[2020] UKUT 0159 (TCC)

Appeal number: UT/2019/0071

MONEY LAUNDERING – penalty - Regulation 33 of the Money Laundering Regulations 2007 – whether prohibition in that Regulation applies only to businesses in existence when register established and still unregistered six months later – no – appeal allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Appellants**

-and-

DESMOND MARTIN T/A COPPERGATE INTERNATIONAL — **Respondent**

TRIBUNAL — **JUDGE SWAMI RAGHAVAN**
JUDGE JONATHAN RICHARDS

Sitting in public by way of remote telephone hearing deemed to be at the Royal Courts of Justice, Belfast, on 4 May 2020

Joanna Vicary, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Appellants

The Respondent did not appear and was not represented

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DECISION

1. The Appellants ("HMRC") appeal against a decision (the "Decision") of the First-tier Tribunal (the "FTT") released on 12 March 2019. The appeal raises a short point of construction of Regulation 33 of the Money Laundering Regulations 2007 ("MLR 2007"). Those regulations are no longer in force, having been revoked and replaced by the Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. However, by regulation 110(2) of MLR 2017, MLR 2007 continue to have effect where the relevant conduct began prior to 26 June 2017. This appeal is concerned with such historic relevant conduct and so the provisions of MLR 2007 remain relevant.

2. Prior to the hearing, there was some correspondence relating to the hearing between Mr Martin and the Upper Tribunal's administration team. In that correspondence, Mr Martin agreed with a suggestion from HMRC that the appeal could be determined on the papers by reference to written submissions from the parties. We were not, however, satisfied that a determination on the papers would enable us to ask questions of the parties to ensure that we properly understood their respective arguments. Bearing in mind that Mr Martin was unrepresented, we therefore indicated to the parties that we would favour a hearing over the telephone (rather than Skype) as that would not require Mr Martin to employ any specialist IT equipment. Mr Martin, however, indicated that he did not wish to attend even a telephone hearing because of his work and other commitments and that he had no submissions to make beyond those made to the FTT. He did not request a postponement of the hearing.

3. Mr Martin did not attend the telephone conference on the day of the hearing. We concluded that he had received notice of that hearing and that, taking into account the correspondence with him to which we have referred, it was in the interests of justice to proceed in his absence as permitted by Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Background

4. The FTT provided a detailed analysis of the relevant factual and legislative background in the Decision from which we gratefully draw. References in this section to numbers in square brackets are to paragraphs of the Decision unless we state otherwise.

5. As their title suggests, MLR 2007 set out requirements that must be satisfied by various businesses and professions to protect against money-laundering. MLR 2007 designated HMRC as a "supervisory authority" for, among others, tax advisers. HMRC were, by regulation 32 of MLR 2007, empowered, but not obliged, to maintain a register of tax advisers who were not supervised by any of the professional bodies listed in

Schedule 3 to MLR 2007. HMRC decided to establish such a register on 1 January 2009[1].

6. Mr Martin carries on business as a tax adviser (within the meaning of Regulation 3(1)(c) of MLR 2007), applied to be entered on the register and was so registered under number 12434553 on 3 December 2008 ([6]). This was a few weeks earlier than the date on which the register was formally established which Ms Vicary, on behalf of HMRC, explained was because it had originally been thought that the register would be established earlier than 1 January 2009, and the process of registering businesses was underway, but the formal establishment of the register was then postponed. Nothing material turns on this: HMRC accept that the effect of Mr Martin's "pre-registration" was that he was on the register on 1 January 2009, when it first took effect.

7. On 4 June 2015, HMRC cancelled Mr Martin's registration because he had not paid the annual fee required to maintain it. At the time they cancelled his registration, Mr Martin and HMRC were engaged in correspondence as to whether he was complying with provisions of MLR 2007 requiring him to perform "enhanced due diligence" on certain categories of customer. That correspondence continued for a period after his deregistration. Following his deregistration, HMRC warned Mr Martin that he should apply to be registered again, as otherwise he could be liable to a fine ([7] to [17]).

