TC07647

Pensions – primary and enhanced protection – notification – whether reasonable excuse for late notification – yes – whether late notification made without unreasonable delay – no – appeal dismissed

FIRST-TIER TRIBUNAL

TAX CHAMBER

Appeal Number TC/2018/05271

BETWEEN

DONALD GRAHAM KETLEY **Appellant**

-and-

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE IAN HYDE

TERENCE BAYLISS

Sitting in public at BIRMINGHAM on 10 and 11 September 2019

Oliver Hilton, counsel, for the Appellant

Paul Harbottle, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns the application of pension reforms introduced on 6 April 2006, known as "A Day", and entitlement to enhanced protection. The appellant filed his notification for enhanced relief late and this appeal concerns whether he had a reasonable excuse for doing so late and whether he took unreasonable delay in making his application.

THE A DAY REFORMS

2. Finance Act 2004 ("FA 2004") brought in substantial reforms to the taxation of registered pension schemes, with effect from 6 April 2006. The detail of these reforms is not relevant to this appeal but the reforms introduced a lifetime allowance charge under which increased tax charges would arise in certain circumstances where a taxpayer's pension value exceeded the lifetime allowance of £1.5m.

3. Two types of transitional protection for pensions schemes exceeding the lifetime allowance on A Day, known as primary and enhanced protection, were introduced by paragraphs 7 and 12 respectively of Schedule 36 to FA 2004.

4. In order to benefit from these protections, the taxpayer was required to give notice to HMRC in the prescribed form on or before 5 April 2009. Where notification was not made by 5 April 2009, regulations provide that HMRC would consider a late notice provided the taxpayer had a reasonable excuse and did not unreasonably delay in making the notification after the reasonable excuse had finished.

5. The prescribed form for notification, form APSS200, required in the applicant to provide personal information including name, address, national insurance number and unique tax reference, together with information on the relevant pension scheme information including its value as at 5 April 2006. The taxpayer had to sign the form, making the declaration that:

> "to the best of my knowledge and belief the information given on this notification is correct and complete"

THE FACTS

6. The appellant, Mr David Yelloly, Ms Julie Rackham, Mr Mark Abrol and Mr David Fleet provided witness statements and they all gave evidence in the hearing.

7. We are conscious that underlying this appeal are difficult questions as to whether any advisor has been negligent. Notwithstanding the temptation for witnesses to defend their own position, we found all the witnesses to be honest and truthful, although in some cases suffering from lack of recollection of events some time ago.

8. Based on that witness evidence and the documents presented to the Tribunal we find the facts as set out below.

Background

9. The appellant is 74 and a successful businessman who retired some 18 and a half years ago. During his career he invested as much as he could into his pension and so built up significant pension investments, worth some £5.2m as at A Day and in the region of £8m now. The pension was originally with Equitable Life but prior to A Day and the events relevant to this appeal was transferred to Scottish Equitable, now known as AEGON.

10. The appellant's pension is a self invested personal pension scheme and a registered pension scheme and so within the scope of the A Day changes. The appellant has not taken any benefits from the pension scheme but in broad terms when he reaches 75 he will be

required to do so and so benefit crystallisation tax charges will arise under section 214 FA 2004 unless primary or enhanced protection applies. Whilst not to be decided in this appeal, this tax charge is estimated to be some £1.5 million so this is a significant matter for the appellant.

11. The appellant acknowledged that because of his business career he is financially literate and describes himself as a "well-informed amateur as to pensions" but does not have any technical expertise or time to deal with such matters himself. He relied upon his financial adviser.

12. The appellant's financial adviser since 1993 and at the time of A Day was Mr Yelloly. They first met in the early or mid 1990s and became friends. At the time of the Equitable Life difficulties the appellant instructed Mr Yelloly to help transfer his pension into Scottish Equitable and has acted as the appellant's financial adviser from that time until November 2014. Mr Yelloly also helped the appellant sorting out his affairs when the appellant's wife died unexpectedly.

13. Due to their friendship the relationship between the appellant and Mr Yelloly was professional but somewhat informal. The appellant placed his full trust in Mr Yelloly. They would meet between two and four times a year at which appellant would review a summary of his investments and Mr Yelloly would make suggestions has to potential courses of action but generally the appellant, being cautious and conservative in his approach, would not make any changes and simply allowed them to continue.

14. Mr Yelloly was a director of Montpelier Group Europe Limited ("Montpelier"). The appellant was Mr Yelloly's most significant client, although a few of Mr Yelloly's other clients had pensions significant enough that the A Day changes would have applied to them.

15. Montpelier did a lot of work with AEGON and a representative of AEGON would be in Montpelier's offices 2 or 3 times a week to take forms back to AEGON's offices.

Events

16. In about 2006 the appellant became aware through the financial press of the proposed A Day pensions changes and the possibility of protecting his pension from those changes. The appellant told Mr Yelloly, and asked whether something could be done.

17. At the next meeting between them in 2006 Mr Yelloly advised the appellant that in order to obtain primary and enhanced protection it was necessary to send a form to HMRC.

18. Mr Yelloly was not clear as to how to complete the form and so following this meeting consulted with AEGON. It was agreed that the form would be signed by the appellant and sent to AEGON for transmission to HMRC.

19. Sometime in 2006 the appellant attended Montpelier's offices and met with Mr Yelloly's PA, Ms Rackham, in order for the appellant to sign the form. Mr Yelloly was not present and Ms Rackham had had no experience of assisting in completing the form as this was a new area for her and Montpelier.

20. There is a lack of clarity in the evidence as to the extent to which the form had been completed at that time the appellant signed it. The appellant could not recall nor could Ms Rackham but Mr Yelloly's recollection was that it would have been completed except for the pension valuation. We find that the appellant and Mr Yelloly knew in broad terms the value of the appellant's scheme but not its precise value and, given the limitation in technology in 2006, could not easily access the information.

21. The evidence from Mr Yelloly and Ms Rackham, which we accept, is that on Mr Yelloly's instructions the form was completed save as to the pension valuation then signed by

the appellant and physically handed to George Koulloupas, a representative of AEGON, when he visited Montpelier's offices shortly after the form was signed so that AEGON could complete the form and send it directly to HMRC.

22. The only evidence that the form was actually sent to HMRC is the e mail from Mr Koulloupas at AEGON of 23 February 2009 referred to at paragraph 30 below and he did not give evidence in this appeal. HMRC have no records of receiving any form and HMRC never issued any certificate. The position is therefore not clear.

