[2017] UKFTT 859 (TC)

TC06254

Appeal number: TC/2016/02491

Income tax – self assessment - deliberate errors – careless errors – non careless errors. Reliance on professional advice. Distinction between adviser acting as a mere functionary or substantively as a professional adviser. Barristers' chambers accounting system – reasonable to rely thereon.

FIRST-TIER TRIBUNAL
TAX CHAMBER

PATRICK CANNON **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MR. IAN MENZIES-CONACHER FCA

Sitting in public at Taylor House, Rosebery Avenue, London on 23 & 24 October 2017.

Mr. Simon Farrell Q. C. for the Appellant.

Miss Larissa Mulder, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction.

1. This is an appeal by Mr Patrick Cannon ("the appellant") in respect of three penalties imposed upon him by HMRC ("the respondents"). Each penalty relates to the fiscal year ended 5 April 2011. Each penalty assessment was issued on 26 August 2015, albeit varied upon Statutory Review on 14 April 2016. Each penalty was levied on the basis of the Finance Act 2007, schedule 24.

2. The three bases upon which the several penalties were levied were :

(1) that during the relevant fiscal year the appellant had made a duplicated claim for repair/refurbishment works undertaken at his professional premises,

(2) that during the relevant fiscal year the appellant omitted certain professional fees from his gross income, same being accounted for in the following fiscal year by reason of appearing in the appellant's professional accounts for one year later than the year of receipt, and

(3) an incorrect furnished holiday letting loss claim.

3. The appellant's self-assessment tax return for the fiscal year ended 5 April 2011 was filed on 16 November 2011. In 2012 the respondents undertook "a barrister project" and the appellant's tax return was subjected to checking. Initially this was undertaken by Miss Weir, who requested various items of information from the appellant which he duly provided. After the receipt of the request for various pieces of information, the appellant voluntarily informed the respondents that there had been an error in his repairs claim in respect of his professional premises, in that the expenditure had been overstated or, perhaps more correctly, double counted.

4. After the appellant provided requested information relating to the furnished holiday lettings loss claim, the enquiry was referred to the respondents' Tax Evasion

Referral Process, being a central team, where the matter was allocated to Mr Charles. He issued a Code of Practice 9 document, which invokes a specified procedure where the respondents suspect tax fraud.

5. We now go back in time. The appellant is and was at all material times, a practising barrister. Although a man of mature years, in the fiscal year 2010/11 he was still in his first seven years of practice at the Bar because first he had worked as a solicitor, having been admitted in 1984 as a solicitor. The appellant held himself out as a barrister with particular expertise in the area of the tax generally referred to as stamp duty, but, more correctly, stamp duty land tax. It is common ground that after the introduction of stamp duty land tax, and particularly as the rates thereof were substantially increased, there was a market for legal advice to clients who sought either lawfully to avoid paying that tax altogether or to mitigate the amount payable. It is now well known that various arrangements were put in place by some such potential taxpayers, usually upon professional advice, some of which had the desired effect until such time as either legislative changes were made or Court decisions found such arrangements to be ineffective to achieve the desired outcome. We raise this point, for two reasons.

6. The first is that the respondents place great store upon the fact that the appellant was a practising barrister and had a degree of expertise in at least one specialist area of tax law. Inferentially, the respondents assert that if he had such expertise in one area of tax law then, at the very least, he was able to find his way around applicable tax legislation as it applied to his personal affairs even if he did not purport to be an expert in those other areas of taxation.

7. The second is that the appellant's evidence is that not only did he advise individual or corporate clients in respect of tax matters, with particular reference to stamp duty land tax, but was also consulted, on an *ad hoc* basis, by officials of the respondents when consideration was being given to possible amendments to the legislation relating to stamp duty land tax. The appellant refers to a meeting held at his Chambers on 11 September 2012 which had been arranged at the request of Mr Ian Valentine, who was a senior officer within the respondents' organisation with

particular responsibility for its Residential Property Tax Program. The appellant's evidence is that Mr. Valentine was accompanied by Mr Jeremy Schryber and another (unnamed) person being a senior officer in the respondents' anti-avoidance group. The documentary evidence available to us includes an email timed at 11:03 hours on 21 August 2012 from Mr Valentine's personal assistant (Helen) asking for such a meeting to be arranged. It was not a meeting or Conference in the strict professional sense in that the respondents were not proposing to be there as a fee paying client. The respondents were, in reality, seeking the benefit of the appellant's professional knowledge and expertise, *gratis*.

8. The appellant's evidence is that that meeting proceeded as planned and that although the tenor of the meeting and discussions was cordial, at the very end of the meeting Mr. Valentine made it known to the appellant that he wanted him to desist from giving legal advice to clients in respect of any stamp duty land tax mitigation strategies or arrangements. The appellant said that he declined that invitation. The appellant does not contend that that request was made in any kind of threatening manner, or with a hostile demeanour, but it is his case that notwithstanding Mr Valentine's polite delivery of that requirement, it carried with it an underlying subtext to the effect that the appellant would be sensible to heed that request which the appellant construed as a demand dressed up as a request.

