



**TC06778**

**Appeal number: TC/17/5726**

***INFORMATION NOTICE UNDER FA 2011 TO RELEVANT DATA  
HOLDER -whether solicitors' partnership a relevant data holder because of  
obligations under the money laundering regulations to keep records – no –  
whether such records are relevant data – no – appeal allowed***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**WILSONS SOLICITORS LLP**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE BARBARA MOSEDALE**

**Sitting in public at Taylor House, Rosebery Avenue, London on 24-25 September  
2018**

**Mr A Sutcliffe QC, instructed by DAC Beachcroft LLP, for the Appellant**

**Ms J Anderson, counsel, instructed by the General Counsel and Solicitor to HM  
Revenue and Customs, for the Respondents**

## DECISION

1. On 24 February 2017, HMRC issued the appellant partnership with a Notice under paragraph 1 of Schedule 23 to the Finance Act 2011 ('Sch 23'). The notice notified the appellant of its right of appeal, and the partnership appealed on 29 March 2017. HMRC offered a review and the appellant partnership accepted the offer; HMRC's review decision on 15 June 2017 upheld the notice. On 12 July 2017, the appellant lodged an appeal with this Tribunal.

### 10 **The notice**

2. The legislation allowed HMRC to require a relevant data-holder to provide relevant data. The notice given to Wilsons Solicitors LLP defined the partnership as the 'relevant data-holder' and defined the 'relevant data' as the data set out in its schedule. The Schedule read as follows:

15 In so far as you have, as a Trust or Company Service Provider (TCSP) within the meaning of regulation 3 of the Money Laundering Regulations 2007 (MLR), or where an agent acting on your behalf, been required to keep any records pursuant to regulation 19 of the MLR, I require you to give the particulars outlined below in your return.

20 Details of beneficial owners of offshore companies and persons who have beneficial interests in offshore partnerships, trusts and other like entities (anstalts, stiftungs, foundations and so on) where you, or an agent acting on your behalf, have or has provided services related to the formation of offshore companies, trusts and other entities or the creation of beneficial interests or the settling of funds in them for the whole period from 06/04/2013 to 05/04/2016 inclusive.

25 In respect of each offshore entity I require you to give the following particulars:

30 [there followed a list of details from the name of the person with the beneficial interest down to the value of the property settled]

Notwithstanding the terms of this notice, nothing within it should be taken as requiring any data protected by legal professional privilege.

Wilsons did not accept that it was a relevant data-holder or that it held relevant data.

### 35 **The legislation**

#### *The scope of the provision*

3. Section 86 of the Finance Act 2011 introduced the data-gathering powers for HMRC contained in Sch 23. The power was in ¶1:

40

## 1 Power to give notice

(1) An officer of Revenue and Customs may by notice in writing require a relevant data-holder to provide relevant data.

(2) Part 2 of this schedule sets out who is a relevant data-holder.

5 (3) In relation to a relevant data-holder, 'relevant data' means data of a kind specified for that type of data-holder in regulations made by the Treasury.

.....

4. ¶28 of Sch 23 gave a person the right of appeal on three grounds:

- 10 (a) It is unduly onerous to comply with the notice or requirement,  
(b) The data-holder is not a relevant data-holder, or  
(c) Data specified in the notice are not relevant data.

The appellant appealed on grounds (b) and (c): its position was that it was not a relevant data holder and the data requested was not relevant data.

15 *Provisions on 'relevant data-holder'*

5. As ¶1(2) stated, Part 2 of sch 23 set out who was a relevant data-holder. It did this by specifying some 20 types of activity (almost exclusively business activities) and then giving details on the extent to which someone carrying out that activity was a relevant data holder. I do not set out the provisions in full but the general scheme of  
20 Part 2 is relevant and so I will provide an outline of it.

6. The list of activities were:

- Salaries, fees, commissions etc  
Interest etc  
Income, assets etc belonging to others  
25 Merchant acquirers etc  
Providers of electronic stored-value payment services  
Business intermediaries  
Money service businesses  
Payments derived from securities  
30 Grants and subsidies out of public funds  
Licences, approvals etc  
Rent and other payments arising from land  
Dealing etc in securities  
Dealing in other property  
35 Lloyd's

- Investment plans etc
- Petroleum activities
- Insurance activities
- Chargeable soft drinks
- 5 Environmental activities
- Settlements
- Charities

7. Some of the provisions were very short; for instance, the one for charities (¶27) simply stated that ‘a charity is a relevant data-holder’. Other provisions were a little  
10 more detailed; for instance, ¶26 on settlements contained a definition of settlement and provided that the settlor, trustees, beneficiaries and ‘any other person to whom income is payable under a settlement’ was a relevant data-holder.

