



Neutral Citation: [2024] UKFTT 00810 (TC)

Case Number: TC09284

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video hearing]

Appeal reference: TC/2023/08656

INCOME TAX – pensions taxation – lifetime allowance – refusal by HMRC to accept late notification for Fixed Protection ('FP 2012') pursuant to The Registered Pension Scheme (Lifetime Allowance Transitional Protection) Regulations 2011 ('FP 2012 Regulations') – whether the requirements of reg. 4 of the FP 2012 Regulations were met – no – whether First-tier Tribunal has the power to review HMRC's refusal to exercise discretion to accept late elections for fixed protection – no – absence of "reasonable excuse" provisions in the FP 2012 Regulations – The Executors of David Harrison (Deceased) & Simon Harrison v HMRC considered and applied – whether HMRC had an obligation to make the Appellant aware of the changes to the law – no - Appeal dismissed

Heard on: 7 June 2024

Judgment date: 5 September 2024

Before

**JUDGE NATSAI MANYARARA
ANN CHRISTIAN**

Between

PAUL ANTHONY HAIGH

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Appellant in Person

For the Respondents: Mr Thomas Pearson, Litigator of HM Revenue and Customs'
Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant (Mr Paul Anthony Haigh) appeals against HMRC's decision to refuse his notification for Fixed Protection 2012 ("FP 2012"). Paragraph 14 of Schedule 18 to the Finance Act 2011 ("Schedule 18") gives a taxpayer the right to make an election for FP 2012. The provisions regulating the exercise of that right are set out in The Registered Pension Schemes (Lifetime Allowance Transitional Protection) Regulations 2011 SI 2011/1752 ("the FP 2012 Regulations"). The Appellant gave notice for FP 2012 on 24 July 2022. The deadline for submitting notice was, however, 5 April 2012. HMRC have refused to accept the notice as it was received ten years late.

2. The Appellant submits that it is unfair, and unjust, to have expected him to know about the deadline for making an election for FP 2012. He further submits that the Tribunal should overturn HMRC's decision.

3. HMRC submit that the Tribunal has no jurisdiction to overturn a decision to refuse late notification for FP 2012. In this respect, HMRC place reliance on the case of *The Executors of David Harrison (Deceased) & Simon Harrison v HMRC* [2021] UKUT 0273 (TCC) ('*Harrison*') (Judges Richards and Greenbank).

4. With the consent of the parties, the form of the hearing was V (video). Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public. The documents to which we were referred to were: (i) the Hearing Bundle consisting of 95 pages (within which were the Notice of Appeal dated 25 June 2023 and the Statement of Reasons dated 21 September 2023); and (ii) the Appellant's Authorities Bundle consisting of 46 pages.

ISSUES

5. The appeal turns upon the application of reg. 4 of the FP 2012 Regulations. A key issue for determination before us was whether there was a requirement for notification to be given by a specified deadline (i.e., whether the requirements of reg. 4 of the FP 2012 Regulations were met). Also at issue is the extent to which the First-tier Tribunal ('FtT') has the power to interfere with HMRC's refusal to accept the Appellant's late notification.

BURDEN AND STANDARD OF PROOF

6. The burden of proof is on the Appellant to show that the requirements of reg. 4 of the FP 2012 Regulations were met. The standard of proof is the civil standard; that of a balance of probabilities.

BACKGROUND FACTS

7. On 23 July 2022, the Appellant wrote to HMRC notifying his election for FP 2012, and enclosing his completed APSS227 form. The Appellant acknowledged that his application was over ten years late, and considered that HMRC would likely reject his notice, but sought HMRC's reply to enable him to seek judicial review of the matter.

