[2015] UKFTT 00263 (TC)

TC04458

Appeal number: TC/2014/04644

Money Laundering Regulations – Regulations 7, 14, 20 & 21 – penalty for non-compliance – high value dealer – penalty confirmed in reduced amount

FIRST-TIER TRIBUNAL
TAX CHAMBER

THOMPSONS DISCOUNT ELECTRICAL LIMITED **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
JANE SHILLAKER

Sitting in public in Priory Court, Birmingham on 26 March 2015

Paul Johnston of DHJH LLP accountants and Carl Thompson, Director, for the Appellant

Joanna Vicary of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty imposed by HMRC on the appellant under regulation 42 of the Money Laundering Regulations 2007 ("the MLR's") for breach of various provisions of those Regulations. The appellant is registered as a "high value dealer" for the purposes of the MLR's.

The facts

Introduction

2. We received a bundle of documents and heard oral testimony from Carl Thompson, a director of the appellant. We also heard oral testimony from HMRC officers Zoe Kenning and Chris Hunt, supplemental to witness statements that had been made by them previously. Officer Kenning had led the visit to the appellant in January 2014 which resulted in the penalty under appeal. She had made the decision to impose the penalty. Officer Hunt had assisted her at the January 2014 visit.

3. We find the following facts, which were largely uncontentious.

Background

4. The appellant carries on business in a specialised niche of the electrical goods market. In broad terms, it has ongoing relationships with manufacturers and/or large retailers as a result of which it receives from them, typically on very short notice, shipments of 12 to 24 pallets of mixed stock of electrical goods. These are often "end of line" or goods which have been returned by customers. The appellant then sells on these goods, either through its own retail outlets (of which it has three in Worcester and Bromsgrove) or direct to smaller bulk purchasers. Where the goods are in need of repair, they are commonly sold for export to overseas markets such as Africa, where it is economic to repair them.

5. The appellant's turnover for the year ended 31 December 2013 was approximately £2.7 million.

6. The business is very fast moving. When the appellant becomes aware of the content of an incoming shipment, it will usually approach existing customers it is aware are likely to be interested in the goods in question. A price is agreed and the customer is required to pay in advance – often effectively by way of a deposit to "reserve" the goods. This is generally (though not always) done at least in part by payment through a bank account. When customers arrive with their own vehicles to pick up the goods, it is quite common for there to be slight variations in what they purchase before they leave – for example, many of the goods are bought for export and it is important, in order to minimise shipping costs, that shipping space is utilised as fully as possible. This often results in "on the spot" purchases of other available goods which are loaded there and then, as well as payment in cash of the outstanding balance on goods which have been partially paid for by bank transfer in advance. The

appellant does not allow any goods to leave its premises until they have been paid for in full and in practical terms, this often means that the appellant requires the customer to pay the outstanding balance in cash before being allowed to uplift the goods.

7. On occasion, these cash payments may be quite large. Recognising that it would fall within the definition of "high value dealer" in the MLR's if it received any cash payments exceeding €15,000, the appellant applied on 1 April 2004 to be registered as such under the 2003 version of the MLR's.

HMRC visits

8. Following its initial registration, the appellant received an educational visit from HMRC on 7 September 2004. At the end of the visit, Mr Carl Thompson (in his capacity as Money Laundering Reporting Officer) signed a declaration in which he confirmed he had received, amongst other things, a copy of HMRC's Anti-Money Laundering Guide. He also confirmed his understanding of the requirement (amongst other things) to "set up internal control systems and training to enable identification of possible money laundering".

9. A second visit took place on 16 November 2010. Mr Thompson was not present. Mr Robin Whitehouse (sales director) and Mrs Amanda Gray (office/exports administrator) represented the appellant. HMRC's enquiries were structured using a standard form template with various headings. The visiting officer noted that the appellant was "satisfactory" under most of the headings, with one or two small points of detail discussed. Two areas were however considered to be "unsatisfactory". First, it was noted that anti-money laundering training had not been updated since 2004; this needed to be done, to include details of customer due diligence and "enhanced due diligence" (see below) measures, recognition of money laundering, and how and when staff should report any suspicions of money laundering. Second, the lack of any updated documented risk assessment/policy statement meant the visiting officer could not examine it and could see no evidence of anti-money laundering staff training.