8. The provision which was the one relied on by HMRC to give the appellants the notice under appeal was in ¶17 ‘Licences, approvals etc’. That provided as follows:

15 **17 Licences, approvals etc**

(1) A person by whom licences or approvals are issued or a register is maintained is a relevant data-holder.

(2) ‘Register’ includes –

- (a) any record or list that a local authority maintains, and
- 20 (b) any record or list that any other person is required or permitted to maintain by or under an enactment.

9. This short provision was at the heart of the hearing. Was Wilsons Solicitors LLP a person by whom ‘a register is maintained’? If the partnership was not, it was not a relevant data-holder and it was not obliged to comply with the notice served by  
25 HMRC.

10. HMRC did not suggest that the appellant was a person who issued licences or approvals. HMRC’s position was that Wilsons maintained a register.

11. Both parties were agreed that ¶17 gave a partial definition of the word ‘register’ as it was stated to ‘include’ two types of ‘record or list’. It was HMRC’s case that  
30 Wilsons fell into (b) as maintaining records required by an enactment. The enactment was the Money Laundering Regulations 2007/2157 (‘MLR’) and in particular ¶19 of the MLR which required a person affected by the regulations to keep records.

12. The MLR were amended in 2017 but neither party suggested this was relevant: the records sought dated to before the amendments and so the records kept were kept  
35 under the 2009 MLR.

*The Money Laundering Regulations*

13. Both parties were agreed that Wilsons was required to keep records under the MLR. ¶3 of the MLR stated that it applied to, amongst others, ‘independent legal professionals’ and to ‘trust and company service providers’. Wilsons was an independent legal professional: I was told it did not necessarily accept it was a TCSP. There is little point in setting out the definitions since both parties were agreed that Wilsons was a ‘relevant person’ within the scope of the MLR.

14. ¶19 of the MLR provided:

**19 Record-keeping**

(1) subject to paragraph (4), a relevant person must keep the records specified in paragraph (2) for at least the period specified in paragraph (3).

(2) The records are –

(a) a copy of, or the references to, the evidence of the customer’s identity obtained pursuant to regulation 7,8,10,14 or 16(4);

(b) the supporting records (consisting of the original documents or copies) in respect of a business relationship or occasional transaction which is the subject of customer due diligence measures or ongoing monitoring

15. By ¶7 a relevant person was obliged to undertake due diligence measures at certain points; by ¶8 a relevant person was obliged to conduct ongoing monitoring of a business relationship. ¶5 defined what customer due diligence measures were.

16. In detail, ¶7 required a relevant person to undertaken due diligence when establishing a business relationship or when carrying out an occasional transaction, as well as on other occasions. ¶8 required ongoing monitoring which meant scrutinising transactions to ensure they were consistent with what the relevant person knew of its client and ‘keeping the documents, data or information obtained for the purpose of applying customer due diligence measures up-to-date’.

17. Due diligence measures were defined as:

(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;

(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.

From ¶7(3) it was clear that the extent of the due diligence measures would vary from client to client as it provided:

(3) A relevant person must –

- 5 (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.

10 18. I find, and I don't think it was in dispute, that Wilsons were, by the MLR, obliged to consider and keep copies of, in respect of every client, documents which proved identity and documents which evidenced the purpose and nature of the business relationship; the evidence kept for each client would vary depending on Wilson's perception of risk with respect to that client and the particular transaction  
15 concerned.

19. The dispute was whether the requirement to keep these MLR records meant that Wilsons was a relevant data-holder for Sch 23.

## **The evidence**

### *The witnesses*

20 20. The appellant relied on the witness evidence of 3 witnesses. HMRC accepted their evidence and they were not called for cross-examination. I will only briefly summarise their evidence as it was not really relevant to the issue I was called upon to determine, which was a matter of statutory construction of the applicable legislation.

