[2021] UKUT 0273 (TCC)

Appeal number: UT/2020/000388

INCOME TAX – whether FTT had power to review HMRC's refusal to exercise discretion to accept taxpayers' late elections for fixed protection – no – taxpayers' appeals dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

(1) THE EXECUTORS OF DAVID HARRISON (DECEASED) **(2) SIMON HARRISON**	**Appellants**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL: **JUDGE JONATHAN RICHARDS**
JUDGE ASHLEY GREENBANK

Sitting in public at The Royal Courts of Justice, Strand, London on 27 October 2021

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

Charles Bradley, instructed by the General Counsel and Solicitor for Her Majesty's Revenue & Customs for the Respondents

DECISION

1. Pension benefits that taxpayers build up under registered pension schemes are subject to a "lifetime allowance" so that, very broadly, benefits in excess of that allowance incur an additional tax charge. For the tax years 2010-11 and 2011-12, the lifetime allowance was £1,800,000. That figure was subsequently reduced to £1,500,000 for tax years 2012-13 and 2013-14. Recognising that taxpayers may have made decisions based on their expectation that the lifetime allowance would continue at £1,800,000, paragraph 14 of Schedule 18 of Finance Act 2011 entitled taxpayers, by notice to HMRC, to elect for what we will describe as "Fixed Protection 2012", to distinguish it from other types of fixed protection. A taxpayer making an election for Fixed Protection 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.

2. The deadline for submitting a notice electing for Fixed Protection 2012 was 6 April 2012 although HMRC have a discretion to accept a notice served after that date. The Appellants in this case submitted their notices after the deadline of 5 April 2012 and HMRC refused to accept them. This appeal is against a decision of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 3 February 2020 (the "Decision") and reported at [2020] UKFTT 68 (TC). At issue is the extent to which a tribunal has the power to interfere, or should in this case interfere, with HMRC's refusal to accept those notices.

The Legal Framework

3. As we have noted, paragraph 14 of Schedule 18 to the Finance Act 2011 ("Paragraph 14") gives a taxpayer the right to make an election for Fixed Protection 2012. Provisions regulating the exercise of that right are set out in the Registered Pension Schemes (Lifetime Allowance Transitional Protection) Regulations 2011 (the "Regulations").

4. Regulation 4 sets out requirements that a notice under Paragraph 14 must satisfy. It provides, so far as material, 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; …

5. It was common ground that the Appellants were both individuals described in paragraph (1) of Paragraph 14 and that the applicable deadline was, therefore, 5 April 2012.

6. Regulation 5 provides:

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.

7. Regulation 5 does not itself set out any criteria that HMRC must apply when deciding whether to "accept" a notice under Paragraph 14; it just specifies the requirement for a certificate. However, Regulation 6 expands on the scope of HMRC's power to refuse to "accept" a Paragraph 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.

8. It was common ground that Regulation 6 has the following effect:

(1) If a Paragraph 14 notice satisfies all the requirements of Regulation 4, HMRC are obliged to accept it. There is no residual discretion to reject valid Paragraph 14 notices.

(2) If a Paragraph 14 notice does not meet the requirements of Regulation 4, HMRC are entitled to reject it, but they retain a discretion to accept it.

9. Regulation 7 provides as follows:

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.

10. We will address the competing contentions of the parties on the scope of the tribunal's jurisdiction later in this decision. However, it can be seen that there is at least some tension between the provisions of Regulation 7(1) and those of Regulation 7(3). The appellants stress the width of Regulation 7(1) in conferring a right of appeal against a "refusal to accept" a Paragraph 14 notice. That, they argue, gives a tribunal power to review the exercise of HMRC's discretionary power to accept or refuse a Paragraph 14 notice that does not meet the requirements of Regulation 4 (for example because it is delivered too late). HMRC by contrast point to the more limiting words of Regulation 7(3) arguing that the tribunal has power only to consider the issue of whether the requirements of Regulation 4 are met and has no general power to review HMRC's exercise of discretion.