10. In summary, therefore, the outcome of this second visit was that the appellant was advised of the need to prepare a written money laundering policy/risk assessment and deal with (and record) appropriate staff training.

11. A third visit took place on 23 October 2012. Once again, the visiting officers met Mr Woodhouse and Mrs Gray. HMRC identified continuing weaknesses, and on 16 November 2012 they wrote to the appellant, enclosing a schedule which set out the breaches of the MLR's which HMRC had identified, the related regulations, the corrective action they required to be taken and deadlines for doing so. The appellant was warned that civil penalties or a criminal prosecution could arise from failure to act on the warning.

12. The accompanying schedule highlighted breaches or weaknesses in relation to customer due diligence (Regulations 7 & 9 MLR's), monitoring of business relationships (Regulation 8 MLR's), ceasing transactions where no customer due diligence could be carried out (Regulation 11 MLR's), enhanced due diligence in

relation to high-risk transactions (Regulation 14 MLR’s), lack of a written policy/procedures/risk assessment and inadequacy of informal procedures (Regulation 20 MLR’s), reporting to SOCA (Regulation 20.2(d) MLR’s) and staff training (Regulation 21 MLR’s).

13. Specific concerns were identified as follows:

(1) Whilst identification documents were seen for all customers at the commencement of the customer relationship, the appellant was only retaining copies of those documents where the first transaction with the customer involved either the export of the goods or a cash payment exceeding the €15,000 limit. As 95% of the appellant’s customers undertook repeat transactions (which HMRC considered to be “linked transactions”), this meant that suitable customer identification documents were not retained on file for customers who crossed the €15,000 limit at a later stage by virtue of linked transactions.

(2) Customer transaction histories were not checked before undertaking a new transaction. In any event it did not appear possible, from the appellant’s existing records, readily to establish the payment method used by customers on previous transactions (cash/cheque/bank transfer) and so to establish whether any new transaction would potentially result in the crossing of the €15,000 threshold; this was entirely dependent upon the personal knowledge of Mr Woodhouse. The reliance on such an informal process was considered insufficient for a business which had dealt with over 150 trade customers in the previous financial year.

(3) The appellant had no written policy and procedures documents.

(4) There were some events described at the meeting which should, it was considered, have been reported to SOCA on a suspicious activity report.

(5) No formal staff training had taken place.

14. Because of the issues identified in the October 2012 visit, the appellant was scheduled for a follow-up visit which took place on 16 January 2014. Officers Kenning and Hunt conducted the visit. This time, Mr Thompson attended the meeting as well as Mrs Gray and Mr Woodhouse.

15. Whilst some work had been done (for example, some kind of training document had been produced for staff, and there was a customer information template with fields for customer due diligence information) it appeared that the appellant had not taken all the requisite corrective action following HMRC’s warning letter dated 16 November 2012.

16. In particular, the customer due diligence information held by the appellant was still incomplete and patchy. It did not appear to be held in an organised way which enabled it to be readily accessed. Also, whilst the appellant was now making checks on the EU website of the VAT numbers given to it by its overseas European customers, there were a number of customers (both European and African) for whom it appeared there was inadequate or no customer due diligence material available.

Finally, whilst there was a brief training document in existence, there was no log of any training having been given to the staff.

17. In summary, the appellant's behaviour in response to the earlier warnings was considered "complacent/negligent".

Dealings with specific customers

18. During the visit on 16 January 2014, the officers reviewed the calendar year 2013 in particular. They identified the following specific transactions of concern:

(1) On 26 November 2013 a customer ("Customer A") paid £16,000 in cash. The appellant's records did not explain the reason for the cash payment, or who had physically brought the cash to the premises. Further, customer due diligence was limited to a Europa VIES validation check of the EU VAT number which the customer had identified as belonging to it.

