[2016] UKFTT 0814 (TC)

TC05539

Appeal number: TC/2016/00970

INCOME TAX – application for enhanced protection – whether reasonable excuse for late application – no – whether unreasonable delay – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GORDON ANTHONY YABLON **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at Fox Court, Brooke Street, London on 24 November 2016

Gary Brothers of Independent Tax & Forensic Services Ltd for the Appellant

Moira Browne, Officer of HM Revenue & Customs, for the Respondents

DECISION

1. Mr Yablon applied for "enhanced protection" in respect of his pension arrangements under the provisions of paragraph 12 of Schedule 36 of the Finance Act 2004. In order to do so, he needed to give HMRC notice of his intention to do so no later than 5 April 2009. It was common ground that he gave that notice only on 4 February 2015. However, pursuant to Regulation 12(1) of the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006 (the "Regulations"), HMRC are obliged to consider late applications in situations involving a "reasonable excuse". The parties were agreed that the sole question which the Tribunal needs to determine in this appeal is whether Regulation 12(1) applies or not.

Evidence and procedural matters

2. Mr Yablon gave oral evidence having previously provided a witness statement and Ms Browne cross-examined him. We found Mr Yablon to be a reliable and honest witness. HMRC did not rely on witness evidence, but made submissions by reference to a bundle of documents that had been prepared for the hearing.

3. At the beginning of the hearing, HMRC applied to introduce new evidence in the form of a two-page document dated 16 February 2012 in which Mr Yablon applied for fixed protection. Mr Brothers objected to the admission of that evidence primarily because it was served so late. However, I permitted the document to be admitted as it was short, was clearly relevant to the question of when Mr Yablon discovered that no application for enhanced protection had been made and because Mr Yablon had referred to the document in his own witness statement.

Facts

4. The facts set out below were either agreed or determined by me.

5. Mr Yablon has no particular expertise in pension matters and relies upon professional advisers for an understanding of most issues, including tax matters, relevant to his pension arrangements.

6. Mr Yablon was born in 1940. At material times, he held three relevant pension funds. From 2000 until around 2013 he obtained financial advice (including advice on his pension funds) from Origen Financial Services Ltd ("Origen"). On 12 January 2006, Mr Yablon's then adviser at Origen, Mr Tony Laverick, sent Mr Yablon an email advising on the effect of the lifetime allowance that had been introduced in Finance Act 2004. The thrust of his advice was that, when Mr Yablon came to take benefits from his pension funds, absent some claim for protection (such as "enhanced protection" or "primary protection"), he would suffer a tax charge. He started his email by stating "This is extremely complicated" and ended it with "Clear as mud!". Mr Laverick's email was detailed and set out a number of options for Mr Yablon to consider, making it clear that:

> You literally must seek to 'protect' your pension funds…

7. There was evidently then some ongoing correspondence and oral discussions between Mr Yablon and Mr Laverick. However, the next document that we saw was an email dated 24 September 2007 from Mr Laverick to Mr Yablon. That email started by referring to an email from Mr Yablon dated 21 November (which must have been a reference to 21 November 2006) and "subsequent queries". Mr Laverick's email was over three pages long and dealt with 11 numbered issues of which the first one was the issue relating to "protection" of Mr Yablon's pension funds. That email included the following section:

> You are well above the Protection limits and we must now apply for protection.
>
> An election form for the protection will follow shortly – we have until April 2009 to file this. Meantime, I have once again had to request the A-day transfer value from [one of the pension funds] in order that this can be prepared…

Mr Laverick's email also enclosed an administration agreement (unrelated to the issue of protection of Mr Yablon's pension funds) with a request that Mr Yablon sign and return it. The email concluded with the words:

> Once again, sorry for the lack of the response.

