



Neutral Citation: [2023] UKFTT 00853 (TC)

Case Number: TC08954

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/13534

INCOME TAX – whether Notice of Enquiry validly given – Section 7 Interpretation Act 1978 – deemed served but established that it was not – Notice of Enquiry not validly given – whether subsequent Sch 36 Information Notice validly given – yes Condition B – whether reasonable – yes - Notice confirmed – Appeal allowed in part

Heard on: 20 September 2023
Judgment date: 04 October 2023

**TRIBUNAL JUDGE ANNE SCOTT
MEMBER IAN SHEARER**

Between

RICHARD MONKS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Gary Foreman, Nash Harvey Group LLP

For the Respondents: Kieran Gargan, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an appeal against
 - (1) the validity of a notice of enquiry (“the Enquiry”) issued under section 9A Taxes Management Act 1970 (“TMA”) on 27 January 2022,
 - (2) an Information Notice (“the Notice”) issued under Schedule 36 Finance Act 2008 (“Sch 36”) on 3 March 2022.
2. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
3. The documents to which we were referred comprised a Hearing Bundle consisting of 78 pages and an Authorities Bundle consisting of 48 pages. In the course of the hearing, and at the end thereof, Mr Gargan produced a link to a website commenting on Royal Mail’s targets in January 2022, two letters from HMRC that Mr Foreman relied upon but which had been inadvertently omitted from the Hearing Bundle and two excerpts from Companies House records.
4. We heard evidence from all of those present. Both parties advanced previously unheralded arguments. In the case of the appellant that was the impact, or not, of Covid and Mr Foreman’s recollection of events. In the case of HMRC, it was information from Companies House upon which HMRC had relied. With the consent of the Tribunal, having had regard to Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) (“the Rules”), because both Mr Foreman and Mr Gargan had not just made submissions but also strayed into evidence in relation to those matters, that evidence was admitted.

The facts

5. On 29 January 2021, the appellant’s self-assessment tax return for 2019/20 was filed with the respondents (“HMRC”).
6. On 27 January 2022, HMRC issued the Enquiry informing the appellant that they would be conducting a check of that return under section 9A TMA. That enclosed a schedule of the information and documents that were required by HMRC to carry out the check.
7. HMRC have produced a receipt from the Post Office for first class post for two large letters at a cost of £2.58 at 11:21am on 27 January 2022. A copy of that receipt had been retained with the papers for the appellant. The receipt did not contain any reference to the destinations to which the letters were addressed. Only one letter was addressed and sent to the appellant.
8. On 3 March 2022, HMRC wrote to the appellant by email pointing out that none of the information that they had requested to be lodged with them by 28 February 2022 had been received and therefore they were issuing the Notice. A deadline for provision of the information by 3 April 2022 was imposed.
9. On 1 April 2022, Mr Foreman wrote to HMRC referring to the letters of 27 January and 4 March 2022 and stated that having taken specialist advice the response was as follows:-
 - (a) The Enquiry was dated 27 January 2022 and, in terms of the legislation, the closing date for receipt of that was Saturday 29 January 2022. Their information suggested that

the Notice had not been received by the appellant until 1 February 2022. He challenged the validity of the Enquiry and asked for information confirming that the deadline had been met.

(b) He appealed the Notice on the basis that (i) the Enquiry had not been received within the required time frame, and (ii) the comprehensive information and documents requested in the Notice were not reasonably required.

(c) He requested that the Notice be withdrawn. If it transpired that a valid enquiry had been opened, information which is considered reasonable would be furnished.

10. On 27 April 2022, HMRC wrote to the appellant by email confirming that:-

(a) The Enquiry was issued by First Class post and would be taken to have been delivered to the appellant in the ordinary course of post within the time limit to open an enquiry unless there was evidence to demonstrate something to the contrary.