23. We accept the appellant's evidence that he was not aware that he should have received a certificate, notwithstanding the notes on the back of the form headed "Notes to help complete form APSS 200" which set out the application process and stated that the certificate would be sent out. He did not read the notes at the time of signing because it was prepared by his advisors and he simply signed where required.

24. At the next meeting with Mr Yelloly following the signature of the form, the appellant asked whether the application had been successfully completed and Mr Yelloly confirmed that it had. The appellant did not know what the process would be but was left with the impression that nothing further was required from him. The appellant assumed the form had been dispatched to HMRC by AEGON as Mr Yelloly had told him would be the case.

25. In subsequent meetings the appellant would from time to time ask Mr Yelloly about progress and was reassured that everything was in hand.

26. On 24 January 2007 Ms Rackham e mailed Mr Koulloupas at AEGON as follows;

> "Subject D G Ketley
>
> You will recall that your [sic] collected the 'Protection of Existing Benefits' Form for the above. I have heard nothing further. Can you confirm all OK"

27. There is no evidence of any reply to this e mail.

28. Ms Rackham's recollection was that she became aware about this time that there would be a certificate issued by HMRC to the appellant directly. She also suggested to Mr Yelloly at this time that he should check with the appellant as to whether he had received it.

29. On 22 February 2009 Ms Rackham e mailed Mr Koulloupas at AEGON forwarding her request from 24 January 2007 as follows:

> "Re: D G ketley
>
> Can I please refer you back to my email below – and confirm all is in order and lodged"

30. On 23 February 2009 Mr Koulloupas replied to Ms Rackham:

> "when a client applies for Primary/Enhanced Protection they receive a certificate for confirmation of registration for protection. The client can then send us a copy so that we can note our policies. However, that could happen on the day before or on retirement.
>
> Having checked with HO, I cannot see that any such notification has been received. Has the client received anything?"

31. Ms Rackham replied on the same day:

> "George, I passed the form to you ages [sic] and you said you would sought [sic]"

32. Mr Koulloupas replied, again on the same day:

> "All we can do is fill in the blanks and forward it on which is what we did.

> After that the client is contacted directly and we have no control over that part of the process"

33. In February 2012 Montpelier went into liquidation. Merito Financial Services Limited ("Merito") bought the assets from the liquidator and continued to trade. Mr Yelloly moved across to Merito and the appellant continued to engage him. In November 2014 Mr Yelloly left Merito and the appellant transferred his instructions to Mr David Fleet, another financial adviser at Merito. At some point Merito changed its name to Eastcote Wealth Management ("Eastcote") where Mr Fleet still works.

34. In November or December 2014, the appellant had his first meeting with Mr Fleet but the pensions protection issue was not raised.

35. In a meeting on 29 June 2015 Mr Fleet asked the appellant whether or not he had applied for pension protection. The appellant advised Mr Fleet that he had dealt with it with Mr Yelloly who had confirmed everything was in order.

36. On 8 July 2015 Mr Fleet, confident that the form had been submitted, wrote to HMRC to check the position and to find out why a certificate had not been issued. In the letter Mr Fleet said that the form had been sent via AEGON under Montpelier's name.

37. On 27 July 2015 HMRC replied to Mr Fleet saying that they had searched their systems and there were no such lifetime allowance certificates.

38. Mr Fleet delayed telling the appellant about HMRC's response because he wanted to conduct a search for the missing certificate. This involved arranging for Ms Rackham to come back into the offices and search for it which, for logistical reasons did not happen until August or September time.

39. During Mr Fleet's investigations he exchanged messages with Mr Yelloly who maintained that the form had been completed and sent to HMRC. Mr Yelloly sent to Mr Fleet copies of the e mails between Ms Rackham and Mr Koulloupas.

40. On 14 October 2015 at a meeting Mr Fleet, having completed his investigations, advised the appellant that there was a problem in that a certificate had not been issued. The appellant was shocked and angry. The appellant was not advised at this meeting that he could make a retrospective application by submitting a further form because Mr Fleet was not aware that this was possible.

41. On the same day the appellant called Mr Abrol, a partner at Wilkes Partnership and a solicitor he had used on previous occasions. The appellant's concern at the time was that there had been professional negligence, an area Mr Abrol specialised in.

42. Mr Fleet, who also knew Mr Abrol, separately called him on 14 October 2015 to discuss the issue.

43. On 16 October 2015 Mr Fleet, wrote to the appellant updating him on matters following the recent meeting and in that letter confirmed that HMRC claimed not to have received his form. As there was therefore was no protection for the pension fund in place at whole, he could protect the scheme's lifetime allowance level at £1.5m via the Individual Protection 2014, but in order to do so a form needed to be completed by 5 April 2017. It was agreed at the hearing that this was a reference to a different form of pension protection which was available at that time but was less attractive than the primary or enhanced protection. The appellant did not take up this protection.

44. The appellant did not instruct Mr Abrol at this time as he thought Mr Fleet was looking for the form and he was reflecting on what to do next. The appellant was aware that this was

a very expensive error as it would cost him about £1m in increased taxes and he was weighing up whether to bring a possible negligence claim.

45. The appellant did not take any steps over December because he was away from home for about 10 days in the middle of December 2015 which was followed by the Christmas period and then his partner's daughter's wedding.

46. Having thought the matter over the appellant instructed Mr Abrol at a meeting on 26 January 2016. Mr Abrol's instructions were to investigate what had happened and, amongst other matters, to advise on the prospects of bringing a professional negligence claim. He was not instructed to consider how to remedy the position with HMRC. At this point the appellant still did not know that he could submit a late notification.

47. In the period February to July 2016 Mr Abrol contacted the individuals who he believed could help in the investigation, including Mr Fleet, who had conducted his own enquiries, Ms Rackham, Mr Yelloly and AEGON.

48. Mr Abrol met Mr Fleet on 2 February 2016 and Mr Fleet explained the investigations he had been carrying out to try and find out what had happened. Mr Fleet carried out further searches after that meeting but reported to Mr Abrol on 4 March that he could not find anything more.

49. Mr Abrol's met Ms Rackham on 15 March and at Mr Abrol's request Ms Rackham agreed to attend the offices again to try and see if the notification had been scanned onto the system and did so on 2 June 2016.

50. On 4 April 2016 Mr Abrol met Mr Yelloly for an hour.

51. In April 2016 Mr Abrol became aware it was possible for a taxpayer to make a late notification.

52. Mr Abrol contacted a Mr Ian Pankhurst, the liquidator of Montpelier to try and obtain any papers but as he was no longer the liquidator, had to contact the current liquidator, a Mr Alisdair Findlay at Findlay James. Ultimately the liquidator could not find any papers.

