[2016] UKFTT 0674 (TC)

TC05404

Appeal number: TC/2015/04408

MONEY LAUNDERING – whether appellant had breached requirements of the Money Laundering Regulations 2007 regarding the carrying out of customer due diligence monitoring business relationships keeping adequate records and maintaining appropriate risk sensitive policies and procedures - yes-whether penalty of £3750 imposed appropriate-penalty reduced to £3094

FIRST-TIER TRIBUNAL
TAX CHAMBER

N BEVAN LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
IAN ABRAMS

Sitting in public in Birmingham on 18 August 2016 and after considering further written submissions of the parties dated 19 August and 22 September 2016

Mr N Bevan, director, for the Appellant

Mr David Griffiths, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant ("NBL") appeals against a decision of the Respondents ("HMRC") dated 15 April 2015 to impose upon NBL a penalty of £3,750 in respect of alleged breaches of the Money Laundering Regulations 2007 (the "Regulations"). The decision was upheld on review on 29 June 2015. NBL is a small firm which carries on an accountancy business but which is not supervised by a professional body and is therefore required to be registered with HMRC and thereby become subject to the provisions of the Regulations.

2. The reasons given for the imposition of the penalty were that HMRC contended that NBL had breached Regulations 7, 8, 19 and 20 of the Regulations during the period from 28 November 2008 to 3 November 2014. HMRC found that during this period NBL's procedures for customer due diligence did not fully meet the requirements of Regulation 7, its procedures for ongoing monitoring did not fully meet the requirements of Regulation 8, its procedures for record-keeping did not fully meet the requirements of Regulation 19 and its procedures for risk assessing its clients and adopting a risk-based approach to its clients did not fully meet the requirements of Regulation 20.

3. The amount of the penalty had been determined by the application of HMRC's penalty framework which has two elements, a fixed starting penalty of £5,000 and an additional penalty which takes into consideration the client base that was exposed to money laundering breaches. The result of that calculation was that the penalty of £7,500 was the starting point but HMRC allowed a reduction of 50% as they found that the breaches occurred as a result of failure to take reasonable care and misinterpretation of the Regulations rather than being deliberate.

4. NBL does not accept that it has breached any of the Regulations. It said in its notice of appeal in response to HMRC's Statement of Case that its procedures and records in relation to anti-money laundering are based on the information provided by the electronic services provided for agents by HMRC in respect of the income tax and corporation tax affairs of the small number of clients for whom it provides its services. NBL says that it mainly acts for clients whose background, character and activities it has been aware of for many years and it only takes on new work from individuals or companies who are connected with existing clients, normally by family connection but occasionally through work relationships.

The Law and relevant Guidance

10. The Money Laundering Regulations 2007 implement the United Kingdom's obligations under Directive 2005/10/EC which relates to the prevention of use of the financial system for the purpose of money laundering and terrorist financing. The Regulations provide for various steps to be taken by the financial services sector and other persons to detect and prevent money laundering and terrorist financing.

Obligations are imposed on "relevant persons" defined in Regulation 3. These are credit and financial institutions, auditors, accountants, tax advisors and insolvency practitioners, independent legal professionals, trust or company service providers, estate agents, high value dealers and casinos.

11. By virtue of Regulation 23 HMRC are the supervisory authority for auditors, external accountants and tax advisers which are not supervised by any other specified body.

12. Regulation 7 requires a relevant person (that is a person to whom the Regulations apply) to apply "customer due diligence measures" when, inter alia, he establishes a business relationship or suspects money laundering or terrorist financing. Regulation 7(2) also requires a relevant person to apply customer due diligence measures at other appropriate times to existing customers on a "risk-sensitive basis." Regulation 7 (3) (b) requires a relevant person to be able to demonstrate to his supervisory authority that the extent of the customer due diligence measures he has applied is appropriate in view of the risks of money laundering and terrorist financing.

13. Regulation 8 requires a relevant person to conduct "ongoing monitoring" of a business relationship, which includes "scrutiny of transactions throughout the course of the relationship to ensure that transactions are consistent with the relevant person's knowledge of the customer, his business and risk profile" and keeping the documents, data or information obtained for the purpose of applying customer due diligence measures up- to- date.

