Briefing

Private client review for May

Speed read

This month, we comment on the recent FTT decision in *Sweby*, reminding us of the importance of process in tax disputes. For UK residential properties held through non-natural persons, new valuations are required for ATED payments. The FTT judgment in *McEnroe* highlights the importance of accurate drafting to ensure that the tax consequences of a transaction reflect the economic outcome. Clarification on two charity law points has been provided over the last month. Finally, a recent High Court case on the ostensibly Dickensian concept of 'fraudulent calumny' highlights that advisers' evidence may make the difference between a will surviving challenge and not.

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Sweby: process remains important in disputes

This column has often commented on the importance of procedural compliance in tax disputes. It is often tempting to focus only on the substance of the dispute and assume that a tribunal will forgive any procedural indiscretions along the way – but the recent case of *Sweby v HMRC* [2022] UKFTT 122 (TC) shows the dangers of such assumptions.

In that case, HMRC was due to file its statement of case in 2016. It successfully applied for an extension until June 2018, when a decision was due in some similar cases. A further batch of relevant cases were due to be heard in October 2018. HMRC had apparently intended to apply for a further extension until a decision in that second batch of cases was handed down; however, due to an administrative error, it failed to do so. HMRC eventually filed its statement of case in December 2021 with a retrospective application for an extension.

The taxpayer objected and applied for HMRC to be barred from further participation in the appeal, on the ground that the tribunal could not deal with the matter fairly or justly given the passage of time since the year under appeal. Such a bar would result in the taxpayer automatically winning the appeal, regardless of the merits of her case.

The First-tier Tribunal (FTT) found that an administrative error, even where a party had a genuine belief that they had complied with the rules, had 'very little merit' as a reason for an extension. The prejudice suffered by the taxpayer (in the form of it being harder to remember and give evidence on the details of her case) was given more weight than the prejudice suffered by HMRC (losing the appeal by default) since the prejudice suffered by HMRC was brought about by its own failures.

This decision shows that HMRC is not 'above the law' on procedural matters and that tribunal procedures cannot be taken any less seriously than those in other courts. Taxpayers should therefore be careful to comply scrupulously with directions from the tribunal, as they cannot expect any more sympathy than HMRC received in *Sweby*.

ATED: new valuations required

The annual tax on enveloped dwellings (ATED) applies to 'non-natural persons' which hold an interest in a UK residential property. ATED liability is based on a banding system related to the value of the property in question, with a revaluation taking place every five years. The last valuation date was 1 April 2017, with valuations at that date valid for all ATED filings up to and including the 2022/23 ATED year.

Any companies subject to ATED will therefore need to obtain fresh valuations of their properties as at 1 April 2022. Valuations should be obtained in time to file 2023/24 ATED returns, the deadline for which is 30 April 2023.

McEnroe: the importance of accurate drafting

The recent FTT case of *McEnroe and another v HMRC* [2022] UKFTT 113 (TC) illustrates the importance of accurate drafting in the context of sale and purchase agreements, and the adverse tax implications of getting it wrong.

In that case, the sellers sold their residential care home business, Kingly Care Partnership Ltd (KCPL), in 2013/14. The sale and purchase agreement stated that the consideration for their shares was £8m. KCPL owed a bank debt of around £1.1m and, on the day of sale, the buyer transferred this sum to the bank to discharge the debt, with the remaining £6.9m paid to the sellers. The sellers submitted tax returns on the basis that they had received a total of £6.9m for their shares; however, HMRC challenged this, arguing that the taxable consideration should be £8m, with the £1.1m paid to the bank being a voluntary discharge of the debt by the sellers.

The FTT acknowledged that the sellers had not actually received £8m since £1.1m had moved directly from the buyer to the bank to discharge KCPL's debt. However, Judge Sarah Allatt saw 'no ambiguity in the contract itself. The Bank Debt is not referred to in any clause that is relevant to the consideration for the purchase of the shares.' She was therefore unable to accept the sellers' argument that the £8m paid by the buyer should be apportioned between the shares and the bank debt to give a consideration of £6.9m for the shares.

In March (*Tax Journal*, 18 March 2022), we noted the case of *Rawlings and another v HMRC* [2022] UKFTT 32 (TC), in which the UK CGT charge on the sale of a Swiss property did not reflect the true economic outcome of the transaction due to exchange rate fluctuations. Similarly in this case, the consideration deemed to have been received by the sellers for CGT purposes did not reflect the actual amount paid to them. This highlights the importance of accurate drafting in order to ensure, as far as possible, that the tax consequences of a transaction reflect the economic outcome.

HMRC clarifies rules on gift aid and naming rights

Gift aid is probably the most widely known tax break on gifts to charity by individual cash donors. Charities commonly

wish to acknowledge the generosity of their donors; however, care must be taken here as a charitable donation will not qualify for gift aid if any benefits provided to the donor exceed certain limits.

