[2017] UKFTT 893 (TC)

TC06277

Appeal number: TC/2016/01657

INCOME TAX – Pension schemes lifetime allowance – Fixed Protection (FP) 2012 – application to notify reliance on FP 2012 late – refusal by HMRC to exercise discretion to accept late notice in absence of "reasonable excuse" provisions in Regulations - strike out application on grounds Tribunal has no jurisdiction to rule on refusal – withdrawal of appeal when HMRC offered reconsideration of discretion – application for reinstatement within time allowed – reinstatement allowed – application for strike out dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRIAN YOUNGMAN **Applicant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at City Exchange, Leeds on 14 November 2017

Michael Collins, instructed by Independent Tax and Forensic Services LLP, for the applicant

Charles Bradley, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an application by Mr Brian Youngman ("the applicant") for the reinstatement of an appeal made by him and subsequently withdrawn. His appeal was made on 18 March 2016 and was an appeal against a decision of an officer of the respondents ("HMRC") refusing to accept the applicant's notice given to them under regulation 3 of the Registered Pension Schemes (Lifetime Allowance Transitional Protection) Regulations 2011 (SI 2011/1752) ("the 2011 Regulations").

Introduction to the lifetime allowance and transitional protections

2. Because this is legislation which has not featured in any previous published decision of this Tribunal I first set out some background to it.

3. As readers of this decision will no doubt be aware, April 6 2006 was an important date in relation to the taxation of pension schemes and income from them and relief for contributions to them. So important was it that it got its own name, A-day.

4. A-day marked the coming into force of a major amount of legislation. The primary legislation was enacted as Part 4 of the Finance Act ("FA") 2004 and for the most part is still there, not having been rewritten to any great extent. It has been amended and supplemented in subsequent Finance Acts, including relevantly for this case, FA 2011. Numerous statutory instruments were and continue to be made under the powers in FA 2004 and later Acts, including the 2011 Regulations.

5. Part 4 FA 2004 not only merged eight or so different sets of rules for different types of pension scheme into one, but also introduced a charge to tax designed to prevent exploitation of what were perceived as generous reliefs. This charge is called the "lifetime allowance charge" and is set out in sections 214 to 226 FA 2004. Section 215 shows that the rate of tax on the charge can be 55% or 25%.

6. The charge arises if there is a "benefit crystallisation event", ie benefits are taken, or start to be taken, by the person for whose benefit a pension scheme was established, and the amount crystallised exceeds the person's "lifetime allowance".

7. The amount of the lifetime allowance in s 218 FA 2004 set for the tax year 2006-07 was £1,500,000. There are complex rules for the calculation of the value of pension scheme benefits for the purposes of the lifetime allowance which I do not need to go into for the purposes of this decision.

8. It was recognised by the Government when Part 4 FA 2004 was enacted that there should be some protection from the rigours of the lifetime allowance charge for those the value of whose pension "pots" (as they often called) had reached £1,500,000 before A-day. Part 2 Schedule 36 FA 2004 provides for "primary protection", which broadly treats the value of the pot as it stood on A-day as the lifetime allowance and

also provides for an "enhanced protection" and other protections. With effect from December 2006 two further protections were included in Schedule 36, paragraphs 11A and 15A.

9. Crucially all these paragraphs of Schedule 36 required the person wishing to rely on these protections to give notice to HMRC in accordance with regulations made under that Schedule.

10. Those regulations are the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006 (SI 2006/131) ("the 2006 Regulations"). It is convenient to set out here some relevant parts of those regulations.

> "**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 5th April 2009.
>
> **3A Reliance on paragraph 11A of Schedule 36 (lifetime allowance enhancement: "primary protection": taking account of death benefit)**
>
> (1) This regulation applies if a person is paid a relevant lump sum death benefit in respect of an individual in the circumstances specified in paragraphs (a) and (b) of paragraph 11A(1) of Schedule 36.
>
> (2) That person may give notice of intention to rely on paragraph 11A of Schedule 36 ("paragraph 11A").
>
> (3) If that person intends to rely on paragraph 11A, that person must give a notification to the Revenue and Customs on or before the closing date.
>
> (4) The closing date is the date specified by paragraph (5); but if paragraph (6) applies and specifies a later closing date, the closing date is the date specified in paragraph (6).
>
> (5) The date specified by this paragraph is the date determined in accordance with the following rules.
>
> *First rule*: Find the 31st January following the tax year in which the relevant lump sum death benefit is paid.
>
> *Second rule*: Find the 31st January five years after that.
>
> The date so found is the closing date.