9. The independent Bar is not "independent" for no good reason. The ability of citizens to appear before an independent judiciary, independent of the executive and organs of state, whilst being represented by legal representatives, such as barristers who represent clients before Courts and Tribunals without fear or favour (provided a sufficient fee is paid), is an important part of the largely unwritten constitutional mechanism upon which democracy and the rule of law operate in this country. Thus Mr. Valentine was entitled to make a request to the appellant to desist from accepting instructions from particular clients in respect of particular aspects of tax law; but he was not entitled to go beyond a simple request, that is to say, he was not entitled to issue a demand, particularly a demand which could have been construed as carrying with it a suggestion that there might be adverse consequences for the appellant should he fail to abide by that request.

10. After considering the totality of the relevant evidence in this appeal, we find that the appellant subjectively construed Mr Valentine's request as a demand and we also find that the appellant subjectively believes (to this day) that the enquiry into his affairs that followed and out of which this appeal arises, would probably not have taken place had the appellant met the request/demand put to him by Mr Valentine.

11. We make no finding as to whether Mr Valentine intended what he said to amount to a demand carrying an implication of adverse consequences for the appellant should the demand not be met, because it would be unfair of us to make any such finding without Mr Valentine having the opportunity to deal with that allegation. He has not given evidence and that is understandable given that this issue is not at the core of this appeal.

12. It was put to Mr. Charles that his extremely assiduous investigation into the appellant's tax affairs was motivated by the respondents wishing to vent displeasure against the appellant for continuing to give advice on matters relating to stamp duty land tax to such clients as saw fit to engage his professional services. Mr. Charles denied that that was so and gave evidence that he was not aware of what had transpired between the appellant and Mr Valentine. It is his position that the fact that his enquiry into the appellant's affairs was undertaken with great assiduity, bordering upon zealousness, is entirely coincidental and simply reflects him doing his job appropriately. We will return to that issue hereafter. For the moment it suffices to say that initially Mr. Charles determined that each of the appellant's self-assessment return errors had been made deliberately, whereas subsequently that was varied to an allegation that the furnished holiday letting loss claim was a deliberate error or misrepresentation, but the two others were to be downgraded to careless omissions/errors. The initial decision to categorise one relatively modest fee being put into the wrong accounting year, as a deliberate error, feeds our conclusion that Mr. Charles was being overzealous and that such zealotry no doubt fed the appellant's belief that he was being pursued as a consequence of not abiding by Mr. Valentine's request (see above).

13. Because this appeal involves three different taxation issues we find it convenient to deal with each one separately, so far as our findings of fact and overall conclusion are concerned. However, it should be understood that in arriving at our separate findings and each conclusion, we have had regard to the totality of the evidence given in this appeal because, as a matter of forensic common sense, a person's conduct and/or credibility and/or veracity in respect of one issue is, at the very least, capable of bearing upon those same issues in respect of a different area of taxation. In other words, we have considered the evidence holistically, not compartmentally.

14. It is inevitable that the outcome of each component within this appeal turns, to a significant, if not substantial, extent upon the credibility and veracity of the witnesses who gave evidence before us, when that evidence is considered in the context of the relevant documents (to some of which we will refer below). Our overarching finding is that the appellant was a witness of the truth whose evidence we characterise as credible and reliable. We are satisfied that he was not prone to evasion, equivocation or exaggeration in the evidence that he gave. Likewise, we consider that the factual evidence given by Mr Charles was given truthfully and reliably. However, his evidence in chief (comprising his witness statement dated 15 May 2017) contains numerous expressions of opinion or inferences of fact that he saw fit to draw, based upon established primary facts, in respect whereof our overall conclusion differs when it comes to drawing such inferences or making secondary findings of fact in the light of the established primary facts. The difference between Mr Charles' position and our position is that he substantially had to decide matters on the basis of a desk top or paper assessment albeit that he had been present at an interview of the appellant (under caution which took place on 14 October 2013). We have the transcript of that interview in the appeal bundle and have considered its content. We, in contrast, have had the valuable advantage of hearing oral evidence and cross examination thereon which has provided us with the opportunity which the oral trial process is designed to provide, of being able to assess the evidence of each relevant witness in a way which a paper exercise simply does not permit.

General Law.

15. It is trite that a taxpayer can only be found to have made a careless error in and about completing a tax return if he has failed to take reasonable care in and about collating and processing the appropriate information which goes into providing the figures inserted into any such tax return. Such a person must also take reasonable care to ascertain whether a particular type of tax is payable and, if any reliefs or deductions are claimed, whether same are properly deductible or relievable under the applicable legislation. What amounts to reasonable care is capable of varying according to the facts of a particular case or the obscurity of particular tax legislation and, at least to some extent, so the respondents contend, according to the particular attributes of an individual taxpayer. That latter submission can only hold good if the test is not entirely objective. In the law of tort the test of "reasonable care" is entirely objective with the consequence that, for example, a learner driver's driving, in road traffic accident cases where negligence is alleged, is assessed by reference to the reasonably competent driver not the level of competence reasonably to be expected of a learner driver, let alone a learner driver on his first lesson as opposed to a learner driver who might be having a lesson immediately before being considered ready to pass his driving test.

