



TC03039

Appeal number: TC/2012/10348

TYPE OF TAX – Income tax. Carelessness. Reasonable excuse. Reliance on a professional advisor. Wald v HMRC [2011] UKFTT 183 (TC) not followed. AB v HMRC [2007] STC (SCD) 99 followed and explained. No carelessness where taxpayer unaware of advisor’s carelessness/negligence - when advisor acts in a truly professional capacity and not as a mere functionary.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ELIZABETH MARINER

Appellant

- and -

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

**TRIBUNAL: JUDGE GERAINT JONES Q.C.
ANTHONY HUGHES ESQ.**

Sitting in public at Bedford Square, London on 12 September 2013.

Mr Embleton for the Appellant

**Mr Reeve, instructed by the General Counsel and Solicitor to HM Revenue and
Customs, for the Respondents**

DECISION

1. In respect of the fiscal year ended 5 April 2011 the appellant, Mrs Mariner, filed her tax return through the agency of her tax adviser, Faith in Finance Ltd (in the guise of Mr Embleton).
2. Subsequently the respondent issued a penalty in the sum of £434.94p alleging that the appellant had made a careless or negligent error which had resulted in an under payment of tax.
3. The appellant asked for a Review of that decision but the penalty was upheld on review. The appellant has now appealed to this Tribunal.
4. In her tax return the appellant declared income and outgoings in respect of real property. Once the appropriate calculations had been undertaken they revealed that the appellant had made a loss in respect of renting out that property. In her tax return she sought to set the loss against income earned from elsewhere.
5. It is now accepted that she was not entitled to do so.
6. Although the appellant accepts that there was a material inaccuracy in her tax return for the year ended 5 April 2011, in that she claimed to offset the loss in respect of rental income against earned income, the appellant denies that she was careless and says, in the alternative, that if there was a careless or negligent error in her tax return, she has a reasonable excuse in respect thereof.
7. The appellant gave evidence and her manuscript witness statement dated 12 September 2013 stood as her evidence in chief. We consider her to be an honest and reliable witness.
8. At this juncture it is relevant for us to point out that for the fiscal year ended 5 April 2010 the appellant, by her tax adviser, had similarly set a rental income loss against other income. On 29 July 2010 the respondent had written to the appellant's agent to state that the respondent considered that to be incorrect and inviting a voluntary amendment to the return. That resulted in an amendment to the assessment for that year. The appellant's agent replied on 29 November 2010 querying whether the respondent was correct in its assertion, whereafter the respondent replied by letter dated 27 January 2011 maintaining its assertion but also adding reasons in respect thereof. Correspondence continued with the appellant's agent demonstrating that he was not persuaded by the argument advanced by the respondent.
9. The appellant's tax return for the year ended 5 April 2011 was filed on 25 July 2011 and notwithstanding the correspondence that had taken place concerning the offset of the rental loss against other income for the year ended 5 April 2010, a similar offset appeared in the return for the year ended 5 April 2011. That resulted in an enquiry being opened on 02 April 2012; subsequent amendment of the return; and the penalty notice presently under appeal.

10. We accept and find as a fact that the appellant had entrusted the completion of her tax returns to her tax adviser and, having provided him with all relevant information, trusted in his expertise to declare the correct amount of income and to claim appropriate allowances or offsets.
- 5 11. This is where the nub of this appeal arises. It is the appellant's case that she relied upon her adviser who was engaged not as a mere functionary to fill-in forms for her and to dispatch them, but to provide professional advice and guidance on the appropriate tax treatment of differing heads of income, profit and loss.
- 10 12. The issue as it developed before us became whether the appellant, by entrusting the completion of her tax return to such a professional adviser, had or had not taken reasonable care in and about her tax affairs. On behalf of the respondent it was submitted that the appellant could not demonstrate taking such reasonable care, nor could she demonstrate any reasonable excuse, because her tax adviser had been in correspondence with the respondent (in respect of the tax year ended 5 April 2010) on
15 the very issue that has given rise to the penalty presently under appeal.
13. That is a powerful argument but it is not, in our judgement, determinative of this appeal. That is because it is not the state of mind or state of knowledge of the appellant's professional tax adviser that is in issue, but rather the state of mind or state of knowledge of the appellant herself.
- 20 14. Thus it was important that we received evidence on the issue of what, if anything, the appellant knew of the dispute that had been the subject of correspondence between her tax adviser and the respondent in respect of the year ended 5 April 2010. As Mr Reeve contended, if the appellant was aware of that dispute, then it may well not have been sufficient for her simply to say that she relied
25 upon her adviser regardless of the fact that she knew that the respondent was advancing a contention contrary to that being put forward by her adviser. It is Mr Reeve's case that in such circumstances an appellant ought to take steps to establish which contention is correct rather than placing blind faith in the expertise of her adviser. We found nothing in that submission with which to quarrel.
- 30 15. However, the factual issue for us relates to the state of knowledge or state of mind of the appellant. That is an important issue because, as mentioned above, the appellant's adviser, Mr Embleton, was not acting as a mere functionary but as a professional adviser upon whom the appellant relied and upon whom it was manifestly reasonable for her to place reliance. He held himself out as having
35 expertise in tax matters; he was paid for providing such expertise and advice; and so far as the appellant was concerned she had no reason to doubt the competence of his advice and expertise, unless she was aware of the dispute that had taken place in respect of the earlier tax year.
- 40 16. We heard evidence on that issue. The appellant's evidence was that she had no recollection of being shown, or having any discussion with Mr Embleton in respect of, the letter at page C1 in the respondent's bundle. She said that she had no recollection of the letter at C3 being discussed with her and that she had certainly not