8. The FTT made no express finding to the effect that Mr Martin continued to carry on business as a tax adviser after his de-registration. However, that is implicit in its finding at [4] that he was, "at all material times", a tax adviser and its statement at [59(4)] that Mr Martin's case involved a person continuing to carry on business as a tax adviser after de-registration.

9. On 26 June 2017, HMRC (Ms Ford) issued a "penalty decision notice" informing Mr Martin that, pursuant to the powers in regulation 42 MLR 2007, HMRC were charging Mr Martin a penalty of £1,000 for trading as an "accountancy service provider" without being registered with HMRC.

10. Section 42 of MLR 2007 provided, so far as material, as follows:

> **42 Power to impose civil penalties**
>
> (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 … .

[1] In the Decision, based on evidence and submissions that HMRC made to the FTT, the FTT proceeded on the basis that the register was established on 1 April 2008. At the start of the hearing before us, Ms Vicary, on behalf of HMRC, confirmed that this was not correct. Although it had been expected that the register would be established earlier, it was not formally established until 1 January 2009. Although we saw no evidence as to the precise date on which the register was established, nothing material ultimately turns on this point as we will explain later in this decision

…

(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 alleged offender.

…

11. Thus, the penalty at issue in these proceedings was imposed because HMRC considered that there had been a failure to comply with a requirement imposed by Regulation 33 of MLR 2007. Regulation 33 provided, so far as material, as follows:

33 Requirement to be registered

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.

12. Mr Martin was dissatisfied with HMRC's decision and he exercised his right, conferred by Regulation 43 of MLR 2007 to appeal to the FTT. In hearing that appeal, the FTT was entitled to exercise a full appellate jurisdiction and its powers are, by Regulation 43(4) as follows:

(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 Decision

13. Mr Martin was not represented before the FTT and he did not, therefore, provide the FTT with formal grounds of appeal that explained why, in his view, he should not have been charged the penalty. However, having reviewed correspondence passing between Mr Martin and HMRC, the FTT summarised various points that Mr Martin had made at [34] to [37]. He did not deny that he carried on business as a tax adviser when not registered, but made the following objections to the penalty he had been charged:

> (1) He considered that the obligations that HMRC were seeking to impose on him to perform enhanced due diligence were unworkable and out of all proportion to the extent of money laundering risk present in his business.
>
> (2) He had allowed his registration to "lapse" not realising that he needed to keep it current while discussing the extent of his compliance obligations with HMRC.
>
> (3) HMRC were slow in responding to correspondence that he sent them and, when they did, they did not answer all the points he was making.

14. The FTT considered that the points raised above did not themselves set out any defence to the penalty, or any reasons why the penalty should not have been imposed. Nevertheless, it concluded (at [48]) that HMRC bore the burden of establishing that a penalty was due and, at [49] it directed itself as to the matters that HMRC needed to establish in the following terms:

> In the context of regulation 42 we think that this requires HMRC to show that:
>
> (1) the appellant's conduct was such as to amount to a contravention of regulation 33 MLR so as to be within regulation 42(1).
>
> (2) there were reasonable grounds for HMRC to be satisfied that the appellant did not take "all reasonable steps and exercised all due diligence to ensure" that the requirement in regulation 33 would be complied with (see regulation 42(2)).
>
> (3) HMRC considered whether the appellant followed any relevant guidance which was at the time issued by them which had been 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 (see regulation 42(3)).
>
> (4) HMRC gave the appellant notice of their decision to impose the penalty and its amount; the reasons for imposing the penalty; the right to a review under regulation 43A MLR and the right to appeal to the Tribunal under regulation 43 (see regulation 42(4)).