8. On 17 August 2022 and 4 October 2022, HMRC wrote to the Appellant, requesting further information.

9. On 11 September 2022 and 24 October 2022, the Appellant submitted the further information requested.

10. On 21 December 2022, HMRC refused to accept the Appellant's late notification.

11. On 6 January 2023, the Appellant made an appeal to HMRC, under reg. 7 of the FP 2012 Regulations.
12. On 16 March 2023, HMRC issued their View of the Matter letter, upholding the original decision. The letter offered a statutory review of the decision, or the right to appeal to the FtT (which needed to be notified within 30 days from 16 March 2023).
13. On the 23 March 2023, the Appellant emailed HMRC asking for more time to seek legal advice.
14. HMRC replied to the Appellant by email, on 24 March 2023, and clarified that the two options available to the Appellant were: (i) an independent review; or (ii) an appeal to the FtT.
15. On 6 April 2023, the Appellant acknowledged HMRC's email.
16. On 24 April 2023, HMRC emailed the Appellant to inform him that the original HMRC officer who had been dealing with the matter had moved departments. Due to delays in responding to the Appellant, the Appellant was given an additional 30 days to notify either a request for an independent review, or to make an appeal to the FtT.
17. By a Notice of Appeal dated 25 June 2023, the Appellant notified his appeal to the FtT.

RELEVANT LAW

18. The provisions governing FP 2012 are set out in para. 14 of Schedule 18, which gives a taxpayer the right to make an election for FP 2012.
19. Paragraph 14 of Schedule 18 provides that:

“SCHEDULE 18
LIFETIME ALLOWANCE CHARGE

...

PART 2
COMMENCEMENT AND TRANSITIONAL PROVISION

- (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). ...”

20. Provisions regulating the exercise of that right are set out in the FP 2012 Regulations, as follows:

“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.”

21. Regulation 4 sets out requirements that a notice under para. 14 must satisfy and provides that:

“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; ...”

22. Regulation 5 then provides that:

“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.”

23. Regulation 6 expands on the scope of HMRC's power to refuse to accept a para. 14 notice, in the following terms:

“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.”

24. Regulation 7 provides that:

“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.”

[Emphasis added]

APPEAL HEARING

25. The Appellant was unrepresented at the hearing before us. He confirmed that he was not expecting a legal representative to attend the hearing on his behalf, and that he was ready to proceed with the hearing having received all of the documents.

26. We heard submissions from both parties.

Submissions

27. Mr Pearson's submissions can be summarised as follows:

(1) The right of appeal is set out at reg. 7(1) of the FP 2012 Regulations. The focus of the FtT must be on reg. 7(3), which exhaustively sets out the nature of the grounds of appeal.

(2) The Appellant has to meet the requirements of reg. 4 of the FP 2012 Regulations. As the Appellant submitted his APSS227 form after the deadline of 5 April 2012, the notice does not meet the requirements of reg. 4 (2)(b)(i).

28. The Appellant's submissions can be summarised as follows:

(1) He accepts that his form was submitted ten years late. The authorities that he relies on will show that HMRC can (and should) exercise discretion in his favour.

(2) He meets the criteria for FP 2012 in all respects, other than the application being ten years late. If he had made his application prior to 5 April 2012, it is likely that the application would have been accepted.

(3) HMRC are acting unreasonably in not accepting his notification.

(4) He was not informed of the lifetime allowance provisions by his pension scheme providers, or by the private administrators of his additional pension plans. This is exacerbated by the fact that HMRC did not adequately inform those in his position of the changes to the lifetime allowance.

(5) If he had been aware of the lifetime allowance rules, he would have applied for FP 2012 in time.

29. At the conclusion of the appeal hearing, we reserved our decision, which we now give with reasons.

FINDINGS OF FACT

30. The following facts were either accepted, admitted or proved:

(1) On 28 March 2002, the Appellant retired from his employment as an NHS dental practitioner, and he drew his NHS pension immediately. He did not seek any advice regarding his pension at that time.

(2) The Appellant had contributed to private pension schemes up to the date of his retirement, and he did not make any further contributions thereafter.

(3) The Appellant only became aware of the lifetime allowance when his pension provider asked for his pension details, prior to his 75th birthday.

(4) On 23 July 2022, the Appellant wrote to HMRC notifying his election for FP 2012, and enclosing his completed form APSS227. The Appellant acknowledged that his application was ten years late.

