TC01986

Appeal number: TC/2011/02989

Money Laundering Regulations 2007- penalty for practising as an external accountant or tax adviser without being registered – whether HMRC took reasonable steps to advertise maintenance of register – whether appellant had taken all reasonable steps to comply – whether penalty appropriate

FIRST-TIER TRIBUNAL
TAX CHAMBER

CLARKE & CO **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
NIGEL COLLARD

Sitting in public in Brighton on 10 January 2012

Mr Clarke in person

Alex Vesikari for HM Revenue and Customs

DECISION

1. Mr. Clarke, who is the proprietor of Clarke& Co, appeals against a penalty of £737.91 imposed by HMRC under regulation 42 of the Money Laundering Regulations 2007. The penalty related to his failure to register as a tax advisor or external accountant in the period between 1 January 2009 and February 2011.

The Regulations

2. Regulation 3(7) defines "external accountant" to mean:

> "a firm or sole practitioner who by way of business provides accountancy services to other persons, when providing such services."

3. "Tax adviser" is defined by regulation 3(8):

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

4. Regulation 32 provides:

> "(4) The Commissioners [HMRC] may maintain registers of --
>
> (a) auditors;
>
> (b) external accountants; and
>
> (c) tax advisers,
>
> who are not supervised by the Secretary of State, DETI[The Department of Enterprise, trade and Investment in Northern Ireland]or any of the professional bodies listed in schedule 3. [It was common ground that Mr Clarke was not supervised by any of these.]
>
> "(5) Where a supervisory authority [by reg 23(1)(c) this is HMRC in this case] decides to maintain a register under this regulation, it must take reasonable steps to bring its decision to the attention of those relevant persons in respect of whom the register is to be established."

5. Regulation 33 provides:

> "Where a supervisory authority decides to maintain a register under regulation 32 in respect of any description of relevant persons and establishes a register for that purpose, a relevant person of that description may 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."

6. Regulation 42 provides:

"(1) A designated authority [which in this case, by regulation 36, was HMRC] may impose a penalty of such amount as it considers appropriate on a relevant person who fails to comply with any requirement in regulation [there then follow 25 regulations] or 33 or a direction made under regulation 18 and, for this purpose of "appropriate" means effective, proportionate and dissuasive.

"(2) The designated authority must not impose a penalty on a person under paragraph (1) where there are reasonable grounds for it to be satisfied that the person took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with.

"(3) In deciding whether a person has failed to comply with the requirements 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 bodies;

(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."

7. Regulation 43 provides:

"(1) This regulation applies to decisions of the Commissioners made under -

...(c) regulation 42, to impose a penalty.

(2) Any person who is the subject of a decision to which this regulation applies may appeal to the tribunal in accordance with regulation 43F.

...

(4) A tribunal hearing an appeal under paragraph (2) has the power to -

(a) quash or vary any decision of the supervisory authority, including the power to reduce any penalty to such amount (including nil) as it thinks proper, and

(b) substitute its own decision for any decision quashed on appeal.

The Issues in the Appeal.

8. HMRC say that Mr. Clarke practised as an accountant and tax adviser from about 1970; that they decided to establish a register of external accountants and tax advisers on 1 April 2008; that the last date for registration would thus have been 1 October 2008 but was extended to 1 January 2009; that Mr. Clarke did not register until February 2011; and as a result he was in default of regulation 33 from 1 January 2009 to February 2011 and thus liable to a penalty under regulation 42.

9. There was no dispute that Mr. Clarke did not register before February 2011. He registered only after he received a letter from HMRC in January 2011. On receipt of that letter he questioned some of the statements made in it, but completed the requirements for registration (including the payment of a fee) on 22 February 2009 and was registered with effect from 31 January 2011.

10. The issues debated before us were the following:

(1) Was Mr. Clarke a tax adviser or external accountant?

(2) Had HMRC complied with regulation 32(5), and if it had not, did it make any difference?