15. The FTT concluded ([50] to [53]) that HMRC had discharged their burden on points (2) to (4). That left the question of whether Mr Martin had indeed contravened the requirements of Regulation 33 of MLR 2007. The starting point for a consideration of that issue was identifying the precise date on which HMRC decided to maintain a register under Regulation 32. The Decision is not entirely clear on this matter and we

infer from the correction that Ms Vicary gave us (referred to at footnote 1 above) that this may have been because of a lack of clarity in HMRC's submissions. At [38] of the Decision, the FTT appears to suggest that the register was established on 1 April 2009, but in view of later analysis it seems likely that this is a typographical error. However, from [55] to [57] of the Decision it seems reasonably clear that the FTT was proceeding on the basis (wrongly as it now appears from Ms Vicary's confirmation referred to in footnote 1) that the register was established on 1 April **2008**.

16. During the hearing, the FTT identified a concern it had as to whether there was a breach of Regulation 42 in the following passage:

> 55. What our concern was can best be explained if we set out a comminuted version of the text of regulation 33 as it applies to tax advisers and the particular register for [them] (and other businesses within regulation 3(1)(c) MLR):
>
> > "**Requirement to be registered**
> >
> > 33 If HMRC establishes a register a tax adviser not otherwise supervised may not carry on that business *for a period of more than six months beginning on 1 April 2008* unless he is included in the register." [Our emphasis]
>
> 56. Had the italicised words been omitted, we would have had no difficulty in saying that with effect from the date on which the appellant was treated as deregistered, he was contravening regulation 33 in that form if he continued to carry on his business as tax adviser after the cancellation of his registration and when doing so he was not supervised by a relevant professional body. We should say that the appellant has never suggested that he was at any time so supervised.
>
> 57. But our provisional reading of the regulation including the italicised words was that the prohibition on carrying on business only applied if the tax adviser was carrying on business on 1 April 2008 and was still carrying it on without being registered on 1 October 2008. Thus the italicised words seem apt only to punish those businesses which, being in existence at the date the register was established, do not take advantage of a "period of grace" of 6 months from that date to make an application for registration and become registered, do not do that and so contravene regulation 33 and become liable for a penalty (or for prosecution). It looks quite like a transitional provision, but is not a typical transitional provision dealing just with the position of businesses existing at the date legislation comes into force, since different registers may be established at different times and new types of business may be prescribed as falling within the ambit of HMRC's supervisory discretion.

17. The FTT requested the parties to make written submissions on the issue that it had identified. HMRC did so, but Mr Martin chose not to. The FTT set out an extract from HMRC's submission at [60] and, at [61] gave some "clarificatory remarks" on those submissions which suggested that the FTT thought HMRC were maintaining that (i) the register was established on 1 April 2008, (ii) Regulation 33 established a "grace period" expiring six months after the date the register was established and so that a

person carrying on a business at any time after expiry of that grace period would be in breach of Regulation 33 if not registered; (iii) ostensibly that grace period expired on 1 October 2008; (iv) HMRC had somehow extended the grace period to the end of June 2009 but that this did not assist Mr Martin because (v) he was carrying on his business without being registered from 4 June 2015, well after expiry of the grace period as extended. In HMRC's submission, the question posed by Regulation 33 was whether Mr Martin had, for any period of time after 30 June 2009, carried on business as a tax adviser without being registered. Since he had done so (between 4 June 2015 and 26 June 2017), a penalty was due. Reading the extract from HMRC's submissions, with the benefit of hindsight, it appears possible that HMRC premised those submissions on an assumption that the register was established on 1 January 2009.

18. The FTT concluded, at [72] that it did not matter whether HMRC's averred grace period ended on 30 June 2009 or some earlier date in 2008 because the FTT rejected the interpretation of the provisions that HMRC were advancing in the following passage:

> 72 … Our reading [of Regulation 33] is that the period of contravention can only start at the end of the grace period because that is what the words "carry on the business … in question *for a period* of more than six months *beginning on* the date [of establishment of the register]" mean.