8. Ms Browne suggested to Mr Yablon in cross-examination that the email of 24 September 2007 demonstrated that Mr Laverick needed to be "chased" for responses on matters relating to pension protection. However, Mr Yablon was clear in his evidence that he regarded Mr Laverick as reliable and responsive and that he placed a great deal of trust in him, not least since Mr Laverick had advised Mr Yablon for a long time and even before he joined Origen. I did not consider that the email of 24 September 2007 demonstrated otherwise. While it referred to an initial email of 21 November 2006, it was clear that there that been discussions subsequently and so the September email was intended to pull together responses on a chain of discussions that had started in 21 November 2006. Moreover, while Mr Laverick apologised for the "lack of response" that apology could have related to any one of the issues referred to in his email: it did not demonstrate that Mr Yablon had been waiting since 21 November 2006 for a response on matters relating to pension protection. I have therefore accepted Mr Yablon's evidence.

9. Mr Yablon accepted in cross-examination that he interpreted Mr Laverick's email as meaning that he would be sent a form to sign and he had previous experience of Mr Laverick sending him forms with instructions to sign them. He was happy to do this, even if he did not himself understand the detail of the forms as he trusted Mr Laverick's advice. Mr Yablon also accepted in cross-examination that he trusted Mr Laverick to send the form and did not chase up its progress since Mr Laverick's email made it clear that there was a long time before it needed to be submitted. Mr Yablon did not make any diary entries or other similar reminders to check that the form was sent or submitted.

10. Some time in 2008, Mr Laverick left Origen and Mr Yablon was assigned a new adviser, Mr Lester Wicks. I was not shown any correspondence between Mr Wicks and Mr Yablon dealing with the question of protection of Mr Yablon's pensions. Mr Yablon found Mr Wicks less easy to deal with than he had found Mr Laverick. However, he had periodic discussions with Mr Wicks on matters that included pension protection and we have accepted Mr Yablon's unchallenged evidence that in those discussions Mr Wicks indicated that he would deal with those matters. Mr Yablon could not remember Mr Laverick suggesting to him that there was no longer any need to apply for pension protection.

11. In fact, no application for enhanced protection was submitted by 5 April 2009. I had no evidence from Origen, Mr Wicks or Mr Laverick to explain why that was the case. However, in the documents bundle was an email and a memorandum from a Ms Lorraine King (who worked at Origen). It seems from those documents that in July 2009, Ms King was helping Mr Wicks to provide Mr Yablon with some advice and became concerned at the fact that no application had been made to protect Mr Yablon's pension. In an email dated 31 July 2009, Ms King referred to Mr Wicks's assurance to her that Mr Yablon was not affected by the lifetime allowance, but she expressed reservations about whether that conclusion was correct. Ms King appears then to have filled in an "Errors and Omissions Form" in accordance with Origen's internal procedure for reporting errors (although it is not clear when she did so). In that form, Ms King indicated that Mr Yablon had been advised that he did not need protection.

12. There was, therefore, something of a conflict between the "Errors and Omissions Form" and Mr Yablon's evidence: Mr Yablon had no recollection of being told that protection was no longer necessary, whereas the form suggested that he had been told. Since the form was hearsay evidence of what Ms King believed the position to be and was not tested in cross-examination, I prefer Mr Yablon's evidence.

13. The next relevant piece of correspondence was dated 16 February 2012. On that date, Mr Yablon signed a form applying for fixed protection. HMRC received that form on 23 February 2012. Mr Yablon confirmed that the form was filled in in his own handwriting and bore his signature. In Box 8 of the form, Mr Yablon ticked a box to indicate that he did not have enhanced protection from the lifetime allowance. Mr Yablon's unchallenged evidence, which I have accepted, was that Mr Wicks gave him instructions on how to complete the form and that he followed those instructions. I have also accepted Mr Yablon's evidence that, because he was not familiar with pensions matters or the technical names for the various forms of protection that could be claimed, it did not occur to him, when he signed this form, that he was confirming that he did not hold the very protection ("enhanced protection") that Origen had told him needed to be applied for by 5 April 2009.

14. Between 2012 and 2013, Mr Yablon became dissatisfied with the level of support that he was obtaining from Mr Wicks. He instructed Anders Bayley Scott Limited ("Anders Bayley Scott") as his new financial advisers. In September 2013, Mr Yablon found out, for the first time, that he did not hold enhanced protection when Mr Kevin Ceurvost at Anders Bayley Scott informed him of this fact. Anders Bayley Scott did

not, however, tell Mr Yablon that he might be able to make a late application for enhanced protection.

