[2017] UKFTT 0341 (TC)

TC05818

Appeal number: TC/2016/02184

PENSION – late application for enhanced protection – confirmation by financial adviser that application submitted in time – application in fact never submitted – whether reasonable excuse to rely upon confirmation – late application initially made otherwise than on specified form – subsequently corrected – whether late application made without undue delay – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN JACKSON **Appellant**

- and -

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

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC

Sitting in public at Alexandra House, Manchester on 28 March 2017

Mr Gary Brothers of Independent Tax and Forensic Services LLP for the Appellant

Linda Wheeler, Solicitor's Office and Legal Services, HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal concerns a late notification by Mr John Jackson of his intention to rely on paragraph 12 of Schedule 36 to the Finance Act 2004 (a "late application for enhanced protection"). The Notice of Appeal to the Tribunal indicates that the appeal should have been notified to the Tribunal by 24 February 2016. It was in fact only notified on 15 April 2016. This was evidently because the Respondents' ("HMRC") review letter went astray and was eventually only received by e-mail on 10 March 2016. The slight further delay in notifying the appeal was due to the taxpayer's ill health. HMRC raised no objection to the late notification and in the circumstances I agree to the necessary extension of time

2. The appeal arises from section 214 of the Finance Act 2004, which introduced a charge to income tax known as the lifetime allowance charge. I do not need to elaborate on the manner in which the lifetime allowance charge operates or on the events that may give rise to the charge to tax. The aim of the charge is to limit the tax benefits available for saving in a registered pension scheme from 6 April 2006 (commonly referred to as "A day").

3. An individual's lifetime allowance is set under section 218 of the Act and given the long-term nature of pension savings special transitional provision was made for those with certain levels of pension saving at A day. To that end, Part 2 of Schedule 36 makes provision for the operation of the lifetime allowance charge in the case of pre-commencement rights. In particular paragraph 12 of Schedule 36 applies on and after A day in the case of an individual who has one or more relevant existing arrangements if notice of intention to rely on it is given to HMRC in accordance with regulations.

4. Mr Jackson is one of those individuals who was advised to seek the benefit of these transitional provisions. Mercifully I am not required in this Decision to grapple with the complex detail of these changes to the taxation of pension provision or the operation of the lifetime allowance or the transitional provisions, or whether Mr Jackson was correctly advised in relation to such matters. The sole question that I have to consider is whether Mr Jackson has given the requisite notice of his intention rely on the transitional provisions through a late application for enhanced protection.

5. The final date for giving notice of that intention was 5 April 2009. Mr Jackson's notification on the prescribed form was signed by him and dated 8 October 2014 (and was received by HMRC on 28 October 2014). That is not, however, fatal to Mr Jackson's case. An individual may still give an effective notification after the closing date provided he has a reasonable excuse for not giving the notification on or before the closing date and the notification is given without unreasonable delay after the reasonable excuse ceased.

6. The relevant statutory provisions can be briefly and conveniently stated at this point:

> (1) Regulation 4(4) of the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006 (SI 2006 No 131) ("the Regulations") specifies that the "closing date" for reliance on paragraph 12 of Schedule 36 (lifetime allowances: enhanced protection) is 5 April 2009.
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> (2) Regulation 10 of the Regulations (as substituted by the Registered Pension Schemes (Enhanced Lifetime Allowance) (Amendment) Regulations 2006 (SI 2006 No 3261)) requires that the notification must be in a form prescribed by HMRC and the individual concerned must sign and date the notification.
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> (3) Regulation 12 of the Regulations states that if an individual gives a notification to HMRC after the closing date, HMRC must still consider the information provided in the notification if they are satisfied that the individual—
>
> > (a) had a reasonable excuse for not giving the notification on or before the closing date, and
> >
> > (b) gave the notification without unreasonable delay after the reasonable excuse ceased.

