[2020] UKFTT 0068 (TC)

# TC07564

*Income tax – pension – lifetime allowances – The Registered Pension Schemes (Lifetime Allowance Transitional Protection) Regulations 2011 - whether or not the appeals are against decisions or reviews – decisions – the scope of the FTT's jurisdiction – supervisory jurisdiction – whether or not HMRC were entitled to take the view that the notices did not satisfy the requirements – yes - whether or not the decisions were reasonable – yes – appeal dismissed*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal numbers: TC/2018/01135**
**TC/2018/01137**

**BETWEEN**

**(1) THE EXECUTORS OF THE ESTATE OF DAVID HARRISON (DECEASED)**
**(2) SIMON HARRISON** **Appellants**

**-and-**

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

**TRIBUNAL: JUDGE RICHARD CHAPMAN QC**
**MR NICHOLAS DEE**

**Sitting in public at Centre City Tower, 5-7 Hill Street, Birmingham on 28 June 2019**

**Mr Michael Collins, Counsel, instructed by Independent Tax and Forensic Services LLP, for the Appellants**

**Mr Charles Bradley, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs**

## DECISION

**INTRODUCTION**

1. These appeals are brought by the Executors of the late Mr David Harrison and by Mr Simon Harrison (together "the Appellants") against HMRC's decisions refusing to accept late notifications for the purposes of applying for fixed protection of the lifetime allowances for their pensions ("the Notices"). Mr David Harrison sadly passed away on 12 October 2015. His Executors are Mr Simon Harrison and Mrs Finula Allen, pursuant to a grant of probate dated 4 April 2016. The appeals have been directed to be heard together as they raise common factual and legal issues.

2. The context of the appeals is the introduction of lifetime allowances for the value of pension scheme benefits and various changes to the amount of those allowances. In essence, tax charges would accrue on the value of benefits over those lifetime allowances, with various protections being available (subject to fulfilling the relevant requirements) for those whose benefits exceeded the lifetime allowance. The lifetime allowance was set at £1,500,000 for the 2006-2007 tax year and was followed by successive increases, rising to £1,800,000 for 2010-2011 and 2011-2012. The lifetime allowance was then set at £1,500,000 for the tax years 2012-2013 and 2013-2014. There have also been further decreases through to 2016-2017 and 2017-2018 followed by increases thereafter, the detail of which is not relevant for present purposes.

3. The protections included "enhanced protection" and "fixed protection". Enhanced protection provided for, in specified circumstances, exemptions from paying tax on funds exceeding the lifetime allowances and operated from 6 April 2006 to 5 April 2009. "Fixed protection" provided for securing lifetime allowances at set levels, again in specified circumstances. In order to deal with the situation where individuals had not applied for enhanced protection by the relevant closing date in the expectation that the lifetime allowance would remain at £1,800,000, transitional provisions and a closing date of 6 April 2012 were introduced. By way of background (and neither binding on us nor part of the regulations), paragraphs 7.3 to 7.4 of the explanatory note to The Registered Pension Schemes (Lifetime Allowance Transitional Protection) Regulations 2011 ("the 2011 Regulations") provide as follows:

> "7.3 In recognition that reducing the lifetime allowance creates a potential issue for individuals who may have already built up pension pots on the expectation that the lifetime allowance would remain around its current level of £1,800,000, the Government introduced a protection regime to support individuals who had already made pension savings decision based on the current level of the lifetime allowance.
>
> 7.4 Individuals who have built up pension pots in the expectation that the lifetime allowance would be around its current level of £1,800,000 can apply for transitional protection which gives them a lifetime allowance of the greater of £1,800,000 and the standard lifetime allowance. In return for this protection they must, by 6 April 2012, cease all contributions to any defined contribution arrangement and stop accruing new benefits in any defined benefit or cash balance arrangement in a registered pension scheme. There are also further conditions which the individual must satisfy set out in the legislation such as the fact they must not have, or must surrender, certain protection which they previously held at the time that the Act came into force."

4. The main dispute in the present case is the scope of the Tribunal's jurisdiction on appeals relating to HMRC's refusal to accept notifications from the Appellants made by the Notices filed on 30 September 2015 and so after the closing date of 6 April 2012. The Appellants argue that the Tribunal has a supervisory jurisdiction, whereas HMRC argue that the Tribunal's

jurisdiction is limited to assessing whether or not HMRC were entitled to take the view that the notice did not satisfy the regulatory requirements.