53. Mr Abrol also made contact with Mr Koulloupas, who was by then no longer an employee of AEGON, and spoke to him on 14 June 2016. However, Mr Koulloupas could not recall any details relating to the matter.

54. On 1 July 2016 Richard James of AEGON reported back to Mr Abrol on his internal enquiries within AEGON. Mr James said that he would have expected such a form to have been completed by the adviser firm and then sent to HMRC. However this did not appear to have happened in this instance. He suspected that the AEGON representative would have collected the form with the intention to send it on. He could not explain the email chain between Ms Rackham and Mr Koulloupas "but what is evident is that the form has never in my opinion made it to the HMRC".

55. All of the above investigations concluded in the middle of July 2016 and Mr Abrol met the appellant on 13 July 2016 to discuss his findings. Mr Abrol declined to disclose to the Tribunal the outcome of his investigation, retaining privilege over it.

56. On 15 August 2016 Mr Abrol wrote to HMRC on behalf of the appellant, setting out the history of the matter and the difficulties encountered in finding either the form or any confirmation as to how it was communicated to HMRC, and seeking late notification under regulation 12. Mr Abrol stated in the letter:

> "We are fairly certain that you **did not** get the form. This is because Merito wrote to you on 8 July 2015 and you responded on 27 July 2015 (copies

> enclosed). It is clear that you search your systems in response to that letter. Our client did not receive the acknowledgement that he ought to have had, if form had got to you
>
> …through no fault of his own he has been left at a significant financial disadvantage.
>
> In the circumstances we would ask that you please exercise your discretion in his favour and accept that the reasonable excuse criteria and regulation 12…. are satisfied in this case"

57. Mr Abrol in oral evidence said, and we accept, that a second form was not submitted with this letter because it was believed that a form had already been submitted and so it was not necessary to send another one.

58. On 24 October 2016 Mr Welford-Proctor of HMRC replied to Mr Abrol saying;

> "I will also need a completed APSS200 form before I can consider the notification, as no copy had been received by HM Revenue and Customs (HMRC). I have also checked our records and I can confirm the information previously given by HMRC that we have no record of any lifetime allowance protection being held or requested by Mr Ketley"

59. On 1 December 2016 Mr Abrol wrote to Mr Welford-Proctor enclosing a completed form APSS200. The form was undated because as he stated in his covering letter Mr Abrol was unclear as to whether to date it in 2006 when the original form was signed or with a current date.

60. There then followed a series of exchanges between Mr Abrol and Mr Welford-Proctor as to the history of the matter, the appellant's awareness of the need for a certificate and the reasons for the delay in submitting the form.

61. On 29 June 2017 Mr Welford-Proctor wrote to the appellant rejecting the notification for enhanced protection received in 2 December 2016 on the grounds that the appellant has not demonstrated that there was a reasonable excuse nor that the application was made without unreasonable delay after the reasonable excuse ceased:

> "It appears to me that the reasonable excuse ended with HMRC's letter of 27 July 2015, which confirmed that you did not have EP. HMRC were not contacted again until Mr Abrol's letter of 15 August 2016 to raise a late notification of EP. Mr Abrol confirmed that Wilkes Partnership were contacted in February 2016 to take on your case and preceded [sic] to carry out their own investigation into the events that followed your signing of the APSS200 form, believed to be late 2006.
>
> It is my view that you or your adviser could have contacted HMRC following the receipt of our 27 July 2015 letter to ask if there remained any opportunity to obtain EP. No such communication was made and it took approximately 7 months to appoint Wilkes Partnership to take on your case and another 6 months before Mr Abrol wrote to HMRC with your late notification. In total there was a delay of over a year between discovering that you did not have EP and making a late notification for EP to HMRC. It is my belief that this was an unreasonable delay from the end of the reasonable excuse."

62. On 24 July 2017 Mr Abrol wrote to Mr Welford-Proctor submitting a notice of appeal to HMRC.

63. On 2 February 2018 Mr Welford-Proctor wrote to Mr Abrol raising additional questions on the history of the matter.

64. On 9 February 2018 Mr Abrol wrote to Mr Welford-Proctor advising that there would be a delay in his response due to Mr Abrol underging surgery.

65. On 26 March 2018 Mr Abrol wrote to Mr Welford-Proctor responding on the additional points to be raised, summarising at length the history of the application and available evidence but also complaining about HMRC's delay and requesting a review.

66. On 18 April 2018 Mr Welford-Proctor wrote to the appellant providing his view of the matter, rejecting the taxpayers arguments and advising the appellant all his right to request an independent internal review and a right of appeal to the tribunal.

67. On 30 April 2018 Mr Abrol left Wilkes Partnership, the appellant's files being transferred to him at his new firm in January 2019.

68. On 15 July 2018 Ms Bond of HMRC, following a request for an internal review, wrote to the appellant notifying him of the outcome of the internal review upholding the original decision that that there was no reasonable excuse and that, if there was a reasonable excuse, the taxpayer had unreasonably delayed submitting the application after that reasonable excuse had expired.

LEGISLATION

69. This appeal concerns the application of provisions in the registered pension schemes (Enhanced Lifetime Allowance) Regulations 2006 SI 2006/131 ("the Regulations"), the material provisions of which relevant to enhanced protection are set out below.

70. Paragraph 3 provides:

> "3. Reliance on paragraph 7 of Schedule 36 (lifetime allowance enhancement: "primary protection")
>
> (1) This regulation applies if the amount of the relevant pre-commencement pension rights of an individual (determined in accordance with paragraph 7(5) of Schedule 36 exceeds £1,500,000.
>
> (2) The individual may give notice of intention to rely on paragraph 7 of Schedule 36 ("paragraph 7").
>
> (3) If the individual intends to rely on paragraph 7, 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 5 April 2009."

71. Paragraph 4 provides:

> "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."

72. Paragraph 10 provides:

> "10. Form of notification: the specified regulations
>
> (1) This regulation applies is a notification is given under one of the specified regulations.

(2) The notification must be in a form prescribed by the Commissioners for Her Majesty's Revenue and Customs.

(3) The individual must sign and date the notification"

73. Paragraph 12 provides:

"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."

74. Regulation 13 provides insofar as relevant:

"13. Procedure on giving of notification to the Revenue and Customs

(1) If an individual gives a notification to the Revenue and Customs, and there are no obvious errors or omissions in the notification (whether errors of principle, arithmetical mistakes or otherwise), the Revenue and Customs must issue a certificate to the individual.

(2) …."

