35(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Respondents (“HMRC”) applied for full written findings and reasons. This document sets out those findings and reasons.

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30 Evidence and Findings of Fact

5. We heard evidence from Mr Donald Currie, Company Secretary of the Appellant, and had a bundle containing correspondence between the parties and various other documents. Mr Currie’s evidence was not challenged and the other evidence was not disputed. From the evidence that we heard and the documents that we have seen we make the following findings of fact.

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6. On 6 December 2012 HMRC wrote to the Appellant to advise them that if they were providing a payroll service they may be operating as an ASP and if so they would be required to be registered under the Regulations unless they were supervised by one of the specified professional bodies, which the Appellant was not. The letter requested that the Appellant make an application for registration and warned it that failure to have registered at the required time can render it liable to a penalty.

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7. The Appellant disputed the need for registration but after inconclusive discussions between Mr Currie and HMRC, the Appellant decided under protest to register simply to avoid any further debate. Accordingly the Appellant made the necessary application as an ASP on 20 January 2013 and it was entered on the register on 1 February 2013.

8. On 10 June 2013 HMRC wrote to Mr Currie informing him that as the Appellant had, contrary to Regulation 33 of the Regulations, carried out trading for a period during which it was required to be registered but was not (identified as the period between 1 June 2011 and 1 February 2013), it was intended to issue the Appellant with a penalty of £957.91 pursuant to Regulation 42 of the Regulations. The penalty was comprised of a fixed penalty fee of £500 and £457.91 representing back fees for the period that the Appellant operated whilst unregistered.

9. On 3 July 2013 Mr Currie wrote to HMRC and described the Appellant's business as follows:

“In simple terms this company is not in any way involved and cannot be involved in anything related to money laundering. Our business is concerned solely with carrying out computations in respect of other companies' outsourcing requirements. Our operations comprise of receiving details of gross monthly salaries of company personnel and working out, using provided software, the amount of tax and national insurance deductions and so on applicable to the detailed gross amount. Thereafter we print out payslips and summary sheets, all of which are returned to our client companies. At no time does this company have any money that belongs to our client companies – we do not even have a 'Client Account'. Net salaries to client employees are paid directly from clients' bank accounts. For good order it should also be stated that the company activities are solely as stated: it does not give any professional advice relating to taxation or other such matters.”

10. Mr Currie elaborated on this description at the hearing of this appeal. He confirmed that the Appellant's business consists solely of carrying out computations on an outsourced basis of the tax and insurance contributions payable in respect of the gross earnings of the employees of its limited number of clients. Its operations consist of it receiving on a spreadsheet details of the gross earnings of the employees in question together with the tax codes of the employees concerned for the relevant period, using a software package to calculate the amount of tax and national insurance to be deducted in respect of each employee, and printing out payslips and a summary sheet for the client. Mr Currie characterised the Appellant as being no more than a data processor so that the services it provides do not amount to accountancy services.

The Law and relevant guidance

11. 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.

12. Article 39(1) of the Directive is headed “Penalties” and reads as follows:-

“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.”

5 13. The Regulations require that “relevant persons” should be registered. By virtue of Regulation 3(1) (c) “auditors, insolvency practitioners, external accountants and tax advisers” are “relevant persons”.

10 14. 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”.

15 15. 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”.

20 16. 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”.

25 17. 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”.

18. Regulation 42(3) reads:

30 “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.”

19. Regulation 42(3) reads:

35 “In deciding whether a person had 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
40 their opinion to bring the guidance to the attention of persons likely to be affected by it.”

20. 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:

5 “(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.”

21. In February 2011 the Respondents issued, as Notice MLR9D, a Registration Guide for Accountancy Service Providers. This document has been approved by the Treasury as “relevant guidance” under Regulation 42(3).

22. We observe that although Regulation 42(3) provides that in deciding whether a person has failed to comply with a requirement of the Regulations, the designated authority (in this case HMRC) must consider whether any relevant guidance has been followed, the fact that a person has not followed the guidance is not conclusive in determining whether the relevant requirement of the Regulations to which the guidance relates has as a matter of law been complied with. On an appeal, that is a matter for the Tribunal to determine. The Tribunal should consider the guidance in making its determination and indeed, as we observe later, HMRC’s submissions as to why in its view the Appellant was required to register as an ASP were based entirely on the views expressed in the guidance. Nevertheless, although it might act as a “safe harbour” if complied with, it has no special status if it is not complied with.