(6) This paragraph applies if an assessment to income tax is made under section 217(2) on a person to whom a lump sum death benefit has been paid; and, if this paragraph applies, the closing date specified by this paragraph is 5th April in the tax year following the tax year in which the assessment is made.

[The regulation dealing with paragraphs 7 and 18 protection is in substantially identical terms to regulation 3, and the regulation dealing with paragraph 15A is in substantially identical terms to regulation 3A.]

…

10 Form of notification: the specified regulations

(1) This regulation applies if 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.

…

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.

13 Procedure on giving of notification: the specified provisions

(1) If an individual gives a notification to the Revenue and Customs under one of the specified provisions, 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) If an individual gives a notification to the Revenue and Customs under one of the specified provisions, and there are obvious errors or omissions in the notification (whether errors of principle, arithmetical mistakes or otherwise), the Revenue and Customs must return the notification to the individual.

[Regulation 13A deals in substantially similar terms with a notification under paragraphs 11A and 15A, as those paragraphs are not defined as "specified provisions"]

14 Appeal against refusal to issue certificate

(1) This regulation applies if there is a dispute as to whether the Revenue and Customs are entitled to take the view that there are obvious errors or omissions in a notification given under one of the specified regulations (whether errors of principle, arithmetical mistakes or otherwise).

(2) The individual may require the Revenue and Customs to give notice of their decision to refuse to issue a certificate.

(3) If the Revenue and Customs give notice of their decision to refuse to issue a certificate, the individual may appeal ...

(5) 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.

(6) On an appeal that is notified to the tribunal, the tribunal shall determine whether the Revenue and Customs were entitled to take the view that there were obvious errors or omissions in the notification (whether errors of principle, arithmetical mistakes or otherwise).

(7) If the tribunal allows the appeal, the tribunal may direct the Revenue and Customs to issue a certificate to the individual with effect from a date specified by the tribunal."

[Regulation 14A deals in substantially similar terms with a notification under paragraphs 11A and 15A, as regulations 3A and 4A are not defined as "specified regulations]

11. There have been a number of cases in which this Tribunal (or in one case, the Special Commissioners) has considered regulation 12 of the 2006 Regulations and decided whether or not the applicant had a reasonable excuse for their failure to notify after the closing date. But none of those cases, nor any others, was required to consider the provisions of regulation 14.

12. A notable feature of those cases is that many of them turn on the question whether the person concerned was able to rely on the failings of another, such as a

financial adviser, as a reasonable excuse within the meaning of regulation 12(1)(b) and in some cases the person was so able (see eg *Irby v HMRC* [2012] UKFTT 291).

13. The lifetime allowance set at £1,500,000 for 2006-07 did not remain at that level. By a series of statutory instruments the amount was increased to £1.6m for 2007-08, £1.65m for 2008-09, £1.75m for 2009-10 and to £1.8m for 2010-11 and 2011-12.

14. One effect of these annual increases would have been that those people, the value of whose "pension pot" was, on dates after A-day, on the verge of reaching or was over £1.5m, would find that they did not need to seek lifetime protection under the 2006 Regulations.

15. Finance Act 2011 changed this. Paragraph 2 of Schedule 18 to that Act ("Schedule 18") substituted a new s 218(2) FA 2004 which said:

> "(2) The standard lifetime allowance for the tax year 2012-13 and, subject to subsection (3), subsequent tax years is £1,500,000."

Thus there was for the first time a reduction in the allowance.