Prior to 2019, it was generally accepted that naming a building or part of a building after a particularly generous donor would not be considered a benefit for the purposes of gift aid. However, in August 2019, HMRC updated its guidance notes, with ambiguous wording raising concerns that HMRC's view on this had changed. Following discussions with the Charity Tax Group, HMRC published updated guidance on 21 April which confirms that:

- a simple acknowledgment of an individual donor's generosity, for example, in a printed brochure or a commemorative plaque; and
- naming a building or part of a building after an individual donor

are not considered benefits for gift aid purposes, provided in both cases that such courses of action do not act as an advertisement or sponsorship for a business. This is a welcome clarification.

Responsible investment and charities: High Court provides clarity

In April, the High Court handed down its eagerly awaited judgment in the case of *Butler-Sloss and others v Charity Commission* [2022] EWHC 974 (Ch), clarifying the extent to which charity trustees may allow their objects and wider moral considerations to influence their investment policy. Although the case concerned the implementation of a responsible investment policy by charities with an environmental focus the decision has wider application.

The two charities involved had general charitable purposes. However, the trustees had decided to focus on causes relating to environmental protection or improvement, and the relief of those in need.

In investing the charities' substantial assets, the trustees had already excluded certain investments such as fossil fuel companies and favoured others with better 'green' credentials. However, they had come to the conclusion that this did not go far enough and were concerned that many of their current portfolio holdings conflicted, or might conflict, with their charitable purposes. Accordingly, they sought the court's approval for the adoption of new policies which would exclude investments that are not aligned with the goals set out in the 2016 Paris Climate Agreement. These policies would have the effect of excluding over half of publicly traded companies and many commercially available investment funds and, although the proposals targeted an annual return of CPI + 5% (which the Charity Commission indicated would be in line with the published rates of return of other large charities), the trustees accepted that they were unable accurately to determine the extent of the financial detriment which might be suffered by the charities as a result of adopting the proposed investment policies.

Michael Green J reviewed the principles which had previously been set out in *Harries v Church Commissioners for England* [1992] 1 WLR 1241 (the 'Bishop of Oxford' case), and then summarised his understanding of the law in this area.

He noted that charity trustees' investment powers must be exercised to further their charitable purposes, and this will normally be achieved by maximising the financial returns on the investments that are made. However, 'where trustees are of the reasonable view that particular investments ... potentially conflict with the charitable purposes, the trustees have a discretion as to whether to exclude such investments and they should exercise that discretion by reasonably balancing all relevant factors including, in particular, the likelihood and seriousness of the potential conflict and the likelihood and seriousness of any potential financial effect from the exclusion of such investments.' In performing this balancing exercise (and specifically in considering the financial effect of making or excluding certain investments), trustees may take into account the risk of losing support from donors and potential reputational damage to the charity.

The judge issued a note of caution about trustees making investment decisions on purely moral grounds, as there may be differing legitimate moral views on certain issues among a charity's supporters and beneficiaries.

In this case, the court concluded that the trustees had performed the necessary balancing exercise properly and so would be permitted to adopt their proposed investment policies.

This judgment provides some clarification of the law on responsible investing by charity trustees. Although advisors should note that the judgment implies some limits on the extent to which purely moral considerations can be taken into account, for charities focused on environmental causes, this decision, alongside updated Charity Commission guidance (once published), should enable trustees to proceed with confidence in weighing up potential conflicts with their objectives against financial return, and implementing a suitable investment policy which reflects the objects of their charity.

'Fraudulent calumny': not just a Victorian relic

We have focused recently on questions of advisers' testimony as to clients' testamentary capacity. In the recent High Court judgment in *Whittle v Whittle* [2022] EWHC 925 (Ch), the court set aside the testator's will, even though he possessed mental capacity and understood his will, because his decision to frame his will had been undermined by lies told to him by his daughter. It forms an interesting apparent counterpoint to the principle of testamentary freedom.

In alleging 'fraudulent calumny' (perhaps because capacity is difficult to undermine on the traditional basis), the disappointed beneficiary claimant must jump through six hoops, proving on the balance of probabilities that: (i) the defendant made a false representation, (ii) typically about the character of a disappointed beneficiary; (iii) to the testator; (iv) for the purpose of inducing the testator to alter his testamentary dispositions; (v) in the knowledge that the representation was untrue (or reckless as to whether it was true); and (vi) that the disputed will was made because of the false statements.

Here the deceased died at the age of 92, frail and vulnerable but otherwise with capacity. In an excoriating decision, the court set aside the will, finding that it had been obtained on the basis of intentional falsehoods by the daughter that were designed to procure a new will in her favour and minimise her brother's ability to challenge it. She was ordered to pay the costs of the proceedings.

It is a reminder of the need for advisers to look-out for evidence of a testator's mind being poisoned without apparent justification; like capacity-driven challenges, much turns on contemporaneous contextual evidence and professionals' impressions recorded in file notes may be decisive. ■

- Cases: *C Sweby v HMRC* (27.4.21)
- *McEnroe and Newman*: tax on a debt-free sale of a company (D Whiscombe, 27.4.21)