19. It seems to us that, in this passage the FTT was confirming its "provisional reading" referred to at [57]. In the FTT's view Regulation 33 only applied where a person was carrying on the business when the register was established and was carrying the business while unregistered six months later so that, in the FTT's phrase, a "period of contravention" started as soon as the grace period expired. The FTT considered ([75]) that Regulation 33 was not ambiguous and it did not, therefore, need to consider the implications of the decision of the House of Lords in *Inco Europe Limited (and others) v First Choice Distribution (a firm) and others* [2000] 1 WLR 586. It observed at [75] that, if it had considered that Regulation 33 was ambiguous (so that either HMRC's interpretation, or the FTT's competing interpretation could be correct) it would, following an application of the "principle against doubtful penalisation" have concluded that Mr Martin could not be charged a penalty.

20. The FTT did not spell out expressly what its finding at [72] meant for Mr Martin's business. In particular, it had found that the register was established on 1 April 2008 but that Mr Martin was not registered until 3 December 2008 (more than six months later). On the face of it, therefore, if Mr Martin was in business on 1 April 2008 when the FTT thought the register was established, he would have been in breach of Regulation 33 as interpreted by the FTT unless what the FTT understood to be HMRC's "extension" to the grace period somehow affected the provisions of Regulation 33. By contrast, if Mr Martin had not commenced his business until after 1 April 2008, then, on the FTT's reading of Regulation 33 and its assumption as to the date of establishment of the register, Mr Martin was not in breach at all, no matter when the "grace period" ended.

21. Nevertheless, it is quite clear that the FTT decided that Mr Martin was not in breach of Regulation 33, and could not therefore be charged a penalty under Regulation 42 and it is this conclusion against which HMRC appeal.

Grounds of appeal against the Decision

22. HMRC appeal against the Decision, with the permission of the FTT, on the ground that the FTT erred in its construction of Regulation 33. They repeat the arguments that they advanced before the FTT. In HMRC's submission, Regulation 33 requires a relevant person, carrying on a business for which HMRC have decided to maintain a register, to be registered if they are going to carry on that business at any point after 30 June 2009 (the date falling six months after the register was established). Mr Martin carried out the business for a period after 4 June 2015, well after the grace period expired, and accordingly in HMRC's submission was liable to a penalty.

Discussion

23. The FTT's interpretation of Regulation 33 effectively involved the taking of two "snapshots" of the position first when the register was established and then again six months later. Only if those snapshots revealed a business in existence when the register was established that was still unregistered six months later would Regulation 33 be breached, at least as far as we understand the Decision. The FTT itself acknowledged at [59(1)] that, on its view of Regulation 33, a person establishing a new business, after the date HMRC decided to maintain a register, was not subject to any requirement to register at all. At [59(3)] it acknowledged that its interpretation also meant that a business which, on expiry of the grace period was supervised by another regulator and so not initially required to register, would not be brought within the scope of Regulation 33 if it ceased to be supervised by that regulator. Moreover, the effect of its interpretation, partially referred to at [59(4)] of the Decision, is that any business which is properly registered when the "grace period" expires, but which ceases to be registered subsequently, for whatever reason, is not in breach of Regulation 33.

24. On the face of it, these outcomes make no sense. There is no suggestion, whether on the face of MLR 2007 or elsewhere, that the potential for tax advisers to become involved in money laundering was somehow limited to businesses which existed at a given point in time (whether that was when the regulations came into force or when a supervisory authority took up the option to register). In addition, the clear intention of Regulation 33 is that HMRC is a supervisor of last resort of the businesses of, among others, tax advisers. Therefore, there was no obvious reason why tax advisory businesses which cease to be supervised by another regulator should escape HMRC supervision. Nor is there any obvious reason why businesses that fail to maintain their registration going forward should escape sanction.

