



TC05417

Appeal number: TC/2015/06852

TC/2015/06856

INCOME TAX - pensions - late notification of claim for enhanced protection - whether reasonable excuse – no, appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr CARL RADLEY and Mr ANDREW GIBBS Appellants

- and -

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

**TRIBUNAL: JUDGE ABIGAIL MCGREGOR
MR RICHARD LAW**

Sitting in public at Fox Court, London on 19 May 2016

Michael Collins, of Counsel, instructed by Independent Tax and Forensic Services LLP, for the Appellants

Sadiya Choudhury, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Background

- 5 1. The appellants, Mr Andrew Gibbs ("**Mr Gibbs**") and Mr Carl Radley ("**Mr Radley**") appeal against the refusal of the respondent ("**HMRC**") to consider information provided by them in a late notification for enhanced protection of their pensions against the lifetime allowance charge. The issue in these proceedings was whether the appellants had a reasonable excuse for the late applications.

10 Evidence

2. Both Mr Gibbs and Mr Radley gave oral evidence at the hearing and were cross-examined.

3. Documentary evidence submitted included:

15 (1) copies of email correspondence between Mr Gibbs and Mr Radley and their advisers both before and after the 5 April 2009 deadline; and

(2) copies of correspondence between the appellants and HMRC relating to the late application, HMRC's refusal to accept it and the independent review decision.

Law

- 20 4. There is no dispute as to the application of the legislation in this case, but it is useful to set out its terms briefly in order to explain the significance of the claim. On 6 April 2006 the UK regime for the taxation of pensions changed significantly as a result of amendments made by Finance Act 2004 ("**FA 2004**"). This date is commonly known as "A-day". One of the changes introduced was an income tax
- 25 charge, known as the lifetime allowance charge, which applies where the value of pension benefits arising at a benefit crystallisation event exceeds an individual's lifetime allowance available at that time.

5. Transitional savings were included in the A-day changes that allowed taxpayers to give notice to HMRC of their intention to rely on certain provisions known as
- 30 "enhanced protection". Where paragraph 12 of Schedule 36 to FA 2004 applies to an individual, he or she is not liable to the lifetime allowance charge (para. 12(3)(a)). Paragraph 12(1) states that this paragraph applies:

35 *"...on and after 6th April 2006 in the case of an individual who has one or more relevant existing arrangements if notice of intention to rely on it is given to the Inland Revenue in accordance with Regulations made by the Board of Inland Revenue."*

There was no dispute in this case over whether Mr Gibbs and Mr Radley had a "relevant arrangement".

6. Regulation 4 of the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations (SI 2006/131) (the “**ELA Regulations**”) is the provision that sets out how this notice must be given. Paragraphs 2 to 4 of this regulation provide as follows:

- 5 “(2) *The individual may give notice of intention to rely on paragraph 12 of Schedule 36 (“paragraph 12”).*
 (3) *If the individual intends to rely on paragraph 12, the individual must give a notification to the Revenue and Customs on or before the closing date.*
 (4) *For the purposes of this regulation the closing date is 5th April 2009.”*

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7. An individual who wished to obtain enhanced protection therefore had to give notification of his intention to rely on paragraph 12 on or before 5 April 2009. Regulation 10 of the ELA Regulations provides that the notification must be in a form prescribed by HMRC and it must be signed and dated by the individual.

15 8. It was common ground in this case that the notifications were not made within the deadline. Therefore the provision on which Mr Gibbs and Mr Radley seek to rely is that which provides for late application. Regulation 12 of the ELA Regulations is headed “*Late submission of notification*” and states as follows:

- 20 “(1) *This regulation applies if an individual—*
 (a) *gives a notification to the Revenue and Customs after the closing date,*
 (b) *had a reasonable excuse for not giving the notification on or before the closing date, and*
 (c) *gives the notification without unreasonable delay after the reasonable excuse ceased.*
25 (2) *If the Revenue and Customs are satisfied that paragraph (1) applies, they must consider the information provided in the notification.*
 (3) *If there is a dispute as to whether paragraph (1) applies, the individual may require the Revenue and Customs to give notice of their decision to refuse to consider the information provided in the notification.*
30 (4) *If the Revenue and Customs gives notice of their decision to refuse to consider the information provided in the notification, the individual may appeal.*
 (6) *The notice of appeal must be given to the Revenue and Customs within 30 days after the day on which notice of their decision is given to the individual.*
35 (7) *On an appeal that is notified to the tribunal, the tribunal shall determine whether the individual gave the notification to the Revenue and Customs in the circumstances specified in paragraph (1).*
 (8) *If the tribunal allows the appeal, the tribunal shall direct the Revenue and Customs to consider the information provided in the notification.”*
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The facts

9. From the evidence presented, we find the following facts.

10. Mr Radley and Mr Gibbs were businessmen involved in the creative communications industry and neither of them had any financial or pensions qualifications.

