Neutral Citation: [2024] UKFTT 00304 (TC)

Case Number: TC09133

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/08328

PRELIMINARY ISSUE – whether notice of enquiry served by the time limit – Interpretation Act s 7 – whether letter properly posted – whether postal disruption prevented the operation of the deeming provision – whether the appellant had proved non-receipt – Preliminary Issue decided in favour of HMRC

Heard on 14 March 2024
Judgment date: 3 April 2024

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

ASSEMBLY GLOBAL NETWORKS LIMITED

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Hammad Baig of Counsel, instructed by the Forensic Investigation and Taxation Services Ltd

For the Respondents: Mr Christopher Vallis, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. On 24 May 2021, Assembly Global Networks Ltd ("AGN") submitted an amended Corporation Tax ("CT") return for the year ended 30 September 2020. The amended return stated that AGN had spent £1.6m on research and development ("R&D"), and included a claim for an R&D credit of £304,951.09.

2. In accordance with HMRC's "process now, check later" approach, on 21 October 2021 they paid AGN the £304,951.09. On 15 July 2022, Officer Bethan Morris drafted a letter opening an enquiry into the amendment ("the Enquiry Letter"). This was addressed to AGN's registered office at 5 Chancery Lane, London; that premises was occupied by a firm called Orega Limited ("Orega"), which provides services for a number of companies, including AGN.

3. On 16 August 2022. having received no response to the Enquiry Letter, Ms Morris issued AGN with a Notice under Finance Act 2008, Sch 36, para 1 ("Sch 36 Notice"), and followed this on 26 September 2022 with a penalty for failure to comply with the Sch 36 Notice.

4. On 31 May 2023, AGN applied to close the enquiry into its CT return, and on the same day, also applied to make late appeals against the Sch 36 Notice and the related penalty. The grounds for each application were that the Enquiry Letter had not been received at AGN's registered office by 31 July 2022, the last date on which HMRC were able to open a valid enquiry into the claim. The Tribunal (Judge Bailey) directed that this question be decided at a hearing as a preliminary issue ("the Preliminary Issue").

5. Mr Vallis, on behalf of HMRC, relied on the deeming provision at s 7 of the Interpretation Act ("IA"), namely that the Enquiry Letter had been properly addressed, franked and posted and was thus deemed to have been validly served, because AGN had not proved non-delivery.

6. Mr Baig, on behalf of AGN, submitted that the deeming provision did not operate because:

   (1) HMRC had failed to prove that the Enquiry Letter had been posted;

   (2) as the result of postal disruption, there had been no "ordinary course" of postal deliveries in the relevant time; and/or

   (3) AGN had proved non-receipt.

7. I found that the Enquiry Letter had been properly addressed and franked and that it had been posted on 18 July 2022. I agreed with Mr Baig that there was no ordinary course of postal deliveries in the week ending 22 July, but found that the ordinary course of post had resumed on Monday 25 July. AGN failed to show non-receipt, and the Enquiry Letter was therefore deemed to have been delivered on 28 July 2022. As a result, I determined the Preliminary Issue in favour of HMRC.

EVIDENCE

8. HMRC filed and served a documents bundle running to 410 pages. l was also provided with a witness statement from Ms Morris; she was cross-examined by Mr Baig, and re-examined by Mr Vallis. I found her to be a wholly honest and credible witness.

9. I was also provided with a witness statement from Mr Peter Smith, AGN's director. who was cross-examined by Mr Vallis. Much of his witness statement consisted of a recitation of facts not in dispute about the correspondence between AGN and HMRC after September 2022; it also set out Mr Smith's view of the legal position (which I have disregarded). Additionally, there were two differences between what Mr Smith said in the letter he sent to Ms Morris on 30 September 2022, and the evidence in his witness statement:

(1) In the letter to Ms Morris, Mr Smith said he had received the Enquiry Letter, which he described as being "dated almost two months before I received it, but in the witness statement he denied receipt. That apparent evidential conflict was not put to Mr Smith in cross-examination. Whether he had received the Enquiry Letter was a key issue about which only Mr Smith could know the true position. Having considered the principles set out by the Supreme Court in *Tui v Griffiths* [2023] UKSC 48 at [70], I decided that, in the absence of cross-examination, it would not be fair to reject the evidence in Mr Smith's witness statement, see further §58ff.

(2) The second conflict concerned the date on which Orega received the Sch 36 Notice, see further §106ff. Although Mr Smith's attention was similarly not drawn to that conflict, Mr Vallis challenged Mr Smith's evidence about Orega generally, saying he had "no way of knowing" what went on in Orega's office. In addition, the Bundle included evidence from Orega itself, while the issue was also "collateral" to the matter I had to decide, because it related to the Sch 36 Notice and not the Enquiry Letter. Taking into account all relevant factors, I decided it was not unfair to AGN for the Tribunal to weigh all the evidence relating to Orega and make a related finding, see *Tui* at [70(viii)] and [61].

10. On the basis of the evidence summarised above, I make the findings of fact set out in this decision. I begin with the findings which are not in dispute, and make further findings of fact later in this decision.

FINDINGS OF FACT NOT IN DISPUTE

11. AGN is involved in telecommunications. On 24 May 2021, it submitted an amended CT return for the year ended 30 September 2020. This stated that it had spent £1.6m on R&D, and included a claim for a R&D credit of £304,951.09. HMRC operated a "process now, check later approach, and paid AGN the £304,951.09 on 21 October 2021.