14. Regulation 14 requires a relevant person to apply on a risk sensitive basis enhanced customer due diligence measures and enhanced ongoing monitoring in a situation which by its nature can present a higher risk of money laundering or terrorist financing.

15. Regulation 5 defines "customer due diligence measures." The term includes identifying the customer and verifying the customer's identity on the basis of documents, data or other information obtained from a reliable and independent source. The term also includes 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. The term also includes obtaining information on the purpose and intended nature of the business relationship.

16. Regulation 6 defines "beneficial owner" in relation to a body corporate as any individual who ultimately owns or controls more than 25% of the shares or voting rights in the body or otherwise exercises control over the management of the body.

17. Regulation 17 provides that a relevant person may rely on a person who falls within specified categories to apply any customer due diligence measures provided that the other person consents to being relied on. The specified categories include credit or financial institutions authorised to carry on regulated activities by the Financial Conduct Authority and accountants or lawyers who are supervised by

certain specified bodies. The specified categories do not include HMRC or any other government body.

18. Regulation 19 requires a relevant person to keep certain records, generally for a period of 5 years. The records required to be kept include a copy of, or the references to, the evidence of the customer's identity obtained pursuant to Regulation 7, 8 or 14.

19. Regulation 20 provides that a relevant person must establish and maintain appropriate and risk-sensitive policies and procedures relating to customer due diligence measures and ongoing monitoring, reporting, record-keeping, internal control, risk assessment and management and the monitoring and management of compliance with, and the internal communication of, such policies and procedures in order to prevent activities related to money laundering and terrorist financing. These policies and procedures include policies and procedures which provide for the identification and scrutiny of complex or unusually large transactions, unusual patterns of transactions which have no apparent economic or visible lawful purpose and any other activity which the relevant person regards is particularly likely by its nature to be related to money laundering or terrorist financing.

20. Regulation 42 gives HMRC power to impose a penalty of such amount as they consider appropriate on a person whom they supervise pursuant to the Regulations who fails to comply with, inter-alia, any requirement in Regulation 7, 8, 19 and 20. "Appropriate" is defined by Regulation 42 (1C) to mean "effective, proportionate and dissuasive". By virtue of Regulation 42 (2) HMRC must not impose a penalty where there are reasonable grounds for them to be satisfied that the person took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with.

21. Regulation 42 (3) provides that in deciding whether a person has failed to comply with the requirement of the Regulations, HMRC must consider whether he followed any relevant guidance which was at the time issued by a supervisory authority or any other appropriate body and which had been both approved by the Treasury and published in a manner approved by the Treasury as suitable in their opinion to bring the guidance to the attention of persons likely to be affected by it. "Appropriate body" means any body which regulates or is representative of any trade, profession, business or employment carried on by the relevant person.

22. Regulation 43 makes provision for appeals against decisions of HMRC. It provides, inter alia, that a person who is the subject of a decision under Regulation 42 to impose a penalty may appeal to the Tribunal. Regulation 43(4) provides inter alia that the Tribunal hearing an appeal against a decision under Regulation 42 has the power to-

> "(a) quash or vary any decision of the supervisory authority, including the power to reduce any penalty to such amount (including nil) as it thinks proper, and
>
> (b) substitute its own decision for any decision quashed on appeal."

23. It is common ground that the effect of Regulation 43(4) is that the Tribunal has in relation to an appeal under Regulation 42 full power to decide for itself afresh as to whether the Regulations have been breached, whether a penalty is justified in relation to any breaches established and, if so, what level of penalty would be appropriate in the light of all the evidence and circumstances before it. The Tribunal is not bound by HMRC's penalty framework when making an assessment of a penalty but in our view it should pay due regard to the policy when carrying out its overriding objective of doing justice between the parties. Accordingly, our approach has been to examine how HMRC, applying their penalty framework, arrived at the figure of £3,750 as the appropriate penalty and decide whether in all the circumstances, if we find that there have been breaches of the Regulations, we should accept that figure or depart from it in any respect. We note that this approach was recently followed by this Tribunal in *Jackson Grundy Limited v HMRC* [2016] UKFTT 0223 (TC).