15. Mr Ceurvost's discovery caused Mr Yablon to make a formal complaint to Origen. Initially, Origen refused to entertain that complaint as they considered that Mr Yablon had been aware, since January 2006, of the need to apply for protection and his claim was statute-barred under applicable limitation rules since he had not made it within 6 years of that date. That caused Mr Yablon to take the matter up with the Financial Ombudsman Service who, having considered whether Mr Yablon was in time to make the complaint, decided, on 2 September 2014, that it was a matter that they could investigate. The Financial Ombudsman Service did not suggest to Mr Yablon that he could make a late application to HMRC for enhanced protection.

16. On 10 November 2014, Origen conceded that they were liable for loss that Mr Yablon had suffered as a consequence of their failure to arrange enhanced protection. However, they said that Mr Yablon had a duty to mitigate his loss and should accordingly make a late application to HMRC. I accept that this was the first occasion on which Mr Yablon knew that there was the facility to make a late application to HMRC. Independent Tax and Forensic Services Limited ("Independent Tax") duly set about making such an application but to do so, they first needed to obtain information about pension fund valuations.

17. On 26 January 2015, Independent Tax wrote to HMRC enclosing evidence of their authority to act for Mr Yablon. They explained that Mr Yablon would be submitting a late application for enhanced protection and outlined the nature of Mr Yablon's "reasonable excuse".

18. On 4 February 2015, Independent Tax followed up on their letter of 26 January 2015 by sending HMRC a duly completed form applying for enhanced protection.

19. After some correspondence, on 17 June 2015, HMRC refused to accept Mr Yablon's late application for enhanced protection. Very broadly, they concluded that, having been advised well before the deadline of 5 April 2009 that he needed to apply for enhanced protection, he had not taken reasonable steps to check on Origen's progress in dealing with that matter. Therefore, they concluded that he had no "reasonable excuse".

20. Mr Yablon appealed to HMRC against that decision and some further correspondence ensued. On 12 January 2016, HMRC confirmed their decision following an internal review. On 24 February (slightly outside the applicable time limit), Mr Yablon appealed to the Tribunal[1].

[1] Ms Browne has not suggested that the Tribunal should decline to hear Mr Yablon's appeal since it was made late. In those circumstances, I will exercise my discretion to permit the appeal to be made late since the delay involved was just a matter of days.

The law

21. Paragraph 4 of the Regulations provides as follows:

> **4 Reliance on paragraph 12 of Schedule 36 (lifetime allowances: "enhanced protection")**
>
> (1) This regulation applies in the case of an individual to whom paragraph 12(1) of Schedule 36 has applied at all times on and after 6th April 2006.
>
> (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.

22. Paragraph 12 of the Regulations provides as follows:

> **12 Late submission of notification**
>
> (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.
>
> (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.
>
> (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.
>
> (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.

23. In order for Mr Yablon's appeal to succeed, therefore, he must satisfy two distinct tests (and he has the burden of proof on both of them):

> (1) Firstly, he must show that he had a "reasonable excuse" for not submitting the notification to HMRC by 5 April 2009.
>
> (2) Secondly, if that reasonable excuse ceased before the notification was actually given (on 4 February 2015) he must establish that the notification was given without unreasonable delay after the reasonable excuse ceased.

24. There is a difference between the two limbs of the defence. The first limb focuses on whether Mr Yablon himself has a reasonable excuse. Accordingly, as noted below, that involves an examination of Mr Yablon's own actions and circumstances. The second limb, however, focuses on the length of any delay and is not confined to an analysis of whether Mr Yablon's own actions caused that delay.

25. The parties were agreed that there is no statutory definition of what constitutes a "reasonable excuse". However, the phrase appears in a number of contexts in tax legislation and has been considered on numerous occasions by both courts and tribunals. I consider that the correct test to apply is that outlined by Judge Medd in *The Clean Car Company Limited v CEE* [1991] VTTR 234 where he said:

> …the test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible 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 in at the relevant time, a reasonable thing to do?