12. From 31 March 2021 until 7 June 2023, AGN's registered office was at 5 Chancery Lane, London. That premises is occupied by Orega, which provides registered office services for a number of companies, including AGN. Orega had been instructed to forward envelopes addressed to AGN to Mr Smith at his private address.

13. AGN had been advised in relation to its R&D claim by the Forensic Investigation and Taxation Services Ltd ("FITS"), but until at least mid-August 2022 Mr Luciano de Mello was the person authorised to act as AGN's tax agent in relation to HMRC.

Drafting the Enquiry Letter

14. On Friday 15 July 2022, Ms Morris drafted the Enquiry Letter; this was a compliance check opening letter. She asked AGN for extensive and detailed information about the R&D claim, and why it considered that the statutory requirements had been met. The drafting was carried out on HMRC's "Shared Experience to Exploit" system, and Ms Morris included AGN's name and the address of its registered office.

15. She also drafted a copy of the same letter to send to Mr de Mello. That copy letter was identical to Enquiry Letter, other than that it included Mr de Mello's home address, and was headed "Check of your client's amendment to the Company tax return for the period ended 30 September 2020".

16. Ms Morris pressed print for both letters, and made a note on HMRC's "Caseflow" system to record what she had done.

The Sch 36 Notice

17. On 16 August 2022. Ms Morris sent AGN the Sch 36 Notice. It began by saying that Ms Morris had written to AGN and its agent on 15 July 2022, but had not received any of the items requested; Ms Morris also attached a copy of the Enquiry Letter. On 26 September 2022, she issued a penalty notice for failure to comply with the Sch 36 Notice.

18. On 30 September 2022, Mr Smith wrote to Ms Morris, saying he had received the Enquiry Letter on 1 September 2022; I make further findings about that letter at §58ff. On 25 October 2022, Mr Smith asked Ms Morris to copy FITS on her correspondence, and subsequently provided the appropriate authorisation. Correspondence between the parties continued, focusing on whether the Enquiry Letter had been served by the due date.

The appeals/applications

19. On 12 April 2023, AGN made a late appeal to HMRC against the Sch 36 Notice and the subsequent penalty. On 24 May 2023, HMRC refused to admit the late appeals. On 31 May 2023, AGN applied to the Tribunal to close the enquiry into its CT return, on the grounds that the Enquiry Letter had not been validly served. On the same day, AGN asked the Tribunal for permission to make late appeals against the Sch 36 Notice and the related penalty.

20. On 5 July 2023, HMRC applied for the late appeal applications to be stayed, and for the Tribunal to hold a hearing to determine as a preliminary issue whether the Enquiry Letter had been validly issued ("the Preliminary Issue"). AGN did not object to that application.

21. On 8 November 2023, Judge Bailey allowed HMRC's application and gave directions for a hearing of the Preliminary Issue. Those directions included requirements for the parties to file and serve lists of documents and authorities, and to file and serve witness statements, and for HMRC to provide a bundle. There was no direction to exchange skeleton arguments.

22. On 7 February 2024, Mr Baig filed an application for HMRC to be barred from the proceedings, and for the Preliminary Issue to be determined in AGN's favour because of HMRC's failures to comply with certain of Judge Bailey's directions. The same document included Mr Baig's submissions on the Preliminary Issue.

23. On 13 February 2024 (the document is incorrectly dated), Mr Vallis provided a response. He apologised on behalf of HMRC for the compliance failures Mr Baig had identified, and provided explanations. He also said he was setting out HMRC's "case" in relation to the Preliminary Issue.

24. On 1 March 2024, Judge Bailey refused AGN's application for sanctions against HMRC and directed that the Preliminary Issue be heard on the date it had been listed.

THE RELEVANT LEGISLATION

25. Taxes Management Act 1970 ("TMA"), s 9A is headed "Notice of enquiry" and so far as relevant reads:

> "(1) An officer of the Board may enquire into a return under section 8…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)-(b) …
>
> (c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.

> For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October."

26. TMA s 115 sets out how a notice of enquiry may be "given". It is headed "Delivery and service of documents" and reads:

> "(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.
>
> (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person 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) in the case of a company, at any other prescribed place….
>
> (3) In subsection (2) above "prescribed" means prescribed by regulations made by the Board, and the power of making regulations for the purposes of that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of the House of Commons."

27. Companies Act 2006 s 1139 provides that "a document may be served on a company registered under this Act by leaving it at, or sending it by post to, the company's registered office".

28. The following points were common ground:

(1) The deadline for a notice of enquiry to be "given" to AGN was 31 July 2022, because AGN had amended its CT return under TMA s 9ZA on 24 May 2021.

(2) A notice of enquiry was validly served if it was delivered to its registered office.

29. The parties disagreed on whether the Enquiry Letter had been "given" to AGN by 31 July 2022 and on whether s 7 of the Interpretation Act 1978 ("IA s 7") applied. That section 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 STEPS

30. There were four steps to arrive at a decision on the Preliminary Issue:

(1) whether the Enquiry Letter had been properly addressed, pre-paid and posted by HMRC;

(2) if so, when it had been posted;

(3) whether the deeming provision in IA s 7 should be disapplied; and

(4) whether AGN had proved that the Enquiry Letter had not been delivered.

