[2016] UKFTT 731 (TC)

TC05460

Appeal number: TC2015/02897
TC2015/03668

Capital Gains Tax - paragraph 18 of schedule 24 of the Finance Act 2007 - reliance upon professional advice - whether sufficient to come within paragraph 18(3) of Schedule 24 – yes.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MRS AMANDA CARRASCO **Appellant**
MR JAVIER CARRASCO

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q.C.
MRS CLAIRE HOWELL.

Sitting in public at The Royal Courts of Justice, London on 24 October 2016.

Mr. A. Cooper – solicitor - for the Appellant

Mrs A. Rees, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is an appeal by Mr and Mrs Carrasco severally against penalty determinations made against each of them by the respondents. It is appropriate that we first set out the history of the present appeal. It began as an appeal against Capital Gains Tax assessments relating to the appellants' respective capital gains made upon the sale of a property at 33 Smith Terrace, Chelsea, London. The first named appellant had inherited that property from her late mother in June 1988.

2. The facts that we set out hereunder are our findings of fact based upon relevant contemporaneous documents and the evidence given by each appellant and their supporting witness, Mr Wadhams. We considered each witness to be a witness of the truth and to have given his/her evidence without embellishment, reservation or equivocation. Thus we find the following facts proved in reliance upon that credible evidence:

(1) That the first named appellant inherited the subject property in June 1988.

(2) That prior to its sale the first named appellant vested the property in herself and the second named appellant further to a Deed of Gift with an appropriate amended registration being accepted by the Land Registry.

(3) That the property was let to tenants from June 1998 until June 2010. The precise date in June 2010 to which the property was let is not a matter of reliable evidence, but the preponderance of the evidence indicates it to have been on or around 27/28 June 2010.

(4) That the property was put up for sale and an exchange of contracts took place on 25 May 2010, which culminated in that contract being completed on 23 July 2010.

(5) That the appellants, accompanied by teenage children and family pets, moved into the property on 29 June 2010 and resided there until 22 July 2010.

(6) Acting upon the advice of their retained accountants the appellants executed a principal private residence election on 23 April 2012 to the effect that the subject property was their principal private residence until 22 July 2010.

(7) By an election signed on the same date the appellants elected 22 Favart Road, London as their principal place of residence with effect from 30 June 2010.

(8) That each appellant, acting upon the advice of their then accountant and tax adviser (see below), timeously filed self-assessment returns in which they each declared their appropriate capital gains, but reduced those gains by excluding from the computation the gain attributable to the rise in property prices over the immediately preceding three year period.

3. The respondents undertook an enquiry into the appellants' capital gains tax returns and disallowed the reduction referable to the principal place of residence deduction. At least in part, the respondents' position rested upon section 28 Taxation

of Capital Gains Act 1992 ("the 1992 Act") which provides that the date for ascertaining any gain is the date of the exchange of contracts and not the date of completion of a transaction.

4. When this matter came before the Tribunal earlier this year there was discussion concerning the effect of section 28 of the 1992 Act which culminated in the appellants withdrawing their respective appeals against the capital gains tax assessments but intimating an intention to continue their respective appeals against associated penalty assessments. It is not overstating the position to say that when these appeals first came before us they had not been properly prepared for presentation to the Tribunal. No witness statements had been prepared and/or filed/served, there was no chronology and no appellants' bundle of documents. At that stage the appellants had been represented by Wadhams, Chartered Accountants. When the appeal returned to us, in respect of the penalties, the appellants were represented by a solicitor, Mr Cooper.

5. At the resumed hearing the only issue that fell for determination was the issue of penalties. The significance of that is that although the respondents bear the onus of proof in a penalty case, the fact that the appellants no longer pursued their appeal in respect of the assessments was sufficient to allow the respondents to discharge the onus of proving the default said to give rise to the penalties. The issue before us was limited to a consideration of paragraphs 1 and 18 to schedule 24 of the Finance Act 2007 ("the 2007 Act"), which gives effect to the principal provisions set out in section 97 of that Act.

6. The respondents issued a Penalty Notice to the first named appellant in the sum of £16,918.78p and a Penalty Notice to the second named appellant in the sum of £6647.58p.

