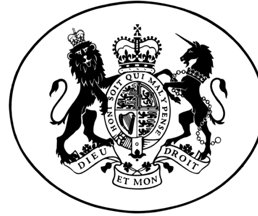
[2017] UKFTT 0591 (TC)



TC06033

Appeal number: TC/2016/01248

INCOME TAX – pensions - late notification of enhanced protection – reliance upon an adviser – failure to advise of the need for enhanced protection - whether or not a reasonable excuse for late notification – yes – whether or not the notification was given without unreasonable delay after the reasonable excuse ceased – eleven months - unreasonable delay – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALAN TWAITE	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD CHAPMAN

Sitting in public at 4th Floor, 11 Albion Street, Leeds, LS1 5ES on 6 February 2017 with further written submissions on 14 March 2017, 1 June 2017 and 20 June 2017.

Mr Gary Brothers, Accountant, for the Appellant

Ms Moira Browne, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This appeal is against HMRC's refusal to accept Mr Twaite's late notification ("the Notification") seeking enhanced protection in respect of the lifetime allowance charge to tax of his pension benefits. By virtue of Regulation 4(4) of the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006 ("the 2006 Regulations") the closing date for notifications was 5 April 2009. The notification was made on 24 February 2015. However, Regulation 12 of the 2006 Regulations requires HMRC to consider the Notification if Mr Twaite has a reasonable excuse for not giving the Notification on or before 5 April 2009 and if he gave the Notification without unreasonable delay after the reasonable excuse ceased. The appeal turns upon the application of Regulation 12.

The Statutory Framework

2. It will be of assistance to set out the statutory framework at the outset.

3. Section 214 of the Finance Act 2004 introduced a lifetime allowance charge for pension benefits. This was to take effect on 6 April 2006, which was labelled "A Day". Primary protection is provided for by paragraph 7 of Schedule 36 to the Finance Act 2004 ("Schedule 36") allowing for the benefit of any increases in the lifetime allowance if the value of the pension was at least £1,500,000 as at 6 April 2006. Enhanced protection provides for the lifetime allowance not to apply if no further contributions are paid after 6 April 2006. However, enhanced protection requires a notice of intention to rely on paragraph 12 of Schedule 36 to have been given on or before the closing date, being 5 April 2009 (see Regulation 4 of the 2009 Regulations).

4. Late notifications and appeals are provided for by Regulation 12 of the 2006 Regulations as follows:

> "(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.
>
> (5) …
>
> (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."

Evidence

5. I was provided with a bundle of documents which included a witness statement from Mr Twaite and correspondence between Mr Twaite and his pension advisers, Close Asset Management Ltd ("Close") and between HMRC and Mr Twaite's advisers in this appeal, The Independent Tax and Forensic Services LLP ("Independent Tax").

6. I also heard evidence from Mr Twaite. I say at this stage that I found him to be an honest and reliable witness. He was frank and open in his answers to questions and was keen to ensure that I had an accurate picture of the position, whether it helped his case or not. He was also prepared to be politely firm and forthright in his opinions where necessary.

Findings of Fact

7. On the basis of the evidence before me (much of which was not in dispute) I make the following findings of fact.

8. Mr Twaite is a retired engineer. He was a director of a company which was taken over by Pilkington. After the takeover, he became a branch manager for Pilkington.

9. In the early 1980s, Mr Twaite was introduced to Lomond Asset Management ("LAM") and engaged them as his pension advisers. Close took over LAM's business in about 2000 and continued to advise Mr Twaite. Mr Twaite said, and I accept, that with the exception of the matters which have led to these proceedings, Close have been excellent in all they have done for Mr Twaite and they remain his pension advisers.

10. At the material times, Mr Twaite's relationship manager at Close was Mr Julian Warden. Mr Warden was responsible for all matters relating to the administration of Mr Twaite's pension but did not stray into investment strategy or the choice of portfolios. Mr Twaite and Mr Warden had annual review meetings in London in

January of each year. January was chosen so that this could coincide with a boat show which Mr Twaite and his wife attended each year. Even on the occasions when Mr and Mrs Twaite did not attend the boat show (being 2007 and 2008), they still went to London in January to meet Mr Warden. Mr Twaite described Mr Warden as, “a very nice guy”, “very attentive” and “very diligent.