5. We note that Mr Bradley's skeleton argument included a submission that the appeal should be struck out upon the basis that the Tribunal has no jurisdiction to consider "reasonable excuse". However, no formal application was made to this effect. Given that the appeals have been listed for (and approached by all the parties as) a final hearing and no strike out submission was pursued (whether as a preliminary issue or at all), we have considered the substantive merits of the case on a final basis rather than by way of a strike out application.

**FINDINGS OF FACT**

6. The parties have effectively proceeded upon the basis of agreed facts by reference to HMRC's statement of case. As such, no written or oral witness evidence was adduced by either the Appellants or HMRC. We therefore make the following findings of fact upon the basis of the statement of case as supplemented by non-contentious documents within the bundle provided for the appeals.

7. The Appellants engaged AFH Wealth Management ("AFH") to provide them with advice in respect of their pensions.

8. On 26 June 2006, Mr Alan Hudson of AFH sent a letter to AXA (the main provider of the Appellants' pensions) stating that they wished to apply for enhanced protection. Correspondence then passed between AFH and AXA relating to the values of the pensions and the maximum protectable fund. On 2 April 2008, Mr Mason, a consultant with AFH and by then the Appellants' primary contact, reached the view that the Appellants should not apply for enhanced protection upon the basis that this would create a tax charge and the lifetime allowance at the level it was then at was sufficient. However, whilst there was a file note of Mr Mason's decision not to make such an application, this decision was never communicated to the Appellants.

9. At some later stage, the question of enhanced protection was then revisited but Mr Mason was wrongly of the view that enhanced protection had already been obtained. As such, he gave no advice to the Appellants as to the effect of the lifetime allowance and, in particular, gave no advice as to relevance of fixed protection or the closing date of 6 April 2012.

10. In April 2014, the Appellants asked Mr Mason about whether or not they needed to apply for fixed protection. Mr Mason advised that this was unnecessary as (he thought) enhanced protection had already been obtained. However, in the course of searches for certification, it became clear that enhanced protection had not been applied for. These searches included letters to Mr Mason from HMRC received on 2 July 2014 and 21 October 2014 stating that they could not find a record of an application for enhanced protection being made and that no certificates had been issued. By 22 December 2014, it was clear to AFH that no applications or certificates could be found. AFH duly informed their insurers of a potential claim against them and, in March 2015, dismissed Mr Mason. Internal investigations continued and, on 7 July 2015, AFH informed the Appellants that enhanced protection had not been applied for.

11. Independent Tax and Forensic Services LLP ("Independent Tax") were subsequently instructed by the Appellants and filed applications dated 28 August 2015 for fixed protection of the Appellants' lifetime allowances. HMRC maintain that these were not received until 5 October 2015. We note that HMRC has stated in its statement of case that the forms were filed on 30 September 2015 and so, given that this has been agreed by the parties, we treat this as the appropriate date. This was sent to HMRC with a letter dated 29 September 2015 in respect of each Appellant, asking HMRC to allow a late notification upon the basis of what Independent Tax termed a "reasonable excuse." The letter went on to set out the facts which are, in broad terms, the same as those set out above.

12. Correspondence passed between Independent Tax and HMRC, resulting in decisions dated 2 June 2017 written in substantially the same terms for each of the Appellants refusing to accept the notifications ("the Decisions"). The relevant parts of the Decisions are as follows:

> "Regulation 4 of the Registered Pension Schemes (Lifetime Allowance Transitional Protection) regulations 2011 (SI 2011/1752) outlines the criteria required when making an application for Fixed Protection. At regulation 4(2)(b)(i) this includes the requirement that the notice must be received by HM Revenue and Customs (HMRC) on or before 5 April 2012.
>
> Regulation 6(1) states that HMRC may refuse to accept the notification if it does not satisfy the requirements in regulation 4. As stated above, one of these requirements is that the notice should have been received by HMRC no later than 5 April 2012. Therefore, as your notice was not received by HMRC until 5 October 2015 and therefore after the statutory deadline of 5 April 2012, I have decided to exercise my discretion to refuse to accept your notification.
>
> In coming to this decision, I have taken into account the following points:
>
> 1. Your explanation of the reason why you were unable to give a notification until now us because you believed that you already possessed Enhanced Protection at the time that notifications for Fixed Protection were being accepted. You said that it was not until 7 July 2015 that you were formally informed by your adviser that Enhanced Protection had not been applied for, leading to your decision to apply for Fixed Protection as an alternative, although this was after the deadline of 5 April 2012.
>
> 2. Information and documents provided in your agent's letters of 30 September 2015, 7 June 2016, 28 September 2016, 18 January 2017 and 11 April 2017 to HMRC.
>
> 3. Your agent Mr Gary Brothers' argument in his letter dated 30 September 2015 that the circumstances leading to the notification are considered to be a reasonable excuse. (Your advisor's insurers approached Mr Gary Brothers of Independent Taxes and Forensic Services Ltd to make the late notification for Fixed Protection on your behalf).
>
> I have considered all these representations and decided that there is nothing that has been provided that would reasonably stop me exercising my discretion under regulation 6(1), considering that there has been failure to comply with the requirements of regulation 4. Specifically, I refer to the failure to submit the notice before 5 April 2012 as required by regulation 4(2)(b)(i), and that unlike previous legislation for Enhanced Protection and Primary Protection, there is no provision in the Fixed Protection legislation allowing for late notifications to be accepted where there is a reasonable excuse for not having met the deadline and the notification was made without unreasonable delay once the reasonable excuse ended. The lack of such a provision reflects Parliament's intention to limit the circumstances in which HMRC may accept a late application for Fixed Protection, and I have decided that it would be contrary to that intention were I to exercise discretion to allow your late notification."