7. It is not in dispute that the appellants' respective self-assessment returns are documents of a class mentioned in paragraph 1 of Scheduled 24. The essence of this appeal relates to paragraph 18 of that Schedule which is as follows :

> 18(1) P is liable under paragraph 1(1)(a) where a document which contains a careless inaccuracy (within the meaning of paragraph 3) is given to HMRC on P's behalf.
>
> (2) In paragraph 2(1)(b) and (2)(a) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.
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> (3) Despite sub-paragraphs (1) and (2), P is not liable to a penalty in respect of anything done or omitted by P's agent where P satisfies HMRC that P took reasonable care to avoid inaccuracy (in relation to paragraph 1) or unreasonable failure (in relation to paragraph 2).
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> (4) In paragraph 3(1)(a) (whether in its application to a document given by P or, by virtue of sub-paragraph (1) above, in its application to a document given on P's behalf) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.
>
> (5) In paragraph 3(2) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.

8. It is not now disputed that there was an inaccuracy in each relevant self-assessment form insofar as capital gains are concerned. It is for the respondents to prove that the

inaccuracy arose as a result of carelessness. By reason of paragraph 18(2) carelessness on the part of the appellants' erstwhile tax advisers and accountants is sufficient to bring the inaccuracy within paragraph 18(1).

8. At the first hearing before us it became apparent, at a very early stage, that the appellants' erstwhile professional advisers were not aware of section 28 of the 1992 Act and had not advised their clients in knowledge thereof. Furthermore, it became apparent that they had failed to give any consideration to the consequences, if any, that would flow from the fact of an exchange of contracts which pre-dated the appellants moving into the property, in addition to failing to consider whether the period of residence of the appellants' family at the property was sufficient to constitute it their permanent place of residence (especially given that contracts had already been exchanged for its sale prior to them moving into it).

9. Given the analysis in paragraph 8 above, which was not challenged by the appellants and/or Wadhams at the first hearing, we are satisfied that the errors in each self-assessment return were made carelessly within the meaning of that expression in paragraph 18(1) of Schedule 24 of the 2007 Act.

10. We turn to the evidence of the first named appellant, Mrs Carrasco, who gave her evidence in chief by adopting her witness statement dated 01 July 2016. She was asked several questions that elicited information already set out in her witness statement. The only relevant evidence that she added was that her erstwhile professional advisers had been aware of how long she and her family had lived at Smith Terrace. She said that they had been provided with council tax bills, parking permits, utility bills and, most importantly, details of all rental payments received in respect of the property whilst it was let. Mrs Carrasco also gave evidence that the Completion Statement in respect of the sale of the property at Smith Terrace had been given to her professional advisers who thus knew that completion had taken place further to the exchange of contracts on 26 May 2010. Furthermore she also gave evidence to the effect that each of the elections made on 10 April 2012 was made upon the direct advice of her erstwhile professional advisers.

11. During cross-examination Mrs Carrasco referred to the fact that at or about the time when the relevant self-assessment returns were being completed she was undergoing a course of chemotherapy. She said that she placed reliance upon her professional tax advisers and accountants, Wadhams, and assumed that they "had done a good job".

12. Importantly, Mrs Carrasco exhibits several documents to her witness statement. The first is a File Note dated 07 June 2006 prepared by Mr Ingenhaag, the accountant then advising her on various tax matters. The file note records *"She is thinking that she might move into Smith Terrace, when the tenants leave in two years. If she were to do so and subsequently sold Smith Terrace, she would qualify for partial main residence exemption. I pointed out that the last three years are always exempt so even if she only moved in for say six months before selling it, there would be deemed a three-year exemption back dated from the date of sale"*. The evidence is that the first named appellant had first instructed Ingenhaag LLP to act for her as accountants and

tax advisers in 1987 with the partner who looked after her affairs being Mr Leo Ingenhaag. Mrs Carrasaco explained that when he left that firm to join CLB Littlejohn Fraser, she transferred her business to that firm until such time as Mr Leo Ingenhaag retired in 2010. She then transferred her accountancy business back to Ingenhaag LLP.

