Reasonable excuse and insufficiency of funds

Some tribunals appear more sympathetic than others.

It is always interesting to read about reasonable excuses, and there have been two recent (and strangely contrasting) cases on the subject.

In *N Crossley v HMRC* [2016] UKFTT 810 (TC), the taxpayer persuaded the tribunal that he had a reasonable excuse for not paying his tax on time because he did not have the money. That was impressive when you consider that FA 2009 Sch 56 para 16 specifically states: 'An insufficiency of funds is not a reasonable excuse, unless attributable to events outside the person's control.'

The facts were unusual, and they clearly struck a sympathetic chord with the tribunal.

Mr Crossley had some properties which were funded by bank borrowings. He sold one property at a profit but the bank insisted on receiving all the sale proceeds before they would release their charge. So Mr Crossley ended up with no money, but he still had a capital gains tax bill.

The tribunal found that he could only conclude the sale if he could give clean title – which required all the sale proceeds to go to the bank. Accordingly, the absence of the funds to pay the tax was attributable to an event outside his control.

They concluded that Mr Crossley did the best he could in this unfortunate situation. He therefore had a reasonable excuse and should be relieved from the penalty imposed by HMRC.

In contrast, we have the case of *W Coomber v HMRC* [2016] UKFTT 809 (TC). Mr Coomber was also late paying his tax and claimed to have a reasonable excuse from the resultant surcharge.

Mr Coomber sent a cheque to HMRC for the tax, but it was dishonoured by the bank. There was no reason given why the cheque bounced as there were adequate funds in the account to meet the cheque. When Mr Coomber found out about this, he sent another cheque to HMRC which was duly paid. Unfortunately, this was more than 28 days after the due date and a 5% surcharge arose.

Mr Coomber said that he did not know the bank had dishonoured his cheque – and there was no reason for it to do so – and it was certainly not his fault that payment was delayed beyond the surcharge date.

The tribunal said that it was Mr Coomber's responsibility to pay his tax on time. He had chosen to pay the tax by cheque rather than by electronic means and he was therefore taking a risk that if anything went wrong, the clock for penalties would start to run against him.

Mr Coomber said that he could not be expected to telephone the bank on a regular basis to see if cheques had cleared. (Indeed, his agent had spoken to HMRC who told him that the tax had been paid.) The tribunal disagreed. In their view, a reasonable taxpayer would have telephoned the bank to find out whether the tax cheque had cleared. His failure to do so was unreasonable and the surcharge was upheld.

Goodness me, that looks harsh. A few weeks ago, millions of people will have sent cheques to HMRC expecting them to arrive in the normal course of post. Providing they had funds in their account to meet the payment, they may feel it is reasonable to believe that the cheque will arrive and the payment will be made.

Is it reasonable to expect all those millions of people to have made millions of telephone calls to their banks to make sure their cheques have cleared? (They would not have been able to get through of course, but never mind that.) Furthermore, what is the taxpayer then supposed to do. He calls the bank and they tell him that the cheque has not cleared. So what then: does he send another one? He may not have sufficient funds to pay the tax twice. He could cancel the first cheque, but that would mean that the cheque which was sent on time (which might just be about to clear) would certainly not be paid, thereby giving rise to a penalty.

One might have hoped that both HMRC and the tribunal would have felt that the quality of mercy would not have been too strained by a more sympathetic approach. ■

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What next for UK tax competitiveness?

Haven our cake and eating it.

In a recent interview, Pascal Saint-Amans, director of the OECD's Centre for Tax Policy and Administration, was asked how concerned he was that the UK will end up going the tax haven route following withdrawal from the EU. He said:

'The UK wants companies to pay taxes – not much tax, because they want to be very competitive, and they have a very competitive system. Now, can they go much further in [terms of] competitiveness? Yes, they may cut their taxes a bit more, but there's not much room [that] would drive dramatic change. The margin for slashing taxes is very limited because their taxes are already pretty low.'

So, not that concerned it would seem.

That seems to us to be the correct analysis. The UK does indeed have a very competitive tax system at present, ironically in part due to changes required by European law. A low rate of corporation tax (currently 20%, dropping to 19% from 1 April this year and falling further to 17% by 2020), a corporate dividend exemption, a substantial shareholding exemption that is being further relaxed, no dividend withholding tax, manageable controlled foreign company rules and an impressive double tax treaty network.

The expression 'tax haven' has become so debased in recent discussions so as to be essentially meaningless, but what could the UK do to make it look like the traditional tax havens, such as the Cayman Islands?

It could abolish corporation tax. The problem is that those who advocate such a radical route tend also to conclude that it would need to be replaced with a tax on distributed earnings at the shareholder level, including non-resident shareholders, in order to recoup the billions of pounds of revenue foregone. Which doesn't sound much like a tax haven.

Maybe the UK could become a tax haven for individuals, with say a flat rate of income tax at 20%. Well, it could do, but that would also leave a significant shortfall in government revenues, which would need to be replaced by higher taxes elsewhere, or even greater reductions in government spending. If one looks at the profile of those who voted to leave the EU, and their reasons for doing so, a policy that involves those on higher incomes (the perceived elites) retaining a substantially greater proportion of those incomes is unlikely to be popular, especially if it comes at the cost of deeper or longer austerity.

The IFS warned earlier this month that UK tax burdens will soar to the highest level for 30 years.