7. The two issues for my decision, therefore, are whether Mr Jackson had a reasonable excuse for his late notification and whether, after the reasonable excuse ceased, his notification was made without unreasonable delay.

8. Mr Jackson and his financial adviser, Mr Neil Peden of Greystone Financial Services Ltd, both gave evidence and were cross-examined by Mrs Wheeler for the Respondents. They gave a straightforward and honest account of matters and I accept their evidence without reservation. Mr Peden in particular was entirely candid about what had happened, which must have been a matter of considerable professional embarrassment to him and to Greystone. I was also provided with a bundle of relevant documents, to which I shall refer as necessary.

The Facts

9. Mr Jackson has been a client of Greystone Financial Services Ltd ("Greystone") since 1992. Mr Peden has been his financial adviser since December 2004. Mr Jackson appreciated that the changes in pension taxation following the Finance Act 2004 would affect his existing pension arrangements and that he would need to take some action to protect his position. He accordingly sought the advice of Mr Peden.

10. Mr Peden advised Mr Jackson at a meeting in October 2005 that he would need to apply for enhanced protection under the transitional provisions. Appropriate valuations were obtained and calculations were agreed. Mr Peden wrote to Mr Jackson on 27 January 2006 recommending a "final" pension contribution before A day and saying, "I propose that post-5th April, you opt for both Enhanced and Primary Protection." Mrs Wheeler for HMRC put to both witnesses the suggestion that this

indicated that Mr Peden expected Mr Jackson to make the necessary notification. Both said that this was not the case: Mr Jackson said that he relied upon Mr Peden to deal with such matters and Mr Peden accepted that it was (and he understood it to be) his responsibility to take whatever steps had to follow from Mr Jackson's decision to opt or not. In any event, quite apart from their evidence, I do not consider that what Mr Peden wrote would ordinarily be understood in the way Mrs Wheeler suggested. It is a perfectly natural way of expressing advice on an issue under consideration where the client has to make the decision (having regard to the advice he has received). It does not imply that the client and not the adviser is to do whatever is necessary to give effect to the client's decision.

11. The Appellant made a final lump sum contribution to his pension on 4 April 2006 and then on 15 January 2007 an internal Greystone memorandum noted that the HMRC forms to apply for enhanced and primary protection needed to be completed. Mr Jackson said that at two meetings with Mr Peden in 2007 the requirement not to make further pension contributions had been discussed due to the protection that Mr Jackson had understood to be in place. He was not aware that this required him to complete any forms and believed that Greystone had done whatever was necessary to secure the protection. As far as Mr Jackson was concerned this was just a matter of confirming that you ticked all the right boxes. It was not something on which HMRC had to exercise some judgment or discretion that they then had to confirm.

12. On 6 July 2007 another Greystone internal memorandum noted that it would inappropriate to transfer shares in specie to Mr Jackson's pension fund because this could be treated as a contribution and therefore breach the terms of the Appellant's protection.

13. Another Greystone memorandum of 2 January 2008 similarly states that:

> "[Mr Jackson] had left a message with Vicky on 20th December that he wished for the appropriate SIPP (he has three) to purchase some shares from himself, which he has recently purchased via Brewin Dolphin. We do need to be careful here because we mustn't be in a situation whereby the value moving into the SIPP is deemed to be a contribution, as it would trigger the loss of [Mr Jackson's] enhanced, and indeed, I think he has primary protections."

14. Furthermore, on 4 November 2008, in other words, not long before the closing date, Mr Peden wrote to Mr Jackson about a particular pension arrangement. In the course of the letter he said:

> "You will, however, recall that it is important that you pay no further pension contributions so as to benefit from the enhanced protection we put in place, ie: protection of your funds as compared to the Lifetime Allowance. Please therefore ignore the premium reminder."