11. Mr Twaite has unfortunately suffered serious ill health. In the late 1990s, he was diagnosed with heart failure, which was getting progressively worse. In 2000, he was referred for a heart transplant. In 2001, he took early retirement on the grounds of ill health. After three years of waiting for a transplant, he was given a specialised experimental pacemaker. Thankfully, Mr Twaites’ condition did stabilise from 2004 onwards. Upon being asked about his health from 2006 to 2009 (of course, an important period for the purposes of this appeal), Mr Twaite said that although his condition had stabilised he was not cured; rather, his health was being managed by the pacemaker and medication. Further, the pacemaker had only a 30% success rate and so, although it had been implanted successfully, he still had serious and justified concerns as to how long it would last. Mr Twaite said, and I accept, that, “the last thing in the world that I wanted to be bothered by was pensions,” save that he wanted to do whatever he could do to ensure that his wife could benefit if anything happened to him. Mr Twaite said, with admirable understatement, that, “it was a pretty torrid time.”

12. In 2006, Mr Warden prepared a valuation of Mr Twaite’s pension for the purposes of advising upon whether or not he was eligible for pension protection. Mr Warden advised Mr Twaite that he was not eligible for such protection. This formed the basis of a report in March 2006. Mr Twaite contacted Mr Warden to tell him that the Pilkington pension was incorrect. Mr Warden said that he would revise the figures and would contact Mr Twaite if his advice as to pension protection changed. Mr Warden also said that they should “wait and see” what his pension would be worth in the years ahead but prior to the closing date on 5 April 2009. In the event, Mr Warden did not amend or supplement his advice and did not raise the matter again in his review meetings or at all.

13. Mr Warden subsequently left Close and was succeeded by Mr Kevin Broadbent. During Mr Twaite’s review with Mr Broadbent in January 2014, Mr Broadbent said that he had looked at Mr Twaite’s file and the income from Pilkington was significantly higher than Mr Warden had informed Mr Twaite in 2006. Mr Broadbent asked if Mr Twaite had made any additional contributions. Mr Twaite confirmed that he had not. Mr Broadbent said that he was concerned about the lack of protection and that it would be prudent for him to revert to his compliance department. Mr Broadbent said that if he needed Mr Twaite to do anything he would speak to him.

14. On 13 March 2014, Mr Broadbent contacted Mr Twaite and confirmed his concern that Mr Warden’s advice was incorrect and that he had needed enhanced protection. Mr Twaite registered a complaint with Close on the same day.

15. Mr Graham Kennedy, Close’s compliance officer, was assigned to Mr Twaite’s case and duly introduced himself by telephone and by letter. About one month or six

weeks after the introduction, Mr Twaite telephoned Mr Kennedy to see how he was getting on and to see if he needed any further information. Mr Kennedy said that the matter was in hand and that he was not able to say what was going on.

16. By an email dated 17 June 2014, Mr Kennedy asked further questions about the report Mr Warden had made in 2006, whether or not any further payments had been made and as to his future plans to crystallise the remaining benefits. Mr Kennedy ended by saying, "The above information may provide a greater insight into your situation and in particular whether it may be possible to approach HMRC with a view to making an application for the retrospective granting of either enhanced or fixed protection at a greater level of protection than you currently have."

