[2021] UKFTT 0049 (TC)

TC08035

INCOME TAX – ENHANCED PENSION PROTECTION — *application made years late – reasonable excuse accepted by HMRC but post excuse delay alleged – taxpayer remained reliant on advice – objectively reasonable – reasonable excuse found - appeal allowed*

Appeal number: TC/2018/08236 A/V

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr MAURICE GAMMELL **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN MANUELL
Mr IAN MALCOLM

The hearing took place on 12 February 2021. The Tribunal heard Mr Gary Brothers for the Appellant and Ms Moira Duncan, 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 in its final form and a supplemental bundle together with a bundle of authorities, all in electronic form.

The hearing was held in public.

DECISION

Introduction

1. The Appellant appealed against HMRC's refusal of his late claim for enhanced protection against a Lifetime Allowance charge made under paragraph 12 of Schedule 36 to the Finance Act 2004 ("FA 2004"). Following discussions between the parties prior to the hearing, HMRC conceded that the Appellant had a reasonable excuse for his delay up until 16 October 2015, but HMRC nevertheless contended that the Appellant had thereafter delayed unreasonably in submitting the relevant form (APSS 200), which was not received until 22 December 2016. HMRC contended that therefore the Appellant's late application should not be accepted because of a delay of 14 months between the relevant knowledge and his late application.

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 12 August 2016 he had no knowledge of the possibility of obtaining enhanced protection by means of a late application. That is the date on which he accepts his reasonable excuse ended. He says that he had relied on his advisors, that it was reasonable for him to do so and that he had acted promptly once he was aware that a late application could be made. His application was made within 4 months of acquiring the relevant knowledge.

Background

4. The Appellant finally retired in 2010, although he had retired from his main role as managing director of a well-known restaurant chain in 2003. In outline, the Appellant had appointed financial advisors in 2001, who assisted him with his pensions and investments. He dealt with a named individual. He received no advice about enhanced protection in 2006 from those advisors or subsequently. The named individual changed in 2009 following illness. Enhanced protection was still not brought to the Appellant's attention. Nor was the Appellant advised about the 2012 Fixed Protection Limit of £1.8m. Following his advisor's recommendation, the Appellant applied for and received the 2014 Lifetime Allowance of £1.5m in August 2013.

5. From late 2015 the Appellant became disenchanted with his advisor and began to look elsewhere. On 13 October 2015 a prospective new advisor alerted the Appellant to the failure to apply for (a) enhanced protection in 2009 and (b) fixed protection in 2012. The Appellant was not at that stage informed about the possibility

of making a late application for enhanced protection. The Appellant took up the omissions with his existing advisors in December 2015, and sought to resolve the problem. By April 2016 the Appellant considered that there had been no progress in resolution and terminated their engagement.

6. That termination was treated by the advisors as a complaint. The Appellant engaged with their complaints procedure, which was protracted. On 12 August 2016 the Appellant was informed by the advisors in writing for the first time that there was the possibility of applying for enhanced protection out of time and that he should do so. The Appellant sought additional information which was provided by specialist consultants. The Appellant wished to ensure that his position was adequately safeguarded. There followed a month's delay caused by the illness of the staff member of the former advisor who was responsible for gathering the necessary information to support the late application. As noted above, the application was submitted on 19 December 2016. It was not until 11 December 2018 that HMRC notified their decision to refuse the application.

The law

7. 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)).

8. 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.

9. Regulation 12 makes provision for cases where (a) an individual had a reasonable excuse for not giving the notification by the due date, and (b) 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."

Evidence

10. Evidence was given by the Appellant who was also extensively cross examined. In summary the Appellant stated that he had no knowledge of pensions law and had trusted his advisors whom he had relied on for many years. He expected his advisors to give correct advice and saw no point in conducting his own research when he was paying substantial fees. Once the enhanced protection problem had emerged, it did not occur to him to contact HMRC or to look at HMRC's website. He was continuing to take advice about what he should do. Nor was he aware that making a late application was urgent, as he was not told. He considered that he was required to engage in his former advisor's complaints process before any other action was taken.

