# TC08013

*INCOME TAX – ENHANCED PENSION PROTECTION — application made years late – taxpayer believed Lifetime Allowance inapplicable to him – no advice taken nor further enquiries made – not objectively reasonable – no reasonable excuse found - appeal dismissed*

**Appeal number: TC/2018/08055 A/V**

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Mr ROBERT ANTHONY DANIEL BATESON** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN MANUELL**
**Mr JOHN WOODMAN**

**The hearing took place on 18 January 2021. The Tribunal heard Mr Gary Brothers for the Appellant and Mr Kevin Brooke, Litigator, of HM Revenue and Customs' Solicitor's Office, for the Respondents.**

**With the consent of the parties, the form of the hearing was by remote video link using the Tribunal video platform. The issues for the Tribunal were narrow and a remote hearing was appropriate. The documents to which we were referred consisted of the agreed bundle as prepared by HMRC, together with a bundle of authorities, both in electronic form.**

**The hearing was held in public and there was one observer.**

## DECISION

*Introduction*

1. The Appellant appealed against HMRC's refusal of a late claim for enhanced protection against a Lifetime Allowance charge made under paragraph 12 of Schedule 36 to the Finance Act 2004 ("FA 2004"). The Tribunal must decide whether he had a reasonable excuse for submitting the relevant form (APSS 200) for protection against the Lifetime Allowance charge some 8 years after the latest due date of 5 April 2009.

2. As usefully summarised in *Platt* [2011] UKFTT 606 (TC), significant changes to the taxation regime for pension savings came into force on 6 April 2006 ("A-Day"). These introduced a threshold of a Lifetime Allowance for pension savings. If an individual's pension savings exceed the threshold, the individual is liable to a Lifetime Allowance charge on the excess savings when the pension benefits are taken. The legislation contains transitional provisions which give protection to individuals against the Lifetime Allowance charge, provided they registered a claim for such protection with HMRC by 5 April 2009.

3. The Appellant maintains that until 2017 he had absolutely no idea that the changes made by the FA 2004 had affected his personal pension, as he believed that the value of his pension fund of £700,000 was too low to be affected by the new Lifetime Allowance. He submits that this is a reasonable excuse for his failure to make the claim by the due date.

*Background*

4. The Appellant's Self Invested Pension Plan ("SIPP") was established in 2003, when he converted an existing Small Self-Administered Scheme ("SSAS") to a SIPP with Suffolk Life. The Appellant was then advised by Mr Melvyn Martell. That connection withered away as the Appellant believed he had achieved his objective. Suffolk Life wrote to the Appellant in December 2005, March 2006 and November 2008 informing the Appellant of the coming pension taxation changes, recommending that he took advice if he thought he was affected. The Appellant believed that he was not affected because his fund's value was £700,000 and not £1,500,000 or more and took no advice. In 2015 he engaged Mr John Alwyn Evans ("Mr Evans") as his financial advisor. In 2017 during an exercise to convert the SIPP back to an SSAS, Mr Evans advised the Appellant that he had a Lifetime Allowance problem and should apply late for Enhanced Protection, which he did by application dated 3 November 2017.

5. As Mr Evans explained (see his witness statement at [6]), the reason the Appellant needed Enhanced Protection is that the pensions he crystallised before 6 April 2006 (known as "pre A-Day") are valued for the Lifetime Allowance by a multiple of the maximum income he could take under the capped drawdown rules,

producing a much higher value than the current actual fund value. Although the Appellant's pre A-Day crystallised fund will not be tested against the Lifetime Allowance, he has uncrystallised pension funds which will be tested at a Benefit Crystallisation Event ("BCE"), at which point his pre A-Day crystallised fund will be taken into account to determine the Appellant's remaining available Lifetime Allowance. Currently the Appellant's actual combined crystallised and uncrystallised fund values are below the Standard Lifetime Allowance. It is the income multiple formula which results in the excess.

*The law*

6. Section 214 FA 2004 imposes a charge to income tax, known as a "lifetime allowance charge" in respect of certain "benefit crystallisation events" occurring in relation to an individual who is a member of one or more registered pension schemes where the amount crystallised (which depends on the event in question) exceeds the individual's lifetime allowance. When the new rules, including the lifetime allowance charge, were introduced by FA 2004, it was recognised that transitional provisions were needed in order to give some relief to those who had made pension provision on the basis of the previous law. Section 283 FA 2004 accordingly provided for Schedule 36 to the Act to make a number of transitional provisions and savings. Among those is paragraph 12, Schedule 36 which applies to an individual who has one or more relevant existing arrangements, i.e., arrangements under pension schemes made before 6 April 2006 which, by virtue of paragraph 1, Schedule 12, become registered pension schemes on that date. Where paragraph 12 applies, there is no liability to the lifetime allowance charge in respect of the individual (paragraph 12(3)).

7. To qualify for enhanced protection, the individual had to give notice of intention to rely upon paragraph 12 in accordance with regulations made by the Board of Inland Revenue (para 12(1)), the Registered Pension Scheme (Enhanced Lifetime Allowance) Regulations 2006 ("the Enhanced Lifetime Allowance Regulations"). Regulation 4 imposed a cut-off date of 5 April 2009. (the closing date) for notice of intention to rely on paragraph 12.

8. Regulation 12 makes provision for cases where an individual had a reasonable excuse for not giving the notification by the due date, and gave it without unreasonable delay after the reasonable excuse ceased. It also provides for the right of appeal to the tribunal.

