



TC02296

Appeal number: TC2011/09646

Penalty. Reliance upon accountant. AB v HMRC [2007] STC 99 and Wald v HMRC [2011] UKFTT 183 explained and reconciled.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MICHAEL ANDERSON LITHGOW

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE GERAIN T JONES Q.C.

The Tribunal first determined the appeal on 06 June 2012 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 11 November 2011 and HMRC's Statement of Case submitted on 18 January 2012. The Appellant has now requested full written reasons.

1. The appellant, Mr Lithgow, entrusted the task of filing his tax returns to his agent, Mr Gerard Mone, who trades as GM Accounting Limited.
2. His agent, for whatever reason, failed to file the appellant's tax return for 2009/2010 until 7 December 2011. HMRC says that it returned that tax return to the appellant because it was "deemed incomplete". HMRC alleges that it remains outstanding. Whilst I need not decide that issue, if a tax return was filed, then it is not for HMRC to decide to reject it, albeit that it may require further information in respect of any missing detail.
3. HMRC has issued two late filing penalties, each in the sum of £100.
4. This appeal has been put on the basis that the appellant's agent, Mr Mone, or, more properly, GM Accounting Ltd, was unable to make the necessary filing on time because of various issues of ill-health, including terminal leukaemia suffered by Mr Mone's elderly father. Mr Mone says that he runs a small one man accountancy practice, with no employees. Thus, he says, when he cannot give his personal attention to his client's affairs, they simply do not get dealt with.
5. Whilst I can sympathise with the predicament in which Mr Mone found himself, the issue that I have to decide is whether the appellant (not Mr Mone) had a reasonable excuse for not filing on time. That requires an excuse to be put forward which, when judged objectively, can be said to be reasonable; no more, no less.
6. Whilst an excuse has been put forward I cannot take the view that the failings of a professional agent can ordinarily be considered objectively reasonable as an excuse. If that was the position, then professional agents would be able to ignore deadlines for filing or undertaking other tasks safe in the knowledge that their clients could not be penalised because the clients would simply point to the failings of their various professional agents.
7. The appellant could, and in my judgement should, have instructed his accountant to make the filing by the deadline and, if advised that his agent was unable to comply with the construction, to have made alternative arrangements.
8. The decision of this Tribunal in *Wald v HMRC [2011] UKFTT 183 (TC)* at paragraph 15 of that Determination sets out that an appellant will remain responsible if there are errors in the tax return due to the negligence of his retained accountant whilst acting on his behalf. The Tribunal points out that it may well be that the taxpayer has some recourse against the accountant; but that is a separate matter.
9. I also refer to the decision of the Tribunal in *AB v HMRC [2007] STC (SCD) 99*, a case involving complicated facts concerning the deductibility of various expenses when computing profits. However, for present purposes the case also involved the issue of penalties in respect whereof the Tribunal (Sir Stephen Oliver QC and Dr. N. Brice) held that :
10. *"105. We are of the view that the question whether a taxpayer has engaged in negligent conduct is a question of fact in each case. We should take the words of the statute as we find them and not try to articulate principles which could restrict the application of the statutory words. However, we accept that negligent conduct amounts to more than just being wrong, or taking a different view from the Revenue. We also accept that a taxpayer who takes proper*

and appropriate professional advice with a view to ensuring that his tax return is correct, and acts in accordance with that advice (if it is not obviously wrong), would not have engaged in negligent conduct.”

11. I consider the approach taken in *AB* to be the correct approach. A taxpayer is only liable to a penalty if he has been negligent. There are few who would gainsay the proposition that tax law can be complicated and difficult for taxpayers to understand and, thus, it is only to be expected that, from time to time, taxpayers will resort to professional advice. The purpose of resorting to professional advice is that one normally expects to be able to rely upon it, whether that professional advice is taken from a lawyer, an accountant or a medical practitioner. We consider it difficult to understand how a taxpayer can be negligent if, perceiving the need for professional advice on a matter of difficulty or in a situation where the taxpayer is in doubt as to the proper approach to be taken, he then seeks, and relies upon properly considered professional advice.

12. In my judgement, if the advice of a professional, in the sphere of tax matters usually an accountant, is negligently provided, that negligence is not to be imputed to the taxpayer. The question is whether the taxpayer was negligent. He cannot be principally or vicariously liable for the negligence of his professional adviser unless the factual circumstances in which the advice is given indicate that a matter is fraught with difficulty and doubt, with the professional adviser giving no more than his honest opinion about which side of a sometimes difficult line, the facts of a particular case happen to fall. It is contrary to the very notion of negligence (that is, a failure to take reasonable care) that the person who perceives there to be doubt or difficulty and then sets out to take the advice of a professional person whom he believes will be able to resolve that doubt or difficulty, can be said to be negligent if he then relies upon that properly provided advice (even if it turns out to be wrong).

13. Accordingly, I decline to follow the reasoning in paragraph 15 in *Wald*, as it seems to me to be counter-intuitive to speak about a taxpayer being negligent when he has placed his affairs in the hands of an accountant or sought specific advice on a specific matter and the professional adviser has then been negligent in providing that advice.

14. In my judgement, the two different decisions to which I have referred are properly reconcilable on this basis. If a taxpayer claims that his accountant has been negligent, for example, by failing to meet a deadline for filing a return or undertaking some or other administrative task, then the negligence of the accountant will not usually provide a defence to a penalty because the accountant is simply acting as the taxpayer's agent or functionary in filing the document that needs to be filed by a particular deadline. In other words, he is acting as an agent or functionary for his principal; but not as an independent professional adviser. However, in a situation where a professional adviser is not retained simply to act as a functionary, but is retained to give professional advice based upon the best of his skill and professional ability, he is not then a functionary or agent for his principal. He is a professional person acting under a retainer to give professional advice upon an identified issue. He is bound to provide that advice to the best of his professional skill and ability, whilst taking reasonable care in and about preparing and giving that advice. In other words, he is acting as a true professional, rather than as an agent or functionary.

15. In my judgement, where an accountant acts as an administrator or functionary, he is acting as the taxpayer's agent and his default (whether negligent or not) will usually provide a taxpayer with little opportunity to claim that he is not in default of a particular obligation. However, when a professional acts in a truly professional advisory capacity, the situation is

otherwise and reliance upon properly provided professional advice, absent reason to believe that it is wrong, unreliable or hedged about with substantial caveats, will usually lead to the conclusion that a taxpayer has not been negligent if he has taken and acted upon that advice.

16. This is a case where the accountant agent was a mere functionary. Accordingly the appeal must be dismissed.

17. 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.

**GERAINT JONES Q.C.
TRIBUNAL JUDGE**

RELEASE DATE: 3 October 2012

