[2016] UKFTT 246 (TC)

TC05022

Appeal number: TC/2015/4627

INFORMATION NOTICE– whether validly issued – whether enquiry opened – whether Condition B satisfied – yes - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPRING CAPITAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at the Royal Courts of Justice, Strand, London on 4 April 2016

Mr R Thomas, Director, for the Appellant

Ms H Jones, HMRC officer, for the Respondents

DECISION

1. HMRC issued the appellant with an information notice under Schedule 36 of the Finance Act 2008 (Sch 36) on 15 April 2015. The appellant appealed against HMRC's review decision dated 13 July 2015 upholding the issue of the information notice.

2. The sole grounds of the appeal was that (the appellant claimed) there was no open enquiry into the appellant's tax affairs to which the information notice related. In particular, the information notice stated it related to a notice of enquiry given in respect of the appellant company's corporation tax return for the period ended 30 April 2013 ('the 2013 return') but it was the appellant's case that it had never received notice of any such enquiry until after the closing of the period in which HMRC could open an enquiry.

3. HMRC's case was that a letter dated 9 January 2015 ('the NOE letter') gave notice of the opening of the enquiry. I find (and it was not in dispute) that if HMRC were right, then the NOE letter was within the window for the opening of the enquiry and would have validly opened the enquiry.

Did the appellant have a right of appeal?

4. Paragraph 29 of Sch 36 provides:

> **Right to appeal against taxpayer notice**
>
> 29(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.
>
> (2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records.

5. Although it was HMRC's case that the greater part of the notice related to statutory records, they did not put the case that to the extent that the notice related to statutory records there was no right of appeal. I presume that as a matter of practical reality, HMRC chose not to make a stand on this point as they would not seek to enforce an invalid notice and in any event cannot impose penalties for failure to comply with an invalid notice.

6. So far as this Tribunal's jurisdiction is concerned, the appellant clearly did have a right of appeal to the extent that the notice related to non-statutory records and HMRC accepted that some part of it did relate to non-statutory records. So I proceed to deal with the appeal against the information notice.

Was there an open enquiry?

7. Paragraph 21 of Sch 36 gives four alternate conditions, one of which must be met before an information notice can be issued in circumstances where the taxpayer

has filed a self assessment tax return for the period to which the information notice relates:

> 21 (4) Condition A is that a notice of enquiry has been given in respect of –
>
> (a) the return …..

8. The parties did not agree on whether a notice of enquiry had been given. HMRC accepted, and the appellant did not dispute, that for notice of enquiry to be given to a taxpayer it had to be received by the taxpayer. I agree that this is a correct interpretation of the law. Schedule 18 of the Finance Act 1998 ('Sch 18') provides:

> **Notice of enquiry**
>
> 24(1) an officer of revenue and customs may enquire into a company tax return if they give notice to the company of their intention to do so…within the time allowed.
>
> …

9. Then the Taxes Management Act 1970 ('TMA') which applies as Sch 18 is part of the Taxes Acts provides:

> **S115 Delivery and service of documents**
>
> (1) [not relevant]
>
> (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if so given, sent, served or delivered to or on any person by the Board, by any officer of the Board, or by or on behalf of any body of Commissioners, may be so served addressed to that person –
>
> (a) at his usual of 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….

10. The appellants accepted that the address to which HMRC claimed to have sent the NOE letter was the right address. I will refer to it as the White House address. It was the company's place of business.

11. There was no agreement whether the NOE letter had been sent by HMRC, or if sent, whether it had been received by the appellant. I will deal with each of these matters in turn.

Was a notice of enquiry letter created by Mr Stewart to be sent to the appellant?

12. I had before me a copy of the letter dated 9 January 2015 which both parties appeared to accept was sufficient to open an enquiry into the year ended 30/4/13 had it been both sent to and received by the appellant. As I have said, I will refer to it as the NOE letter.

13. Mr Stewart was the HMRC officer with responsibility for the appellant's tax affairs. It was his evidence that he created and signed the NOE letter on 8 January 2015 and left it with a clerk (Ms Hendon), who held responsibility within that HMRC office for posting letters, with instructions to send it 'track and trace' the following day.

14. It was Mr Thomas' case that Mr Stewart had not put out for posting the NOE letter on 8 January because (1) Mr Stewart had taken no steps to follow up on the NOE letter until three months later when the information notice was sent and (2) it was Mr Stewart's usual practice (as he accepted) to send copies of significant letters to the appellant to it by both email and post yet the NOE letter in this appeal had not been emailed to the appellant.

15. As Mr Thomas did not even suggest that HMRC had fabricated the NOE letter with an 'in-time' date at a time when they were out of time to open an enquiry, there is no question of such a finding and no evidence on which to make one. So it seems that the appellant's case is that it accepts that the NOE letter was created at this time, but consider Mr Stewart forgot to send it as evidenced by his failure to chase it up or send an email enclosing it.

16. In so far as Mr Stewart did not chase up the NOE letter for three months, I accept Mr Stewart's explanation that he normally would give the appellant that amount of time to provide the information asked for in a notice of enquiry letter because he knew Mr Thomas was busy and there had been complaints from Mr Thomas in the past if Mr Stewart did not allow sufficient time to respond. So I do not find Mr Stewart's three month delay in issuing the information notice indicated he had not created and sent the NOE in January 2015.