13. The next relevant File Note is almost four years later and dated 25 February 2010. It records that the first named appellant had not been happy with professional advice provided to her by Littlejohns and so decided to return to Ingenhaag LLP. The File Note was prepared by somebody with the initials "IW", being Mr Ian Wadhams, who represented the appellants at the first hearing of this appeal. In that File Note he records *"She was planning to sell the house when the market recovers, but expects there to be a large capital gains tax liability. I pointed out that she would get the last three years exempt if she had ever lived in the property (which he proposes to do) and the letting exemption."* The same note then goes on to refer to the benefit of transferring part ownership to the second named appellant so that the capital gains tax exemption would be doubled. That advice was given to Mrs Carrasco approximately 3 months prior to the exchange of contracts. Although when Mr Carrasco gave evidence it was suggested to him, in cross-examination, that he had not taken proper care because he had not himself spoken with Mr Wadhams, we reject that contention because it is entirely appropriate that the second named appellant should have relied upon what was reported to him by the first named appellant, his wife, as the person dealing directly with the professional tax advisers. That is the reality of family life.

14. The next relevant exhibit is an undated email from Mr Wadhams to the first named appellant, attaching an estimated tax computation in respect of the sale of 33 Smith Terrace. It is "estimated" because at the time when it was sent it is clear that some of the sale costs had not been established. That, in turn, leads to the inference that had the document been dated it would have been dated prior to completion and quite possibly prior to the exchange of contracts. The attached computation showed three years' principal place of residence relief being applied to the gains made by the first and second named appellants. There can be little doubt that that was an implied representation to each appellant that each was entitled to such relief.

15. There is a further File Note, dated 07 April 2010, which has only peripheral relevance but does not contain any advice to the effect that principal place of residence relief might not be available on the facts then known to the appellants' erstwhile accountant.

16. We are satisfied that Mrs Carrasco was a witness of the truth and we find as a fact that she sought advice from Mr Ingenhaag in 2006 and Mr Wadhams in 2010 in respect of her capital gains tax liability and any potential for mitigating it. We are satisfied that the advice given is accurately summarised in the File Notes and emails to which we have referred above.

17. Mr Carrasco gave evidence by adopting his witness statement dated 01 July 2016 as his evidence in chief. In effect, he said that he agrees with everything set out in his wife's witness statement. During cross-examination he gave evidence that he

relied upon the accountant's advice both in respect of the capital gains entries in the self-assessment return and, later in 2012, the advice to execute various principal place of residence elections. We are satisfied that Mr Carrasco was a witness of the truth.

18. The next witness was Mr Wadhams who adopted his witness statement dated 05 July 2016 as his evidence in chief. In cross-examination he said that he was not aware that the appellant had not moved into Smith Terrace prior to the exchange of contracts. Again, we were satisfied that Mr Wadhams was a witness of the truth.

19. It follows from the fact that we believe the evidence given by each of the first and second named appellants that we are satisfied that it is more probable than not that they placed reliance upon the professional accountancy and tax advice that they had received from their retained accountants. We are satisfied that that advice was to the effect that provided that they resided at the Smith Terrace property for some period of time prior to its sale (by which the appellants understood sale to be contemporaneous with completion) the three year capital gains tax exemption would be applicable. We are also satisfied that the exemption provisions are sufficiently technical and obscure as to fall outside the working knowledge of the average man in the street and to be a matter upon which it is entirely reasonable to expect a layperson to seek and take appropriate professional advice upon which he/she will then rely in and about ordering his/her tax affairs and in and about completing his/her self-assessment return.

20. The central issue in this appeal is whether or not, for the purposes of paragraph 18(3) of Schedule 24 of the 2007 Act, we are satisfied that each appellant took reasonable care to avoid inaccuracy in his/her tax return.

21. It is reasonable to start from the position that tax laws and tax rules in this country are generally complex and often convoluted. There can be no doubt that a person might need to rely upon the expertise of an accountant or other professional adviser who has (or who professes to have) expertise in tax matters when filing a tax return, whether that return relates to income tax, capital gains, corporation tax or a multitude of other individual taxes. The average man in the street cannot reasonably be expected to have a working knowledge of tax legislation, notwithstanding the artificial legal presumption that individuals are presumed to know the law. Whilst many individuals might have a working knowledge of the most basic principles attaching to the better-known taxes, it is not to be expected that such persons will have a detailed working knowledge of the intricacies surrounding even the most common taxes, such as income tax, VAT and/or capital gains tax.

