[2016] UKFTT 720 (TC)

TC05449

Appeal number: TC/2016/02114

MONEY LAUNDERING REGULATIONS – penalty for failure to register before starting to carry on business – whether penalty validly imposed – yes - whether penalty prompted or unprompted – held unprompted – penalty reduced.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BLACKHORSE PROPERTY MANAGEMENT LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Combined Courts Centre, Bradford on 7 October 2016

The Appellant did not appear and was not represented

Kelly Bond, instructed by HMRC Solicitor's Office, for the Respondents

DECISION

1. This was an appeal by Blackhorse Property Management Ltd ("the appellant") against a penalty of £536.67 imposed by the respondents ("HMRC") under regulation 42 of the Money Laundering Regulations 2007 (SI 2007/2157) ("MLR"). The penalty was imposed for late registration under the MLR.

2. The appellant did not appear and was not represented. I was satisfied that they had been notified of the hearing. The clerk contacted the appellant's offices and was given a mobile number for the director, Mr Faisal Aslam, and she called him. There was no answer. I considered that under Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 it was in the interests of justice to proceed with the hearing.

3. Because there was no appearance by the appellant, I put to Ms Bond a number of points that the appellant might have made. She acknowledged that the burden was on HMRC to show that the penalty was correctly imposed and in the right amount.

Evidence

4. I had a bundle of documents which contained the correspondence between the parties (and related persons), printouts of website entries for the appellant's organisation and from Zoopla and witness statements of two officers of HMRC, Mrs Pearman, the officer who conducted the correspondence with the appellant and Mr Davies, her supervisor, who quality assured the penalty notice.

5. Mrs Pearman was unable to attend, but Mr Davies did and he gave answers to some questions from me.

Facts

6. From the documents in the bundle, including Mrs Pearman's witness statement which I took as read and accepted in evidence, and from the evidence of Mr Davies I find the following facts.

7. HMRC's Anti-Money Laundering Supervision team (Ms Martinali) wrote to Mr Khalid Khan at Black Horse Property Group Ltd, 532 Thornton Rd, Bradford on 4 June 2015. The letter informed Mr Khan that HMRC had checked their records and could not find a registration as an Estate Agency Business ("EAB") for "you". The letter asked him to complete a form MLR 100 (Registration form) and send the fees, unless he was a lettings and property management agent and did not carry out work of the type listed in the letter, a summary of what constitutes EAB. The letter included an emboldened paragraph warning of possible penalties for failure to register at the correct time.

8. A response dated 8 June 2015 purportedly from Gosia Bibi writing as director explained that "we are a lettings and property management agent and do not carry out [EAB]". The notepaper on which she wrote showed only the name of Blackhorse Property *Management* Ltd (the appellant).

9. On 15 June 2015 HMRC replied to Gosia Bibi. The address used still "Black Horse Property Group Ltd, 532 Thornton Road …". The letter stated that the website

of the appellant showed that property sales (which are part of EAB) were advertised and a copy of the website wording was enclosed. The letter repeated the request for the MLR 100 etc to be filed.

10. On 27 June 2015 HMRC issued a warning to "*Mr* [*sic*] Gosia Bibi". The address used was still "Black Horse Property Group Ltd, 532 Thornton Road …". The letter said that HMRC were considering imposing a penalty of £1,000 on 27 August 2015, and that registration within 30 days would reduce the penalty to £500. A penalty would not be issued if the appellant showed that they had taken all reasonable steps to follow the regulations and "our HM Treasury approved MLR9D".

11. A Form MLR 100 was received by HMRC on 3 August 2015. It showed:

(1) the name "Blackhorse Property Management Ltd"

(2) its date of incorporation as 4 August 2014

(3) that it had not registered previously under the MLR and was not registered for VAT

(4) that it carried out MLR activities at 532 Thornton Rd and that the business concerned was EAB. In answer to the question: "From what date did/will the activities begin at this address", the appellant put 1 April 2015

(5) the Nominated Officer for the MLR as Gosia Bibi, and the email address "gosia[at]blackhorseproperty.com" was given

(6) the company was stated not to be a member of any of the estate agency associations listed, and it ticked the box to show that the type of EAB was "Residential estate agency business"

(7) the form was signed by Gosia Bibi and the date shown was 22 June 2015.

12. On 3 December 2015 HMRC (Mrs Pearman) issued a letter informing the appellant that they intended to issue a penalty of £536.67, made up of a fixed penalty of £500 for a prompted late registration, and £36.67 being the fees for the four months between the start of EAB and the month of registration. It repeated a request for any details if it believed it had taken "all reasonable steps" [to do what was not stated]. From this letter onwards it was the appellant, Blackhorse Property Management Ltd whose name appeared in the address box in HMRC correspondence.