31. We, therefore, make these findings of fact.

DISCUSSION

32. The Appellant appeals against HMRC's decision to refuse to accept his notification for FP 2012 as it was received late (on 24 July 2022). In essence, the Appellant submitted that the FtT has the power to review the exercise of HMRC's discretion. In this respect, he placed reliance on various decisions of the FtT, which we shall refer to later. The Appellant nevertheless accepted that his notification for FP 2012 was given late.

33. Mr Pearson submitted (in reliance on *Harrison*) that the FtT only has the power to consider the issue of whether the requirements of reg. 4 of the FP 2012 Regulations were met.

34. We have derived considerable benefit from hearing the Appellant giving evidence before us. Having heard the evidence, we found the Appellant to be a credible witness who gave his evidence in a clear and straightforward manner, without equivocation. The appellant's credibility as a witness is not, however, determinative of the issue(s) before us. This is because the incontrovertible fact in this appeal is that the Appellant gave his notification for FP 2012 late. This matter is not in issue between the parties. The legislation clearly sets out the requirements that have to be met for an individual to be entitled to FP 2012, and the deadline for giving notice. Furthermore, case law has established the FtT's jurisdiction in appeals of this nature as set out in the legislation.

35. We proceed to set out the legislation.

36. Pensions tax simplification took effect from 6 April 2006 following a policy announced by the government in 2004. This date (6 April 2006) is commonly referred to as "A-Day". The intention was to simplify the previous eight tax regimes into one single regime for individual and occupational pensions. The changes to the legislation introduced a threshold for pensions savings. From 6 April 2006, every individual would have a "lifetime allowance" (the threshold). The lifetime allowance represents the total capital value of all pension benefits - except the State pension - before extra tax is chargeable. There are complex rules for the calculation of the value of pension scheme benefits for the purposes of the lifetime allowance.

37. The changes to the lifetime allowance over time are set out in the following Table:

Tax Year	Amount
2006-07	£1,500,000
2007-08	£1,600,000
2008-09	£1,650,000
2009-10	£1,750,000
2010-11	£1,800,000

2011-12	£1,800,000
2012-13	£1,500,000

38. The primary legislation was enacted as Part 4 of the Finance Act 2004 ('FA 2004'). Part 4 introduced a comprehensive new regime for the taxation of pensions schemes, running from ss. 149 to 284. Part 4 further merged eight or so different sets of rules for different types of pension scheme into one, and 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 ss. 214 to 226 FA 2004. The new rules were based on deterrence, as described by Henderson LJ in *Clark v HMRC* [2020] EWCA Civ 204; [2020] STC 596 ('*Clark*'), at [25]:

"25...In very general terms, the underlying policy of the legislation, in common with much predecessor legislation in the same field, was to provide fiscal incentives for the establishment and investment of occupational pension schemes, so as to provide retirement pensions and associated benefits for employees and their dependants, but coupled with strict provisions designed to ensure that the schemes would be properly administered, and that payments made out of them to beneficiaries or sponsoring employers would be confined to certain authorised categories of payment. If unauthorised payments were made, they would be taxed at high rates intended to have a deterrent effect and to compensate the State, in a rough and ready way, for the fiscal benefits previously enjoyed by the relevant funds."

[Emphasis added]

39. Section 214 FA 2004 (which came into force in 2006) imposed the lifetime allowance charge if an individual's pensions savings exceeded the lifetime allowance/threshold. The charge was imposed on a member of one or more registered pension schemes in respect of certain "benefit crystallisations events", where the amount crystallised when added to any previous such events exceeded the individual's lifetime allowance (i.e., 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). The charge was dealt with under s 215 FA 2004. Section 215 establishes that the rate of tax on the charge can be 55%, or 25%. The rate of tax varies according to the type of benefit which exceeds the allowance. The rules applied to calculate the amount of the lifetime allowance, and where it has been exceeded, in any individual case.