(2) Another customer ("Customer B"), with whom the appellant had traded for some eight years, paid cash totalling £16,750 into the appellant's bank account at a number of different banks in different parts of the UK in relation to a single purchase of goods. No due diligence into the customer had been carried out, and no explanation had been sought as to why the payment was made in this way.

(3) An invoice dated 31 October 2013 for £19,793 had been issued to another customer ("Customer C"), Customer C was apparently a Nigerian limited company, but HMRC were informed at the visit that four cash payments totalling £19,800 had been received in respect of that invoice. There was no due diligence material on Customer C or the individual(s) behind it. In fact, it now transpires that only two of the payments (totalling £8,300) were received in cash, £11,500 being received by way of two bank transfers from two different individuals believed to be behind Customer C (in response to a request from Ms Vicary, we confirm we find this as a fact, based on Mr Thompson's evidence and our understanding of the entries on the copy bank statements produced to us).

(4) There appeared to be a course of trading with another customer ("Customer D"), who had been a customer since April 2012. Over the period from 24 January to 27 June 2013, HMRC identified nine invoices issued to Customer D in the total value of £105,589.40[1]. The smallest invoice was for a little under £4,000 and the largest was for £18,725. They were mostly in the £12,000-£15,000 range. HMRC were informed that £50,590 was received in cash in respect of these invoices. The appellant held a VIES VAT number validation printout from the European Commission website in the name of Customer D and a copy of a Polish passport for another individual with the

[1] This figure reflects a £500 arithmetical error on the part of HMRC. The true figure was £106,089.90, as shown in the Appendix. This £500 error was carried through into HMRC's calculation of the cash payments received from Customer D (which they counted as £50,090 rather than £50,590 when assessing "culpable turnover"). See also para [19] below.

same surname (who, we were informed, is Customer D's father who sometimes collects the loads for him). The appellant provided at the hearing a spreadsheet showing the invoices and payments for Customer D, a summary of which is appended at the end of this decision.

The penalty and the appeal

19. On 14 March 2014, officer Kenning wrote to the appellant notifying her intention to impose a penalty. She had identified "culpable turnover" of £102,633 (comprising all the cash payments referred to at [18] above, though she had excluded the £7 "overpaid" in cash on one invoice, and also made an arithmetical error which reduced the culpable turnover figure by a further £500). In accordance with HMRC's published guidance, she said a penalty of £25,526.60 was intended. This was made up of a "fixed starting penalty" of £5,000 and an additional penalty of £20,526.60, calculated at 20% of the culpable turnover. No reduction was proposed by way of mitigation because she considered the appellant to be guilty of "continued breaches" despite three anti-money laundering inspections and a clear and specific warning letter following the most recent of them.

20. In the letter dated 14 March 2014, officer Kenning specified five specific areas which she considered justified the penalty. These were:

(1) Regulation 20(1) MLR's – failure to establish and maintain appropriate and risk-sensitive policies and procedures relating to:

- customer due diligence
- reporting
- record-keeping
- internal control
- risk assessment and management
- the monitoring and management of compliance with, and the internal communication of, such policies and procedures.

(2) Regulation 20(2) MLR's - consequent failure to include policies and procedures providing for the identification and scrutiny of:

- complex or unusually large transactions
- unusual patterns of transactions which have no apparent economic or visible lawful purpose
- any other activity regarded as particularly likely by its nature to be related to money laundering or terrorist financing.

(3) Regulation 21 MLR's – failure to take appropriate measures so that all relevant employees are:

- made aware of the law relating to money laundering and terrorist financing

- regularly given training in how to recognise and deal with transactions and other activities which may be related to money laundering or terrorist financing.

(4) Regulation 7 MLR's – failure to apply customer due diligence measures at other appropriate times to customers on a risk sensitive basis.

(5) Regulation 14(1) MLR's – failure to apply on a risk sensitive basis enhanced customer due diligence measures and enhanced ongoing monitoring in any other situation which by its nature can present a higher risk of money laundering or terrorist financing.