THE ISSUES

75. This appeal is concerned with two issues;

(1) whether the appellant had a reasonable excuse for making a late notification within paragraph 12(1)(b)

(2) whether, if there was a reasonable excuse, the appellant made the notification without unreasonable delay after it ceased within paragraph 12(1)(c)

76. For the appellant to succeed in his appeal he must establish both that he had a reasonable excuse and that there was no unreasonable delay in filing the notification after the reasonable excuse ceased.

77. This appeal is not concerned with the amount of any tax charge arising. No tax charge had arisen at the time of the appeal and the point was not in issue.

78. Further, a number of other points are not in issue in this appeal;

(1) FA 2004 provides for two forms of protection, primary and enhanced. The appellant applied for both as permitted on form APSS200. However, the interrelationship between the two was not debated in this appeal and the appellant was content with HMRC's practice that where both are applied for enhanced protection was applied first. In any event, the process for notification under paragraphs 3 and 4 of the Regulations are identical and the appeal proceeded on the basis of considering the regulations and the process for applying for enhanced protection and we have dome the same. References to enhanced protection in this decision should be read accordingly.

(2) The appellant did not argue that HMRC had been notified as required by paragraphs 3 and 4 of the Regulations but proceeded on the basis that there was no notification even if in the form had been received by HMRC.

(3) HMRC did not take the point that the form APSS submitted by the appellant in December 2016 was undated contrary to Regulation 10(3).

(4) Prior to the hearing there was an issue between the parties as to when any reasonable excuse ended. The point is relevant as to when the appellant must show he acted without unreasonable delay, as required by paragraph 12(1)(c). At the hearing Mr Harbottle for HMRC agreed with the appellant that any reasonable excuse ended when Mr Fleet told the appellant about HMRC's letter of 27 July 2015 at their meeting on 14 October 2015 and not when Mr Fleet received HMRC's letter of 27 July 2015.

79. We note that paragraph 12(7) of the Regulations provides that on appeal the Tribunal is to determine whether the circumstances set out in Regulation 12(1) apply, that is to say whether the appellant notified HMRC in time, whether he had a reasonable excuse or whether he notified without undue delay. This is an original rather than supervisory jurisdiction and the issue is whether those requirements were met not whether it was reasonable for HMRC to refuse to accept the requirements were met.

80. The burden of proof in this appeal is on the appellant.

THE APPELLANT'S ARGUMENTS

81. Mr Hilton for the appellant argued that there was a reasonable excuse for filing the notification late and any delay in submitting the late notification was not unreasonable.

Reasonable excuse

82. The appellant argued that the relevant legal principles on whether there was a reasonable excuse in his appeal were:

(1) The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, see *Barrett v HMRC* [2015] UKFTT 329 at [154]:

> "The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard. Whilst other cases in the First-tier Tribunal may give an indication of the approach that has been taken in the particular

> circumstances at issue, those cases cannot be regarded as providing any universal guidance."

(2) The question to be asked is was what the taxpayer did a reasonable thing for a responsible taxpayer conscious of and intending to comply with his obligations, but having the experience and other relevant the tributes of the taxpayer and placed in the same situation that the taxpayer found himself at the relevant time. See *Yablon v HMRC* [2016] UKFTT 814 at [25] and *Tipping v HMRC* [2017] UKFTT 485 at [25].

(3) "The reasonable taxpayer" is shorthand for "a responsible person with the same experience and other attributes of the taxpayer and placed in the same situation as the taxpayer" (see *Twaite v HMRC* [2017] UKFTT 591 citing with approval the decision of Judge Redston in the First-tier Tribunal in *Christine Perrin v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 156 (TC))

(4) The test is therefore an objective legal standard, namely one of reasonableness in the context, and no higher or lower standard should be applied

(5) The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. The categories of reasonable conduct encompass more than one course of action. The decision maker's task is not to identify a reasonable course which the taxpayer did not take, but to examine what the taxpayer did and determine whether what he did was the action of reasonable person. It depends on the circumstances. For example in *Charles Irby v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKFT 291 (TC) at [45]:

> "…the categories of reasonable conduct encompass more than one course of action. Our task is not to identify a reasonable course of action which Mr Irby did *not* take and deduce from the fact that he did not take it that he had no reasonable excuse for the course of action that he *did* take. Our task is to examine what Mr Irby did and determine whether what he did was the action of a reasonable person."

(6) The circumstances in which a reasonable excuse may be shown for not doing something do not have to be exceptional. They can be mundane, and need not be limited to matters beyond the taxpayer's control.

(7) Ignorance of the need to do something by a deadline, particularly in a context of the complex transitional nature of the FA 2004 and the Regulations, can, as a matter of principle, amount or a reasonable excuse. The question is whether it is reasonable in the circumstances.

(8) As a matter of principle reliance on a professional advisor can amount to a reasonable excuse, as to which:

> (a) The question is whether such reliance was reasonable, depends on the circumstances (*Twaite* at [29]). It is not correct that only in exceptional circumstances would reliance on a third party constitute a reasonable excuse.
>
> (b) The commercial abilities or expertise of the taxpayer will not be relevant if it is reasonable for the taxpayer to leave tax and pension matters, as to which he has no expertise, to his paid professional advisers
>
> (c) It can be reasonable to rely completely on a professional advisor, particularly if they are specialist, long held and there is a degree of trust and confidence in their abilities and service, had accepted responsibility for the task and/or had given assurances that the notification had been made

(d) Where reliance is placed on a professional adviser who had accepted responsibility for a task, a reasonable taxpayer would not necessarily have taken separate steps to inform himself independently of his obligations, including by reference to HMRC guidelines or to double check on the protection or investigated further, but instead could rely on his advisors silence that there were no more outstanding obligations

(e) While negligence of the professional adviser might ground a reasonable excuse, it is no part of the decision-makers task to make a positive finding of negligence, and a reasonable excuse can be found where the reason for the professional's error is unknown and even where there is a paucity of documentation. This is because the decision maker is not concerned whether the professional advisor had an excuse, but whether the taxpayer had a reasonable excuse

(9) The consequences of the decision whether to grant leave are irrelevant

83. In the current appeal the appellant's reasonable excuse is simple, mundane and beyond his control. The appellant did all that could reasonably be required of him but the completed and signed form was either lost in transit or when in the custody of HMRC, which was not his fault. At most it was the fault of the appellant's advisers and agents. The appellant had business acumen and took an interest in the pension A-Day changes but he had complete trust and confidence in Mr Yelloly and had no reason to doubt he was competent to deal with the notification and was reassured he would. The appellant's complete reliance on Mr Yelloly was thus reasonable in the circumstances and amounts to a reasonable excuse.