16. The government recognised that people who had not sought the protections given by the 2006 Regulations could now find that their pension pots were worth more than the new lifetime allowance of £1.5m, thus making them liable to the lifetime allowance charge when benefits crystallised. Part 2 of Schedule 18 provided for transitional provisions and in that Part paragraph 14 provided:

> "(1) This paragraph applies on and after 6 April 2012 in the case of an individual—
>
> (a) who has one or more arrangements under a registered pension scheme on that date,
>
> (b) in relation to whom paragraph 7 of Schedule 36 to FA 2004 (primary protection) does not make provision for a lifetime allowance enhancement factor, and
>
> (c) in relation to whom paragraph 12 of that Schedule (enhanced protection) does not apply on that date,
>
> if notice of intention to rely on it is given to an officer of Revenue and Customs.
>
> (2) The Commissioners for Her Majesty's Revenue and Customs may make regulations specifying how notice is to be given.
>
> (3) Part 4 of FA 2004 has effect in relation to the individual as if the standard lifetime allowance were the greater of the standard lifetime allowance and £1,800,000 (the standard lifetime allowance for the tax year 2011-12).
>
> …"

17. Paragraph 14 therefore preserves the previous allowance of £1,800,000 for those who give a notice of intention to HMRC to rely on it.

18. The regulations referred to in paragraph 14(2) are the 2011 Regulations, of which the relevant parts for this case are :

> "**3 Reliance on paragraph 14 of Schedule 18 to the Finance Act 2011**
>
> (1) Subject to paragraph (2), an individual may rely on paragraph 14 if—
>
> (a) the individual has given a paragraph 14 notice to Her Majesty's Revenue and Customs, and
>
> (b) Her Majesty's Revenue and Customs have accepted that notice by issuing a certificate to the individual.
>
> …
>
> **4 The paragraph 14 notice**
>
> (1) A paragraph 14 notice must include the following information—
>
> (a) the title, full name, address (including post code, if applicable) and date of birth of the individual submitting the paragraph 14 notice,
>
> (b) the national insurance number of the individual or, where the individual does not qualify for a national insurance number, the reasons for this,
>
> (c) a declaration that paragraph 7 of Schedule 36 to the Finance Act 2004 (primary protection) does not make provision for a lifetime allowance enhancement factor in the case of the individual, and
>
> (d) a declaration that paragraph 12 of that Schedule (enhanced protection) will not apply in relation to the individual on and after 6th April 2012.
>
> (2) A paragraph 14 notice must be—
>
> (a) in a form prescribed by Her Majesty's Revenue and Customs, and
>
> (b) received by Her Majesty's Revenue and Customs on or before the following dates—
>
> (i) if it relates to an individual described in sub-paragraph (1) of paragraph 14, 5 April 2012; …
>
> …
>
> (3) The individual must sign and date the paragraph 14 notice.
>
> **5 Issue of certificate by Her Majesty's Revenue and Customs**
>
> (1) If Her Majesty's Revenue and Customs accept the paragraph 14 notice, they must issue a certificate to the individual.
>
> (2) The certificate must have a unique reference number.
>
> **6 Refusal by Her Majesty's Revenue and Customs to accept notice**

(1) Her Majesty's Revenue and Customs may refuse to accept the paragraph 14 notice if it does not satisfy the requirements in regulation 4.

(2) If Her Majesty's Revenue and Customs refuse to accept the paragraph 14 notice the individual may require that Her Majesty's Revenue and Customs provide reasons for the refusal.

7 Appeal against refusal to accept notice

(1) The individual may appeal against a refusal by Her Majesty's Revenue and Customs to accept the paragraph 14 notice.

(2) The notice of appeal must be given to Her Majesty's Revenue and Customs before the end of the period of 30 days beginning with the day on which the refusal to accept the paragraph 14 notice was given.

(3) Where an appeal under this regulation is notified to the tribunal, the tribunal must determine whether Her Majesty's Revenue and Customs were entitled to take the view that the notice did not satisfy the requirements in regulation 4.

(4) If the tribunal allows the appeal, the tribunal may direct Her Majesty's Revenue and Customs to accept the paragraph 14 notice and issue a certificate to the individual."

19. Two major differences between the 2006 Regulations and these 2011 Regulations should be noted. Firstly, the 2006 regulations allowed a period of over 3 years between the date the regulations came into force and the cut-off date, whereas the 2011 regulations allowed a period of less than eight months. Second, the 2011 regulations contain nothing that expressly permits a late application to be accepted if the person had a reasonable excuse for the delay.

