

Timing is key to a successful appeal

Jesminara Rahman explains how to submit an appeal to HMRC, and why it's vital you act in a timely manner

A tax appeal can be lodged if the taxpayer has the right to appeal an HMRC decision. For example, appeals can be lodged against decisions about but not limited to:

- a tax assessment.
- an amendment of a tax return after an enquiry because HMRC believe there to be an error.
- a claim or disallowing a claim for tax relief.
- a request to check business records.
- a penalty or surcharge which is incorrect or unjust (for example, filing a tax return late/providing an inaccurate return/paying tax late).

HMRC states that a notice to appeal a tax decision or penalty must be made in writing by the taxpayer or agent to HMRC by completing the appeal form attached to HMRC's penalty letter or by following the instructions on the letter. If there is no appeal form attached to HMRC's letter, then alternatively a written submission can be made to the HMRC office related to that particular tax return.

The appeal must include, in HMRC's view, the following:

- the taxpayer's name or business name;
- the tax reference number (found on the HMRC decision notice);
- what the disputed tax decision is and reasons why the taxpayer believes it be incorrect;
- what the correct figure should be and how the taxpayer's calculation was made; and
- the taxpayer's signature.

Under S31A Taxes Management Act 1970, the tax legislation states that the notice of appeal must be given:

(a) in writing.

(b) within 30 days after the specified date.

(c) to the relevant officer of the Board.

Section S31 Taxes Management Act 1970 outlines the notice of appeal must specify the grounds of appeal. It does not mention what the correct figure

should be or the other admin details necessary although that is common sense to provide the name and reference relevant to the appeal.

Late appeal

HMRC can give leave for late notice of appeal only if in HMRC's view:

- there was a reasonable excuse for not giving notice within 30 days; and
- the request for permission to appeal after the expiry of the time limit was made without an unreasonable delay.

In early May 2020, HMRC granted an extra three months in addition to the statutory 30 days required by tax legislation to appeal any tax assessments, penalties or tax decisions dated February 2020 or later. I have written an earlier article for 'HMRC Enquiries, Investigations and Powers' regarding Covid-19 as a reasonable excuse in detail (June-July issue, 2020).

Reasonable excuse

Late filing penalties can be cancelled if you have a reasonable excuse for the late filing. The appeal can be issued using the online service for tax returns from 6 April 2015 onwards or by using form SA360 and must contain:

- the penalty issue date.
- the self-assessment tax return date of filing
- the details of a reasonable excuse for late filing.

HMRC defines a reasonable excuse as something that prevents the taxpayer from meeting a tax obligation where reasonable care was taken. The reasonable excuse must continue throughout the period from the missed date of filing to a date shortly before the actual return. HMRC takes a narrow view of what is a valid reasonable excuse (which has been challenged at tribunal) for the late filing of a return and examples includes:

- partner or another close relative died shortly before the tax return or payment deadline.
- an unexpected stay in hospital that prevented the taxpayer from dealing with their tax affairs.
- the taxpayer had a serious or life-threatening illness.
- computer or software failed just before or while preparing the online return.
- service issues with HMRC's online services.
- a fire, flood or theft prevented the completion of the tax return.

- postal delays that could not have been predicted.
- delays related to a disability of the taxpayer.

According to HMRC, the following are examples of what will not be accepted as a reasonable excuse:

- the taxpayer relied on a third party (for example, an accountant or business advisor) to send the return and the third party failed to do so.
- payment failed as the taxpayer did not have sufficient funds.
- the taxpayer found HMRC's online system too difficult to use.
- no reminder was issued by HMRC.

The tribunal judge stated in the NA Dudley Electrical Contractors Ltd tax case (TC 01124) that the phrase 'reasonable excuse' should be given their plain, everyday usage and ordinary meaning. However, as you can see HMRC still sees death or a serious illness as a reasonable excuse when one would consider this as an exceptional circumstance.

HMRC would expect to see any of the excuses provided by the taxpayer evidenced in order to verify the reasonable grounds for appeal.

Misconceptions about appealing

I have come across common misconceptions held by agents/clients and even HMRC had about submitting an appeal:

1. "I need to do a full review of the case or situation before submitting an appeal to HMRC."

In order to safeguard the taxpayer's position, you can put in a brief appeal in writing, stating that the assessment is excessive and/or unreasonable, and so you are appealing the tax assessment/penalty. Then, at a later date, you can provide a full, substantive appeal. It is important that there is no delay in submitting an appeal in writing. In one case, the agent was given leave to submit a late tax appeal by the county court judge for bankruptcy proceedings, but the agent submitted the appeal three months later in the mistaken idea that the case had to be fully reviewed and the tax position quantified before an appeal could be submitted. The additional three months' delay had to be explained or justified to the tribunal judge, which at the end was not deemed reasonable.

2. "I talked to HMRC on the phone and expressed the intention to appeal."

The tax legislation states the appeal has to be submitted in writing to HMRC; if the HMRC caseworker's details are unavailable or not known then it can be sent to a representative officer of HMRC.

3. "I did not know that I had to submit an appeal."

HMRC would normally inform you of your right to appeal in their letter or assessment. It will state that you need to submit an appeal within 30 days and in writing.

4. "I moved house and therefore did not receive the letter or notice in order to submit an appeal."

HMRC would send correspondence to the last known address on their system and it would be the responsibility of the taxpayer to ensure that the address was updated. However, there was a tribunal case where the appellant demonstrated that the updated address was provided through the HMRC's PAYE system. However, it is the responsibility of the taxpayer to update HMRC with their current address.

Under S115 TMA 1970, any notice or other document to be served under the Taxes Acts is legally served on, or sent or delivered to, the person by HMRC if it is addressed to that person:

- at their usual or last known place of residence; or
- at their place of business or employment; or
- in the case of a company, at any other prescribed place; or
- in the case of a liquidator of a company, at the liquidator's address for the purposes of the liquidation or any other prescribed place.

This means that any notice that is sent or delivered to a person at any of the above addresses is legally served, irrespective of whether they receive it or not.

I represented our client Mr M A Rashid at First Tier Tribunal (TC/2019/01404 and TC/2019/01407) on 29 September 2020. One of the arguments I put forward although the last known address was correct, our client simply did not receive the PAYE personal liability notice. Throughout the year, the correspondence between HMRC and the agents at the time did not at any time refer to this notice, even though other notices (resulting in total of £131,000 were forwarded to our client at a similar time) had been thoroughly discussed and evidenced in correspondence between HMRC and the agents.

The burden of proof is on the taxpayer to establish that they did not receive the notice, and the standard of proof is on the balance of probability, which in this case of Mr Rashid we managed to demonstrate it to the satisfaction of the judge.

To summarise, it is essential that the agent or taxpayer submits a timely appeal in writing within 30 days of the assessment/penalty issued. The appeal does not have to be extensive, but can be a simple statement stating the grounds of the appeal, which can later be expanded upon. As the saying goes, a stitch in time saves nine; in this case, a timely appeal saves going through the additional costs and time to submit a late appeal, and if this is rejected to submit a tribunal application for permission to make an appeal, and so on. A brief written appeal compiled of two sentences at the beginning can save the taxpayer a lot of stress, time and complications later on.

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