



TC05682

Appeal number: TC/2013/8018

***COSTS REGIME – complex appeal - whether opt out made in time –
whether discretion should be exercised to extend time for opt out***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RAPID BRICKWORK LIMITED (in liquidation) Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Decided on the papers

Written representations made for the Appellant by Mishcon de Reya LLP

Written representations made for HMRC by HMRC Solicitors office

DECISION

1. A dispute over the applicable costs regime arose between the parties, it appears
5 during a case management hearing in April 2015, and it was agreed it was appropriate
to have this resolved as an interim matter as the parties had the right to know which
costs regime applied to the appeal.

2. The case has been allocated to the complex track which would leave the appeal
in the open costs regime unless the appellant opted out. The appellant considered that
10 the open costs regime did not apply because:

(1) The appeal had been, said the appellant, consolidated with appeal
TC/2013/4487 which was already opted out;

(2) The appellant had made, said the appellant, a timely opt out on this
appeal;

15 (3) And if wrong on that, the appellant ought to be given a short extension so
that if its opt out was late by a few days, it would be treated as made on time.

3. The parties made written representations which I said I would consider and, if in
doubt on the correct decision, might call a hearing but would otherwise decide on the
papers. I asked for further submissions on a few points, which I received on 10
20 February 2017 and concluded that the matter was sufficiently clear and I would not be
assisted by, nor did the parties need to be put, to the cost of a hearing on the matter.
So I have concluded the matter on the papers.

Consolidation

4. Without deciding the point, I can see the force in the appellant's view that if this
25 appeal had been consolidated with an earlier opted-out appeal, then as from the date
of consolidation it would (as a single appeal) be entirely opted out.

5. However, I do not accept the premise that the two appeals have been
consolidated. The appellant could point to no direction which consolidated the
appeals. The appeals have clearly been joined for case management purposes, and
30 single hearings have been called to deal with case management for both appeals and
for the substantive hearing.

6. But joining is not consolidation. Consolidation requires the two appeals to be
treated as a single appeal. Once consolidated the appeal is known by a single case
reference. Whereas these two appeals have retained their distinct numbers on
35 directions, on letters to and from the tribunal, and in the Tribunal's computer records.

7. The Tribunal has never treated them as a single appeal: it maintains separate
files for both appeals. I find they are not consolidated so the appellant fails on its
ground (1) above.

Timely opt-out?

8. Rule 10(1)(c)(ii) provides that the opt out is timely if:

5 ‘the taxpayer....has...sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs....’

9. To work out whether the opt out was timely, I need to know

- (a) the date the appellant received notice of complex allocation;
- (b) the date the appellant sent or delivered its opt out to the Tribunal.

10 *Date of receipt of notice of complex allocation*

10. The appellant does not adduce any evidence of when it received notice of the complex allocation.

11. However, the Tribunal’s file shows that the appeal had been received on 28 October 2013 and was acknowledged on 13 December, at the same time as complex allocation was notified.

12. The simultaneous acknowledgement of the appeal and its allocation to a category was in accordance with Rule 23 which requires a direction to be made allocating an appeal to a category on its receipt. Under Rule 6 the direction must be notified to the parties.

13. The Notice of Appeal had been signed by the appellant’s then representative. The papers filed with the Notice of Appeal did not include a notice of authority for the agent and nor was the agent a legal representative as defined in the Rules (Rule 11(2)). Therefore, in accordance with the Rules, the Tribunal staff quite properly sent the acknowledgement and notice of allocation of category direct to the appellant itself.

14. HMRC suggest it was sent by email. No evidence of this has been adduced. There is nothing on the file to indicate that it was sent by email and indeed the Tribunal did not appear to possess the appellant’s email address. Nor was it the practice of the Tribunal in 2013 to communicate with appellants by email unless requested to do so. I find that the letter was sent by post.

15. The appellant accepts it received the letter: it has no record of when. In 2013 the Tribunal, as it does now, posted all letters by second class post unless they concerned a hearing within 7 days’ time. I find it is more likely than not that the letter of 13 December 2013 would have been posted by second class post.