40. The charges to tax contained in Chapter 5 included: (i) the unauthorised payments charge and surcharge (sections 208 to 210); (ii) the lifetime allowance charges (where an individual's annual contribution limits or lifetime pension allowance were exceeded); (iii) the charge on authorised employer payments; (iv) the scheme sanction charge (levied on the scheme administrator, where an unauthorised payment was made by the pension scheme); and (v) a de-registration charge, also levied on the scheme administrator, when the registration of a registered pension scheme was withdrawn.

41. Schedule 36 FA 2004 was introduced by s 283 FA 2004. Schedule 36 provided for transitional provisions, and savings, to protect against the lifetime allowance charge. This was on the condition that the taxpayer gave notice to HMRC of his/her intention to rely on para. 12(3) of Schedule 36, in accordance with regulations made.

42. Numerous statutory instruments (regulations) were made under the powers in FA 2004, and later Acts. The regulations govern the issuance and revocation of protection.

43. The Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006 SI 2006/131 ('the 2006 Regulations') dealt with notifications electing for "Enhanced Protection" and "Primary Protection". Primary Protection, broadly, treated the value of the pension pot as it stood on A-Day as the lifetime allowance. Enhanced Protection offered full protection against the tax charge on the condition that all contributions, or other benefit accrual, ceased before A-Day. The date by which eligible taxpayers were required to give notice of their intention to rely on para. 12 of Schedule 36 was 5 April 2009 (the "closing date" or cut-off date"). As long as the protection was not lost, or revoked, there would be no tax charge.

44. From 2006, where the requirements of para. 12 were met, there would be no lifetime allowance charge. Regulation 12 of the 2006 Regulations dealt, specifically, with the situation where a taxpayer submitted a late notification, as follows:

"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."

45. The effect of reg. 12 was that if the taxpayer had a "reasonable excuse" for serving the notification late, and gives the notification "without unreasonable delay after the reasonable excuse ended", HMRC would be obliged to accept the notification even though it was late. Regulation 12 of the 2006 Regulations further gave the FtT the power, on an appeal notified to it, to form its own view as to whether the requirements of reg. 12 were met (pursuant to reg. 12(7) of the 2006 Regulations). In this respect, the jurisdiction of the FtT was appellate. If an appeal was allowed (i.e., a reasonable excuse was established), the FtT had jurisdiction to direct HMRC to consider the information in the notification, but could not direct HMRC to admit the late claim.

46. There is no similar provision in relation to FP 2012 (which applies to the appeal before us).

47. As shown by the Table at para. 37 above, the lifetime allowance was set at £1,500,000 for 2006-07, but it did not remain at that level. By a series of statutory instruments, the amount was increased over time. One effect of these annual increases was that those people, the value of whose "pension pot" was, on dates after A-Day, on the verge of reaching, or was over, £1,500,000 would find that they did not need to seek lifetime protection under the 2006 Regulations.

48. Part 4 FA 2004 has been amended, and supplemented, in subsequent Finance Acts, including (relevantly for this case) the Finance Act 2011 ('FA 2011'), which changed the position. Paragraph 2 of Schedule 18 substituted a new s 218(2) FA 2004, which provides that:

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

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

50. The government recognised that people who had not sought the protections given by the 2006 Regulations could find that their pension pots were worth more than the new lifetime allowance of £1,500,000, making them liable to the lifetime allowance charge when benefits crystallised. Part 2 of Schedule 18 provided for transitional provisions. Recognising that taxpayers may have made decisions based on their expectation that the lifetime allowance would continue at £1,800,000 (as it had been for 2011-12), para. 14 (supra) entitled taxpayers, by notice to HMRC, to elect for FP 2012, to distinguish it from other types of fixed protection. Paragraph 14, therefore, preserved the previous allowance of £1,800,000 for those who gave a notice of intention to HMRC to rely on it. Provisions regulating the exercise of that right are set out in the FP 2012 Regulations. A taxpayer making an election for FP 2012 would continue to benefit from a lifetime allowance equal to the higher of £1,800,000 and the allowance prevailing from time to time. The deadline for submitting a notice electing for FP 2012 was 5 April 2012.