23. The relevant guidance in Notice ML9D provides as follows:

“2.3 *Do I need to register with HMRC?*

25 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 Services Providers

3.1 *Who needs to register?*

30 *What is an Accountancy Services Provider?*

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

35 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?*

40 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?*

5 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?*

10 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 ...%.

15 When you give tax advice you will have studied the 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.

3.6 *What types of businesses will be covered?*

20 Businesses covered include:

- Accountants ...
- Tax advisers
- Book-keepers ...
- Payroll agents

25 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?*

30 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.

35 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?*

40 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.

3.19 *Are all payroll providers covered by the MLRs?*

Businesses will generally fall within the scope of the MLRs 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.

3.20 *What are payroll functions?*

5 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?*

Businesses will not fall within the scope when they:

- 10 • 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
- 15 • pay invoices services 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
- 20 • 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
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3.25.2 *When do I register*

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

Discussion

30 24. We now turn to consider the three issues in this appeal as set out in paragraph 3 above in the light of our findings of fact and the relevant law and guidance.

25. Mr Marshall submitted that the tasks carried out by the Appellant were sufficient to constitute the Appellant as “external accountant” within the meaning of Regulation 3(1) (c), Regulation 3(7) defining that term as “a firm or sole practitioner who by way of business provides accountancy services to other persons ...”.

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26. Mr Marshall relied purely on HMRC’s guidance as to what is meant by “accountancy services”. This guidance is widely drawn and states that the term includes the “recording, review, analysis calculation or reporting of financial information and covers professional bookkeeping services ...”. The guidance specifically states that the Regulations cover payroll functions and HMRC contend that TVP provide payroll services and therefore provide accountancy services.

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27. Mr Marshall was unable to refer us to any legal authority which offers assistance on the meaning of accountancy services, whether of the UK courts or tribunals or of any decision at EU level or of another member state, bearing in mind that the Regulations are made pursuant to the requirements of an EU Directive.

5 28. We therefore construe the term in the light of its ordinary meaning and the
context in which it is used. In our view its ordinary meaning is narrower than pure
bookkeeping, data processing, or undertaking arithmetical calculations without the
application of any professional skill. In our view a person who provides accountancy
services, commonly known as an accountant, would be distinguished from
10 bookkeepers and the like because of the professional nature of the services and the
extra levels of expertise required or purported to be offered. In our view the ordinary
meaning of the term “accountant” does not cover a person who merely calculates
figures which form the basis of transactions to be entered into a company’s books but
denotes a person who exercises some degree of professional skill in assessing the
15 quality of the entries being made. These additional elements are lacking in the current
case. In our view the Appellant’s business purely involves the performance, on an
outsourced basis, of a mechanical task which results in the provision of information to
be entered into a company’s books and records. It is closer to the kind of activity
described in the first bullet point under paragraph 3.21 of Notice MLR9D in that the
20 functions carried out are narrower than the kind of payroll service that the guidance
envisages would constitute the provider an ASP.

29. We also note that Regulation 3(1) (c) groups external accountants with
insolvency practitioners, auditors and tax advisers, indicating that what are intended
to be covered are those who provide professional services. This is consistent with
25 what we perceive to be the policy behind the Regulations, which is that those whose
businesses pose a risk to involvement in money laundering should be subject to a
degree of regulation. We cannot see how regulating a business as limited as the
Appellant's contributes to that objective; it receives no details of its clients underlying
businesses and merely carries out calculations on the basis of data provided to it.

30 30. We therefore conclude on the facts of this case that the Appellant does not
provide accountancy services. That is not to say that others who provide payroll
services do not. Each case will depend on its own facts.

Conclusion

31. We therefore determine the first issue set out in paragraph 3 above in favour of
35 the Appellant with the result that it does not require to be registered as an ASP under
the Regulations. That being the case, there is no basis on which a penalty of any
amount could have lawfully been imposed on the Appellant pursuant to Regulation
42(1) because there has been no breach of Regulation 33. It is therefore unnecessary
for us to consider the second and third issues identified in paragraph 3 above.

40 32. It follows that pursuant to Regulation 43(4) we quash the decision of the
Respondents to impose a penalty on the Appellant and the appeal is allowed.

33. 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 Rules. 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.

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**TIMOTHY HERRINGTON
TRIBUNAL JUDGE**

RELEASE DATE: 14 July 2014