13. Independent Tax requested reviews of the Decisions and stated their understanding that HMRC had seen nothing that would prevent them from accepting the late application form. HMRC responded with letters dated 31 July 2017 which provided the following clarification:

> "Your reading of paragraph two on page two 'I have considered …' does not reflect my intention. I apologise if my meaning was unclear, but for clarity the intention was 'I have considered all the information made available to HMRC and cannot see any reason to accept a late application. Therefore, I will be

> exercising my discretion under regulation 6(1) of SI 2011/1752 to refuse to accept the late notification, on the basis that there has been a failure to comply with the requirements of regulation 4. Specifically, I refer to the failure to submit the notice before 4 April 2012 as required by regulation 4(2)(b)(i)'".

14. The Appellants continued to request reviews, which resulted in review conclusion letters dated 11 January 2018 ("the Reviews"), again in substantially similar terms. The relevant parts of the Reviews were as follows:

> "Regulation 4 confines itself to the form and timing limitations of the notice. The discretion implied in Regulation 6 is limited to the elements of Regulation 4 only and is not a broader mandate to consider whether a reasonable excuse exists.
>
> …
>
> In the circumstances of this case I agree that HMRC were correct to refuse to accept the notification under Paragraph 14(1) of Schedule 18 to the Finance Act 2011, as the requirement under Regulation 4(2)(b)(i) of the Registered Pension Schemes (Lifetime Allowance Transitional Protection) Regulations 2011 is not satisfied.
>
> Additionally I have concluded that the legislation covering notifications under Paragraph 14(1) of Schedule 18 to the Finance Act 2011 does not allow for a consideration of reasonable excuse. I have not therefore gone on to consider the individual circumstances of this case and whether a reasonable excuse might exist."

15. The Appellants filed notices of appeal which were received by the Tribunal on 9 February 2018.

**ISSUES**

16. The following issues arise for determination:

(1) The legal framework.

(2) Whether the appeals are against the Decisions or the Reviews.

(3) The scope of the Tribunal's jurisdiction.

(4) Whether or not HMRC were entitled to take the view that the Notices did not satisfy the requirements in regulation 4.

(5) Whether or not the Decisions were reasonable.

(6) If the Decisions were not reasonable, whether or not any relief is to be granted (and if so, the terms of such relief).

17. We note that the Appellants' grounds for appeal included reliance upon section 118(2) of the Taxes Management Act 1970 to the effect that there was a freestanding jurisdiction for HMRC and the Tribunal to consider whether or not a late notification should be allowed in the event of a reasonable excuse. However, Mr Collins helpfully informed us during his submissions that he was no longer advancing this argument. He was right to do so in the light of the Court of Appeal's judgment in *Raftopoulou v Revenue and Customs Commissioners* [2018] EWCA Civ 818, [2018] STC 988 which held that this cannot apply where the time limit related to a voluntary application for a benefit. As such, despite the references to "reasonable excuse" in the correspondence and grounds for appeal, the relevance of the reason for the late notification is as to whether or not this can be considered in the context of the Tribunal's consideration of the exercise of HMRC's discretion rather than any argument that there is a freestanding jurisdiction to extend time if a reasonable excuse exists.

**THE LEGAL FRAMEWORK**

18. There was no dispute about the legal framework.

19. Paragraph 14 of Schedule 18 to the Finance Act 2011 provides for the ability to give notice of an intention to treat their lifetime allowance to the higher of the standard lifetime allowance and £1,800,000 subject to various conditions.