Facts

20. The facts of the case are not in dispute. What is set out in §§21 to 38 constitutes my findings of fact and they are derived from the papers in the bundle produced by HMRC and from a witness statement by the applicant which was not in the event referred to in the hearing of the application.

21. Until he retired in June 1992 at the age of 52 the applicant, who is an FCA (Fellow of the Institute of Chartered Accountants of England and Wales), was an audit partner in the firm of Ernst & Young ("EY"). He was not engaged in tax nor in providing financial advice. Since 1993 he has worked for a small charity and has gradually lost contact with EY.

22. He had contributed to the EY Partners pension scheme ("EYPS") the trustees of which had decided to wind the scheme down in 2008. He had not drawn any benefits from the scheme by 2009. He also had a number of other pension policies where the benefits were undrawn.

23. A firm called Close Asset Management Ltd ("CAML") were the administrators of the EYPS and the applicant had received a letter from them on 1 October 2008 about the wind down. He also had a telephone call from a Mr Slocombe there and as

a result he appointed CAML his pension advisers and during 2010 as his financial advisers generally. CAML formed a SIPP (Self-Invested Personal Pension) for the applicant and transferred his remaining pension policies to it. CAML, in the person of Mr Slocombe, were aware that the applicant did not propose to start taking any benefits until he was 75.

24. Mr Slocombe left CAML in 2014 and was replaced by Mr Newman. At his first meeting with the applicant in November 2014 Mr Newman asked the applicant about the lifetime allowance, and having worked out the value of the applicant's pension funds was immediately concerned about the position, saying he needed to carry out a detailed analysis of CAML's records.

25. There followed a period of discussions and negotiations which I do not need to set out for the purposes of this application, but the upshot was that on 22 September 2015 the applicant signed an application for Fixed Protection 2012 and was told that this was submitted to HMRC on 23 October 2015 by Independent Tax and Forensic Services LLP ("Independent") with a covering letter requesting that HMRC accept the admittedly late application because the applicant had a reasonable excuse for the delay.

26. By a letter dated 23 November 2015 HMRC refused to accept the application.

27. On 22 December 2015 the applicant gave HMRC a notice of appeal.

28. On 18 March 2016 the applicant notified his appeal to the Tribunal. The Tribunal listed the appeal for hearing in Leeds on 7 November 2016 before me as judge.

29. On 13 October 2016 HMRC made an application to strike out the appeal. They added that because their reply to Independent's letter of 23 November 2015 had misstated the law they undertook that "if and when this appeal is struck out (or withdrawn), and if the Applicant so wishes, [HMRC] will reconsider the decision to refuse to accept his paragraph 14 notice."

30. On 1 November 2016 Independent complained to the Tribunal that they had only just been made aware of the strike out application, and were given details of it by HMRC.

31. On 2 November 2016 Independent asked HMRC to agree to an adjournment of the hearing so that HMRC could reconsider its decision to refuse the notice in accordance with HMRC's undertaking.

32. By an email of 3 November 2016 HMRC refused to agree to an adjournment and said they would reconsider their decision only if the appeal was withdrawn.

33. After 6 pm on Friday 4 November 2016 Independent emailed the Tribunal to say that they were withdrawing the appeal to allow HMRC time to reconsider their decision as proposed in the application of 13 October. This was too late to prevent my travelling to Leeds on the morning of Monday 7 October, and I was only told

about the withdrawal in a phone call from the Tribunal received as my train left Wakefield.

34. In the course of my reading of the papers before the hearing I had become perturbed by the terms of HMRC's correspondence with Independent and I caused the Tribunal to raise these concerns with HMRC on 8 November, copied to the applicant.

35. On 1 December 2016 the applicant sought to reinstate his appeal on a precautionary basis, citing the time limit in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 as a reason for doing so.

36. On 19 December 2016 HMRC wrote to the Tribunal opposing the application on the grounds that there was no reasonable prospect of any reinstated appeal succeeding.

37. There was correspondence between HMRC and Independent on 8 to 10 March 2017 about the reconsideration proposed by HMRC. On 10 March 2017 HMRC notified Independent that "no further work will be done on reviewing the decision until either the case is heard at the Tribunal, or the application to re-instate the appeal is withdrawn".

