

Will you be reasonable?

Mark McLaughlin looks at HMRC's current approach to 'reasonable excuse' in the context of late filing of self-assessment returns by individuals

The 'filing season' for self-assessment returns is shortly followed by the 'penalty season' when individuals who filed their tax returns late can expect to receive penalty notices from HMRC.

At the time of writing, many taxpayers will have appealed against penalties for the late filing of their self-assessment returns for the tax year 2020/21, or will soon be considering whether to do so, on the basis that they have a 'reasonable excuse' for their non-compliance.

What does it mean?

Fortunately, no late filing penalty arises if the taxpayer satisfies HMRC (or on appeal, the tax tribunal) that there was a reasonable excuse for the failure, provided that if the reasonable excuse has ended the failure is remedied without unreasonable delay thereafter.

However, if the individual relies on another person (e.g., an agent) to deal with the return, there is no reasonable excuse unless the individual took reasonable care to avoid the failure. Furthermore, an insufficiency of funds is specifically excluded from being a reasonable excuse unless attributed to events outside the individual's control (FA 2009, Sch 55, para 23).

There is no statutory definition of 'reasonable excuse' (or 'unreasonable delay') for penalty purposes; note that instead of defining reasonable excuse in positive terms, the late filing penalty legislation only specifies circumstances in which a reasonable excuse does not exist. HMRC states that 'reasonable excuse' has its "normal meaning" (see HMRC's Compliance Handbook manual at CH160200) – whatever that means!

Nice try!

There have been some valiant attempts (but epic fails!) when it comes to taxpayers failing to convince HMRC that a reasonable excuse existed for the late filing of their tax returns. These include:

'I fell in with the wrong crowd'

'My pet dog ate my tax return... and all the reminders'

My work colleague borrowed my tax return to photocopy it, and never gave it back'

It is probably fair to say that such individuals do not take their tax compliance obligations seriously enough! Late filing penalties are imposed to 'encourage' such taxpayers to improve their tax compliance.

Beyond control

On the other hand, HMRC will generally accept that there is a reasonable excuse for late filing in circumstances beyond the individual's control.

For example, in response to the disruption in tax compliance caused by the Coronavirus pandemic, HMRC guidance states (at CH160300): "Where a person has not been able to meet an obligation on time due to the impact of COVID-19, HMRC will usually accept that they will have a reasonable excuse." HMRC also points out that the reasonable excuse resulting from COVID-19 must have applied on or before the date on which the obligation should have been met.

What does it mean?

However, in most cases, in the absence of a statutory definition, individuals will find themselves in a grey 'middle ground' in which they may be required to persuade HMRC (or the tax tribunal) that they had a

reasonable excuse for the late filing of their tax return. This has resulted in relatively extensive case law on the subject.

HMRC guidance (in its Compliance Handbook manual, at CH160200) features its interpretation of 'reasonable excuse', which quotes extensively from Judge Medd in *The Clean Car Company* (LON/90/138X) and includes the following passage:

"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 at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question; was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position that the taxpayer found himself, to do?"

Judge Medd also stated that a person's age and experience, health or the incidence of some other difficulty or misfortune "and, doubtless, many other facts" may all have a bearing on whether they acted reasonably, and so had a reasonable excuse.

The 'correct test'

Subsequently, in *Perrin v Revenue and Customs* [2018] UKUT 156 (TC), the Upper Tribunal (UT) suggested a four-step approach for the First-tier Tribunal (FTT) when considering whether there is a reasonable excuse defence. This approach broadly involves the following steps (see also CH160900):

1. Establishing what facts the taxpayer asserts give rise to a reasonable excuse.
2. Deciding which of those facts are proven.
3. Deciding whether, viewed objectively, those proven facts indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased (ie taking account of the taxpayer's experience and relevant attributes, and their situation at the relevant time(s). The UT commented that it might assist the FTT to ask itself: "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?").
4. Having determined when any reasonable excuse ceased, deciding (once again objectively, based on the circumstances, etc.) whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased).

The UT in *Perrin* also stated: "...it will be a matter of judgment for the [FTT] in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long".

Is it reasonable?

HMRC's Compliance Handbook manual features guidance on specified circumstances, in the context of reasonable excuse. These include mental health, physical illness, ignorance of the law, reliance on another person, bereavement, postal delays and service issues with HMRC Online.

HMRC Online service issues include rejection of the return. The taxpayer (or agent) should provide HMRC with the error message (or details of it) and the date it could not be filed online (CH160300).

Examples of situations which HMRC will not accept, on their own, as a reasonable excuse include pressure of work, lack of information and lack of a reminder from HMRC (CH160800).

Updated guidance

Early in 2022, HMRC updated its guidance on appeals and reviews based on reasonable excuse in the Self Assessment manual at SAM10090.

The updated guidance includes amended commentary on examples of what HMRC might agree as grounds of reasonable excuse.

Making Tax Digital

The existing penalty regime for late filing of self-assessment returns by individuals is being replaced by an entirely new, points-based penalty regime. Making tax digital for income tax self-assessment purposes starts on 6 April 2024. The first quarterly updates, for the quarter 6 April to 6 July 2024, are due on 5 August 2024. It is currently expected that the first end of period statements (for the tax year 2024/25) are due on 31 January 2026.

The new penalty regime provides that no liability to a penalty point or a financial penalty arises if HMRC (or the tribunal, on appeal) is satisfied that the person had a reasonable excuse for the failure (FA 2021, Sch 24, para 19(1)). This provision is very similar to the existing reasonable excuse exception from late filing penalties.

Conclusion

Taxpayers (and agents) should consider using the four-step approach in Perrin when considering the merits of penalty appeals on the grounds of reasonable excuse in appropriate cases and should not be afraid to appeal to the tribunal if HMRC does not agree, even if HMRC's non-statutory guidance suggests otherwise.

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- *Mark McLaughlin CTA (Fellow) ATT (Fellow) TEP is Editor and a co-author of HMRC Investigations Handbook (Bloomsbury Professional).*