21. The appellant replied to officer Kenning's letter with a letter dated 9 April 2014. Whilst recognising that "more needs to be done as per regulations and enhanced training for staff", it pointed out that there were only five staff involved in the wholesale selling of products to customers. In view of its long-standing relationships with customers, and the fact that it was generally the appellant's requirement for the customer to pay cash, the risk was considered to be small. Such transactions were routine, and not suspicious. Various further steps had also been taken to improve the appellant's compliance since HMRC's visit, and these were outlined in the letter.

22. Officer Kenning did not consider anything in the appellant's response merited a change to her original view and therefore raised the penalty as originally envisaged, notifying it to the appellant by letter dated 14 May 2014.

23. The appellant submitted a letter of appeal dated 4 June 2014, asking HMRC to review their penalty decision. Whilst accepting that "our efforts to implement fully the money laundering procedures may have fallen short of the required standard", it was submitted that the penalty was not "fair and commensurate with the degree of failure". Attention was drawn to the bona fide efforts to improve compliance which had taken place since the visit, and issue was taken with the level of "culpable turnover" identified by HMRC (we will return to this point later).

24. HMRC carried out a statutory review and on 30 July 2014 issued their confirmation that the original decision was upheld. The appellant notified its appeal to the Tribunal by notice of appeal dated 18 August 2014, received 21 August 2014.

The law

Introduction

25. The MLR's represent the UK's implementation of Directive 2005/60/EC on the Prevention of the use of the Financial System for the purpose of Money Laundering and Terrorist Financing ("the Directive"). There was no argument that the MLR's are defective in any way in such implementation, so we do not consider that point further.

26. It is common ground that the appellant has acted as a "high value dealer" for the purposes of the MLR's, defined as meaning "a firm[2] or sole trader who by way of business trades in goods (including an auctioneer dealing in goods), when he receives, in respect of any transaction, a payment or payments in cash of at least EUR 15,000 in total, whether the transaction is executed in a single operation or in several operations which appear to be linked" (Regulation 3(12) MLR's). This provision derives from Article 2.1(3)(e) of the Directive, which refers to "other natural or legal persons trading in goods, only to the extent that payments are made in cash in an amount of EUR 15,000 or more, whether the transaction is executed in a single operation or in several operations which appear to be linked".

Regulation 7 MLR's

27. Regulation 7 of the MLR's provides (so far as relevant in this case) as follows:

> "(1) … a relevant person[3] must apply customer due diligence measures when he –
>
> > (a) establishes a business relationship;
> >
> > (b) carries out an occasional transaction…
> >
> > …
>
> (2) … a relevant person must also apply customer due diligence measures at other appropriate times to existing customers on a risk-sensitive basis.
>
> (3) A relevant person must –
>
> > (a) determine the extent of customer due diligence measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction; and
> >
> > (b) be able to demonstrate to his supervisory authority that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing."

28. "Customer due diligence measures" are defined in regulation 5 of the MLR's as follows:

> "(a) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;

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[2] Somewhat unusually, "firm" is defined in the MLR's as "any entity, whether or not a legal person, that is not an individual and includes a body corporate and a partnership or other unincorporated association"; for these purposes, "firm" therefore includes a company such as the appellant.

[3] This includes high value dealers – see Regulations 2(1), 3(1)(g) and 3(12) MLR's

> (b) 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, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement; and
>
> (c) obtaining information on the purpose and intended nature of the business relationship."

29. "Business relationship" means "a business, professional or commercial relationship between a relevant person and a customer, which is expected by the relevant person, at the time when contact is established, to have an element of duration".[4]

30. "Occasional transaction" means "a transaction (carried out other than as part of a business relationship) amounting to 15,000 euro or more, whether the transaction is carried out in a single operation or several operations which appear to be linked".

31. Regulation 7 therefore requires the relevant person to make a judgement, when contact with the customer is first established, as to whether there will be "an element of duration" to the relationship. If he considers that there will, then he is obliged to carry out customer due diligence straightaway. If he does not, then the obligation only arises as and when he carries out an "occasional transaction".