(3) Had Mr. Clarke taken all reasonable steps and exercised all due diligence to ensure that the requirements of the regulations would be complied with (regulation 42(2));

(4) If Mr. Clarke had failed to comply with regulation 33, should we vary the penalty charged? What penalty would be effective, proportionate, and dissuasive?

(1) Was Mr. Clarke a tax adviser or external accountant?

11. Mr. Clarke's notepaper advises Clarke & Co as "Accountants & Practitioners in Revenue Law". We take note of the fact that Mr. Clarke has represented a number of clients in tax appeals heard by us.

12. Mr. Clarke argued that he does not give tax advice: he told his client was what the relevant law was and answered, on behalf of his clients, the letters they received from HMRC; tax advice was something different.

13. There was no doubt in our minds that "provid[ing] advice about the tax affairs of another person" includes providing clients information about the tax law which affects them (particularly where it is provided by a skilled practitioner such as Mr. Clarke). The information he provided related to their tax affairs. It was given in the course of Mr. Clarke's business. We have no doubt that he is a “tax adviser”, and was such at all relevant times.

14. Mr. Clarke told us that he practised as an accountant in the period 2009 to 2011. That work was clearly "providing accountancy services to other persons". He was therefore an "external accountant" as defined by regulation 3(7).

(2) Did HMRC decide to maintain a register under regulation 32, did they take reasonable steps to bring the decision to the attention of relevant persons, and if they did not take such steps does it make any difference?

15. Mr. Vesikari told us that HMRC decided to establish a register under regulation 32(4) of auditors, external accountants and tax advisers with effect from 1 April 2008. These three categories of persons were referred to in HMRC's materials as Accountancy Service Providers (“ASPs”).

16. Mr. Vesikari showed us the MLR 9 Registration notice which explained HMRC's views, and set out its guidance on the requirement to register. This, according to HMRC's statement of case, was published on 1 January 2009 and approved by the Treasury on 27 October 2009. (Although, oddly, the copy given to us bore the date 30 July 2008).

17. We were also shown copies of advertisements which appeared in The Times, The Financial Times, The Daily Telegraph, The Mail on Sunday, and The Observer in December 2008 which indicated that the new money laundering regulations applied from 15 December and set out categories of business which could be affected by the requirement to be registered.

18. HMRC's statement of case also indicated that the requirement to register had been advertised on the radio, in a part of HMRC's website and in their publications, VAT Notes and Agent Updates.

19. We accept that HMRC did decide to maintain a register of ASPs on 1 April 2008. The regulation 33 prohibition on practice without registration thus applied from 1 October 2008. But (as described below) HMRC's actions postponed the effective date of that prohibition to 1 January 2009. We also accept that the requirement was advertised in newspapers, in HMRC's publications and on its website.

20. Regulation 32(5) requires HMRC to "take reasonable steps to bring its decision to the attention of those" persons affected by it. Mr. Clarke submitted that the steps taken were inadequate. He said that HMRC could easily, and should, have e-mailed or written to each accountant and adviser with whom it had dealings. He said that (1) the website requires searching to find the relevant information and does not "bring" matters to users' attention; (2) VAT Notes are not read by everyone; he did not read them: he looked things up in the law library if he needed information; (3) he found newspapers depressing and did not read them; and (4) he had not received HMRC's Agent Updates.

21. HMRC said that a large proportion of the tax agents they deal with would not need to register since they are supervised by recognised accountancy and other bodies. It would therefore not have been appropriate or cost-effective to write to them all.

22. We agree with Mr Clarke that the publication of information on HMRC's website about a change in the law would not bring that change to the attention of many affected persons and that there is a difference between making information available somewhere and bringing it to people's attention. Advertisements in national newspapers and on the radio would in our view bring the change to the attention of many such persons. VAT Notes and Agent Updates could reasonably be expected to bring change the attention of many more of those who are involved in giving tax advice. Taken together the steps taken could, in our view, have reasonably been expected to bring the change to the attention of most affected persons.