16. There can be no doubt that there is a distinction to be drawn between a taxpayer who uses a professional adviser, such as an accountant holding himself out as competent to advise on particular tax matters, as a mere functionary rather than to give advice on technical matters within his field of expertise. It will usually not be open to a taxpayer to assert that he has a reasonable excuse for late filing of documents because he entrusted that mechanical task to his accountant. The position will be otherwise if a taxpayer asserts that he has a reasonable excuse for making an incorrect deduction or claiming an incorrect relief if the basis of that claim has been reliance upon a professional adviser holding himself out as having the requisite expertise to advise upon the matter, where it was reasonable for the taxpayer to seek and rely upon such advice.

17. It is reasonable to start from the position that tax laws and tax rules in this country are generally complex, often convoluted and change regularly. 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 the vast mass of United Kingdom 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, given the complexity that Parliament has seen fir to introduce thereto. The respondents contend that that proposition should be watered down in this case because the appellant is somebody who gave tax advice in a professional capacity, at least in respect of one niche area of tax law.

18. As we will set out below, on the appellant's case this is not a case where the appellant's accountant and tax advisers acted as a mere functionary to undertake some kind of filing or routine administrative task instead of it being undertaken by the appellant himself. It is his case that he sought and relied upon professional advice from his accountant which confirmed his view of whether a particular requirement did or did not apply (see below).

19. 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.
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> 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, he 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. 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 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 he believes he can properly rely, can be said to be negligent if he 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 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.

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.

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 taxpayer has acted reasonably.. 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 his professional adviser may not be

correct or that it is being contended that his 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 should proceed.

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 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. In this case the appellant's own abilities meant that he was in a better position to assess his accountant's degree of proficiency and expertise, which bears mainly upon the issue whether it was reasonable for the appellant to seek and rely upon his advice (on the matters to which we refer below).

20. We should also mention that the very phrase "reasonable care" indicates that the test will be satisfied, provided that the care taken is reasonable. It carries with it the implication that perfection need not be reached, and it necessarily recognises that errors might occur even when a reasonably prudent taxpayer has taken that degree of care which is requisite when dealing with the respondents. A taxpayer might

genuinely and honestly misconstrue legislation; a taxpayer might inadvertently make an arithmetic error or press an inappropriate key on a computer keyboard (and fail to notice having done so); or genuinely mis-remember a salient fact. The test is not to ask whether any such error or failure would have occurred in a perfect world, because that would be to elevate the test beyond that which is applicable. The test is not to ask whether the taxpayer could have done something else which, if done, might have revealed the error unless the doing of that other task is itself something which a reasonable taxpayer ought to have done, and which, if done, would have revealed the initial error.

21. By contrast, a deliberate error in a tax return requires that the taxpayer knew about the error and intended to misrepresent the true position to the respondents. Nothing short of that will do, save in circumstances where a taxpayer has deliberately shut his eyes to the true factual position, sometimes referred to as "Nelsonian blindness." In our judgement the position, as we have summarised it above, is properly to be taken from the decision of this Tribunal in Auxillium Project Management Ltd v HMRC [2016] UKFTT 249 at para 63.

22. We also keep in mind that although there is only one civil standard of proof, it is a general requirement of a fair trial that the more serious the allegation relied upon by one party, such as an allegation of dishonesty or the making of a deliberate misrepresentation to the respondents, the fact-finding tribunal must be the more assiduous to ensure that the evidence relied upon by the person making that allegation is sufficiently credible, relevant and cogent to warrant such an adverse finding. In pointing that out we gratefully adopt what Lord Hoffmann said in Re B [2008] UKHL 35 at paragraph 45 of his speech. We need not set it out in full because the principle is well recognised and, we venture to think, necessary to render a decision in a case where such a serious allegation is made, compatible with article 6 of the European Convention on Human Rights.

The Furnished Holiday Letting Loss Claim.

23. It is unnecessary for us to specify figures but we can record that during the fiscal year ended 5 April 2011 the appellant had very substantial gross earnings and no financial difficulties. He and his wife owned a property in Lincolnshire which, on the basis of the appellant's evidence, we are satisfied, the appellant hoped might be run, in part, as a holiday letting venture. We mention at this stage that the concept of "holiday letting" is a generally used expression, but that the relevant legislation, to which we refer below, does not in fact require that such short term letting should be to persons who are actually taking a holiday, as opposed, for example, staying at a particular location whilst working in that location for a week or two. Nonetheless, we adopt the shorthand expression commonly used and will refer to this as the furnished holiday letting claim.