24. There is guidance of a type referred to in Regulation 42 (3) to which HMRC has had regard in deciding whether there has been a breach of the Regulations in this case. The guidance concerned is that issued by The Consultative Committee of Accountancy Bodies (CCAB) in August 2008 and which has been approved by the Treasury pursuant to Regulation 42 (3). This guidance is freely available on the Internet. In our view this guidance is issued by a body which is representative of the profession or business of accountancy and accordingly in our view it is appropriate that HMRC should have regard to it in considering whether there has been a breach of the Regulations and it is also therefore appropriate that we should have regard to it in considering whether there has been a breach of the Regulations.

25. It appears to us that the guidance (which we refer to as the "CCAB Guidance") operates in essence as a "safe harbour" in that if we were to find that NBL had complied with this guidance in relation to the matters which are alleged to amount to breaches of the Regulations on its part then it necessarily follows that it is not in breach of the relevant Regulations. The converse is not necessarily true; failure to comply with the relevant terms of the guidance does not necessarily mean that the relevant person is in breach of the Regulations if compliance is achieved in any other manner.

26. Section 5 of the CCAB Guidance, sets out comprehensive guidance as to what an accountancy firm might be expected to carry out by way of customer due diligence measures. In particular, the guidance deals with the need to identify and verify the client's identity using documents or information from reliable and independent sources and to identify the beneficial owner of the client, including understanding the ownership and control structure of the client and verifying, according to risk, the identity of the beneficial owner and obtaining information on the purpose and intended nature of the business relationship.

27. The guidance sets out, at Section 5A, a helpful list of questions or prompts to be incorporated into customer due diligence procedures. The guidance also emphasises that ongoing monitoring of the business relationship is required and the documentation concerning the relationship (including customer due diligence) is kept up to date.

28. In section 5B of the guidance, outline guidance on a risk based approach to verification of identity is set out, including examples of the kind of documents that can be asked for to verify the identity of the more common client types.

Evidence

29. We had a witness statement from Andrea Glew, an officer in HMRC's Anti-Money Laundering Supervision Team. Officer Glew undertook two compliance visits to NBL and her statement deals with the discussions she had at those visits with Mr Neil Bevan, the sole director and owner of NBL. We also had a witness statement from Mark Picton, a higher officer in HMRC's Anti-Money Laundering Supervision Team. Officer Picton accompanied Officer Glew on her second visit to NBL and made the decision to impose the penalty on NBL. Officer Picton's statement deals with the discussions that took place with Mr Bevan at the second visit.

30. We found both officers to be honest and credible witnesses, doing their best to remember events which happened some time ago.

31. NBL did not file any witness statements but Mr Bevan gave oral evidence and was cross-examined. Aside from some of his evidence as to what files he maintained containing client information relevant to the customer due diligence process which we found to be unconvincing, we have accepted Mr Bevan's evidence.

32. In addition, we had a bundle of documents. This bundle included Officer Glew's report of her first visit to NBL on 30 April 2014 and a report of the subsequent visit made by Officer Glew and Officer Picton on 3 November 2014. The bundle also included relevant correspondence and notes of discussions with Mr Bevan following each of the visits leading up to the imposition of the penalty.

Findings of Fact

33. There was little dispute as to the facts, except in one respect regarding the information that was available to the HMRC officers during their visits. From the documents we saw and the evidence we heard we make the following findings of fact.

34. NBL operates a small accountancy business. Its sole professional is Mr Neil Bevan, a former chartered accountant and registered auditor, who has been practising for some 40 years and who founded NBL in 1995. NBL has a current client base of approximately 75 clients with three main clients, namely two firms of solicitors and a motor vehicle dealer.

35. NBL does not advertise its services: all of its clients are local clients, met face-to-face usually at their business premises, as Mr Bevan does not like having clients come to his home address, from where NBL operates. NBL has not taken on any new clients for some time. NBL is registered with HMRC as an Agent and the business has a current turnover of approximately £50,000. The main services provided are end of year accounts preparation, and assistance with self-assessment, corporation tax, PAYE and VAT returns. NBL has in the past provided company formation services to clients and also had approximately ten clients for whom a registered office service

was provided. As a result of that information being provided to HMRC during Officer Glew's first visit Mr Bevan was advised that as well as being registered with HMRC pursuant to the Regulations in respect of its accountancy services it also needed to be registered as a trust or company service provider for the purposes of the Regulations. That registration was in due course effected.