25 21. Mr Michael Parker joined the appellant in 2001 and has been managing partner since 2014. His evidence was that, although the firm had two electronic databases which related to client affairs, the clients' files were still maintained in paper form and it would be difficult and time-consuming to ascertain which clients asked for advice in respect of offshore structures and thereby to comply with the notice.

30 22. Mr Alasdair Patch was the firm's director of IT. He has been employed by them for 22 years. His evidence was that the firm had two databases. One database recorded information on all the firm's clients and would ordinarily indicate what type of documents had been inspected and copies retained in respect of due diligence for money laundering obligations. The actual copy documents would either be held electronically in the second database, which held electronic copies of many  
35 communications to and from clients, or they would be held in paper form on the client's file.

23. His evidence also indicated that there would be no easy way of identifying which of Wilsons' clients sought advice on off-shore structures. Nor did Wilsons maintain a database comprising copies of the money laundering due diligence.

24. Mr Timothy Fullerlove joined the firm in 2006 and is now a partner in its Wills, Tax and Estate Planning department. His witness statement was given in response to what were perceived as allegations by Ms Akhurst, HMRC's witness.

25. I did not find Mr Patch's and Mr Parker's evidence relevant. Firstly, although it was possible to appeal a Sch 23 notice on the grounds it was too onerous to comply, Wilsons did not appeal the notice on that ground. Therefore, if I found that the firm was a relevant data-holder holding relevant data, then it would need to comply with the notice however onerous it was (see §4). Secondly, and more importantly, liability to the notice did not depend on how in practice Wilsons chose to hold the information, but whether any obligation to hold the information brought Wilsons within Sch 23.

26. The appellant considered Ms Akhurst's witness statement contained veiled allegations of improper behaviour by Wilsons Solicitors LLP. Counsel felt obliged to cross examine her in respect of them. In her cross-examination, Ms Akhurst made it clear that she made no such allegations. For this reason, Mr Fullerlove's witness statement was also irrelevant.

27. For the avoidance of any doubt, I do not see how there could be any proper criticism of Wilsons Solicitors LLP in appealing the notice they received, rather than immediately complying with it. They owe a duty of confidentiality to their clients: it is only if the notice was a proper notice in accordance with the legislation that that their duty of confidentiality would be overridden. It was Wilsons' right, and probably their duty to their clients, in circumstances where the law lacked clarity, to test whether the firm was obliged to give HMRC the information which HMRC sought.

28. Ms Akhurst was an officer in HMRC's Risk and Intelligence Service. I had no reason to doubt her factual evidence but was not really called to reach any firm conclusions on it as it was not relevant to the issues in the appeal. I do note that she thought Wilsons had accepted it was a TCSP, whereas Wilsons said they had disputed this: whether or not they had done so was not relevant, and I make no finding.

29. I did not accept Ms Akhurst's opinions on the correct interpretation of the law or on any other matter.

### 30 *Identification of other solicitors' firms who received similar notices*

30. Evidence given by Ms Akhurst in her witness statement, and confirmed in her cross-examination, and which I accept, was that HMRC had served notices on 9 other firms of solicitors. HMRC regarded the service of these ten notices as a sort of test run with a view to serving similar notices on much larger numbers of firms in the future. Her case was that 7 firms (not named by her) had complied with the notices, one (named) firm had made a nil return which HMRC had accepted, and another (named) firm had successfully appealed to HMRC on the basis that it was too onerous to comply. The tenth firm was Wilsons.

31. Wilsons had been in discussions with the Law Society over the notice. I was told that the Law Society was only aware of three notices being served, being the last

three above mentioned. In other words, the Law Society was not aware of the identify of any law firm which had actually provided data to HMRC under a Sch 23 notice.

32. In cross-examination, Ms Akhurst was asked to identify the seven firms which had complied with the notice. She stated she did not wish to answer and Ms  
5 Anderson said she ought not be required to answer because of (a) her duty of confidentiality as an officer of HMRC and (b) the answer was not relevant to the proceedings before the Tribunal.

33. Mr Sutcliffe's view was that the answer was material because Ms Akhurst's  
10 witness statement implied (in his view) that the Tribunal was being asked to draw adverse inferences about Wilsons' refusal to provide the information by making adverse comparisons with 'compliant' law firms, and so the appellant wanted to test whether it was actually correct for HMRC to say that some 7 law firms had complied with the notices.

