Sweby case humiliating for HMRC

The Caroline Sweby case saw HMRC exposed by the Tax Tribunal, writes Les Howard

Persistent poor practice by HMRC has been ruthlessly exposed by the Tax Tribunal in the case of Caroline Sweby.

The underlying substantive tax question related to loss relief in relation to 'Pendulum Contracts', a form of financial trading. There have been previous FTT decisions on the issue in Thomson, Mungavin and Worsfold [2018] FTT 396 and Sherrington (TC/2009/10952).

Ms Sweby's case turned in part on those decisions and also the FTT decision in Outram [TC/2015/03404 & 03405] on the question of discovery assessments.

So there were a number of technical legal matters under consideration. This is routine, and parties generally make applications to the FTT, for example, to stand over an appeal until the release of one or more Tribunal or Court decisions.

The FTT decision highlights that the fact that HMRC had been directed by the FTT to issue its Statement of Case within two months of the release of the Thomson decision. The two-month period expired on 16 September 2018. On 1 January 2021, HMRC applied for an extension of time to issue their Statement of Case. It was this application that the taxpayer had objected to.

The FTT's demolition of HMRC's application and supporting arguments is superb.

The main case on late applications is Martland (paras 24-25 refer). A point to note here is that time limits apply to HMRC and taxpayers alike. Readers will be familiar with the threefold Martland tests.

First, HMRC sought to argue that Martland did not apply (paras 26-27). They said "in the case of a late statement of case, however, the position is that the time must be extended if the statement of case contains an application for an extension and a reason for the delay". Outrageous! So, HMRC could issue their Statement of Case at any time, admitting a delay and bypassing Martland! The Tribunal was restrained in its response: "HMRC's reading of rule 25(4) would make the time limits in rule 25(1) for providing a statement of case otiose."

Second, HMRC's application was for a "retrospective extension of time". The FTT simply concluded that this would mean that "compliance with rules and directions would become unnecessary where a party could reasonably argue that it could have applied to have them amended or extended". Para 33 of the decision continues: "That submission cannot be right. In this case, no application was made for more than three years and to ignore that because one could have been made would be completely inconsistent with the need for compliance with rules, practice directions and orders." Penetrative and searing. Ouch!

Third, following further delay, HMRC compounded their error. Having had an exchange of correspondence with Gary Brothers, the taxpayer's representative, in July 2021, HMRC waited a further five months to make application. There was a vague statement of HMRC requesting paper records, scanning, etc., before drafting their Statement of Case. This statement contained no explanation for the delay, as required by Martland. "That shows a casual attitude to compliance with the FTT directions which is inconsistent with the guidance given in the cases cited above and which the FTT will not tolerate."

Fourth, HMRC argued that for the FTT to refuse their application would effectively bar them from participating in the Appeal. This is also the substance of the application by the taxpayer! Inevitably, the Appeal would be allowed. And why not!?

Fifth, Sweby's objection to HMRC's application included a comment that a 3½ year delay would prejudice her case. Memories fade over time. And the delay would prejudice her ability to bring civil proceedings against the accountants who had advised her to invest in Pendulum.

Sixth, HMRC made no reference to Martland in their application. This is (or should be) standard practice in all cases where either party has delayed making an appeal or application.

On its analysis of the reasons for the delay, the FTT concluded that this was essentially a series of administrative errors. The reasons given "have very little merit". They had overlooked a date for compliance for three years! And there was no justification for taking a further five months to make an application to the FTT for a (further) extension of time.

Part of the Martland process is to consider prejudice to the parties. HMRC correctly argued that, for the FTT to deny its application, would be effectively to allow the appeal. The FTT responded: "As that prejudice is the consequence of HMRC's own failure to comply with the FTT's directions, I do not give it as much weight as the prejudice caused to Ms Sweby. I consider that, on balance, the prejudice caused to Ms Sweby outweighs the prejudice that will be suffered by HMRC."

In conclusion, HMRC said that the circumstances of the case did not merit the "rather draconian final outcome" that HMRC be barred from the appeal. The FTT disagreed. Sweby's application was allowed.

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