17. Mr Twaite replied by an email dated 19 June 2014. Given its significance, I set out the whole of the substance of this email as follows:

> "1. Pilkington Pension
>
> I do indeed have my copy of Julian's report of 23/3/06. However, the figure quoted for the Pilkington pension at £9,048/annum was not only incorrect but actually had no resemblance to any other figures being discussed at the time. The actual figure for my Pilkington pension at the time was £21,434 as evidenced by the attached copy of my P60 for the tax y/e 2006. I have some recollection of a subsequent discussion on the phone with Julian and in particular I have a scribbled note on my file that with the correct Pilkington figure in the calculation we would be just about on the £1.5m. I have a further recollection that Julian's view was to wait and see as we would still have the option of Enhanced Protection until 2009 given that I was retired on health grounds and no further contributions into any pensions had been made since then (2001) nor would there be in the future.
>
> Looking back through my paper file and my compute documents back up file, I have no record of writing a letter to confirm the discussions. However, if I did subsequently confirm the discussion it would most likely have been by email but I cannot help in this regard as I have long since changed providers (from Tiscali then to BT now) and the history went with the closure.
>
> However I met with Julian each year in London (to coincide with the London Boat Show in January) until he resigned and my financial circumstances were always reviewed and updated at the meeting. I will be surprised if there are not further references in my file to my various incomes at those times.
>
> 2. Payments into Pensions
>
> I can confirm that no further payments have been made into any of my pension plans since 5/4/06.
>
> 3. Future Plans
>
> I'm afraid I don't fully understand this question. From recent calculations made by Kevin Broadbent using the correct figures, there seems a likelihood that having made and been granted the HMRC 2014 Fixed Protection application, there is unlikely to be a tax recovery

> charge following my final BCE at age 75. However, if portfolio performance exceeds expectations sufficient to create a tax charge, it is unlikely that the charge would have arisen if the earlier 2009 Enhanced Protection had been properly administered and applied for.
>
> Might I suggest that a further calculation is made on a "best possible expectations" basis before deciding whether or not to approach HMRC for retrospective consideration.
>
> I hope this will help in your investigation and thank you for your assistance to resolve the matter."

18. Mr Twaite soon became concerned that little was happening. Mr Twaite said in oral evidence that, "I didn't make any real phone calls for the first three or four weeks but when I wasn't getting much satisfaction it was much more regularly. It was enough to make him realise that he should be getting in touch with me and telling me what was going on. I spoke to Mr Kennedy in all four or five times to move things along." I take it from the absence of any reference to this in Mr Twaite's email of 19 June 2014 that, "the first three or four weeks" refers to three or four weeks from the June 2014 email correspondence. Mr Twaite also made the point that although he spoke to Mr Kennedy four or five times, this involved many more phone calls as for every occasion that they spoke there were four or five phone calls when Mr Kennedy was unavailable.

19. Mr Twaite's assessment of what was happening is a frank one and one that I agree with. He said in oral evidence that, "I think if I am really honest I now think Mr Kennedy saw his role as much to limit the damage to Close as to relieve the damage to me. A lot of his early work he did not want to share with me."

20. By a letter dated 15 December 2014, Mr Kennedy informed Mr Twaite that he had reviewed the position and had revised Mr Warden's calculations. Mr Warden had calculated the value of the pensions at £1,203,618.50. However, Mr Kennedy's recalculation of this as at March 2006 was £1,513,268.47. Mr Kennedy concluded with, "Had the previous calculation been more accurately completed using the correct Pilkington pension in payment, I believe we would have been in a more informed position to advise you accordingly, based on your circumstances and objectives at that time."

21. The letter of 15 December 2014 did not provide any information about what Close was going to do next. This was a point not lost on Mr Twaite, who said that the letter, "wound me up again." He then chased Mr Kennedy to see what was happening and, "had a rant on the phone and I said let's get on with it". Mr Twaite continued, "In the end I made such a fuss that he sent me the form to fill in." On receipt of the retrospective enhanced protection application form, Mr Twaite completed it with the assistance of Mr Broadbent and signed it on 2 February 2015. It was then submitted to HMRC on 24 February 2015 by Independent Tax with a request that the late application be accepted.

22. After further correspondence between HMRC and Independent Tax, HMRC rejected the late application by a letter dated 6 August 2015. Independent Tax (on

behalf of Mr Twaite) appealed against this, which appeal was rejected by HMRC by a letter dated 23 October 2015. A request for a review was made by a letter dated 18 November 2015. That review was concluded by a letter dated 28 January 2016, in which HMRC upheld the decision.