20. The 2011 Regulations set out the notice, certification and appeal provisions as follows:

> "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; or
>
> (ii) if it relates to an individual described in sub-paragraph (1A) of paragraph 14, 5 April 2014.
>
> (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."

21. The Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006 ("the 2006 Regulations") (as amended by The Registered Pension Schemes (Enhanced Lifetime Allowance) (Amendment) Regulations 2006) are materially different to the 2011 Regulations in that they specifically deal with late notification of a notice at regulation 12 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 .

(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."

**THE APPEALABLE DECISIONS**

***Submissions***

22. The significance of this issue is that the Decisions make specific reference to the exercise of a discretion whereas the Reviews (on one reading) appear to suggest that HMRC have no discretion.

23. Mr Collins submitted that the decisions under appeal were the Reviews or alternatively the Decisions as varied by the Reviews. He argued that the decision of the original officer is pending the review and only becomes final following a review. He relied upon the First-tier Tribunal decision of *Half Penny Accountants Ltd v HMRC* [2016] UKFTT 45 (TC) (Judge Zachary Citron and Ms Elizabeth Bridge) at [38] to [40]:

"Do we have jurisdiction over the review decision?

[38] This tribunal's jurisdiction is limited to those matters provided for by statute and such matters include, under s83(1) of the Act, the requirement of any security under paragraph 2 of Schedule 11 to the Act. The question before us is to identify the decision that gives rise to that "requirement". Whilst service of the notice requiring security is clearly a necessary step to creating that requirement, it seems equally clear to us that, if the review procedure is initiated under s83C of the Act, such that HMRC "must" undertake a review, that first step becomes insufficient in and of itself since, under s83F(5)(c), that original decision can be cancelled on conclusion of the review. Once a review becomes compulsory under s83C, it seems to us that the original decision goes into a state of suspension; the decision that truly establishes the "requirement" is therefore that taken under s83F(5)(a) at conclusion of the review to uphold the original decision. It is thus over the latter decision, the review decision, that our supervisory jurisdiction rests.

[39] We are fortified in this view by the following aspects of the review process:

(1) Once the review process is initiated, no appeal can be made to this tribunal until it has concluded.

(2) HMRC must give their reasoning when notifying the conclusions of the review.

(3) The review decision is a different decision from the decision originally taken, as HMRC are required, upon review, to "have regard to" and "take into account" matters which were not before the original decision-maker (see sub-sections 83F(3) and (4)). Furthermore, the nature and extent of the review are matters for HMRC's discretion (s83F(2)): in this case, it is clear to us that Mr Littlewood considered the matter afresh.

[40] We therefore are of the view that our jurisdiction is over the review decision, as this was the decision that established the requirement to provide security."

24. Mr Bradley submitted that the appeals are in respect of the Decisions. The case is to be treated in the same way as other direct tax appeals. He relied upon sections 49A, 49B, 49E, 49F, 49G and 49I of the Taxes Management Act 1970, which provide as follows:

"49A Appeal: HMRC review or determination by tribunal

(1) This section applies if notice of appeal has been given to HMRC.

(2) In such a case—

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),

(b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or

(c) the appellant may notify the appeal to the tribunal (see section 49D).

(3) See sections 49G and 49H for provision about notifying appeals to the tribunal after a review has been required by the appellant or offered by HMRC.

(4) This section does not prevent the matter in question from being dealt with in accordance with section 54 (settling appeals by agreement).

49B Appellant requires review by HMRC

(1) Subsections (2) and (3) apply if the appellant notifies HMRC that the appellant requires HMRC to review the matter in question.

(2) HMRC must, within the relevant period, notify the appellant of HMRC's view of the matter in question.

(3) HMRC must review the matter in question in accordance with section 49E.

(4) The appellant may not notify HMRC that the appellant requires HMRC to review the matter in question and HMRC shall not be required to conduct a review if—

(a) the appellant has already given a notification under this section in relation to the matter in question,

(b) HMRC have given a notification under section 49C in relation to the matter in question, or

(c) the appellant has notified the appeal to the tribunal under section 49D.

(5) In this section "relevant period" means—

(a) the period of 30 days beginning with the day on which HMRC receive the notification from the appellant, or

(b) such longer period as is reasonable.

…

49E Nature of review etc

(1) This section applies if HMRC are required by section 49B or 49C to review the matter in question.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purpose of subsection (2), HMRC must, in particular, have regard to steps taken before the beginning of the review—

(a) by HMRC in deciding the matter in question, and

(b) by any person in seeking to resolve disagreement about the matter in question.

