



TC06775

Appeal number: TC/2017/09460

*Pensions – lifetime allowance – whether taxpayer notified intention to fix
lifetime allowance – application to strike out - granted*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BRIAN TOWNLEY

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S

Respondents

TRIBUNAL: JUDGE IAN HYDE

Sitting in public in Birmingham on 1 October 2018

The Appellant did not appear and was not represented

Ms Johnstone, officer, for the Respondents

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DECISION

1. This application concerns the appellant's appeal in respect of his registered pension scheme and whether he has provided the requisite notice to be entitled to fix his lifetime allowance in accordance with Finance Act 2011.

2. In the application which is the subject of this hearing HMRC have applied to strike out his appeal on two grounds, first that the appellant has not served the required notice on HMRC and so therefore the Tribunal has no jurisdiction to hear the appeal and, second, that any appeal has no reasonable prospect of success.

Preliminary matter

3. The appellant did not attend the hearing either personally or through a representative. No indication had been given by the appellant in advance that he would not be attending.

4. In deciding whether to proceed in the absence of a party, the Tribunal must have regard to the overriding objective of the Tribunal under Rule 2 of the Tribunal procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to deal with cases fairly and justly, which under Rule 2(2) includes;

“

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

....

(e) avoiding delay, so far as compatible with proper consideration of the issues”

5. I take particular note that this is an application to strike out the appellant's appeal and the requirement in Rule 8(4) that;

“(4) the Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representation in relation to the proposed strike out”

6. I have considered these principles and concluded that, the appellant having been given due notice of the hearing (including a warning in the usual format that should he not attend the hearing might proceed without him), not having given any reason for failing to attend, the hearing should proceed. HMRC's grounds for the application have been set out in full in its application to strike out of 20 March 2018 which were sent to the appellant and upon which he has commented. Further, the appellant's argument were set out in correspondence, and could properly be considered in his absence.

The pension lifetime allowance regime

7. The pensions regime under Finance Act 2004, which provides for certain tax reliefs for registered pensions schemes, provides a limit on the value of tax privileged benefits an individual can draw from the pension scheme by reference to the lifetime allowance (“LTA”).

8. The level of the LTA has been reduced several times in recent years and this appeal concerns the transitional regime that applied when the LTA was reduced with effect from 6 April 2012.

9. Schedule 18 Finance Act 2011, which received Royal Assent on 19 July 2011 provides for changes to the LTA, amending section 218 Finance Act 2004 so that the LTA reduced from £1,800,000 to £1,500,000 with effect from 6 April 2012. However, under paragraph 14(3) of Schedule 18 an individual could fix their LTA at £1,800,000 (known as fixed protection 2012 or FP12, distinguishing it from equivalent protection applicable in other years) by providing notice.

10. Paragraph 14 provides;

“(1) this paragraph applies on and after 6 April 2012 and in the case of an individual-

(a) who has one or more arrangements under a registered pension scheme on that date,

(b) in relation to whom paragraph 7 of schedule 36 to FA 2004 (primary protection) does not make provision for a lifetime allowance and enhancement factor, and

(c) In relation to whom paragraph 12 of that Schedule (enhanced protection) does not apply on that date

If notice of intention to rely on it is given to an officer of Revenue and Customs

(2) The Commissioners for Her Majesty’s Revenue and Customs may make regulations specifying how notice is to be given

(3) Part 4 of FA 2004 has effect in relation to the individual as if the standard lifetime allowance were the greater of the standard lifetime allowance and £1,800,000 (the standard lifetime allowance for the tax year 2011-12)”

11. The Registered Pension Schemes (Lifetime Allowance Transitional Protection) Regulations 2011 (“the 2011 Regulations”) were made on 20 July 2011 pursuant to paragraph 14(2), laid before the House of Commons on 21 July 2011, and came into force on 11 August 2011.