15. Between 2005 and 2014 (up to 15 March 2014), Mr Peden had been able to identify some 284 documented interactions between Greystone and Mr Jackson (for himself or his family's financial planning), in the form of meetings, letters, e-mails

and telephone conversations. To the extent that the subject of protection was relevant to these, they reflected that enhanced protection was thought to have been put in place. There had also been 31 occasions on which some submission or other had been made to HMRC, none of which had led Greystone, Mr Peden or Mr Jackson to think that enhanced protection was not in place.

16. Mr Peden identified in his witness statement some 20 documented interactions within Greystone and with Mr Jackson from A day up to December 2013 which either noted specifically or tended to suggest that both Greystone and Mr Jackson believed that enhanced protection had been applied for and obtained. The relevant documents were produced but I think it unnecessary to record them all here. I find that at all times Greystone and Mr Jackson believed that enhanced protection had been applied for and obtained. Mr Peden also expressed the view that after A day Mr Jackson understood that Greystone was initially responsible for putting in place the protection and that they had taken the relevant action to do so. Mr Peden accepted that it was their responsibility. I also find that that was the case.

17. Mr Jackson said that he knew nothing about pension protection other than that Greystone had assessed that he needed it. They handled all his pension planning and he relied upon them absolutely. As far as he was concerned they were to do whatever was needed to obtain the protection and it would be for them to tell him if he needed to sign any forms to secure it. He had referred many clients to Greystone based on his own experience of their services and he had never known them to make a mistake (in relation to his affairs or, so far as he knew, those of the clients he had referred). He said that Mr Peden had proved very diligent and had provided good advice. He found the mistake that had occurred regarding the notification that had to be made in his case beyond comprehension.

18. He said that he had been told and had always understood that Greystone had applied for the protection he needed and that the protection was in place. As far as he was concerned he had no reason to question what he had been told or to seek further confirmation that Greystone had done what they had said they had done. Throughout his professional career as an accountant he frequently had responsibility for submitting forms or taking particular action for clients and his clients would take his word or written assurance as sufficient confirmation of the matter.

19. The fact that Greystone expected him to take perfectly usual steps to secure payment of his "final" pension contribution before A day did not indicate that they were expecting him to take whatever steps were needed to secure enhanced protection. Producing the funds needed to pay a pension contribution and transferring them to the pension provider was plainly his responsibility. Taking steps to notify HMRC that his pension arrangements should benefit from enhanced protection was equally plainly part of Greystone's role. While he was aware that any contributions had to be made before A day (and that none should be made thereafter), he was not aware of the closing date by which the required protection had to be notified, nor of the steps that needed to be taken to secure it.

20. The fact that he was a Chartered Accountant and regularly submitted forms on company, accounting or other matters for clients did not in Mr Jackson's view mean that his experience should have told him to expect to have to sign and submit some form to secure the protection he needed or that he should have expected to be shown some confirmation from HMRC that protection had been granted. In his experience of dealing with clients this was not the usual way in which matters were dealt with between client and adviser. In his experience the adviser would deal with such matters and advise the client if anything was expected of them. In the present case it was Greystone's responsibility to tell him as the client if he needed to sign or to do anything to achieve the protection he needed. I accept Mr Jackson's evidence.

21. Mr Peden had been a director of Greystone since October 1992. He was a Regulated Financial Adviser and a member of the Institute of Financial Services, holding their Financial Advice diploma. He accepted that the failure to make any notification before the closing date was an error on Greystone's part. Mr Peden was unable to offer any explanation or otherwise account for that error. He made the point that Mr Jackson was probably the only client for whom they would have needed to make an application and that this was not an area with which at the time they would have had particular familiarity. I also accept Mr Peden's evidence. In a busy professional office, on occasion mistakes happen and matters are sometimes overlooked. This appears to have been one of those occasions.

22. I can fast forward to February 2014. It was then that Mr Jackson advised Greystone that he was considering making a draw down from his pensions. It was as a result of the enquiries that this initiated that Greystone discovered that no application for enhanced protection had ever been notified to HMRC. What then followed was this.