24. The appellant's property in Lincolnshire had outbuildings which have been referred to as The Stables and The Forge. Sometime in 2005 the local authority had granted planning permission for the conversion of The Forge into additional residential accommodation. The appellant's evidence, which we accept, is that the planning authority had informed him that The Stables did not require planning consent because the then existing proposals for their use did not involve a material alteration for planning purposes. That planning permission would last for only five years, although the appellant could take his chance upon whether it would or would not be renewed upon an appropriate application being made. The appellant decided to proceed with alterations to The Forge within the permitted five year period and given that he was absent from Lincolnshire, attending to his practice in London, for most of each week, a decision was taken to engage the services of a Mr. Moore to act as a project manager. Mr. Moore had worked as a head gardener at a local country house and the appellant also subsequently engaged his services to undertake garden design and landscaping works, including hard landscaping and planting.

25. The appellant's desire to proceed with the work was, at least in part, also informed by the fact that he was aware that the government was consulting upon proposals to restrict "sideways loss relief" whereby losses made in connection with one trade or profession might be set against profits generated by a different trade or profession carried on by the same person.

26. The property in Lincolnshire was registered at H. M. Land Registry in the appellant's wife's name; she being the owner thereof. On 20 September 2010 the appellant's wife granted him a licence to occupy The Stables and The Forge (along with a designated garden area attaching to those outbuildings) with a view to operating a furnished holiday letting enterprise. This was to document that which, as between husband and wife, they were free to arrange on an informal basis.

27. On an unspecified date, but in March/April 2010, the necessary building and alteration works commenced with Mr. Moore, acting as project manager. Mr. Moore lived near Lincoln and worked on matters relating to the appellant's property on a daily basis whilst acting in his capacity as project manager. It was said in oral evidence that this did not necessarily involve him travelling on a daily basis but, at least, two or three days in each week.

28. The appellant's evidence is that in July 2010, Mr. Moore informed him that he and his family were moving to live in Woodbridge, Suffolk. That would make a commute to the appellant's property unachievable or, at the very least, extremely arduous. To overcome that problem initially Mr Moore made overnight stays at local accommodation known as The Wishing Well Inn, Dyke; itself approximately a 30 minute drive from the appellant's premises.

29. When the building and renovation works were sufficiently advanced as to render the accommodation fit for human habitation, the appellant and Mr. Moore agreed that instead of Mr. Moore, staying at remote accommodation and paying for same, as and when necessary he would reside temporarily at The Stables. This had obvious logistical and practical advantages for all concerned.

30. The appellant's evidence is that it was agreed that Mr. Moore would make payment for the use of that accommodation at the rate of £100 per night (plus VAT), albeit that the evidence is that such payment was deferred and eventually set off against money owing by the appellant to Mr. Moore for work that he had undertaken for the appellant (with particular reference to landscaping and planting work). There is nothing commercially suspect or unsatisfactory about such an arrangement and the law readily recognises set off as a normal commercial arrangement. Indeed, the invoice issued to Mr. Moore for the accommodation was not issued until January 2011 being the time when final accounting between the parties took place and one debt was set against the other. In the interim, the appellant accounted for the VAT due on the contracted rate for the accommodation, notwithstanding that the appellant had not received payment. During the hearing before us there was cross-examination on the basis that the quantum of the VAT did not exactly match that which would have been payable on the basis of a fee of £100 per night for the accommodation but we do not consider that to be a material discrepancy or one which casts doubt upon the accuracy or veracity of the appellant's evidence.

31. The appellant makes no bones about the fact that if his fledgling furnished holiday letting business were to make a loss in its first trading period, he wanted to ensure that he should be able to set that loss against his barrister income/profits. As applicable tax legislation then stood he was perfectly entitled to do so. The appellant was equally aware that the government was consulting upon changing that position so that, in future years, sideways relief might not be available. We say "might not be" because in 2010 the matter was under consultation, even though one might reasonably adopt the view that where the government "consults" the reality is that the proposal will come into effect (with or without minor amendments).

32. The fact of the matter is that in his first trading period the appellant did make a loss which he did set against his barrister earnings/profits.

33. The respondents, by Mr. Charles, contend that thereby the appellant deliberately made a claim for a relief to which he knew he was not entitled. This has been put on three bases by the respondents.

34. The first is that there was not a *de facto* furnished holiday letting business being operated in any accepted commercial sense from September 2010 when Mr Moore began staying at the property and that the assertion that such an arrangement amounted to furnished holiday letting is a retrospective construct on the part of the appellant to give himself a tax advantage by being able to claim sideways loss relief prior to its abolition.

35. The respondents' case on this issue is that in an email dated 15 November 2010 the appellant said to his accountant, Mr Jennings, that he had had somebody staying some two – three nights per week since September 2010 and so "at a pinch I could argue that I commenced then". The respondents argue that Mr Moore's use and occupation of the premises was not use and occupation which could properly be characterised as either commercial or furnished holiday letting, notwithstanding the absence of a need for a person actually to be "on holiday."

36. The applicable respondents' Guidance on Furnished Holiday Letting businesses pointed out that :

> (1) the accommodation must be available for commercial letting to the general public as holding accommodation for no less than 140 days in each year,
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> (2) it must be so let for at least 70 days in aggregate during each trading year, and
>
> (3) the property must not be in the same occupancy for more than 31 days for at least seven months within each trading year.