5 seen the letter at C5 which, had she seen it, would have alerted her to the fact that there was a dispute between her adviser and the respondent. It was the appellant's evidence that it was only sometime in April 2012, after she received the letter dated 02 April 2012 at C9 that, for the first time, she became aware of the dispute between her adviser and the respondent. We accept her evidence as truthful and accurate.

10 17. We are in no doubt that it was incumbent upon Mr Embleton to draw his client's attention to the fact of the dispute concerning the tax return for the year ended 5 April 2010 and we are at a loss to understand why he failed to do so, unless he thought that because (in his mind) he was correct, there was little point in troubling his client with such an issue.

15 18. We have to be careful to distinguish between what may have been an inappropriate approach by Mr Embleton with carelessness on the part of the appellant and/or the absence of a reasonable excuse on the part of the appellant. In our judgement two matters arise in this case (i) the absence of carelessness and, (ii) in the alternative, the claimed reasonable excuse. Each relies upon the appellant placing reliance upon her retained professional adviser.

20 19. We refer to the decision of this Tribunal in *Wald v HMRC [2011] UKFTT 183 (TC)* which at paragraph 15 of the Determination sets out that an appellant will remain responsible if there are errors in a 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 that is a separate matter.

25 20. We 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 :

30 *"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*
35 *advice (if it is not obviously wrong), would not have engaged in negligent conduct."*

40 21. We 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, she then seeks and relies upon properly considered professional advice.

5 22. In our 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. She cannot be principally or vicariously liable for the negligence of her professional adviser unless
10 the factual circumstances in which the advice is given indicate that the 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 a need to take the advice of a professional person upon whom she believes she can properly
15 rely, can be said to be negligent if she then relies upon that properly provided advice (even if it turns out to be wrong). That principle applies regardless of whether the advice is given expressly or impliedly.

23. Accordingly, we decline to follow the reasoning in paragraph 15 in *Wald*, as it seems to us to be counter-intuitive to speak about a taxpayer being negligent when she
20 has placed her 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.

24. In our judgement, the two different decisions to which we have referred are properly reconcilable on this basis. If a taxpayer claims that his accountant has been
25 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 a mere agent or functionary for his
30 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 identified issues. He is
35 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.

25. In our judgement, where an accountant acts as a mere agent, administrator or functionary, he is acting as the taxpayer's agent and his default (whether negligent or
40 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 person 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 she has taken and acted upon that advice.

26. In our judgement it is not careless to rely upon a professional adviser who holds himself out as having appropriate expertise in and about a person's tax affairs and dealings with the respondent. The situation might be different if the appellant has reason to believe that her professional adviser may not be correct or that it is being contended that her adviser is not correct in his approach to the relevant tax affairs. But that, as we find as a fact, is not the present situation. The respondent has argued that a person is careless even if the negligence or carelessness is that, and only that, of the professional adviser even when that advisor is not acting as a mere functionary, but in a truly professional capacity. It is clear from what we say above that we reject that submission as wrong in law.

27. This is a case where the accountant agent was not a mere functionary. Accordingly the appeal must be allowed.

28. 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.

Decision.

Appeal allowed and penalty of £434.94p set aside.

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

RELEASE DATE: 25 October 2013