51. Regulation 4 of the FP 2012 Regulations sets out requirements that a notice under para. 14 must satisfy.

52. Regulation 5 does not set out any criteria that HMRC must apply when deciding whether to accept a notice under para. 14. The regulation merely specifies the requirement for a certificate.

53. Regulation 6 expands on the scope of HMRC's power to refuse to accept a para. 14 notice. If a para. 14 notice satisfies all the requirements of reg. 4, HMRC are obliged to accept it. There is no residual discretion to reject valid para. 14 notices. If a para. 14 notice does not meet the requirements of reg. 4, HMRC are entitled to reject it, but they retain a discretion to accept it.

54. A further difference worth noting is that the 2006 Regulations allowed a period of over three years between the date that the regulations came into force and the cut-off date, whereas the FP 2012 Regulations allowed a period of less than eight months.

55. Turning to the circumstances of this appeal, there is, in truth, one live issue. That is whether the requirements of reg. 4 were met by the Appellant.

Whether the requirements of reg. 4 of the FP 2012 Regulations were met: the FtT's jurisdiction

56. Whilst the Appellant accepts that he gave his notification for FP 2012 ten years late, he nevertheless submits that he meets the criteria for FP 2012 in all respects, other than the application being ten years late. He further submits that if he had made his application prior to 5 April 2012, it is likely that the application would have been accepted, and that HMRC have acted unreasonably in not accepting his election to FP 2012. Having considered the Appellant's submissions in their entirety, we find that the Appellant's submissions are misconceived, fail to have regard to the requirements of the FP 2012 Regulations, and amount to public law arguments over which we have no jurisdiction.

57. In summary we are satisfied that:

(1) Firstly, under reg. 4 of the FP 2012 Regulations, there was a requirement for notification (in the prescribed format) to be given to HMRC prior by 5 April 2012, in order for there to be entitlement to Fixed Protection. The prescribed form was form APSS227. Notification would only be considered to have been made once the prescribed form was completed, signed, dated and submitted to HMRC by the specified deadline.

(2) Secondly, and more importantly, the incontrovertible fact in this appeal is that the Appellant did not complete the form until 24 July 2022. This was after the deadline of 5 April 2012. This matter is not in issue between the parties.

(3) Thirdly, the FP 2012 regulations contain nothing that expressly permits a late application to be accepted if the person had a reasonable excuse for the delay.

(4) Fourthly, the FtT's jurisdiction is to consider whether the requirements of reg. 4 of the FP 2012 Regulations were met, and the FtT has no jurisdiction to consider public law arguments.

(5) Fifthly, the tax charge that the Appellant is subsequently liable to pay is not a penalty, but a consequence of the legislation.

58. Whilst the Appellant has referred us to various authorities that he relies on to submit that the FtT has jurisdiction to consider HMRC's refusal to accept his late notification, we find that the authorities do not take the Appellant's case any further.

59. We proceed to consider the authorities referred to us by both parties.

60. The case of *Youngman v HMRC* [2017] UKFTT 0893 (TC) ('*Youngman*'), upon which the Appellant placed reliance, concerned an application for the reinstatement of an appeal made by the appellant in that appeal (which had been withdrawn). The underlying appeal was against HMRC's decision to refuse to accept notice given to them under reg. 3 of the FP 2012 Regulations. At [78], Judge Richard Thomas said this:

"...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."

61. Whilst the underlying appeal in *Youngman* concerned an underlying decision which is similar to the decision in the appeal before us, the FtT in that appeal was, however, considering was an application by Mr Youngman for the reinstatement of his appeal, as well as a strike out application by HMRC. The decision, therefore, concerned procedural matters and does not take the Appellant's appeal any further in terms of the jurisdiction of the FtT. In any event, *Youngman* is not binding on us and was decided before *Harrison* (in the UT), which we will consider later.

62. Furthermore, we have considered the fact that the FP 2012 Regulations do not include a provision as to "reasonable excuse" when notification for FP 2012 has been given late. Indeed, Judge Thomas in *Youngman* recognised this, at [61]:

"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.”