16. There is no evidence about when the letter was actually received and neither party suggests anything out of the ordinary happened to it. The Post Office website says:

2nd Class items are delivered in two to three working days. We aim to deliver 98% of 2nd Class items within three working days of posting.

17. The second working day after posting was 16th December as the post office works on Saturdays, but not on Sundays, and 15th December was a Sunday. The third day after posting was therefore 17th December.

18. By s 7 Interpretation Act 1978, where postal service is authorised:

‘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.’

19. HMRC point out that s 7 only applies to ‘an Act’ and not to Rule 6, which is subordinate legislation. Nevertheless, s 7 seems to reflect the balance of probabilities. It is more likely than not that the letter arrived in the ordinary course of post.

20. So should I find it arrived on the 16 or 17 December? The burden of proof, it seems to me, is on the appellant, as it is the appellant that claims it opted out in time. Has it proved that the letter was more likely to have been delivered on the 17th rather than the 16th?

21. In fact, the appellant maintains that the letter was delivered no earlier than the 16th, but that seems to be because the appellant considers 16th sufficient for the opt out to be in time, but that is not my view (see §26). The appellant does not address its mind to whether the letter was delivered on 16th or 17th December.

22. I consider that the statement from the post office is somewhat ambiguous over whether a second class letter is more likely to be received on the second or third day after posting. However, I note that this letter was posted just before Christmas and take judicial notice of the fact that in the few weeks before Christmas, the number of letters in the postal system is so large that even the post office recognises that deliveries will be later than normal. I find it was more likely that the letter was delivered on 17 December and not 16 December 2013.

Date appellant notified its opt out

23. The appellant’s agent notified the opt out by letter dated 13 January 2014. On the same day, but in a separate letter, the agent also enclosed written authority from its client for it to act. Therefore, I find that the opt out was validly served by the agent (see Rule 11(3)).

24. HMRC questions whether the letter was indeed sent on 13 January 2014. The original letter received by the Tribunal bears a received stamp applied by the Tribunal dated 15 January 2014. I have no information as to how the letter was posted and what class post was used. But in the absence of any indications to the contrary, it

seems more likely than not that the letter would have been posted on the day it bears, particularly when it was actually received two days later. I find it was posted on 13 January 2014.

Conclusion on ground (2)

5 25. Rule 10 requires the opt out notice to have been sent (not received) within 28 days of receiving notice of the complex allocation. I have found that the earliest the complex allocation was received was 17 December 2013 and the opt out notice was sent on 13 January 2014.

10 26. From and including 17 December to and including 13 January is exactly 28 days: so I find that the opt out notice was sent within 28 days of the appellant's receipt of the complex allocation letter.

27. I find, therefore, that the opt out was made in time. That resolves this dispute on costs regime in favour of the appellant.

Conclusion on ground (3)

15 28. In these circumstances I do not need to consider an exercise of my discretion to extend time for compliance. However, taking into account that my decision was based on taking judicial notice of the slowdown in postal delivery times before Christmas, I have gone on to consider whether if I had found against the appellant on ground (2), I would nevertheless have extended time. I consider that I would extend
20 time because:

(a) If the opt out was made late, it was only one day late;

(b) HMRC were notified of the opt out in April 2013 and did not make any challenge to its timeliness until over a year later;

25 (c) It is difficult to see how HMRC would have been prejudiced by the opt out being one day late bearing in mind that they did not challenge it at the time.

(d) The appellant was potentially prejudiced by having its opt out challenged so long after it was made, because it had proceeded with the appeal on the assumption that it was not in an open costs regime.

30 29. So on this ground the appellant would succeed as well.

30. What this dispute does make clear is that it is difficult for HMRC or the Tribunal to calculate whether an opt out is made in time: the date of receipt of the notice of category allocation and the date of sending of the opt out are dates known to the appellant and not necessarily apparent to the Tribunal or HMRC.

35 31. In view of this uncertainty, it seems right to me that if HMRC are concerned with an opt out that they challenge it early on and a failure to challenge it early on

might be a factor in the Tribunal deciding to extend time if the opt out does indeed turn out to be slightly late.

5 32. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision 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.

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**Barbara Mosedale
TRIBUNAL JUDGE**

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