34. Ms Anderson made it clear that HMRC were not asking the Tribunal to draw  
15 adverse inferences against Wilsons; for that reason, I ruled that the information was not relevant to the hearing and the witness did not need to answer the question. Nevertheless, I did not accept that Ms Akhurst's duty of confidentiality preventing her answering questions about other taxpayers. Had I considered the information relevant to this hearing, I would have required an answer.

20 *Wilson's nil return*

35. As well as appealing the notice, on 24 May 2017 Wilsons submitted a nil return to HMRC. The rationale for doing this was explained to me as being that Wilsons took the view that it was not a relevant data-holder therefore its return would be nil. Nothing turned on it in the hearing: it seemed accepted that if Wilsons lost this  
25 appeal, the nil return would have been incorrect as Wilsons had not undertaken any exercise to identify the information sought by HMRC. But if Wilsons win this appeal, strictly, it seems to me, no return would have been required at all.

### **Was Wilsons a relevant data-holder?**

36. Whether Wilsons was a relevant data-holder depended on whether it was 'a  
30 person by whom ... a register is maintained': ¶17(1) Sch 23 set out in full at §8 above. I will look at the meaning of both 'register' and 'maintained'.

### *Statutory interpretation of 'register'*

37. Both parties were agreed that I should look at the natural meaning of the word  
35 'register' in the context in which it was used. Neither party considered I would or should get any assistance from the ejusdem generis rule nor from the title to ¶17. Neither party had considered the explanatory notes to the legislation helpful, but they were produced when I asked to see them and I did find them of some relevance as explained below.



38. The appellant's case was that the natural meaning of the word 'register' was the same as or similar to that given by the Government on its website (*Gov.uk* under the government digital service headed 'The characteristics of a register'). The writer referred to a register as:

5 'the only authoritative list of a specific type of thing'

While the appellant did not necessarily agree with the writer's suggestion that each register contained unique information and could not duplicate information on another register, it did consider the writer was correct to describe a register as an 'authoritative list of a specific type of thing'. HMRC did not accept that any part of  
10 the definition was necessarily correct, and considered that the various restrictions the writer proposed on true registers were not inherent in the nature of a register; but their main point was that the definition, dictionary or otherwise, of a register was largely irrelevant because Parliament had defined 'register' in ¶17 and that was what mattered.

15 39. So I move on to consider the statutory definition of 'register'.

*Record or records – does the singular include the plural?*

40. The context of 'register' in ¶17 was that it was given a partial definition as 'record or list'. This was because ¶17(2) defined it as including a 'record or list' maintained by a local authority or by any other person if required or permitted to do  
20 so by legislation.

41. HMRC's point was that the MLR required the appellant to keep records. This was absolutely clear on the face of ¶19 of the MLR which referred to the obligation to 'keep the records'. A register, therefore, said HMRC, included any collection of records which a person was obliged or permitted to keep by an enactment.

25 42. The appellant did not agree. It said that an obligation to keep 'records', which it accepted the MLR gave it, was not the same as an obligation to maintain a 'record or list'.

43. HMRC's reply to this was that the Interpretation Act 1978 provided:

**S 6 Gender and number**

30 In any Act, unless the contrary intention appears, -

.....

(b) words in the singular include the plural and words in the plural include the singular.

35 A 'record', said HMRC, included 'records'. And the appellant accepted it was obliged by the MLR to keep records.

44. The appellant did not agree, however, that ¶17 referred to 'records' and pointed out that s 6(b) of the Interpretation Act only applied 'unless the contrary intention appeared'. It said a contrary intention was implicit. It relied on the authority of *R v*

*Home Secretary ex parte Atlantic Commercial* [1997] BCC 692 to show that a contrary intention can be implicit.

45. The *Atlantic Commercial* case concerned s5 of the Interpretation Act which provided that, unless the contrary intention appeared, words listed in Schedule 1 were to be construed as set out in that schedule; that schedule provided that a ‘person’ was to be construed as including a body of persons corporate or unincorporate. That was relevant in that case because the applicant company had applied for compensation for a miscarriage of justice, but the provisions which enabled the Home Secretary to pay ex gratia compensation were limited to payments to ‘a person’ wrongly convicted.