36. On 30 April 2014 Officer Glew visited Mr Bevan at his home address and undertook a compliance visit. Officer Glew explained that this was a routine visit, which she was asked to undertake as part of HMRC's routine monitoring of the firms it regulates. At that visit, Mr Bevan provided the information concerning NBL's business set out at [35] above. Officer Glew asked Mr Bevan to provide a list of NBL's clients but Mr Bevan said he was unable to do so as his printer was not working. Mr Bevan's response to Officer Glew's questions as to how he checked and verified the identity of NBL's clients was that following an initial interview with the client at which the client provided him with identification details and residency details he registered them with HMRC via the online tax agent system. NBL therefore relied on receipt of the tax agent authorisation code issued by HMRC to the client which the client then passed to NBL in order for HMRC to register NBL as an agent of the client. Mr Bevan said that he expected that HMRC would have evidence of the client's identity and as he had known his clients for years no further checks were made. Mr Bevan said that he regularly checked the online details for any changes. He said he was unable to provide a record of the checks undertaken as he had not maintained a record and stated that HMRC should be able to trace the checks he had made. Mr Bevan was also unable to access the relevant client details through the HMRC online tax agent system during the meeting for reasons which Officer Glew could not recall.

37. Mr Bevan advised Officer Glew that he believed that by meeting his clients more than once a year and by checking that the HMRC online information (on the Tax Agent Self-Assessment System) remained unchanged, he was doing enough to meet the identity verification and risk assessment requirements. NBL maintained no documentary records regarding the clients, all paperwork was returned to the client and no records were maintained of historical checks. Mr Bevan stated that all relevant information was "in his head" as he had known his clients for many years.

38. During the visit Officer Glew referred Mr Bevan to the CCAB Guidance and specifically to section 5 B examples of risk verification and contended that NBL was not meeting those requirements. Mr Bevan disagreed and stated that he sees numerous documents produced by NBL's clients including bank statements and his only failure was not to keep records. Mr Bevan confirmed that he had seen the CCAB Guidance when he first registered. Officer Glew assisted Mr Bevan in downloading a copy of the CCAB guidance to his laptop. Mr Bevan was unable to provide evidence of identity of the beneficial owners of NBL's three main clients other than some correspondence dated in 2003 and 2004.

39. There was a dispute as to what further client information was available for Officer Glew to check during the visit. Mr Bevan's oral evidence was that there was a file available containing information that he had gathered concerning some of his

corporate clients. Officer Glew's evidence was that no such file was produced at the meeting. Mr Bevan also said that information which demonstrated that he had established his clients' identity was contained on various files which were in his house. Mr Bevan said that he would have been able to show that this information was to be found on HMRC's online tax agent system had he been able to access it at the meeting. As he was unable to access the system, he did not think there was any purpose in pulling up the physical files and showing them to Officer Glew.

40. We prefer Officer Glew's evidence on this point. We are surprised that had the file that Mr Bevan referred to been made available at the meeting that this was not mentioned subsequently by Mr Bevan in his letter of 6 May 2014, referred to below. We therefore find that no relevant evidence as to the customer due diligence carried out by Mr Bevan was made available to Officer Glew at the meeting on 30 April 2014. Mr Bevan ultimately confirmed that this was the case during his cross-examination.

41. On 6 May 2014 Mr Bevan wrote to Officer Glew confirming the procedures he adopted in relation to money laundering, reiterating that he mainly acted only for clients whose background, character and activities he had been aware of for many years and only took on new work from individuals or companies who were connected with existing clients, normally by family connection but occasionally through work relationships. He explained in this letter how he obtained information from his clients that enabled him to obtain access to the authorised agent facilities provided by HMRC. He said that that process validates an individual's National Insurance number and gives NBL access to the other information that HMRC provides but that NBL did not place information on its client's record but merely confirmed the information already present on the record.

42. Mr Bevan went on to say in this letter that he then verified the other information he had obtained to the information provided by HMRC and subsequently maintained the permanent record through the self-assessment process. In effect, Mr Bevan used the HMRC online tax agent system as an electronic record of the information that he had gathered on his clients.

43. Mr Bevan contended in this letter that he did specifically assess the risk of a business being used by criminals to launder money, considered the identity of the beneficial owners of the business, monitored his clients' business activities, kept summaries of financial transactions and assessed his clients' business procedures and processes but gave no further details as to how those matters were undertaken. He also enclosed with this letter the list of client records he was unable to print out at the meeting with Officer Glew.