12. The 2011 Regulations provide so far as relevant;

“3(1) subject to paragraph (2), an individual may rely on paragraph 14 if-

(a) the individual has given a paragraph 14 notice to Her Majesty’s Revenue and Customs, and

5 (b) Her Majesty’s Revenue and Customs have accepted that notice by issuing a certificate to the individual

(2)....

4(1) A paragraph 14 notice must include the following information-

10 (a) the title, full name, address (including postcode, if applicable) and date of birth of the individual submitting the paragraph 14 notice,

(b) the national insurance number of the individual or, where the individual does not qualify for a national insurance number, the reasons for this,

15 (c) a declaration that paragraph 7 of schedule 36 to the Finance Act 2004 (primary protection) does not make provision for a lifetime allowance and enhancement factor in the case of the individual, and

(d) a declaration that paragraph 12 of that Schedule (enhanced protection) will not apply in relation to the individual on and after 6 April 2012

(2) a paragraph 14 notice must be-

20 (a) in a form prescribed by Her Majesty’s Revenue and Customs, and

(b) received by Her Majesty’s Revenue and Customs on or before the following dates-

(i) if it relates to an individual described in subparagraph one of paragraph 14, 5 April 2012; or

25 (ii)

(3) the individual must sign and date the paragraph 14 notice

5....

6(1) Her Majesty’s Revenue and Customs may refuse to accept the paragraph 14 notice if it does not satisfy the requirements in regulation 4

30 (2) if Her Majesty’s Revenue and Customs refuse to accept the paragraph 14 notice the individual may require that Her Majesty’s Revenue and Customs provide reasons for the refusal

7(1) the individual may appeal against the refusal by Her Majesty's Revenue and Customs to accept the paragraph 14 notice

5 (2) the notice of appeal must be given to Her Majesty's Revenue and Customs before the end of the period of 30 days beginning with the day on which the refusal to accept the paragraph 14 notice was given

(3) Where an appeal under this regulation notified to the tribunal, the tribunal must determine whether Her Majesty's Revenue and Customs were entitled to take the view that the notice did not satisfy the requirements in regulation 4

10 (4) If the tribunal allows the appeal, the tribunal may direct her Majesty's Revenue and Customs to accept the paragraph 14 notice and issue a certificate to the individual"

13. The form prescribed by the 2011 Regulations, the APSS227, was made available on 11 August 2011.

The Facts

15 14. Based on the papers as supplemented by information provided by HMRC in the hearing, I find the facts as set out below.

15. The appellant has a registered personal pension to which the LTA regime applies and wished to protect his LTA at £1,800,000 by giving notice under the Finance Act 2011 transitional regime.

20 16. On 1 July 2013 the appellant contacted HMRC by e mail to inform them that he had written to HMRC on 21 March 2011 to request an APSS 227.

17. On 22 July 2013 HMRC informed the appellant that they did not have a record of the appellant submitting an APSS 227 form and that they did not send out such forms to be completed as they were accessed online.

25 18. On 25 February 2016 the appellant responded informing HMRC that he had attempted to download an APS S227 form prior to 21 March 2011 but had been unsuccessful.

30 19. On 6 October 2017 the appellant contacted HMRC by telephone to discuss how he should proceed in order to obtain FP12, that is to say preserve the £1,800,000 LTA.

20. On 25 October 2017 HMRC wrote to the appellant to inform him that anyone wishing to rely on FP12 had to notify HMRC by 5 April 2012. HMRC did not have a record of receiving his APSS227 application form.

35 21. On 30 October 2017 the appellant wrote to HMRC and stated that his letter of 21 March 2011 should be taken as notification to HMRC of his intention to rely on FP 12.

22. On 22 December 2017 the appellant appealed this matter to the Tribunal.

23. On 20 March 2018 HMRC applied to the Tribunal to strike out the appellant's appeal pursuant to Rule 8 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Tribunal Rules").

