TC04254

Appeal number: TC/2013/09480

Income tax — late self - assessment return – reliance on accountant – intentionally misled by accountant – reasonable excuse – level of penalty – HELD - reliance on accountant not reasonable excuse – administrative task only - penalty levels mitigated.

FIRST-TIER TRIBUNAL
TAX CHAMBER

JASWINDER DHARIWAL **Appellant**

- and -

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

TRIBUNAL: JUDGE RACHEL SHORT
MR WILLIAM SILSBY

Sitting in public at Vintry House, Wine Street, Bristol on 28 November 2014

Dr Jaswinder Dhariwal the Appellant in person and Mr Andrew Gotch representing the Appellant

Mr Corbett instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

1. This is an appeal against a determination issued under s 100 Taxes Management Act 1970 in respect of a tax geared penalty charged under s 93(5) of that Act amounting to £113,662 at the 35% rate for the 2007-8 tax year, served on Dr Jaswinder Dhariwal on 23 May 2013. Dr Dhariwal's self assessment return was due to be made for this period on 31 January 2009 but was not made until 22 December 2012. The tax stated to be due on the return when submitted was £395,530.52.

2. HMRC notified Dr Dhariwal of the penalty charged by letter on 23 May 2013. That decision was reviewed by HMRC and confirmed by letter to Dr Dhariwal on 8 November 2013 save that the penalty was subject to a minor adjustment to take account of two small credits standing to Dr Dhariwal's account.

3. This appeal was made on 12 December 2013 and so was made late but HMRC confirmed to the Tribunal that they had no objection to the extension of the time limit for the making of the appeal and so this appeal was treated as made in time.

Conflicts of Interests

4. Mr Silsby notified the parties that he worked for the Association of Taxation Technicians and had in that capacity worked with Mr Gotch on a number of consultative bodies and that they had recently attended a meeting together of HMRC's Dispute Resolution Sub-group. Neither party objected to Mr Silsby sitting as a member.

Agreed Facts

5. Dr Dhariwal is a dentist who qualified in 1991. His business has expanded considerably, starting with a single practice in 1993, expanding to a number of different sites by 2006 and including involvement in limited liability partnerships and private medical businesses. In 2010 Dr Dhariwal gave up full time dentistry to concentrate on the management of these businesses.

6. Dr Dhariwal has always employed an accountant to help him deal with his finances and at the relevant time his accountant was Mr Bhamra of Business Ledger Limited, Chartered Certified Accountants, who had acted for Dr Dhariwal since 1996 or 1997. Mr Bhamra provided a wide range of services to Dr Dhariwal, including business advice, IT and legal advice as well as tax advice for his businesses and his personal tax position. In general Dr Dhariwal had been happy with Mr Bhamra's services. He dealt with him mainly in face to face meetings or by phone.

7. Dr Dhariwal was aware that his personal tax return for the 2007-8 tax year was due to be made on 31 January 2009 and had a meeting with Mr Bhamra on 27 January 2009 where this was discussed. Mr Bhamra advised him at that meeting that he wanted to check some points so it would not be possible to file the return on 31 January 2009. However, at a meeting in February 2009, Mr Bhamra gave Dr Dhariwal the distinct impression that the return had been submitted. On that understanding, Dr Dhariwal immediately paid Mr Bhamra's fee for submitting his 2007-8 tax return. Dr

Dhariwal's self- assessment return for the 2007-8 tax year was not in fact received by HMRC until 22 December 2012.

8. Dr Dhariwal paid a sum of £250,000 to HMRC on 26 February 2009 on the advice of Mr Bhamra. He believed that this was a payment on account of his 2007-8 tax liabilities.

9. Dr Dhariwal received two automatic penalty notices for £100 each because his return had not been submitted on time and a revenue determination (on 21 April 2009) relating to his 2007-8 tax return. Dr Dhariwal also had access to his self-assessment tax statement for 2007-8. HMRC wrote to Dr Dhariwal on 15 May 2012 about his 2008-9 tax return and referred to the fact that his 2007-8 return was outstanding. HMRC wrote to Dr Dhariwal on 15 January 2013 setting out the penalties due for late submission of his 2007-8 return which Mr Dhariwal discussed with Mr Bhamra.