44. On 8 May 2014, as a follow-up to the visit, Officer Glew sent a Warning Letter. In that letter she said that she identified some weaknesses in NBL's anti-money laundering and counterterrorist financing procedures and controls and enclosed with the letter what was described as a "table of failures". In summary, this table alleged that NBL had not put in place risk-based record keeping requirements in breach of Regulation 20, had not applied customer due diligence measures when establishing a

business relationship in breach of Regulations 5 and 7, had not monitored business relationships in breach of Regulation 8 and had not kept documents in respect of customer due diligence for 5 years in breach of Regulation 19.

45. This document advised NBL that it should take immediate steps to rectify the breaches found. NBL was referred to the CCAB Guidance for help on what it needed to do to remedy the failures and weaknesses found. NBL was also advised that reliance on the HMRC online services alone did not meet the requirements of the Regulations.

46. Officer Glew confirmed in oral evidence that it would have been open to HMRC to assess NBL to a penalty at this point, but HMRC decided to issue a Warning Letter instead. Consequently, the letter stated that on this occasion HMRC were prepared to give NBL an opportunity to correct the weaknesses identified and would not at that time treat them as breaches of the Regulations. NBL was warned that failure to treat the warning seriously may make it liable to a civil penalty or criminal prosecution. The letter finished with the statement that NBL would be contacted in due course to arrange a further visit to look at what steps it had taken to address the issues identified so as to ensure it fully complies with the Regulations.

47. On 3 November 2014 Officer Glew and Officer Picton made a follow-up visit to NBL. Officer Picton attended as well because of his responsibility for trust and company service providers and since the first visit NBL had been registered as such a provider. During that visit, Officer Glew asked Mr Bevan if any improvements had been made following the recommendations after the first visit. Mr Bevan stated that he had not changed the process as regards customer due diligence. He stated that he regarded what he currently did as sufficient and that there was no need to take account of the CCAB Guidance because it was not the law. Officer Picton, however, did agree to refer NBL's reliance on HMRC online services to HMRC's policy team for a view as to its adequacy.

48. On 20 February 2015 Officer Picton had a telephone discussion with Mr Bevan and advised him that following policy discussions HMRC's position was that using HMRC agent authorisation as a means for customer due diligence was not adequate because HMRC cannot be relied upon as a third party within the scope of Regulation 17 (1) and in any event HMRC would not consent to being relied on in these circumstances. Mr Bevan was also informed that a penalty notice would now be issued. Officer Picton explained to Mr Bevan that the penalty can be based on two criteria, a fixed starting penalty or a maximum penalty capped at 10% of the gross profit. He asked Mr Bevan if he could supply any details within the next few days of the gross profit of the business. Mr Bevan said that he would await Mr Picton's letter regarding the proposed penalty before responding with these details.

49. On 26 February 2015 Officer Picton wrote to NBL informing it that he had identified breaches of Regulations 7, 8 and 20 and that he intended to issue NBL with a penalty of £3,750 for these breaches after 28 days from the date of the letter. Mr Picton stated in the letter that he had enclosed a statement which explains the basis for his decision, how he had arrived at this penalty and what NBL must now do to

comply with the Regulations. That statement was not attached to the copy of the letter in the hearing bundle and when asked by the Tribunal as to whether the statement was in fact sent with the letter Mr Picton could not recall whether in fact it had been so sent. In their later written submissions on penalty, provided in response to the directions referred to at [64] below, HMRC confirmed that the penalty calculation table was enclosed with the letter of 26 February 2015. However, HMRC have not provided evidence that the table was so enclosed, and accordingly we cannot place any weight on this further submission in the light of the evidence that Mr Picton gave at the hearing.

50. On the basis that it was not included in the hearing bundle, we find that it was more likely than not that the statement stating how the penalty had been calculated was not sent and therefore NBL did not receive any details as to how the penalty had been calculated, and in particular, the relevance of its gross profit to the process.

