Elden v HMRC: where procedure becomes the problem

Management of taxes

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We consider a case where the litigation process itself became a source of conflict.

Key Points

What is the issue?
A tax appeal became mired in procedural failures, tactical delays and the apparent misuse of AI by the taxpayer's representatives, leading HMRC to seek a strike-out.

What does it mean to me?
Litigation before the tribunal requires strict adherence to procedural rules and deadlines. Poor case management – including careless reliance on AI – can jeopardise a client's appeal and attract judicial criticism or sanctions.

What can I take away?
Treat tribunal directions as mandatory, not aspirational; ensure full and timely compliance; and, if using AI, verify all output carefully. Advisers unfamiliar with litigation should seek guidance, rather than risk prejudicing their client's case.

The purpose of litigation is to enable the parties to a dispute to resolve it through an independent judicial process. The Tax Chamber has rules that are designed to facilitate that process, the underlying theme of which is 'to enable the Tribunal to deal with cases fairly and justly' – known as the 'overriding objective', in rule 2(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

However, the case of *Elden v HMRC* [2026] UKFTT 41 (TC) demonstrates how things can go wrong during the litigation process itself and how the tribunal will sometimes need to resolve those issues in order to progress the resolution of the underlying tax dispute.

The facts of the case

The case concerns closure notices issued to Mr Elden following HMRC enquiries into his 2013-14 and 2014-15 tax returns. The closure notices were issued on 15 February 2021 and the appeals against them were notified to the tribunal on 11 August 2023. The subject matter of the closure notices is totally irrelevant to the matters that the tribunal had to determine on this occasion. However, for context, it is worth noting that the amount of tax in dispute was approximately £210,000.

Mr Elden appointed a member firm of the ICAEW to represent him in the course of the appeal process. Although that would entitle HMRC to write solely to the representative firm, they actually copied Mr Elden in on most of the correspondence.

Early in the appeal process, the representative firm wrote to HMRC to request a copy of the technical advice that led to the closure notices. The firm indicated that if HMRC did not comply, it would make an application to the tribunal for a direction compelling the provision of that information.

In response, HMRC requested further clarification of Mr Elden's grounds of appeal. Later that day, the representative firm made its own request for further and better particulars, including an explanation of HMRC's reasoning behind the closure

notices.

The tribunal responded a few months later, noting that, procedurally, it is the appellant's appeal and that the appellant is required to prove that the closure notices were wrong. The tribunal added that any failure by the appellant to make a positive case will mean that he is unlikely to be successful in his appeal. It is implicit that Mr Elden's grounds of appeal were not clearly stated, and the tribunal thus proceeded to grant HMRC its request for further and better particulars (directing that these be produced by 8 April 2024). The tribunal did not consider that HMRC was required to provide the information sought by the appellant's representatives.

Mr Elden did not comply with the direction to produce the further and better particulars by 8 April 2024. Accordingly, on 22 April 2024, HMRC applied to the tribunal for an 'unless order'. HMRC sought a direction that 'unless the appellant confirmed with[in] 7 days his intention to continue with the appeal and provide their [*sic*] amended grounds of appeal, then the appellant's appeal should be struck out'.

Before the tribunal could process that application, Mr Elden eventually complied with the previous direction on 7 May 2024. HMRC duly withdrew the application.

HMRC then served its statement of case on 1 August 2024. (This is usually when HMRC is required to set out its understanding of the factual and legal position underpinning the decisions under appeal.)

Provision of the statement of case then triggers, under the tribunal's rules of procedure, the parties' obligations to notify each other of the documents that they would wish to rely on at the hearing. HMRC complied with that requirement on 30 August 2024. Mr Elden did not, although (subsequently) the tribunal superseded the requirement in the procedure rules, by directing the exchange of lists of documents by 18 November 2024. The directions also required that each party provide to the other side any documents that had already not been provided.