(b) HMRC's view of the matter was that there was a valid enquiry but if the Enquiry was not received within the time limit, HMRC would rely on paragraph 21(6) Sch 36 on the basis that HMRC believed that taxable income had been omitted from the 2019/20 tax return.

11. On 31 May 2022, the offer of a review was accepted.

12. On 26 August 2022, HMRC issued the Review Conclusion letter. In relation to the Enquiry, that letter referred to the Post Office receipt and relied on Judge Jones in *Royal Institute of Navigation v HMRC* [2012] UKFTT (472) (TC) ("Navigation") for the proposition that it was for the appellant to prove that the Enquiry had not been received timeously.

13. In relation to the Notice, HMRC referred to paragraphs 1, 2, 21, 29 and 64 of Schedule 36 and went on to explain why the information required was reasonably required. That was on the basis that the 2019 tax return was believed to be inaccurate. It showed only one employment page where Mr Monks had declared that he was a director of Kent & Sussex Waste Management Limited and that he received dividend income of £82,897. He had not declared any other directorship or any other source of income.

14. A Companies House search had confirmed that Mr Monks had been appointed as a director of Greenbox Recycling Kent Limited ("Greenbox") on 7 January 2011 and he remained a director. HMRC had reason to suspect that he had received taxable income from Greenbox and that that had not been declared in the 2019/20 tax return. It was on that basis that the Notice had been issued.

15. On 22 September 2022, the appellant lodged an appeal to the Tribunal. The Grounds of Appeal are:-

(a) The Enquiry was not received within the statutory time limit.

(b) Since the Notice had been issued on the basis of the Enquiry, that too was being appealed until there was a decision on the Enquiry Notice.

(c) The appellant had a series of messages on WhatsApp dated 1 February 2022 where the appellant had sent copies of the correspondence to Mr Foreman immediately on receipt and requested a call to discuss that. That was evidence that the time limit had not been honoured. HMRC had not complied with their own guidance according to which HMRC should attempt to contact a taxpayer to advise them of an enquiry where this is within 7 days of the deadline for issue, and should consider guaranteed Royal Mail delivery when close to the deadline.

(d) *Navigation* was not relevant.

The burden of proof

16. HMRC accept that the burden of proof lies with them to demonstrate that the Enquiry was issued in time to be received by the appellant. The burden then moves to the appellant to demonstrate that the Notice was not received within the time limit.

17. As far as the Notice is concerned, HMRC must establish that the information requested was reasonably required.

Legislative framework

The Enquiry Notice

18. The legislation relevant to this appeal can be stated quite shortly. At the material time, section 9A of the Taxes Management Act 1970 (“TMA 1970”), so far as is material, provided:

“9A Notice of enquiry

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so (“notice of enquiry”) –

- (a) to the person whose return it is (“the taxpayer”),
- (b) within the time allowed.

(2) The time allowed is –

- (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;
- (b) ...”.

19. Section 115(2) TMA 1970 provides:

“115 Delivery and service of documents

...

(2) Any notice or other document to be given ... under the Taxes Acts may be served by post, and, if to be given ... to ... any person by the Board, by HMRC may be so served addressed to that person –

- (a) At his usual or last known place of residence, or his place of business or employment, or
- (b) ...”.

20. Section 7 of the Interpretation Act 1978 (“IA78”) provides:

“7 References to service by post

Where an Act authorises or requires any document to be served by post (whether the expression ‘serve’ or the expression ‘give’ or ‘send’ or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to, have been effected at the time at which the letter would be delivered in the ordinary course of post.”

The Notice

21. Paragraph 1(1) of Sch 36 allows HMRC by notice in writing to require a person to provide information or to produce a document if the information or document is reasonably required for the purpose of checking that person’s tax position.

22. Paragraph 21 of Sch 36 provides that, for a taxpayer notice to be valid in circumstances where a tax return has been lodged, one or more of conditions A to D must be met. Paragraph 21(6), which is the relevant provision in this instance, reads:-

“Condition B is that, as regards the person, an officer of Revenue and Customs has reason to suspect that—

- (a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,
- (b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or
- (c) relief from relevant tax given for the chargeable period may be or have become excessive.”