11. Finally in this section we note a provision that is <u>not</u> present in the Regulations. The Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006 (the "Enhanced Protection Regulations") dealt with notifications electing for "enhanced protection" and "primary protection", which are different from the elections for Fixed Protection 2012 that are relevant to these appeals. Regulation 12 of the Enhanced Protection Regulations dealt specifically with the situation where a taxpayer submitted a late notification. The broad effect of that regulation is 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. Moreover, Regulation 12 of the Enhanced Protection Regulations expressly gave the tribunal the power, on an appeal notified to it, to form its own view as to whether the requirements of Regulation 12 were met. There is no direct analogue of that provision in the Regulations as applicable to Fixed Protection 2012.

The Decision

Relevant facts

12. There is no appeal against the FTT's findings of fact and we therefore set those out in summary form with references in numbers in square brackets being to paragraphs of the Decision. The FTT's findings were themselves drawn entirely from a statement of facts that the Appellants and HMRC had agreed and the FTT heard no witness evidence.

13. The Appellants took financial advice on their pensions from AFH Wealth Management ("AFH"). Between 2006 and 2008 there were some discussions involving AFH as to whether the Appellants should apply for enhanced protection in relation to their pensions. That enhanced protection would have protected the Appellants from any tax charge if their pension benefits exceeded the lifetime allowance. However, that protection would come at a price not least because it would be lost if the Appellants made any future contributions to a registered pension scheme. Mr Mason, a consultant at AFH, thought that the price was not worth paying and accordingly no application for enhanced protection was ever made. However, the Appellants were not informed of Mr Mason's conclusion ([7] to [8]).

14. Mr Mason came to think (wrongly) that an election for enhanced protection had been made. Since Fixed Protection 2012 was not available to taxpayers who had elected for enhanced protection, he did not give the Appellants any advice on the availability of Fixed Protection 2012. In April 2014, the Appellants asked Mr Mason specifically whether they needed to apply for fixed protection. Because of his mistaken belief that the Appellants benefited from enhanced protection, he advised that this was unnecessary. However, the dialogue prompted a review of Mr Mason's files and by 22 December 2014 it became clear to AFH that no application for enhanced protection had ever been made. AFH duly informed their insurers of a potential claim against them and Mr Mason was dismissed ([9] and [10]).

15. AFH told the Appellants on 7 July 2015 that they did not benefit from enhanced protection. The Appellants engaged Independent Tax and Forensic Services LLP ("Independent Tax"). Independent Tax filed applications for Fixed Protection 2012 on behalf of the Applicants on 28 August 2015, but HMRC did not receive those applications until 30 September 2015. In their covering letter submitting the applications, Independent Tax sought to rely on the provisions for "reasonable excuse" set out in the Enhanced Protection Regulations. In fact, these regulations were inapplicable to the Appellants' claims for Fixed Protection 2012. Those applications were governed by the Regulations which, as we have noted, contained no provisions entitling taxpayers to have late applications accepted where the requisite reasonable excuse was present ([11]).

16. Further correspondence ensued between Independent Tax and HMRC. HMRC asked for further information on the circumstances in which the Paragraph 14 elections came to be made late, which was duly provided. Independent Tax came to realise that the Regulations contained no concept of a "reasonable excuse" but argued that s118 of the Taxes Management Act 1970 meant that, because of the presence of a reasonable excuse, the Paragraph 14 notices should be treated as made in time. They also argued that HMRC should exercise their discretion to accept late notices.

17. On 2 June 2017, HMRC made a decision refusing to accept the late Paragraph 14 notices. That decision was clarified in an HMRC letter of 31 July 2017 and upheld following an HMRC review performed on 11 January 2018. We will not seek to summarise the reasons given in HMRC's decision or review letters because the correct interpretation of the reasons given was a matter of considerable dispute between the parties. The Appellants' position is that HMRC refused even to consider exercising

their discretion to accept late notices because they were wrongly influenced by the fact that the Regulations contained no provision permitting late notices to be accepted on the grounds of "reasonable excuse". HMRC's position is that HMRC properly considered their exercise of discretion but refused to exercise it in the circumstances of the Appellants' cases.