23. On 6 March 2014 Greystone provided an initial warning to Mr Jackson that he might have no pension protection in place. Mr Jackson said that at that point he might not have fully appreciated the significance of what he had been told and Mr Peden indicated that while they appreciated that there could be a problem they did not necessarily get to the bottom of it immediately. In any event, by 31 March 2014 Greystone had submitted on the Appellant's behalf an application for Fixed Protection 2014. (This secured that for the tax years 2014/15 onwards the Appellant had a protected lifetime allowance of £1.5million.)

24. And then on 17 April 2014 Greystone wrote to HMRC on a no names' basis to ask what (if anything) could be done to rectify the mistake that had occurred and place the client in the position that he had always believed he was in. Mr Peden confirmed that the client in question was Mr Jackson and Mr Jackson confirmed that the letter was written with his knowledge. On 8 May 2014 HMRC replied to Greystone setting out the late application criteria (i.e. the need to provide a reasonable excuse and for there to be no undue delay in making the notification now that the mistake had been identified). The letter appears only to have been received on 21 May 2014 and provided references to the relevant legislation and HMRC guidance but did not specifically refer to the need to complete a particular form. The letter

concluded with the warning that the circumstances that Greystone had described were not such as, in themselves, would normally lead to a late application being accepted.

25. This was followed on 30 June 2014 by Mr Jackson writing to HMRC setting out his circumstances and noting his wish to apply retrospectively for enhanced protection. The letter had been prepared with the benefit of relevant advice (both from Greystone and from solicitors who had been engaged to assist). It was plainly designed to put forward reasons that it was hoped would persuade HMRC to accept that Mr Jackson had a reasonable excuse for his late notification. Beyond recording his understanding that Greystone had put the protection in place before the closing date, and that he had no clear understanding as to why that had not been done, Mr Jackson noted that he had suffered from serious ill health, including hospitalisation, around the 2006 period. This, the letter recorded, "will have had some impact on my administrative efficiency at the time". The letter also noted that as he was finally approach retirement after a long working career, it appeared that he would be significantly financially penalised "for a single individual instance of administrative oversight".

26. Mrs Wheeler for HMRC sought to make something of this letter, as suggesting that it indicated that Mr Jackson accepted some responsibility for what had happened and for a failure on his part to deal with matters as he should have done. I do not accept that. It seems to me that the letter of 30 June was designed to deal with HMRC's response of 8 May 2014 and in particular the indication that HMRC were unlikely to accept that Greystone's error alone sufficed as a reasonable excuse. The position up to March or April 2014 (when the omission was clearly understood) was as I have previously set out. I was given no reason to think that what Mr Jackson wrote on 30 June 2014 about his health in the 2006 period was inaccurate. It was not, however, something upon which he relied specifically in his appeal.

27. HMRC replied to Mr Jackson's letter on 29 July 2014 asking for copies of the notes and correspondence with Greystone to which he had referred in his letter and also asking him to complete form APSS 200. And then on 22 August 2014, before they had received any further communication from him, HMRC wrote again and in more detail to Mr Jackson in reply to his letter of 30 June 2014, providing references and links to HMRC guidance and again enclosing APSS 200 for completion.

28. On 24 October 2014, Independent Tax wrote to HMRC on Mr Jackson's behalf enclosing a letter of authority to act and the completed form APSS 200 signed and dated by the Appellant on 8 October 2014. This letter set out in greater detail the fact that Mr Jackson had reasonably relied on Greystone's support in these matters and therefore had a reasonable excuse for making a late notification.

29. As regards the time taken between the initial discovery by Greystone of their error (sometime in March 2014) and the submission of form APSS 200 in October 2014, which HMRC say amounts to unreasonable delay, I should record what Mr Jackson and Mr Peden told me about events over that period. Having told Mr Jackson of their error, Greystone notified (as they were bound to do) their professional indemnity insurers, who then became involved. Solicitors were instructed to assist

and following their enquiry of HMRC, Mr Jackson's letter of 30 June 2014 was thought to provide what was needed at that stage. It was not recognised that even in the case of a late notification, the prescribed form had to be submitted rather than a bespoke letter explaining why the notification was late (i.e. that the prescribed form was not limited to in time notifications and had to be submitted even before HMRC had agreed to accept a late notification).

