TC02208

Appeal number TC/2011/00490

Capital gains tax. Penalty. Negligence of professional adviser- whether attributable to taxpayer. Distinction between professional adviser acting as a functionary and acting in a true professional advisory capacity.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR WASEEM SHAKOOR **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
SONIA GABLE

Sitting in public at 45 Bedford Square, London WC1 on 27 June 2012.

Mr Maas for the Appellant

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

DECISION

1. By his Notice of Appeal dated 14 January 2011 the appellant, Mr Shakoor, appealed against an assessment to capital gains tax in the sum of £49,014 plus a penalty levied thereon at 70%. At the hearing before us it was common ground that the capital gains tax was payable and in fact had been paid, but the penalty remained the subject of the appeal.

2. Page 1 of the bundle produced by the respondent contains a list of agreed facts. It is agreed that the appellant purchased two flats at Platinum House, Harrow in August 1999 for the sum of £327,500; same being a purchase "off plan". It is agreed that the appellant disposed of his interest in those properties in July 2003 for the sum of £475,000. It is agreed that the appellant did not reside in either flat at any time whatsoever. The appellant did not refer to the purchase or sale of either flat in his self-assessment tax return for the fiscal year ended 5 April 2004 which he completed and signed on 3 July 2005. The last date for the respondent to make an enquiry under section 9A Taxes Management Act 1970 was 31 October 2006. The present assessment and the penalty thereon have arisen by way of a discovery assessment.

3. At the outset of the appeal Mr Maas argued that the penalty imposed, at 70%, was too high and should be reduced to nil. He pointed out that this is a case in which the respondent has not alleged fraud but has alleged negligence. He contended, correctly, that the onus is upon the respondent to establish such negligence. He told us that it was accepted that the respondent was entitled to issue a discovery assessment under section 29(5) of the 1970 Act. He went on to say that it was the appellant's case that insofar as there was any negligence involved in this matter, it was the negligence of the appellant's agent, his accountant, Mr Mandani.

4. Mr Maas then referred us to the decision of this Tribunal in *Wald v HMRC [2011] UKFTT 183 (TC)* supposedly in support of that proposition. In our judgement 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. Thus it does not support Mr Maas' submission.

5. Mr Maas also made reference 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 our purposes the case also involved the issue of penalties in respect whereof the Tribunal (Sir Stephen Oliver QC and Dr. N. Brice) held that :

"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."

6. 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, he then seeks, and relies upon properly considered professional advice.

7. 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. 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).

8. 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 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.

9. In our judgement, the two different decisions to which we have referred are probably 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 and 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.

10. In our 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.

11. We heard evidence from Mr Mandani who relied upon his witness statement dated 11 June 2012 as his evidence in chief. When Mr Mandani was cross examined, he said that he had advised the appellant, during several telephone calls, that his disposal of the properties referred to above did not give rise to a capital gains tax liability. He was unable to refer to any Attendance Notes of any telephone conversations during which any such advice was given and recorded. He said that he had looked for Attendance Notes, but found none. Mr Mandani said that he knew that the appellant had not lived in either flat as they would have been uninhabitable, at least until a Certificate of Practical Completion had been issued.

12. Strangely, Mr Mandani told us that he did not consider the gain upon the sale of the flats to be taxable because it came within Extra Statutory Concession D49, which appears at page 179 of the Tribunal Bundle. He went on to say that it was his understanding that the respondent recognised that a taxpayer may not be able to occupy a property, but could nonetheless have one or two years within which to complete a proposed purchase. He said that he did not inform the appellant that the sale transaction might give rise to a taxable event.

13. Mr Mandani went on to say that he based his advice to the appellant upon the Extra Statutory Concession D49 and gave no consideration to the issue of capital gains tax relief under the relevant statutory provisions. He said that he did not discuss the Extra Statutory Concession with the appellant or refer to that particular provision when speaking with his client.

14. On 9 December 2009 the respondent wrote to the appellant's accountant indicating that the disposal of the flats may well have given rise to a taxable event. The annex to that letter asked the appellant, by his accountant, to say on what basis, if any, he believed that capital gains tax might not be due or that any reliefs might be due.

15. On 3 June 2010 the appellant's accountants wrote to the respondent and argued not that Extra Statutory Concession D49 was applicable; but that Extra Statutory Concession D37 was applicable. It was also contended that the disposal had been a disposal of the appellant's principal private residence and so not liable to capital gains tax.

16. When Mr Mandani was asked why he had changed tack from relying upon Extra Statutory Concession D49 to D37 he said *"I took a strategic decision. I just felt D37 was more applicable at the time."* He acknowledged that D37 and D49 apply to quite different factual circumstances.

17. The appellant gave evidence in accordance with his witness statement dated 9 June 2012. In that statement he says that he had previously sold property which gave rise to a capital gains tax liability, *"as advised by Mr Mandani"*. His statement emphasises the extent to which he relies upon Mr Mandani and he says that when he was sent his tax return for the year ended 5 April 2004, he noticed that it contained no reference to his disposal of the flats at Platinum House. He says that he questioned this with his accountant, who told him that as the disposal was exempt from tax, there was no requirement to refer to it in the tax return. He said that he was happy to accept that explanation.