18. Whatever the reasons underpinning HMRC's decision, it was clear that HMRC were refusing to accept the Appellants' late Paragraph 14 notices and the Appellants duly notified their appeal to the FTT.

The FTT's conclusions

19. It was common ground before the FTT, as before us, that the Appellants' Paragraph 14 notices did not meet the requirements of Regulation 4 since the Appellants submitted them later than the prescribed deadline of 5 April 2012. Accordingly, if as HMRC argued, Regulation 7(3) limited the FTT's jurisdiction to a consideration of whether the requirements of Regulation 4 were met, the appeal would necessarily fail. However, the FTT accepted the Appellants' arguments that it had power to consider the wider question of whether it was reasonable for HMRC to refuse to exercise discretion to accept later Paragraph 14 notices. HMRC challenge almost all the reasons that the FTT gave for that conclusion and so we set out the FTTs reasoning in full:

> 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.
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> 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.

20. The FTT therefore went on to review HMRC's exercise of discretion. The FTT concluded at [46], in disagreement with the Appellants, that HMRC had not fettered their discretion by refusing to consider accepting late Paragraph 14 notices. The FTT also decided, at [46] and [47], that HMRC's decision was reasonable and involved no overlooking of relevant considerations. The FTT went further, saying that it agreed with the way that HMRC had exercised their discretion

21. At [48] to [50] the FTT considered what relief it should order if, contrary to its conclusion, HMRC had unduly fettered the exercise of their discretion. The FTT concluded that, in such a case, it should not exercise its power in Regulation 7 to direct HMRC to accept the late Paragraph 14 notices and issue a certificate, reasoning that HMRC's decision would inevitably have been the same, even if they had not fettered their discretion.

The Grounds of Appeal

22. With permission given by the Upper Tribunal, the Appellants appeal against the Decision on three grounds:

> (1) The FTT was wrong to conclude that HMRC had not fettered the exercise of their discretion.
>
> (2) The FTT was wrong to base its review of HMRC's decisions on the original decisions, rather than HMRC's review letters.
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> (3) It was procedurally unfair for the FTT to reach the conclusion that, even if HMRC had fettered their discretion, they would "inevitably" have reached the same conclusion without offering the parties the opportunity to make submissions on that question.

23. In their Respondents' Notice, HMRC submit that the FTT did not have jurisdiction to review the exercise of HMRC's discretion and that the sole issue on which the FTT had jurisdiction was the question whether the Appellants' Paragraph 14 notices satisfied the requirements of Regulation 4.

24. Both parties agree that we should decide the following issues in order to determine both the appeal and the issues raised in HMRC's Respondents' Notice. We will structure the remainder of this decision by reference to those issues:

(1) Issue 1 – whether the FTT had jurisdiction to hear an appeal against HMRC's exercise of discretion.

(2) Issue 2 – whether HMRC fettered its discretion to accept the Appellants' late Paragraph 14 notices.

(3) Issue 3 – if the Upper Tribunal allows the Appellants' appeals, whether it should direct HMRC to accept the Appellants' Paragraph 14 notices.

25. The parties were also agreed that Issue 1 was a threshold issue and neither Issue 2, nor Issue 3, would arise if Issue 1 is resolved in favour of HMRC.

Issue 1

26. Both parties were agreed that the FTT has no inherent judicial review jurisdiction. It only has the powers conferred on it by statute or statutory instrument. Therefore, if the FTT does have power to review the exercise of HMRC's discretion to accept late Paragraph 14 notices, that power can only come from the Regulations. Accordingly, Issue 1 involves a construction of the Regulations which, like all questions of construction, must have due regard to the context in which the Regulations were enacted and their purpose.

The correct approach to the question of construction

27. The parties had diametrically opposed positions on how the question of construction should be approached. The Appellants argue that the Regulations would need to contain express words or a necessary implication to exclude their right to make a public law challenge to HMRC's exercise of discretion. HMRC argue that express words, or necessary implication, would be needed to give the Appellants such a right.