26. Both parties made submissions by reference to other Tribunal decisions on the concept of "reasonable excuse" with Mr Brothers making submissions to the effect that Mr Yablon's factual situation was similar to that in cases where the Tribunal found that there was a "reasonable excuse" and Ms Browne making submissions that the position was closer to cases in which the Tribunal found there was no "reasonable excuse". I have derived little assistance from this process of reasoning by analogy. The question in each case is whether there is a "reasonable excuse" by reference to the particular facts of that case.

Discussion

Whether there was a reasonable excuse

27. Mr Brothers presented Mr Yablon's case ably and made a number of cogent submissions to the effect that it was entirely reasonable for Mr Yablon to place his trust in Origen to obtain enhanced protection by the deadline of 5 April 2009. I found the arguments to be quite finely balanced, but have come to the conclusion that Mr Yablon did not have a reasonable excuse.

28. Even though I accept that Mr Yablon had no detailed knowledge of pensions matters, I have concluded that he was aware (i) that material sums of money depended on successfully obtaining a form of "protection", (ii) that to obtain the necessary protection action needed to be taken by 5 April 2009 and (iii) that the necessary action involved Mr Yablon himself signing a form that Origen would send him. While I accept Mr Brothers's submission that the underlying legislation was of formidable complexity, I do not consider that these three points were difficult to comprehend and I have no doubt that Mr Yablon himself understood them. In those circumstances, I believe that a reasonable taxpayer would have taken steps to check periodically with Origen as to the progress being made with enquiries assuming more urgency as the deadline of 5 April 2009 approached. Mr Yablon has not satisfied me that he took reasonable steps such as this.

29. Mr Yablon explained that Mr Laverick left Origen quickly and with little notice. Mr Yablon was therefore being put in a position where he was no longer being advised by Mr Laverick, in whom he had a high level of trust and confidence, and was instead being advised by someone he did not know very well. A reasonable taxpayer, anxious to ensure that an election for protection on which a large amount of money depended, would therefore have felt a particular need to ensure that Mr Wicks was able to confirm either that the election had been made or that there was a clear programme in place that would enable it to be obtained by the due date. I did not consider that Mr Yablon took reasonable steps to respond to the sudden change in adviser and to check that there was continuity in the way that Origen handled his affairs.

30. It is possible, of course, that if Mr Yablon had chased Mr Wicks more assiduously for updates that Mr Wicks would have informed Mr Yablon of his evident belief that there was no need to apply for enhanced protection after all. However, in such a case, since Mr Yablon had received conflicting advice from Mr Laverick, in whom he placed a great degree of trust and confidence, it would have been reasonable for Mr Yablon to outline the advice he had previously received and ask Mr Wicks whether he was really sure that no enhanced protection was needed. There was very little evidence as to what Mr Wicks's precise view was on the question of enhanced protection, or why he held that view. In those circumstances, I am not satisfied that, if Mr Yablon had taken reasonable steps to chase Mr Wicks about progress with the application, the outcome would still have been that no in-time application for enhanced protection was made.

31. For all of the reasons set out above, I do not consider that Mr Yablon had a "reasonable excuse" for the failure to submit the notification by 5 April 2009.

When any reasonable excuse ceased

32. Strictly, the finding at [31] of itself means that the appeal must be dismissed. However, in view of the full arguments that were put on other points, I will deal with them.

33. Even if there was initially a reasonable excuse for the failure to submit the notification in time, all parties were agreed that the reasonable excuse had ceased by September 2013 when Mr Yablon realised that the application for enhanced protection had not actually been made.

34. Ms Browne made a strong argument that any reasonable excuse actually ceased on or around 16 February 2012, the date on which Mr Yablon signed the form claiming fixed protection. However, while Mr Yablon confirmed by signing the form that, at that time, he did not hold "enhanced protection", I have found at [13], that he did not realise the significance of that statement since he did not understand the differences between the various types of protection that could be claimed. Nor do I think that a reasonable taxpayer in Mr Yablon's position would have understood those differences. Mr Laverick's email of 24 September 2007 referred to at [7], mentioned only the importance of claiming generic "protection". It did not mention specifically that he needed to claim "enhanced protection". Nor do I consider that it was unreasonable for Mr Yablon to sign the form (on Mr Wicks's instructions) without fully understanding the content of that form himself. I suspect that few taxpayers who sign tax returns prepared by their advisers could claim a deep understanding of the contents of every single box on that return.