10. At the end of May 2013 Dr Dhariwal appointed a new accountant to deal with his affairs. By an email of 16 August 2013 Mr Bhamra stated to HMRC that the failure to submit Dr Dhariwal's 2007-8 tax return on time was due to his failure to submit the return once it had been completed.

Law

11. The relevant legislation is set out at s 93 Taxes Management Act 1970 which details the penalties due for failure to make a return for income tax or capital gains tax including at s 93(5) the tax geared penalties payable if a taxpayer fails to comply with a notice to make a return for more than one year after the anniversary of the filing date.

> "*Without prejudice to any penalties under subsections (2) to (4) above, if-*
>
> *(a) the failure by the taxpayer to comply with the notice continues after the anniversary of the filing date; and*
>
> *(b) there would have been a liability to tax shown in the return,*
>
> *the taxpayer shall be liable to a penalty of an amount not exceeding the liability to tax which would have been shown.*"

12. S 118(2) Taxes Management Act 1970 sets out the circumstances in which a taxpayer shall not be liable to a penalty:

> " *For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the Commissioners or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse has ceased".*

Evidence

Dr Dhariwal

13. Dr Dhariwal referred us to a number of emails and telephone exchanges between him and Mr Bhamra from March 2008 until May 2012 concerning Dr

Dhariwal's tax return. In particular emails of 22 July 2008 in which Dr Dhariwal wrote:

> "*As one of your bigger clients and biggest referrer I would appreciate quicker service/response e.g. the tax amount payable at the end of the month*"

and of 21 March 2008 when Dr Dhariwal wrote to Mr Bhamra:

> "*Please make sure this is done way before the end of the month as it is a difference of saving nearly £180,000 on future CGT bills, so don't let me down"*.

14. At a meeting on 11 February 2009 Mr Bhamra discussed submission of Dr Dhariwal's tax return and Dr Dhariwal approved submission of his return. At a meeting on 9 March 2009 Mr Bhamra told Dr Dhariwal that his tax return had been submitted. Dr Dhariwal confirmed that he had no written evidence which confirmed that his tax return had been sent. When Dr Dhariwal received two penalty notices from HMRC for late submission of his return, he forwarded them to Mr Bhamra who told him that HMRC had made a mistake and re-assured him that his return had been sent.

15. In response to questions from Mr Corbett, Dr Dhariwal said that while he had access to his tax statements from HMRC, it was not clear to him that the £250,000 which he had paid in February 2009 had not been credited against his 2007-8 tax liabilities. He did not look at or understand the details of these tax statements. He believed because of the substantial payment which had been made and relying on advice from Mr Bhamra that his tax account was in credit for the 2007-8 tax year, although he was aware that the amount which he had paid had been on the basis of an estimated tax bill.

16. Dr Dhariwal said that he would have been able to pay the full amount of the tax bill due in 2009 had he been aware that it was outstanding. He was not aware until HMRC started their checks in May 2012, and their letter of 15 May 2012 that his tax return for 2007-8 was outstanding. At that stage he contacted Mr Bhamra who said he would deal with HMRC. In response to HMRC's letter of 15 January 2013 Dr Dhariwal had a further meeting with Mr Bhamra who said he had "spoken to experts" and the penalties claimed were not due, they were the result of a miscommunication. Dr Dhariwal had not been informed that his 2007-8 tax return had not been submitted by Mr Bhamra.

17. Dr Dhariwal had similar meetings with Mr Bhamra to discuss his tax returns for subsequent periods, which were also submitted late. For each of these periods he had paid Mr Bhamra's bills and assumed that the tax returns had been made. Mr Bhamra always invoiced him separately for the tax return work when it was done.

18. Dr Dhariwal moved all of his business to a new accountant in May 2013. To date Mr Bhamra had not been forthcoming with information about why the returns had been submitted late. Mr Bhamra was not available to provide evidence to the Tribunal.