31. The standard of proof is the balance of probabilities, which as Lord Hoffman said in *Re B* [2008] UKHL at [13] means "whether the fact in issue more probably occurred than not".

STEP 1: WHETHER THE ENQUIRY LETTER WAS ADDRESSED, PREPAID AND POSTED

32. There were three main sources of evidence in relation to Step 1:

(1) Ms Morris's witness statement and related exhibits;

(2) documents relating to Mr de Mello; and

(3) Mr Smith's evidence.

Ms Morris's evidence

33. Ms Morris's unchallenged evidence was that:

(1) when a draft document such as the Enquiry Letter has been created on HMRC's SEES system, that system automatically sends the documents to HMRC's central print service ("HCPS");

(2) HCPS prepares a print-ready file which it sends overnight to HMRC's print supplier; and

(3) letters are normally printed, enveloped and despatched on that following day, but when that day was a Saturday, enveloping and despatch happens on the Monday.

34. Ms Morris exhibited a print-out from the HCPS system showing the Enquiry Letter and the copy letter to Mr de Mello had been received by that system on 15 July 2022 and that each was 18 pages long. The print-out also showed the following, for both letters:

Column heading	**Information in column**
Job status	Completed
Completed date	16/7/22
Mailing service	Royal Mail via DSA
Mailing envelope	Envo 1-1
Tariff name	Default

35. Ms Morris was asked in re-examination about the meaning of "Royal Mail via DSA" but was unable to assist. Both parties put their cases on the basis that HMRC had used Royal Mail's postal service, and I have taken that to be a fact.

36. Mr Baig referred Ms Morris to the HMRC guidance in the Enquiry Manual at EM1506 (his emphasis):

> "It is important that you retain evidence that the enquiry notice has been posted, just in case the customer challenges receipt of it. For all cases, it is best practice to note on Caseflow/SA **the date that the notice left the office**. You should also **contact the customer and/or agent by telephone** to inform them that the notice is on the way. Notes of the calls should be made and retained in the case papers. If you need written authorisation from your manager for the use of first class post or tracked delivery, a copy of the authority should be uploaded to Caseflow and/or also placed in the file as evidence.
>
> This list of evidence is not intended to be exhaustive and you should keep any further evidence that you have of the notice being issued. We **should not wait until too near to the last date for the enquiry to issue the notice.** In cases where it is unavoidable that the notice is issued within one week of the last date for the enquiry, you should, in addition to retaining the evidence detailed

> above, ensure that the notice is sent via tracked delivery and evidence of this is retained.
>
> Unless the contrary is proved, the notice is taken to be delivered as it would have been through the ordinary course of post. Royal Mail's published position is that second class post takes up to 3 working days to be delivered and first class post takes 1 working day. Working days include Saturdays but not Sundays or Bank Holidays. You should consider how long the post takes to leave the office when considering this. **If you are ever in doubt as to whether a notice will be sent in time using Royal Mail, send it via tracked delivery** instead so we have proof of receipt. This is only a guide and each case will need to be decided on their own facts."

37. Ms Morris accepted that:

(1) she had not noted on Caseflow when the Enquiry Letter had been despatched;

(2) she had not called AGN or Mr de Mello before the deadline of 31 July 2022;

(3) she had not sent the Enquiry Letter by tracked delivery, despite widely publicised problems with Royal Mail; and

(4) it would have been "good practice" to have used track and trace; but she had not followed that good practice.

The case law

38. In *Qureshi v HMRC* [2018] UKFTT 0115 (TC) at [14], a passage endorsed by the Upper Tribunal in *Barry Edwards v HMRC* [2019] UKUT 0131 (TCC) at [51], the Tribunal said:

> "We acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant's address held on file and then sealed it in a postage prepaid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material."

Submissions and findings

39. Mr Vallis drew attention to the fact that the Ms Morris's exhibit contained the words "Royal Mail via DSA" and that the "job status" was shown as "completed". He said this supported HMRC's inference that the Enquiry Letter had been posted.

40. Mr Baig submitted it was not possible to make that inference. He referred to Ms Morris's failure to take any of the further steps (such as using track and trace) set out in EM1506, as well as to her acceptance that she had not followed best practice.

41. I make the following findings of fact:

(1) The Enquiry Letter and the copy letter to Mr de Mello were sent for printing. I make that finding on the basis of Ms Morris's unchallenged evidence.

(2) Both those letters were printed on Saturday 16 July 2022. This finding is made in reliance on the following:

(a) The exhibit gives that as the "completion date"; and

(b) Ms Morris's unchallenged evidence that post was not enveloped or despatched on Saturdays, so the task that was completed on 16 July 2022 was therefore the printing.

(3) Both letters were enveloped on Monday 18 July. This finding is made on the basis that:

(a) the exhibit shows that the "envelope" column had been completed; and

(b) Ms Morris's evidence that letters sent on Friday were enveloped the following Monday.

(4) On Monday 18 July, both the Enquiry Letter and the copy letter to Mr de Mello were printed and enveloped and ready to be sent out.

(5) Both envelopes were franked. That finding is supported by the column headed "tariff name", which was completed. It is also consistent with the long-established presumption of regularity, expressed by Lindley LJ in *Harris v Knight* (1890) 15 PD 170:

> "The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability."