28. The Appellants support their case by reference to paragraph 45 of Simler LJ's judgment in *Beadle v HMRC* [2020] STC 1058, where she said this:

> 45. Mr Gordon submits that only express statutory language is capable of excluding such a challenge. Like the UT, I disagree. In my judgment the express words used by a statutory scheme looked at in isolation may not be sufficient on their own to restrict or exclude public law challenges, but that may be the clear and necessary implication when the relevant statutory scheme is construed as a whole and in light of its context and purpose.

29. We do not, however, consider that this paragraph has the broad effect for which the Appellants argue. Paragraph 45 of Simler LJ's judgment follows on from paragraph 44 in which she said:

> Where a public body brings enforcement action against a person in a court or tribunal (including a court or tribunal whose only jurisdiction is statutory) the promotion of the rule of law and fairness means, in general, that person may defend themselves by challenging the validity of the enforcement decision or some antecedent decision on public law grounds, save where the scope for challenging alleged unlawful conduct

> has been circumscribed by the relevant statutory scheme, which excludes such a challenge. The question accordingly is whether the statutory scheme in question excludes the ability to raise a public law defence in civil (or criminal) proceedings that are dependent on the validity of an underlying administrative act.

30. Therefore, in paragraph 44, Simler LJ was considering the situation of persons defending themselves against "enforcement action" brought by a public body such as HMRC. In such enforcement action, whether before a court with inherent jurisdiction or a tribunal whose jurisdiction derives from statute, the taxpayer should "in general" be able to challenge the enforcement decision or some antecedent decision on public law grounds. In paragraph 45, Simler LJ considers the scope of the exception to this proposition implicit in her use of the words "in general" concluding that any such exception could consist either of express words in the relevant statutory provision or "clear and necessary implication when the relevant statutory scheme is construed as a whole and light of its context and purpose".

31. Paragraphs 44 and 45 of Simler LJ's judgment in *Beadle* cannot be read as laying down some general proposition to the effect that the FTT always has jurisdiction to consider public law challenges to HMRC decisions unless express words or "necessary implication" exclude that jurisdiction. Her conclusion was more limited and addressed at the specific situation of persons defending themselves against enforcement action brought by a public body and seeking, in the context of their defence, to make a public law challenge to either the enforcement action itself or some antecedent action.

32. The Appellants argue that the decision of the Upper Tribunal in *KSM Henryk Zeman SP zoo v Revenue & Customs Commissioners* [2021] UKUT 182 (TCC) has extended the principle set out in paragraph 45 of Simler LJ's judgment in *Beadle*. In *KSM Henryk Zeman*, HMRC had made an assessment on the taxpayer under s73(1) of the Value Added Tax Act 1994 ("VATA"). Section 83(1)(p) gave the taxpayer a right of appeal "with respect to" that assessment. The taxpayer wished to argue that the assessment had been made contrary to his legitimate expectation that he would not be assessed. Accordingly, a question before the Upper Tribunal was whether his right of appeal under s83(1)(p) entitled him to make that public law argument before the FTT.

33. The Upper Tribunal decided that the taxpayer had no legitimate expectation that he would not be assessed (see [20] of the decision) and said that this conclusion was sufficient to dispose of the appeal. It went on, however, to consider the question of jurisdiction and reasoned as follows:

> (1) The taxpayer was, in substance, a defendant in enforcement proceedings taken by HMRC, namely the assessment that they had made.
>
> (2) Therefore, the same logic as set out in paragraph [45] of Simler LJ's judgment in *Beadle* should apply. Accordingly, considerations relating to the promotion of the rule of law and fairness, meant that the taxpayer should be entitled to challenge HMRC's antecedent decision to assess in proceedings before the FTT "unless that entitlement is excluded by the relevant statutory language" (see [34] of the decision).

(3) Section 83(1)(p) of VATA conferred a right of appeal "with respect to" an assessment. Section 73 of VATA gave HMRC a discretion, but not an obligation, to assess. The statutory language did not expressly or by necessary implication exclude the FTT having the power, on an appeal under s83(1)(p), to review the exercise of discretion that preceded HMRC's decision to make the assessment.