46. The Judge in that case held that the ex gratia provisions as a whole were inappropriate to govern a company; the provisions referred to a person being ‘pardoned’ or ‘dead’ or responsible for his own mistaken conviction. The Judge also took into account the forerunner convention which was more clearly limited to natural persons. He decided that there was implicit contrary intention, therefore Schedule 1 did not apply, and ‘person’ meant only natural persons.

47. Other than for the proposition that a contrary intention can be implicit, I agree with HMRC that little assistance can be gained from the case. The legislative scheme about ex gratia payments was very different to the one in this case. So the question is, was there a contrary intention implicit in ¶17 of Sch 23?

*Implicit contrary intention?*

48. It seems obvious to me that there is a contrary intention when the word which a party is seeking to read in the plural is part of a definition of a word in the singular. If a word in the singular is defined by reference to another word in the singular, it seems obvious that the drafters intended what they said: it would only be legitimate to read the defining terms in the plural if the word defined was also plural.

49. It is implicit in defining a word in the singular by another word in the singular that more than one of the defining thing is more than one of the thing defined. Anything else is illogical and ungrammatical. For instance, take Group 1 of Sch 8 Value Added Tax Act which at item no (2) gives a partial definition of ‘animal’ as:

‘animal’ includes bird.....

50. While ‘animals’ include ‘birds’, ‘animal’ does not include ‘birds’. I’m not aware that anything turns on this in practice, but the drafter cannot have intended that a single animal could comprise several birds.

51. So it seems to me that where a word appears in a definition, grammar and logic means that the contrary intention must be implicit: so in ¶17, if a register includes a record, the drafter must have intended that each record is a register. So a register = a record, and registers = records, but it is not true to say ‘a register’ is the equivalent of ‘records’.

52. So it follows that ¶17 would apply as much to a person or body which kept registers as it would apply to a person or body who only kept one register. A person who keeps two ‘records or lists’ is therefore a person who keeps two ‘registers’. But a person who keeps one ‘record or list’ is a person who keeps one ‘register’. And a person who keeps ‘records’ is not a person within §17 unless it is appropriate to see every record kept as an individual register.

53. In conclusion, I do not agree with HMRC that ‘register’ includes ‘records’. However, I do have to consider the possibility that every record kept under the MLR could be a register under §17. What exactly did Parliament mean when they defined a register as a ‘record or list’?

*The meaning of ‘register’*

54. HMRC point out that the meaning of ‘register’ must be wider than merely a list because it is defined as including ‘record or list’. Record must mean something other than list because why else include that word in the definition? While I do not disagree with this, it seems to me that ‘record’ could mean a type of register than was not simply a list; it does not require it to mean ‘records’ in the sense of all and any type of documents recording some kind of information.

*The wider context – register rendered otiose?*

55. That grammatical reading of §17 is also in my view supported by the wider context. Why use the limiting word ‘register’ if what Parliament meant was the much larger term ‘records’? Many persons are required to keep records. For instance, all taxpayers must keep tax records. Rather fewer are required or permitted to compile a register.

56. It is not a natural use of language to refer to ‘records’ in the general sense, such as used in the MLR, as a register or registers.

57. As Mr Sutcliffe pointed out, HMRC’s definition of ‘register’ as including all ‘records’ made the use of the word ‘register’ completely otiose. ¶17 could have had the same meaning as contended by HMRC if it had been drafted to say:

**17 Licences, approvals etc**

(1) A person by whom licences or approvals are issued or ~~a register is maintained~~ records are kept is a relevant data-holder.

58. The only sense that could be made of the drafter’s use of the word ‘register’ is that it was intended to give a meaning that was narrower than ‘records’.

*The wider context – the true meaning of ‘records’?*

59. If HMRC were right, a register was any records that a person was required or permitted to keep. All taxpayers are required to keep records by statute: that would make all taxpayers relevant data-holders and all liable to receive notices under Sch 23

(save of course such notices could not be used in respect of the taxpayer's own tax affairs). No doubt there are many other classes of person required or permitted to keep records.