18. The explanation referred to in paragraph 17 above itself gives rise to a difficulty because, as an accountant, Mr Mandani would or should be well aware that the fact of a disposal should be declared unless it is the disposal of a principal place of residence, and is exempt from capital gains tax. The exemption applies only if the relevant property has been a taxpayer's residence throughout the period of ownership (with one or two exceptions which are not relevant for present purposes). Mr Mandani knew that the appellant had not resided in either of these flats for any period of time whatsoever. There was no sense in which it could sensibly be said that the appellant had "resided" in either flat.

19. We regret to have to say that we did not consider Mr Mandani to be a satisfactory or reliable witness. We find it, to say the least, surprising that a professional accountant should have changed his ground from relying upon one obviously inapplicable Extra Statutory Concession to another equally inapplicable Extra Statutory Concession. We find it most surprising that there is no advice proffered to the appellant in writing or, at the very least, any Attendance Notes of advice orally given at the telephone.

20. In our judgement both Mr Mandani and the appellant knew that the appellant had not resided in either flat for any period of time whatsoever. At the very least, each of them appreciated that there must be doubt as to whether the principal place of residence exemption could apply. As the appellant says in the penultimate paragraph of his witness statement, he queried with Mr Mandani the omission of his disposal of the flats from his tax return. His evidence is that when he queried it he was informed that it was exempt from tax; but he makes no reference to any reasoned explanation being given in support of that opinion.

21. We do not accept that a chartered accountant could have taken substantially differing views as to whether the disposals of these two flats could be exempt from capital gains tax by reference to two very different Extra Statutory Concessions. Even if we were to accept that that was the thought process adopted by Mr Mandani, it would indicate significant doubt on his part.

22. We regret to have two say that we do not accept the evidence given by Mr Mandani that, at the time when the appellant's relevant tax return was filed, he had actively addressed the issue of whether the disposals were exempt and, if so, on what basis. We arrive at that conclusion given the changing bases (see above) upon which Mr Mandani has sought to justify the advice that he claims was given at the time when the tax return was filed. We proceed on the basis that it is more probable than not that, as the appellant says in his witness statement, he queried the omission from the tax return of the disposal of the flats because his state of mind was that those disposals would give rise to some capital gains tax liability. We find that this was raised with his accountant, who, without any proper basis for so doing, may have given the appellant some cause to believe that the disposals need not be referred to; but, as we find, in a perfunctory and unreasoned fashion that could not have been considered persuasive or authoritative by a client who, as we find, realised that the disposals may well give rise to a capital gains tax liability.

23. We find that the advice, if such advice was given by Mr Mandani, was obviously wrong and that the appellant realised or ought to have realised that it was obviously wrong or so potentially obviously wrong that it called for further explanation or justification. It is notable that nobody suggests that Mr Mandani gave any explanation to the appellant as to why the disposals should be exempt from capital gains tax or why they need not be referred to in the tax return. Given that the appellant plainly believed that the disposals may well give rise to a capital gains tax liability, it defies belief that he did not seek an explanation from his accountant as to why, or on what basis, any exemption, and which exemption, could be relied upon by him. This was, as we find, a case of shutting one's eyes to what either was or ought reasonably to have been seen as incorrect advice - if, indeed, any such advice was actually given – a matter upon which we entertain significant doubt.

24. Nonetheless, whilst there are several unsatisfactory aspects to the evidence given by Mr Mandani and the appellant, we do not consider that the totality of the evidence justifies us finding that the evidence that the appellant was given some advice to the effect that the disposals would not give rise to capital games tax liability, is an *ex post facto* invention. We find that the advice that was given was no more than some kind of off the cuff comment, wholly unreasoned and such that the appellant knew or ought reasonably to have known was very far from being a considered and reasons piece of professional advice from somebody who had properly considered and/or researched the applicable provisions.

25. In the foregoing circumstances we conclude that a penalty is properly due as we find that the appellant cannot bring himself within the principle that we take from paragraph 105 in the decision of this Tribunal in *AB (above)*.

26. The assessment of the penalty gives rise to a difficulty. We start from the position that a penalty is properly payable, but in circumstances where the appellant's negligence (not that of his accountant) has been his inappropriate and eager reliance, upon advice which, if given, could have given him no confidence whatsoever that it was a properly thought through and reasons professional opinion on the issue upon

which the appellant required advice once he had raised the point that his tax return contained no reference to his disposal of the apartments at Platinum House.

27. We have to weigh the various levels of culpability that arise. We take the view that the appellant was content to take a chance on the basis that his accountant had given him comfort, albeit in the rather dubious circumstances that we have recounted above. The assessment of a penalty is not a precise science but involves assessing relative and relevant culpability. In arriving at our conclusion we give some benefit of the doubt to the appellant who, in our judgement, has been ill served by his professional adviser. On the basis of the evidence available to us our overall assessment is that the penalty should be 30%.

28. Whether the appellant was or was not given firm advice that the disposals were exempt from tax, we are in no doubt that that was advice that the appellant must have realised was open to significant, if not substantial, doubt.

29. 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.

Penalty reduced to 30%.

GERAINT JONES Q.C.
TRIBUNAL JUDGE

RELEASE DATE: 22 August 2012