22. This is not a case where the appellants' accountants and tax advisers acted as mere functionaries to undertake some kind of filing or routine administrative task instead of it being undertaken by the appellants themselves. This is a case where, we accept, the appellants' tax returns relating to capital gains were based upon the advice given by Mr Wadhams in 2010 at a time when he was cognisant of the facts surrounding the letting, sale and occupation of the Smith Terraced property by the appellants.

23. In Mariner v HMRC [2013] UKFTT 657 this Tribunal summarised the approach to be taken as follows :

"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.

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 :

"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 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."

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.

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 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 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 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 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 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 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.
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> 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 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 taxpay26. 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".

24. We consider that to be an accurate and helpful statement of the applicable law. The very purpose of obtaining professional advice against a full disclosure of pertinent facts, is to gain advice as to how one should proceed, whether it be by reference to medical treatment, legal matters, accountancy or tax matters or a multitude of other matters where the input of true expertise is appropriate before a person can make an informed decision on how he/she should proceed. We are satisfied that the computation of capital gains tax applicable to each appellant falls into that category. We arrive at that conclusion notwithstanding that we acknowledge that it might have seemed strange to somebody versed in tax matters that merely moving into a property for several weeks after an exchange of contracts had taken place, would suffice to secure a principal place of residence exemption spanning back three years. Nonetheless, that is the advice that we accept was erroneously given to each appellant, or, more correctly, to the first named appellant and, through her, to the second named appellant.

25. In our judgement when a person seeks appropriate professional advice from somebody who is a professed expert in the applicable discipline, it will almost always be reasonable for the person who has sought out such advice to rely upon that advice provided only that that person has selected a seemingly competent professional adviser, unless there are factors to the knowledge of the recipient of the advice which indicate to him/her that it ought not to be relied upon. In our judgement such factors would have to be reasonably obvious rather than subtle or such as might only be picked up by a fellow professional. It was not argued by the respondents that on the facts of this case the situation falls into that latter category.

26. We should also record that the respondents argued that the appellants had not used the Smith Terrace property as their main residence, even for the several weeks during which they resided at that property. In the Statement of Case submitted by the respondents it is said in paragraph 6.5 that "*during this period the property was no longer their residence as a contract for its disposal was made on 25 May 2010*". That

proposition is untenable as the date upon which an exchange of contracts takes place is irrelevant to whether a place is, as a matter of fact, the residence of any given individual. The provision in section 28 of the Taxation of Capital Gains Act 1992 has no application to that issue. That issue is a straightforward factual issue. It is commonplace for vendors to remain resident in a property pending completion and, in ordinary parlance, a vendor might quite reasonably describe the property as his/her residence pending completion of a sale. If a vendor or did so, it is likely to be an accurate statement of fact.

27. Furthermore, whilst the period of time during which a person is resident at a particular residence might go some way to informing whether or not it is his/her permanent place of residence, that is but one factor to be taken into account. The most important factor is the intention of the resident. The fact that time alone is nowhere near being a determinative factor can be illustrated by a simple example. When a person sells his house and simultaneously moves into a different house that he has purchased, the fact that he may have resided in his new house for only one or two weeks will not prevent it being his principal place of residence. We acknowledge that that is not the factual scenario in the instant appeal given that the appellants moved into Smith Terrace after an exchange of contracts had taken place and it was foreseeable that that contract would move to completion with the requirement that vacant possession must be delivered up to the purchaser.

28. It follows from what we have said above that each appeal succeeds and each penalty assessment must be set aside. That is because we accept and find that each appellant did take reasonable care to avoid the inaccuracy that resulted in the underpayment of capital gains tax and thus falls within paragraph 18(3) of Schedule 24 of the 2007 Act, by taking and relying upon professional accountancy advice from an accountant professing special skill and knowledge pertinent to the appellants' capital gains tax returns and computations.

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.

GERAINT JONES Q. C.
TRIBUNAL JUDGE

RELEASE DATE: 28 OCTOBER 2016