34. The Appellants urge us to adopt the same approach and to find that, as a matter of principle, the Regulations would need to contain clear words or a necessary implication to exclude their right to raise public law arguments before the FTT. We will not, however, do so. The approach that the Upper Tribunal followed in *KSM Henryk Zeman*, was predicated on its conclusion that the taxpayer in that case was, in substance, a defendant in enforcement proceedings taken by HMRC. That is not the case here. The Appellants are not seeking to defend themselves against an assessment or penalty that HMRC are seeking to impose. On the contrary, the Appellants are in substance in the position of claimant: seeking to obtain the issue of a Paragraph 14 certificate that HMRC do not wish to issue.

35. HMRC's rival argument is that clear words would be needed in order for the Regulations to give the Appellants the right to challenge the exercise of HMRC's discretion before the FTT. HMRC support their case with various examples from the case law:

(1) In *Customs & Excise Commissioners v JH Corbitt (Numismatists) Ltd*, [1981] AC 22, the taxpayer was entitled to apply a particular VAT margin scheme only if it kept certain specified records, with the Commissioners having power to permit alternative records to be kept instead. Since the taxpayer did not maintain the specified records, the Commissioners made an assessment on the footing that the margin scheme was not available. The taxpayer's statutory right to appeal against that assessment was the statutory predecessor to s81(1)(p) of VATA that was considered in *KSM Henryk Zeman* and gave the taxpayer the right of appeal "against the decision of the commissioners with respect to [the assessment]". The question arose whether it was open to the taxpayer, when exercising that right of appeal, to argue that the Commissioners should not have made the assessment because they should have exercised their discretion to permit the taxpayer to maintain alternative records, thereby entitling the taxpayer to the benefit of the margin scheme. The ratio of the House of Lords' judgment (which was by a majority) is contained in the speech of Lord Lane and, at page 61, he said that clear words would have been expected if the VAT Tribunal, which had no inherent supervisory jurisdiction, was to have the power to review the Commissioners' exercise of discretion in the taxpayer's statutory appeal.

(2) A similar point was made in *Aspin v Estill* [1987] STC 723. In that case, the question was whether, in an appeal against income tax brought before the General Commissioners, a taxpayer could argue that it was an abuse of power for the assessment even to be made because the Inland Revenue had previously assured the taxpayer that the income in question was not taxable. In his judgment the Master of the Rolls did not analyse the scope of the

taxpayer's statutory right of appeal in great detail, but held (at page 726) that judicial review could only be granted by the High Court, and then only with leave. In those circumstances, Parliament could not have intended to confer on the General Commissioners the effective power of judicial review over the Inland Revenue's decision to make an assessment.

(3) The Upper Tribunal in *HMRC v Noor* [2013] UKUT 71 (TCC) made a similar point in the context of the VAT Tribunal jurisdiction in an appeal brought under s83(1)(c) of VATA 1994. At [77] of its judgment, the Upper Tribunal held that Parliament was legislating in circumstances where it would be exceptional for an inferior tribunal such as the VAT Tribunal to have a judicial review power. Accordingly, Parliament could be expected to use clear words if it intended to give the VAT Tribunal the power to determine that HMRC had wrongly issued an assessment in breach of a taxpayer's legitimate expectation.

36. We think, however, that it overstates matters to say that there is a strong presumption against the FTT having power, in any statutory appeal, to consider public law arguments to the effect that HMRC have exercised discretion wrongly, with that strong presumption being rebutted only with clear words or necessary implication. Ultimately, the task in each case is to construe the right of appeal conferred by the statute or secondary legislation. Whilst the exercise of construction must acknowledge that the FTT does not have a general supervisory jurisdiction, it does not follow that the FTT does not have jurisdiction to take into account public law matters in exercising the jurisdiction which is conferred upon it by statute. Whether or not the FTT has that jurisdiction is simply a matter of statutory construction.