84. HMRC's argument that the appellant signing the form before it was completed was not a good point. It was not unreasonable for the appellant to do so having been advised by Mr Yelloly to do just that. Insofar as the point was that had the appellant signed the completed form it would not have been sent to HMRC by AEGON, this is counterfactual. Had he done so what is likely to have happened is that the form would have remained with Montpellier and it would not have been more likely that it was sent to HMRC. Further this argument falls into the error of identifying one possible reasonable course of action and, given the taxpayer did not do it, deducing unreasonableness from that. Ultimately the appellant was not the reason why the form went missing.

85. HMRC's argument that the guidance notes to APSS200, if read, would have alerted the appellant to the need for him to send the form and that he would have received personally a certificate, is also a bad point. The appellant did not read the guidance notes because he was not completing the form. The guidance notes contemplate that someone else might complete form for the taxpayer and did not contemplate that the taxpayer was to send the forms to HMRC directly. It is not unreasonable to have someone else to complete the form given the "formidable complexity" of the provisions (*Yablon* at [28]). As a reasonable taxpayer whose advisor had taken responsibility for filing the form, the appellant did not need to take independent steps to inform himself of HMRC's guidance.

86. Finally Mr Hilton challenged HMRC's argument about the appellant's "passive stance". The appellant had not being passive, he was first to raise the A Day changes and had regularly enquired of Mr Yelloly as to progress of the application. He was reassured everything was in order. Having placed complete reliance on Mr Yelloly there was nothing more that the appellant could reasonably have done.

87. In this context Mr Hilton relied upon *Irby, Jackson*, *Tipping* and *Twaite* where as in his appeal there was no need to chase the advisor because his reliance upon him was reasonable. In fact in *Irby* the Appellant was aware that a certificate should have been

received but the appellant said his advisor had dealt with it (*Irby* at [25]). Reliance on an advisor has been held not to be reasonable where there is a sudden change in advisor before 5 April 2009 and/or the ability of the advisor had been called into question or the taxpayer was worried (*Radley* at [49] and [53], *Yablon* at [29]). In any event here, unlike those cases, the application had been completed and forwarded to HMRC so if anything the current case is a stronger one for not chasing the adviser any further.

Unreasonable delay

88. Mr Hilton submitted that the following legal principles applied as to whether the appellant had unreasonably delayed the submission of the late notification after the reasonable excuse expired:

(1) Where the taxpayer is under the impression that the notification had been made on his behalf, the reasonable excuse will cease upon the taxpayer becoming aware that no enhanced protection was in place

(2) The delay will cease upon receipt by HMRC of a late notification, although the tribunal should consider the substance rather than matters of form (*Tipping* at [65]). Indeed, the taxpayer need not submit a form APSS200 for the delay to cease, a letter notifying HMRC that the taxpayers wishes to make a late application can suffice: *John Jackson v HMRC* [2017] FTT 0341 at [61-62].

(3) The regulations give no deadline as to when delay will be stop nor is there any hard and fast scale of when delay is unreasonable, the question is one of reasonableness in the circumstances

(4) There is a tension in the authorities in relation to the role of the taxpayer's advisors and whether delay on the part of an advisor is to be attributed to the taxpayer. For example, Judge Richards in *Yablon* said at [38]:

> "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. This delay is caused by the unreasonable actions of his advisors, that delay will be unreasonable."

(5) In *Twaite* Judge Chapman said at [52]:

> "I find that the consideration of whether or not the delay is unreasonable is not limited to the conduct of Mr Twaite, requires a consideration of all the circumstances and does not exclude consideration of [Mr Twaites's financial adviser]. I respectfully agree with Judge Richards in *Yablon* at [24] to [38] that the wording of regulation 12(c) focuses on the length of the delay. Further, the reference to the "individual" merely identifies who is giving the notice and does not restrict the scope of unreasonable delay. To do so would involve treating regulation 12(c) as including a limitation on whose delay it was. This would involve reading, "gives the notification without unreasonable delay after the reasonable excuse ceased" as "gives the notification without unreasonable delay *by the individual* after the reasonable excuse ceased" or alternatively expressly excluding delays caused by third parties. There is no need to insert these additional words and no basis for doing so in the present case."

(6) However, in *Tipping* at [63] Judge McNall did not attribute the delay of an adviser to the taxpayer:

> "significant portions of that time…. Were taken up by delay on the part of [Mr Tipping's financial adviser] which cannot be attributed to Mr Tipping"

(7) The position in *Tipping* is to be preferred because the requirement of reasonableness in regulation 12 cannot be considered a vacuum and must consider the circumstances. There is no policy justification for considering the question of reasonableness differently when considering delay as compared to an excuse, particularly where reliance is placed on advisors. Thus in the same way that it is not considered just to attribute the failure of the appellant's trusted advisors to the appellant when considering reasonable excuse, it would not be just to do so when considering delay.

(8) Whilst inaction will be unreasonable, a reasonable step would likely entail the taxpayer asking his advisors to investigate why there is no enhanced protection and what could be done to remedy the late submission, particularly if there is no knowledge about how to remedy it: *Yablon* at [41] and *Tipping* at [46]

(9) The absence of knowledge about how to make a late notification (such as failure to receive the right advice) can also be relevant: *Twaite* at [49]

(10) Much depends on the taxpayer's state of knowledge at the time: *Tipping* at [46 and 50]

89. In the current appeal the reasonable excuse ceased on 14 October 2015 when Mr Fleet told the appellant of HMRC's letter of 27 July 2015.

90. Having been told by Mr Fleet that time was on his side, the appellant spent time with his family until early 2016. Any assurance taken by the appellant as result should not be held against him.

91. Further, the appellant's lack of knowledge of the ability to make a late notification can be a relevant consideration (see *Twaite* at [49]). The appellant's lack of knowledge arose because of Mr Fleet's failure to advise him and it cannot be fair to attribute Mr Fleet's failure to the appellant.

92. The appellant was by the end of 2015 and beginning of 2016, not unreasonably contemplating a professional negligence action. An investigation after the circumstances leading to the situation the appellant found himself in in 2015 was not only reasonable but necessary.

93. Even aside from the professional negligence question, it is not unreasonable to conduct investigations before seeking dispensation for a late notification under regulation 12, as recognised in *Yablon* at [41] and *Tipping* at [46].

94. HMRC's position appears to be that a reasonable course of action would have been to apply for late notification first, investigate and prove later. This position is both bizarre and unreal. The appellant did not know that he could make a late notification still less that he had grounds to do so. A bare request under regulation 12 with nothing to evidence that there was a reasonable excuse would have been met with immediate and justified refusal by HMRC. It was not within the appellant's ability or interest to make a late notification without first seeking to gather the evidence as to whether one could first be made.