Appellant's Arguments

Reasonable Excuse

19. The Appellant's representative argued that Mr Dhariwal had a reasonable excuse for late payment, placing reliance on his otherwise trustworthy accountant who had intentionally misled him about whether this tax return had been submitted; Dr Dhariwal had no reason to suspect that Mr Bhamra had not carried out his duties as reported to Dr Dhariwal. The information which Dr Dhariwal had from HMRC was not sufficiently clear to put him on notice that the return had not been made.

20. Mr Gotch pointed out that in determining whether there was a reasonable excuse for a tax error, it was necessary to consider not a generic taxpayer, but a taxpayer in the same position with the same knowledge as Dr Dhariwal, citing cases such as *Christine Perrin v HMRC [2014] UKFTT 488(TC):*

> *"the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account".*

Applying that approach to Dr Dhariwal, he had a long standing relationship with Mr Bhamra who he believed was offering a first class service. He unwittingly relied on an accountant who was deceptive in this particular regard. Mr Gotch also referred to the tribunal decisions of *Thorne v General Commissioners for Sevenoaks ([1989] 62 TC 341)* and *Rowland* v HMRC ([2006] UKSpC 0054) setting out the circumstances in which the actions of an agent, including an accountant, could amount to a reasonable excuse; since Dr Dhariwal had been comprehensively misled by his accountant, that should be treated as a reasonable excuse.

21. Mr Gotch described Dr Dhariwal's relationship with Mr Bhamra as going beyond relying on an agent accountant for "mere functionary" tasks. As made clear in the *Mariner* decision, (*Elizabeth Mariner v HMRC* [2013] UKFTT 657(TC)), there was a distinction between an accountant carrying out tasks where he acted as a mere functionary, doing tasks which the taxpayer could undertake themselves compared to an accountant who was retained to give professional advice based upon the best of their skill and professional ability. In the latter case, reliance on an accountant to carry out these tasks could form the basis of a reasonable excuse. Mr Bhamra had carried out a wide range of professional services for Dr Dhariwal and it would produce a false dichotomy to split the tax services from all the other services which he provided.

22. In addition, if, as here, a taxpayer's agent has intentionally deceived the taxpayer that is also relevant to the question of whether the taxpayer has a reasonable excuse. Mr Gotch referred to the *Yellow Crown* decision and concluded that, as in that case, Dr Dhariwal had been "*positively misled by a dishonest and unreliable agent*". (*Yellow Crown Limited v HMRC* [2013] UKFTT 527 (TC)). Mr Gotch also referred to the decision in *Providence Health Consultants Limited v Commissioners for HMRC* ([2013] UKFTT 601(TC)) which concerned an accountant misleading a client and failing to put a tax return in on time.

23. Mr Gotch stressed that while Dr Dhariwal had been provided with information from HMRC about his tax position, the precise understanding of the figures in his tax statement was an esoteric exercise which was beyond Dr Dhariwal. Dr Dhariwal was a busy professional who rightly relied on Mr Bhamra to keep his financial affairs in order.

Penalty Computation

24. Even if Dr Dhariwal did not have a reasonable excuse for late payment, HMRC had not applied the penalty legislation in a fair way. By reference to the Human Rights Act 1998 s 6 and Article 1 Protocol 1 of the European Convention on Human

Rights, Mr Dhariwal's rights had been unlawfully infringed. The level of penalty charged was not proportionate. The Tribunal should reduce the penalty payable by exercising its powers under s 100B(2)(b) Taxes Management Act 1970. HMRC had failed to follow their own instructions or exercise proper judgment in calculating the penalty due.

25. Mr Gotch referred to HMRC's own guidance about how penalties are calculated and referred to HMRC's letter of 23 May 2013 in which the penalty calculation was explained and HMRC's three heads of "penalty abatement" were set out and applied; Disclosure, Co operation and Seriousness. Mr Gotch did not dispute the maximum penalty abatement which had already been given for disclosure (20%).