38. On 7 June 2017 the Tribunal listed the reinstatement application for hearing.

The submissions by the parties

39. The opposing submissions are simple.

40. The applicant says that his grounds of appeal are that HMRC's decision not to accept the notice was based on an error of law, in that when the officer of HMRC made his decision he mistakenly believed that regulation 6 required him to refuse a late notice.

41. By contrast to what HMRC say (at §43(6)), the grounds of appeal are not that HMRC exercised their discretion under regulation 6 in a way in which no reasonable panel of Commissioners could have done. That would be an impossible ground of appeal because when the officer made his decision he mistakenly believed that under regulation 6 he had no such discretion and that regulation 6 required him to refuse a late notice.

42. HMRC say that the appeal should not be reinstated because the Tribunal has no jurisdiction to hear the appeal. In support of that they refer to their strikeout application of 13 October as giving the reasons why the Tribunal has no jurisdiction.

43. In that application they say:

(1) Regulation 6 of the 2011 Regulations provides that HMRC may refuse to accept a notice that a person wishes to rely on paragraph 14 Schedule 18 FA 2011 if it does not meet the requirements in regulation 4.

(2) Regulation 4(2)(b)(i) has as one of the requirements that the notice must be received by the respondents by (in a case such as this) 5 April 2012.

(3) Regulation 7 provides for a right of appeal against a refusal by HMRC to accept a paragraph 14 notice. Crucially regulation 7(3) provides that:

> "Where an appeal under this regulation is notified to the tribunal, the tribunal must determine whether Her Majesty's Revenue and Customs were entitled to take the view that the notice did not satisfy the requirements in regulation 4."

(4) That must be interpreted as exhaustive of the Tribunal's powers in relation to the regulations. It cannot mean that the Tribunal *may* determine any other matters, but whether they do or not they *must* determine as in regulation 7(3).

(5) The notice was over three years late. The applicant relies on CAML's failures so as to constitute a reasonable excuse, but there is nothing in the regulations that allows such an excuse to be relied on. The only thing the Tribunal can do is to examine whether the requirements of paragraph 4 are complied with, and here they clearly are not.

(6) The use of the word "may" in regulation 6 has to be seen in the light of regulation 7. HMRC does have a discretion to admit a notice received late, but it is the non-appealable exercise of this discretion of which the applicant complains, and this is not justiciable before this tribunal (as to which see *HMRC v Noor* [2013] UKUT 71 (TC)).

Discussion

Approach to reinstatement applications

44. The rule relevant to reinstatement of withdrawn appeals in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 is Rule 17, which in relation to reinstatement provides:

> "(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.
>
> (4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—
>
> (a) the date that the Tribunal received the notice under paragraph (1)(a); or
>
> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

45. It should also be noted that an application may be made for reinstatement of an appeal where it has been struck out under Rule 8, but expressly only where the striking out was made because of failure to comply with an "unless" direction.

46. There is case law from the Upper Tribunal (which is thus binding on me) where it has considered a Rule 8 or 17 reinstatement. The only case mentioned by the

parties in their skeletons is *Pierhead Purchasing Ltd v HMRC* [2014] UKUT 321 (TC) ("*Pierhead*"), a Rule 17 case.

47. In that case the appellant had withdrawn their appeal to the First-tier Tribunal ("FtT") on the eve of the hearing. Six months later (ie five months after the time limit) they applied to reinstate the appeal. The grounds for reinstatement were that leading counsel had advised the principal of the appellant to withdraw the appeal, but new counsel considered that the previous one had not properly drawn the appellant's attention to the considerable downsides of withdrawal. The FtT (Judge Malcolm Gammie QC) refused to allow reinstatement.

48. In upholding this decision, the Upper Tribunal (Proudman J) said:

> "21. Withdrawal of cases before the FTT is dealt with in rule 17 of the Rules. Rule 17(3) provides that a party which has withdrawn its case may apply to the FTT for the case to be reinstated. There is no guidance in the rules as to how such a decision is to be reached other than the application of the overriding objective."

and

> "24. I was asked by Mr Jones to provide guidance as to the principles to be weighed in the balance in the exercise of discretion to reinstate. Because of the view I have formed I do not think it is appropriate to set any views in stone. I agree with the FTT in the *Former North Wiltshire* case that the matters they took into account are relevant to the overriding objective of fairness. I also believe that the guidance given in *Mitchell v. News Group Newspapers Limited* [2013] EWCA Civ 1537 in relation to relief from sanctions is helpful. It is perhaps instructive that CPR 3.9 (which does not of course apply to Tribunals in any event) does not now exist in its original form. Fairness depends on the facts of each case, all the circumstances need to be considered and there should be no gloss on the overriding objective."