30. The requirement for form SPSS 200 first became apparent to those concerned on 29 July 2014 but this was followed by HMRC's more detailed reply on 22 August 2014, following which the details required to complete SPSS 200 had to be gathered, leading in due course to its submission on 24 October 2014.

31. On 1 December 2014 HMRC responded to Independent Tax with a request for some further documents and these were supplied on 13 February 2015. Further correspondence ensued and on 23 October 2015, HMRC refused Mr Jackson's late application on the basis that he did not have a reasonable excuse for submitting a late application. On 20 November 2015 Independent Tax appealed that decision on Mr Jackson's behalf and requested an independent review on the basis that:

> (1) Mr Jackson was a layman in terms of the pension legislation and had reasonably engaged the services of financial experts to provide advice and guidance, on which he had relied;
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> (2) Having discovered their failure to submit an in time application for protection, he had submitted an application without unreasonable delay.

32. On 4 December 2014 HMRC considered Mr Jackson's appeal and upheld the original decision. On 23 February 2016 HMRC issued the review conclusion letter upholding HMRC's decision. On 15 April 2016 Mr Jackson notified his appeal to the Tribunal.

The Appellant's submissions

33. Mr Brothers' submissions on behalf of Mr Jackson were straightforward in the light of his and Mr Peden's evidence, which I have accepted. He relied on *Irby v HMRC* [2012] UKFTT 291 (TC), which also concerned a late notification. Paragraph 19 of that case records that:

> "Mr Irby's evidence (which we accept) is that when it came to applying for enhanced protection, he understood from his discussion with ZV that an application needed to be made and that UBS would take care of it. He was not aware of the process or that input would be needed from him. He understood that the application could (and would) be made by UBS on his behalf without the need for his involvement."

34. At paragraph 43, the Tribunal record that their reason for allowing Mr Irby's appeal was that they found that he relied upon UBS to make the necessary notification in time on his behalf and that such reliance was reasonable. He therefore had a reasonable excuse. In Mr Irby's case there was a question whether in the

circumstances he should have made himself aware of the closing date and followed up on a 'double check' that another person was supposed to be making but who never came back to Mr Irby. The Tribunal noted that this might have been a reasonable thing to do but, as the Tribunal concluded:

> "… 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 that 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. We consider it was, and that our approach is entirely consistent with the reasoning of the Tribunal in *Platt*, which is the decision in which (of the decision cited to us) the concept of reasonable excuse in this context is most fully explored."

35. Mr Brothers also referred me to *Rowland v HMRC* [2006] STC (SCD) 536. He drew my attention to paragraph 8(q) in which it was found as a fact that Mrs Rowland did not have specialist knowledge and expertise and relied upon the persons she reasonably believed to have that knowledge and expertise. In relation to this the Special Commissioner concluded that it was a reasonable and responsible way of behaving. As the Special Commissioner noted at paragraph 18 of his decision:

> "The question here is, 'Did Mrs Rowland have a reasonable excuse?' I am not concerned whether the accountants have a reasonable excuse. I am solely concerned with whether the taxpayer (Mrs Rowland) had a reasonable excuse."

36. Thus the fact that the accountant's advice seemed to be incorrect did not prevent Mrs Rowland from having a reasonable excuse. And then at paragraph 21:

> "In these circumstances I consider it was reasonable for Mrs Rowland to rely on her then accountants and it was this reliance that led to the underpayment. I consider that this was an excuse for the underpayment and as the reliance was reasonable the excuse was at first blush reasonable."

