

When is an application to reduce penalties because of 'special circumstances' a better bet than 'reasonable excuse'?

There are lots of tribunal cases where HMRC has imposed a penalty for a failure to comply with the tax legislation and the taxpayer has claimed a reasonable excuse with varying degrees of success. The recent case of *Optrak Distribution Software Ltd v HMRC* [2015] UKFTT 0279 (TC) is such a case, but it contains some interesting (and unusual) features. The case involved the late payment of PAYE liabilities but the precise details do not matter here.

The taxpayer claimed that (for various reasons) the imposition of the penalty was unfair. However, the tribunal explained that:

'In the light of the Upper Tribunal's decision in *Hok*, we have no choice but to find that unfairness cannot be a ground on which to allow the appeal.'

The taxpayer then argued that the penalty was disproportionate and unduly onerous. The tribunal said that it had sympathy for the appellant's arguments, but explained that a penalty cannot be set aside for being disproportionate or unduly onerous either. Whatever the merits of this particular case, these conclusions seem in stark contrast to the HMRC consultation paper on penalties issued on 2 February 2015 in which it expressed the 'underpinning' principle that penalties ought to be fair and proportionate.

It may be that there is nothing the tribunal can do about it, but this seems a bit off. I thought the whole idea was for the courts to protect the taxpayer from unfair, disproportionate and onerous impositions by the executive. (I am sure Magna Carta had something to say about that – and Montesquieu too.) In any event, having regard to its public statement one might have thought that HMRC's duty of care and management would have inhibited it from pursuing these arguments quite so vigorously.

Moving on, it may be remembered that there used to be an issue about postal delays – where the taxpayer posts a cheque for the tax in good time, but the payment does not reach HMRC until after the due date. That issue seems to have been resolved (at least there has been a series of cases on the subject) – but in the case of *Optrak*, the circumstances were slightly different.

The company did not post a cheque to HMRC; it paid by bank transfer. There was a three day banking delay (unless 'faster payment' applies, which apparently HMRC does not use). The tribunal held that the taxpayer should have known the payment would have taken three days to reach HMRC, so it could not reasonably have been expected to have arrived earlier. This is an interesting variation on the postal delay cases. Another point of interest was the possible application of 'special circumstances', which seems to be arising more regularly.

HMRC has power under FA 2009 Sch 56 para 9 to reduce a penalty because of 'special circumstances'. This is a discretion given to HMRC and cannot be reviewed by the courts unless the approach of HMRC was flawed – or if it should have been considered and HMRC failed to do so. However, the special circumstances must be special to the particular taxpayer. It must be something more than the general circumstances which would apply to many taxpayers by virtue of the scheme of the provisions themselves.

There were no special circumstances which operated in the particular circumstances of *Optrak* and so no reduction on this ground was appropriate, but it is interesting that this issue is being raised increasingly by taxpayers as an alternative to a reasonable excuse. A reduction for special circumstances only applies where there is no reasonable excuse but the effect on the taxpayer may well be the same.

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