5 60. If such an interpretation was correct, it would make ¶17 of Sch 23 rather inconsistent with Sch 23 as a whole. As the appellant pointed out, Sch 23 contains a detailed, specific list of the person who can be the subject of a Sch 23 notice (see §6 above). It would be odd to have such a general category tucked 2/3rds of the way down such a specific list. Moreover, some of the categories would appear redundant as they would be subsumed within the category of record-holders under ¶17 if HMRC  
10 were correct.

61. Moreover, if 'register' meant 'records', it would be odd for this to be the tail-piece of ¶17. The 'register' category would be of much wider scope than persons granting licence and approvals, so why would the drafter put 'register' holders in third place?

15 62. While I do not put too much weight on this (see §37), the title 'Licences, Approvals, etc' seems inconsistent with HMRC's reading of 'register'. If ¶17 was really intended to apply to any person required to keep records, surely this, as the most significant part of ¶17, would be reflected in the title, perhaps as 'holders of records'?

20 63. Moreover, 'register' is third in the list; the other two being licences and approvals. The ordinary ejusdem generis rule would suggest that the meaning of 'register' would be coloured by 'licences' and approvals'. Even if this is (as both parties agreed) a weak rule of statutory interpretation, it is nevertheless consistent with the appellant's case and what I have said at §60 and inconsistent with HMRC's  
25 case that 'register' has nothing to do with licences and lists of approvals or lists generally but is about the keeping of records.

#### *Maintenance of register*

30 64. ¶17 is clear that a register must be 'maintained': it only applies where a register is maintained; the partial definition refers only to a record or list which is maintained by a local authority or compulsorily or permissibly maintained by someone else.

65. So the only register to which ¶17 applies is one which is 'maintained.' The appellant referred to the dictionary definition of 'maintain' as being 'to keep up, preserve, cause to continue in being'. It suggested that in the context of a register, the word meant something like 'kept up to date' rather than merely 'preserved'; HMRC  
35 considered 'maintain' only meant to preserve and not destroy and did not imply any obligation to keep it up to date.

40 66. I agree with the appellant, however, that the natural meaning of maintaining a register is in the sense of 'keep up' or 'keep up to date'. A car which is maintained is one kept in running order and not one simply stored away, preserved, in a garage. A register which is maintained is one kept current for continued use. So I consider the

ordinary meaning of ‘maintained’ in the context of a register is a register which is kept up to date.

67. HMRC’s next point was that even if ‘maintained’ meant kept up to date, the MLR required Wilsons to keep their MLR records up to date. The MLR (Regulation 8) required a relevant person to conduct ongoing monitoring of their business relationship and, as part of that, to

‘keep the documents, data or information obtained for the purpose of applying customer due diligence measures up to date’ (Reg 8(2)(b)).

68. The appellant was keen to emphasise that this obligation to keep their due diligence records up to date ceased when the transaction was completed. They saw this as incompatible with the keeping of a register which was implicitly meant to be a reliable list; maintaining a register, said the appellant, implied an on-going obligation to make sure it was right.

69. HMRC’s point was that there was an obligation to keep the MLR records up to date for a period and they did not think it inherent in the word maintain that a register or record was kept up to date forever.

70. I do not think that the length of time records must be kept under the MLR is significant: the significance is in the nature of the obligation to ‘keep’ compared with the obligation to ‘maintain’. ‘Records’ implies something that is accurate at the time reported; it does not imply that it is updated. But maintaining a register does imply something that may change over time. While the MLR does require the relevant person to keep their due diligence records up to date, the implication is that the law firm is required to acquire newer, more up to date due diligence records and not alter the ones already in their possession: indeed the obligation to ‘keep’ records (MLR ¶19(1)) implies that they should be kept unaltered. So as time goes by, the law firm will add to its existing due diligence records for any particular client but it will not destroy or alter the ones acquired when it undertook earlier due diligence exercises for that client; on the contrary it will continue to keep each individual record unaltered in accordance with its obligation under ¶19(1).

71. More simply, the ‘keep’ in Reg 8 of MLR refers to preserving unaltered records; the ‘maintain’ in ¶17 of Sch 23 refers to updating a record by changing it as and when required.