49. Later at [38] she said:

> "I should say that Mr Foulkes [counsel for HMRC] asked me, by way of cross-appeal, to find that the FTT had been wrong in finding that it could not take the merits of the appeal itself into account. Mr Foulkes submitted that the lack of merits in the appeal was self-evident. However, it seems to me that the FTT was right in deciding that it was unable to take any view on the merits of the appeal. To do otherwise, in the absence of evidence and a full hearing, would have been to pre-judge the matter."

50. A recent decision of the Upper Tribunal has also considered a Rule 17 reinstatement, *SRN Horizon Ltd v HMRC* [2017] UKUT 246 (TC) ("*SRN*").

51. In that case four days before the intended hearing of the appeal in the F-tT the appellant had withdrawn their appeal. They applied the next day for reinstatement on the grounds that the withdrawal was a mistake made by the appellant's solicitors. Judge Barbara Mosedale considered the reinstatement application on the papers

together with HMRC's objections and the appellant's response to these objections. She rejected the application agreeing with HMRC that the appeal had no reasonable prospect of success.

52. In the Upper Tribunal (Asplin J and Judge Colin Bishopp) the appeal was allowed and the decision on reinstatement remitted to the F-tT. The primary reason was that Judge Mosedale had not given the appellant any opportunity to seek an oral hearing or to put forward reasoned grounds for the reinstatement.

53. The Upper Tribunal began its discussion with this:

> "29. Like Proudman J in *Pierhead Purchasing* we shall not attempt to set out guiding principles. We agree with her that each reinstatement application turns on its own facts and circumstances; moreover, the circumstances of this case are unusual and we do not think it would be helpful to lay down principles derived from an unusual case."

54. In an ordinary case, the Upper Tribunal said, an application to correct a simple mistake ought not to be opposed. But they added that in this case they were not at all surprised that Judge Mosedale had held that the appeal lacked any merit. They added:

> "32. Against that background we think that once she had formed the initial view that the application should be refused the judge should have asked SRN's solicitors whether they were content to have the application determined by reference to their written submissions and, if so, should have given them the opportunity of making further submissions. If they were not so content she should have offered a hearing. This case is not on all fours with *Frey v Labrouche* but there are similarities; and the principle to be derived from what the Master of the Rolls said is that there is a presumption in favour of a hearing when a draconian step—there striking out, here refusal to reinstate—is in contemplation. Had the solicitors not made the mistake of withdrawing the appeal it would have proceeded to a hearing on 29 July 2016. SRN might well have lost, for all the reasons the judge identified, but at least it would have had the opportunity of advancing its case, such as it was. Instead, the judge deprived it of that opportunity by reason of an error for which SRN was not itself responsible. We do not think it was appropriate to do so, and in consequence leave SRN in a position similar to that which might have faced the claimant in *Beedell v West Ferry Printers*, excluded from any opportunity of ventilating its case."

55. It is evident that the facts and circumstances in these two cases differ one from the other, and there are also differences (but also similarities) between one or other of these two cases and this one.

56. In *Pierhead* the application was five months late: in *SRN* and this case the application was in time.

57. In *Pierhead* and this case the decision to withdraw was a considered one: in *SRN* it was a mistake.

58. In *Pierhead* the F-tT did not consider the merits of the appeal: in *SRN* it did.

59. In this case the decision to withdraw was made after an application for a strike out under Rule 8, and indeed on the eve of a hearing of the strike out application. Nothing of that sort was present in *Pierhead*, and in *SRN* HMRC had not sought a strike out (nor did Judge Mosedale actually make one).

Conclusion

60. It seems to me from this that I am, following *Pierhead*, required to consider all the facts and circumstances. It further seems to me that these include the circumstances in which the appeal was withdrawn and those which led to the application to reinstate. They also include the fact that the hearing before which the appellant's case was withdrawn was a hearing to consider HMRC's strike out application and not the appeal itself.