5 11. Mr Radley and Mr Gibbs were trustees of the Radley Yeldar pension fund (“**RY**”).

12. Mr Radley and Mr Gibbs were advised in relation to RY and their personal pension positions by Truestone Asset Management PLC (“**Truestone**”) from about 1988. Their relationship manager was Mr Paul Szkiler.

10 13. In January 2004, Truestone sent summary notes of the likely forthcoming pensions changes that may affect RY to both Mr Radley and Mr Gibbs. They were notes on government consultations, and so were not final recommendations. These notes contained no specific details of applications for enhanced protection, but referred to the need to make registrations with HMRC within a three year period.

15 14. In December 2004, Mr Gibbs attended a meeting with Mr Szkiler at which the general performance of RY was discussed alongside the forthcoming pensions changes. Mr Gibbs made notes at that meeting, including:

“all new pensions have maximum value of £1.5m, ours will not be capped as long as registered etc, Paul will do that”

20 15. In May 2005, Truestone provided a document to Mr Gibbs and Mr Radley entitled ‘A-Day’. It was a single page document that summarised the new lifetime allowance and associated charge, among other changes. At the bottom of the page under the heading ‘Opportunities and planning required’ one of the items listed was “protecting the tax efficiency of your pension fund – enhanced protection”. It contains no other details of what this might require.

25 16. On 17 October 2005, Mr Gibbs sent Mr Szkiler an email in which he expressed his concerns about getting “the service/information required”, noting that he was seriously considering “finding an alternative source for this advice”. Finally he set out a list of six outstanding items, which included “comfort that everything is in place for A Day”.

30 17. On 26 October 2005, Mr Szkiler replied to that email as follows (*sic*):

“Andy just back from Sierra Leone, get you on the next trip, please call me tomorrow I spoke to Mark on the 17th same day you sent this message.

If I am not hear Rory will always help, but lets talk.

35 Paul”

18. In December 2006, Mr Gibbs attended a further meeting with Truestone at which the annual pension performance review was discussed. The document provided stated:

5 “The value of your benefits within the SSAS currently amount to approximately 98% of the lifetime limit...I would remind you that you have until 5th April 2009 to apply for transitional protection and, assuming you have made contributions after April 5th 2006, you will be eligible to apply for enhanced protection of accrued rights. I will therefore arrange for the appropriate form to be pre-populated and forward to you for your endorsement.”

10 19. In November 2008, Mr Radley and Mr Gibbs terminated their arrangements with Truestone because they were not happy with the service being provided. The termination was triggered by unhappiness about another matter, i.e. not enhanced protection of RY.

20. For the period between November 2008 and July 2009, Mr Radley and Mr Gibbs had no pensions adviser.

15 21. In July 2009, Mr Radley and Mr Gibbs appointed Financial Lifestyle Management Limited and, through them, St James’ Place wealth management (“**FLM/SJP**”) to take over the provision of pension advice.

20 22. At some stage after that instruction (either in late 2009 or early 2010, the exact date was not clear but is not material) FLM/SJP provided Mr Gibbs with a report detailing their proposed services. It mentions the need to have obtained enhanced protection on certain pension assets. This report was discussed at a meeting and Mr Gibbs made numerous hand-written notes, including, at the section of the report dealing with enhanced protection: “Done, protected”. Mr Gibbs also recalled informing FLM/SJP that he thought it was protected.

25 23. Following further questions from FLM/SJP, on 2 April 2012, Mr Gibbs and Mr Radley sent a letter to HMRC asking whether enhanced protection had been applied for.

24. On 26 April 2012, HMRC confirmed that no enhanced protection was in place for either Mr Gibbs or Mr Radley.

30 25. Between April 2012 and July 2012, Mr Gibbs tried to establish from Truestone whether or not Truestone could provide evidence to him that enhanced protection had been applied for.

26. At the end of June 2014, Mr Radley and Mr Gibbs commenced a professional negligence claim against Truestone for their failures in relation to enhanced protection.

35 27. On 23 December 2013, Collegiate Management Services Limited (the claims management company appointed by Truestone’s insurers in relation to the negligence claim against Truestone (“**Collegiate**”)) requested that a late application for enhanced protection be made by Mr Gibbs and Mr Radley.