26. *Co-operation*: Mr Gotch made clear that although it had been suggested by HMRC that the tax for 2007–8 had only been paid as a result of their investigations, actually no investigation had been made for 2007-8 and the penalty abatement under this head should be increased.

27. In Mr Gotch's view, HMRC should have recognised that the £250,000 payment made by Dr Dhariwal in early 2009 was a payment on account of his 2007–8 tax liabilities, other smaller payments had been dealt with in this way by HMRC. (For example as set out in their letter of 15 January 2013 and the determination notice which treated a payment made on 21 April 2009 as a payment on account.) The Revenue's own guidance at EM6075 stated that payments on account should be considered relevant in determining the level of co operation. For these reasons the penalty reduction for Dr Dhariwal's co-operation should be the maximum amount (40%)

28. *Seriousness*; Mr Gotch suggested that an abatement of 35% of the penalty was more correct under this head. Dr Dhariwal had paid the amount of tax which he thought was due for 2007-8. The lateness of returns for subsequent periods should not be a factor in considering the penalty for this period. By allowing a penalty abatement of only 5% more than the 15% which HMRC might apply to fraud, HMRC were treating Dr Dhariwal's behaviour as tantamount to fraud. Far from being fraudulent, Dr Dhariwal had not been culpable at all for the late submission of his return, which had been due to his reliance on his accountant. The level of abatement for seriousness should be increased to 35% (against a maximum of 40%).

HMRC's Arguments

Reasonable Excuse

29. HMRC's starting position, explained by Mr Corbett, was that the responsibility for completing a tax return remains with a taxpayer even when an accountant has been instructed to prepare and submit the return on the client's behalf. HMRC referred to the decision in *William Maxwell* v *HMRC* (TC 02849) in support of this.

30. For HMRC, Mr Corbett accepted that in some circumstances reliance on third party such as an accountant who failed to act properly might amount to a reasonable excuse for late submission of a return. However, the facts of Dr Dhariwal's case did not suggest that it was reasonable for him to rely on his accountant, particularly because of the information which he, Dr Dhariwal, had received from HMRC, including his tax statement and the two penalty notices which had been sent to him, all of which clearly indicated that his tax return had not been submitted on time. The making of a tax return was not the kind of technical issue for which it might be reasonable for someone like Dr Dhariwal to rely on his accountant.

31. Dr Dhariwal's tax statement which was available to him, which Mr Corbett took the Tribunal to, showed that there was no final charge for the 2007-8 tax year and that the £250,000 payment on account had been set against other years' tax liabilities. It was not possible for HMRC to set the £250,000 payment against Dr Dhariwal's 2007–8 tax liabilities because a return had not been put in for that year. The payment had been held as an unallocated payment. If it had been intended as a pre-payment for the 2007–8 tax year, it was Dr Dhariwal's obligation to notify HMRC of this.

32. Even if it was possible to suggest that Dr Dhariwal had a reasonable excuse for not submitting his tax return, that excuse ceased from 15 May 2012 when HMRC notified him that the return had not been made. Despite that letter Dr Dhariwal had not taken action to put in his tax return until December 2012.

33. In general Dr Dhariwal should have relied on the information which had been provided by HMRC about his tax return for 2007-8 rather than the assurances given to him by his accountant. Mr Corbett pointed out that the Tribunal had not seen any specific evidence that Dr Dhariwal had been intentionally misled by his accountant and suggested that the real reason for the non-submission of Dr Dhariwal's return was to prevent Dr Dhariwal having to pay a large amount of tax for that year.

Penalty Calculation.

34. Mr Corbett explained how HMRC had calculated the penalty payable under s 93(5) Taxes Management Act 1970 which had been charged on Dr Dhariwal by reference to their guidelines set out in their letter of 23 May 2013:

(a) A maximum penalty reduction of 20% had been given for disclosure.

(b) *Co operation*; Dr Dhariwal should have done more to satisfy himself that his return had been made. A 25% reduction out of a possible 40% reduction had been given to Dr Dhariwal for his co operation.