Mr de Mello's evidence

42. I have already found as facts that:

(1) at the time Ms Morris drafted the Enquiry Letter, Mr de Mello was registered on HMRC's system as AGN's agent for tax purposes; and

(2) Ms Morris drafted a copy of the Enquiry Letter addressed to him.

43. Mr de Mello was not called as a witness, but the Bundle contained further evidence relating to the copy letter addressed to him.

The evidence in the Bundle

44. An HMRC file note records a call with Mr de Mello as follows:

> "to 64-8 agent who advised customer no longer a client of his, however he has passed on the opening letter and schedule".

45. On 14 February 2023, Ms Morris informed FITS of that call, saying:

> "Contact was made to the registered 64-8 agent Luciano De Mello on 12 August 2022. Mr De Mello confirmed he had received the notice however as he no longer represented the Company, he had forwarded the notice onto the Company directly."

46. On 12 April 2023, FITS wrote to HMRC, saying they had contacted Mr de Mello, who had provided the following statement ("Mr de Mello's Statement"):

> "Following your request to outline communication I have had with HMRC concerning the Assembly Global Networks Ltd R and D enquiry letter, I can confirm the following:
>
> 1. HMRC sent the letter to my old home address.
>
> 2. I received the enquiry letter forwarded by the Post Office during first week of August 2022, I don't recall the exact date but within 2 days of its receipt I sent it on [to] the Assembly Global Networks Ltd.
>
> 3. I confirmed this in my call with HMRC the following week."

The parties' submissions

47. Mr Vallis said this evidence showed that Mr de Mello's copy letter had been posted by HMRC, because it had been received by him. He asked the Tribunal to find on the balance of probabilities that the Enquiry Letter had been similarly despatched.

48. Mr Baig submitted that the Tribunal could not take the evidence about Mr de Mello's letter into account, because:

(1) Mr Vallis had not relied on it when putting HMRC's case in relation to Step 1, but had instead raised it for the first time when cross-examining Mr Smith in the context of Step 4.

(2) The Tribunal had then asked Mr Vallis whether HMRC were relying on Mr de Mello's evidence (which Mr Vallis confirmed) but the Tribunal does not have an inquisitorial function.

Whether the Tribunal could rely on this evidence

49. I agree that Mr Vallis did not draw attention to Mr de Mello's evidence until the later part of the hearing, but I also take into account the following:

(1) Mr de Mello's Statement was supplied by FITS, so was provided to HMRC on behalf of AGN.

(2) AGN's application to the Tribunal began as follows:

> "There has been correspondence between FITS Ltd and HMRC regarding the validity of HMRC's Compliance Check (CC) with FITS Ltd maintaining that the CC was invalid due to service out of time on the Company."

(3) Attached to that application was the letter of 12 April 2023 which contained Mr de Mello's Statement, so it formed part of the documents provided by AGN in relation to its Tribunal application.

(4) In the same letter of 12 April 2023r, AGN relied on Mr de Mello's Statement to support their case that the Enquiry Letter had not been received by the due date.

(5) AGN's application to the Tribunal also attached letters from HMRC to FITS dated 14 February 2023 and 24 May 2023, in which Mr de Mello's evidence formed an explicit and key part of HMRC's case.

(6) Mr Vallis's response document was not provided in response to directions issued by the Tribunal, because Judge Bailey did not direct that the parties exchange skeleton arguments setting out their case on the Preliminary Issue. Moreover, his response was served on 13 March 2024, the day before the hearing, so cannot have made any difference to Mr Baig's preparation.

(7) If AGN had wanted to challenge part of the evidence given by Mr de Mello, they could have called him as a witness (and could have asked the Tribunal to treat him as a hostile witness); or they could have asked HMRC to call him as a witness, or applied for a witness summons, but they took none of those steps. That decision cannot have been impacted by Mr Vallis's response document, because the deadline for witness statements was 5 December 2023, over three months before the hearing.

50. Having considered all the above, I decided it would not be procedurally unfair to place reliance on the evidence in the Bundle about Mr de Mello.

51. I went on to consider whether the Tribunal would be improperly exercising an inquisitorial jurisdiction by relying on that evidence, as Mr Baig submitted would be the position. I took into account the following:

(1) The evidence is both relevant and admissible, and was included in the Bundle provided to the Tribunal in order that the Preliminary Issue be determined.

(2) The task of a judge at first instance is to find the facts from the evidence. In *Fage v Chobani* [2014] EWCA Civ 5 at [114], Lewison J (as he then was), said that "the expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed", and he continued "in making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him".

(3) The role of the burden of proof was explained by Lady Hale in *Re B* at [32]:

> "In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to makeup his mind where the truth lies without needing to rely upon the burden of proof."

52. It is clear from the foregoing that a judge cannot be shut out from finding facts based on the evidence because the party with the burden of proof on a particular point did not draw attention to that evidence in his opening, and there is nothing "inquisitorial" in a judge considering all the evidence put forward by the parties.

53. I therefore find that it is in the interests of justice to take into account Mr de Mello's evidence, and that there is no jurisdictional bar to doing so.

Weighing the evidence

54. Mr de Mello twice stated that he had received his copy of the Enquiry Letter, both in his response to the call from HMRC on 12 August 2022 and in his Statement.