5 24. In June 2018 the appellant submitted APSS227 in respect of FP12 but this was refused by HMRC in July 2018 on the grounds that it was submitted late ("the 2018 refusal"). The appellant has been advised that he has the right to appeal this refusal but at the time of the hearing HMRC was not aware whether the appellant would be doing so.

10 **The Tribunal Rules**

25. Rule 8 of the Tribunal Rules provides so far as it is relevant;

"8(2) the Tribunal must strike out a whole or part of the proceedings if the Tribunal-

15 (a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them

(3) the Tribunal may strike out the whole or a part of the proceedings if-

(a)...

20 (b)...

(c) The Tribunal considers there is no reasonable prospect of the appellant's case, or part of it succeeding"

The appellant's arguments

26. The appellant argued that he has given notice as required by paragraph 14.

25 27. First, the letter of 21 March 2011 should be taken as notification to HMRC of his intention to reply on FP12.

28. Second, the appellant should be treated as having given notice because he attempted to download an APSS227 form from the HMRC website on 21 March 2011 but could not do so. In his letter of March 2011 he requested a paper form but no form
30 was ever sent to him. Accordingly, he was unable to provide the notice but he should not be prejudiced by that.

29. Separately the appellant has argued in correspondence that since HMRC have now refused his late application the strike out application should be withdrawn.

HMRC's arguments

30. HMRC's argument in this application is that paragraph 14 requires a taxpayer to give notice and allows HMRC to make regulations specifying how that notice is to be given. Regulation 4 of the 2011 Regulations sets out the required information that
5 needs to be contained in the notice, requires that the notice must be given in the form prescribed by HMRC, that is to say APSS227, and must be received by HMRC on or before 5 April 2012.

31. The appellant did not comply with the requirement of regulation 4 in that he did not complete APSS227 and send it to HMRC by 5 April 2012. Further, there is no
10 evidence that the appellant sent the letter of 21 March 2011 or that the letter contained the information required by regulation 4(1).

32. APSS227 was only available from 11 August 2011 when the 2011 Regulations came into force and so could not have been downloaded or provided earlier. In the course of the hearing Ms Johnstone confirmed that if the appellant had asked for a
15 paper copy of APSS227 after August 2011 it would have been provided but the appellant only made contact in 2017.

33. On that basis HMRC argued that the appellant has not submitted a paragraph 14 notice at all. Accordingly the appellant has no right of appeal under regulation 7, as there has been no refusal by HMRC of a paragraph 14 notice and so the Tribunal has
20 no jurisdiction and the appeal must be struck out pursuant to Rule 8(2).

34. Alternatively, even if the Tribunal does have jurisdiction, it is so evident that the notice does not comply with the requirements of regulation 4 that there is no reasonable prospect of the appellant's appeal succeeding and the appellant's appeal should be struck out under Rule 8(3)(c).

25 Decision

35. Paragraph 14 simply requires notice to be given but regulation 4 is prescriptive. The appellant has not sent to HMRC or this Tribunal a copy of the 21 March 2011 letter and the appellant has changed his view on what the letter said, from being itself
30 in my view this does not change the position. Even if the letter of March 2011 contained the information required by regulation 4(1), the requirement in rule 4(2) that the notice must be given in a form prescribed by HMRC, that is to say APSS227, cannot have been met. The form was not available in March 2011. Accordingly, the appellant has not provided a notice that complies with the requirements of rule 4 and
35 therefore it cannot constitute a paragraph 14 notice.

36. For completeness I note that the appellant has argued that he was unable to access the form in that he could not download it in 2011 and he was not sent one when he asked in 2011. However, he did not ask until 2017 and I accept HMRC's
40 evidence that had he asked after August 2011 he would have been able to obtain a form either from HMRC's website or by asking for a paper form.

37. Further, I note the appellant's argument in correspondence that given the 2018 refusal the strike out application should be withdrawn. In my view this is a matter for HMRC and they have decided to continue with the application which this Tribunal must consider. It may well be that the 2018 refusal leads to another appeal but that is not relevant to this application.