Although the future shape of the UK's fiscal model is inevitably going to have to adapt to a new post-Brexit reality, the budgetary constraints on the country mean that the UK simply can't afford to become a tax haven post Brexit, and that it would be electoral suicide for a government to try. Future developments in the competitiveness of the UK's tax system are going to need to be far more subtle than simply gaming headline rates. ■

Jeremy Cape and Robert O'Hare, Squire Patton Boggs

The draft rules on IHT, UK residential property and offshore structures

More Finance Bill clauses stray beyond the brief.

The draft Finance Bill clauses published in December 2016 contain several examples of provisions that seem to have an effect beyond the stated target. One such set of provisions is the new Sch A1 to IHTA 1984, which can be found in Sch 13 to the draft Finance Bill.

This new Schedule contains provisions which are designed to prevent shares in closely-held companies which derive their value from UK residential property from being treated as 'excluded property' for IHT purposes and so outside the scope of IHT. The principal target of these new rules is to extend the scope of IHT to UK residential property owned by non-domiciled individuals through offshore structures.

Various representative bodies have made representations about these provisions which seem to extend not only to individuals owning a home through an offshore corporate structure but also, for example, to certain private banks which make loans secured on UK residential property. Another aspect of the new rules is that they make no distinction between companies that hold residential property for personal use by the shareholders or as an investment and those, such as residential property developers, which hold real estate as part of a trade. Under the current drafting of Sch A1, the result is that shares in a closely-held non-UK incorporated company which is a developer of residential property in the UK or which is the parent company of a UK company that is undertaking such development are no longer excluded property.

This seems contrary to the policy behind the legislation. And while it may often be the case that shares in real estate developers will qualify for business property relief from IHT, others will not. Perhaps some thought could be given to an exception for property developers similar to the exclusion from the annual tax on enveloped dwellings (ATED). It might even begin to look like a consistent policy. ■

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The evolution of the tax lawyer

The importance of getting the 'knowledge versus recommendation' balance right.

What follows is not a tax commentary. It aspired to be one, but somewhere along the way evolved into something different. I won't say 'evolved into something more', because what more is there than tax?

To give context to what follows I should say that my background is very much rooted in academia. I fell into the practice of tax law entirely by accident; but loved it all the same. It appeals to my academic core and is in a constant and challenging state of flux. What is there not to love about that?

But I am an academic; I appreciate that business is diametrically opposed to me on this point.

So what do my clients want from me? Apart from the obvious that is, which is the correct (and practical) answer to their tax conundrums.

When I moved away from City practice, where many clients were once happy to pay for the chapter and verse (or a weighty doorstop) underpinning a tax opinion, I spent some considerable time being retrained by my new colleagues. Putting aside the quips about my floral and occasionally archaic use of the English language (with a sprinkling of Latin for good measure), I was told not to spend vast amounts of time writing a lengthy and technical advice in which all options are explored with detailed pros and cons. Instead, I was to explore the options 'behind the scenes' and note on the file the pros and cons. Doing this in note form saved the client from having to pay for my time to write up such notes in an explanatory and detailed format; better still, it saved them from having to read it. As a consequence, the advice I sent clients became shorter, with very little background narrative and invariably starting with an executive summary that set out my recommendation. The text that followed the summary would set out the pros and cons and highlight any risks; if there were other viable options then these would be referred to. But no (or very little) case names were used, and definitely no Latin (okay, maybe just a little bit on special occasions).

It felt peculiar and, at times, a little risky to be so direct when giving tax planning advice; but clients seemed to appreciate it and kept coming back, which is as good an indicator of client satisfaction as you can get. Indeed, this approach to giving tax advice seemed popular. Increasingly (and in all areas of the law) clients are requesting a 'no frills' service; limit the scene setting stories and the encyclopaedic explanations. As one of my clients recently said: 'you don't need to prove to me that you know your specialism, I wouldn't still be instructing you if I didn't believe you knew what you were talking about, just tell me what the realistic options are and headline the risks for me'. The first time I heard the 'no frills' sentiment expressed this way, it seemed rather brusque. I don't mind saying that I was a little bit put out. I had always felt that when advising a client on tax planning options, they needed to be fully informed; made aware of the technical and far-removed risks as well as any immediate ones. As I'm sure you can appreciate, this required me to at least doff my hat to *Ramsay* and *Westmoreland* and the GAAR, alongside commenting on any relevant TAARs. But it is now a rare piece of tax planning advice that sees a client actually requesting such level of detail.

Is it such a bad thing though? As UK tax law becomes ever more complex and voluminous, a detailed opinion that covers every conceivable tax angle of a transaction or a piece of planning will inevitably become implausible (not to mention, unreadable). A big part now of being a good tax lawyer is having the ability to take a practical and measured hand to the way we deliver our advice; balancing this alongside the need to make sure the client is sufficiently well-informed of any risks they might be taking. This balancing act is not always an easy one to perform in an area such as tax where the risks seem to be ever-increasing, and sometimes even retrospective.

So as tax lawyers (and in truth, tax advisers generally) we need to add another string to our, already heavily strung, bow: the ability to get the knowledge versus recommendation balance just right. Of course, that balance is different for every client, and it is here that I struggle to offer any sort of generic insight. All you can do is take the time to get to know each client and to make sure that you understand what they want to use your advice for, what they want to achieve and how much energy they want to expend on it. ■

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