The correct construction of the Regulations

37. We turn, therefore, to the question of construction that will determine the scope of the FTT's jurisdiction in this case.

38. Both parties have sought to persuade us that the case is obvious. The Appellants rely heavily on Regulation 7(1) as conferring a broad right of appeal against a refusal by HMRC to accept a Paragraph 14 notice which is capable of putting in issue all reasons for that "refusal", including HMRC's refusal to exercise their discretion in the Appellants' favour. HMRC also submit that the case is obvious on the basis that Regulation 7(1) simply provides for a right of appeal, with the permissible grounds of appeal set out exhaustively in Regulation 7(3) and so being limited to a consideration of whether the requirements of Regulation 4 are met. (We note a slight oddity in Regulation 7(3), namely that the FTT is required to consider whether HMRC were "entitled to take the view that" the requirements of Regulation 4 were not met, rather than whether those requirements were actually met, irrespective of the reasonableness of HMRC's view to the contrary. Both parties explained in response to our questions that they attached no significance to this point and we will not address it any further.)

39. Had Regulation 7(3) followed the architecture of, for example, Regulation 24L of the Income Tax (Construction Industry Scheme) (Amendment) Regulations 2021, to which the Appellants referred us, by setting out, expressly, that a right of appeal was

conferred, but could be exercised only on limited grounds, the case would indeed have been obvious. However, difficulty arises because Regulation 7 does not follow this architecture and so does not spell out expressly the relationship between the apparently wide terms of Regulation 7(1) and the restrictive terms of Regulation 7(3).

40. The Appellants make the following specific points in support of their analysis:

> (1) If the FTT allows a taxpayer's appeal, Regulation 7(4) gives the FTT the discretion, but not the obligation, to direct HMRC to accept the Paragraph 14 notices in question. The Appellants argue that it would be "surprising" if the FTT had such a discretion if it did not also have the power to review HMRC's own exercise of discretion. However, beyond pointing to the difference between the FTT's powers and the scope of HMRC's decision said to be subject to review, the Appellants did not set out any particularly "surprising" consequences that would flow. We therefore regarded this argument as being of little force.
>
> (2) If the FTT's powers were limited to the question of whether the Regulation 4 requirements were met (which can be answered in "yes or no" terms), it would be expected that the FTT would be required, on allowing a taxpayer's appeal, to direct HMRC to accept a Paragraph 14 notice, rather than having a mere discretion to do so.
>
> (3) It is difficult to see how there could ever be a dispute as to whether the taxpayer has complied with Regulation 4 since its requirements are so straightforward. Regulation 7 cannot, therefore, be intended to limit a taxpayer's right of appeal to matters as simple as whether the Paragraph 14 notice is in the prescribed form, has been delivered on time and contains specified information such as a taxpayer's name, national insurance number and date of birth.

41. We do not accept the Appellants' argument set out at [40(2)]. As HMRC point out, Regulation 11 contains power for HMRC to revoke a certificate if certain events take place (for example, if a taxpayer makes further contributions to a registered pension scheme). It makes sense for the FTT to be given a discretion to direct the issue of a Paragraph 14 certificate, even if a taxpayer wins an appeal under Regulation 7, to protect against the possibility of the FTT otherwise being bound to direct the issue of a certificate which HMRC are inevitably going to revoke.

42. Nor are we persuaded by the argument in [40(3)]. As HMRC point out, it is possible for there to be some dispute as to whether some of the requirements of Regulation 4 are satisfied. For example, Regulation 4(2)(b), invites a consideration of when HMRC received an application which could be a matter of some dispute. In any event, we do not consider that there is any presumption of construction to the effect that appeal rights are conferred only when it can be expected that they are exercised frequently. As Mr Bradley pointed out in his oral submissions on behalf of HMRC, Regulation 10 permits HMRC to issue a replacement Paragraph 14 certificate. Regulation 12 permits a taxpayer to appeal against HMRC's decision to issue such a replacement certificate even though it is difficult to envisage circumstances in which a taxpayer could have

any real objection to this given that the taxpayer would continue to benefit from Fixed Protection 2012 even if a replacement certificate is issued.