95. The delay ended when Mr Abrol sent the letter to HMRC on 15 August 2016 even though the form was not submitted until December. HMRC did not respond to this letter requesting a form until 24 October. See the decision of Judge Gammie QC in *Jackson* at [61-62]:

> "61. As regards the time taken to remedy the position, I am also of the view that there was no unreasonable delay. Once the omission came to light Greystone did exactly what was suggested in *Yablon*: it sought advice from

> HMRC as to how to remedy the position. As a result of that Mr Jackson wrote to HMRC within a short period of receiving their initial advice. It is true that his letter did not enclose the official form that needed to be submitted for a notification, but that appears to have been because those concerned at that stage with remedying the position were focussing on explaining why a notification was having to be made late rather than being concerned to complete and submit the requisite information that would be needed for a notification on the assumption that HMRC agreed to accept that one could be made late. It does not seem unreasonable to think that the first step is to persuade HMRC to agree to accept a late notification and, having done so, to submit the notification that they have agreed to accept.
>
> 62. Once it became apparent that HMRC required Mr Jackson to submit the prescribed form (even though it was then rejected by HMRC as out of time), the form was submitted again within a short period of HMRC's more detailed response on 22 August 2014. There was throughout this period a process that had started almost as soon as the omission became known and which involved several interactions with HMRC. It led in due course to the submission of a late notification on the required form, signed and dated by Mr Jackson. In all the circumstances I consider that there was no unreasonable delay. "

96. The period of delay, some 10 months from October 2015 to August 2016, is similar to the delay allowed in *Tipping* (at [62]) and less than the period between Mr Welford-Proctor's decision of 29 June 2017 and the review decision of Ms Bond on 15 July 2018. For HMRC to criticise the appellant is staggering.

97. Finally the investigation was not protracted. Specifically Mr Abrol was seeking to piece together events that happened a decade ago and in 2006 business was predominantly paper-based. There was a paucity of documents which were not easily discovered. Thus Montpelier no longer existed and Ms Rackham and Mr Yelloly no longer worked at the successor firm.

98. Accordingly there was no unreasonable delay.

HMRC'S ARGUMENTS

99. HMRC argued that the appellant did not have a reasonable excuse and, the excuse having ended, there was an unreasonable delay until the form APSS200 was filed on 1 December 2016.

Reasonable excuse

100. Mr Harbottle for HMRC pointed out that there was no legislative definition of "reasonable excuse" but a significant volume of case law. The correct test is an objective one as set out by Judge Redston in the First-tier Tribunal in *Christine Perrin v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 156 (TC):

> "[99] The task of this Tribunal combines the tasks of judge and jury: we must decide whether "there is a reasonable excuse for the failure." We agree with Judge Medd and Judge Brannan that the correct way of doing this is to ask:
>
> > '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 at the relevant time, a reasonable thing to do?"
>
> [100] It is on that basis that we approach this case. When we refer to "the reasonable taxpayer" we are using that phrase as shorthand for " a

> responsible person with the same experience and other attributes of the taxpayer and placed in the same situation as the taxpayer."

101. This test was elaborated upon by the Upper Tribunal on appeal ([2018] UKUT 156 (TC)) at [81]:

> "When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

102. This test has been accepted as applying to the question of reasonable excuse under regulation 12 (*Twaite* at [25] to [27]).

103. The following relevant principles also apply in this appeal;

(1) Reliance upon an agent can constitute a reasonable excuse (see for example *Irby* and *Tipping*) but it is not "a trump card which invariably constitutes a reasonable excuse" (*Tipping* at [29]). The predominant factor is the reasonableness of the reliance.

(2) The degree of confidence, trust and reliance placed in an advisor is a factor to be assessed by the tribunal (*Tipping* at [29]).

(3) The appellant's financial expertise and professional background of factors for the tribunal to take into account as part of all relevant circumstances (for example the Upper Tribunal in *Perrin* at [81] quoted above "… the experience, knowledge and other attributes of the particular taxpayer…").

104. On the current appeal Mr Harbottle submitted that it was not objectively reasonable for the appellant to sign an incomplete or blank APSS200 form notwithstanding that the appellant relied upon Mr Yelloly and for the following reasons:

(1) The appellant knew at all times times the value of his pension fund, was active and highly concerned with his pension investments yet all he did was attend a brief meeting with Ms Rackham and sign the form

(2) The form's declaration required confirmation from the appellant that "to the best of my knowledge and belief the information given on this notification is correct and complete". In signing an incomplete form the appellant was in breach of this declaration

(3) Crucially in doing so, the appellant was required on the advice of Mr Yelloly to take an unreasonable action. The appellant did not query why the form needed to go to AEGON or why AEGON could not complete the blanks before signing. This inevitably

would have raised an issue with procedure and drawn Mr Yelloly's attention to the declaration and avoiding the need for a third party, AEGON, to take control of an important notification. In his evidence the appellant himself recognised that with hindsight it would have been better to have sent the form directly to HMRC.

105. Further, the appellant did not read the guidance accompanying the form which indicated that the appellant would receive a certificate following notification. The form itself references 'Notes' which would have drawn attention to the existence of the notes. A reasonable taxpayer with the appellant's background and with a financial adviser would still enquire as to what the references meant and ask for any accompanying guidance which would in turn indicate the receipt of the certificate. The appellant's action was therefore not objectively reasonable.

106. Finally, the appellant, despite relying upon Mr Yelloly, adopted an overly "passive stance" as regards the submission of the form. Specifically:

(1) The appellant met with Mr Yelloly during late 2006/early 2007 following the signing of form when it was discussed. The appellant was somewhat fleetingly reassured everything was in hand. However bearing in mind the changes were significant to the appellant, he did not enquire as to any details including when the notification had been made, how it would be acknowledged and whether he or anyone would receive a copy of any acknowledgement.

(2) The appellant was aware of the need to send the form to HMRC and that AEGON was doing so. However at no point did the appellant confirm that Mr Yelloly had sent the form to AEGON, that AEGON have definitely sent the form to HMRC and that an acknowledgement had been obtained.

(3) The "passive stance" taken by the appellant is distinguishable from that taken in authorities cited by the appellant:

(a) In *Irby* the appellant was unaware of the 5 April 2009 deadline and the need to sign APSS200 which makes a passive stance reasonable in the circumstances

(b) In *Tipping* the appellant was unaware of the transitional provisions, had not been advised by his representatives as regards primary and enhanced protection and did not know the deadline. A passive stance is arguably the only option in the circumstances

(c) In *Twaite* the appellant was suffering from serious ill-health and was specifically advised initially but no notification need to be made and advised to "wait and see" if he needed to make notification notification at a later date. In these fact sensitive circumstances it was reasonable to presume that the issue would be raised by the appellant's advisor if his pension rights crossed the threshold at a later date. A passive stance was therefore reasonable.