13. On 18 December 2015 the appellant wrote to HMRC. This was signed on behalf of Faisal Aslam, who said that Mrs Gosia Bibi had resigned as director and that he was the new director of the appellant.

14. The letter stated that "Mrs Bibi was not aware that she should have registered and if she had known then she would have. As soon as she was notified and was in receipt she completed the application and registered without delay."

15. The letter went on to say that the penalty should be waived as "the company was not fully trading as an estate agent. There were things that were required which have been put in place and we have just recently started trading fully." And "I can assure you that if we had known that we were supposed to register we would have registered….".

16. In a response dated 14 January 2016 HMRC enclosed the penalty notice.

17. On 9 February 2016 Mr Aslam asked for an independent review, as he had been advised the appellant could ask for one. He also supplied a Form MLR RCT1 giving details of the change of Nominated Officer from Gosia Bibi to him.

18. On 17 March 2016 Mr Allan Donnachie of the "ISBC Dispute Resolution – Appeals & Reviews" unit of HMRC wrote to the appellant. It acknowledged that HMRC have 45 days to conduct a review from 12 February 2016, the date the request was received in HMRC.

19. Mr Donnachie notified the conclusions of his review in a letter dated 18 March 2016.

20. The review upheld the penalty and informed the appellant that it had a right of appeal.

21. An appeal was made to the Tribunal, but surprisingly there is no Notice of Appeal form in the bundle.

Law

22. The law applicable to this case is the MLR. The relevant provisions for this appeal follow. References in this decision to a "regulation" without more are to that regulation of the MLR.

23. Regulation 3:

> "(1) Subject to regulation 4, these Regulations apply to the following persons acting in the course of business carried on by them in the United Kingdom ("relevant persons")—
>
> …
>
> (f) estate agents;
>
> …
>
> …
>
> (11) "Estate agent" means—
>
> (a) a firm; or
>
> (b) sole practitioner,
>
> who, or whose employees, carry out estate agency work …, when in the course of carrying out such work.
>
> (11A) For the purposes of paragraph (11) "estate agency work" is to be read in accordance with section 1 of the Estate Agents Act 1979 (estate agency work) …"

"Firm" (counter-intuitively) includes a body corporate – see definition of "firm" in regulation 2(1).

24. "Estate agency work" in section 1 of the Estate Agents Act 1979 means:

> "things done by any person in the course of a business … pursuant to instructions received from another person (in this section referred to as "the client") who wishes to dispose of or acquire an interest in land—

> (a) for the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to acquire or, as the case may be, dispose of such an interest; and
>
> (b) after such an introduction has been effected in the course of that business, for the purpose of securing the disposal or, as the case may be, the acquisition of that interest;".

It can be seen that for work done to be estate agency work there have to be instructions from a client, so preparatory work in setting up the business does not involve estate agency work.

25. Regulation 23:

> "(1) Subject to paragraph (2), the following bodies are supervisory authorities—
>
> (d) the Commissioners are the supervisory authority for—
>
> (vii) estate agents."

By regulation 2(1) "the Commissioners" means the Commissioners for Her Majesty's Revenue and Customs.

26. Regulation 32:

> "…
>
> (4A) The Commissioners may maintain a register of estate agents.
>
> (5) Where a supervisory authority 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."

27. I was shown no evidence that the Commissioners had made a decision to maintain a register. I was shown extracts from the HMRC website showing that on 1 April 2014 HMRC had issued guidance for estate agents informing them that they should register, so I am prepared to conclude that the Commissioners made such a decision and took reasonable steps to draw its decision to the attention of relevant persons. In that regard I was told that HMRC had publicised the decision to associations of estate agents and in relevant publications.

28. Regulation 33:

> "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."

29. Again I am prepared to assume from the evidence from the HMRC website that the "date" here was in early 2014, and that the six month period of grace had expired before 1 April 2015.

30. Regulation 42:

> "(1) A designated authority may impose a penalty of such amount as it considers appropriate on a ... person … who fails to comply with any requirement in regulation … 33.
>
> (1C) In paragraph[ ] (1) … "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 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.
>
> (4) In paragraph (3), an "appropriate body" means any body which regulates or is representative of any trade, profession, business or employment carried on by the person.
>
> (5) Where the Commissioners decide to impose a penalty under this regulation, they must give the person notice of--
>
> (a) their decision to impose the penalty and its amount;
>
> (b) the reasons for imposing the penalty;
>
> (c) the right to a review under regulation 43A; and
>
> (d) the right to appeal under regulation 43.
>
> (8) A penalty imposed under this regulation is payable to the designated authority which imposes it."

