

You told me to do it... didn't you?

Mark McLaughlin looks at whether an innocent misunderstanding of advice given by HMRC can represent a reasonable excuse for penalty purposes

Tax practitioners of a certain vintage (including me, unfortunately!) will remember the days when HMRC mainly disseminated information to taxpayers through published material such as press releases, leaflets and booklets. It was also possible to pick up the telephone and call the local tax office for advice (I'll pause there to reflect nostalgically about how much easier tax seemed back in the 'good old days'!).

With the passage of time, technological advancements have resulted in the vast majority of HMRC information and guidance being published online, via the [Gov.uk](https://www.gov.uk) website. Sadly, local tax offices have disappeared and have been replaced by helplines and call centres (www.gov.uk/contact-hmrc). However, taxpayers can still ring HMRC for help and advice and can potentially still write to HMRC with queries. Other facilities include a digital assistant to assist with certain tax matters (e.g. tax codes, or claiming a tax refund), with the option of transferring the query to an HMRC officer, if preferred.

In addition, HMRC operates community forums, to help users find answers to their questions about tax and benefits (<https://community.hmrc.gov.uk/>). The customer forums are aimed at taxpayers, while the agent forums are for tax agents who are represented by a professional body to enable the reporting of issues about HMRC systems that are affecting taxpayers and their clients.

As with all types of information and advice provided by HMRC the question arises: to what extent can taxpayers rely on information or advice given by HMRC officers (in this instance, on the customer forums), which turn out to be incorrect or misleading?

The small print

Very few people read the terms and conditions of websites that offer information or guidance of any kind. However, where tax (and possibly interest and penalties) is at stake, it would clearly be unwise to ignore them. Of course, HMRC will not discuss the tax affairs of individual taxpayers over social media, so will only use the forums to answer general queries, not personal ones. Nevertheless, the terms and conditions of the forums (<https://tinyurl.com/md2dntj5>) contain some important disclaimers by HMRC, including:

- "By operating the Forums, we do not represent or imply that we endorse the material there posted, or that we believe such material to be accurate, useful or non-harmful."
- "Despite our efforts, the Forums may contain... content containing technical inaccuracies, typographical mistakes, and other errors."
- "Information on these Forums, including information provided by HMRC, may be incorrect, out of context, out of date, or may not apply in all circumstances. Always check the official HMRC guidance."
- "Information provided by HMRC via these Forums is provided 'as is' and on the same basis as material on the HMRC website or [Gov.uk](https://www.gov.uk). See [Gov.uk](https://www.gov.uk/help/terms-conditions) Terms and Conditions [www.gov.uk/help/terms-conditions]."

It would be for lawyers (or possibly the courts) to decide whether HMRC's terms and conditions of forum use are watertight enough to protect HMRC from claims by taxpayers in the event of incorrect or misleading advice being given by its personnel. However, it does not take a lawyer to realise that HMRC's intention is to distance itself from such advice.

In addition, the extent to which taxpayers might be able to rely on advice from HMRC (or another government body) that turns out to be incorrect or misleading was covered in the context of other sources of HMRC information and advice in my article 'When HMRC is wrong' (see HMRC Enquiries, Investigations & Powers, April/May 2024). HMRC accepts that incorrect advice given to a taxpayer will be binding if certain tests are all met (see HMRC's Admin Law Manual at ADML1300). However, the tests collectively present high hurdles for taxpayers to jump.

Reasonable excuse?

HMRC's responsibility for the collection and management of taxes is set out in CRCA 2005, s 5. As indicated in my earlier article, HMRC considers that the legislation only permits taxes properly due to be foregone if HMRC would obtain a higher net return for the exchequer by honouring the incorrect advice (ADML1200). However, if the taxpayer receives incorrect HMRC advice but follows it in good faith, could doing so constitute a reasonable excuse for the purposes of contesting the imposition of penalties for (say) the late payment of tax? Depending on the circumstances, the answer seems to be 'yes'.

For example, in *Cohen v Revenue and Customs* [2024] UKFTT 707 (TC), on 5 February 2023, HMRC issued a tax return filing notice for the tax year 2021/22. The filing date for the tax return was 16 May 2023. The return was filed electronically on 26 April 2023. However, as the taxpayer failed to notify HMRC of untaxed income within the statutory time limit of 5 October 2022, the due date for payment of his tax liability was 31 January 2023 (TMA 1970, s 59B(4)). The taxpayer only paid the outstanding tax on 26 April 2023. HMRC therefore imposed late payment penalties. The taxpayer appealed. The basis for his appeal surrounded a webchat with two HMRC advisers, which he claimed gave rise to a reasonable excuse (within FA 2009, Sch 56, para 16).

The taxpayer had sought assistance from HMRC's online platform. Upon being connected to the platform, he stated: "I would really appreciate some additional time to submit my tax return as there have been many days over the last two months since I set up the account on 7 December that I have been unable to work and function like a normal human being."

He was subsequently connected to Kevin, an HMRC digital assistant from the online extra support team (EST). The taxpayer informed Kevin: "I would expect to be able to deal with this before the end of February, as I am taking some time off work to deal with my challenges and will be able to complete it then... latest end of [February], but more likely before the 15 February."

Kevin replied: "We will note the date you expect to file the return (28/02/23) We will not charge a penalty if the return is filed on or before that date The due date for payment remains at 31 January We will charge penalties and interest if the payment is late." [sic]

Unfortunately, the taxpayer was disconnected from the webchat before his discussions with Kevin had concluded, and whilst seeking clarification on the difference between filing his tax return and paying the outstanding tax liability.

A second HMRC adviser, Steve, was then connected to the taxpayer. Steve had specifically been asked to read the transcript of the taxpayer's earlier discussion with Kevin. The taxpayer was informed by Steve: "As your record was only set up on 26 January 2023 you will be allowed 3 months to complete your 2021/22 tax return. We don't expect you to complete it by 31 January." The taxpayer replied: "Great, if you could email me this conversation of confirmation I have 3 months from 26 [January] to complete the tax return." [sic]. However, no further discussion took place with Steve about the difference between the filing date and the payment date.

On appeal, the First-tier Tribunal (FTT) considered the taxpayer's situation and the contents of the webchats. The FTT found that the taxpayer genuinely believed that he had three months to file his return and pay the tax. The FTT also considered case law on reasonable excuse, including *Perrin v Revenue and Customs* [2018] UKUT 156 (TC). The FTT accepted the truth in the taxpayer's submission that despite being completely new to self-assessment, his actions in seeking assistance were guided by a commitment to complying with his tax obligations. It was clear from the taxpayer's questions to Kevin and Steve that the taxpayer did not want to miss any deadlines and was seeking as much guidance as possible, having given full and frank disclosure of his personal circumstances. This prompted him to contact the EST. The taxpayer's appeal was allowed.

Conclusion

The taxpayer in *Cohen* certainly did the right thing in retaining the transcripts of his webchat with Kevin and Steve, in support of his contention that no distinction was made between 'filing' and 'paying' in the advice given by either HMRC adviser. It is certainly a prudent and recommended course of action if seeking to rely on any HMRC advice given in a webchat.

Nevertheless, the FTT pointed out that "mistakes cannot, per se, amount to a reasonable excuse", so in that sense the taxpayer can perhaps count himself lucky. As always, the facts, relevant factors (e.g. the taxpayer's level of knowledge and experience) and the circumstances will generally determine the outcome in each case.

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