

Penalty mitigation – reasonable excuse (Lecture P1305 – 14.08 minutes)

The issue of penalty mitigation is an important one for advisers. This session will consider the principle of reasonable excuse and includes practical considerations for advisers dealing with a case where it is, or may be, relevant.

Overview of reasonable excuse

A reasonable excuse may provide a defence for a person against penalties imposed by HMRC for certain compliance failures, including the following:

- Late filing of returns, Schedule 55, FA 2009;
- Failing to make a payment on time, Schedule 56, FA 2009;
- Failing to notify chargeability, Schedule 41, FA 2008;
- Failing to notify under the Requirement to Correct provisions, Section 67 and Schedule 18, Finance (No. 2) Act 2017.

It is important to recognise that the term “reasonable excuse” is not defined in statute. The phrase takes its normal meaning. This means that each case must be determined by its own facts and merits, and the circumstances of the person.

The onus is on the tax taxpayer to demonstrate that they had a reasonable excuse for the failure giving rise to the penalty. Consideration of how this might be done is covered later in this article. It is important to recognise that there are two stages to a reasonable excuse defence. It is not sufficient that the client had a reasonable excuse – they must also have addressed the relevant failure without unreasonable delay (not defined) after the reasonable excuse has ceased to apply.

Reasonable excuse is not the same as reasonable care, although there may be an overlap between the two concepts.

What is a reasonable excuse?

As noted above, there isn't a statutory definition of reasonable excuse. The following might be a reasonable excuse:

- Coronavirus;
- Mental health;
- Physical illness;
- Bereavement;
- Ignorance of the law;
- Reliance on another person (which might include an HMRC officer);
- Service issues with HMRC's Online Service;
- Delay caused by HMRC.

There may be a combination of factors which contribute to the reasonable excuse. Each case must be considered on its own facts, and by reference to the person's abilities and circumstances. What constitutes a reasonable excuse for one person might not apply to another person.

What is not a reasonable excuse?

Although there isn't a statutory definition of what is a reasonable excuse, statute provides that an insufficiency of funds or reliance on a third person does not constitute a reasonable excuse. However, there are exceptions to this provision.

In addition to the statutory provisions, there are various situations that, on their own, HMRC will not normally accept, as a reasonable excuse, including the following:

- Pressure of work;
- Lack of information;
- Lack of a reminder from HMRC;

What is HMRC's view on reasonable excuse?

HMRC's guidance on reasonable excuse is contained in the Compliance Handbook (CH160100 to CH160950). The guidance has recently (January 2022) been updated, and HMRC now recognises that the "law does not require that a reasonable excuse is based on an unforeseeable or inescapable event". This is a welcome change and reflects a shift from the position previously taken by HMRC. The guidance also states that a reasonable excuse is "something that stops a person from meeting a tax obligation despite them having taken reasonable care to meet the obligation". Advisers should point HMRC officers to their own guidance manual if they are not familiar with the updated HMRC view of reasonable excuse.

The test for reasonable excuse

It is difficult for advisers to refer to tribunal decisions for relevant examples of reasonable excuse, as it is unlikely that the facts and circumstances of a case will exactly mirror their client's position. The upper tribunal decision of *Perrin v HMRC* [2018] UKUT 156 [TC] is a case worth referring to, as it sets out a four-step process, summarised below, for determining if there is a reasonable excuse:

1. Establish what facts the taxpayer asserts give rise to a reasonable excuse;
2. Decide which of those facts are proven, based on the evidence available;
3. Decide whether, viewed objectively, those facts amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased;
4. Decide whether the taxpayer remedied the failure without unreasonable delay after the reasonable excuse ceased (unless they had already done so before the reasonable excuse stopped).

The evidence needs to be considered on the balance of probabilities. In the *Perrin* case, the tribunal also made the point that, before any question of reasonable excuse is considered, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is due.

Practical considerations

The first point for the adviser to consider is the last one made in the preceding paragraph – if there has not been a failure which is subject to a penalty, you do not need to consider reasonable excuse. Where there has been a failure, you need to establish all relevant facts, including timings. I have assisted numerous advisers and their clients over the years on this area.

In many cases, even where the adviser has considered that there might be a reasonable excuse, there has been an absence of fact-finding, and exploring all potential avenues to build a defence. This process includes collating supporting documentation, the detail of which will depend on the circumstances of the case. Advisers should follow the four-stage test, noted above, and, where they consider there is a reasonable excuse, ensure that the facts are presented to HMRC, together with appropriate supporting documentation.

Where advisers are unsure whether their client has a reasonable excuse, they should consider seeking specialist advice, which may extend to assistance in presenting the facts to HMRC.

Other considerations

If the HMRC officer does not accept that there is a reasonable excuse, the adviser has other options:

- Seeking a statutory review of the officer's decision;
- Alternative Dispute Resolution;
- Appeal to the tribunal.

Another option for advisers to consider is whether there are special circumstances, such that the penalty can be reduced under the provisions relating to special reduction.

Contributed by Phil Berwick (Director, Berwick Tax)