

Penalties and reasonable excuses

The disproportionate number of penalty appeal cases before the tribunals suggests that there is something wrong with their design or operation.

I hope that I may be forgiven for returning to the theme of penalties and reasonable excuses.

It cannot seriously be doubted that penalty appeals take up a disproportionate amount of court time. Anybody reading these judgments will be driven to the inescapable conclusion that something has gone a bit wrong.

The number of penalty appeals is huge – vastly more than on any other subject. The volume of these appeals gives a clue to the problem – and to the solution.

If you have a door in your office that people are always bumping into, you could say that they should jolly well take more care and should be penalised. That will teach them. However, nobody bumps their head on a door on purpose and if lots of people do so, then what is wrong is not them, but the design of the door. The numbers speak for themselves.

So it is with tax penalties. The penalty cases are so disproportionately numerous (and the published ones can only be the tip of an iceberg) that they show there is something wrong with their design or operation. In any event, it is self evident that people cannot be deterred by a penalty from doing something which they did not want, or intend, to do in the first place.

It is not only that the penalties are too harsh; it is that they are applied too harshly. The tribunals make that quite clear. The vast majority of people do not need such penalties. The compliance record in the UK is extremely good. Taxpayers really do want their tax affairs right, but the rules are so complicated that they inevitably give rise to errors. Taxpayers are outraged when the slightest (and often innocent) error is severely punished – particularly when errors by HMRC face no sanction at all.

The result of the penalty regime being applied with unreasonable harshness is that the courts bend over backwards to mitigate that hardship as far as they can. They cannot always do so, but they try – sometimes tying themselves in knots to find a reasonable excuse, or some other reason – so that they do not have to apply the clear words of the legislation and can relieve the taxpayer from manifest injustice. I would suggest that a revenue authority exercising proper care and management would take note of the approach (and criticisms) of the courts, and act accordingly. It is perfectly able to cause the legislation to be framed

appropriately, or to adjust it where it has gone wrong. To claim money unjustly from taxpayers simply brings the tax system into disrepute – and is counterproductive because the very unfairness discourages compliance.

There is an endless supply of examples in the published reports of appeals before the tribunals demonstrating these points, and more are being published all the time. Four notable cases in the last few weeks include *Munn* [2018] UKFTT 234, *Hart* [2018] UKFTT 207, *Hayhurst* [2018] UKFTT 265 and *Hamilton* [2018] UKFTT 263.

This all means that the taxpayer does not have the faintest idea about the correct position – and advisers are not much better placed. They can read the legislation and HMRC's manuals and conclude that they are caught by a penalty with no possibility of any relief. However, if they then read the tribunal reports they will find lots of examples where the legislation (and the manuals) were held not to apply. So what does any sensible person do? They appeal, of course, because the courts could well sympathise and relieve them from the injustice they feel they are suffering at the hands of HMRC. And whether they are right or wrong, this inevitably increases the almost overwhelming number of penalty cases before the courts.

Of course, there are people who deliberately fail to discharge their tax obligations in the hope they will get away with it. Such people deserve to be treated harshly. However, no good purpose is served by treating innocent taxpayers in the same way.

HMRC may well say that it has to apply the same rules to everybody. However, it certainly does not have to apply the rules in the same way to all taxpayers. But even if it were true, it is no justification for continuing to perpetuate clear and obvious injustices. It can and should do something about it. ■

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Consultations closing soon

The following consultations and calls for evidence close this month:

CGT payment window for residential property gains: Consultation on a new requirement to make a payment on account of CGT due on disposals of residential property within 30 days of completion. See bit.ly/2qXWB8u. Closes 6 June.

Cash and digital payments in the new economy: Consultation seeking views on what more can be done to prevent the use of cash to evade tax and launder money. See

bit.ly/2p7HnOb. Closes 5 June.

Employment status: HMRC, HMT and BEIS are consulting jointly until 1 June 2018 on how to define more clearly the employment status rules within the current three-tier system (employee, worker and self-employed), which the government, in its response to the Taylor review of modern working practices, agreed should be retained. See bit.ly/2nTDhb5. Closes 1 June.

Energy products: EC consultation on evaluation of the EU framework for taxation of energy products and electricity. See bit.ly/2GBDqbb. Closes 4 June.

Gaming duty: HMRC is consulting on three options for changing the current six-month accounting period for gaming duty. See bit.ly/2GJ1op0. Closes: 4 June.

IHT: An OTS call for evidence and online survey to gather information for its review of IHT. See bit.ly/2rbNW36. Closes 8 June.

Insolvency and tax abuse: HMRC is consulting on proposals for tackling avoidance and evasion through abuse of the insolvency regime, including phoenixism. See bit.ly/2GSnoxW. Closes 20 June.

Northern Ireland: Views sought on the impact of VAT and APD on tourism in Northern Ireland. See bit.ly/2FPKtQn. Closes 5 June.

Online platforms: Consultation on what online platforms could do to make users aware of their tax obligations. See bit.ly/2pbdSdt. Closes: 8 June.

Profit fragmentation: HMRC is consulting on measures to prevent individuals, partnerships or companies avoiding UK tax by transferring trading profits to unrelated foreign entities. See bit.ly/2HRCCtn. Closes 8 June 2018.

Security deposit regime: Consultation on extending the existing security deposit regime to include corporation tax and the construction industry scheme. See bit.ly/2HvMVZF. Closes 8 June.

Training, self-funded work-related: A consultation on extending the tax relief available for self-funded training by employees and the self-employed. See bit.ly/2tNziTg. Closes 8 June.

Transfer pricing guidelines: Two OECD consultation documents proposing changes to the transfer pricing guidelines. See bit.ly/2KNvPIR. Closes 20 June.

VAT registration threshold: HMT is consulting on the effects of the current VAT threshold on business growth, and ways to smooth the cliff-edge effect for businesses of reaching the threshold. See bit.ly/2FPZLog. Closes 5 June.

VAT split payment for online sales: HMRC is consulting on VAT 'split payment' as a means of preventing online VAT fraud. See bit.ly/2pabuU5. Closes 29 June 2018. ■

For more details, see the consultation tracker on taxjournal.com.