25. Moreover, MLR 2007 was introduced in response to EU Directive 2005/60/EC (the "Money Laundering Directive"). Recital (1) to the Money Laundering Directive refers to "massive flows of dirty money" damaging the stability and reputation of the financial

sector and threatening the single market. Recitals (19) to (21) explain the risk of independent advisers' services being misused by persons involved in money laundering. Recital (37) indicates that the Directive establishes detailed rules for customer due diligence. Article 37 obliges Member States to require their supervisory authorities to effectively monitor and to take the necessary measures so as to ensure compliance by those covered by the Directive requirements. As regards maintenance of a register by supervisory authorities, with the exception of certain businesses mentioned in Article 36, the Directive does not go as far as prescribing the particular means supervisory authorities must deploy regarding monitoring and ensuring compliance, but it does not preclude supervisors being empowered to maintain a register as a means of monitoring and supervision. It is notable that nowhere does the Directive indicate that the obligations on persons it covers, or it follows, any such monitoring or supervision of those obligations are to be applied only to businesses in existence on a particular cut-off date. Further, insofar as the Directive does impose a registration or licensing requirement in Article 36 on certain persons [2] the Directive does not suggest that registration requirement should apply only to businesses in existence on a particular cut-off date or that registration on a particular cut-off date is sufficient even if the business subsequently decides not to maintain its registration. Article 36 can only be read as requiring both new and existing businesses to be subject to an <u>ongoing</u> registration requirement.

26. Of course, the background to the MLR 2007, and the mischief at which those provisions are aimed takes matters only so far. This is particularly so when it comes to the interpretation of domestic regulations which operate in the space of a Member State discretion. It is still necessary to construe the actual words used in those regulations to ascertain their true meaning. However, since the interpretation that the FTT advanced produced absurd results that were incompatible with the very purpose of MLR 2007, that is certainly a strong indication that the FTT's interpretation is not correct.

27. We turn, therefore, to the wording of Regulation 33 itself which is not very happily phrased. At the heart of the regulation is a prohibition which is to apply only if a condition precedent is satisfied (namely that a supervisory authority "decides to maintain a register under regulation 32"). Where the condition precedent is satisfied, the prohibition becomes operative namely that a relevant person:

> …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.

28. In respectful disagreement with the FTT, we do not consider that by applying the prohibition to periods "beginning on the date on which [the register was established]",

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[2] Article 36 obliges Member States to require that currency exchange offices, money transmission or remittance offices, trust and company service providers, casinos shall be licensed or registered in order to operate their business legally.

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Regulation 33 is seeking to limit the scope of the prohibition to businesses in existence on that date. Rather, in our judgment, Regulation 33 signals an intention to change the regulatory landscape applicable to all relevant businesses (both new and existing) on a prospective basis. That change was driven by a clear purpose: to implement the Money Laundering Directive and to counteract money laundering. In those circumstances, the Regulations did not need to spell out that the requirement to be registered applied on a prospective basis to new and existing businesses alike. On the contrary, if the Regulation 33 sought to achieve the extraordinary result of excluding new businesses from its reach, or of providing that it was sufficient for a business to be registered on expiry of a period and it did not matter if the registration was subsequently maintained, those extraordinary results would have needed to be spelled out. The FTT's interpretation, while perhaps tenable as a purely linguistic matter, does not give effect to the manifest intention in Regulation 33 and the Money Laundering Directive to change the landscape since the change that was clearly thought necessary simply could not be achieved by taking two snapshots of events when the register was established and six months later.

29. It follows, therefore, that we do not consider the FTT's interpretation of Regulation 33 to be correct.

30. That naturally leads to the question of what is the correct interpretation of Regulation 33. Before us, HMRC maintained their position that, properly construed, Regulation 33 requires a relevant person carrying on a business for which HMRC have decided to maintain a register to be registered if that business is carried on at any point after the initial six-month grace period ends.