(d) In *Jackson* the appellant was unaware of the need for him to sign a form and presumed the notification was a tick box exercise that could be completely undertaken by his advisors. As such, he lacked knowledge of the respective process such that a passive stance is more understandable

Unreasonable delay

107. Mr Harbottle for HMRC argued that the appellant must show it there has been no unreasonable delay from when the reasonable excuse ended, which is agreed to be from 14 October 2015 to when it ended.

108. The period for which there must be no unreasonable delay ended when the APSS200 form was received, that is 1 December 2016. As a minimum therefore the delay from 14 October 2015 to 1 December 2016 was 13 months and 17 days. As a maximum, taking the delay from 27 July 2015, it was 16 months and 4 days.

109. Mr Harbottle for HMRC argued that the test in Regulation 12(1)(c) was an objective test, and it did not matter whether the delay was caused by the taxpayer or his advisers. He argued that the appellant's delay in the current appeal was unreasonable for the following reasons.

110. First, Regulation 12 does not envisage a delay caused by a period of investigation into a potential professional negligence claim. In *John Hughes v HMRC* [2017] TC/2016/01652 Judge Chapman in the First-tier Tribunal said at [49] to [50]:

> "[49] Mr Hughes cannot stand behind the fact that his advisers were investigating the position if the time taken to do so was unreasonable.
>
> [50] We find the delay was unreasonable. There is no evidence as to why Sesame took so long to investigate the position"

111. The time taken to conduct the investigation in the current appeal was unreasonable. It was commenced by Mr Fleet in the summer of 2015 and ended in July 2016. A period of just over 12 months is unreasonable, considering HMRC could have been contacted at any point to ask what action could be taken to protect the appellant's position.

112. Second, the appellant and his advisers did not take a reasonable course of action following the excuse ceasing. The appellant immediately contacted his solicitor on 14 October 2015 to investigate the matter to see if a professional negligence claim was possible. At no point did anyone enquire as to whether a late notification could be made. Nothing would have been lost in sending the notification or contacting HMRC.

113. For example, in *Yablon* Judge Richards in the First-tier Tribunal said at [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."

114. A similar point was made in *Carl Radley* v HMRC [2016] UKFTT 0688 (TC) where the taxpayers had initially contacted their advisers to establishing whether notification had been made. Following this a professional negligence claim was explored before making notification :

> "63. We would 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…was not unreasonable delay. We do not find that they met that burden…"

115. In the current appeal the decision by the appellant to instruct Mr Abrol was after an investigation had already taken place by Mr Fleet.

116. It is by no means unreasonable for the appellant after becoming aware on 14 October 2015 that HMRC did not have any notification and being aware of the significant financial consequences, to contact HMRC as a priority and not to wait for another 8 months of investigations.

117. Third, the Regulations on notification are not overly complex. As Judge Richards in *Yablon* said at [39];

> " 39. 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".

118. Regulation 12 should have been considered, or considered more carefully, during the course of the investigation.

119. The appellant in his evidence conceded that in or around October 2015 the Wilkes partnership discovered that an application can be made out of time. Even if the date was not entirely accurate, the appellant and his advisers knew a late application could be made whilst they investigated a professional negligence claim.

120. The length of the delay is comparable to the period of delay in other cases where it was found to be unreasonable (*Twatite*, *Yablon* and *Hughes*).

DISCUSSSION

121. As stated above, this appeal is concerned with two issues;

(1) whether the appellant had a reasonable excuse for making a late notification within paragraph 12(1)(b)

(2) whether, if there was a reasonable excuse, the appellant made the notification without unreasonable delay after it ceased within paragraph 12(1)(c)

Reasonable excuse

122. The nature of the reasonable excuse being advanced by the appellant is in short that he relied on a trusted adviser, Mr Yelloly, both in the advice he was given as to the manner of completing and sending the APSS200 form to HMRC and, later, in trusting Mr Yelloly that everything was in order.

123. The parties have cited different case law for the test to apply in determining whether there is a reasonable excuse. Mr Hilton for the appellant referref to *Yablon* at [25] where Judge Richards adopted the Tribunal adopted the well known test of Judge Medd QC;

> "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?"

124. HMRC have cited the First-tier Tribunal and Upper Tribunal in *Perrin*.

125. We do not find any difference but adopt that set out by the Upper Tribunal in *Perrin*:

> "Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

126. It is an objective test taking into account the experience and attributes of the taxpayer and the circumstances in which he was in.

127. We note that the parties have cited a number of cases, principally First-tier Tribunal decisions which are not binding on us. The issue of reasonable excuse is a fact sensitive one and the objective is to apply the test in *Perrin* to the facts and decisions taken in other circumstances have limited usefulness.

128. Having considered all the facts and the arguments put to us we agree with the appellant that he had a reasonable excuse. The appellant was a highly experienced businessman and well informed about pensions matters but in our view it was reasonable for him to rely upon professional advice as to how to navigate the complex tax changes introduced by FA 2004. Further, he trusted his longstanding financial adviser Mr Yelloly and had no reason to doubt that between him and his scheme administrator AEGON they would know how to obtain primary and enhanced protection for him.

129. We disagree with HMRC that it was not objectively reasonable for the appellant to sign an incomplete APSS200 form. We consider it reasonable for a taxpayer to delegate completion of the form to a trusted adviser. In doing so he would be relying upon his adviser to ensure he was not in breach of the declaration on the form but that is the nature of the relationship. Indeed, had the appellant signed the form after it had been completed, as he was not a pensions specialist, he would as regards the technical aspects of the form, still have been reliant upon his advisors for it being correct.

130. In any event we agree with Mr Hilton that the issue was not the relative timing of the completion and signing of the form but the appellant's reliance upon third parties to deliver the form to HMRC that caused the failure to submit the form by 6 April 2009. Specifically the appellant relied upon Mr Yelloly's advice to send the form via AEGON and for AEGON to send it correctly and on time to HMRC. We do not accept there is anything in the circumstances as to the nature of the form including the declaration required, the reference to guidance notes or other factors which made it unreasonable for the appellant to accept Mr Yelloly's advice as to how to complete and send it to HMRC. This was an administrative task where those no reason for the appellant, however informed on pension matters, to gainsay the advice given.

