FOUR PRACTICAL POINTS TO HELP DEFEND YOUR CLIENT

by Laurent Sykes

No-one is perfect (not even HMRC), and sometimes taxpayers fail in their obligations. Here are some important practical arguments for the taxpayer to have in mind in such circumstances.

Point 1: Failure to notify chargeability

On the face of it, 20 year time limits apply under s36 TMA 1970 where there has been a failure to notify chargeability even where there has been no "deliberate" conduct.

However, s118(2) TMA 1970 says that, where a person had a reasonable excuse for not doing anything required to be done, he shall be deemed not to have failed to do it provided, once the excuse ceased, he did it without unreasonable delay.

This is a mouthful, but the point is, if the taxpayer can establish a reasonable excuse for failure to notify chargeability (bearing in mind ignorance of the law can in some cases be a reasonable excuse), time limits can be halted. This is an argument which HMRC have in the past accepted.

A typical example may be an individual who does not realise that he is viewed as UK resident. HMRC may seek to go back 20 years. But using S118(2) could shorten this period to just 6 years and potentially 4.

Similar principles apply to trusts and, under FA 1998, the same rule is brought in to also apply to companies which fail to notify of their chargeability to corporation tax.

Point 2: No need for a reasonable excuse

HMRC may be obliged to extend a statutory time limit or deadline if the result of not doing so would amount to a

disproportionate interference with the taxpayer's rights to their own property. A reasonable excuse is not necessary.

That HMRC do have a general discretion to extend time limits in case of hardship is recognised by both them and the case law (see the Wilkinson case). The dispute arises as to when the discretion should be exercised. Where the interference is disproportionate, then, as a public body, HMRC must exercise their discretion to prevent this. Proportionality is moreover to be judged in light of the impact on the specific taxpayer and not in the abstract (see the Total Technology case). It follows then that an extension does not always depend on showing an absence of any blameworthiness by the taxpayer.

Point 3: Reasonable excuse – factors to be considered

Where the legislation allows for a reasonable excuse to avoid a penalty, what constitutes a reasonable excuse is a matter of statutory interpretation.

If the Act provides for taxpayers to be given a reminder before the sanction is imposed, then it would be treating taxpayers unfairly if the taxpayer who was not provided with the reminder should be put in a worse position because of HMRC's failing to give that warning. An example is the oft-ignored obligation on HMRC to notify the taxpayer that a tax-geared penalty under Schedule 56 FA 2009 has been incurred as soon as the first one is. Another is the obligation on HMRC, where there has been a faulty claim to enhanced protection under the lifetime allowance charge regulations, to notify the taxpayer of that. Who has the burden of proof for showing this warning has been given? HMRC, naturally, since only they have the information necessary to do so. If they cannot, a reasonable excuse may be established.

Point 4: The postal rule

If there is a dispute about whether something has been sent by the taxpayer to HMRC it will often be sufficient to prove

on the balance of probabilities that the item was posted by the taxpayer, and not that it was received by HMRC.

The rule allowing service by post of tax documents is contained in s115(2) TMA 1970, which provides that any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post. That applies whether the sender is HMRC or a taxpayer. It also follows from this that the risk of non-receipt lies on HMRC since they are taken to have accepted the risks inherent in the postal system by enacting s115(2). See *Aikman v. White* [1986] S.T.C. 1, cited with approval in *Hayman v. Griffiths* [1988] Q.B. 97.