72. I have interpreted ‘maintenance’ from the context in which it is used: it is used in the context of ‘register’. Maintaining a register is, as I have said, quite a different concept to preserving records. So if Parliament had really intended ‘register’ to mean ‘records’ it is very strange that they used the term ‘maintained’ which makes sense when paired with ‘register’ but less sense when paired with ‘records’. It is a more natural use of language to say records are kept, not maintained.

*Wider context of Sch 23 - Failure to exclude LPP and failure to include law firms?*

73. Sch 23 contained no exclusion for legally privileged ('LPP') material. Nevertheless, HMRC had chosen to exclude LPP material from the notice: see the last paragraph of the notice cited at §2 above. The appellant's view was that virtually all the information required by HMRC under the notice was subject to LPP: HMRC's view was that very little was likely to be properly subject to LPP. I was not asked to resolve this dispute. My jurisdiction was to determine whether Wilsons was a relevant data-holder and the information sought relevant data: it was not to determine if the material sought was subject to LPP.

74. The appellant considered LPP relevant to what I did have jurisdiction to decide. Its point was that Sch 23 did not contain an exclusion for information protected by legal professional privilege ('LPP'), although even HMRC did not suggest that the government intended such information to be disclosable under Sch 23. The appellant presumes it was for that reason HMRC excluded LPP material from the notice issued to Wilsons.

75. The appellant's point was that the failure to exclude LPP material from the ambit of Sch 23 is an indication that Parliament never intended Sch 23 to cover material which could potentially be LPP. Moreover, regulations such as the MLR are specifically stated to apply to law firms (see §13), but there is no such category in Sch 23. Therefore, reasoned the appellant, it was unlikely Parliament intended law firms as such to be subject to Sch 23. Yet if HMRC are right, all law firms are subject to Sch 23 as all law firms are subject to the MLR in respect of their clients.

76. HMRC did not agree: its point was that record holders was a much wider group than merely law firms so, on their reading of §17, there was no need to single out law firms.

77. I don't think that this point is particularly decisive one way or the other: the really significant point is that Sch 23 applies to a person required to maintain a register and the MLR does not require law firms to maintain a register.

*Explanatory Notes.*

78. Neither party came prepared to make submissions on the explanatory notes to the FA 2011. However, as I have said, when I asked about them, I was shown them. The only even potentially relevant explanatory note was in relation to ¶17 and it said:

'Paragraph 17 is based on the data-holders in s 18A(2) of TMA. To avoid disputes over the meaning of the term 'register' a new definition is inserted'.

79. S 18A TMA was the forerunner to Sch 23 FA 11 and was very much more limited. It applied to grantors of licences and approvals and maintainers of registers and very little else. In respect of those persons it provided:

(2) Any person by whom licences or approvals are issued or a register is maintained shall, on being so required by a notice given to him by an inspector, furnish to the inspector, within the time limited by the notice—

- 5 (a) the name and address of any person who is or has been the holder of a licence or approval issued by the first-mentioned person, or to whom an entry in that register relates or related; and
- (b) particulars of the licence or entry.
- 10 (3) the persons to whom this section applies include any department of the Crown, any public or local authority and any other public body.

80. In so far as the Explanatory Notes carry any weight, it is clear that ¶17 was not intended to be a wholesale departure from s 18(2): the Notes say ¶17 is ‘based’ on s 18(2). Moreover, the newly inserted definition of ‘register’ is said to be there to ‘avoid disputes’ over the meaning; it is not stated to be there to enormously expand the meaning of ‘register’ over what it had been before, when there was no definition as ‘record or list’.

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81. My conclusion is that the Explanatory Notes support the appellant’s case and my reading of ¶17. The word ‘register’ was used because Parliament had in mind some sort of register, being a kind of record which would list persons or things which met criteria. A ‘register’ is not actually a ‘licence’ or ‘approval’ but it is something akin to them. The Explanatory Notes would not read as they do if Parliament’s intention was that a relevant data holder under ¶17 would include everyone who was obliged to keep any records of any type. Instead, the Notes would have explained that the intention was to go well beyond the normal scope of the word ‘register’ and that ¶17 was not intended to be based on s 18(2) TMA which was limited to licences, approvals and registers.

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#### *Conclusion on meaning of ‘register’*

82. A ‘register’ does not mean ‘records’. As ‘register’ is defined as a ‘record or list’, it is implicit that every ‘record’ referred to must be a register by itself. The MLR obliges a relevant person such as Wilsons to keep records; that is not an obligation to maintain a register unless it can be said that every record is a register.