In the meantime, Mr Elden's representative firm noted that HMRC's list of documents did not contain 'any reference to the legal framework that you intend to rely upon, but merely copies of documentation sent between the parties'. The tribunal subsequently explained that HMRC's explanation of the legal framework need not be provided until shortly before the hearing.

In late October 2024, HMRC tried to ascertain from the appellant's representatives which documents on their list they did not have, so as to ensure that copies could be provided to them. HMRC received no response to this request. The representatives later stated that they had not received that message.

Although the appellant was required to send HMRC his list of documents by 18 November 2024, he failed to do so. That led to a further unless order application being made by HMRC on 28 November 2024.

On 2 December 2024, the appellant's representatives then sent a list of documents. They did not send HMRC any of the documents on the list on the basis that HMRC would have had them all previously. In the representatives' 2 December 2024 list, one item was 'Witness statement – to be provided'. (Separately, the tribunal had directed that witness statements be served on the other side by 16 December 2024.) No such witness statement was ever provided. In addition, HMRC considered that it required a copy of three other documents from Mr Elden's list, which were the subject matter of correspondence between the parties through January 2025.

On 28 January 2025, HMRC sought a strike-out of Mr Elden's case.

So far as the missing witness statement is concerned, Mr Elden's representatives informed HMRC that Mr Elden no longer wished to rely on a witness statement. Instead, he would give oral evidence on the day of the eventual hearing of his appeal.

Eventually, the tribunal directed that HMRC's strike-out application be the subject of a separate hearing.

Strike-out hearings

There are several situations in which the tribunal can strike out an appellant's case. In this case, HMRC was arguing that 'the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly' (as per rule 8(3)(b)).

Ahead of that hearing, the parties were directed to provide skeleton arguments setting out their respective views on the merits of HMRC's application in the light of the wording of rule 8(3)(b) and the relevant case law.

The First-tier Tribunal’s decision

The case came before Tribunal Judge Allatt. Summarising the litany of failings and unmerited applications being made on behalf of Mr Elden, the judge said that the representative firm ‘appears to be either unfamiliar with Tribunal case management or deliberately choosing to apply tactical delays at every point, or both’. However, the judge also noted that Mr Elden had been copied in on virtually all of the correspondence between the tribunal and/or HMRC and his representatives, adding: ‘He cannot fail to have noticed that his representatives were not complying with the relevant deadlines.’

The tribunal summarised the catalogue of failings as follows:

- repeated failures to comply with the tribunal’s directions and to keep to the time limits for such directions;
- an apparent lack of care in the information given to the tribunal; and
- (a point not yet mentioned but which will be picked up below) obfuscation in the representatives’ answer to the tribunal’s questions as to whether artificial intelligence had been used in the course of the preparation of their skeleton argument for the hearing.

However, the tribunal realised (from what was said at the hearing) that Mr Elden had not previously appreciated that there were positive advantages in producing a witness statement in advance, rather than expecting to turn up at the hearing and hoping that the tribunal would then permit him to explain his understanding of the facts. Mr Elden then asked for additional time to produce a witness statement.

This was a factor that the tribunal took into account when asking itself whether the failures were so great ‘that the Tribunal cannot deal with the proceedings fairly and justly’. In addition, there had been no scheduled date for the hearing of the appeal and therefore the provision of a witness statement (while late) would not preclude a fair hearing.

On the other hand, the judge was clear that the history of non-compliance (and non-co-operation) was such that a strike-out of Mr Elden’s appeal ‘would be fully justified’. Furthermore, the tribunal noted what had previously been observed in the case of *XG Concept Ltd v HMRC* [2017] UKFTT 92: ‘This catalogue of non-co-operation means that the Tribunal can reasonably extrapolate that the

appellant’s conduct of the proceedings would continue in the same vein in the future were the case to proceed to a final hearing.’

There again, the judge noted that in *XG Concept*, the taxpayer did not attend the strike-out hearing, whereas Mr Elden did participate in this hearing and ‘was at pains to stress that he would ensure a change of attitude’. Accordingly, the judge was ‘satisfied that it would not be fair to extrapolate the conduct of the Appellant hitherto to automatically assume he will continue in the same vein’.

