Neutral Citation: [2023] UKFTT 708 (TC)

Case Number: TC 08899

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: **TC/2022/02449**

SDLT - Notice of Enquiry - whether valid? - delivery by post - Section 7 Interpretation Act 1978 - whether in the ordinary course of post – yes - appeal dismissed

Heard on: 27 July 2023
Judgment date: 4 August 2023

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER JOHN ROBINSON

Between

MR MELVYN LANGLEY AND
MRS CAROL LANGLEY

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Melvyn Langley

For the Respondents: Ms Sele Pretoru, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The appeal is against the Closure Notice issued by HMRC under paragraph 23 Schedule 10 Finance Act 2003 ("FA 03") on 1 December 2021. That Closure Notice concluded HMRC's enquiry into an Amendment to a Stamp Duty Land Tax ("SDLT") return. That enquiry was opened under paragraph 12 Schedule 10 FA 03 by letter dated 23 March 2021 ("the Opening Letter").

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 an amended Hearing Bundle extending to 530 pages and an additional Bundle for the preliminary issue extending to 206 pages.

4. We heard evidence from Mr Langley whose emailed witness statement was in the Hearing Bundle. The witness statement of Officer Julie Gregson was not challenged and therefore it, and its exhibits, were taken as read.

Preliminary issues

5. The sole appellant named within the Notice of Appeal dated 31 March 2022 was Mr Melvyn Langley. In his email of 19 April 2023, Mr Langley requested that his wife, Mrs Carol Langley, be added as a party to the appeal. HMRC consented and therefore in terms of Rule 9(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules"), Mrs Langley is duly added as a party.

6. In terms of Directions issued by the Tribunal on 19 July 2023, Mr Langley's application to adduce further evidence and HMRC's Objection thereto were directed to be heard as a preliminary matter.

7. There was no formal application by Mr Langley but rather a string of emails. HMRC had provided a Schedule outlining all of the documentation to which he had referred. All were documents dated in the early part of 2023. Having established that those were the documents that the appellant wished to adduce in evidence, Ms Pretoru very helpfully provided an indexed Bundle identifying all of those documents. That Bundle also included reference to relevant case law.

8. After an adjournment, Mr Langley conceded that he was no longer pursuing the application since it related to mail deliveries to various taxpayers in 2023. He formally withdrew the application.

The substantive issue

9. There was no dispute about the relevant legislative provisions. The appellants' stated Ground of Appeal is that the Closure Notice should be cancelled because the enquiry to which it related was not validly notified by HMRC within the statutory time limits set out at paragraph 12 Schedule 10 FA 03. In summary, in this case, to be valid the notice of enquiry had to be served on the appellants by no later than 26 March 2021.

10. Section 84 FA 03 states that the notice may be served by post and that for the purposes of Section 7 of the Interpretation Act 1978 ("Section 7") that would be to the last known place of residence.

11. It is not disputed that the Opening Letter was posted by HMRC by First Class post on 24 March 2021 and to that address. The appellants state that it was not received by 26 March 2021.

12. HMRC argue that the statutory conditions were met by sending the Opening Letter by post to the correct address with postage paid within the stipulated time frame. HMRC rely on Section 7.

Section 7

13. Section 7 reads:-

> "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 Facts

14. On 5 December 2019, the appellants' agent lodged with HMRC a SDLT 1 return which is a return for SDLT purposes. It included the address to which the Opening Letter was sent.

15. On 13 May 2020, the appellants wrote to HMRC seeking a repayment of SDLT as the return had been completed incorrectly. HMRC sought further information which was provided in a letter dated 24 June 2020 and received by HMRC on 26 June 2020.

16. The amendment to the SDLT return was made on 26 June 2020.

17. In terms of paragraph 12(2)(c) Schedule 10 FA 03, the nine month window for enquiry commenced on that date.

18. HMRC's contemporaneous records, produced by Officer Gregson, confirm that the Opening Letter was received by HMRC's print supplier on 23 March 2021 and they duly printed the letter and had it enveloped by machine. It was issued by First Class mail on 24 March 2021. Royal Mail collected the mail between 4 and 5pm that day.

19. On 21 May 2021, Mr Langley wrote to HMRC on behalf of himself and his wife stating "I am in receipt of your letter dated 23 March and apologise for delay (sic) in responding."

20. He went on to argue that the matter had been resolved in May 2020 and that it was now wrong to raise issues some ten months later. On 1 December 2021, HMRC replied to the email of 21 May 2021 and stated that, having reviewed the case and the correspondence between Mr Langley and Officer Heggarty, that letter was a Closure Notice issued under paragraph 23 Schedule 10 FA 03.

21. In response to the argument that matters had been concluded in 2020, the officer pointed out that paragraph 12 Schedule 10 FA 03 provides a nine month window to open an enquiry into an amendment to a return. The Closure Notice was on the basis that the property was residential and there was no non-residential element so the effect was to increase the SDLT liability on the transaction by £71,250. Effectively the amendment to the SDLT return was reversed and HMRC sought to recover the repayment that had been made.