23. But we see considerable force in Mr. Clarke's submission 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.

24. But 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.

25. Even if HMRC had not complied with regulation 32(5) there is nothing in the regulations which makes that compliance a condition for the maintenance of a register, or for the prohibition in regulation 33 on practice without registration, or for the imposition of penalties by regulation 42.

26. However it may be appropriate to bring the quality of the advertisement of the setting up of the register into account in determining the size of any penalty which may be appropriate, given that advertisement is required by the regulations

(3) Had Mr. Clarke taken all reasonable steps and exercised all due diligence to ensure the requirement in regulation 33 would be met?

27. This question arises under regulation 42(2). That regulation refers to the requirements of 26 separate provisions of the regulations: it applies to applying customer due diligence, ongoing monitoring of customer relationships, carrying out transactions with the customer where due diligence has not been possible, enhanced due diligence, the obligations of financial institutions in relation to their branches, and carrying on of business while not registered.

28. In the context of matters such as customer due diligence the taking of reasonable steps applies to the way in which he required task is to be carried out. In relation to the requirement not to practice unless registered the concept is more difficult to apply.

29. Mr. Clarke says that he took all reasonable steps. As soon as he was told by HMRC that he should be registered he made an application: he says that until you know of a requirement to register there is no reasonable step you have failed to take in relation to being registered. Due diligence must also be seen in that context.

30. Mr. Clarke explained that he had been seriously troubled by ill health since 2007. We accept that this was the case. In particular he had severe spinal problems and was in much pain. Nevertheless for most of that period after 1 January 2009 he maintained his practice, working for the equivalent of about 50 days in each year, although there was a period of about nine months from 27 November 2009 when he did almost no work. He submitted that his ill health limited the steps which it was reasonable for him to take.

31. Mr. Vesikari says that Mr. Clarke conducted a not insubstantial business in the relevant period. In the course of his business he could have been expected to take steps to comply with the law. Those were reasonable steps. There was no get out of jail free card for those who were unaware of the law.

Discussion.

32. It seems to us that what are "all reasonable steps" must be determined in the light of the circumstances of the relevant person. What is a reasonable step for a large enterprise may not, for example, be reasonable for a small one; if a person is or becomes wholly incapacitated it may no longer be reasonable for him to take any steps. However, it must be the case that in this branch of the law as in any other, a person is to be treated as knowing law and his obligations under it. Mr. Clarke must be treated as knowing he had an obligation to register, and the steps which it was reasonable for him to take must be viewed in that light. Whilst in the nine months from 27 November 2009 the severity of his medical condition may well have meant that it would not have been a reasonable step for him to have sought to register, it would have been a reasonable step to have sought to have done so in the period before and after that nine-month stretch. We therefore concluded that Mr. Clarke did not take all reasonable steps to comply with the requirements of regulation 33 in the relevant period.

33. In the light of this conclusion it is not necessary for us to consider whether Mr. Clarke exercised "all due diligence"to ensure the requirement would be met.

34. Regulation 42(3) requires HMRC to consider whether Mr. Clarke followed the relevant guidance issued by HMRC and approved by the Treasury. That guidance is the MLR9 Registration Notice. Mr. Clarke based no part of his appeal on the provisions of that guidance. The guidance required an ASP to register before 1 January 2009 and for the application to be received before 30 September 2008. Therefore in our view, no failure to register before 1 January 2009 may be treated as a failure within regulation 42(1).

(4) If Mr. Clarke had failed to comply with regulation 33 should we vary the penalties charged? What penalty would be effective, proportionate and dissuasive?

35. Regulation 43(4) gives the tribunal the power to "quash or vary any decision ... including the power to reduce any penalty to such amount (including nil) as it thinks proper, and [to] substitute its own decision for any decision quashed on appeal."

36. Mr. Clarke says that this regulation gives the tribunal a power to *reduce* a penalty, but not to increase it. We did not agree. The specific inclusion of a power to reduce the penalty does not preclude a power to increase it. The power given to the tribunal to substitute its own decision for a decision which is quashed shows more generally the intention that the tribunal is given a wide ranging power to determine whether a penalty should be imposed and the amount of that penalty.