61. I also consider that a relevant circumstance is that the 2011 Regulations are untested legislation, and legislation which differs in major respects from the 2006 Regulations, mainly of course because of its apparent lack of any ability to persuade an independent Tribunal that there was a reasonable excuse for lateness in giving the relevant notice.

62. Having regard to all these facts and circumstances I reinstate the appeal.

Reasons for conclusion

63. My primary reason for allowing reinstatement is that I consider that the appellant may have been under a misapprehension when he withdrew his appeal and that the terms of HMRC's correspondence with him and with Independent may have unwittingly led to that misapprehension. I stress that I do not attribute any blame to, or make any accusations of unfair dealings by, HMRC. I accept fully statements made by or on behalf of HMRC about their motives in their dealings with the appellant.

64. I need to set out the matters which have caused me to come to this view in some detail. I had noted that in HMRC's letter of 23 November 2015 HMRC had said:

> "I realise that this [inability to accept the appellant's notification] will be a disappointment to Mr Youngman, but <u>there is no legislative provision allowing HMRC to accept notifications for FP2012 that were received after the closing date of 5 April 2012</u>." [HMRC's underlining]

65. On the next page of the letter the author of the letter repeats the underlined words (but this time without any underlining). He then added:

> "HMRC does however have discretionary powers under section 5(1) Commissioners for Revenue and Customs Act 2005 relating to the collection and management of taxes. HMRC can use these powers to consider whether in exceptional circumstances late notifications can be accepted. The way HMRC exercises these discretionary powers in relation to late applications is to consider whether a case falls within any of three categories"

66. There then followed three bulleted categories of case, the first two of which are plainly irrelevant to this case (HMRC or other Government error contributing to delay in notifying and intention to apply before deadline). The third and relevant category is:

> "where the notification was late for reasons beyond the person's control"

67. But, the letter goes on:

> "It is important when exercising powers such as those under section 5(1) that HMRC acts [*sic*] in a fair and consistent manner in relation to all taxpayers and across the range of taxes. When considering what factors can be accepted as being beyond a person's control, HMRC has consistently taken the line that notifications cannot be accepted where they are submitted late due to the oversight or negligence on the part of a person's adviser." [My underlining this time]

68. This is not the occasion on which to analyse the logic or coherence of this statement. It seems to me however to be beyond doubt that the appellant's case would not benefit from the discretion exercised by HMRC under s 5(1) Commissioners for Revenue and Customs Act 2005 ("CRCA") as expressed in the letter. Indeed HMRC said as much in their next paragraph.

69. The appellant was correctly advised that he cannot appeal to this tribunal against the exercise or non-exercise of the s 5(1) CRCA discretion, but that he could seek to judicially review the decision.

70. HMRC's strike out application dated 13 October 2016, but only received by Independent on 1 November 2016, contains, after giving grounds why the appeal should be struck out, two final paragraphs:

> "**Re-consideration of decision**
>
> 20. As noted above, it is admitted that the statement in the Respondents' letter of 23 November 2015, that there is no legislative provision allowing the Respondents to accept late paragraph 14 notices, was incorrect: regulation 6 of the 2011 Regulations gives the Respondents a discretion.
>
> 21. The Respondents therefore undertake that, if and when this appeal is struck out (or withdrawn), and if the Appellant so wishes, they will reconsider the decision to refuse to accept his paragraph 14 notice. Their grievance with the present appeal is simply that to challenge such a decision (except on the grounds that the notice satisfied the requirements in regulation 4) falls within the judicial review jurisdiction of the High Court, not the jurisdiction of the Tribunal."

71. This is clearly what caused the appellant to withdraw his appeal. But it seems to me that a reasonable reading of these paragraphs, taken with the passages from the 23 November 2015 letter I have quoted, leads to the conclusion that, without a change of policy by HMRC, the reconsideration will lead to the same answer as the letter of 23 November 2005 did. The policy which that letter said was the policy of HMRC

when considering a late application under the discretion in s 5 CRCA would, when applied to this case, have led to a refusal to admit the late application. I asked Mr Bradley, and through him the HMRC pension team behind him, whether they could give me an undertaking that, or at least indicate whether, the s 5(2) CRCA policy would also be applied to the proposed reconsideration. They could not or would not say. I infer that the most likely thing is that it will.