55. Mr Smith's witness statement did not refer to Mr de Mello. In the course of cross-examination, Mr Vallis asked Mr Smith to agree that Mr de Mello had received his copy of the Enquiry Letter, and Mr Smith replied "I don't believe he did".

56. I place more weight on the evidence from Mr de Mello than on Mr Smith's expression of belief, because:

(1) Mr de Mello confirmed to HMRC on 12 August 2022 that he had received his copy of the Enquiry Letter; that is evidenced both by the file note and by Mr de Mello's Statement.

(2) That call took place only a month after Ms Morris had drafted the copy letter, whereas Mr Smith's evidence was given for the first time during this hearing, over 18 months later.

(3) Mr de Mello carefully distinguished between what he could remember (that the copy letter was sent to his old address; that he forwarded that letter; and that he did so within two days of receipt), and what he could not, namely the exact date of receipt. That particularisation adds to the cogency of the evidence.

(4) Mr Smith gave no reason for his belief that Mr de Mello did not receive the copy letter.

Finding and conclusion

57. I find as a fact that Mr de Mello received his copy of the Enquiry Letter.

Mr Smith's evidence

58. I have already found as a fact that Mr Smith wrote to Ms Morris on 30 September 2022, see §18. That letter began:

> "I am writing in relation to your letter dated 15th July 2022 on [sic] which we received on 1/09/2022, having been forwarded from the registered office address at 5 Chancery Lane, London which the company use as a serviced office address.
>
> I note in your letter you have requested that we provide certain information to you by 15th August 2022, however obviously as your letter was received after this date, I hope you'll understand that it was not possible for us to comply."

59. However, on 19 December 2022, FITS wrote to Ms Morris saying:

> "We are reliably informed that the letter of 15th July 2022 has never been received by either the Serviced Office/Registered Office (Orega) nor by the Company nor the director at any other address…The first time our client was aware of any potential Enquiry was the HMRC letter dated 16th August 2022 [the Sch 36 Notice] which had a copy of the 15th July 2022 Enquiry letter enclosed."

60. Mr Smith's witness statement says "AGN have not to this day received the original notice of enquiry dated 15 July 2022. They have only received the copy enclosed with the reminder letter dated 16 August 2022". In cross-examination, Mr Smith was not challenged on that evidence by reference to the letter he had written on 30 September 2022.

61. I therefore accept the evidence in Mr Smith's witness statement and find as a fact that he did not receive the original Enquiry Letter at any time, but only the copy which was attached to the Sch 36 Notice, and that both letters were received on 1 September 2022.

Was the Enquiry Letter posted?

62. Mr Vallis submitted that Mr Smith's non-receipt of the Enquiry Letter could have been caused by a failure by Orega to forward it, or by a failure by the Post Office to deliver it after it had been forwarded He emphasised that Mr Smith's non-receipt was not determinative of the posting issue, because the question for determination was whether it had been received *by Orega*.

63. While agreeing with Mr Vallis that it was Orega's receipt that was in point, Mr Baig nevertheless submitted that significant weight should be placed on Mr Smith's non-receipt.

64. I took into account the fact that Mr Smith did not receive the Enquiry Letter, but I also took into account the facts that:

(1) on Monday 18 July 2022, the Enquiry Letter and the copy letter were in franked envelopes in the HCPS waiting for despatch;

(2) those letters had therefore been processed together and made ready for despatch together; and

(3) Mr de Mello's letter was posted.

65. I place more weight on the facts about the situation in the HMRC's print and despatch area than on Mr Smith's non-receipt, given that the Enquiry Letter had to be forwarded by

Orega before it could be delivered to Mr Smith. As Mr Vallis said, there are other possible reasons why Mr Smith did not receive the Enquiry Letter.

66. I find as a fact on the balance of probabilities that the Enquiry Letter was posted to Orega at the same time as the copy letter was posted to Mr de Mello.

Conclusion on Step 1

67. I find that the Enquiry Letter was properly addressed and pre-paid, and was despatched to Orega by post. HMRC therefore succeed on Step 1.

STEP 2: WHEN WAS THE ENQUIRY LETTER POSTED

68. I have already found as a fact that letters which were ready for despatch on a Saturday would normally be collected by Royal Mail (and so posted) on the following Monday. It was HMRC's case that, in accordance with that normal position, the Enquiry Letter was posted on Monday 19 July.

69. However, Mr Baig submitted that the disruption in Royal Mail during the last two weeks of July prevented a finding of fact that the Enquiry Letter had been collected on any particular day.

Findings of fact about the postal service

70. I begin with the normal position and then consider three possible sources of postal disruption: hot weather, the pandemic and industrial action.

The normal position

71. I make the following findings of fact about the normal position:

(1) The exhibit to Ms Morris's witness statement recorded that tariff for the Enquiry Letter and the copy letter was "default". I had no direct evidence as to the meaning of the "default" tariff, but both parties assumed that HMRC's default position was that letters are sent by second class post, and I have taken that to be a fact.

(2) HMRC's manual states at EM1506 that the Post Office's published position is that second class post takes up to three working days to be delivered. Neither party sought to dispute that figure and I have accepted it.

(3) The Bundle included various documents about disruption to HMRC's wholesale customers; both parties assumed that HMRC was such a customer and I agree that this is a reasonable inference.