The Appellant's case

11. Mr Brothers for the Appellant submitted that the Tribunal's task was to determine a very narrow issue and that HMRC by conceding that it was reasonable for the Appellant to have relied on professional advisors could hardly resile from that by arguing that the Appellant had unreasonably delayed when he had continued to rely on professional advice when making his late application. The *Perrin* [2018] UKUT 158 (TC) tests had to be applied. The Appellant had acted responsibly throughout and had acted promptly once he became aware that a late application was possible and was not simply a delaying tactic by his former advisors. That period was about 4 months in total and had included time lost because of illness of a staff member at the former advisor. 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 recent decision in *Gibson* [2020] UKFTT 07916 (TC) provided a useful analogy and should be followed. The appeal should be allowed.

The Respondent's case

11. Ms Browne for HMRC relied on her skeleton argument and submitted in summary that, applying the tests set out in *Perrin*, the Appellant had not acted without unreasonable delay once his reasonable excuse had ceased. He had not contacted HMRC to establish where he stood. He had concentrated on his compensation claim rather than on making a simple application to HMRC which was a two sided form. The Appellant was an experienced businessman and he knew that his long standing advisor had let him down. The loss to the Appellant was a serious sum of money for a person who had paid close attention to his finances. He had taken 14 months before submitting his claim, which was too long a delay, as the reported cases showed. A reasonable taxpayer would not have acted in that way. The appeal should be dismissed.

Burden and standard of proof

12. 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 (or no unreasonable delay once the reasonable excuse had ended) lies on the Appellant.

Discussion and findings

13. The essential 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. 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). Our starting point in the present appeal, as noted above, has to be that HMRC have accepted that the Appellant had a reasonable excuse for the admitted failure to apply for enhanced protection by the due date. The reasonable excuse accepted by HMRC is that the Appellant reasonably relied on professional advisors whom he had believed to be competent: see *Rowland* [2006] SP C 548. The only change after 13 October 2015 was that the Appellant had come to understand was that the advice for which he had paid significant fees over many years was defective.

14. We are unable to accept HMRC's view of the Appellant's actions. On the facts of the present appeal, we find that the Appellant has shown that he acted promptly and reasonably once he had good cause to believe that he faced serious and wholly unexpected problems. He paid close attention to its resolution, as his contemporaneous notes showed. The Appellant followed up the situation, after

weighing it carefully. The steps in the process were documented in letters and emails. He believed that he should engage in the complaints process with his former advisor. That was reasonable yet he was careful not to allow too much time to elapse. It was reasonable for him to believe that following that route might well have led to a favourable resolution within an acceptable period of time. The advisors had caused the problem and should have the opportunity to solve it.

15. It was suggested by Ms Browne that the Appellant should have contacted HMRC directly after 13 October 2015. While that was possible, it seems to us that it was not a necessary step for a taxpayer who had always relied on professional advisors. While it is true that the application form for enhanced protection is not in itself a complex document, the Appellant had not recently dealt with such matters and was no doubt somewhat perplexed about this unexpected turn of events. It was important that any forms were fully and properly completed.

16. It was also suggested for HMRC that the Appellant was an experienced businessman and could have found out better information and have proceeded more quickly. Again, it seems to us important that the Appellant had retired in 2003 and had ceased work altogether by 2010. We infer that he did not have access to the type of useful informal discussions which occur among colleagues in the workplace. The Appellant had relied on advisors in the past for many years and took new advice after he discovered that he had received inadequate advice.

17. In our view, the date on which the Appellant became positively aware that he could make a late application was 12 August 2016. That was the first time he had been given complete information and could appreciate that there was potential merit in doing so. As was pointed out by Judge Gething at [55] in *Gibson* (above), appointing a new advisor takes a certain amount of time. It seems to us that the month lost by illness of the staff member of the former advisor should be left out of the calculation of time between 12 August 2016 and 19 December 2016, the date the late application was submitted to HMRC. That leaves a period of three months, which in our view is sufficiently diligent and expeditious.

18. We find that the Appellant has shown that he acted as an objectively reasonable taxpayer in his situation. We thus find that he has demonstrated no unreasonable delay in the submission of his late application.

The appeal is accordingly allowed.

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: 24 FEBRUARY 2021