31. HMRC's interpretation would suggest that the reference to "six months" links to the date the register is set up; the six months informs the period after which the prohibition starts to run. Another way of putting this is that the person "may not carry on the business or profession in question for a period". It is implicit in the concept of a period that it has some kind of time limitation. So if one asks the question "what date does that period begin?" the regulation gives the answer: the period beginning on the date of "more than six months on which the supervisory authority establishes the register". (This is in contrast to the FTT's view under which the "six months" spoke to the duration of the prohibition with the beginning of that prohibition period being the date on which the register was established.)

32. We quite accept that there are textual issues with that interpretation. In particular, it involves the preposition "of" being interpreted as identifying the **start** of a period of prohibition whereas, in ordinary English usage, it might tend to identify the **duration** of the period. Nevertheless, we consider HMRC's interpretation is sustainable. Its result is also consistent with the evident purpose of the legislation discussed above and, in our judgment, goes with the grain of the legislation. In fairness to the FTT, we acknowledge that HMRC's interpretation does not, without regard to the underlying purpose of the scheme, of regulation, readily leap out from the wording but takes some unravelling.

33. During the hearing, we suggested another possible reading of Regulation 33 which breaks the regulation into two components. The first part deals with the scope of the prohibition: the person "may not carry on the business or profession in question for a period of more than six months". The second part then sets out when that prohibition starts: "…beginning on the date on which the supervisory authority establishes the register unless he is included in the register".

34. On that interpretation, the words "beginning on the date on which the supervisory authority establishes the register" indicates not the start of any "period", but rather the date from which the new prohibition is to take effect. On that interpretation, with effect from 1 January 2009 (when HMRC established their register), a person could not carry on a tax adviser's business for a period of more than six months without being registered. On that interpretation, all businesses, and not just those in existence when the register was established, would benefit from a six-month grace period.[3]

35. That interpretation would involve tax advisory businesses such as that of Mr Martin enjoying a more generous transitional regime than is available to other businesses covered by MLR 2007. As the FTT noted in the Decision, Regulation 50 of MLR 2007 provides a detailed transitional regime for other kinds of business (such as "high value dealers") which applies only to businesses in existence on a particular date (15 December 2007). However, we do not consider that to be fatal to the alternative interpretation. The FTT recorded, at [65], HMRC's apparent acceptance that tax advisory businesses represent a lower money laundering risk than the business of a "high value dealer" because a high value dealer's business might itself be used to launder money whereas a tax adviser might only be aware of money laundering taking place within its clients' businesses. If, as appears likely, the business of a tax adviser presents less of a money laundering risk than the business of a high value dealer, there is nothing obviously wrong with the conclusion that the transitional provisions applicable to tax advisers are more generous than those available to high value dealers. On the other hand we acknowledge that, insofar as the rationale for a "grace period" derives from a concern that existing businesses might need sufficient notice to apply to register when a new register was created (particularly where the register's creation would not be known at the outset because it is created at option of the supervisory authority), then an alternative interpretation which gives a "grace period" to all businesses on an ongoing basis many years after the register's original creation would not be consistent with that rationale.

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[3] On this interpretation, the case of *Renaissance Accountancy Services v HMRC* [2012] UKFTT 83 (TC) would be wrongly decided. In that case, the taxpayer started business on 8 November 2010 (after the register was established) and was held to be in breach of Regulation 33 on 24 March 2011 since the taxpayer was not registered on that date. Yet, by 24 March 2011, the taxpayer had not been carrying on the business for six months so, on the alternative interpretation we have outlined, would not be in breach of Regulation 33.

36. We are conscious that Mr Martin has chosen to make no submissions on the correct construction of Regulation 33. Moreover the possible alternative interpretation outlined at [33] was of our own devising and, while Ms Vicary made helpful submissions on it during the hearing, neither she nor HMRC had any opportunity prior to the hearing to consider it. In those circumstances, we do not think it would be right to express a considered judgment on the full ambit of Regulation 33 since, whether HMRC's interpretation or that set out at [33] is correct, Mr Martin was in breach of Regulation 33, and is liable to a penalty[4].

