

## Seeing reason

The tribunal is the arbiter of fact when it comes to the reasonable excuse defence, says Robin Williamson, who explains all with reference to some recent cases

If a taxpayer satisfies HMRC or a tribunal that his failure is not deliberate, and that he has a reasonable excuse, then he is not liable for any penalty. It is not a question of his incurring a penalty, then being let off for reasonable excuse; no penalty arises in the first place.

If HMRC refuse to accept a reasonable excuse plea, the taxpayer can either go on to internal review within the Department and thence to the tribunal if necessary, or appeal directly to the tribunal. Although First-tier Tribunal cases cannot set a precedent, each reasonable excuse case turns very much on its facts of which that tribunal is the ultimate arbiter. That is subject to a right of appeal to the Upper Tribunal if the FTT has erred at law, but the Upper Tribunal will not substitute its own findings of fact for those of the FTT unless the FTT's findings are irrational. It is therefore instructive to study the many FTT cases to see how it is likely to implement reasonable excuse in like circumstances.

### Criteria

Perhaps the leading case on reasonable excuse is *The Clean Car Company Ltd v C&E Commrs* (1991) VATTR 234 where, in a much-quoted passage, Judge Medd QC set out the following criteria for deciding whether a reasonable excuse has been shown: "The test of whether or not there is a reasonable excuse is an objective one... One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself in at the relevant time, a reasonable thing to do?"

The judge went on to particularise "the relevant attributes of the taxpayer" as follows: "...though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse".

So there are effectively two criteria to be taken into account in deciding whether someone has a reasonable excuse: (1) the standard of reasonableness

one would expect of someone with “a responsible attitude to his duties as a taxpayer”, which is an objective test, and (2) such attributes of the appellant as the tribunal consider relevant, such as age, experience, health and the other things mentioned by the judge.

As HMRC’s internal guidance puts it (CH 61540ff): “What is reasonable for one person’s circumstances and abilities may not be a reasonable excuse for another person.”

Thus, in *Pokorowski v HMRC* [2019] UKFTT 86 (TC), HMRC was castigated by the Tribunal for applying the first of Judge Medd’s criteria and not the second in determining whether the taxpayer, who had been homeless throughout the period of delay in filing his tax return, had a reasonable excuse. HMRC argued that a delay of one year and five months could not in any circumstances be considered reasonable. But the tribunal, allowing the taxpayer’s appeal, held that homelessness was precisely the kind of “particular difficulty or misfortune” referred to in the second passage from Judge Medd’s speech quoted above, and observed that the taxpayer had remedied his default without unreasonable delay once he was back in permanent accommodation.

### **Definition**

HMRC guidance defines reasonable excuse as “something that stopped you meeting a tax obligation that you took reasonable care to meet” (SAM 10090). The legislation provides no definition, but merely sets out what cannot be a reasonable excuse:

- insufficiency of funds, unless (except for VAT purposes) attributable to events outside the taxpayer’s control;
- reliance on someone else to do anything, unless the taxpayer took reasonable care to avoid the default;
- where the taxpayer had a reasonable excuse but that has ceased, and the default is not remedied without unreasonable delay after the excuse has ceased.

### **Insufficiency of funds**

It is for the taxpayer to show (1) that there was an insufficiency of funds and (2) that the insufficiency was due to reasons beyond its control. If it succeeds on (1) but cannot show (2), there is no reasonable excuse. In *Bluu Solutions* [2015] UKFTT 95 (TC), the company claimed reasonable excuse for persistent late payment of PAYE because it was in the construction industry and had experienced cash flow problems during the recession, but the management accounts shown to the tribunal indicated a fairly healthy cash flow, and other excuses offered by the company failed to impress the tribunal.

The VAT legislation does not include the defence that the insufficiency of funds was for reasons beyond the taxpayer's control (VATA 1994, s 71(1)(a)). Nevertheless, in *C&E Commrs v Steptoe* [1992] BTC 5,143, the Court of Appeal by a majority upheld the finding of the tribunal that an insufficiency of funds was a reasonable excuse for late payment of VAT when caused by the habitually late payment of the taxpayer's bills by a major customer that accounted for 95% of his business. It was the cause of the insufficiency, rather than the insufficiency itself, that constituted the reasonable excuse for late payment.

### **Reliance on another person**

If the taxpayer wishes to plead reliance on another (typically, an agent) as a reasonable excuse, they must show that they took reasonable care to avoid the failure.

In *Northam v HMRC* [2017] UKFTT 706 (TC), the taxpayer, who was suffering from depression, signed his return before the due date and his agents promised to submit it on time even if they had to estimate certain figures. In the event, they failed to do so. The tribunal found that the taxpayer had a reasonable excuse, as he had done all that he could to ensure that his tax return was submitted on time.

Similarly, in *Schotten & Hansen UK Ltd v HMRC* [2017] UKFTT 191 (TC), a German company that employed another German company as contractor was unaware that it had to comply with the UK Construction Industry Scheme despite engaging a major international accountancy firm. The tribunal found that it had a reasonable excuse for its non-compliance as it was entitled to rely on its accountants to draw its attention to any relevant compliance obligations. On the other hand, in *Mooney-Hynes & Anor v HMRC* [2018] UKFTT 495 (TC), the taxpayers could not claim reliance on their agent as a reasonable excuse for failure to notify. The taxpayers had changed agents after the date on which they should have notified HMRC of their liability, but HMRC had not received a 64-8 from the new agents until many months later. The taxpayers had not taken reasonable care to avoid the alleged failure of the agent.

### **Reliance on HMRC**

There are limits on the extent to which the taxpayer can blame HMRC for its default. In *Bluu Solutions* (cited above), the taxpayer company claimed to have a reasonable excuse for its late payments in that it had no warnings from HMRC during the period in which it was in default and therefore had no opportunity to modify its behaviour. HMRC, in response, pointed to the extensive publicity in which they had set out the new late payment penalties, sent out to all

employers, and to telephone calls they had made to the company's representative. The taxpayer's contention was rejected by the tribunal; and even if HMRC had not provided any information, that would not have provided it with a reasonable excuse on the principle that ignorance of the law is no defence (although that principle has since been modified by the Upper Tribunal – see *Perrin v HMRC* [2018] UKUT 156 (TCC)).

On the other hand, in the very recent case of *Jacques v HMRC Comms* [2020] UKFTT 311 (TC), the taxpayer, who was within PAYE and not in self-assessment, successfully argued that his ignorance of the High Income Child Benefit Charge was a reasonable excuse for failure to notify his liability to it. The tribunal took the view that HMRC did not have an obligation to notify every taxpayer of every charge that might affect them, but equally the taxpayer did not have to “go rummaging through all HMRC's information on the off-chance that there might be something which is hidden away in it which is relevant to his tax position.”

### **Conclusion**

Reasonable excuse is available as a defence in most penalty regimes. The cases discussed above are a small selection – albeit an interesting one – of the very many that have come before the tax tribunals. One can only reiterate that every case turns on its specific facts, so even if HMRC flatly turns down a reasonable excuse plea, it may still be worth an appeal if what the taxpayer has done (or not done) seems reasonable in the context of the two criteria set out by Judge Medd, quoted above.

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