37. The Guidance did not specify what was meant by "each trading year" or "a trading year".

38. The respondents place weight on the fact that on 11 November 2010 the appellant sent an email to Mr Jennings to inform him that he was "about to start" the furnished holiday letting business and wanted advice about the quantum of capital

allowances that he could claim. In the email dated 15 November 2010 the appellant reported to Mr Jennings that he had had somebody staying at the accommodation for two – three nights per week since September 2010 and commented that "at a pinch," he could argue that his holiday letting venture had commenced in September 2010. There is nothing whatsoever wrong with somebody adopting a retrospect and deciding that the facts in existence do or do not fit a particular characterisation. The fact of the matter here is that the characterisation which the appellant gave to Mr. Moore's occupation of the premises suited his desired outcome with respect to qualifying for sideways loss relief on the fledgling furnished holiday letting business. However, the fact that it might suit a taxpayer to characterise a past factual situation in a manner consistent with an outcome that he wishes to achieve, does not lead to the conclusion that it is improper so to characterise it. Whether such characterisation is or is not permissible is a matter of objective assessment.

39. The respondents' position on that, as set out in paragraph 83 of Mr Charles' evidence, is that although the respondents accept that Mr. Moore stayed at the property it should not be regarded as "commercial letting" within the meaning of section 325 Income Tax (Trading and Other Income) Act 2005. In his witness evidence, Mr Charles, places reliance on the fact that in the period September – December 2010, the appellant had not yet obtained a television licence for the premises to be let (distinct from his family home TV licence) and invoices disclosed that some elements of work were being carried out during that period. Mr Charles details those in paragraph 104 of his witness evidence (his statement dated 15 May 2017).

40. In his witness evidence, Mr Charles places reliance, *arguendo,* upon an email of 29 July 2010 in which the appellant informed a Mr Patel that he did not expect to commence his letting business "for a while yet," but that was written prior to Mr. Moore's need for more convenient and local accommodation becoming known. In paragraph 87 of his witness evidence, Mr Charles takes issue with the appellant's willingness to "get in a paying guest" at short notice if that is necessary to comply with legislative requirements which, in turn, would be necessary for him to be able to claim sideways loss relief. That is not something from which any kind of adverse

inference can be drawn. There is nothing wrong with a taxpayer arranging his affairs so as to meet legislative requirements rather than to fail to meet them. The fact that a taxpayer does so because that will work to his advantage is not something from which an adverse inference can be or should be drawn. A person is entitled to arrange his affairs in as tax efficient manner as he might lawfully do, provided that that does not involve artifice. If, when objectiviley considered, a person's characterisation of what has happened, factually, proves to be advantageous in terms of his tax affairs, there is nothing either legally or morally reprehensible in adopting that characterisation.

41. Mr Charles also makes the assertion that the appellant was taking specific steps so as to put himself in a position where he would be able to obtain sideways tax relief. The appellant agrees with that proposition. If the appellant was able to do so, there was nothing wrong with him so doing. Indeed, many would regard that as an eminently sensible thing to do. It has only the most remote bearing upon the argument that the appellant was not running a commercial enterprise but, instead, putting in place a construct to provide sideways loss relief prior to it being abolished or substantially watered down.

42. At the hearing before us the "non-commerciality" argument remained in play but was very secondary to the respondents' argument that the appellant knew that the property had not been let for the requisite number of days to qualify for relief.

43. We are satisfied that there was a proper commercial quality and character to the letting of the property notwithstanding that it was to Mr. Moore and to two other artisans who worked at the property to undertake various cosmetic finishing work, especially work to the gardens/grounds which involved both hard and soft landscaping. We keep in mind that much of Mr Moore's finishing work was external on the gardens, landscaping and planting which had something to do with how desirable the accommodation would be for letting purposes, but little to do with whether the accommodation itself was ready and fit for occupation. Even if it was not the appellant's initial thought or intention to characterise Mr Moore's use and occupation of the property as commercial letting, but it later suited him so to do, the issue is not whether this was a retrospect but whether it was an objectively justified

retrospect. From the perspective of Mr. Moore it was a sensible commercial arrangement because although he paid slightly more than he had been paying at the Inn, he substantially reduced his travelling time and expense. He was "on the job." He also had the commercial advantage of not actually making payment for the accommodation, week on week, but being able to defer payment and make it by way of set-off against fees or payments due to him for work done (mainly on the gardens and landscaping).

44. Thus so far as the respondents' rather secondary argument is concerned, that is, that this was not a commercial letting of the property, we do not accept that assertion and consider that the appellant's characterisation of it as commercial letting was objectively justified. The appellant's evidence is that he had consulted the respondents' guidance in their published document PIM4105, which enjoins the respondents' personnel to "take a reasonably broad view" and instructs that the words "holiday accommodation" are not expressly defined, but that if the other required conditions are met, they should accept lettings as being of holiday accommodation, unless of the view that the appropriate legislation is being abused.

