Winning on penalties

Top five penalty hints.

We couldn't resist. You wouldn't really expect us to, would you? So here are our top five penalty hints.

1. If a tax return is incorrect because of carelessness (but not deliberate inaccuracy) any penalty can, at HMRC's discretion, be suspended. But there is no power to suspend a penalty for a late return.
2. If a return proves to be inaccurate because 'avoidance arrangements' (as defined) don't work, the inaccuracy is presumed to have been 'careless' unless the taxpayer can show that he or she took 'reasonable care'. And relying on 'disqualified advice' (as defined – broadly anything other than specific independent advice from a competent and disinterested person) doesn't count as taking 'reasonable care'.

Two recent cases have given conflicting decisions on whether there can be a 'reasonable excuse' for failure to pay an accelerated payment notice that you genuinely and credibly believe to be incorrect

3. It's not only your own errors that can land you with a penalty! If HMRC issue you with an assessment which understates your liability to tax and you don't within 30 days take 'reasonable steps' to tell HMRC of their error, you become liable to a penalty of up to 30% of the understatement. (Is HMRC liable to a penalty if they carelessly over-assess you? Strangely not…)
4. If a partnership return is incorrect due to carelessness or deliberate failure on the part of the person filing it, it's only the partners whose tax bill is affected by the inaccuracy who are liable to pay a penalty. But they are liable even if they are personally entirely blameless.
5. Two recent cases have given conflicting decisions on whether there can be a 'reasonable excuse' for failure to pay an accelerated payment notice that you genuinely and credibly believe to be incorrect. *Beadle* says you must pay even if it's plainly wrong, and that your only recourse is judicial review (JR). *Chapman* says that it's reasonable to decline to pay a manifestly incorrect demand. Both agree that merely being party to ongoing JR proceedings is not a reasonable excuse. ■

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IHT business property relief

Are there circumstances when a letting property can qualify for business property relief?

The tribunals have consistently held that letting property is an investment business, no matter how extensive the services provided. Business property relief will therefore not apply because IHTA 1984 s 105(3) excludes entitlement to the relief if the business:

'consists wholly or mainly of one or more of the following, that is to say, dealing in securities, stocks or shares, land or buildings or making or holding investments'.

The recent case of *Executors of the Estate of M Ross v HMRC* [2017] UKFTT 507 involved holiday cottages which were let, and where many services were provided to the guests. The tribunal acknowledged that a high level of services was provided to guests and that these services were more extensive that those considered in any previous decision. However, it was irrelevant because, in the view of the tribunal, the business property relief would not be available 'however high the standard of services which were provided and whatever the level of expenditure incurred on those services'. The fact that the business was run on sound business lines and with considerable effort was not relevant. This decision, particularly having regard to the cases of *Pawson v HMRC* [2013] UKUT 50 and *Zetland v HMRC* [2013] UKFTT 284 and many others, looked like the end of the road with this argument.

In the case of *Estate of M Vignes v HMRC* [2017] UKFTT 632, HMRC took the same view with regard to a livery business (which, of course, necessarily involves the use of land and buildings – or at least structures). It said that the business was nothing more than the letting or licensing of land for the use of others and was therefore an investment business – being the making or holding of investments.

However, the FTT concluded that no properly informed observer could have concluded that the livery business was wholly or mainly a business of holding investments. It said that the Upper Tribunal in *Pawson* had started from the preconceived idea that the business is wholly or mainly one of making or holding investments, and then asked whether there are factors indicating to the contrary. The tribunal said that the proper starting point is to make no assumption one way or the other but to establish the facts and determine whether or not the business is wholly or mainly one of making or holding investments.

This approach has now been supported by the case of *Executors of G Joyce Graham (Deceased) v HMRC* [2018] UKFTT 306, which also involved the letting of holiday accommodation and the provision of various services. The taxpayer represented herself and her impressive advocacy persuaded the tribunal that the services she provided were sufficiently extensive that the business should not be regarded as wholly or mainly an investment business. The tribunal said that the provision of 'the pool, the sauna, the bikes and in particular the personal care lavished upon guests by Louise Graham' distinguished it from a second home let out in the holidays.

The conclusion must be that letting property can represent a business qualifying for BPR, being more than merely the holding of an investment – and that the nature and quality of the services provided is what makes the difference

It does not seem that the services provided in this case differ very much from those in *Ross* (or *Pawson* or *Zetland*), all of which were unsuccessful in their claims for business property relief; so Louise Graham's success is even more impressive.

The conclusion must be that letting property can represent a business qualifying for business property relief, being more than merely the holding of an investment – and that the nature and quality of the services provided is what makes the difference. After all, that is why a hotel qualifies for relief. There is clearly a line – the tribunals refer to it, though we do not yet know where the line is. Maybe it will become visible in due course. ■

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