31. Regulations 43 and 43A relate to appeals and reviews, and those regulations together with regulations 43B to 43F broadly mirror the equivalent provisions for VAT.

Submissions

32. An email from Mr Aslam to the Tribunal says that his grounds of appeal are:

> (1) I was not a director at the time … the previous director Gosia Bibi was not aware of the situation.
>
> (2) The company was not trading and was planning to trade – we actually started trading from September 2015.

These grounds are consistent with his letter (see §§14 and 15).

33. HMRC submitted that the penalty had been validly raised and that the first ground of appeal did not avail the appellant as ignorance is no defence. The appellant has not shown that it took all reasonable steps to comply with its obligations.

34. As to the second ground of appeal HMRC refers to the MLR 100 signed by the then director giving the start of EAB as 1 April 2015. Mr Aslam's assertion that the company had not started trading until September was unproven, despite HMRC asking for further and better particulars, and was contradicted by website information and the MLR 100.

Discussion

35. Ms Bond took me through the relevant parts of the MLR. It is clear from them that if a person carries on an estate agency business as defined in the Estate Agency Act 1992 they are required to register. It is also clear from regulation 23 MLR that the relevant person with which to register is HMRC, and that a person must register under the MLR before they begin to carry on that business – see regulation 33 MLR.

36. If they fail so to register they may be liable for a penalty of an amount which HMRC considers appropriate, which is defined to mean "effective, proportionate and dissuasive" (words which are a copy out of the words in Article 39.1 of the EU Money Laundering Directive (2005/60/EC) - see regulation 42(1) and (1C) MLR.

37. HMRC's policy regarding the amount of penalties is not in the regulations and was not shown to me. It is however publicly available in HMRC's Money Laundering Regulations Manual. There it says:

> "**MLR1 PP9420**:
>
> … where we obtain evidence that a business is trading without being registered the business should be given the opportunity to register. If the business responds and their application is accepted, a late registration penalty should be issued for a prompted disclosure following the procedure in MLR1 PP9410
>
> Where despite contact with the business they carry on trading and refuse to register, the following action should be taken:
>
> - issue a penalty in the sum of £1000.
> - advise the business that if they submit an acceptable application to register within 30 days, the penalty will be recalculated on the basis used for prompted disclosure i.e. £500 plus the amount of any unpaid fees.
>
> **MLR1 PP9410**:
>
> The basic steps for calculating late registration penalties (Regulations 26 and 33) are calculated as follows:
>
> - 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".

38. Thus the penalty under that policy for a failure to respond to an approach by HMRC is £1,000, which may be reduced for quick registration (equating to prompt disclosure) to £500. In addition to this fixed penalty, HMRC will also charge a penalty equal to the appropriate fraction of the annual fee that should have been paid from the date the person started to carry on EAB.

39. HMRC must, before imposing the penalty, consider whether they have reasonable grounds to be satisfied the person has taken all reasonable steps and exercised due diligence to ensure that the requirement to register would be complied with (regulation 42(2)). If they consider that they do have such reasonable grounds to be so satisfied, no penalty arises. There is however no "reasonable excuse" provision such as is found is many tax penalty provisions.

40. HMRC is also required to consider whether the appellant followed any relevant guidance which was approved by HM Treasury and suitably published for those is was intended for (regulation 42(3) MLR).

41. HMRC must also, when imposing a penalty, inform the appellant of that decision and if the amount of the penalty, the reasons for imposing it, the right for a review and the right to appeal (regulation 42(5) MLR).

42. I am satisfied that in this case the penalty has been imposed in accordance with the requirements of the MLR. In particular:

> (1) The penalty of £536.67 is in an appropriate amount. There are a number of cases in this Tribunal holding that the late registration penalties imposed by HMRC in these circumstances are "appropriate" - a particularly carefully considered one is *Christine Houghton v HMRC* [2013] UKFTT 716 (TC) (Presiding member Anne Redston, as she then was) which I am fully content to follow
>
> (2) I consider the requirement in regulation 42(2) in more detail below at §45, but I consider that HMRC were correct to argue that regulation 42(2) did not apply in this case
>
> (3) I consider that the guidance issued by HMRC which they demonstrated to me complied with regulation 42(3) and that they had considered whether the appellant had followed it
>
> (4) I consider that regulation 42(5) has been followed.