51. On 15 April 2015 Officer Picton sent NBL a further letter formally notifying it that HMRC had imposed a penalty of £3,750 on NBL for a breach of the Regulations and offering a review of the decision. That letter did enclose a statement explaining the reason for the penalty and how it has been calculated as follows. The penalty amount had been arrived at by adding to the fixed starting penalty of £5,000 an additional penalty of £2,500 which was calculated on the basis that a total of 75 clients had been subject to the breach, HMRC operating a scale charge according to the number of clients the firm had. It was observed that no consideration had been given as to whether the sum calculated exceeded the cap of 10% of the business gross profit as no details regarding that had been provided following the conversation on 20 February 2015. The penalty had then been reduced by 50% as it was a first penalty and was a result of failure to take reasonable care and misinterpretation of the Regulations rather than because of any deliberate failure.

52. On 22 April 2015 Mr Bevan wrote to Officer Picton asking for a review of the decision. The decision was confirmed on review in a letter dated 29 June 2015.

53. On 21 July 2015 NBL gave notice of appeal to the Tribunal against the decision to impose a penalty. The grounds of appeal were that Regulations 7, 8, 19 and 20 were not breached by procedures and recording that is centred on the electronic services provided for agents by HMRC, but, if those regulations had been breached there is a reasonable excuse that will lead to the cancellation of the penalty, namely that client administration was centred on those electronic services in the belief that the Regulations referred to above were not breached by such procedures and records.

Discussion

54. There are two issues we need to deal with. First, we have to decide whether HMRC, on whom the burden of proof lies, have demonstrated to the usual standard of proof of the balance of probabilities that NBL has breached Regulations 7, 8, 19 and 20 of the Regulations during the relevant period. Secondly, if we find that there has been such a breach we need to determine whether the imposition of a penalty is

appropriate and if so, the amount of that penalty, taking account of all the relevant circumstances. We shall now deal with each of those issues in turn.

Breach of the Regulations

55. HMRC's case had proceeded on the basis that NBL had sought to rely on the HMRC online agent registration process as a form of verification of customer's identities and that was not possible because HMRC was not a category of person on whom a person subject to the Regulations could rely to apply customer due diligence measures. It was, apparent, having examined the evidence and having heard what Mr Bevan said at the hearing, that NBL did not rely on that system for identification. NBL relied on the system to record the information that it had obtained from its clients so as to establish their identity and provide ongoing monitoring of the relationship.

56. As our findings of fact demonstrate, NBL has been unable, as it is required to do by Regulation 7 (3) (b), to demonstrate that the extent of the customer due diligence measures it has taken are appropriate. It is unable to do so because it unable to demonstrate what, if any, processes it has undertaken to identify customers, or what ongoing monitoring it has undertaken because at no point has it made available to HMRC the customer files in which it says that information is recorded and which, it says, was subsequently recorded on HMRC's online tax agent system. Neither has NBL at any point provided any evidence that it has established and maintained appropriate and risk sensitive policies and procedures as required by Regulation 20. All that has been provided are bare assertions by Mr Bevan that NBL has the appropriate policies and procedures and clearly those assertions cannot be relied on without more.

57. As regards Regulation 19, in so far as NBL seeks to keep the relevant records through recording information on the HMRC online tax agent system, in our view such a procedure does not comply with Regulation 19. The online system cannot record all the information necessary, such as evidence of the client's identity obtained pursuant to Regulation 7 or the ongoing monitoring required by Regulation 8. Therefore, we find that NBL's approach to record-keeping is not a satisfactory alternative to the clear guidance on these matters given in the CCAB guidance. Mr Bevan is correct to say that the CCAB guidance is not the law, but in the absence of providing a satisfactory alternative method of complying with the Regulations in our view it should be followed by a firm such as NBL, obviously adapted according to the nature of its business. Despite being prompted many times by HMRC to consider that guidance, Mr Bevan has stubbornly refused to do so without justification.

58. We therefore find that HMRC has made its case on the question as to whether NBL has breached Regulations 7, 8, 19 and 20 of the Regulations during the relevant period.

Penalty

59. As the CCAB Guidance makes clear, customer due diligence measures are a key part of the anti-money laundering requirements. They ensure that businesses know who their clients are, ensure that they do not accept clients unknowingly which are outside their normal risk tolerance, or whose business they will not understand with sufficient clarity to be able to monitor for money laundering suspicions when appropriate. If a business does not understand its client's regular business pattern or activity, it will be very difficult to identify any abnormal business patterns or activities.