37. Nor do we consider that the "principle against doubtful penalisation" to which the FTT referred at [74] precludes Mr Martin from being liable to a penalty. Regulation 33 quite clearly in our view provides that Mr Martin could not, with impunity, carry on business as a tax adviser for over 2 years, between 4 June 2015 and 26 June 2017 without being registered.

Disposition

38. The Decision contains an error of law: the FTT wrongly construed Regulation 33 as meaning that Mr Martin could not be liable to a penalty whereas he was, in fact, liable to a penalty. We will exercise our power under s11 of the Tribunals Courts and Enforcement Act 2007 to set aside the Decision.

39. We consider we should remake the decision in the UT rather than remit it to the FTT. The FTT made clear findings of fact (see [14] and [15] above), which have not been challenged before us, that the various matters upon which HMRC bore the burden had been satisfied leaving only the question of the proper amount of the penalty. Mr Martin already had an opportunity to address that issue before the FTT and he makes no additional points on it before us in the UT. HMRC imposed a penalty of £1,000. We are entitled to remake the Decision so as to make any determination the FTT could lawfully have made. Given the provisions of Regulation 43(4) of MLR 2007 which we have quoted at [12] above that means we have a broad power to vary the penalty, including to reduce it to an amount less than £1,000 as we think proper, or else to quash it and substitute it with our own decision.

40. Little guidance is given on the amount of the penalty beyond the stipulation, in Regulation 42(1C) of MLR 2007 that it be "effective, proportionate and dissuasive". The FTT did not address this requirement because, on its view of Regulation 33, Mr Martin was not liable to any penalty. Nor has Mr Martin said anything about what he regards as an appropriate penalty in these proceedings, beyond noting that he has nothing to add to the case he put to the FTT.

41. We have therefore taken the summary of Mr Martin's case as set out in the Decision as our starting point. Mr Martin's view that the regulatory requirements that HMRC are

[4] Mr Martin had been carrying on his business for well over six months when HMRC imposed the penalty so, even on the alternative interpretation, would be liable for that penalty.

seeking to impose are too onerous is not directly relevant since the penalty is imposed, not for breach of HMRC's requirement that he perform "enhanced due diligence" on certain customers, but rather for his breach of the requirement to be registered. However, it is clear, and we do not understand HMRC to deny, that Mr Martin's business represents a relatively low risk of money laundering. It follows that the risk posed by his business not being registered is correspondingly low and should not attract a high penalty.

42. Mr Martin's complaints that HMRC were slow to reply to his letters and that their replies, when received were incomplete, are of little direct relevance, since it is Mr Martin's conduct that gives rise to the penalty, not that of HMRC. However, indirectly Mr Martin's points indicate that he was not simply ignoring his regulatory obligations and was making at least some attempt to engage constructively with HMRC. That also suggests that a penalty at the lower end of the range might be proportionate.

43. We also regard it as material that, in correspondence with Mr Martin, HMRC indicated that they would reduce the penalty to £500 if he submitted a prompt application to be registered once more. Mr Martin evidently did not accept that offer which indicates to us that we should not reduce the penalty to give credit for remedial action that he did not undertake.

44. Overall, we are satisfied that a penalty of £1,000 was effective, proportionate and dissuasive. We therefore remake the Decision so that Mr Martin is liable for a penalty of £1,000. We emphasise that our decision as to the amount of the penalty is made in the circumstances of this case. We are not seeking to provide general guidance to the FTT as to the approach they should take generally when deciding the amount of penalties that should be imposed in other cases involving a breach of Regulation 33 of MLR 2007.

JUDGE SWAMI RAGHAVAN

JUDGE JONATHAN RICHARDS

RELEASE DATE: 19 May 2020