63. The primary reason that the appeal in *Youngman* was allowed was that the appellant had wrongly withdrawn his appeal, and not because of anything contained in the FP 2012 Regulations.

64. The second case upon which the Appellant placed reliance was that of *Gammell v HMRC* [2021] UKFTT 0049 (TC) (*Gammell*) (Judge John Manuell and Member Malcolm). The FtT in *Gammell* was considering an appeal against HMRC’s refusal to accept a late claim for Enhanced Protection under the 2006 Regulations. The FtT concluded that the appellant in that appeal had a reasonable excuse for the delay in notifying his claim. Once again, this does not take the Appellant’s case any further. This is because the effect of the 2006 Regulations was that if the taxpayer had a reasonable excuse for serving the notification late and gives the notification without reasonable delay after the reasonable excuse ended, HMRC would be obliged to accept the notification even though it was late. On appeal, the FtT had jurisdiction to consider whether there was a reasonable excuse.

65. There have been a number of cases in which the FtT considered reg. 12 of the 2006 Regulations and decided whether or not an appellant had a reasonable excuse for their failure to notify after the closing date, which are not relevant to the circumstances of this appeal. None of those cases support the Appellant’s arguments before us.

66. The final case upon which the Appellant placed reliance was the case of *Hymanson v HMRC* [2018] UKFTT 667 (TC) (*Hymanson*) (Judge Philip Gillett). The Appellant seeks to distinguish his appeal from *Hymanson* by submitting that the default in *Hymanson* was significantly worse than his default in that Mr Hymanson had continued to make contributions into his Self-Invested Personal Pension Scheme (‘SIPP’). We find that *Hymanson* did not concern the issue of late notification, and it does not take the Appellant’s case any further.

67. In *Hymanson*, the FtT was considering Mr Hymanson’s appeal against a decision by HMRC to revoke a certificate of Fixed Protection, which they had previously issued to him. Reg 11 of the FP 2012 Regulations deals with the revocation of FP 2012 certificates. It provides that HMRC may revoke a certificate if they have “reason to believe” that a para. 14(4) (Schedule 18) event has occurred. A para. 14 event is defined as follows:

“14...

(4) But this paragraph ceases to apply if on or after 6 April 2012

(a) there is benefit accrual in relation to the individual under an arrangement under a registered pension scheme,

(b) there is an impermissible transfer into any arrangement under a registered pension scheme relating to the individual,

(c) a transfer of sums or assets held for the purposes of, or representing accrued rights under, any such arrangement is made that is not a permitted transfer, or

(d) an arrangement relating to the individual is made under a registered pension scheme otherwise than in permitted circumstances.”

68. In *Hymanson*, a para. 14 event had occurred in the sense that there was a benefit accrual after 6 April 2012. Mr Hymanson’s position was that the amounts paid were paid by virtue of a mistake and, as such, the payments were void in accordance with the principle in *Pitt v. Holt* [2013] UKSC 26. The appeal in *Hymanson* also does not take the Appellant’s appeal any further.

69. Returning to *Harrison*, upon which HMRC placed reliance and which is relevant to the circumstances of the appeal before us, the issue in the appeal was the extent to which the FtT has the power to interfere, or should interfere, with HMRC’s refusal to accept notices electing for FP 2012 after the deadline of 5 April 2012. The appellant in *Harrison* had, similarly, argued that a right of appeal gives the FtT the power to review the exercise of HMRC’s discretionary power to accept, or refuse, a notice that does not meet the requirements of reg. 4 of the FP 2012 Regulations. HMRC, on the other hand, argued that the FtT only has the power to consider the issue of whether the requirements of reg. 4 are met, and has no general power to review the exercise of HMRC’s discretion.

70. The Upper Tribunal (‘UT’) held, at [36], that:

“36. ... Ultimately, the task in each case is to construe the right of appeal conferred by the statute or secondary legislation ... Whether or not the FTT has that jurisdiction is simply a matter of statutory construction.”