(c) *Seriousness*; Dr Dhariwal's return had been outstanding for a significant time period, a large amount of tax was owed and Dr Dhariwal's tax affairs were complex. It was only as a result of HMRC's own enquiries that the tax for 2007-8 was actually paid. Returns for later years had also not been made on time; returns for the 2009-10 and 2010-11 tax years had been filed late. 20% of a possible 40% reduction in the penalty level had been given for seriousness.

(d) The overall penalty reduction was 65%, leading to a penalty of 35% of the tax outstanding.

Human Rights Act:

35. Mr Corbett explained that he had not prepared detailed arguments on the Human Rights Act aspects of Dr Dhariwal's appeal because he had not been aware that this would be argued. In brief, he accepted that the level of the penalty did appear to be high, but that this was as a result of Dr Dhariwal's high level of taxable income. A 35% penalty level was proportionate in this case.

Decision

36. The onus of proof is on the Appellant to demonstrate that he had a reasonable excuse for late submission of the tax return for this period.

Facts Found

37. The Tribunal found the following facts from the evidence provided by the parties:

(a) Dr Dhariwal received directly a number of pieces of correspondence and information from HMCR during 2009, including his self-assessment tax account statement, two penalty notices and a determination notice.

(b) Dr Dhariwal paid a separate invoice for the tax services provided to him by Mr Bhamra, including one for the 2007-8 tax return in February or March of 2009.

(c) Dr Dhariwal was aware that his 2007-8 tax return was due at the end of January 2009 and reminded Mr Bhamra of that. He knew that his return had not been submitted by the due date of 31 January 2009 but he did not subsequently seek any form of written confirmation from Mr Bhamra or HMRC that his return had been filed.

(d) Dr Dhariwal genuinely believed that the payment of £250,000 which he made to HMRC in February 2009 was a payment on account of his 2007–8 tax bill and would be treated as such by HMRC.

Reasonable Excuse

38. It was accepted by the parties that in accordance with the decision in *Rowland* amongst others, reliance on a third party, including an accountant, can form the basis of a reasonable excuse for a particular taxpayer, but that the hurdle to demonstrate that reliance on a professional third party should amount to a reasonable excuse, is relatively high. It is not sufficient for a taxpayer to offload his obligations onto an agent who fails to act properly. As was stated by Judge Jones in *Mariner:*

> " *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 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"*.

39. One of the few circumstances in which the failure of a professional agent has been treated as forming the basis of a reasonable excuse is when that agent has been providing technical advice and support over and above the ability and understanding of the taxpayer himself; referred to in Mariner as "*a professional person acting in a truly professional advisory capacity*". The fault in dispute here is the filing of a tax return. We do not consider this to be the kind of technical professional advice which falls within the category of actions which a taxpayer can fully delegate to his agent. In our view it falls within the category of "functional" or administrative matters which a taxpayer must remain liable for even if an agent has been entrusted to carry it out. Mr Gotch attempted to argue that the role of Dr Dhariwal's accountant was more sophisticated than this and that we needed to take account of other, more complex tasks undertaken by Mr Bhamra to decide whether Dr Dhariwal could be liable for Mr Bhamra's failures. We do not accept this approach; Dr Dhariwal paid a separate invoice for the tax return services provided by Mr Bhamra, and to that extent this made up a discrete service to Dr Dhariwal which we do not think can be put into a package of other more sophisticated services to suggest that this was a task which Dr Dhariwal should not retain responsibility for. We do not accept that Dr Dhariwal was in the same position as the taxpayer in *Mariner* where the default related to the

technical in-put into the contents of the tax return, rather than the submission of a return.

40. HMRC made the point that even if Dr Dhariwal had delegated responsibility for making his return to Mr Bhamra, he should still have been on notice that there were issues with that return, both from the penalty notices, the determination and from his tax statement. We agree with this to an extent; we do not agree that the tax statement and the allocation of payments contained within that statement is something which a taxpayer could easily understand without professional advice. However, we do think that the penalty notices and the determination should have been enough to alert Dr Dhariwal to the fact that there were issues with the submission of his 2007-8 tax return. Having been made aware of that, he should have been more proactive with Mr Bhamra to ensure that action was taken.