5 **The Issues**

23. Mr Twaite's notice of appeal is dated 26 February 2016. In essence, the grounds for appeal contend that Mr Twaite had a reasonable excuse for the late notification because he reasonably relied on his advisers who were in error and that he made the Notification without unreasonable delay after that reasonable excuse ceased. HMRC
10 does not accept either of these propositions.

24. It follows that the issues are:

(1) Did Mr Twaite have a reasonable excuse for not giving the Notification on or before the closing date?

(2) Did Mr Twaite give the Notification without unreasonable delay after the
15 reasonable excuse ceased?

Reasonable Excuse

Legal Principles

25. The parties are agreed as to the relevant authorities and principles involved in deciding whether or not Mr Twaite had a reasonable excuse for the late Notification.

20 26. A helpful summary of the meaning behind the shorthand "reasonable taxpayer" (albeit in a different context) was provided by Judge Anne Redston in the First-tier Tribunal case of *Perrin v HMRC* [2014] UKFTT 488 (TC) at [99] and [100]:

> "[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."
> 25 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
> > 30 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
> 35 responsible person with the same experience and other attributes of the taxpayer and placed in the same situation as the taxpayer."

27. For the avoidance of doubt, when I use the term "reasonable taxpayer" in this decision, I do so as shorthand in the same way as in *Perrin*.

28. The fact that a reasonable taxpayer might have acted in a different way does not itself mean that it was unreasonable to adopt a different course. In *Irby v HMRC* [2012] UKFTT 291 (TC) (Judge John Walters QC and Mrs Sheila Chong) ("*Irby*"), this was applied in the context of a late notification for enhanced protection. The excuse relied on was that of delay by an adviser. The issue also arose as to whether or not Mr Irby ought to have made himself aware of the closing date and ought to have contacted somebody who was double-checking the position. The Tribunal stated as follows at [45]:

> "[45] But 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. 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 decisions cited to us) the concept of reasonable excuse in this context is most fully explored."

29. The parties agree that a third party's defaults can constitute a reasonable excuse in this context if the reliance upon that third party was reasonable. This proposition is supported by *Irby* at [43] and, in the context of surcharges, *Rowland v HMRC* [2006] STC (SC) 536 at [21].

30. Both parties referred me to a number of First-tier Tribunal decisions, some of which found that there were reasonable excuses and some of which did not. It was agreed that these were merely illustrative and that these matters are highly fact sensitive. Nevertheless, I have considered each of the cases as illustrative of the legal principles to be applied. These cases are: *Scurfield v HMRC* [2011] UKFTT 532 (TC) (Judge Michael Tildesley OBE and Mr Harvey Adams), *Platt v HMRC* [2011] UKFTT 606 (TC) (Judge Roger Berner and Mr Harvey Adams), *Yablon v HMRC* [2016] UKFTT 814 (TC) (Judge Jonathan Richards), *Radley and Gibbs v HMRC* [2016] UKFTT 688 (TC) (Judge Abigail McGregor and Mr Richard Law) and *Jackson v HMRC* [2017] UKFTT 0341 (TC) (Judge Malcolm Gammie CBE QC).

31. For completeness, the parties also referred to various other cases in respect of reasonable excuse in other contexts. These were: *Inland Revenue Commissioners v Nuttall* [1990] BTC 107, *The Research and Development Partnership Ltd v HMRC* [2009] UKFTT 326 (TC), *B Fairall Ltd v HMRC* [2010] UKFTT 305 (TC), *Lobler v HMRC* [2015] UKUT 0152 (TC) and *Hely-Hutchinson v HMRC* [2015] EWHC 3261 (Admin). In the present context, these cases add nothing to the legal principles which are set out above.

Mr Twaite

32. The essence of Mr Brothers' submissions in respect of reasonable excuse was that the cause of the late notification was Close's failure to calculate Mr Twaite's

pension properly and the resultant advice that protection was not necessary. He said that it was reasonable for Mr Twaite to rely on Mr Warden.