38. HMRC's application is to strike out the appellant's appeal either under Rule 8(2) or 8(3)(c) of the Tribunal rules. These are two different arguments which must be considered in turn.

39. Under Rule 8(2) if the Tribunal has no jurisdiction and does not exercise its powers to transfer to another court of tribunal (which does not apply here) it "must" strike out the appeal. For Rule 8(2) to apply the Tribunal must have no jurisdiction and I take it that the burden of proof must be on HMRC.

40. The Tribunal's jurisdiction in this matter comes from rules 6 and 7 of the 2011 Regulations, that is to say;

15 "6(1) Her Majesty's Revenue and Customs may refuse to accept the paragraph 14 notice if it does not satisfy the requirements in regulation 4.....

7(1) the individual may appeal against the refusal by Her Majesty's Revenue and Customs to accept the paragraph 14 notice...

20 7(3) where an appeal under this regulation notified to the tribunal, the tribunal must determine whether Her Majesty's Revenue and Customs were entitled to take the view that the notice did not satisfy the requirements in regulation 4"

41. HMRC say there is no jurisdiction because paragraph 6(1) requires there to be a paragraph 14 notice which has been refused. Here there has been no paragraph 14 notice because any notice given by the appellant necessarily does not comply with the requirements of rule 4.

42. In my view the wording of regulations 6 (1) and 7(3) makes it clear that the purpose of the Tribunal appeal rights are to enable the Tribunal to determine whether, in the event of disagreement between HMRC and a taxpayer, the conditions for a valid paragraph 14 notice have been met. Regulations 6 and 7 therefore envisage that the issue as to whether the conditions in rule 4 are satisfied should be considered in a substantive hearing of this Tribunal. That being the case, it is pre-emptive to determine the question of compliance with rule 4 as a question of jurisdiction prior to any substantive hearing. Accordingly in my view if a notice has been served and HMRC refuse to accept it as a valid paragraph 14 notice, the Tribunal has jurisdiction.

35 43. Here the appellant has argued that his letter of 21 March 2011 is a notice. Irrespective of the merits of that notice, for the purposes of Rule 8(2), this does not prevent the Tribunal from having jurisdiction. I therefore reject HMRC's application to strike out the appellant's appeal under Rule 8(2).

44. HMRC's alternative argument is that under Rule 8(3)(c) the Tribunal should strike out an appeal on the basis that there is no reasonable prospect of the appellant's appeal succeeding. The Tribunal has a discretion under Rule 8(3)(c) in that it "may" strike out the appeal where the Tribunal considers there is no reasonable prospect of the appellant's appeal succeeding. I consider that in order to strike out on this basis there must be a high degree of likelihood that the appeal will fail.

45. Were this appeal to proceed to a substantive hearing regulation 7(3) sets out the task of the Tribunal;

"7(3) where an appeal under this regulation notified to the tribunal, the tribunal must determine whether Her Majesty's Revenue and Customs were entitled to take the view that the notice did not satisfy the requirements in regulation 4"

46. The only notice that the appellant could be said to have provided is the letter of 21 March 2011 and as I have decided at paragraph 35 above, it is evident that the appellant has not provided a notice that complies with the requirements of rule 4 so that it would constitute a paragraph 14 notice. The point was not argued but I note that this jurisdiction of the Tribunal sits in isolation of the rest of the tax code. For example, there is no discretion to allow for reasonable excuse or other mitigating factors. In that context it is difficult to see how a Tribunal could take into account wider factors for example, any difficulties, were they to be proved, in obtaining the relevant form.

47. In my view it is clear the appellant could not reasonably hope to persuade a Tribunal that the conditions in regulation 4 were satisfied and HMRC were not entitled to take the view that they were not satisfied. I therefore accept HMRC's application to strike out the appellant's appeal under Rule 8(3)(c).

48. 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.

IAN HYDE
TRIBUNAL JUDGE

RELEASE DATE: 17 October 2018