35. I have therefore concluded that any reasonable excuse ceased in September 2013 and not the earlier date for which Ms Browne argued.

Whether there was unreasonable delay after the reasonable excuse ceased

36. Any reasonable excuse ceased in September 2013. It then took Mr Yablon until 4 February 2015 to make an application for enhanced protection. The reason that Mr Yablon advanced for this delay was that he was personally not aware, and was not advised (whether by Anders Bayley Scott or the Financial Ombudsman Service), of the potential for making a late application.

37. In September 2013, Mr Yablon discovered that an application on which a large amount of money depended had not been made by the due date. A reasonable course of action would have been to ask whether the application could be made late. Even if it was thought that the deadline was absolute, there was nothing to be lost by writing to HMRC, enclosing the form and asking HMRC, in the circumstances, to exercise their discretion to accept it late. Alternatively, it would have been reasonable to call up HMRC and ask if anything could be done to remedy the situation. Mr Yablon's evidence did not mention that he took any such steps or asked his advisers to take such steps. I have concluded, therefore, that he did not do so.

38. Mr Yablon argues that, because he was not positively informed by his advisers, or the Financial Ombudsman Service, of the possibility of making a late application and only discovered this possibility from Origen (or its insurers) in November 2014 as part of discussions on loss mitigation, it necessarily follows that the delay up until that date was reasonable. I do not agree. Paragraph 12(1)(c) of the Regulations is asking whether a period of delay is unreasonable. That test is not focused on Mr Yablon's

conduct alone in contributing to that delay. If delay is caused by the unreasonable actions of his advisers, that delay will be unreasonable.

39. I do not believe that it was reasonable for Anders Bayley Scott not to realise until 10 November 2014, when they received the letter referred to at [16], that there was some facility for late elections to be submitted. As I have said at [37], even without a deep knowledge of the legislation, a natural and reasonable step would be to try to submit the election late (accompanied by an explanation of the lateness). Moreover, I do not agree with Mr Brothers's submission that paragraph 12 of the Regulations was an unfamiliar backwater of pensions legislation. That provision appears in the very same set of Regulations that imposed the deadline of 5 April 2009 in a section headed "Late submission of notification". A cursory glance at the legislation would have revealed that there was some facility for late notifications to be submitted. Moreover, if Anders Bayley Scott had sought to get in contact with HMRC they would, in all likelihood have been told that late elections were possible if made without unreasonable delay in circumstances where there was a "reasonable excuse". The fact that Anders Bayley Scott were evidently unaware until November 2014 of the possibility of making a late election has caused me to conclude that they took none of these steps. A reasonable financial adviser with expertise in matters relating to pensions protection would have done so.

40. Nor do I consider that it was reasonable for Mr Yablon to assume, from the fact that the Financial Ombudsman Service did not mention the possibility of making a late application, that no such application was possible. The Financial Ombudsman Service was looking into Mr Yablon's complaint against Origen. It was not reasonable to expect that they would give him advice on his personal tax position in relation to his pensions.

41. It follows that Mr Yablon did not take the reasonable step of asking his advisers to investigate what could be done to remedy the late submission of the election. Therefore, even if the focus was only on Mr Yablon's actions, I would consider the delay unreasonable. Considering the actions of Anders Bayley Scott confirms that conclusion. They did not take steps that would be reasonable for a financial adviser of consulting the legislation, speaking to HMRC or even trying to submit the form late. In those circumstances, I am not satisfied that the election was submitted without "unreasonable delay" after September 2013.

Conclusion

42. My conclusion, therefore, is that there was no "reasonable excuse" for the late submission of the election. Even if there was initially a reasonable excuse, that excuse ceased in September 2013 but the application was not submitted without unreasonable delay after that date. It follows that Mr Yablon's appeal is dismissed.

43. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 8 DECEMBER 2016