(4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that HMRC's view of the matter in question is to be—

(a) upheld,

(b) varied, or

(c) cancelled.

(6) HMRC must notify the appellant of the conclusions of the review and their reasoning within—

(a) the period of 45 days beginning with the relevant day, or

(b) such other period as may be agreed.

(7) In subsection (6) "relevant day" means—

(a) in a case where the appellant required the review, the day when HMRC notified the appellant of HMRC's view of the matter in question,

(b) in a case where HMRC offered the review, the day when HMRC received notification of the appellant's acceptance of the offer.

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that HMRC's view of the matter in question (see sections 49B(2) and 49C(2)) is upheld.

(9) If subsection (8) applies, HMRC must notify the appellant of the conclusion which the review is treated as having reached.

49F Effect of conclusions of review

(1) This section applies if HMRC give notice of the conclusions of a review (see section 49E(6) and (9)).

(2) The conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question.

(3) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (2) applies.

(4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49G.

49G Notifying appeal to tribunal after review concluded

(1) This section applies if—

(a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or

(b) the period specified in section 49E(6) has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period.

(3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this section "post-review period" means—

(a) in a case falling within subsection (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6), or

(b) in a case falling within subsection (1)(b), the period that—

(i) begins with the day following the last day of the period specified in section 49E(6), and

(ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(9).

…

49I Interpretation of sections 49A to 49H

(1) In sections 49A to 49H—

(a) "matter in question" means the matter to which an appeal relates;

(b) a reference to a notification is a reference to a notification in writing.

(2) In sections 49A to 49H, a reference to the appellant includes a person acting on behalf of the appellant except in relation to—

(a) notification of HMRC's view under section 49B(2);

(b) notification by HMRC of an offer of review (and of their view of the matter) under section 49C;

(c) notification of the conclusions of a review under section 49E(6); and

(d) notification of the conclusions of a review under section 49E(9).

(3) But if a notification falling within any of the paragraphs of subsection (2) is given to the appellant, a copy of the notification may also be given to a person acting on behalf of the appellant."

***Discussion***

25. We find that the Appeals are in respect of the Decisions in the present case. This is for the following reasons.

26. First, section 49G(4) states that the Tribunal is to determine "the matter in question". Section 49I(1)(a) defines "the matter in question" as "the matter to which an appeal relates". It is clear from sections 49A to 49H (and in particular 49A(2), 49B(3) and 49E(3)) that "the matter in question" is the decision which is itself being reviewed.

27. Secondly, we agree with Mr Bradley that sections 49A, 49E and 49F are of particular relevance. They envisage the review being a separate process to the Decisions. In particular, by virtue of section 49F, in the event of there being no appeal to the Tribunal, the review has the effect of an agreement in writing settling the matter. This does not treat the review as a new decision.

28. Thirdly, we agree with Mr Collins' secondary submission that a review has the capacity to vary the original decision. This arises out of the nature of the review within section 49E(5). However, this does not mean that the review replaces the decision; the decision remains in existence as varied.

29. Fourthly, a distinction is to be made between commentary within a review decision and the outcome of a review decision. Where a review upholds a decision, the decision effectively remains unchanged. It might be that in some cases a review will provide a different basis for a decision. However, it is arguable that in such circumstances the original decision is technically being varied. In the present case, we find that the review officer was expressly upholding the Decisions upon the basis that they were made.

30. Fifthly, albeit in the context of a VAT appeal, the Upper Tribunal dealt with the interplay between a decision and a review as follows in *HMRC v NT ADA Limited* [2018] UKUT 0059 (TCC) (Judge Roger Berner and Judge Sarah Falk) at [26] to [33]:

> "[26] Section 83 contains a right of appeal against an assessment made under s 76 and, again, there is nothing to indicate that this right is dependent on the assessment having been made or notified in a particular form, or on it having been accompanied by an offer of a review. It simply requires there to have been an assessment made (and we would add notified) under s 76.
>
> [27] Section 83A, the provision which imposes an obligation to offer a review, refers to a "decision" of HMRC in respect of which "an appeal lies under section 83". The term "decision" does not appear in s 76 but s 83(2) makes it clear that the reference to a decision with respect to which an appeal lies under s 83 includes any matter listed in s 83(1). In other words, it includes the amount of any penalty assessed under s 76, within s 83(1)(q).
>
> [28] Whilst it is clear that Parliament did intend that a person receiving an appealable decision should be offered a review, we can see nothing in the terms of s 83A to support the proposition that failure to do so renders an assessment invalid, invalidly notified, or not capable of appeal. Rather, the language indicates that the opposite is the case.