HMRC

33. Ms Browne accepted that Mr Twaite acted reasonably in engaging an independent financial adviser and that he relied on Close. However, Ms Browne submitted that Mr Twaite knew in March 2006 that Mr Warden had made a mistake, as he corrected him after the report and knew that he would be "just about £1.5 million." A reasonable taxpayer, Ms Browne submits, would be left in no doubt that the matter had not been fully dealt with and would not be satisfied with Mr Warden's advice to "wait and see". At the very least, a reasonable person would chase the matter up. It was not reasonable, Ms Browne says, to consider that Mr Warden would deal with the matter under his delegated authority.

Discussion

34. I find that Mr Twaite did have a reasonable excuse for failing to apply for enhanced protection prior to the closing date. This is for the following reasons.

35. First, this was a specialised area of law and Mr Twaite went to a specialist adviser to deal with his pensions. The starting point is that it was reasonable to seek out and to rely upon that specialist advice.

36. Secondly, this came in the midst of Mr Twaite's "pretty torrid time" with his health. In such circumstances, it was reasonable for Mr Twaite to concentrate on matters other than his pension in the knowledge that he had engaged Mr Warden.

37. Thirdly, by highlighting the inaccurate figures, it was reasonable for Mr Twaite to think that he had done all he needed to do to ensure that Mr Warden was fully informed. In the present circumstances, this reinforces, rather than detracts from his entitlement to rely on Mr Warden's advice to "wait and see" in the light of that corrected information. In any event, the annual reviews continued and it was reasonable to take it that it would be raised by Mr Warden if necessary at those reviews.

38. Fourthly, there was no suggestion that Mr Warden had given any other concern for concern as to his competency.

39. Fifthly, whilst other taxpayers might have investigated the matter further, it was not unreasonable for Mr Twaite not to do so in all the circumstances given the confidence he had in Mr Warden.

Delay

The Legal Principles

40. There is a dispute between the parties as to the law on delay in this context. On behalf of Mr Twaite, Mr Brothers submits that the reasonableness of the delay is to be

measured by reference to the taxpayer not his or her adviser. By contrast, Ms Browne argues that the reasonableness is tested by reference to the delay itself, whether caused by the taxpayer or his or her agent.

41. There are conflicting authorities on the relevance of third parties, although these are First-tier Tribunal decisions and so not binding on me. In *Yablon v HMRC* [2016] UKFTT 814 (TC) (Judge Jonathan Richards) ("*Yablon*") the Tribunal did not restrict the question of reasonableness to that of the taxpayer (albeit that this was *obiter* given the Tribunal's other findings). Judge Richards stated as follows at paragraphs [24] and [38]:

> "[24] There is a difference between the two limbs of the defence. The first limb focuses on whether Mr Yablon himself has a reasonable excuse. Accordingly, as noted below, that involves an examination of Mr Yablon's own actions and circumstances. The second limb, however, focuses on the length of any delay and is not confined to an analysis of whether Mr Yablon's own actions caused that delay.
>
> …
>
> [38] Mr Yablon argues that because he was not positively informed by his advisers, or the Financial Ombudsman Service, of the possibility of making a late application and only discovered this possibility from Origen (or its insurers) in November 2014 as part of discussions on loss mitigation, it necessarily follows that the delay up until that date was reasonable. I do not agree. 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. If delay is caused by the unreasonable actions of his advisers, that delay will be unreasonable."

42. Although not referred to by the parties, in *Hughes v HMRC,* TC/2016/01652, I (sitting with Mrs Susan Stott) took the same approach as in *Yablon*. By contrast, in *Tipping v HMRC* (Judge Christopher McNall and Mr David Moore) [2017] UKFTT 0485 (TC), the Tribunal treated an adviser's delay as not attributable to the taxpayer, stating as follows at [63]:

> "[63] Significant proportions of that time, as we have outlined above, were taken up by delay on the part of SJP which cannot be attributed to Mr Tipping."

