Change my mind?

Management of taxes

01 January 2016

Keith Gordon reviews the Upper Tribunal's decision in *Raftopoulou*

Key Points

What is the issue?

The essence of a reasonable excuse defence is that the taxpayer had a valid reason for missing the deadline. Less common is the case of a taxpayer invoking the defence when a claim is made outside the normal statutory
time limit

What does it mean to me?

The Upper Tribunal's decision should prompt advisers to check whether it is worth pursuing claims that would otherwise have been considered out of time

What can I take away?

It will be interesting to see whether HMRC appeals against the verdict or if it starts to use the Raftopoulou decision to overcome instances where it has failed to act in a timely fashion

Reasonable excuse defences are often raised when a taxpayer seeks to avoid a penalty. Indeed, recent examples – with different outcomes – were covered in the November and December issues of Tax Adviser. The essence of the defence is that the taxpayer had a reasonable excuse for missing the deadline and, after that reason ceased to apply, the failure was remedied without unreasonable delay. The statutory basis for such a defence is TMA 1970 s 118(2). It should be noted that s 118 remains on the statute book, although the reasonable excuse defence has been updated for many of the rewritten penalty codes, such as those found in FA 2009, Schs 55 and 56.

Less common is the case of a taxpayer invoking s 118 when a claim is made outside the statutory time limit.

The facts of the case

Dr Vasiliki Raftopoulou submitted her 2007 tax return on 14 January 2008 showing a tax liability of about £18,000. Dr Raftopoulou considered the figures to be wrong, but did not – as she was entitled to do at any stage until 31 January 2009 – submit

an amended return. Instead, on 13 October 2011, she made a repayment claim under the provisions found in TMA 1970 Sch 1AB.

It is worth noting that Dr Raftopoulou had written to HMRC in November 2008, explaining that she considered her 2007 return to be wrong in that it overstated her income and understated her expenses. However, it appears that HMRC did not respond to this; neither did Dr Raftopoulou pursue it.

In the meantime, Dr Raftopoulou was studying in the US and she returned to the UK shortly before resuming her claim in 2011. In her formal overpayment claim, she explained that the errors on the 2007 return had arisen from misunderstandings between Dr Raftopoulou and her accountant. However, HMRC rejected the claim on the basis of the four-year time limit contained in TMA 1970 Sch 1AB para 3(1), which provides that an overpayment claim 'may not be made more than four years after the end of the relevant tax year'. It was, thus, just over six months late.

Dr Raftopoulou appealed against the decision to the First-tier Tribunal (FTT). The basis of her appeal was that HMRC was aware of the mistake, presumably from her 2008 letter. However, she did not go so far as to suggest that the 2008 letter itself constituted a claim. The proceedings in the FTT were conducted on the basis that the formal claim was that made on 13 October 2011. In that regard, the First-tier judge considered that the statutory wording of para 3(1) was unassailable, so the claim had to be rejected and the appeal dismissed.

An application for an appeal to the Upper Tribunal (UT) was made on the basis of s 118, something that had not been considered by either party in the proceedings in the FTT.

The tribunal's decision

HMRC first tried arguing that the tribunals had no jurisdiction to hear any appeal on the overpayment claim. HMRC's logic was that the claim had been made more than four years after the end of the relevant tax year and therefore fell foul of para 3(1) and was defective. Therefore, although the tribunals had jurisdiction over *valid* claims under Sch 1AB, the UT did not have jurisdiction over the present claim. The UT judges Roger Berner and Swami Raghavan, however, considered that this

argument put the cart before the horse so it was necessary to consider first the second question, being whether the lateness of the claim could be overcome by s 118(2).

The dispute on the meaning of s 118(2) boiled down to a single point. Section 118(2), so far as is relevant, reads as follows:

> 'Where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.'

What the UT had to consider was whether the words 'anything required to be done' focused on matters that a taxpayer was obliged to do, such as submit a return or make a payment – the narrower interpretation – or whether they extended to matters that a taxpayer had the option of doing, for example, making a claim, as in the present case, where such an option had to be exercised by a specific date – the broader interpretation.

Having considered the competing arguments, including reference to the detailed discussion on s 118(2) given by the FTT in *Robert Ames v RCC* [2015] UKFTT 337 (TC), which was the subject of my article 'Skyfall – you only claim twice' (*Tax Adviser*, October 2015), the UT concluded that the broader interpretation, as favoured by Dr Raftopoulou, should be preferred. The case was remitted to the FTT to consider whether, in fact, Dr Raftopoulou had a reasonable excuse for her late claim.