23. Paragraph 64 provides a definition of a tax position which reads:-

“(1) In this Schedule, except as otherwise provided, “tax position”, in relation to a person, means the person’s position as regards any tax including the person’s position as regards:-

- (a) past, present and future liability to pay any tax,
- (b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax, and
- (c) claims, elections, applications and notices that have been or may be made or given in connection with the person’s liability to pay any tax,

and references to a person’s position as regards the particular tax, (however expressed) are to be interpreted accordingly.

...

(4) References in this Schedule to a person’s tax position are to the person’s tax position at any time or in relation to any period, unless otherwise stated.”

24. Paragraph 29(1) allows the person to appeal against an Information Notice or any requirement in the Notice but paragraph 29(2) adds that there is no right of appeal against a requirement to produce statutory records.

25. Paragraph 32 (3) of Schedule 36 provides that:-

“(3) On an appeal that is notified to the tribunal, the tribunal may –

- (a) confirm the information notice or a requirement in the information notice,
- (b) vary the information notice or such a requirement, or
- (c) set aside the information notice or such a requirement”.

26. Paragraph 32(5) of Schedule 36 provides that such a decision is final and there is no further right of appeal.

Discussion

The Enquiry

27. Mr Foreman argued, as he had in the Grounds of Appeal, that although HMRC had produced a Post Office receipt it did not carry a postcode. More importantly HMRC had not followed their own guidance EM1506 . They had not contacted Mr Monks to advise him of the

Enquiry within seven days of the deadline. They had also not utilised guaranteed Royal Mail delivery.

28. Mr Gargan conceded that that was the guidance but argued that it was not mandatory, did not have the force of law and was simply best practice. We accept that. In fact in that guidance it says that it is best practice. Obviously it would have assisted HMRC had they followed their own guidance. Nevertheless, on the balance of probability, given that the receipt had been retained with the case papers and Mr Monks did receive the letter, we accept that it would have been posted on 27 January 2022.

29. Accordingly, since in the ordinary course of post it would have been expected that it would have been delivered within one day, service would be deemed to have been effected timeously. HMRC have met the requirements of section 7 Interpretation Act 1978. The burden of proof then moves to the appellant to prove to the contrary.

30. We did note both parties' arguments in relation to the impact of Covid-19 but there was no definitive evidence on the point. Mr Foreman relied on an article which he had seen in the Daily Mirror, which was not produced, which apparently stated that on 17 January 2022, Royal Mail had warned of delivery delays in 56 areas in the UK. It is not known what those areas might have been or whether Mr Monks resided in one of those areas. Mr Gargan relied on a statement by the Chief Executive of Ofcom dated 27 January 2022 which stated that "normal service targets now apply". However, that was of no assistance since it related specifically to Hornsey & Wood Green where it was recognised that there might be issues.

31. The evidence produced in the hearing bundle in relation to the purported delivery date of the Enquiry was less than persuasive. It transpired that the screenshot of the WhatsApp messages was a screenshot of Mr Foreman's telephone taken approximately one month later once he had received advice on the statutory position for the timing of issue of Notices of Enquiry.

32. However, Mr Monks had his telephone with him and produced it to the Tribunal. We could see clearly that he had taken six photographs (being each page) of the Enquiry at 16:40 on 1 February 2022. His credible evidence was that his post box was checked every day and that any mail relating to his financial affairs was sent immediately to Mr Foreman. He did not send a message with the photographs because he telephoned Mr Foreman. Mr Foreman confirmed that there had been a number of missed calls and that he had then contacted Mr Monks. Mr Monks was adamant that he was a "creature of habit", that the mail had been opened every day and that the Enquiry had been received on 1 February 2022. We accept that evidence.