71. And, at [48] to [49]:

“48. We acknowledge that HMRC’s interpretation of Regulation 7 produces a result that the Appellants and other taxpayers might find unwelcome. If HMRC refuse to accept a late Paragraph 14 notice or, for example, capriciously refuse to accept a Paragraph 14 notice that does not contain the taxpayer’s correct national insurance number because of a transposition error, then a taxpayer’s remedy lies in expensive judicial review proceedings rather than in less formal proceedings before the FTT. We therefore pause to consider whether this result was truly what the Regulations intended. There are, however, several areas of the tax code in which the tribunal is not given full jurisdiction to resolve all challenges that a taxpayer may wish to make to an HMRC decision. *Beadle* provides an example of such a situation. Ultimately, we have concluded that taxpayers’ understandable wish to bring all of their challenges in one forum does not constitute a “necessary implication” to the effect that challenges to HMRC’s exercise of discretion can be brought in an appeal under Regulation 7 given the clear indications in Regulation 7 to the contrary.

49. Having weighed up the competing indications, in respectful disagreement with the FTT, we consider that HMRC’s construction of Regulation 7 is to be preferred. On an appeal notified to the FTT, the FTT’s sole jurisdiction is to consider whether the requirements of Regulation 4 are met.”

72. The UT, ultimately, held that the jurisdiction of the FtT in relation to HMRC’s refusal to accept notices of election for FP 2012 after the deadline of 5 April 2012 was whether the requirements of reg. 4 of the FP 2012 Regulations were met. The UT was, further, satisfied that the FtT did not have the jurisdiction to hear public law arguments in relation to HMRC’s refusal to accept late notification for Fixed Protection.

73. The UT decision in *Harrison* is binding on us.

74. A further decision that sheds light on the jurisdiction of the FtT in appeals of this nature (and HMRC’s powers) is the decision in *Ames v HMRC* [2015] UKFTT 337 (TC) (‘*Ames*’). The case concerned the Enterprise investment Scheme (‘EIS’). Judge Redston held that the FtT held did not have jurisdiction to allow the appellant in that appeal to make a late claim, or to consider the way in which HMRC had exercised their powers of care and management under s 5 of the Commissioners for Revenue and Customs Act 2005 (‘CRCA’) as there was a deadline for the claim to be made. Judge Redston held, at [110], that:

“*Jurisdiction over late claims*

110. Not only does the Tribunal have no jurisdiction to allow a late claim under TMA s 118(2), we were also unable to identify any provision which gives a person the right to appeal against an HMRC refusal to allow a late claim. TMA s 33 simply states the time limit. TMA

Sch 1A, which provides for claims made outside returns, only allows appeals against amendments to claims, not against a refusal to extend a time limit so as to admit a claim. We therefore find that the Tribunal has no jurisdiction to allow Mr Ames to make a late claim.”

75. At [117], Judge Redston said this:

“...the Tribunal does not have jurisdiction over HMRC’s exercise of their care and management powers. Whether HMRC have exercised those powers unfairly is a matter for judicial review. This is clear from the case law. In *Aspin v Estill* [1987] STC 723 Donaldson LJ, giving the leading judgment with which the rest of the Court of Appeal concurred, found that the General Commissions had no judicial review powers. In *HMRC v Hok Limited* [2012] UKUT 363 Warren J and Judge Bishopp considered *Aspin v Estill* and also the statutory jurisdiction under which the Tribunal was established, before saying that there is “no room for doubt that the First-tier Tribunal does not have judicial review jurisdiction.”

76. Mr Ames appealed to the UT: *R (on the application of Ames) v R & C Comrs* [2018] UKUT 190 (TCC) (Fancourt J and Judge Sinfield). The UT reached the same view as the FtT; that being that the FtT did not have the jurisdiction to entertain the appeal against the refusal to admit the late claim. The decision of the FtT was only quashed by the UT on the grounds that the decision-maker (within HMRC) had wrongly fettered his discretion and, accordingly, the decision-making process had been flawed.

77. The differences in fact in *Ames* and in the appeal before us do not negate the need to consider the requirements of the FP 2012 Regulations in relation to deadlines for making claims, and the jurisdiction of the FtT (as set out in the legislation).