40 28. In January 2014, FLM/SJP started preparing the necessary information to make the late applications.

29. On 11 April 2014, K&L Gates LLP (solicitors acting for Mr Gibbs and Mr Radley) submitted late applications to HMRC. Mr Radley's late application was made on this date. The form submitted for Mr Gibbs had been signed but not dated.

5 30. On 22 May 2014, HMRC sent a letter in reply asking for further evidence related to the claim for reasonable excuse in relation to both Mr Radley and Mr Gibbs and stated that they could not consider Mr Gibbs' late application until the signed and dated form had been submitted.

10 31. On 12 November 2014, Independent Tax and Forensic Services LLP (who had been appointed by Mr Radley and Mr Gibbs to assist in this matter) sent further information to HMRC in relation to both Mr Radley and Mr Gibbs

32. On 15 December 2014, HMRC again requested a signed and dated application from Mr Gibbs alongside further information to support his late application (once received). On the same date HMRC also requested further information in relation to Mr Radley's late application.

15 33. On 11 May 2015 (this is an assumed date since the letter was incorrectly dated 26 February 2015 but was sent in response to a letter from HMRC dated 1 May 2015 and was received by HMRC on 12 May 2015), the completed application from Mr Gibbs was sent to HMRC.

20 34. On 27 May 2015, HMRC sent letters setting out its position that neither Mr Gibbs nor Mr Radley had a reasonable excuse for the late application and it would therefore not consider the late applications.

25 35. Following a further exchange of letters, on 28 October 2015 (for Mr Radley) and 12 November 2015 (for Mr Gibbs), HMRC confirmed on review the decision not to consider the late applications for enhanced protection on the grounds that neither appellant had a reasonable excuse.

36. On 23 November 2015, Mr Radley and Mr Gibbs appealed against those decisions.

37. On 7 December 2015 the Tribunal service directed that the appeals of Mr Radley and Mr Gibbs should be heard together.

30 **The parties arguments**

Appellants' arguments

38. Mr Collins submitted that the appellants had a reasonable excuse for the late application because:

- (1) they had relied on the services of Truestone;
- 35 (2) the reliance on a third party adviser was a reasonable one because the subject matter was complex;

(3) the appellants had a reasonable and justifiable expectation that Truestone would make the application on their behalf based on their previous interactions with Mr Szkiler;

5 (4) the evidence in the documents presented supports the contention that the appellants were under the impression that Truestone would make the application on their behalf;

(5) Truestone had breached their duty of care to both appellants by failing to ensure the enhanced protection applications were made on time; and

10 (6) the appellants would have chased the matter if they had not been firmly of the opinion that all matters were being dealt with by Truestone.

39. Mr Collins relied on the case of *Irby v HMRC* [2012] UKFTT 291 (TC), in which Mr Irby had successfully appealed against HMRC's refusal to consider a late application for enhanced protection, to support the appellants' case in a number of ways. We will refer to that case in our discussion in the paragraphs that follow.

15 40. Mr Collins gave an example of a person who has been advised on 1 January that he would need to sign his tax return before 31 January, but then does not receive the form from his adviser before 31 January. Mr Collins submitted that these were circumstances where the awareness of the need to do something would prevent the taxpayer from having a reasonable excuse of relying on his adviser. However, he
20 submitted that Mr Radley and Mr Gibbs position was 'a million miles away' from this position because there was no evidence that they were clearly told about the need to sign the document personally and there was a period of two and half years between the investment review in 2006 in which the submission of the form was mentioned and the actual deadline.

25 41. Mr Collins submitted that the appellants made the applications without unreasonable delay because:

(1) they did not become aware that the applications for enhanced protection had not been made until the letter from HMRC dated 26 April 2012;

30 (2) neither appellant was aware of the possibility of making a late application until December 2013 when it was suggested by Collegiate;

(3) HMRC did not alert the appellants to the opportunity to submit a late application at any stage, which was in contrast to the position in *Irby*;

35 (4) once they became aware they instructed FLM/SJP to undertake the necessary work in order to be able to submit the application, which they then did in April 2014 (albeit that in Mr Gibbs' case the fully completed application was not submitted until May 2015);

40 (5) the period of approximately 4 months between them becoming aware and the submission of the late applications was not unreasonable given the complexity of the calculations (including pensions valuations) that needed to be made in order to support the applications; and

(6) in the case of Mr Gibbs, the subsequent delays of just over a year were administrative errors of his advisers.