37. In varying or making our own decision as to penalties it is clear that we must do so in the light of the requirement in regulation 33 that the penalty be "appropriate" that is to say effective, proportionate and dissuasive. We could not think something "proper" which did not meet those requirements.

38. The requirement of proportionality must have regard to the circumstances of the default. In particular a culpable default warrants a higher penalty than a blameless one. There are three particular facts which in our view are relevant to the proportionality of the penalty in this appeal. First Mr. Clarke's illness, second the fact that he complied soon after being told of his obligation to do so, and third the fact that HMRC did not avail themselves of the opportunity of taking the reasonable step of notifying known tax advisers by e-mail. Overall this suggests that only a modest penalty would be proportionate.

39. But the penalty must also be effective and dissuasive. Mr. Clarke says that the requirement to dissuade is aimed at the person in default - it is to encourage him not to default in future. Mr. Vesikari argues that it is directed to all persons potentially affected by the regulations -so that they are encouraged to comply.

40. In our view there is an overlap between the elements of efficacy, proportionality and dissuasion. These words include a requirement that the penalty should punish the individual for his transgression and also dissuade him from further default, but they also contain an element directed at the wider public.

41. The penalty of £737.91 imposed by HMRC was calculated by aggregating two amounts: an amount of £237.91 representing the registration fee which Mr. Clarke would have paid in respect of the period between 1 January 2009 and 30 January 2011 had he been registered, and £500. HMRC regard £500 as an appropriate penalty for a prompted disclosure of a failure to comply with the regulations.

42. It seems to us that it is effective, proportionate and dissuasive that some element of the penalty should reflect the period during which Mr. Clarke carried on business without being registered (and thus put him in the same position as he would have been if he had been registered), unless there are circumstances which indicate that part of that period should be ignored. In Mr. Clarke's case the period in which he carried on business before his successful application for registration was almost 2 years and 2 months. The annual registration fee is £110. But in that period there were some nine months in which Mr. Clarke's ill-health effectively prevented him from paying attention to his business. It would be proportionate for that period of severe ill health to be excluded. We would thus reduce this element of the penalty by £82. It would not however be effective or dissuasive to take account of Mr. Clarke's ignorance of the provisions of regulation 33 during that period in addressing this part of any penalty.

43. Merely putting Mr. Clarke in the financial position in which he would have been if he had complied with the regulations is not an effective punishment and does not effectively dissuade either Mr. Clarke or the wider public from contravention of the regulations. Some additional amount is necessary if the penalty is to be appropriate.

44. This element of the penalty must also take into account the circumstances of Mr Clarke's default described above. In our view £500 is a little high in those circumstances. It should be set at £400.

45. Thus we would assess the appropriate penalty at £555.91

Conclusion

46. We conclude that HMRC did decide to set up a register of ASPs. We find that Mr. Clarke was a tax adviser or external accountant within regulation 32. Thus we find that by regulation 33 he was prohibited from practising as such after the relevant date unless he was registered. We find that he did practice as a tax adviser or external accountant after that date and was not registered, and accordingly that he failed to comply with regulation 33. As a result, HMRC were entitled to impose a penalty under regulation 42(1) unless regulation 42(2) applied. We find that Mr. Clarke did not take all reasonable steps and exercise all due diligence, and therefore that regulation 42(2) did not apply so that a penalty may be imposed under regulation 42(1). We therefore do not quash HMRC's decision to impose a penalty,

47. The tribunal has a freestanding power to vary the amount of the penalty. In so doing it must determine an appropriate penalty - one which is effective, proportionate and dissuasive. For the reasons appearing in the last section of this decision we consider that a penalty of £ 555.91 would be appropriate. We vary the penalty charged to that extent.

48. The penalty is set at £555.91.

Rights of Appeal.

49. 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.

CHARLES HELLIER

TRIBUNAL JUDGE

RELEASE DATE: 03 May 2012