78. The FP 2012 Regulations, which govern the giving of notice for Fixed Protection, require that notice is given by a specified time (i.e., 5 April 2012). The FtT’s sole jurisdiction in this respect is to consider whether the requirements of reg. 4 were met. Having regard to our findings of fact, and the applicable law, we hold that the appeal must fail. This is because by his own admission, the Appellant gave notification late and there is no provision in the FP 2012 Regulations that empowers us to consider the issue of reasonable excuse.

79. In respect of any public law arguments, the FtT was created by s 3(1) of the Tribunals, Courts and Enforcement Act 2007 (‘TCEA’), “for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act”. It follows that its jurisdiction is wholly derived from statute. The FtT has no judicial review function. That the FtT has no judicial review function is the only conclusion which can be drawn from the structure of the legislation which brought the FtT into being. The TCEA conferred a judicial review function on the UT; a function it would not have had since it too is a creature of statute without any inherent jurisdiction had the Act not done so, and it hedged the jurisdiction it did confer with some restrictions. It is perfectly plain from perusal of the TCEA that Parliament did not intend to, and did not, confer a judicial review jurisdiction on the FtT, and there is nothing in the Transfer of Tribunal Functions Order which points to a contrary conclusion. Furthermore, the FtT has no supervisory jurisdiction over HMRC.

80. We are satisfied that the FtT does not have jurisdiction to consider the refusal to admit a late claim in the circumstances of this appeal. We are further satisfied that the FtT does not have jurisdiction over HMRC’s exercise of their care and management powers.

81. For completeness, we have considered the Appellant’s argument that HMRC did not make him aware of changes to the law.

Whether HMRC had a duty to make the Appellant aware of changes to pensions taxation

82. The Appellant submits that he had not been made aware of the lifetime allowance by either his pensions providers, or by HMRC. We are satisfied that HMRC do not have a

statutory duty to notify all taxpayers potentially affected by changes in the law. By statutory duty, we mean a duty that is provided by Parliament and laid down in statute. Taxpayers likely to be affected by changes to pensions taxation are not readily identifiable from any information held by HMRC. Furthermore, HMRC do not hold data to enable any identification of those who may be affected by the lifetime allowance charge.

83. Whilst the Appellant may not have been aware of changes in the law, ignorance of the law cannot come to the Appellant's aid. As held by Clouston J in *Holland v German Property Administrator* [1936] 3 All ER 6, at p 12:

“the eyes of the court are to be bandaged by the application of the maxim as to ignorantia legis.”

84. We have found that the FtT does not have any jurisdiction over HMRC's exercise of their care and management powers. Furthermore, the FtT does not have jurisdiction to supervise the conduct of HMRC. Applying *Aspin v Estill* [1987] STC 723, the jurisdiction of the FtT is limited to considering the application of the tax provisions themselves.

85. In *Marks & Spencer plc v C & E Comrs* [1999] STC 205, at 247, Moses J said this:

“...in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the Commissioners then it is clear the Tribunal had no jurisdiction. Its jurisdiction is limited to decisions of the Commissioners and it has no jurisdiction in relation to supervision of their conduct.”

86. This principle was applied by Warren J in *HMRC v Abdul Noor* [2013] UKUT 071, at [28].

CONCLUSIONS

87. Having regard to our findings of fact and the relevant law, we hold that:

- (1) The FP 2012 Regulations required notice to be given by 5 April 2012, in order for the Appellant to benefit from FP 2012.
- (2) The FtT's sole jurisdiction in this respect is to consider whether the requirements of reg. 4 were met.
- (3) The Appellant notified his election for FP 2012 ten years after the statutory deadline.
- (4) HMRC are not obliged to notify all taxpayers of changes in the law.

88. Accordingly, therefore, the appeal is dismissed.

89. These findings take into account the fact that the Appellant was not aware of the lifetime allowance charge, but that is not a matter that affects the outcome of this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

90. 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.

**NATSAI MANYARARA
TRIBUNAL JUDGE**

Release date: 05th SEPTEMBER 2024