37. The Special Commissioner had then gone on to conclude that reliance on a third party could be a reasonable excuse so that Mrs Rowland did, at first and last blush, have a reasonable excuse.

38. Mr Brothers accepted that the question in each case is whether there is a reasonable excuse by reference to the particular facts of that case (as to which he referred to *Yablon v HMRC* [2016] UKFTT 814 (TC) at §26). In so far as authority was needed, however, *Irby* and *Rowland* provided it.

39. Finally he noted that the time from which it would be appropriate to consider any delay in making notification was 21 May 2014, when HMRC's letter of 8 May 2014 had been received. Mr Jackson's letter of 30 June 2014 had been submitted within about six weeks of that. HMRC's letter had not drawn attention to the need to complete form SPSS 200 for a late application and the guidance to which HMRC had

drawn attention in that letter said a late notification could only be made "where there has been an unusual event that was either unforeseeable or beyond the person's control." Mr Jackson's letter of 30 June 2014 had been designed to respond to that guidance and explain why the late notification was unforeseeable or beyond Mr Jackson's control.

40. HMRC's later letter of 22 August 2014, replying to the letter of 30 June 2014, had made the point that HMRC did not accept that failures by third parties or ignorance of the legislation or procedures amounted to a reasonable excuse. This had prompted the need for further advice on Mr Jackson's position (leading to the instruction of Independent Tax & Forensic Services LLP) and the further time taken to reply to HMRC's letter of 22 August 2014. No more than 12 weeks had elapsed in doing so and there had therefore been no unreasonable delay in making the late notification.

The Respondent's submissions

41. Mrs Wheeler said that the Respondents accepted that the Appellant had acted reasonably in engaging a financial adviser to assist with his pensions, and that he relied upon that adviser. She suggested, however, that the Appellant was actively involved in his pension planning and had a clear understanding of the pension changes regarding lifetime allowances and the impact on his pension fund. This was one of the circumstances to be taken into account.

42. She contended that the fact that the Appellant engaged the services of an advisor and consulted with his advisor is not in itself an excuse, reasonable or otherwise. Without knowing the reasons why an application had not been made by the deadline, HMRC could not accept that the Appellant had a reasonable excuse. It was unclear whether any form APSS 200 had been obtained, completed and signed before 6 April 2009 and, if so, by whom. Nor had it been explained why if a form had been obtained, completed and signed it had not been submitted by that date. Had an application been made without the requisite form the application would have been rejected and this would have alerted those concerned to what needed to be done. There was nothing to suggest that those involved could have reasonably thought that an application for enhanced protection had been made, nor that any confirmation of its submission or acceptance had been sought or seen by anyone concerned. She submitted that Mr Jackson as a Chartered Accountant and Greystone as financial advisers could reasonably be expected to know that applications which impacted the tax treatment of substantial sums of money would require forms to be completed, signed, dated and received by HMRC, and acknowledged by them.

43. She accepted that in *Rowland v HMRC* it was established that reliance on a third party can in some circumstances constitute a reasonable excuse. Reasonable excuse, however, was a "matter to be considered in all the circumstances of the case". The Commissioner had concluded that it was reasonable for Mrs Rowland to rely upon her accountants in a complicated and difficult area of film partnership accounts. In contrast the task of submitting a form by a due date could not be considered complicated or difficult.

44. As regards *Irby v HMRC* [2012] UKFTT 291 (TC) Mrs Wheeler noted that Mr Irby was unaware of the deadline for claiming protection and had been told by his professional advisers that they would deal with this as necessary without his involvement. She sought to distinguish Mr Jackson's case on the basis that in Mr Irby's case the Tribunal had found as fact that Mr Irby had been led to believe that his advisor would make the application on his behalf and that he need not be involved in any way. She said that Mr Jackson was plainly aware of the need for an application but sought no assurance and took no action to confirm that an application had in fact been submitted, nor sought confirmation that the application had been successful and the protection was in place.