131. The appellant could have done things differently, and it may have been that the appellant or Mr Yalloly could have performed the task of sending the form better than AEGON but relying on the pension scheme administrator to do so upon the advice of a trusted professional adviser was not unreasonable. As set out in *Irby* at [45]:

> "…the categories of reasonable conduct encompass more than one course of action. Our task is not to identify a reasonable course of action which Mr Irby did *not* take and deduce from the fact that he did not take it that he had no reasonable excuse for the course of action that he *did* take. Our task is to examine what Mr Irby did and determine whether what he did was the action of a reasonable person."

132. We further do not accept HMRC's argument that the appellant should have read the guidance notes accompanying the form. Again, the appellant has relied upon his professional advisor to complete the form properly and it is reasonable for him to expect any guidance notes to be read by the adviser and therefore did not need to be read by him. He could have read the notes but it was not unreasonable for him to fail to do so.

133. Finally, we do not accept that the appellant adopted a "passive stance" such that his actions were unreasonable. There was no reason for him to educate himself as to how the process worked. He periodically asked Mr Yelloly as to progress and was reassured that everything was in order and in our view that was sufficient. Even if Ms Rackham and Mr Koulloupas were worried in 2009, this was not communicated to the appellant.

When the delay ceased

134. The appellant argued that the delay ended on 15 August 2016 when Mr Abrol wrote to HMRC asking HMRC to exercise their discretion under Regulation 12. HMRC argued that the delay ended when the appellant submitted the form APSS200 on 1 December 2016.

135. Mr Hilton relied on the decision of Judge Gammie QC in *Jackson* at [61-62] to justify the delay ceasing in August 2016 even though the form was not submitted until December.

136. Each case of this type needs to be decided on its own facts but we accept here that the appellant's delay ceased on 15 August 2016. Whilst it would have been better had the appellant submitted the form on 15 August, from that date the appellant through his adviser was engaged with HMRC. It took HMRC until 24 October 2016 to respond to Mr Abrol's letter and in that time Mr Abrol chased HMRC on 22 September 2016. Following HMRC's letter of 24 October, the form was submitted on 1 December, a period we accept as long but not sufficient to amount to unreasonable in the circumstances.

137. Accordingly, we find that the period of delay ended on 15 August 2016.

Unreasonable delay

138. We have therefore found that the delay lasted from when the reasonable excuse ended, on 14 October 2015, to 15 August 2016, a period of 10 months.

139. The parties agree that the test as to whether there has been an unreasonable delay to be applied is an objective one. However, we have heard argument from both parties on the issue as to whether the actions of advisers can be attributed to the taxpayer.

140. Mr Hilton preferred *Tipping*. The same principles as set out in the reasonable excuse case law applied as to whether the actions of advisers can be attributed to the taxpayer applied. There can be no justification for different standards to apply at the two stages of an appeal such as this. Further, looking at the behaviour of the professional adviser comes close to an investigation of professional negligence, in this case against Mr Abrol. Mr Abrol is not

a party to this appeal and the Tribunal is not set up to do make a determination as to his negligence. Mr Hilton recognised that *Yablon* (at [38]) and *Twaite* at [52] went the other way.

141. Mr Harbottle argued that the test for unreasonable delay was set out by the Upper Tribunal in *Perrin* (at [77] and 81(4)]) but the focus should be on whether the delay was objectively unreasonable rather than the excuse. On that basis it did not matter whether the dealy was due to the taxpayer or his advisors.

142. We find that the test set out in Perrin applies ([81]:

> "Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

143. However, it is unnecessary for us to decide whether for the purposes of undue delay, the delay caused by advisers should be attributed to the taxpayer as we find the appellant's delay after 14 October 2015 unreasonable without attributing to him the actions of his advisors.

144. We accept HMRC's argument that as a financially aware retired businessman, conscious of the very significant consequences of not having enhanced protection, he did not take the steps a reasonable taxpayer would have done. Thus he did not contact or instruct his advisors to contact HMRC and/or to look at the pensions legislation and guidance to see if anything could be done. Instructing Mr Abrol to conduct a further investigation with a view to a professional negligence claim may well have been a reasonable but it was unreasonable of the appellant not at the same time to consider approaching HMRC or investigating whether the pensions legislation allowed for a remedy.

145. Had the appellant approached HMRC at the end of 2015 or early 2016 we would expect he would have been advised by HMRC to put in a late notification, see *Yablon* at [37] and *Radley* at [63]. We do not accept the appellant's argument that it would have been rejected out of hand. In our view there was sufficient information from Mr Fleet's investigation which concluded in October 2015 to justify at least an outline application and further information could have followed.

146. Mr Hilton argued that the case law justified the appellant's actions in initiating an investigation before contacting HMRC. However we find the case law quoted by Mr Hilton at odds with his position. Thus in *Yablon* the Tribunal said at [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." (emphasis added)

147. In *Tipping* the Tribunal said at [46]:

> "Mr Tipping was not inactive after 10 February 2014. About 5 weeks later, on 25 March 2014, he wrote to Mr Hames to complain. He asked Mr Hames "to instigate an investigation into why I was not advised to apply for the

> earlier protection, what financial implications this has, *and what actions can be taken"* (emphasis added by the Tribunal). We regard this as a reasonable step for Mr Tipping to have taken, given his state of knowledge at the time, which, deduced from the letter, did not include knowledge as to what, if anything, could be done to put the situation right."

148. In the current appeal the cause of the delay was the appellant directing his advisers solely to the professional negligence question and not asking whether the position could be remedied.

149. Accordingly, we do not find it necessary to decide whether Mr Abrol, with instructions limited to investigating a potential professional negligence claim and who knew in April 2016 that a late claim could be made, should have advised that the appellant contact HMRC.

150. We agree with HMRC that had the appellant instructed Mr Abrol, Mr Fleet or another advisor to look at the pensions legislation the ability to make a late notification would have become apparent (*Yablon* at [39]).

151. We do not accept the comparison with the time taken by HMRC in reaching decisions in this matter. Whether there has been unreasonable delay by the appellant is not a comparative exercise. Delay by HMRC can be a source of significant frustration for taxpayers but it is not relevant to this appeal.

Decision

152. We find that the appellant had a reasonable excuse for not submitting an application for enhanced protection until he was made aware of the problem in his meeting with Mr Fleet on 14 October 2015. After that date there was a period of 10 months until Mr Abrol wrote to HMRC on 15 August 2016 and we find that this period was an unreasonable delay. Each of these cases must be determined on its facts and we find that a reasonable taxpayer in the appellant's circumstances would have contacted HMRC and/or investigated the pensions legislation to find out if there was a remedy.

153. We therefore dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

154. 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: 23 MARCH 2020