> [29] In our view both s 83A(1) and (2) are written in terms of the offer of a review being separate from, albeit something that should be issued alongside, the notification of an appealable decision. The decision itself is the assessment, or strictly the "amount" assessed (s 83(1)(q)). Section 83A(1) is written on the basis that there is a decision in respect of which an appeal lies. If there was no valid, notified, assessment under s 76 then it is hard to see how any obligation to offer a review would arise. It is the existence of an appealable decision which gives rise to the obligation to offer a review.
>
> [30] This is also supported by s 83A(2). This requires the offer of a review to be made "at the same time" as the decision is notified. This carries a clear implication that the decision has an existence that is independent of the review offer, and that such offer is not part of the decision, or its notification, but is to be notified alongside it.
>
> [31] This interpretation of s 76, s 83 and s 83A is reinforced by a consideration of the wider context and the consequences that would flow both from this approach and from the approach contended for by Mr Gordon.
>
> [32] On the interpretation we have adopted it is clear that a breach by HMRC of its duty to offer a review does not prevent an appeal being made to the FTT. We disagree with Mr Gordon's suggestion that s 83G is entirely predicated on the assumption that s 83A has been complied with. If a review is not offered then an appeal can still be brought within the 30 day period referred to in s 83G(1), or later with the permission of the tribunal under s 83G(6). In contrast, NT ADA's case is that the FTT has no jurisdiction. Although Mr Gordon submitted that this was because the decision itself was invalid (or more accurately invalidly notified), so that no action need be taken to challenge it, the absence of any recourse to the FTT would be a surprising result.
>
> [33] Sections 83A to 83G VATA were included in the legislation as part of the changes made in 2009 to reform the tax appeals process and create the new tax tribunal system. Prior to that time there was no statutory review process, and VAT appeals were notified direct to the VAT and duties tribunals. The reforms made a significant number of changes, which included giving an additional right in VAT cases, namely the right to opt for a review before deciding whether to appeal to the (now unified) tribunal. In the absence of clear words we do not think that Parliament can be taken to have intended to have removed the (pre-existing) right to appeal to a tribunal against a decision falling within s 83 VATA in the event that HMRC failed to carry out its new obligation to offer a review, or to have intended that future decisions that were not accompanied by an offer of a review should be invalid."

## THE SCOPE OF THE TRIBUNAL'S JURISDICTION

### *Submissions*

31. Mr Collins submitted that the Tribunal has the jurisdiction to consider whether or not HMRC's exercise of its discretion to refuse the Notices was unreasonable. Mr Collins' starting point was to adopt the following comments of Judge Richard Thomas in *Youngman v Revenue and Customs Commissioners* [2017] UKFTT 893 (TC) ("*Youngman*") at [76] to [78]:

> "[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 nonreinstatement).
>
> [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."

32. Mr Collins' further submissions were that: it would be a most surprising result if the Tribunal had discretion to direct HMRC to accept a notice but does not have jurisdiction to consider HMRC's exercise of discretion; the wording of regulation 7(3) of the 2011 Regulations substantially follows the wording of regulation 12(7) of the 2006 Regulations and so should not result in a narrower jurisdiction; it would be odd if taxpayers were required to seek redress by way of judicial review in these circumstances; and it is difficult to see that there could ever be a dispute as to whether or not regulation 4 has been complied with, removing any need for regulation 7(3) if HMRC's construction is correct.

33. Mr Bradley submitted that the Tribunal is not bound by *Youngman* and it should not be followed, particularly as the comparison between the 2006 Regulations and the 2011 Regulations is not an appropriate one. He further submitted that Regulation 7(3) is plainly exhaustive of the Tribunal's jurisdiction and that "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" means "must only" make such a determination.

34. Mr Bradley also argued that there cannot be a discretion here as the legislation only allows the Tribunal to look at whether the conditions are satisfied, not a general review of the exercise of the discretion. He noted that the Tribunal has no general supervisory jurisdiction; instead, its jurisdiction is derived from the relevant legislation. We were referred to *Revenue and Customs Commissioners v Noor* [2013] UKUT 71 (TCC), [2013] STC 998 ("*Noor*") at [25] to [31] in this regard. We were also referred to Neill LJ's judgment in *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 ("*John Dee Ltd*") at 952 d to j to the following effect:

> "It is true that there is no express provision in Sch 8 to the 1983 Act or elsewhere in the 1983 Act governing the powers of a value added tax tribunal on an appeal under s40. I am, however, unable to accept Mr Englehart's general proposition that, in the absence of any express limitation, the powers of a tribunal are akin to those of the Court of Appeal. In my judgment it is necessary in each case to examine the nature of the decision against which the appeal is brought. It is also necessary to take account of the fact that, by virtue of para 1(1) of Sch 7 to the 1983 Act, VAT is under the care and management of the commissioners.
>
> In furtherance of his argument that, once the tribunal had decided that the decision of the commissioners was flawed, it could substitute its own discretion, counsel for the company was constrained to submit that it was for the tribunal to decide whether it appeared to it 'requisite for the protection of the revenue' to require a taxable person to give security. I am quite unable to accept this submission. It seems to me that the 'statutory condition' (as Mr Richards termed it) which the tribunal has to examine in an appeal under s40(1)(n) is whether it appeared to the commissioners requisite to require

> security. In examining whether that statutory condition is satisfied the tribunal will, to adopt the language of Lord Lane, consider whether the commissioners had acted in a way in which no reasonable panel of commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The tribunal may also have to consider whether the commissioners have erred on a point of law. I am quite satisfied, however, that the tribunal cannot exercise a fresh discretion on the lines indicated by Lord Diplock in *Hadmor*. The protection of the revenue is not a responsibility of the tribunal or the court.
>
> I do not consider that it is necessary or would be appropriate in this case to give guidance as to other categories of appeal under s40(1), other than to say that in my view the function and powers of a tribunal in each case will depend in large measure on the nature of the decision appealed against and of course any special statutory provisions. It may be noted, however, that in an appeal under s40(1)(h) against a refusal of an application under s29 of the 1983 Act similar questions to those raised in the present case may arise. Thus an application under s29 is not to be refused by the commissioners 'unless it appears to them necessary for the protection of the revenue' (see s29(4) and (5))."

35. Mr Bradley recognised that the jurisdiction was treated as supervisory in *Hymanson v HMRC* [2018] UKFTT 0667 (TC) (Judge Philip Gillett). However, he argued that whether or not the jurisdiction is termed supervisory is a distinction without a difference if that supervisory jurisdiction is so circumscribed that the legislation sets out what is to be considered.

***Discussion***

36. We find that the Tribunal's jurisdiction is supervisory and is not restricted to whether or not the conditions of regulation 4 have been satisfied. However, in exercising that jurisdiction, the Tribunal must take sufficient account of whether or not HMRC were entitled to reach the view that the conditions of regulation 4 have not been satisfied. This is for the following reasons.

37. First, we do not accept that "must" is to be construed as "must only". Regulation 7(3) does not state that it is exhaustive as to the factors which the Tribunal may consider. Indeed, regulation 7(3) does not on its face restrict the factors which the Tribunal may consider; instead, it specifies a factor which must be considered.

38. Secondly, regulation 6 provides for HMRC's discretion to refuse to accept the notice if it does not satisfy the requirements in regulation 4. As such, regulation 6 provides a threshold requirement (namely, non-compliance with the requirements in regulation 4) before HMRC are entitled to exercise the discretion to refuse to accept the notice. Regulation 7(1) is clear in saying that the appeal is against the refusal by HMRC to accept the notice. As such, the appeal is against the exercise of the discretion as opposed to being merely as to whether or not the threshold has been met.

39. Thirdly, we do not accept that the principles established by *Noor* or *John Dee Ltd* are inconsistent with this. Crucially, the Tribunal's supervisory jurisdiction is derived from the wording of regulation 7 rather than there being any suggestion of a general supervisory power.

40. Fourthly, it is important not to see regulation 7 solely through the prism of late notifications. Regulation 4 of the 2011 Regulations also sets out the contents and form of the notice. We accept that it is difficult to envisage what would constitute an unreasonable decision if HMRC are entitled to consider that the conditions of regulation 4 have not been satisfied when the relevant failure is that of timing. However, the position may be different if the relevant condition is one of content or form; for instance, a technical failure which causes no prejudice

or misunderstanding. As such, the significance of the Tribunal's determination as to whether or not HMRC were entitled to reach the view that the conditions of regulation 4 have not been satisfied will depend upon the factual matrix and the basis of HMRC's decision itself.

41. We note that we have reached this conclusion by a different route to that set out in *Youngman*. We do not agree with *Youngman* (or with Mr Collins' submissions) that we are taking a liberal interpretation of the 2011 Regulations or that this is required as a result of differences between the 2011 Regulations and the 2006 Regulations. In any event, we are not bound by *Youngman* as it is a First-tier Tribunal decision, was a decision relating to an application to reinstate the appeal and a cross-application for a strike out, and the Tribunal expressly refused to make a final determination on the proper construction of the 2011 Regulations.