33. That being the case we find that the Enquiry was not delivered timeously. There is therefore no valid enquiry.

34. Therefore we must turn to the Notice.

The Notice

35. Mr Gargan freely conceded that the summary of paragraph 21(6) Sch 36 in the Review Conclusion letter was less than accurate and the grounds that were articulated for reliance thereon were not complete. It was in that context that he referred to information from Companies House that was not referenced in the letter.

36. He has now produced two links to Companies House. The first is for Greenbox and it confirms that Mr Monks was appointed as a director on 7 January 2011. There is then a link to "Persons with significant control" and that is a company called Caja Verde Limited. Mr Monks is the sole director.

37. Mr Foreman helpfully explained that there was also a third company which had been called Boite Verte Limited but was now called Box Verte Limited.
38. Mr Gargan argued that HMRC's view was that Mr Monks' income in 2019/20 was insufficient to support his lifestyle and expenditure and that therefore the self-assessment was insufficient. Mr Foreman conceded that on the face of it that was the case but nevertheless Mr Monks had sold a company for a very substantial amount. Accordingly, although his income was low in comparison with his outgoings, that could be explained.
39. We accept that Condition B is satisfied. The issue therefore is whether the information sought in the Notice is reasonably required to check Mr Monks' tax position.
40. The Notice is restricted to the period 6 April 2019 to 5 April 2020 inclusive so in that sense it is not wide-ranging.
41. Mr Foreman confirmed that HMRC had timeously opened enquiries into Mr Monks' tax returns for 2020/21 and 2021/22. HMRC had informally requested similar information for those years and Mr Monks was cooperating with HMRC. Most of the information had been ingathered.
42. Nevertheless, because the Notice related to Condition B rather than to an Enquiry, he argued that its scope was far too wide. It should be limited to the perceived risk and that did not mean all of Mr Monks' tax affairs. Paragraph 1 of Sch 36 states that the information must be reasonably required to check the tax position. We have highlighted those key words because paragraphs 64(1) and (4) do not impose such boundaries when checking the tax position where the Notice satisfies the criteria for Condition B
43. Mr Gargan argued that all that Condition B required was a suspicion that there was a loss of tax. There was such a suspicion but HMRC did not know what, if any, income Mr Monks had derived from the other two companies, or indeed from any other source. In a situation where it was known that the declared income in the year did not suffice to cover expenditure, it was reasonable for HMRC to seek information about Mr Monks' tax position in that year and to ascertain all relevant sources of income or capital.
44. Mr Foreman pointed out that there was also an HMRC enquiry into Greenbox and argued that HMRC should explore that and further information from Companies House in the first instance. Unsurprisingly, Mr Gargan argued that that was not the point and the information available from Companies House was relatively restricted.
45. Although Mr Foreman's primary request was that the Notice be set aside, he stated that if the Tribunal was not minded to do so, then he only challenged the requirements under heading "2) Bank, building society, savings, loans, credit cards and store cards".
46. The statutory scheme is such that HMRC are entitled to full disclosure of the relevant facts: this is why they have a right to issue (and seek the issue of) information notices seeking documents and information reasonably required for the purpose of checking a person's tax position.
47. Where Condition B is satisfied, as it is here, HMRC is entitled to know the full facts related to Mr Monks' tax position so that they can make an informed decision whether and what to assess.
48. In circumstances where it is conceded that the declared income in 2019/20 was insufficient to explain Mr Monks' lifestyle we find that the requirements under that heading are proportionate and therefore the information is reasonably required.

Decision

49. For all the reasons given we allow the appeal in regard to the validity of the Enquiry.

50. We do not allow the appeal in relation to the Notice and we confirm both the Notice and the requirements in the Notice.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

51. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision, insofar as it relates to the Enquiry, has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

52. In relation to the Notice paragraph 32(5) Schedule 36 provides that this decision is final so there is no right of appeal.

**ANNE SCOTT
TRIBUNAL JUDGE**

Release date: 04 October 2023