

If you should have notified HMRC for protection against a lifetime allowance tax charge and failed to do so before the closing date of 5 April 2009, but you had a reasonable excuse and give the notification without unreasonable delay after the excuse ended, HMRC must consider your notification: Finance Act 2004, sch 36, para 12 and the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006, SI 2006/131 reg 12.

My client had made his late notification on 21 September 2017, and HMRC refused to consider it on the ground that he had failed to satisfy both the reasonable excuse and the no unreasonable delay tests. HMRC's position on the no unreasonable delay test was that, if the appellant had a reasonable excuse, it ended on 20 April 2016, when he first knew that he ought to have but had failed to notify HMRC for protection before the closing date, and that the delay, about eighteen months, was unreasonable. His argument was that he had a reasonable excuse, it ended on 30 June 2017, when he first knew that it was possible to make a late notification, and the delay until 21 September 2017, less than three months, was not unreasonable.

One of the authorities on which HMRC relied was *Twaite v HMRC* [2017] UKFTT 0591 (TCC), in which the relevant passages were these.

48 The reasonable excuse was Close's failure to advise Mr Twaite of the need for a notification and so this reasonable excuse necessarily ended when he was told that the notification had been needed.

49 I do not accept that the reasonable excuse can only have ceased when Mr Twaite became aware of the possibility of making a late notification. To do so would be to treat any lack of knowledge of the ability to make a late notification as a reasonable excuse in its own right. However, the relevant reasonable excuse is that of the reason for not giving the notification on or before the closing date; clearly, the absence of knowledge of the ability to make a late notification cannot be a reason for a notification not having been given on or before the closing date.

The opposite conclusion was reached in *Gammell v HMRC* [2021] UKFTT v HMRC 0049 (TC), in which the judge found that the reasonable excuse ended only when the appellant first knew that he could make a late application and the delay of about three months was not unreasonable.

It is easy to say (a) that a law, the effect of which is that a person is barred from the remedy offered by it if he did not know that he could avail himself of it, is absurd, and (b) that it must therefore be must be interpreted under the so called golden rule, which was defined by Lord Wensleydale in *Grey v Pearson* [1857] H.L. Cas 61 as follows.

The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further.

It is not easy to know with any certainty how to apply the golden and other rules of interpretation, where the absurdity or inconsistency etc themselves are also

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uncertain, and there is no tool (other than the chancellor's foot as a measure of reasonableness) by which the court can resolve the uncertainty.

My proposition is that, when faced with contradictory interpretations, an approach to resolve or reduce the inherent uncertainty is to reverse engineer the legislation, for which there are four necessary elements. First, one must specify the legal action to be expressed and secondly identify the subject, ie the person who is required or permitted to do or forbidden from doing or is to be submitted to the legal action. Thirdly one must ask in what circumstances does the legal action apply and, finally, ascertain what conditions must be satisfied in order that the legal action can have effect. For example: the words "if the tenant desires to determine the term hereby granted" describe the circumstance or background; "and gives to the landlord notice ..." and "and up to the date of such determination pays the rent" are the conditions that must be satisfied; and "then ... the present demise ... shall cease and be void", is the legal action. In this example there is no legal subject, because the legal action takes place automatically if the circumstance exists and the conditions are satisfied, and therefore the legal action can be expressed in the passive voice.

These four elements of a legal expression were identified by George Coode (1807–1869 of Inner Temple), whose tract *On Legislative Expression*, (as an introduction to the Appendix annexed to the Report of the Poor Law Commissioners on Local Taxation) was presented to Parliament in 1843, and of which a second edition was published in 1852. Coode describes these elements as follows:

- 1 the legal subject (the person to whom the legal action applies);
- 2 the legal action (the obligation, discretion or prohibition);
- 3 the case (the circumstance in which the legal action applies); and
- 4 the condition (what must be done for the legal action to come into effect).

An analysis of reg 12 shows how this mechanism works. There are two essential circumstances (the case) in reg 12. One is that the appellant had failed to notify HMRC on or before the closing date and the other is that he knows that he can notify HMRC after the closing date. If either of these is absent, it is impossible for the legal action to take effect. The resolution of the contradiction between Twite and Gammell is that the appellant's knowledge that late notification is possible is not part of his excuse, but is a circumstance without which the legal action is impossible.

Neither of the circumstances constituting the case in reg 12 is stated expressly. The first, that the appellant had failed to notify HMRC on or before the closing date, is implied. The second, is that he knows that he can notify HMRC after the closing date, is implied by necessity and is so obvious that it does not need to be stated.

In my client's appeal HMRC conceded the no unreasonable delay argument, so it was not tested in the FTT. I believe however that the key, by which Coode suggested how the legislature locks its meaning into its words, can be turned in the other direction to unlock the legislature's meaning when it is not clear from the words. If it does, it is not limited to the narrow point in this example but applies in disputes about the interpretation of all legislation, and private documents too

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