**THE REGULATION 4 REQUIREMENTS**

42. There is no dispute that the Notices were late and no issue about any of the other requirements of regulation 4. It follows that we find that HMRC were entitled to take the view that the Notices did not satisfy the requirements in regulation 4; namely, the requirement at regulation 4(2)(b)(i) that it be received by HMRC by 5 April 2012.

**WHETHER OR NOT THE DECISIONS WERE REASONABLE**

***Submissions***

43. Mr Collins submitted that HMRC treated themselves as not holding a discretion as to the refusal of the Notices and that this inevitably caused such refusal to be unreasonable. His primary argument was that this was expressly stated in the Reviews. His secondary argument was that the Decisions themselves treated the discretion as limited.

44. Mr Bradley did not accept that the Reviews fettered HMRC's discretion. Although unhappily worded, the Reviews were addressing the Appellants' arguments as to the existence of a free-standing "reasonable excuse" jurisdiction rather than limiting the jurisdiction. In any event, the Decisions expressly referred to discretion.

***Discussion***

45. For the reasons that we have set out above, this appeal is against the Decisions rather than the Reviews. We agree with Mr Bradley that the Decisions expressly acknowledged the existence of a discretion and took into account the circumstances of the case, including the reasons for the Notices being late, before exercising that discretion. Although not relevant given this finding, we also agree with Mr Bradley that the proper construction of the Reviews is that the refusal to consider the individual circumstances was in fact a response to the argument that HMRC should consider the existence of a "reasonable excuse".

46. We find that the exercise of HMRC's discretion was reasonable. The fact that HMRC were entitled to reach the view that the Notices did not satisfy the requirements in regulation 4 is of particularly strong weight in the present case. This is because the nature of the non-compliance is only in respect of the timing and we find that HMRC were entitled to consider (as stated in the Decisions) that it would be contrary to the legislation to allow a late notification. It is of note that the Decisions set out Independent Taxes' representations and then decided that, "there is nothing that has been provided that would reasonably stop me exercising my discretion." We do not read the Decisions as stating that the discretion is fettered when a Notice is late, but instead that the representations have been balanced against HMRC's view of the legislative intention. We find that it cannot be said that, in reaching their conclusion, HMRC acted in a way in which no reasonable panel of commissioners could have acted or that they took into account some irrelevant matter or disregarded something to which they should have given weight. Indeed, we agree with HMRC's conclusion.

47. We also note that the Appellants have not pointed to any specific element of the factual matrix which they say has not been given appropriate weight, instead drawing upon the overall circumstances of the cause of the delay. They have not explained why it is said this should override the deadline set by the 2011 Regulations. Further, the Appellants have not provided any evidence as to the extent to which the Appellants are prejudiced by the refusal, whether or not the Appellants have pursued a claim against AFH or the reason for the delay between it becoming clear to AFH on 22 December 2014 that no certificate had been obtained or applied for and the Appellants being informed on 7 July 2015.

**RELIEF**

48. It follows that there is no need for us to consider the question of relief. However, if we are wrong in our analysis of the Decisions (and so if HMRC did treat its discretion as fettered), we still decline to interfere with the Decisions. This is for the following reasons.

49. Regulation 7 of the 2011 Regulations provides an express discretionary power to direct the acceptance of the notification and issue a certificate. This does not restrict the Tribunal to requiring HMRC to retake the Decisions. For the reasons set out at paragraphs 46 and 47 above, we find that the Decisions were correct and so have no basis for directing the acceptance of the notification or issuing of a certificate.

50. If we are wrong as to the Tribunal's powers and if we are instead restricted to requiring HMRC to retake a decision if it is unreasonable, we find that it is inevitable that the Decisions would have been the same if the discretion had not been treated as fettered (although, again, this only even arises if we are wrong in our findings above that HMRC did not treat their discretion as fettered). Again, this is for the same reasons as set out in paragraph 46 and 47 above. In this regard, we bear in mind the following comments of Neill LJ in *John Dee Ltd* at 953a (see also *GB Housley Ltd v HMRC* [2014] UKUT 320 (TCC) at [11]):

> "It was conceded by Mr Engelhart, in my view rightly, that where it is shown that had the additional material been taken into account, the decision would *inevitably* have been the same, a tribunal can dismiss an appeal."

**DISPOSITION**

51. It follows that we dismiss the appeal for the reasons set out above.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

52. 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 QC**
**TRIBUNAL JUDGE**

**RELEASE DATE: 03 FEBRUARY 2020**