In response to HMRC's concerns about the FTT's jurisdiction, the UT's reasoning can be summarised as follows. The FTT always has jurisdiction to hear arguments about whether it can hear a particular appeal. If Dr Raftopoulou did not have a reasonable excuse for the delay, her claim would fall outside Sch 1AB. Her decision to challenge HMRC's rejection of the claim would therefore fall outside the statutory confines of the FTT's jurisdiction, leading to the FTT striking out the appeal – but at least Dr Raftopoulou would have had the opportunity to argue that she had a reasonable excuse. Conversely, if Dr Raftopoulou did have a reasonable excuse for the delay, her claim would be within Sch 1AB and any rejection of this would be within the scope of the FTT's normal jurisdiction. For this purpose, it is also worth noting that the Upper Tribunal concluded that the rejection of Dr Raftopoulou's claim amounted

both to an enquiry letter and a closure notice.

Commentary

Unlike other cases when I have been more prepared to state in public my disagreement with the final decision, I will not go so far to say that the UT, in this case, got it wrong. However, I am prepared to say that I was surprised by the result, although I consider that some of the arguments put forward by HMRC to support the narrower reading of s 118(2) went a bit too far, possibly weakening the force of their other arguments.

However, where I am in 100 per cent agreement with HMRC is its assertion that a decision in favour of Dr Raftopoulou 'would have radical consequences'. In essence, it allows every missed time limit to be revisited on the basis of reasonable excuse. This could be as fundamental as *Fleming (t/a Bodycraft) v CRC* [2008] STC 324 was for VAT returns – where the House of Lords in 2008 permitted VAT refunds to be backdated to 1973 – and the potential impact of the more recent decision in *R (oao Higgs) v HMRC* [2015] UKUT 92 (TCC). On the other hand, although the UT's decision should prompt advisers to check whether it is now worth pursuing claims that would otherwise have been considered to be out of time, it is the tribunals that are unlikely to permit too many stale claims being revisited.
In addition, the UT acknowledged that there would be limits to its interpretation, although it did not provide any examples of when a time limit might be more rigidly applied, without any chance of being relaxed by s 118(2).

What is interesting is that the time limits for different types of claim are sometimes worded in different ways. For example, Sch 1AB para 3(1) itself provides that an overpayment claim 'may not be made' after more than four years, whereas the predecessor legislation in TMA 1970 s 33 specified that an error or mistake claim could be made 'at any time not later than' the then time limit. Arguably, the two formulations should be interpreted in the same way – one being a slightly more modern version than the other. However, I do have a nagging concern that the wording in former s 33 better accommodates a late claim than that in para 3(1). The current statute appears, on a literal reading at least, to preclude a claim being made after four years, notwithstanding any reason for the time limit being missed.

However, this leads to the wider question as to whether HMRC, as opposed to the UT, has the discretion to waive all time limits when to apply one rigidly would

amount to conspicuous unfairness or abuse of power.

In *R v CIR ex parte Unilever plc* [1996] STC 681, the Court of Appeal expressed the view that what is now HMRC had the power to do so in all cases under the commissioners' 'care and management powers'. Although the current wording of these responsibilities focuses on 'collection and management' (CRCA 2005 s 5), the latter phrase is statutorily equated with the former 'care and management' obligations (CRCA 2005 s 51(3)). Further, as recognised in *Unilever* itself and acknowledged by the UT in *Raftopoulou v RCC* [2015] UKUT 579 (TCC), a relaxation elsewhere in the statute does not limit the scope of HMRC's discretionary powers; nor do those discretionary powers limit the scope of any statutory relaxations.

However, a taxpayer's remedy for challenging a refusal by HMRC to allow a late claim will depend on the circumstances. If, as was the case in *Raftopoulou*, the late claim were justified on the basis of reasonable excuse, the FTT would have the jurisdiction to hear the appeal against any refusal. However, if the claim were based on the more nebulous argument of fairness, any challenge would have to be made by way of judicial review.

It will be interesting to see whether HMRC appeals against the decision – I suspect it will try to. Alternatively, it might start to use the *Raftopoulou* decision to overcome instances when it had failed to act in a timely fashion. In other words, although the taxpayer won this particular case, the consequences might be seen in more than one direction.