HMRC's arguments

5 42. Ms Choudhury submitted on behalf of HMRC that the appellants did not have a reasonable excuse for the late submission of the applications for enhanced protection because:

(1) while they are perfectly entitled to obtain advice from professional advisers, the legislation requires that applications for enhanced protection are signed by the applicants themselves;

10 (2) Mr Radley and Mr Gibbs had been informed of the need for them to sign the form personally and of the deadline for submission;

(3) the evidence does not support the conclusion that Mr Radley and Mr Gibbs were relying on Truestone to submit the form on their behalf;

15 (4) the appellants were unreasonable in not contacting Truestone in the period of two years after the 2006 meeting to check on the progress of the application for enhanced protection; and

(5) The action in negligence against Truestone is irrelevant to this case because the Tribunal is considering the actions of the taxpayer not the actions of the adviser and the tests of negligence and reasonable excuse are very different.

20 43. Ms Choudhury urged the Tribunal to consider the tests for reasonable excuse established in *Perrin v HMRC* [2014] UKFTT 488 (TC) and *Barrett v HMRC* [2015] UKFTT 329 (TC).

25 44. Ms Choudhury also took issue with Mr Collins' example of a negated reliance on an adviser. She found the example given to be 'on all fours' with the positions of Mr Radley and Mr Gibbs, rather than a million miles away. Like the person in the example, Mr Radley and Mr Gibbs were aware of the deadline. She could not discern a reason why a longer gap between being advised of the deadline and the coming round of the deadline (i.e. the two and half years in this case, when compared with the month in Mr Collins example) would make appellants' position better.

30 45. If the appellants were found to have had a reasonable excuse for the late application:

(1) the excuse must have ceased on 26 April 2012 when Mr Gibbs and Mr Radley received the letter from HMRC informing them that no enhanced protection was in place;

35 (2) there was still a delay of just under two years for Mr Radley and just over three years for Mr Gibbs, which is not reasonable; and

(3) the absence of a comment from HMRC that they could make a late application does not make the delay a reasonable one and, again, this case can be distinguished from *Irby*, because Mr Irby had specifically asked HMRC what

he could do next whereas Mr Radley and Mr Gibbs do not appear to have asked this question.

Discussion

Reasonable excuse

5 46. It is helpful to draw out the most important findings of facts from the timeline of facts set out above:

(1) Mr Radley and Mr Gibbs were both aware of the need for the application for enhanced protection to be made by the deadline on 5 April 2009 from, at the latest, December 2006;

10 (2) Mr Radley and Mr Gibbs were concerned about the performance of Truestone as a pensions adviser generally from late 2005 and this concern continued until the termination in 2008; and

15 (3) Mr Gibbs (on behalf of himself and Mr Radley) had chased Truestone in relation to preparations for A-day, including the application for enhanced protection, in October 2005.

47. Mr Collins submitted that Mr Radley and Mr Gibbs were in the same position as Mr Irby and drew our attention to paragraphs 19 and 20 of *Irby* in which it was stated that:

20 “He was not aware of the process or that input would be needed from him. He understood that the application could (and would) be made by UBS on his behalf without the need for his involvement”, and

“He did not feel the need to enquire as to UBS’s progress in the matter or to take any further action”.

25 48. Ms Choudhury drew our attention to the distinguishing factor (in paragraph 23 of the same decision) that Mr Irby was:

“not aware that there was a closing date for applications for pension protection or that it was 5 April 2009.”

30 49. We agree with Ms Choudhury that this is a crucial distinction between *Irby* and the current case and cannot agree with Mr Collins that the appellants were in the same position as Mr Irby because the appellants:

(1) were both aware of the deadline of 5 April 2009 for making the application; and

(2) had felt the need to enquire as to Truestone’s progress on the matter.

35 50. Therefore we do not find that the decision in *Irby* supports the appellants’ case on the question of reasonable excuse at all.

51. We would agree with the submission of Ms Choudhury that the test to be applied here is that found in *Perrin* (and derived from earlier cases):

“was what the taxpayer did a reasonable thing for a reasonable trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?”

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52. There are circumstances where an adviser has been negligent and the taxpayer’s reliance on the adviser could constitute a reasonable excuse. However, the two are not necessarily inter-related. The Tribunal’s job (as set out in the quotation from *Perrin* above) is to consider the actions of the taxpayer and conclude whether they were reasonable in the circumstances. The actions of the adviser are some of the relevant circumstances and it is on that basis that we have considered the actions of both the taxpayers and Truestone.

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53. We did not find that Mr Collins’ comparison example was particularly helpful to the appellants’ case, largely for the reasons set out in Ms Choudhury’s submissions. However, we also do not consider that such an example is helpful in applying the test for reasonable excuse, and therefore did not attach any weight to it.

