



The Law Society

Modernising Powers, Deterrents and Safeguards: Simplification of regulatory penalties

Comments of the Tax Law Committee of the Law Society of England and Wales

Introduction

1. The Law Society is the representative body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the profession and lobbies regulators, the Government and others.
2. This response has been prepared on behalf of the Law Society by the members of the Tax Law Committee. The Committee is made up of senior and specialist tax lawyers from across the country.
3. We are grateful for the opportunity to comment on the consultation 'Modernising Powers, Deterrents and Safeguards: Simplification of regulatory penalties' published on 17 June 2011 (the "Con Doc").

Design principles and general issues

4. In the context of this consultation we believe that there are two points which need to be taken into account:
 - 4.1 The various penalties discussed are diverse and have arisen over a significant period of time. It may be that an attempt to bring these within the framework designed for such matters as failure to file returns where far more is at stake for HMRC is not possible or appropriate in many cases;
 - 4.2 We consider that it should be remembered that a penalty charged by a revenue authority is of a similar character to a fine for a criminal offence and any proceedings in respect of it attract Article 6 ECHR (right to a fair trial): *Jusilla v Finland* [2009] STC 29. A taxpayer, if he believes he has been treated unfairly, may well seek legal redress and may well find a court agrees with him. (See for example *N A Dudley Electrical Contractors Limited* [2011] UK FTT 260 where a penalty for failure to file a P35 was discharged when the taxpayer showed he had not been sent the P35 to file; an additional penalty was also discharged because the taxpayer was unaware of his failure until the first penalty notice was received which was only sent when the period for levying a second period had started. The judge described this as not constituting "fair dealing"). It is suggested that HMRC will not wish to bring the full rigour of the new penalty regime into play if loss of tax is not an issue, or where the failure to provide the information is not likely to produce loss for HMRC.

Detailed Comments

5. It follows from the above that in our view:
- 5.1 Many of the penalties which are referred to are ones where the taxpayer is likely to have failed to comply with this obligation simply because he did not know he had to.
- 5.2 We very much agree with the suggestion (and believe it would be of benefit to both HMRC and taxpayer) first to educate taxpayers as to their filing and notification responsibilities, before penalising them for omitting to do something which, very often, they would not know they were required to do.
- 5.3 In principle HMRC should not levy penalties unless it has suffered some fiscal loss or information has not been provided and this failure is likely to lead to such loss – as, unless such loss is present, the financial penalties levied by HMRC appear to us (particularly in the case of regulatory trenches) to be disproportionate and unjustified. Whilst this may not be compatible with the approach taken in the Con Doc, it is thought that it would be preferable to move in this direction where possible. Any penalty levied should be proportionate to the "offence" committed, and in this respect we agree with the appropriateness of the principle of proportionality set out in the Con Doc.
- 5.4 We agree that there is considerable merit, as mentioned above, in applying no penalty for the first offence and that the defence of "reasonable excuse" should apply to all regulatory penalties. We would agree that the limitations on the concept of reasonable excuse found in other legislation could be employed in the case of regulatory penalties, perhaps with some modifications in the light of the fact that the failure is to comply with a regulatory obligation (so the provision could perhaps be simplified). With regard to whether taxpayers should have a right to be reminded of their filing obligations, we consider this is a question of finding the correct balance between what a taxpayer should themselves be expected to know, and what they should be entitled to be reminded of periodically by HMRC. The system will fall into disrepute if taxpayers suffer penalties for minor failures of which they had no knowledge.
- 5.5 We consider that it would be a positive step for HMRC to remove from the extensive list of possible penalties any penalties which HMRC itself acknowledges are no longer commonly relevant to taxpayers. It is thought that such a step towards de-regulating the area would be recognised as a positive step forward.
- 5.6 On a related point, it is noted that the large number of possible penalties which taxpayers may incur may in itself lead to confusion and complicate matters so that it is (a) more difficult for individual taxpayers to correctly comply with the procedures which apply to them, and (b) consequently creates more work for HMRC than may otherwise be necessary. It is thought preferable for simplification of the area to take place where possible, which would be in line with the principles set out in the Con Doc. We are not particularly in favour of importing wholesale the concepts from the remainder of the new system such as "deliberate concealment", reduction for disclosure, and so on. If the penalties are "regulatory" then they should be treated as such.
- 5.7 We do not think it appropriate that, if a taxpayer has historically incurred several penalties from HMRC, he should then be treated more harshly in the event of a further failure to comply than any other taxpayer would be treated. No penalty should be disproportionate to the offence which has been committed. Equally we do not believe that the "parking fine" approach is appropriate in these cases.

- 5.8 The main focus should be on removing as many penalties as possible, adopting a simple system where a taxpayer gets a warning before he is penalised (whether by virtue of being absolved from a penalty on the first offence or otherwise) and offering him a fair hearing through a reasonable excuse defence should he disagree with the penalty imposed in his case.

Contact details:

If you have any questions concerning these representations or would like to discuss anything contained in them, please contact the Chair of the Tax Law Committee, Mr Ashley Greenbank (tel: 020 7849 2512, e-mail: ashley.greenbank@macfarlanes.com) or Mr Richard Stratton (tel: 020 7295 3219, e-mail: richard.stratton@traverssmith.com)

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