32. On a strict reading of the definition of "high value dealer", it could be said that a person only falls within the definition when he actually receives a cash payment of at least €15,000 in respect of any one transaction. That, therefore, is the point at which he becomes a "relevant person" and accordingly subject to all the requirements of the MLR's. On the assumption that contact with the customer is established (and therefore the "business relationship" arises) before any such cash payment passes, it could well be argued that a person who intends to become (but is not yet) a high value dealer by receiving large cash payments cannot, *a fortiori*, be required to carry out customer due diligence when establishing a "business relationship". If that argument were correct, such a trader would effectively be required to apply customer due diligence measures (on an "occasional transaction" basis), every time he received a cash payment or payments of at least €15,000 in respect of a transaction (whether "executed in a single operation or in several operations which appear to be linked"). That result would appear to fly in the face of common sense, and HMRC have not sought to press this interpretation; we therefore proceed on the basis that initial customer due diligence at the outset of the relationship, followed by periodic refreshment on a "risk-sensitive" basis during the course of the relationship, would satisfy the requirements of Regulation 7 of the MLR's.

[4] see Regulation 2(1) MLR's

Regulation 14 MLR's

33. Regulation 14 MLR's (entitled "enhanced customer due diligence and ongoing monitoring") provides, so far as relevant to this appeal, as follows:

> "(1) a relevant person must apply on a risk-sensitive basis enhanced customer due diligence measures and enhanced ongoing monitoring –
>
> > (a) in accordance with paragraphs (2) to (4);
> >
> > (b) in any other situation which by its nature can present a higher risk of money laundering or terrorist financing.
>
> (2) where the customer has not been physically present for identification purposes, a relevant person must take specific and adequate measures to compensate for the higher risk, for example, by applying one or more of the following measures –
>
> > (a) ensuring that the customer's identity is established by additional documents, data or information;
> >
> > (b) supplementary measures to verify or certify the documents supplied, or requiring confirmatory certification by a credit or financial institution which is subject to the money laundering directive;
> >
> > (c) ensuring that the first payment is carried out through an account opened in the customer's name with a credit institution."

Regulation 20 MLR's

34. Regulation 20 of the MLR's provides, so far as relevant, as follows:

> "(1) A relevant person must establish and maintain appropriate and risk-sensitive policies and procedures relating to –
>
> > (a) customer due diligence measures and ongoing monitoring;
> >
> > (b) reporting;
> >
> > (c) record-keeping;
> >
> > (d) internal control;
> >
> > (e) risk assessment and management;
> >
> > (f) 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."

35. Regulation 21 of the MLR's provides as follows:

> "A relevant person must take appropriate measures so that all relevant employees of his are –
>
> (a) made aware of the law relating to money laundering and terrorist financing; and
>
> (b) regularly given training in how to recognise and deal with transactions and other activities which may be related to money laundering or terrorist financing."

36. Regulations 42 and 43 of the MLR's provide, so far as relevant, 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 (except an auction platform) who fails to comply with any requirement in regulation 7(1), (2) or (3), … 14(1), … 20(1)… 21…
>
> (1C) In paragraphs (1)… "appropriate" means effective, proportionate and dissuasive.
>
> …
>
> **43 Appeals against decisions of the Commissioners**
>
> (1) This regulation applies to decisions of the Commissioners[5] 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.
>
> (3) The provisions of Part 5 of the Value Added Tax Act 1994 (appeals), subject to the modifications set out in paragraph 1 of Schedule 5 to these Regulations, apply in respect of appeals to a tribunal made under this regulation as they apply in respect of appeals made to the tribunal under section 83 (appeals) of that Act.
>
> (4) A tribunal hearing an appeal under paragraph (2) has the power to –
>
> (a) quash or vary any decision of the supervisory authority[6], including the power to reduce any penalty to such amount (including nil) as it thinks proper, and

[5] I.e. HMRC – see Regulation 2(1)

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

…"

Submissions of the parties

37. As the appellant admitted that it had not fully complied with its obligations under the MLR's, argument revolved around the extent of the non-compliance and the appropriateness of the penalty imposed.