45. Section 323 Income Tax (Trading and Other Income) Act 2005 provides as follows :

323(1) A letting is a lease or other arrangement under which a person is entitled to the use of accommodation.

(2)A letting of accommodation is commercial if the accommodation is let—

(a) on a commercial basis, and

(b) with a view to the realisation of profits.

(3) A letting is of furnished holiday accommodation if—

(a) the person entitled to the use of the accommodation is also entitled, in connection with that use, to the use of furniture, and

(b) the accommodation is qualifying holiday accommodation (see sections 325 and 326).

(4) This section applies for the purposes of this Chapter.

46. Section 324 of that Act provides :

(1) For the purposes of sections 325 and 326 "the relevant period" for accommodation let by a person in a tax year is determined as follows.

(2) If the accommodation was not let by the person as furnished accommodation in the previous tax year, "the relevant period" is 12 months beginning with the first day in the tax year on which it is let by the person as furnished accommodation.

(3) If the accommodation—

(a) was let by the person as furnished accommodation in the previous tax year, but

(b) is not let by the person as furnished accommodation in the following tax year,

"the relevant period" is 12 months ending with the last day in the tax year on which it is let by the person as furnished accommodation.

(4) Otherwise "the relevant period" is the tax year.

47. The qualifying conditions in the then legislation (which has since been amended) were that the accommodation must be available for letting for not less than 140 days in each year and must be so occupied for not less than 70 days. We have already mentioned other conditions which, for present purposes, are not material.

48. The appellant has accepted that he was not in fact entitled to carry across loss relief because the effect of the legislation is to define "the relevant period" as 12 months ending on the last day of the period in which the property is first let [Section 324(2)]. Thus, "the relevant period" is not the annual accounting period for the business.

49. The respondents' position is that either the definition of "the relevant period" was known to the appellant or should have been known to him and that he made his sideways loss relief claim deliberately knowing that he did not meet the 70 day/night requirement.

50. The respondents put that argument on the basis that the appellant accepts that he was aware of the 70 day/night requirement, but, importantly, had no reason to believe

that it would be pro-rated given that his business did not commence until September 2010. It is not in dispute that during the relevant period the appellant had let the property for only 52 nights. Thus, on the basis of pro-rating September 2010 – April 2011, 52 nights would have fallen well within the 70 day/night requirement. However, section 324(2) of the Act has the effect of providing that the relevant 12 month period for the appellant's purposes is 12 months beginning with the first day of the tax year in which it is first let. Thus, the relevant period ended on 27 September 2011.

51. The main thrust of the respondents' case is that, as the appellant now accepts and swiftly accepted after it was pointed out to him, he did not in fact qualify for sideways loss relief on the losses calculated for his furnished holiday letting business for its first accounting period, because of what has generally been referred to as the "70 day rule."

52. The essential question therefore becomes whether the appellant honestly believed that pro-rating applied. We are in no doubt that he did honestly so believe. We arrive at that conclusion, not only because we found the appellant a credible witness, but also for the following reasons :

(1) If, as the respondents allege, the appellant should have known that he needed 70 days/nights occupation prior to 27 September 2011 to qualify, given that the property had, it is common ground, been let for 52 days/nights, we are satisfied that, as the appellant has asserted, it is overwhelmingly probable that he could/would have been able to facilitate commercial letting for a further 18 days/nights, so as to reach the magic figure of 70, had he considered that to be necessary. In other words, he had it within his power to meet (or to endeavour to meet) the qualifying condition had he known about it and not believed that pro-rating applied.

(2) It is the appellant's evidence that he consulted his accountant, Mr Jennings, about the issue of pro-rating and was advised that it did apply. Notwithstanding that the appellant was a person of ability when considering and construing statutory and extra-statutory material, he was nonetheless entitled to

place reliance upon Mr Jennings' advice which, the appellant readily accepts, served to confirm what he understood to be the correct position.

(3) The fact that such advice was given by Mr Jennings and that he believed it to be correct advice is borne out by the fact that Mr Jennings' presented the loss relief claim on the very basis that there had not been 70 days/nights occupation within the period ending 27 September 2011. It is wholly improbable that he would have done that, had he realised that pro-rating did not apply and that the advice that he had given to the appellant, relating to pro-rating, was wrong. In other words, the appellant's accountant's readiness to compile and submit the appellant's tax return, which included the sideways loss relief claim, on the basis that it was a lawful and proper loss relief claim because the 70 day requirement had been met, when he knew that actual lettings had been for 52 days/nights only, serves to emphasise that accountant's (erroneous) belief in the correctness of the position being taken (i.e. that pro-rating applied) which, by implication would have re-affirmed the position to the appellant.