72. One reason I have for thinking that it will is to be found in paragraph 098000 of HMRC's Pensions Tax Manual:

> "There are no reasonable excuse provisions within the legislation for FP 2012, FP 2014 and IP 2014 which would allow HMRC to accept a late notification. HMRC can, however, in exceptional circumstances, accept a late notification by exercising its discretion under the above regulations in relation to FP 2012 [*regulation 6 of the 2011 Regulations*] and FP 2014 and under collection and management provisions set out in Section 5(1) of the Commissioners for Revenue and Customs Act 2005 in relation to IP 2014 (there being no discretionary power to accept late notifications in the IP 2014 notification regulations)."

73. The lumping together here of the regulations and the CRCA discretion shows that it is unlikely that different criteria would be used when considering a discretion under s 5(1) CRCA and under regulation 6 of the 2011 Regulations.

74. Because of this failure to reassure me that the appellant would be given a reconsideration where the outcome was not a foregone conclusion in exchange for giving up his right to an appeal to this Tribunal, I consider it is in accordance with the overriding objective of this Tribunal to allow the appeal to be reinstated, in order that the appellant has a chance of persuading an independent Tribunal that he the right to have his notification accepted.

75. Another related reason for allowing reinstatement is that I am unconvinced that HMRC had to offer the appellant a stark choice between a reconsideration of his application and withdrawal of the appeal, and correspondingly I do not understand why the appellant's suggestion of an adjournment of the appeal and of HMRC's strikeout application for say three months while there was a reconsideration could not have been agreed to by HMRC. Had the appellant made such an application before me on 7 November 2016 I would have granted it. If on reconsideration the decision was to refuse to accept the application then the strike out application could have been relisted with little more for HMRC to do.

76. I have also thought it right to give some consideration to the merits of the strike out application. That application is on the basis of a lack of jurisdiction in this tribunal to hear the appeal. But in this case that involves a question of interpretation of the 2011 Regulations especially regulations 4, 6 and 7, and I am not prepared to say that the Tribunal lacks jurisdiction to hear the appeal.

77. But if the only arguments that this Tribunal does have jurisdiction to rule on a refusal by HMRC of a late application are fanciful, ie unrealistic, then a strike out

would also be justified on the grounds that there was no reasonable prospect of success (as Judge Mosedale held was the case in *SRN* and was her reason for non-reinstatement).

78. It is solely on this matter that there was legal argument before me. In my view it is not fanciful to suggest that the Tribunal has jurisdiction and that in particular regulation 7(3) may not be exhaustive. The stark differences between the 2011 Regulations and the 2006 ones may be relevant and may be persuasive in allowing a liberal interpretation of the regulations. A propos of this issue no one from HMRC was prepared to, or able to say, what the policy reason was for not allowing a reasonable excuse provision where the window of opportunity was eight months, having allowed one where it was three years. That may also be relevant to an interpretation of the Regulations.

79. But in any event I note that despite the Upper Tribunal's evident agreement with Judge Mosedale in *SRN* that the appellant's case looked hopeless, the Tribunal allowed the appeal and made the comments it did at [32] (see §54).

80. The effect of my allowing the reinstatement of the appeal is that the appellant remains facing an application of his appeal to be struck out, and indeed that was what I would have dealt with in November 2016 had the appeal not been withdrawn on the eve of the hearing.

81. Given that HMRC's grounds for the application are the grounds for opposing reinstatement, it seems to me to be an unnecessary waste of resources and not in accordance with the overriding objective for there to be a further hearing to consider the strike out application, and I deal with it now.

82. For the reasons given in §§76 to 79 for allowing reinstatement I reject the application to strike out.

83. Unless the matter is now settled the next step will be the listing of a hearing of the appeal.

Decision

84. Under Rule 17(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 I reinstate the appellant's appeal notified to the Tribunal on 26 March 2016.

85. I dismiss HMRC's application to strike out that appeal.

86. 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 THOMAS

TRIBUNAL JUDGE
RELEASE DATE: 19 DECEMBER 2017