43. I now turn to the grounds of appeal.

44. These are essentially alternatives. If the appellant did not start its EAB until September 2015 but registered in August then there was no reason for thinking that the appellant did not know about the need to register (ie "was not aware about the situation"). It would have been made aware by HMRC in time.

45. If it had started in April or at any time before HMRC contacted it, then it can have no defence based on the first ground. A penalty arises automatically for a breach unless regulation 42(2) applies. An admission of ignorance invalidates any possible regulation 42(2) defence, because a person who had taken all (not just some) reasonable steps and exercised due diligence would not be ignorant of the requirements of the MLR.

46. If the appellant did not in fact start its EAB until September then it has a clear ground for overturning the penalty, because it would not in fact have been in breach of regulation 33. But I find that the appellant has not shown that it is more likely than not that it did not trade until September. This is for two reasons.

47. The first reason is that there is no evidence to show that in completing the MLR 100 Gosia Bibi was mistaken or misunderstood the question. It is true that on 8 June 2015 a letter purportedly from Gosia Bibi said that the appellant did not carry on EAB. But I pointed out to Ms Bond that the faint signature on that letter was completely different to the one used by Gosia Bibi in the MLR 100. Given the warnings on the MLR 100 about the penalties for false information I find that it is more likely than not that it is the MLR 100 which showed the true position and was the document actually signed by Gosia Bibi as a director.

48. Mr Aslam has not suggested that she was misled or mistaken, and of course Mrs Gosia Bibi neither gave evidence in person nor did she submit a witness statement to say that she had been mistaken. Mr Aslam was not a director at the time, so he cannot know why Mrs Bibi said what she did in the MLR 100.

49. The second reason is that Mr Aslam, who was not a director at the time, has not explained how he knows, and what checks he has made about, what the company was doing and not doing at the relevant time. The website and Zoopla evidence is not clearly dated and it appears that there has been more than one company involved in the website (see §§7 - 10 and the fact that the website says that they have been in business since 2000). But taking the website claims at face value a company in the organisation was dealing with property sales in 2012, and we know from the HMRC letters to Black Horse Property Group Ltd that that company was not registered under the MLR in June 2015. Mr Aslam has not suggested that any other company was conducting the sales that HMRC gave evidence of to the appellant and/or Black Horse Property Group Ltd. Nor has Mr Aslam taken the opportunity given him by HMRC to clarify the position eg by telling HMRC which company has been or was at the time carrying on the sales and purchases shown on the website and Zoopla.

50. As I have mentioned there is no "reasonable excuse" letout in the MLR. Nor is there anything like the "special circumstances" mitigation provision found in modern tax penalty provisions. However this Tribunal does have an unfettered power to vary or quash a penalty.

51. I consider that I should only exercise that power if there is something akin to special circumstances, or if I consider that the level of penalty imposed is not in accordance with HMRC's policy. As noted in §§37 and 38 that policy refers to a penalty of £500 for a prompted registration and a penalty of £100 for an unprompted registration. In this case HMRC regard the disclosure as prompted and applied the penalty that their policy requires.

52. However, I have doubts about whether the application for registration *by the appellant* was prompted. This is because the letter of 4 June 2015 is addressed to Black Horse Property Group Ltd, which is not and never has been the name of the appellant, stating that that company was not registered under the MLR.

53. The response came from a letter on the appellant's notepaper, but no question was ever raised about the difference, and HMRC's next two letters were still addressed to Black Horse Property Group Ltd, including the threats to impose a penalty.

54. It is only with the MLR 100 which *is* in the name of the appellant that HMRC realised they had been referring to, and so prompting, the wrong company. But there is no acknowledgement by HMRC of this.

55. I consider then that HMRC have not shown that the disclosure was prompted, and that the penalty should be that for an unprompted disclosure, £100.

Decision

56. I vary the penalty to £136.67, in accordance with regulation 43(4) MLR.

Observations

57. In the Appendix I have made observations that are not necessary for my decision. I have however been perturbed by some of the conduct of HMRC in this case. What follows in that Appendix are some of the things I have been perturbed by. These are in addition to HMRC's failure to realise that the application to be registered was not in the name of the company they had enquired into.

58. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 24 OCTOBER 2016

APPENDIX

59. The letter of 27 June 2015 referred, without explanation, to "our HM Treasury approved MLR9D". I have no idea what that means and I am sure neither did Mr Khan.

60. In the letter of 3 December 2016 HMRC informed the appellant that "the deadline to register expired on 31 January 2010", but that HMRC became the Supervisory Body for estate agents with effect from 1 April 2014. What is a business supposed to make of this confusing information, especially if they have been in existence only since 4 August 2014?