22. On 16 December 2021, Mr Langley wrote to HMRC arguing that the enquiry should have been opened by 5 March 2021 at the latest.

23. On 24 December 2021, HMRC responded stating that the nine month window started from the point at which HMRC had received all of the information necessary to give effect to

the amendment. That did not mean that the amendment date was necessarily the date HMRC received instructions to amend the return. The documents that the appellants had provided on 13 May 2020 were not signed or dated. The relevant documentation was received by HMRC on 26 June 2020 and the amendment was processed on that date. Therefore the last day of enquiry was 26 March 2021. The enquiry was valid.

24. On 9 February 2022, Mr Langley emailed HMRC again questioning the validity of the enquiry and pointing out the impact of the Covid pandemic on the Royal Mail postal system.

25. On the same day, HMRC responded to him quoting section 84 FA 03 and section 7. Insofar as relevant section 84 reads:

> "**84 Delivery and Service of Documents**
>
> 84(1) A notice or other document to be served under this Part on a person may be delivered to him or left at his usual or last known place of abode.
>
> 84(2) A notice or other document to be given, served or delivered under this Part may be served by post.
>
> 84(3) For the purposes of section 7 of the Interpretation Act 1978 (c.30)(general provisions as to service by post) any such notice or other document to be given or delivered to, or served on, any person by the Inland Revenue is properly addressed if it is addressed to that person-
>
> > (a) in the case of an individual, at his usual or last known place of residence or his place of business …".

26. Mr Langley accepted the offer of a review in an email dated 9 February 2022.

27. On 24 March 2022, the Review Conclusion letter was issued upholding the Closure Notice and for completeness also reviewed the validity of the Opening Letter confirming that it was valid. In that context the Officer stated that:-

> "The matter of the opening notice does now appear to have been resolved as in your email of 10 February 2022 you state 'I fully understand and appreciate your time and attention referring me to Section 84 FA03 and Section 7 of the Interpretation Act 1978'".

28. On 31 March 2022, Mr Langley appealed to the Tribunal in his own name only. The Grounds for Appeal were articulated as follows:-

> "According to the legislation, HMRC have nine months from the last communication from the taxpayer to deliver any objection on the claim.
>
> The letter objecting to same was dated 23 March 2021 (during the pandemic). However, the HMRC objection letter although dated 23 March 2021 was not received until after the nine month deadline and therefore technically flawed.
>
> Due to the close proximity of the nine month rule and especially non-reliability of postage during the pandemic it would have been incumbent for HMRC to use guaranteed next day delivery or recorded delivery to ensure strict compliance within the legislation.
>
> HMRC failed to use such services, the letter being delivered outside of scope period and therefore technically HMRC are precluded from applying for refund of monies".

Discussion

29. We have quoted the full text of Section 7 because it divides the burden of proof in this matter into two issues. HMRC accept that they bear the burden of establishing that they had properly addressed, prepaid and posted the Opening Letter. We accept, and indeed Mr Langley accepts, that they did so. The impact of Section 7 is that therefore the Opening Letter is deemed to have been delivered when it would have been delivered "in the ordinary course of post". That deeming provision does not come into effect if the appellants can establish that it was not delivered in the ordinary course of post.

30. In his witness statement, and reiterated in the course of the hearing, Mr Langley argues that "receipt of the letter is the sole point of contention".

31. In fact, in terms of section 84 FA 03, timeous service of the letter and not the physical receipt of the letter is the issue unless the appellants can prove when they received it. We have no evidence as to their whereabouts in the week ending 26 March 2021.

32. For the first time, in the course of the hearing, Mr Langley alleged that the Opening Letter had been received by the appellants on 30 March 2021. We asked him why, and when, he had known that. His response was to the effect that he had made a note of it at some stage. That note was not in the Bundle.

33. What we did have in the Bundle was a photograph of an envelope addressed to Mrs Langley on which someone had written "received 29/3/22". Mr Langley had attached that to his witness statement arguing that it showed that a letter sent by a C Grifiths (which has not been produced) was dated 24 March 2022 but only received five days later. Firstly, that relates to a different year and it appears to be a Second Class delivery. Secondly, if it was dated 24 March 2022, as he avers, then it would have been posted on 25 March 2022 which was a Friday. It was received on the following Tuesday which was within the Royal Mail's target for delivery of Second Class post. In any event it is largely irrelevant since it does not relate to March 2021. It is however relevant in that he did not state then that the Opening Letter had been received on 30 March 2021.