41. Dr Dhariwal attempted to persuade us that he had no reason not to trust what was being said to him by Mr Bhamra, but we saw a number of email exchanges between the two men which suggested to us that Dr Dhariwal had concerns about Mr Bhamra's reliability even before the date in January 2009 when the return was due to be made, such as the email of 21 March 2008 stressing that Mr Bhamra "*should not let him down*", suggesting that the level of confidence which Dr Dhariwal had in Mr Bhamra was not complete.

42. Mr Gotch referred to Mr Bhamra's intention to deceive Dr Dhariwal as a further exonerating feature. We did not hear any evidence from Mr Bhamra himself, although it was clear from Dr Dhariwal's evidence that he felt that he had been misled by Mr Bhamra to his detriment. Nevertheless, we have concluded that on these facts the actions of Mr Bhamra in allowing Dr Dhariwal to believe that his tax return had been properly submitted are not sufficient to override Dr Dhariwal's obligations to establish what had been done with his 2007-8 tax return, particularly given the direct evidence which he had from HMRC. In this respect Dr Dhariwal's position can be distinguished from that of the taxpayer in the *Providence Health* decision referred to by Mr Gotch; in that case the taxpayer acted promptly as soon as she received the first penalty notice from HMRC to appoint alternative accountants. If Mr Bhamra was intending to deceive Dr Dhariwal, Dr Dhariwal's actions in failing to query penalty notices received from HMRC in an effective way contributed to the continuation of the deception.

43. Mr Gotch and Dr Dhariwal appeared to suggest that account also needed to be taken of the busy nature of Dr Dhariwal's practice and the large number of businesses which he managed, meaning that he was more likely to need to rely on someone like Mr Bhamra and less likely to pay attention to what was required himself. We do not accept that the relative workload of a professional like Dr Dhariwal is a relevant factor for these purposes; it cannot be right that a busy person should be in a better position to avoid obligations for his tax affairs than a less busy person.

44. For these reasons we have concluded that Dr Dhariwal did not have a reasonable excuse for late submission of his tax return for the whole of the period of default.

Penalty Calculation

45. In considering the correct level of penalty due we have referred to HMRC's heads of charge under the penalty rules as they applied at the time but we have also considered by way of comparison, what the level of penalty would be were the new penalty provisions, effective from 1 April 2011 to be applied.

46. HMRC accepted in response to Mr Gotch's comments that it was incorrect for them to have taken account of later defaults (late returns) in deciding what level of relief would be given against penalties for seriousness. As a result we have concluded that the level of penalty mitigation under HMRC's "seriousness" head should be increased to 30%.

47. We also took account of the fact that Dr Dhariwal genuinely believed that he had made a payment on account of his 2007-8 liabilities when he paid £250,000 to HMRC in February 2009 and had failed to realise that this was not how HMRC had treated the payment. We also think that while Dr Dhariwal's reliance on his accountant might not be sufficient to constitute a reasonable excuse, the fact that his accountant offered reassurance which turned out to be false should be taken account of in determining Dr Dhariwal's liability to a penalty. For this reason we think the level of mitigation for co-operation should be increased to 40%.

48. The penalty determination here fell to be made under the old rules. In determining whether its level was fair and proportionate in all the circumstances, the Tribunal used as a stress test the level of penalty which would be applied under the new penalty rules, which were drafted with Human Rights Act issues very much in mind. We considered that under these rules the effective tax-geared penalty would have been 10%, (being two lots of 5%).

49. The Tribunal did not go on to consider the potential application of the Human Rights Act to this reduced level of penalties but left it open to the parties to notify the Tribunal if they wished to make further submissions on this point having considered this decision.

50. For all of these reasons this appeal is dismissed but the penalties charged by HMRC are reduced in accordance with s100B(2)(b) Taxes Management Act 1970 to 10% of the tax due.

51. 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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 27 January 2015