61. The same letter shows "The total penalty amount for breach of regulation 33 as follows: Insert Calculation as follows:".

62. In the letter of 14 January 2016 HMRC asked Mr Aslam whether Gosia Bibi was the Nominated Officer of the appellant. Yet the MLR 100 dated 22 June 2015 shows quite clearly that she was.

63. In the same letter HMRC say:

> "if there is a discrepancy with the dates, please confirm the actual start date [the appellant] commenced trading. However, this will not affect the prompted part of the penalty only the outstanding fees."

64. I do not understand this. If Mr Aslam were to "confirm the actual start date" as falling in September then the so-called prompted (ie fixed) part of the penalty would surely fall away. If he confirmed the start date as 1 April as shown in the MLR 100 then the penalty would remain as before for both parts. It is only if he "confirmed" a different date before 14 August 2015 as the start date would the fixed fee remain as it was but the fee related part (not the outstanding fees) change.

65. The penalty notification of 14 January 2016 gives the appellant 30 days from the date of the penalty to "ask for an independent review". Regulation 43A MLR says that HMRC "must offer" a review. In *NT ADA Ltd v HMRC* [2016] UKFTT 642 (TC) ("*NT*") Judge John Brooks held at [29]:

> "I accept Mr Gordon's submission in relation to s 83A VATA and, given the mandatory requirement in the legislation, it is not sufficient for HMRC to state, as it did in the letter of 4 April 2016, that an appellant "can ask for a review" without any assurance that it will be granted. Rather it should have been stated, as it was in the 29 October 2012 letter, that an appellant has "a statutory right to a review". In my judgment the failure to make it clear to NTJ that it was entitled to a review, and not could just ask for one, invalidates the decision which cannot therefore be an appealable matter within s 83(1) VATA. As such, the Tribunal does not have the jurisdiction to determine it."

66. In this case if I were to follow that decision I would have to say that the penalty decision is invalid. That would mean that no appeal would be possible. I am not

aware of any time limits in the MLR for imposing penalties and suspect there are none, so HMRC would be able to reissue a valid penalty and the appellant would be able to appeal. In *NT* the case concerned VAT where there are time limits, and quite strict ones, so the case is different. I am not bound by *NT* and I do not think it would be in the interests of justice or to follow the overriding principles that govern this Tribunal's actions to make everyone go through the same hoops again. But HMRC have now been warned where their sloppy wording may lead them.

67. It gets worse.

68. The letter of 17 March 2016 from the review team in Mr Donnachie's name contains these passages:

> (1) "After consideration of the application and examination of the circumstances related to this request, it will be decided if a review is appropriate.
>
> (2) If a review is considered to be appropriate, it will be carried out by …..
>
> (3) … At the conclusion of the review there may be a right to appeal to the independent Tribunal Service. ….
>
> (4) … If there is any further information you would like to be considered , please send this as quickly as possible …"

69. It is quite wrong for HMRC to arrogate to themselves a decision as to whether a review is "appropriate" in the circumstances. If as in this case an appellant requests a review HMRC must carry it out, not debate whether to.

70. And it is also quite wrong for HMRC to say that "there *may* be a right to appeal to" the Tribunal. There will be a right under regulation 43F MLR. It is of course likely that if the review quashes the original decision then the appellant will not appeal to the Tribunal, but if that is what HMRC had in mind when they said what they did, they should have made it clear.

71. Even more surprising is that on the very next day, 18 March 2016 Mr Donnachie sent the conclusions of his review to the appellant. He had not waited for the appellant to provide any of the further information asked for in his letter of the pervious day. Ms Bond suggested that the 17 March letter was wrongly dated and that it had been sent much earlier. That is a possibility given the tone of the letter, but if it is true (and I cannot say) it is not a satisfactory state of affairs, as Mr Donnachie should have had available to him either an electronic or paper copy of the letter dated 17 March.

72. A further feature of this case is that beginning to carry on estate agency business as defined for the purposes of the MLR is equated to beginning to trade. The documents in this case show that the appellant said that it was only carrying on the business of property management not the business that constitutes EAB. By carrying on the business of property management the appellant is trading. So asking the appellant when it started to trade is ambiguous and risks HMRC getting a truthful answer which is not the answer to the question that HMRC should have asked.

73. The confusion about which company was in breach of regulation 33 is also apparent from the bundle. It contains what are said to be "Appellant Companies House details". The details shown are those for Blackhorse Property Group Ltd, not the appellant.