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83. From my understanding of the natural meaning of words used in ¶17, it is clear to me that ‘register’ does not simply mean any record; although it is defined as including ‘record or list’, it must be something that is maintained rather than merely preserved, so while the meaning of ‘record’ in this context cannot be precisely the same as ‘list’ or ‘register’ the context does imply that the meaning of ‘register’ is more limited than simply one document in a collection of any type of ‘records’. It is implicit from the use of the words ‘register’ and ‘maintain’ that each ‘record or list’ should comprise a series of names or items which currently meet specified criteria for that particular record or list.

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84. The obligation to keep copies of documents which evidence due diligence on clients is an obligation to keep (in the sense of preserve) records. But an obligation to

5 keep (in the sense of preserve) records, which evidence a particular state of affairs, is not the same as an obligation to maintain (in the sense of keep up) a register, which records the names of persons or things meeting its criteria. It follows that its obligations under the MLR do not make Wilsons a relevant data-holder under ¶17 of Sch 23.

### Relevant data

85. Having reached that conclusion, I do not need to consider whether the notice applied to relevant data, but I make a few comments in case this matter goes higher.

86. The Act does not define ‘relevant data’. It provides in Sch 23 that

10                   ‘(3) In relation to a relevant data-holder, ‘relevant data’ means data of a kind specified for that type of data-holder in regulations made by the Treasury.’

87. The Treasury made regulations: the Relevant Data Regulations 2012. Those regulations defined ‘relevant data’ for ¶17 as follows:

15                   [15] the relevant data for a data-holder of the type described in paragraph 17 of Schedule 23 are-

(a) the name and address of anyone who is or has been the holder of a licence or approval or to whom an entry in the register relates or related;

20                   (b) particulars of the licence, approval or entry;

(c) information relating to any application for such a licence approval or for entry on that register.

25 88. HMRC’s interpretation is inconsistent with ‘relevant data’ as defined here because they are not seeking a copy of an entry on a register: they are seeking copies of records held by the appellant. The records HMRC wants are those kept in relation to clients who have sought advice on offshore structures: yet those clients’ names have not been entered into a register; as there is no such entry, there can be no particulars in relation to it; nor was there any application to be entered into such non-existent register and so no information could relate to such a non-existent application.

30 89. HMRC’s answer to this is that ‘register’ should be read as ‘records’, reading records in the sense of including records of client-vetting material kept under the MLR. But that does not really help. Those records are copies of information provided by the clients. There is no entry into such records; therefore, they can be no particulars in relation to it; nor was there an application to be entered into the records.

35 90. In conclusion, HMRC’s interpretation requires violation to be done to the wording and meaning of ¶15 of the Regulations if it is to be taking as meaning that Wilsons must hand over copies of the records kept under the MLR to evidence their due diligence undertaken on their clients. HMRC’s interpretation involves a most unnatural reading of ¶15 of the Relevant Data Regulations.



91. I do not think that such an unnatural interpretation can be given to ¶15. Therefore, even if I had been satisfied that Wilsons was a relevant data-holder in relation to its clients because of its MLR obligations, I would not be satisfied that Wilsons held any relevant data as defined in the Regulations. The notice would therefore have to be discharged on this ground too.

92. I comment in passing that it is obvious from how ¶15 of the Relevant Data Regulations is worded that the author of the Regulations read ¶17 of the Sch 23 in the same way that I have read it as summarised above at §§82-84. However, I also accept that that does not in any way support my reading of ¶17 of Sch 23 because it is not legitimate to interpret a statute by referring to how it has been interpreted in a statutory instrument.

**Conclusion**

93. The appeal against the notice is allowed. The MLR do not make Wilsons a relevant data-holder nor do the records held under its MLR obligations amount to ‘relevant data’ under Sch 23 Finance Act 2011.

94. HMRC asked for the notice to be varied if I found it to be incorrect: but I have found it to be wholly incorrect for the above reasons and incapable of being varied. It is simply invalid.

95. 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.

**BARBARA MOSEDALE  
TRIBUNAL JUDGE**

**RELEASE DATE: 22 October 2018**