"12(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 35 notification."

*The Appellant's case*

9. Mr Brothers for the Appellant submitted in summary that this was a simple case. Evidence was given by Mr Evans, the Appellant's previous advisor and the Appellant. The information provided to the Appellant by Suffolk Life would not have led any reasonable person in a similar situation to believe that he was affected by the changes. It was objectively reasonable for the Appellant to have taken no action or advice in those circumstances, when the *Perrin* [2018] UKUT 158 (TC) tests were applied. None of the three Suffolk Life letters (assuming that all three were received) explained the Lifetime Allowance, let alone how it would be calculated. It was reasonable for the Appellant to believe that his pension was below the level which needed any action from him, as he had no means of knowing about the formula which applied to the Lifetime Allowance calculation. It was not for the Tribunal to decide whether the Appellant should have done something else but to decide whether what he in fact did was objectively reasonable: see *Twaite* [2017] UKFTT 0593 (TC). The appeal should be allowed.

*The Respondent's case*

10. Mr Brooke for HMRC submitted in summary that applying the tests set out in *Perrin,* no reasonable excuse could be shown. The Appellant was specifically warned by Suffolk Life in December 2005: "To find out how A-Day may affect you personally, we would strongly urge you to contact your financial adviser to discuss the implications and opportunities presented by the changes. It has always been important to review your pension arrangements on a regular basis… We believe that it is particularly important that a review of your current plans is carried out as soon as possible". There were two further letters. Suffolk Life stated that they were not pension or investment advisors. The Appellant claimed ignorance of the law but he

had not acted as a reasonable taxpayer. He could have applied for Enhanced Protection and/or sought advice as to whether that was necessary or he could have sought guidance from HMRC. The Appellant should have followed up the warnings given by Suffolk Life. He had not shown that he was unable to obtain advice or to investigate the position for himself. *Scurfield* [2011] UKFTT 532 (TC) was a similar case and there the Tribunal had found that there had been extensive publicity about the changes: "ignorance of the legal provisions dealing with the provision of pension benefits had no rational basis and did not constitute a reasonable excuse." *Platt* also had similar facts and a similar outcome. A reasonable taxpayer would not have acted in that way. The appeal should be dismissed.

*Burden and standard of proof*

11. The standard of proof is the normal civil standard, the balance of probabilities. The burden of proof to show that there is a reasonable excuse lie on the Appellant.

*Discussion and findings*

12. The facts of this appeal were not in any serious dispute and the summary of events set out under the subheading "Background" above stands as our primary findings. Additionally, as noted by the Tribunal in *Scurfield* (above), there was an extensive publicity campaign about A-Day in addition to the widespread press and media coverage of the Lifetime Allowance changes, which were the subject of much debate. The Tribunal also finds that the Appellant received all three warning letters from Suffolk Life. Suffolk Life emphasised that they could offer no advice themselves, as the excerpts quoted by Mr Brooke in his submissions show. Their letters were not intended as a legal treatise and were necessarily in general terms. Their repeated message was clear. In our view the recipient was adequately warned that he or she needed to review their personal situation in the light of the changes and should do so before the deadline.

13. We must consider whether there was a reasonable excuse for the admitted failure to apply for enhanced protection by the due date. It is undoubtedly the case that HMRC have no obligation to inform individual taxpayers about the consequences of changes in legislation: see, e.g., *Lau v HMRC* [2018] UKFTT 0230 (TC). As is well established, there is no statutory definition of reasonable excuse because there are so many possibilities according to the circumstances affecting individual taxpayers: see *Perrin* (above).

14. On the facts of the present appeal, we find that the Appellant has failed to show any reasonable excuse for the delay in his decision to apply for Enhanced Protection. Apart from the extensive publicity which surrounded the introduction of the limits to the Lifetime Allowance, the Appellant was repeatedly and clearly warned by Suffolk Life to seek specialist advice as to how those changes might affect him. Suffolk Life

also recommended that he should have regular reviews of his pensions, a recommendation which it might be thought was obvious, yet which was ignored.

15. The Appellant had been advised by a specialist when he set up what was then a SIPP in 2003. He next sought pensions advice in 2015. He claimed no knowledge of pensions law himself nor any interest in or knowledge of the subject. While pensions law has complex aspects for which specialist advice is beneficial, there was no evidence to suggest that making an application to HMRC for enhanced protection was particularly difficult or onerous. No fee was payable.

16. There was no evidence produced to us to show that the Appellant conducted any research himself into the manner in which the Lifetime Allowance had to be calculated or might affect him or made any attempt to seek guidance from HMRC or to obtain independent advice from a suitably qualified person prior to the well publicised deadline. The fact that the Appellant had no recollection of receiving the letters from Suffolk Life of 2006 and 2008 tends to indicate that it is more probable than not that he did not read them. Once the Appellant took advice from Mr Evans, years later, he discovered that he had not understood the effect of the changes and was affected. Given that the Appellant's pension fund stood at £700,000, i.e., was of substantial value on any view, that decision to conduct no research, seek no guidance, take no independent advice or make a protective application himself was in our view not a reasonable one.

17. We find that the Appellant has failed to show that he acted as an objectively reasonable taxpayer in his situation. We thus find that he has demonstrated no reasonable excuse for his late application which HMRC correctly refused.

18. The appeal is accordingly dismissed.

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.

**TRIBUNAL JUDGE MANUELL**

**RELEASE DATE: 29 JANUARY 2021**