(4) I also take judicial notice of the fact that Royal Mail delivers post six days a week, but not on Sundays.

Weather

72. On 18 July 2022, Royal Mail sent a "Disruptive Event Notification" to its wholesale customers, because the Met Office had issued a red weather warning which included this passage:

> "In particular, we anticipate that it will negatively impact upon our ability to deliver all Mailing Items in line with the timescales specified in the ALC (i.e. D+2 for standard letters and D+5 for Economy mail)...At present our expectation is that the Disruptive Event will apply to all Mailing Items which are in any part of our network at any time between 18 July and 19 July 2022 (both dates inclusive)."

73. Since second class post is part of Royal Mail's standard service, available to all customers, I have made the assumption that letters sent second class are "standard letters" and that "economy" is a separate service available to wholesale customers.

Covid

74. On 22 July 2022, Royal Mail sent a warning to wholesale customers that a recurrence of the Covid pandemic was adversely impacting its service. On 20 October 2022, it provided further detail as to what had happened, saying:

> "We have now concluded our assessment of trends in Royal Mail staff absence data, and have identified that in weeks commencing 4 July, 11 July and 18 July 2022 (Affected Weeks), absences materially spiked above pre-Covid levels. During July, as was reported across the news, Covid-19 infection rates across the UK increased. During the Affected Weeks, sick absence across our entire workforce, and specifically for staff in operational roles, increased to levels last seen between March 2020 and April 2022 (i.e. when Royal Mail staff absence levels were being impacted by the Covid-19 pandemic).
>
> This increase in absences, which constitutes a Disruptive Event, impacted Royal Mail's ability to deliver all Mailing Items for you in line with the timescales set out under the Access Letters Contract (ALC) and Wholesale Parcels Contract (WPC). To that end, all Mailing Items which were in any part of our network between 4 July 2022 and 23 July 2022 will be excluded from the calculation of our performance against the Service Standard at the end of the financial year. As has previously been communicated to you, for Royal Mail, every 1% of absence equates to approximately 1,300 fewer members of staff, who are available to sort mail in Mail Centres, drive vans to distribute mail to Delivery Offices, or carry out walks and daily duties to deliver mail to households and businesses. If absence levels reach 8% this means approximately 10,400 employees are unable to work."

Industrial action

75. In May and June 2022, staff working for Royal Mail held a series of strikes. On 5 July 2022, the Unite Union announced that managers would work to rule between 15 and 19 July, and would strike between 20 to 22 July 2022. However, it was Ms Morris's unchallenged evidence was that those strikes were cancelled.

76. I therefore find that between 15 and 19 July 2022 there was some disruption caused by managers for the Unite Union working to rule, but that there were no strikes during the last two weeks of July. Further strikes did take place on 26 and 31 August 2022, of which the second is relevant to Step 4.

Delivery targets

77. In November 2023, Royal Mail was fined by Ofcom for missing its delivery targets for both first and second class post during 2022-23; in relation to the latter, it had delivered 90.7% of second class post inside its three day delivery target and so failed to deliver 9.3% of post within that target.

Effect on collections?

78. The above findings relate to problems with sorting, distribution and deliveries, together with industrial unrest among managers. They are thus relevant to Step 3, which concerns deliveries. However, none relate to the *collection* of post on Monday 18 July 2022.

Conclusion on Step 2

79. I find that there was no disruption to the normal collection of HMRC's post on Monday 18 July 2022, and thus that the Enquiry Letter was posted on that day.

STEP 3: WAS THERE AN "ORDINARY COURSE" OF POSTAL DELIVERIES?

80. Mr Baig submitted that the extent of disruption in Royal Mail during the last two weeks of July meant that there was no "ordinary course" of postal deliveries, with the result that the

deeming provision could not operate. Mr Vallis submitted that the deeming provision remained effective and that HMRC were able to rely on it.

Ordinary course of post?

81. My starting point was that, absent any disruption, second class mail would be delivered in the "ordinary course of post" within three days, albeit there are no deliveries on a Sunday.

82. Royal Mail informed wholesale customers that (due to the red weather alert) standard letters within the network between 18 and 19 July 2022 would take two further days, see §72. Thus, on Monday 18 July 2022, when the Enquiry Letter left HMRC, the ordinary course of post had been extended by two days because of hot weather, so a second class letter would arrive within five days (excluding Sudays) rather than three days.

83. However, that was not the only factor affecting deliveries in the week beginning Monday 18 July 2022. In the same week, there were also two days of industrial unrest affecting managers, while staff sicknesses caused by the pandemic also "impacted Royal Mail's ability to deliver all Mailing Items" between 4 and 23 July 2022. Presumably because the effect of sickness varied by location, Royal Mail did not give a revised delivery date, as they had done with the hot weather notification. Instead, they in effect said that until Saturday 23 July 2022, there was no "normal course of post".

84. However, by Monday 25 July, the position had changed: Royal Mail were again committing to deliver second class post by the normal time limits. There was no industrial action and no hot weather warning. For that week, therefore, there was again an "ordinary course of post", namely three working days for second class letters.

Application to AGN

85. The Enquiry Letter was posted second class on 18 July 2022. There was no "ordinary course of post" between that date and 23 July 2022. It was still in the system on Monday 25 July 2022, when the ordinary course of post resumed. If the deeming provision applied, the Enquiry Letter would thus be deemed to be delivered in the normal course of post by 28 July 2022.