45. She also noted the decision in another late application case, *Platt v HMRC* [2011] UKFTT 606 (TC). Mr Platt, despite being aware of newsletters on the changes to pensions, was apparently unaware of the need to give notification until September 2010. The Tribunal had noted that:

> "34. What must be considered is whether a reasonable taxpayer, in the circumstances in question, would have been in a position to make a timely application. The circumstances in which a reasonable excuse may be shown for not doing so do not, in our judgment, have to be in any way exceptional. On the contrary, they may be mundane; there can be a reasonable excuse if an individual does not know of the need to make an application by an impending deadline, and cannot reasonably be expected to have been in a position to have become aware of the need or of such a deadline."

46. The Tribunal concluded that although Mr Platt was unaware of the deadline, his lack of knowledge in light of all of the information available to him was unreasonable. A reasonable person, having read the information provided by HMRC, would have appreciated that he could register for some protection for his benefits, and that he needed to do so by 5 April 2009. The Tribunal concluded that Mr Platt did not have a reasonable excuse.

47. Mrs Wheeler submitted that Mr Jackson was in a similar position, in the light of all the information available to him and his own evidence of his knowledge and awareness of the pension changes and the A-day deadline. It suggest that it was unreasonable for him to not to seek some assurance or confirmation that the application had been submitted successfully and that the required protections were in place.

48. She noted that in *Radley & Gibbs v HMRC* [2016] UKFTT 688 (TC) there was another a late application for enhanced protection, with the appellants seeking to rely on a third party. The appellants in that case had engaged the same financial adviser who had assured them that a form to enable them to apply for enhanced protection would be forwarded to them, and that the application needed to be made by 5 April 2009. The application was not made and Mr Radley and Mr Gibbs dispensed with that financial adviser in November 2008 because they were not satisfied with the service being provided. They did not engage another financial adviser until April 2009. In April 2012, the appellants established that an application for enhanced

protection had not been made. The applications were finally made on 11 April 2014 and 11 May 2015.

49. At paragraph 52 of the decision, the conduct of the adviser was considered:

> "52. There are circumstances where an adviser has been negligent and the taxpayer's reliance on the adviser could constitute a reasonable excuse. However, the two are not necessarily inter-related. The tribunal's job … is to consider the actions of the taxpayer and conclude whether they were reasonable in the circumstances. The actions of the adviser are some of the relevant circumstances and it is on that basis that we have considered the actions of both the taxpayers and [the advisers]."

50. The Tribunal concluded that Mr Radley and Mr Gibb did not have a reasonable excuse. It considered that it was reasonable to rely on advisers for advice. When considering reasonable excuse, however, the actions of both the adviser and the taxpayer had to be considered. This again pointed to a conclusion that it was unreasonable for Mr Jackson to not seek some appropriate assurance or confirmation that the application had been successfully submitted and accepted.

51. Finally, referring to *Yablon v HMRC* she drew my attention to paragraph 28 of the decision:

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

52. Mrs Wheeler said that the facts in *Yablon* could be compared to Mr Jackson's case because it concerned the same legislation. The Tribunal held that a reasonable taxpayer would have taken steps to check the position periodically with their advisor prior to the deadline. Again, it emphasised that Mr Jackson did not take reasonable action or seek appropriate assurance or confirmation that everything had been done as it should.

53. As regards the time taken to submit the late notification, Mrs Wheeler said that the reasonable excuse should be taken to have ended on 6 March 2014, when Mr

Jackson was first told that he did not have any pension protection. That date was supported by an internal Greystone memorandum of 11 March 2014, which noted:

> "I spoke to John at length on the afternoon of 6th March and explained the position to him. He clearly understood that this would be a detrimental position, but I am not sure he fully understands the situation as yet; certainly, we do not at this stage have all the figures available to us."