The judge acknowledged and expressly agreed with the statement in *Clarke v HMRC* [2018] UKFTT 123 (TC), which said that a tribunal excusing poor compliance when there is no good reason for it will encourage poor ongoing compliance in that case and also similar behaviour in other cases. However, she dealt with this by imposing a sanction that was less severe than an immediate strike out of Mr Elden’s case.

In short, the judge refused the strike-out application but imposed a firm deadline on the production of Mr Elden’s witness statement. If that deadline were not met (and it was met by the time that the decision was published), Mr Elden’s case would have been struck out.

Commentary

The decision of the judge in this case seems eminently sensible and fair. The tribunal was facing considerable recalcitrance by or on behalf of the taxpayer and it is not surprising that HMRC had had enough. I don’t wish to suggest that the decision was wrong in any way, but Mr Elden must consider himself lucky that the judge found a compassionate way of making her displeasure known but also reflecting that Mr Elden was probably more the victim of poor advice than the cause of the problem.

Another aspect of the case that was of particular interest was the apparent use of artificial intelligence by Mr Elden’s representatives and the tribunal’s approach to this matter.

Ahead of the strike-out hearing, the representatives submitted a skeleton argument which bore Mr Elden’s name (and, therefore, by convention, implied that it had been authored by him). A few days later, HMRC raised concerns ‘about the use of AI … and the inaccurate citing of authorities within it’.

The matter was addressed at the hearing, where Mr Elden stated that he had not contributed to the preparation of the skeleton argument. When asked, his representatives ‘neither confirmed nor denied the use of AI’.

The judge accepted that the use or non-use of AI is itself not the important question. She acknowledged that AI is a powerful tool that can be used to great effect. However, its limitations are known and whoever relies on AI must ultimately be responsible for the finished product. The unchecked use of AI has an adverse effect on not only the case in question but also on the tribunal’s resources to deal with other cases.

In this case, the judge then read all of the cases referred to in Mr Elden’s skeleton argument. It became clear that the summaries of the cases as contained in the skeleton argument were far from accurate. She concluded that ‘the case summaries were produced using AI and that they have not been verified for accuracy with sufficient care as should be used when producing submissions for a Tribunal hearing’.

As a part of her decision, she imposed additional conditions in relation to any skeleton argument that Mr Elden puts forward in relation to the eventual hearing of his appeal. Each case referred to must be accompanied by a full copy of the judgment, together with direct quotes from the judgment itself and a clear reference to the paragraph or line in the judgment. The skeleton must also contain a brief summary of the case and why it is relevant.

The judge has clearly and wisely recognised that AI is not going to go away, nor should it be banned from use in tribunal proceedings. However, it is a tool that contains dangers as well as advantages. Given the previous use of AI in this case, the judge has imposed sensible safeguards for the future handling of Mr Elden’s appeal. It remains to be seen whether these (or similar) safeguards will be rolled out more widely.

What to do next

It is fair to say that most professional advisers would respond to their clients more quickly than they would to HMRC. Furthermore, increasing delays by HMRC in its own correspondence reinforces the view that responses to officialdom are not necessarily the first priority.

However, when it comes to litigation – whether in the tribunals or in the courts – it is important to adopt a different attitude. Litigation solicitors will know that court orders and tribunal directions are to be adhered to (and are not mere targets). The tribunal rules expressly permit taxpayers to be represented – that is, advised throughout the litigation process – by tax advisers and accountants. Such advisers must recognise that the approach required in litigation is very different from the approach that they are likely to adopt in dealing with HMRC. Otherwise, they risk failing their clients.

Any adviser conducting litigation for the first time should seek advice about the process, rather than guess how it is done. Indeed, there is at least one case where a judge considered that an accountant’s conduct of the litigation process to be so detrimental that a referral was made to the accountant’s professional body.

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