Should the deeming provision be disapplied?

86. The deeming provision cannot operate when there is no "normal course of post", as happened in the week beginning 18 July 2022. The question is whether the deeming provision should also be disapplied for the following week.

87. In *Fowler v HMRC* [2020] UKSC 22 ("*Fowler*") at [27], Lord Briggs, giving the judgment of the Court, said:

> "(1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
>
> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
>
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.

> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real".

88. Although Mr Baig did not refer to *Fowler*, he in terms submitted that application of the deeming provision would produce an "unjust, absurd or anomalous" result, because of the extent of the postal disruption; he also relied on the Ofcom figures for 2022-23 which showed that 9.3% of post missed the delivery targets.

89. As required by *Fowler*, I begin with the purpose of the deeming provision, which is not "difficult to ascertain". It is to avoid the sender having to prove service on an item by item basis by reference to the particular facts of each letter. Instead, once the sender has shown that a letter was properly addressed, stamped and posted (all of which is within the sender's control), the deeming provision operates unless the recipient can prove actual non-receipt.

90. In my judgment, applying the deeming provision to the Enquiry Letter with effect from 25 July 2022 would not produce an unjust, absurd or anomalous result. On the contrary, Mr Baig's approach undermines the purpose of the provision, because it would require senders to check the factual position relating to a particular postal delivery, and only allow reliance on the deeming provision if the sender could prove that the Post Office was on those particular days and/or in that particular part of the country. actually delivering the post in accordance with its published timescales.

91. I am fortified in that conclusion by *HMRC v Vermilion Holdings* [2023] UKSC 37 ("*Vermilion*"), in which Lord Hodge gave the only judgment. At [23], he endorsed the principles in *Fowler*, and then considered the specific deeming provision at issue. This was set out in ITEPA s 471(3), see the emboldened text:

> "A right or opportunity to acquire a securities option made available by a person's employer, or a person connected with a person's employer, **is to be regarded** for the purposes of subsection (1) **as available by reason of an employment** unless…"

92. The First-tier Tribunal had held at [139] of their judgment that the facts of the case were unusual, and, on those facts, the securities option had not made available by reason of the individual's employment. They concluded at [140]:

> "The ambit of the deeming provision should be limited where the artificial assumption from deeming is at variance with the factual reason that gave rise to the right to acquire the option."

93. When *Vermilion* reached the Supreme Court, Lord Briggs said at [27] that the statement set out above was an error of law, because the very purpose of the deeming provision was to avoid the need to decide, on the facts, whether the option had been made available by reason of the employment.

94. The same is true here. It would be an error of law to disapply the deeming provision and instead carry out a factual assessment as to whether or not the Enquiry Letter had been delivered within three working days, because the whole purpose of IA s 7 is to remove the need for such an exercise.

Conclusion on Step 3

95. The Enquiry Letter is deemed to be delivered by 28 July 2022, unless AGN succeed on Step 4.

STEP 4: HAS NON-RECEIPT BEEN PROVED?

96. Step 4 is whether AGN proved that the Enquiry Letter was not delivered. I begin with the case law, and then consider the evidence and related submissions.

The case law

97. In *Calladine-Smith v Saveorder Ltd* [2011] EWHC 2501 (Ch), Morgan J said at [26] that where a letter has been despatched:

> "if the addressee of the letter proves on the balance of probability that the letter was not served upon him then that matter has been proved and the section should be applied accordingly. Of course it is not enough simply to assert that someone did not receive the letter; the court will consider all the evidence and make its findings by reference to the facts which are established including issues as to the credibility of witnesses. That is the ordinary way in which a court goes about making findings of fact."

98. In *R (oao Broomfield) v HMRC* [2018] EWHC 1966 (Admin), Lewis J confirmed that the person must prove that the letter was not received "at the address to which it was, properly, addressed".

99. Although these two cases were not included in the Bundle, the first was relied on in *Burley v HMRC* [2023] UKFTT 00059(TC), which was so included, and in relation to the second, it was common ground that AGN had to prove that the Enquiry Letter was not received at its registered office, in other words, received by Orega.

The evidence from Orega

100. Although Mr Smith said in his witness statement that AGN had a contract with Orega setting out the service to be provided, no copy of that contract was included in the Bundle. The only evidence consisted of two emails from Louise Valentine, Orega's Assistant Customer Service Manager. One was dated 23 September 2022, and read:

> "This is to state that the letter received by you on the 1st September would have been delayed in its delivery due to the Royal Mail strikes that took place at the end of August."

101. That email could only refer the Sch 36 Notice Ms Morris had sent out on 16 August 2022 to which a copy of the Enquiry Letter was attached, as this was the letter received by Mr Smith on 1 September 2022, see §60.

102. The second Orega email was dated 29 November 2022, and read (my emphasis):

> "Our procedure dictates that we receive mail to this office, and it is forwarded on the same day as we receive it. The service we provide you does not include receipt date stamping of your mail. **The letter to which you refer as the HMRC letter and dated 15th July and was forwarded on as soon as we received it** as per our standard procedures. The letter would have been received by us no earlier than the 29th August and re posted to you first class. Assuming 2-3 days delivery then your receipt of the 1st September would be typical of the receipt and delivery expectations of our services. Many of our client's mail delivery was affected by the summer post office mail strikes and the posting party (HMRC in this case) mail would have been subjected to the same delivery delays on account of the strikes. Unless the mail was expediated [sic] with an enhanced delivery process. You will appreciate we cannot be held responsible for industrial action by the postal service."