54. HMRC had only received the required application from APSS 200 on 28 October 2014, signed and dated on 8 October 2014. Thus, the delay in making the application was over 7 months. She noted that in *Yablon*, the Tribunal had considered whether there was unreasonable delay after the reasonable excuse ceased:

> 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.
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> 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. The Tribunal concluded that there was no "reasonable excuse" for the late submission of the election.

55. Mrs Wheeler said that in considering whether the Appellant acted without unreasonable delay both *Radley and Gibbs* and *Yablon* identified the date on which the appellant had become aware that there was no protection in place as the date the reasonable excuse ceased. In this case it was March 2014 and not the date submitted by Mr Brothers of May 2014. This emphasised the point that Mr Jackson had not made the application without unreasonable delay.

My Decision

56. Mrs Wheeler noted that in *Perrin v HMRC* [2014] UKFTT 488 (TC) Judge Redston had identified at paragraphs 99 and 100 the task involved in a reasonable excuse appeal:

> "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 … that the correct way of doing this is to ask:
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> > "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?"
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> 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 relevant attributes of the taxpayer and placed in the same situation as the taxpayer".

57. I have set out the facts and the respective arguments of the parties at some length, including the various authorities on which they have relied. In the end, however, I have to decide whether, on the facts that I have found, Mr Jackson had a reasonable excuse for being late in making his notification and whether he acted without unreasonable delay once he discover that no notification had been made.

58. I sought Mrs Wheeler's clarification on one aspect of HMRC's case: namely whether they regarded the passage of time from 6 April 2009 to March 2014 relevant to the question of reasonable excuse. In other words, did HMRC contend that Mr Jackson should have done anything in that period to confirm whether the protection was in place and was his failure to do so therefore relevant to my consideration of the matter? She said that it was not: essentially HMRC's contention was whether Mr Jackson should have done something before the closing date to satisfy himself that protection was in place. HMRC's view was that he should have done (for the reasons previously advanced). It was not that HMRC said that he needed, for example, to re-confirm its availability at regular intervals thereafter and had unreasonably failed to do so. Once the omission became apparent in March 2014, however, the issue was one of unreasonable delay.

59. Mr Jackson was plainly aware that an application of some sort had to be made to secure protection for his existing pension arrangements. I accept, however, that he had no knowledge of what this involved or that he was required to sign any form to secure the protection. So far as he was concerned, it was an application that his financial adviser could make on his behalf, being essential a matter of 'ticking the right boxes' to confirm that his existing pension arrangements met the relevant criteria for the protection sought. It was something that he believed Greystone were capable of doing, that they had his authority to do and that they had accepted responsibility for

doing. Thereafter, every indication that he received from Mr Peden and Greystone confirmed to him that application had been made and the protection was in place.

60. It is true that no one has been able to say why Greystone failed to submit any notification before the closing date (whether on the required form or otherwise). For all that is known they may have done and it never reached HMRC or was never responded to: but Mr Peden made no claim to that effect. No trace of any application had been identified. Had Mr Peden made further enquiries of his colleagues he might have discovered sooner that no application had been made. Had Mr Jackson asked for further assurance or confirmation from Mr Peden on the matter before the closing date then the omission might have come to light in time. As the Tribunal noted in *Irby*, however, these are not the questions that I am asked to answer. The question is what did Mr Jackson know and do and was that reasonable? In all the circumstances I have concluded that Mr Jackson did act reasonably in relying on Mr Peden and Greystone to deal with this matter and in accepting their assurances that the protection was in place. I have therefore concluded that Mr Jackson did have a reasonable excuse for the late notification.

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.

Conclusion

63. Accordingly I allow Mr Jackson's appeal. In accordance with Regulation 12(8) of the Regulations, I direct that HMRC consider the information provided by Mr Jackson in his notification.

64. This document contains full findings of fact and reasons for my decision on the issue of Mr Jackson's late application for enhanced protection. 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.

MALCOLM GAMMIE CBE QC
TRIBUNAL JUDGE

RELEASE DATE: 24 APRIL 2017