53. There was a third string to the respondents' bow in that they contended that the sideways loss relief claim failed in any event, because, by reason of section 74C Income Taxes Act 2007, such relief would not be available unless the appellant had spent an average of 10 hours per week engaged in the furnished holiday letting business. Although this was not majored upon by the respondents, it was raised as an issue before us. The appellant's position is that if such a pre-condition to sideways loss relief existed at the relevant time he was not aware of it nor is there any reason why he should have been aware of it. He puts forward the latter proposition because by reference to the respondents' Guidance in respect of furnished holiday lettings and any reliefs associated therewith, such guidance makes no reference to any such requirement. In other words, the respondents' case must rest upon the fact that because the appellant is a barrister he must be taken to know almost every single detail of our extensive and complex tax legislation which, we are satisfied, is quite unrealistic because that is beyond the capability of any ordinary mortal. Those of us who sit in this Tribunal regularly will have come across senior personnel from the respondents' organisation who feel confident and comfortable to deal with the

intricacies of one particular area of taxation, but, if questioned about a different and distinct area of taxation, often respond that they know nothing about that other area given that he/she has had no experience of working in that other area of taxation. It is simply a matter of reality that even senior personnel working within the respondents' organisation readily accept and assert that they usually only have expertise in a particular area of taxation law in which he/she is immersed as part of his/her employment.

54. We accept the appellant's evidence that he was not aware of any such 10 hour requirement and so did not make a claim for sideways loss relief knowing that he had failed to meet any such requirement. We are satisfied that there was nothing careless about the appellant's lack of such awareness.

55. We were invited by the respondents to conclude that if the appellant's error on the holiday letting sideways loss relief claim was not deliberate, it was nonetheless careless. We decline to make any such finding for the reasons which we have set out above. We accept that the appellant adopted an entirely reasonable position in believing that pro-rating applied and that he took reasonable care to check that that was the position by consulting his accountant who, we are satisfied, held himself out as competent to advise on that issue and other issues relating to the holiday letting taxation arrangements. There was no suggestion before us that the appellant had exhibited any want of reasonable care in his choice of professional adviser and we see no reason why a barrister, even one versed in some niche areas of tax law, should not place reliance upon his accountant if he holds himself out as able and willing to give expert advice on the matters with which we have been concerned. Accordingly, we decline to find that the appellant made a careless error. The error is to be characterised as an innocent mistake.

The Omitted Business Receipt.

56. We can take this relatively shortly. The issue is simply this. The appellant received a payment, by way of professional fees, directly into his bank account one or two days prior to the end of his annual professional accounting period. He sent an

email to his clerk timed at 19:41 hours on 31 July 2010 (a Saturday) to inform him of that fact. His clerk entered the receipt into the Chambers' computer accounting system on the next working day, which fell in August 2010 just within the appellant's new 12 month accounting period.

57. When the appellant came to complete his professional accounts (and tax return for the year ended 5 April 2011) he did not include the fees that had been received a day to prior to the end of his accounting period but had been booked onto the system a day or two thereafter. That is wholly unsurprising if one understands the relationship between barristers and their clerks. The word "clerks" is apt to misrepresent or diminish the responsible role that such staff undertake. Any properly run set of barristers Chambers now operates a recognised computer accounting package. It is sophisticated and usually set up so as to deny the possibility of ex post facto alterations being made. The function of any clerk tasked with responsibilities relating to the billing and/or receipt of fees, is faithfully to record when fee notes are sent out, when payments are received and generally to maintain the integrity of the computer based accounting system. It is important to note that it would be highly unusual for an individual barrister to have access to the computer system so as to be able to input any data into it or to alter any data that has been input into it by the clerks. In other words, a barrister, in any properly run set of Chambers, relies exclusively upon his duly appointed clerks to maintain the integrity of the accounting records.

58. We note that the allegation that was initially made, of deliberate cheating by the appellant, by treating this one particular fee as falling into a later accounting year when it fell into an earlier accounting year, has been withdrawn, and it is now alleged that that was an error that arose because the appellant failed to take reasonable care or was negligent. The initial assertion that this was deliberate cheating, with the minor effect of transferring the fee from one fiscal year to another fiscal year, indicates to us either that those who undertook the investigation failed properly to understand the nature of the way in which any properly run Chambers' accounting system works, or a most over-zealous approach on the part of those who were investigating the appellant. Unfortunately it has, at least in part, contributed to the appellant's belief that the zealousness with which his affairs have been investigated was caused by his

failure to heed the demand (as he construed it) made by Mr Valentine (see above). It is understandable that he has adopted that view, given the triviality of this particular issue which, even on the respondents' case caused only a timing differential in the payment of any tax and, on the respondents' case involved no more than £72.