103. I first note for completeness that HMRC did not seek to rely on this email as evidence that the Enquiry Letter (and not simply a copy of that letter) had been delivered to Orega,

despite the statement that it had been received at their office. Instead, HMRC's position was that:

(1) As Orega do not date stamp or otherwise log the mail they receive, it was not possible for them to say when a particular letter was received.

(2) Although their second email refers to "the letter…dated 15 July", there is no explanation as to how Orega know anything about any particular letter, especially one which they said had been forwarded over three months previously.

(3) Orega's statement that the letter "would have been received by us no earlier than the 29 August" was unreliable because:

(a) there had been a bank holiday on 29 August, so the Sch 36 Notice could not have been received by Orega on that day;

(b) if the Sch 36 Notice had been received and forwarded on 30 August, it could not have been received by Mr Smith on 1 September, because Orega had also said that 2-3 days delivery…would be typical of the receipt and delivery expectations of our services", and the postal strike on 31 August would have further delayed the delivery; and

(c) since Mr Smith received the Sch 36 Notice on 1 September, it must have been received by Orega *before* 29 August, not on or after that date, as Orega said was the position.

104. I agree with HMRC, and find that:

(1) The evidence in Orega's second email about receipt and onward posting of a letter relates to the Sch 36 Notice and not to the Enquiry Letter.

(2) That evidence is unreliable because Orega has no record of when letters are received or when they are forwarded or as to the addressees or other details of the letters, so has no evidential basis on which to say when a particular letter was received or when it was forwarded.

(3) The inconsistencies pointed out by HMRC exemplify that unreliability.

105. Orega's evidence therefore does not prove that the Enquiry Letter was not received by Orega on or before 31 July 2022.

Mr Smith's evidence

106. I have already found (see §60) that on 1 September 2022, Mr Smith received the Sch 36 Notice and a copy of the Enquiry Letter. I made that finding on the basis of his witness statement having also considered the letter he wrote to Ms Morris on 30 September 2022.

107. In that same letter he said (emphasis added):

> "Given that your letter was dated almost two months before I received it, I made enquiries with Orega, the company who manage the serviced office, trying to establish exactly when the letter was received at the registered address and to check the reason for the delay. They confirmed that **the letter was received at the registered office on 1st September 2022**, and mail is forwarded immediately on receipt."

108. It would have been impossible for Orega to have received the Sch 36 letter on 1 September 2022, as this was the same day it was received by Mr Smith. Moreover, Mr Smith's letter contradicts the later email from Orega with its reference to 29 August, and it is also

inconsistent with his own witness statement, which says that the letter received on 1 September 2022 was "most likely" received by Orega on 29 August 2022.

109. Mr Vallis challenged Mr Smith's evidence about Orega, saying he had "no way of knowing" what went on in that office, and I agree. Mr Smith's evidence about Orega cannot be relied upon to make a finding of fact about the Enquiry Letter.

The postal problems

110. Mr Baig also submitted that, given the evidence of postal disruption, the Tribunal should find as a fact that the Enquiry Letter "did not" reach AGN by 31 July 2022. Mr Baig relied on the facts about that disruption, see §72 to §74, and I also considered Mr de Mello's evidence see §42ff, on which AGN had relied in correspondence.

111. I have already found as facts on the basis of the evidence that (a) although there was significant postal disruption in the week beginning 18 July 2022, the position improved the following week, and (b) Mr de Mello received his copy of the Enquiry Letter. It would be inconsistent with those facts to find, on the balance of probabilities, that the Enquiry Letter "did not" reach Orega because of postal disruption, and I decline to make such a finding.

112. Mr de Mello's evidence also does not assist AGN. He received his copy of the Enquiry Letter in the first week of August, but that copy letter had been forwarded to him from his previous address. There is no evidence as to when the copy letter arrived at that previous address, when it was forwarded, whether it was simply readdressed and so travelled second-class, or on what day in the first week of August it arrived at Mr de Mello's new location. There is thus no evidential basis for a finding of fact that his copy letter arrived at his original address after 31 July 2022.

Conclusion on Step 4

113. AGN have failed to prove that the Enquiry Letter was not received by Orega. As a result, I decide Step 4 in favour of HMRC.

OVERALL CONCLUSION

114. HMRC have succeeded on all four Steps, and it follows that the deeming provision took effect. As Mummery LJ said when giving the only judgment in *HMRC v Jones and Jones* [2011] EWCA Civ 824 at [71(7)]

> "…in the legal world created by legislation the deeming of a fact or of a state of affairs…is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion."

115. In this case, the deemed facts which form part of the conclusion are that HMRC sent the Enquiry Letter in time for it to be received in the ordinary course of post by Orega, and it was so received. The Preliminary Issue is thus decided in favour of HMRC on the basis of findings of fact, including the deemed finding on delivery.

116. Directions in relation to this appeal and AGN's two stayed appeals are being issued to the parties separately at or around the same time as this judgment.

APPEAL RIGHTS

117. 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 REDSTON
TRIBUNAL JUDGE

Release Date: 03rd APRIL 2024