

Two recent tribunal cases indicate that the tribunals are adopting a sympathetic approach to taxpayers in these difficult times. Each involved a penalty charge for the late payment of tax and whether an insufficiency of funds could be a reasonable excuse. This is not a promising prospect. The penalty regime in FA 2009 includes the following phrase in all relevant places: 'an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control'.

HMRC takes the view that cashflow problems are part of the normal cycle of business and need to be managed as part of the day to day operations. However, it does acknowledge that there can be unforeseeable events outside the taxpayer's control which will create a severe cash shortage which cannot be managed.

This issue arose last month in the case of *Anaconda Equipment International Ltd v HMRC* (TC03521). The company's business was the manufacture of conveyor systems and engineering equipment for the construction trade. The company seemed to be managing its cashflow position satisfactorily, but when the bank reduced its overdraft facility from £1m to £355,000 and it lost two big clients which accounted for two thirds of its turnover, it had a serious problem. It had no alternative but to refinance the business and that obviously took some time. Although the taxpayer had a history of poor compliance, the tribunal looked at this appeal on its merits. It concluded that the reduction in turnover from the loss of two major clients and the substantial reduction in the overdraft facility were events entirely outside the taxpayer's control and constituted a reasonable excuse for the late payment.

A few days later, the case of *Paragon Precision Engineering Ltd v HMRC* (TC03542) was published. This involved an appeal on the same grounds: an insufficiency of funds. However, this was even more difficult because it was a VAT case and the rule for VAT in VATA 1994 s 71(1)(a) is: 'an insufficiency of funds to pay any VAT due is not a reasonable excuse'.

There is nothing here about events outside the taxpayer's control and so the appeal looked completely hopeless. However, the taxpayer had an argument based on proportionality. It claimed that the tribunal could strike down the penalty if it was clearly out of proportion to the default. This approach has previously been supported by the Upper Tribunal, although it said that this power should rarely be used because 'the tribunal should show the greatest deference to the will of Parliament when considering a penalty regime'.

In the case of *Paragon*, the tribunal did not think that the penalty was disproportionate – but suspended its decision for 21 days to give the taxpayer the opportunity to provide further evidence regarding its financial affairs to demonstrate a lack of proportionality.

Whether *Paragon* succeeds or not, the mere possibility opens up an interesting further defence to the taxpayer. Although most appeals on penalties fail before the tribunal, there are clearly circumstances which can represent a reasonable excuse if a sympathetic case can be put forward.

**Peter Vaines**

Partner, Squire Patton Boggs  
E [peter.vaines@squirepb.com](mailto:peter.vaines@squirepb.com)

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