Mr Twaite

43. Mr Brothers submitted that it is clear that reliance on a third party can be a reasonable excuse. He referred me to *Rowland v HMRC* [2006] STC (SC) 536 and also *Morrisroe UK Ltd v HMRC* [2015] TC04577, although he acknowledged that these were in different contexts and relate to the reasonable excuse itself rather than identifying whose delay is relevant for the purposes of Regulation 12(1)(c). Similarly, he drew an analogy with section 118(2) of the Taxes Management Act 1970. Further, Mr Brothers focused upon the wording of Regulation 12(1)(c), which refers to the

"individual" giving the notification without unreasonable delay, linking the unreasonable delay to that individual.

44. Mr Brothers went on to submit that the delay in the present case was not unreasonable. Insofar as it related to Close, then it ought not to be taken into account. In any event, he submitted, the reasonable excuse did not cease until the letter from Mr Kennedy on 15 December 2014. On one level, this is because it was only with this letter that Close formally accepted that there was an error in the advice. On another level, this is because it was only with this letter that it was clear that a late notification was possible. Mr Brothers relied upon *Jackson v HMRC* [2017] UKFTT 0341 (TC) (Judge Malcolm Gammie CBE QC) for both these propositions, particularly at [58] as follows:

> "[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 reconfirm 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."

HMRC

45. Ms Browne submitted that the wording of Regulation 12(1)(c) does not limit the reasonableness of the delay to the actions of the individual. Instead, the reasonableness of the delay requires consideration of all the reasons for the delay and the duration of the delay. Ms Browne also submitted that the purpose of Regulation 12(1)(c) was that of a transitional provision and that Parliament envisaged notifications being made as soon as possible. She said that ignoring unreasonable delays caused by third parties is not consistent with this and does not encourage compliance without unreasonable delay. Ms Browne referred me to *Britnell v Secretary of State for Social Security* [1991] 2 All ER 726 ("*Britnell*"), which dealt with the different context of unemployment benefit but in which the House of Lords made the point that transitional previsions are generally intended to be temporary.

46. Ms Browne submitted that the delay was 11 months between finding out about the need for notification (being the 13 March 2014 telephone call) and the submission of the Notification on 24 February 2015. She said that there was no explanation for large amounts of this delay and that it was unreasonably long.

Discussion

47. I find that Mr Twaite did not give the Notification without unreasonable delay after the reasonable excuse ceased.

48. The starting point is as to when the reasonable excuse ceased. I find that this was on 13 March 2014 when Mr Broadbent informed Mr Twaite that he should have made a notification but had not done so. The reasonable excuse was Close's failure to advise Mr Twaite of the need for a notification and so this reasonable excuse necessarily ended when he was told that the notification had been needed. The letter of 15 December 2014 was nothing more than a confirmation of this. It was clear that Mr Twaite had already reached his own conclusion to the same effect in the course of (or immediately after) his conversation with Mr Broadbent on 1 March 2014, as he lodged a formal complaint with Close on the same day.

49. I do not accept that the reasonable excuse can only have ceased when Mr Twaite became aware of the possibility of making a late notification. To do so would be to treat any lack of knowledge of the ability to make a late notification as a reasonable excuse in its own right. However, the relevant reasonable excuse is that of the reason for not giving the notification on or before the closing date; clearly, the absence of knowledge of the ability to make a late notification cannot be a reason for a notification not having been given on or before the closing date. I do not see that *Jackson* helps Mr Twaite in this regard, as paragraph [58] reinforces the position that the reasonable excuse ends when the omission is identified. This is not to say that any absence of knowledge about the ability to make a late notification is irrelevant; instead of prolonging the reasonable excuse it may in principle be one of the circumstances to be taken into account in considering the reasonableness of the delay.

50. In any event, Mr Twaite was aware of the ability to make a late notification long before 15 December 2014. At the very latest, he was aware of this on 27 June 2014 as Mr Kennedy referred to the ability to make a late notification in his email to Mr Twaite. Indeed, Mr Twaite's response on 29 June 2014 made suggestions as to calculating the figures for the purposes of deciding whether or not to approach HMRC for what he referred to as "retrospective consideration".

51. Further, even at the time of informing Mr Twaite of the mistake on 13 March 2014, Close were (given their expertise in such matters) on the balance of probabilities already aware of the ability to make a late notification. This begs the question as to whether or not the consideration of delay is limited to the conduct of Mr Twaite.