43. In our judgment, the indications in support of HMRC's interpretation of Regulation 7 are the stronger.

44. First, the natural reading of Regulation 7(3) is that it is imposing some limitation on the scope of an appeal. If the true position is that a broad appeal right is conferred by Regulation 7(1) alone, the obvious question is what function Regulation 7(3) serves.

45. The Appellants meet this challenge by saying that failure of the Regulation 4 requirements is a necessary precondition to HMRC refusing to accept a Paragraph 14 notice. Therefore, they argue, there is nothing unusual about Regulation 7(3) directing the FTT to consider whether that necessary precondition is satisfied. Specifying this factor does not preclude the FTT from considering other issues, and indeed Regulation 7(1) directs it to do so. However, the Appellants have not provided us with a convincing explanation of why, if all aspects of HMRC's decision are put in issue by Regulation 7(1), Regulation 7(3) singles out for special mention only the requirements of Regulation 4. Why, for example, does Regulation 7(3) not direct the FTT to consider whether HMRC exercised any discretion in a reasonable way in the same way as s16(4) of the Finance Act 1994 directs the FTT's attention to that issue in the context of decisions on excise duty "ancillary matters"? In our judgment, the Appellants' construction gives Regulation 7(3) little or no meaning, whereas HMRC's construction at least gives it some meaning, even if it does lead to a relatively narrow right of appeal as we have explained at [40(3)] above.

46. We are reinforced in this conclusion by the fact that the FTT's sole power, in allowing an appeal, is its discretionary power to direct HMRC to accept a Paragraph 14 notice and issue a certificate. A taxpayer complaining about HMRC's exercise of discretion might make a wide category of argument. It might be said that HMRC's decision-making process was unfair, that HMRC ignored relevant considerations or took into account irrelevant considerations. If such challenges succeeded, it is not obvious that the FTT would be able to make its own decision on the issue. It might wish to remit the matter back to HMRC with directions for reconsideration. Yet Regulation 7(4) gives the FTT no such power (again by contrast with s16(4) of the Finance Act 1994).

47. The force of that point is increased by a consideration of the nature of discretion that HMRC need to exercise in the context of late Paragraph 14 notices. An HMRC official exercising that discretion may wish to take into account the fact that the Regulations set out a time limit and that, by permitting that time limit to be exceeded, the Appellants would be put in a better position than other taxpayers. The official could reasonably be expected to take into account considerations relating to the public finances and the desirability of taxpayers generally meeting deadlines imposed on them. An FTT judge will not always be well-placed to weigh up such administrative considerations, yet Regulation 7 gives the FTT no power to remit the decision back to HMRC, who will frequently be better placed.

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.

Disposition

50. HMRC succeed on Issue 1. Accordingly, it is not necessary for us to determine Issues 2 and 3. Indeed, we consider it would not be right for us to express any view on those issues having concluded that it was outside the scope of the FTT's jurisdiction to do so.

51. We will, however, say that we saw no force in the Appellants' complaint that it was procedurally unfair for the FTT to make its determination of how it would have exercised discretion to accept or refuse the late Paragraph 14 notices without inviting further submissions from the parties. The Appellants were seeking to overturn HMRC's exercise of discretion and persuade the FTT that it should direct HMRC to issue a Paragraph 14 certificate. Their written and oral submissions made before and during the hearing did not persuade the FTT that this was the proper course. In those circumstances, they can scarcely complain that they should have been given a further opportunity after the hearing to persuade the FTT.

52. It follows that the Decision is set aside. We remake the Decision by determining that the FTT had no power to consider the Appellants' appeals to the extent they were based on complaints about HMRC's exercise of discretion. Since no other issues were raised by the Appellants' appeals against HMRC's decisions, we accordingly remake the Decision so that the Appellants' appeals against HMRC's decisions are dismissed.

Signed on Original

JUDGE JONATHAN RICHARDS

JUDGE ASHLEY GREENBANK

RELEASE DATE: 05 November 2021