HMRC

38. On behalf of HMRC, Ms Vicary submitted that the appellant had demonstrated a near complete disregard for the numerous warnings it had received from previous visits, including the very clear warning after the November 2012 visit that penalties would be considered if the failures continued. Its attitude appeared to be that its normal trade included a requirement on occasion for significant cash payments, and that accordingly such payments were routine and entirely unsuspicious, effectively outside the scope of the money laundering requirements altogether. It had no formal systems in place to monitor cash payments, which was not only a breach in itself but also rendered the appellant incapable of complying with its other obligations if one or two key individuals were for any reason not available. It had effectively left HMRC with no alternative but to impose a significant penalty in order to jolt it out of its complacency.

39. The amount of the penalty was calculated in accordance with HMRC's published guidance, as summarised at [19] above. The "penalty cap" referred to in HMRC's guidance had been considered, but did not operate to reduce the penalty in this case. Finally, in view of the repeated non-compliances of the appellant, it was entirely appropriate to apply no mitigation in arriving at the final penalty.

40. Ms Vicary accepted, in reply to a question from the Tribunal, that the Tribunal was not obliged to follow HMRC's guidance in forming its own view of an appropriate penalty (though it should, she submitted, find that guidance persuasive).

41. So far as the calculation of the "culpable turnover" was concerned, she submitted that there was no dispute about the cash sales to Customer A and Customer B. So far as Customer C was concerned, she invited us to find as a fact that the information given to HMRC at the visit (to the effect that all the payments were made in cash) was correct (as opposed to the version since put forward by the appellant, to the effect that only £8,300 out of the total payment of £19,800 was received in cash). We decline to do so – see [18(3)] above.

42. She also submitted that the cash payments to Customer D were all linked, as they arose either out of a running account kept with the customer (there was some indication to that effect on the invoices issued to him) or out of a series of transactions

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[6] For high value dealers, the supervisory authority is HMRC – see Regulations 2(1) and 23.

which ought to be regarded in any event as “linked”, in view of their frequency and the long standing customer relationship.

The appellant

43. On behalf of the appellant, Mr Thompson accepted that it had failed to comply with its obligations under the MLR’s, but in the overall circumstances of the case he submitted that the penalty was excessive.

44. So far as the calculation of “culpable turnover” was concerned, he accepted that the cash payments to Customer A and Customer B (as set out at [18(1) and 18(2)] above) should be included. These sums totalled £32,750.

45. So far as Customer C was concerned, he argued that the evidence of the entries on the bank statements showed that £11,500 had been received by way of direct bank transfer, and we accept his submission on this point (see above). Thus only £8,500 was received in cash, and though we were not provided in our bundles with any evidence of the £/€ exchange rate in October 2013, it is a matter of public record that at exchange rates prevailing at that time, £8,500 would have been well below the €15,000 threshold.

46. So far as Customer D was concerned, he submitted that each sale was an individual transaction; there was certainly a continuing business relationship with Customer D, but each transaction was a “one off” and there was no certainty that further transactions would take place. Thus each transaction should be considered in isolation, and the only cash payment (or combination of cash payments for a single transaction) above the €15,000 limit was the £14,390 paid on 27 June 2014 by Customer D.

47. Essentially, therefore, he was submitting that HMRC’s calculation of culpable turnover was excessive, the correct figure should be £47,140.

48. Nonetheless, even if the penalty were recalculated on the basis of this figure, we understood him to be arguing it would still be excessive.

Discussion and decision

Preliminary matters

49. It is clear the appellant accepts it was in breach of its obligations under the MLR’s. The extent of those breaches is disputed, in particular the amount of cash turnover which was placed at risk of money laundering by reason of the shortcomings in the appellant’s systems.

Linked transactions

50. There is one aspect of the wording of the MLR’s which would have caused us some difficulty if we considered it necessary to reach a final view on the amount of

"culpable turnover" which HMRC had used as the basis of calculating their penalty. This is the general area of "linked transactions".