60. NBL, with its limited client base, may well be able to know its clients and how they operate. It may well know, in relation to its corporate clients, who their beneficial owners are and what influence they exert over the business. However, it is unable to demonstrate to its regulator as it is required to do that such is the case. It cannot do so unless it establishes proper verification, monitoring and record-keeping processes which it has clearly failed to do despite being given a clear warning to do so following the initial visit by Officer Glew.

61. In those circumstances, the imposition of a penalty on NBL is inevitable and it must be of a sufficient amount to be "effective, proportionate and dissuasive". We are satisfied that Regulation 42 (2) does not apply in this case because we have no evidence that NBL took all reasonable steps and exercised all due diligence to ensure that the requirements of the relevant Regulations would be complied with. NBL has simply been unable to provide any evidence that might go to satisfying us on that point.

62. We were concerned during the hearing that NBL had not been given sufficient opportunity to provide details of its gross profit, bearing in mind the omission from Mr Picton's letter of 26 February 2015 of the details as to how the penalty had been calculated. In our view, it was reasonable for Mr Bevan to await details of that, which he expected to have received in that letter, but before providing his gross profit figures. Notwithstanding that, he did have the opportunity to provide that information at any time up to and during the hearing and he did not do so.

63. Nevertheless, we decided that it would be in the interests of justice that before making our decision NBL should be given the opportunity of providing evidence of its gross profit during the relevant period. We have regarded this as relevant to our assessment of the penalty because, as we indicated above, we should have regard to HMRC's penalty policy in deciding what penalty to impose and since HMRC's policy is not to impose a penalty in excess of 10% of a firm's gross profit it was important that we were aware of what that figure was during the relevant period.

64. Accordingly, we directed following the conclusion of the hearing that NBL provide a copy of its statutory accounts of the year ended 31 August 2014 together with the statement of the gross profit of NBL for that year, as derived from those accounts.

65. The material we received in response to these directions demonstrates that NBL had a gross profit of £38,682 for the year ended 31 August 2014. 10% of that figure is

accordingly £3,868 and therefore, according to HMRC's penalty policy framework, the overall penalty to be imposed should be no more than £3,868.

66. We accept that the policy of not imposing a penalty in excess of 10% of a firm's gross profit is appropriate as a starting point, particularly in the case of a small firm, and this tribunal therefore should, unless there is a good reason not to do so, follow that policy which we will do on this occasion.

67. If we were therefore to take £3,868 as the starting point, we need to consider whether that figure should be adjusted to take account of both mitigating and aggravating circumstances. HMRC applied a mitigation factor of 50% on the basis that it found that the breaches occurred as a result of failure to take reasonable care and misinterpretation of the Regulations rather than being deliberate.

68. We regard HMRC as having been generous in that regard. NBL was given a clear warning that it was in breach of the Regulations following Officer Glew's letter of 8 May 2014 but did nothing to address HMRC's concerns. Thus, when it came to the second visit, it was clear that nothing had been done in response to the first visit and NBL was inadequately prepared for that meeting, producing none of the files or other information that could have satisfied HMRC as to its policies and procedures. Overall, NBL has failed to give the degree of cooperation to HMRC that should reasonably have been expected. We regard that as an aggravating factor.

69. However, we should also take account of the fact that NBL has a very small client base, all of which are personally known to Mr Bevan. The risk of actual money laundering or terrorist activity therefore having not been detected as a result of the lack of appropriate policies and procedures regarding customer due diligence may therefore be a limited one.

70. Taking all of those circumstances into account, in our view we should only mitigate the penalty by 20%. We therefore determine the appropriate penalty in this case to be £3,094.

Conclusion

71. This is a sorry outcome for NBL and one that could easily have been avoided had it not, for no good reason, ignored HMRC's warnings about the inadequacy of its policies and procedures and what it might do to address them.

72. NBL would be well advised now to read the CCAB Guidance and develop policies and procedures the take account of that guidance. If it has any difficulty in doing so, it should seek professional advice from many of the specialist compliance consultancies that are available. It should not discount the possibility that HMRC may make further visits in the future and the consequences could be extremely serious if by then NBL has done nothing to address the situation.

Disposition

73. The appeal is dismissed. The appropriate penalty for NBL's breach of Regulations 7, 8, 19 and 20 of the Regulations is £3,094.

74. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 7 OCTOBER 2016