34. There is no contemporaneous evidence as to when the Opening Letter was received. We say that for a number of reasons but primarily because we agree with Judge Amanda Brown, QC and Member Duncan McBride in *Cry Me A River Limited v HMRC* [2022] UKFTT 182 (TC) ("Cry Me") where they state at paragraphs 11 to 14 as follows:

"Approach to evidence

> 11. There are a number of cases which, over the last decade, have considered the approach to be taken in respect of oral evidence received, particularly concerning facts and matters which occurred sometime before the giving of the evidence. These cases have been comprehensively reviewed in the judgment of Judge Brooks in *Hargreaves v HMRC* [2019] UKFTT 244.
>
> 12. So far as material in the present appeal the Tribunal notes, from that judgment, that a certain degree of caution is to be taken because:
>
> > "26 …
> >
> > - memories are fluid and malleable, being constantly rewritten whenever they are retrieved …
> > - the process of … litigation … subjects the memories of witnesses to powerful bias …

- witnesses, especially those who are emotional, who think they are morally right, tend very easily and unconsciously to conjure up a legal right that did not exist …”.

13. The judgments summarised by Judge Brooks conclude that:

> ‘The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. “This does not mean that oral testimony serves no useful purpose … But its value lies largely … in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.’”(emphasis added)

14. This approach is particularly relevant in the present appeal.”

35. We too agree that that approach is relevant in this appeal.

36. We have added the emphasis because we accept that Mr Langley currently genuinely believes that the Opening Letter was received by him on 30 March 2021.

37. We have quoted from his email of 21 May 2021. We put it to him that, when apologising for the delay, if one week of the delay was attributable to the Opening Letter not having been received until 30 March 2021, one would have expected him to have said so. He argued that that had simply been an oversight.

38. As Ms Pretoru pointed out, the Notice of Appeal, from which we have again quoted, simply states that the letter was delivered after the expiry of the nine months.

39. Nowhere in any of the correspondence did he assert that the Opening Letter was received on 30 March 2021. What he has done is (a) to say that only he and his wife would know when it was received and he says that it was received on 30 March 2021, and (b) to argue in his witness statement that HMRC should prove that the letter was delivered or received. He argues that HMRC should not have relied upon First Class post.

40. Mr Langley very fairly conceded that, since almost all of his correspondence was received by email, he had no “system” for recording receipt of letters.

41. The Royal Mail’s UK International Parcel and Letter Services and Code of Practice states that for First Class mail they aim to deliver on the next working day and that that includes Saturdays. Their target for that is 93% but we can see from the House of Commons Library Report on “Royal Mail Services and the covid-19 pandemic” that their performance in 2020/21 (being to March 2021) had dropped from 92.6% in the previous year to 74.7%.

42. That report records that the quality of service improved in the following three months to 87.2%.

43. We put that page of the Report to Ms Pretoru and her argument was that it was still more likely than not, which is of course the standard of proof, that the Opening Letter would have been delivered on the next working day which was 25 March 2021.

44. That statistic for 2020/21 has to be looked at in context. It is an average for the year and covers three lockdowns because March 2020 was the beginning of the pandemic. By the second week of March 2021 the schools in England and Wales were opened and restrictions were being lifted. As the House of Commons Report records, Royal Mail contributed to providing key

services during the pandemic delivering vaccination and shielding letters, Covid-19 tests and PPE. Delivery and collection days increased to seven days a week in November 2020 resulting in next day delivery for tests exceeding 98%.

45. We observe that 24 March 2021 was a Wednesday. The issue for us is to decide what would be the "ordinary course of post" in March 2021. On the balance of probability, whilst the target of delivery by 25 March 2021 may or may not have been met, it seems more likely than not that the second working day, which is the beginning of the target for Second Class post would have been achieved (two to three working days). The statistic for that for 2020/21 in the House of Commons Report is 93.7%. We find that the "ordinary course of post" for First Class mail in March 2021 would have encompassed no more than two working days.

46. The second working day was 26 March 2021 and if deemed delivered on that date the notice of enquiry is valid. In terms of the legislation, HMRC do not have to prove either delivery or receipt. They have to prove, and they have, that the Opening Letter was correctly addressed to the address in the SDLT 1, that it was dated 23 March 2021, that it was prepared and sent for issue on that day and that it was posted by First Class mail on 24 March 2021.

47. The appellants have failed to produce any evidence beyond Mr Langley's assertion in the hearing that it was received on 30 March 2021.

48. Mr Langley argued that HMRC had "pushed it to the wire" in issuing the Opening Letter at "the last minute". That is not a matter for the Tribunal. The only issue before us is whether the enquiry was valid.

49. Lastly, for completeness, there was an implication in Mr Langley's witness statement, the correspondence and in his submissions that it is unfair that HMRC should be able to rely on Section 7. The Upper Tribunal made it explicit in *HMRC v Hok* [2012] UKUT 363 (TCC) that this Tribunal has no jurisdiction to consider whether or not legislation is fair. Section 84(3) FA 03 explicitly references Section 7. HMRC are entitled to rely upon those statutory provisions.

Decision

50. For all these reasons we dismiss the appeal since the only challenge to the Closure Notice was the validity of the Opening Letter. It was deemed to have been timeously served and nothing to the contrary has been proved.

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 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 4 August 2023