51. The dealings with Customer D provide the most vivid illustration of the point. HMRC have taken the view that all nine sales to Customer D over the period from 24 January 2013 to 27 June 2013 should be aggregated as a single linked transaction for the purposes of the MLR's, resulting in the aggregate cash payments being considered as "culpable turnover".

52. Any foundation for this view can only, so far as we can see, derive from the wording of Regulation 3(12) MLR's, which defines a "high value dealer" as someone who:

> "receives, in respect of any transaction, a payment or payments in cash of at least 15,000 euros in total, whether the transaction is executed in a single operation or in several operations which appear to be linked".

53. This wording contemplates a single "transaction" which generates a cash payment of at least €15,000 and provides what is effectively an anti-avoidance provision to prevent the division of a single large transaction into smaller ones falling below the threshold. We doubt whether this can apply in a situation such as the present, where each purchase of stock appears to have been an entirely independent transaction, albeit in the context of an ongoing trading relationship. All the evidence we heard made it clear that each purchase was very much an independent transaction, initiated simply on the basis of what stock had been (or was about to be) received from the appellant's suppliers from time to time.

54. Because of the view we have taken of matters generally however, we do not need to reach a decided view on this point.

The scope of the Tribunal's jurisdiction

55. We note that the Tribunal's power on appeal includes "the power to reduce any penalty to such amount (including nil) as it thinks proper".

56. Whilst we regard HMRC's published guidance on calculation of penalties as providing a reasonable framework, it is in the nature of such documents that they cannot cater appropriately for every possible circumstance. We consider this to be a case in which it is appropriate to look beyond those guidelines in fixing an "effective, proportionate and dissuasive" penalty (which is the only legislative yardstick to be applied, as set out in Regulation 42(1C)).

Decision

57. We consider the non-compliance to have been careless rather than deliberate, and this, together with the amounts involved and the particular circumstances of the appellant's business, lead us to the view that a penalty of the size imposed by HMRC would certainly be excessive. In the circumstances of this case, we consider that a

penalty of £5,000 is the appropriate amount in accordance with Regulation 42(1C). We therefore reduce the penalty imposed by HMRC from £25,526 to £5,000.

Final observations

58. The appellant needs to engage actively with the need to overhaul its processes and procedures and take seriously the threat that its acceptance of cash (even in comparatively small amounts and largely at its own request) does offer an opportunity to prospective money launderers to which it needs to be alert. It should now be well aware that (for example) simply accepting a Europa VIES VAT registration confirmation at face value provides no protection against the hijacking or other improper use of that VAT number for illegal means; and it needs to take all appropriate steps to obtain, record, monitor and update its evidence of the identity of the individuals who control any company or other entity in relation to which it acts as a "high value dealer". We heard some evidence that the appellant is now taking this whole area much more seriously. HMRC have been quite clear in stating what needs to be done, and the appellant needs to carry out its obligations in full if it is to avoid further penalties and a much less sympathetic response to any appeal.

59. 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.

KEVIN POOLE

TRIBUNAL JUDGE

RELEASE DATE: 2 April 2015

Appendix

Summary of dealings with Customer D

Invoice No	Invoice Date	Invoice amount	Bank transfer amount	Bank transfer date	Cash amount	Cash date
779620	24/01/2013	£12,399.20	£10,000	21/01/2013	£2,400	24/01/2013
779625	01/02/2013	£8,600.00	-	-	£8,600	01/02/2013
779646	11/03/2013	£6,179.70	£4,000 & £3,000	01/02/2013 & 12/02/2013	-	-
779662	27/03/2013	£13,795.00	£5,500	27/02/13	£7,100	13/03/2013
779666	28/03/2013	£18,725.00	£10,000	19/03/2013	£9,100	28/03/2013
779671	11/04/2013	£3,996.00	£4,000	10/04/2013	-	-
779680	26/04/2013	£15,000.00	£10,000	23/04/2013	£5,000	26/04/2013
779696	17/05/2013	£13,003.00	£9,000	12/05/2013	£4,000	17/05/2013
779714	27/06/2013	£14,392.00	-	-	£14,390	27/06/2013
	TOTALS:	**£106,089.90**	**£55,500**		**£50,590**	