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54. Having considered all the facts that are set out in this decision, we conclude that:

(1) it was reasonable for the appellants to rely on Truestone to provide them with advice about A-Day, including enhanced protection, because those issues were complicated and the application for enhanced protection required technical calculations on the valuation of pensions; but

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(2) in the context of being concerned about the service being supplied by Truestone and requesting comfort that everything was in place, it was not reasonable for the appellants to conclude that an email a week later that asks Mr Gibbs to call and suggests that they need to talk is ‘comfort’ that everything is being done. If Mr Gibbs was worried enough about it to ask for comfort then it is not reasonable to suggest that the absence of an indication to the contrary is sufficient to provide that comfort; and

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(3) it was also not reasonable, having terminated services from Truestone due to poor service and being aware of a deadline in April 2009, to leave the matter unconsidered for a 10 month period that included the passing of that deadline based on an unfounded assumption that the application had been made.

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55. Therefore we find that Mr Gibbs and Mr Radley did not have a reasonable excuse for failing to submit the application for enhanced protection before the deadline in April 2009.

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Without unreasonable delay

56. Given we have found that the appellants did not have a reasonable excuse, it is not strictly necessary for us to consider the question of unreasonable delay. However, in case it is relevant for a further appeal, we consider the question here.

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57. Regulation 12(1)(c) of the ELA Regulations requires the notification to have been given “without unreasonable delay after the reasonable excuse ceased”. Having concluded above that Mr Gibbs and Mr Radley did not have a reasonable excuse, we will have to assess this on the basis of a hypothetical ending of a reasonable excuse.

5 58. Ms Choudhury invited us to conclude that the reasonable excuse must have ended (at the latest) shortly after 26 April 2012, when HMRC sent letters to the appellants confirming that no enhanced protection was in place.

59. Mr Collins invited us to conclude that the reasonable excuse did not cease until shortly after 23 December 2013 when the appellants became aware of the possibility of making a late application as a result of a letter of that date from Collegiate requesting that a late application be made.

60. In our view, the better position is that of Ms Choudhury. If the hypothetical reasonable excuse is that put forward on behalf of the appellants (i.e. broadly that they were under the reasonable impression that the application had been made on their behalf), then the reasonable excuse must have ceased when they became aware that the application had not been so made, which was on receipt of the letter of 26 April 2012 from HMRC.

61. Having reached that conclusion, we must consider whether the period that elapsed between 26 April 2012 and the submission of the applications was a reasonable delay.

62. Mr Collins again relied on *Irby*, but this time drawing a distinction between that case and that of the appellants. HMRC had included a statement in its response to Mr Irby stating that he could make a late application. The letter from HMRC to Mr Gibbs and Mr Radley made no such statement. We do not find this supports the appellants case for two reasons:

(1) Mr Irby had specifically asked what he could do next, whereas Mr Gibbs and Mr Radley did not (both confirmed this in their evidence); and

(2) HMRC is not obliged to set out the law relating to late applications when responding to queries.

63. In his evidence, Mr Radley drew a comparison with an annual tax return, stating that if a taxpayer misses the deadline for submission, he or she still gets a fine even if it is only a day or two. He felt that the issue of enhanced protection was the same. We do not find this comparison helpful to the appellants’ case. In the context of a tax return, although the fines or penalties may arise after only a short period, it would be reasonable for a taxpayer to rectify the problem as soon as possible by submitting the tax return. When looked at from that perspective, the comparison is not a particularly helpful one for the appellants. We would also distinguish enhanced protection from something like a tax return, because enhanced protection is a benefit to the taxpayer, rather than a burden. We therefore find that it was not reasonable for Mr Gibbs and Mr Radley not to try to establish whether a late application could be made.

64. The burden of proof is on Mr Radley and Mr Gibbs to show that the period between April 2012 and April 2014 (in the case of Mr Radley) and between April 2012 and May 2015 (in the case of Mr Gibbs) was not an unreasonable delay. We do not find that they met that burden of proof and therefore cannot find that the application was made without unreasonable delay.

Decision and appeal rights

65. For the reasons fully explained above, we find that Mr Radley and Mr Gibbs did not give the notification to HMRC in accordance with the requirements of regulation 12(1) of the ELA Regulations because they did not have a reasonable excuse for the late application for enhanced protection. Therefore their appeal against HMRC's refusal to consider the late application is dismissed.

66. 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.

**ABIGAIL MCGREGOR
TRIBUNAL JUDGE**

RELEASE DATE: 17 OCTOBER 2016