59. Now that the respondents put their case on the basis of a want of reasonable care, rather than this being a deliberate error, the assertion is made on the basis that when the appellant asked his clerks for a computer printout of his fee income, aged debt and payments made to his Chambers, in readiness to prepare his accounts which would form the basis of information inserted into a relevant tax return, the appellant should not have placed reliance thereon without undertaking an audit or a reconciliation by reference to his banking records. We reject that contention. It would involve a barrister in such a situation having to undertake audit or reconciliation work quite over and beyond that which is it is reasonable to expect. That is because a barrister is entitled to place reliance upon those in a responsible position within his Chambers tasked with keeping the records in proper order. The concept of proportionality is relevant. Given that a barrister in any properly run set of Chambers is entitled to place faith in the integrity and reliability of the accounting records maintained by his clerks, with which he is unable to interfere, it is in our judgement quite disproportionate to expect any such barrister then to embark upon the extremely time-consuming and laborious process of auditing and/or seeking to reconcile those records. We arrive at that conclusion because, as stated above, the duty is to take reasonable care; not to achieve perfection.

60. In our judgement, a barrister in the position of the appellant takes reasonable care by placing reliance in the integrity and reliability of his Chambers' maintained accounting records unless he has some good and proper reason either to doubt their integrity or accuracy. When the appellant came to have his accounts prepared, very many months after this one fee had been posted to his computer ledger a couple of days after its actual receipt (so as to put it in a different accounting year), we see no reason why the appellant should suddenly have considered that he should check whether his clerks had entered a single fee as received a couple of days after its actual receipt.

61. The appellant says that he was not aware that his clerks had erred in this respect, nor did he have any suspicion that they had done so. We accept that evidence.

Duplicated Repairs Claim.

62. The appellant commissioned a Capital Allowances Report from FTI Consulting in respect of properly claimable capital allowances in respect of the fitting out of the holiday letting accommodation and his professional accommodation in London. The report appears at tab 47 in the bundle where, at internal page 56, appears a Schedule of Expenditure. The FTI Report concluded that of the identified expenditure £18,967 qualified for capital allowances in respect of the appellant's professional income, same being referable to his professional accommodation in London.

63. When the appellant's profit and loss account was prepared by his accountants for his year ended 5 April 2011, there was an entry "Repairs and renewals of property and equipment" shown in the sum of £17,796. In a separate document headed "Profit and Loss Account for the 12 months ended 31 July 2010" the appellant reported to his accountants that his office repairs and redecoration expenditure had been £18,967. The figure that found its way into the appellant's accounts, prepared by his accountants, represented the sum of £18,967 less VAT of £3360, less an additional sum of £2,189 recognised as disallowable.

64. When the appellant gave evidence he said that the FTI Report was lengthy and detailed and that he looked at its main conclusions but did not read it in depth. He made it available to his accountants before his accounts were prepared and said in evidence that he thought that those accountants would appreciate that the figure of £18,967 which he had included within his draft Profit and Loss Account (which the appellant had for the assistance of his accountants) was already within and taken account of in the FTI Report. It suffices to say that the appellant's accountants did not so appreciate and the result was that there was double counting in respect of repair costs which could legitimately be deducted before the appellant's taxable income/profit was calculated.

65. The appellant and/or his accountants spotted that error, quite unprompted by the respondents, and reported it to the respondents. We are not clear whether it was the appellant himself or his accountants who first identified the error.

66. We can deal with this aspect briefly. It is our judgment that for the appellant to have worked on the assumption that his accountants would appreciate that the sum for repairs set out in the Profit and Loss Account that he had prepared was the same or substantially the same as the sum set out in the FTI Report was to court the risk that they would not so appreciate. It would have been a very simple and straightforward thing for the appellant to point out to them that these were, in essence, one and the same and that they should take care that there was no double counting. There is force in the submission made by the respondents that the appellant was the only person in a position to appreciate that there was a significant risk of double counting taking place and so he is the person who should, at the very least, either have checked that no such double counting took place or he should have alerted his accountants to the situation and invited them to ensure that same did not occur. It is for that straightforward reason that we conclude that there was a want of reasonable care in respect of this error in the self-assessment tax return for the year ended 5 April 2011.

67. It has been submitted to us on behalf of the appellant that the penalty in respect of this matter should be suspended. That may happen where conditions attached to the suspension are designed to ensure that a similar error does not occur in the future. In our judgement this is not the kind of error where a suitable condition could be imposed given that the explanation provided to the respondents was that this error had occurred because the element of double counting had been "sadly overlooked." We perceive that there is little by way of any condition that could be imposed to prevent similar oversight in the future.

68. The penalty calculated in respect of this inaccuracy was at the rate of 15% applied to potential lost revenue of £7,959.57p, giving rise to a penalty of £1,193.94p. The only reason to interfere with that assessment is that we have formed the judgment that this disclosure is properly to be regarded as unprompted. Thus the penalty should be levied at 10%, meaning that the penalty figure is reduced to £795.96p.

69. 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.

The penalty in respect of the furnished holiday lettings error is quashed and it is determined that this was a non-deliberate and non-careless error.

The penalty in respect of the omission of professional fees is quashed and it is determined that this was a non-deliberate and non-careless error.

The penalty in respect of the repairs being double counted is upheld on the basis that it arose from a failure to take reasonable care, but the disclosure of that error being unprompted, the penalty is reduced to £795.96p

GERAINT JONES Q.C
TRIBUNAL JUDGE

RELEASE DATE: 21 DECEMBER 2017