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 Close. I respectfully agree with Judge Richards in *Yablon* at [24] and [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.

53. For completeness, I note that Mr Brothers' arguments on section 118(2) of the Taxes Management Act 1970 and Ms Browne's arguments on transitional provisions do not take the matter any further as they do not deal with the specific wording and context of Regulation 12(1)(c).

54. Taking into account delays caused by Close, I find that it is clear that the Notification was not given without unreasonable delay. There is no explanation from Close as to why it took so long for them to investigate the matter, particularly between the email correspondence with Mr Twaite in June 2014 and their letter dated 15 December 2014. In the absence of evidence as to why Close took so long, Mr Twaite cannot discharge the burden of establishing that the delay was reasonable. Mr Twaite clearly takes the same view, as he said in oral evidence, "If you say did my adviser and I take too long over this, you are right."

55. Mr Twaite went on to say, "If you are saying me then no. I acted reasonably. It is not for me to override my advice." I do not agree with this. As such, if I am wrong as to the scope of the consideration of unreasonable delay and so if it is restricted to the conduct of Mr Twaite, I still find that the Notification was not given without unreasonable delay. This is for the following reasons.

56. It is of note that the comparison is with a reasonable taxpayer (using this term as shorthand in the manner set out above and in *Perrin*). The reasonableness of the delay therefore has to take into account the need for the taxpayer to have regard to his rights and obligations as regards HMRC. It is therefore not enough to consider only the reasonableness of Mr Twaite's actions as between him and Close.

57. Mr Twaite acknowledges with hindsight that Mr Kennedy's emphasis was upon limiting the damage to Close rather than advising Mr Twaite. It is also clear that Mr Kennedy was not sharing information with Mr Twaite and not responding to his calls. Ultimately, the reason why the Notification was made was because Mr Twaite forcefully insisted upon it. The reasonable taxpayer would have either insisted upon this earlier or alternatively contacted HMRC himself or engaged another adviser, and it was unreasonable for Mr Twaite not to do so. From 29 June 2014 to 15 December 2014, Mr Twaite was not given any meaningful information by Close and a reasonable taxpayer would not have had any confidence that a late notification was being progressed without unreasonable delay.

58. This begs the question as to when Mr Twaite ought to have acted differently. I find that 29 June 2014 was a turning point, as Mr Twaite had given Mr Kennedy the information which had been requested and Mr Twaite gave Mr Kennedy his own suggestion as to how to progress the late notification. Mr Twaite said that it was another three or four weeks before he contacted Mr Kennedy again. This would allow

a reasonable period for Close to act upon the information given to them by Mr Twaite. It ought to have been clear to Mr Twaite by then that Close was not acting to progress the late notification. Mr Twaite spoke to Mr Kennedy three to four weeks after the June correspondence and was told that he could not tell Mr Twaite about his investigations; this ought also to have alerted Mr Twaite to the fact that Mr Kennedy was not assisting or advising him. Mr Twaite should have insisted upon a late notification at that stage, in the same way that he did after the letter of 15 December 2014. It is clear from Mr Twaite's email dated 29 June 2014 that Mr Broadbent had already carried out various calculations, that Mr Twaite knew about the potential to make a late notification and that Mr Twaite was prepared to suggest to Close how to move forward. I find that Mr Twaite had the same capacity and reason to insist upon a late notification being made in or soon after late June 2014 as he did in December 2014.

59. The time from Mr Twaite's insistence upon progress after the letter of 15 December 2014 and the eventual Notification was slightly more than two months. It follows that if Mr Twaite had insisted upon progress about a month after the June emails, then, assuming the same two month timeframe (which is itself generous given that the Notification was signed on 2 February 2015 but not sent to HMRC until 24 February 2015), the Notification would have been made at about the end of September. This would be about five months earlier than the actual Notification. I find that Mr Twaite's failure to do this makes the delay unreasonable.

Decision

60. It follows that I must dismiss the appeal.

61. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 31 JULY 2017