17. And so far as the failure to email a copy was concerned, I accept Mr Stewart's explanation that he had not done so on this occasion due to his planned absence on holiday on 9 January, the day the letter was due to be posted, and the day after he had handed it to Ms Hendon.

18. As I find Mr Stewart had an explanation for his departure from his normal practice of emailing and an explanation for the three month delay in sending a follow-up, and as I find he appeared a reliable witness with a clear recollection of the event and as his evidence was consistent with the documentary evidence that a letter was both posted and delivered to the appellant at this time, I accept Mr Stewart's evidence that he did create the NOE letter on 8 January and put it out for posting in the tray for special delivery letters having discussed it with Ms Hendon. The documentary evidence I refer to is (a) a form completed by Ms Hendon for the posting of a letter by track and trace on 9 January to the appellant (see §20-21 below) and (b) a Royal Mail receipt for delivery dated 13 January 2015 (see §34 below).

Was a letter posted on 9 January to the appellant by track and trace?

19. Although I have found Mr Stewart created and put out for posting the NOE letter, have HMRC proved it was sent? Mr Stewart can give no direct evidence of this

as he last saw the letter on 8 January when he handed it to Ms Hendon. HMRC did not call Ms Hendon as a witness and in light of this failure the appellant's position was that HMRC had not proved the NOE letter had been posted.

20. As I have said, HMRC produced to the Tribunal a form which, it was Mr Stewart's evidence, had been completed by Ms Hendon in order to instruct Royal Mail to send a letter to the appellant at the appellant's address. A printed reference number was attached to the form.

21. While I accept Ms Hendon was not called, nevertheless the Tribunal also had the Royal Mail receipt referred to at §34 below bearing the same reference number. It is difficult to see what Ms Hendon's evidence could have added as it is very difficult to see any plausible scenario for the documentary evidence other than that the NOE letter was sent by track and trace. If Ms Hendon had failed to post the letter, then why did Royal Mail create a receipt for delivery with the same reference number as on Ms Hendon's form? Moreover, the receipt was signed 'Thomas' when the letter itself was addressed to the company by its name and had no reference to the name 'Thomas' so Royal Mail could not have known the director's name was Thomas. In any event, it was no part of the appellant's case that the documents were forged or part of a deceit so it was difficult to think of any logical scenario in which the documents could be genuine but not evidence the posting of the posting of a letter to the appellant by special delivery. So even in Ms Hendon's absence, I find HMRC have proved that she did send a letter track and trace to the appellant on 9 January 2015.

Was the NOE letter sent on 9 January 2015?

22. As I understand it, it was the appellant's alternative case that Mr Stewart and/or Ms Hendon may have sent a different letter to the appellant and not the NOE letter. However, Mr Stewart's recollection was that he remembered putting out the NOE letter in the tray for special delivery items and speaking to Ms Hendon about it. And as neither party referred me to any other actual letter from HMRC to the appellant at this time, there was no other candidate letter to comprise the contents of the envelope put out for special delivery by Ms Hendon.

23. Mr Thomas relied on the fact that HMRC had fairly recently made a mistake in that the appellant company had been sent a letter about its tax affairs but attached to it had been a single page document relating to the affairs of a different, unconnected taxpayer.

24. Mr Stewart accepted that this had happened. He said that the event was a serious (albeit unintentional) breach of taxpayer confidentiality and had been investigated by HMRC as soon as Mr Thomas had reported it. I accept Mr Stewart's evidence on the cause of the error as he appeared a reliable witness, no other plausible explanation for what happened was suggested to him, and he accepted he was to blame for the error.

25. So I find the cause of the error was as follows. A letter to that other taxpayer had been sent by Mr Stewart with the attachment on the same day as Mr Stewart had send a letter to the appellant with the same document inadvertently attached to it. Probably at the time he picked it up from the printer, Mr Stewart had accidentally attached a surplus copy of the other taxpayer's document to the appellant's letter. He was at fault as he had failed to check that nothing extraneous was attached to the letter he was sending to the appellant.

26. I also accept Mr Stewart's evidence that this was the only error of this kind of which he knew to have happened in that HMRC office in the five years he had been there.

27. Mr Thomas relied on the above mistake as evidence that HMRC had probably made a mistake over the NOE letter and had failed to post it and/or put the wrong letter in the envelope which was posted.

28. I don't attach any significance to the admitted error with the other letter. It was a different kind of mistake to the one alleged (the right letter was put in the right envelope but with extraneous material) and in any event I accept the error was a one-off and not one which evidences a general pattern of carelessness by Mr Stewart. I do not find it supports the appellant's case that HMRC put the wrong letter in the envelope on 9 January 2015.

29. Moreover, there was every reason to suppose, as I have said, that a letter was put in an envelope addressed to the appellant and delivered by the Royal Mail somewhere as there was a receipt. In the absence of any other plausible suggestion for what that envelope contained, I find on the balance of probability it was the NOE letter.

30. So I find the NOE letter was sent by HMRC to the appellant on 9 January 2015.

Did the appellant receive the letter?

31. As I have said, it was not enough for HMRC to send the NOE letter: it had to be received. It was for HMRC to prove that they sent the NOE letter and I find that they have proved this. It was for the appellant to prove its case that the NOE letter was not received at the White House. This is because of the Interpretation Act 1978 which provides as s 7 as follows:

> S 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.

32. I have found that HMRC sent the NOE in an envelope properly addressed to the appellant at the White House address and pre-paid it by posting it special delivery. The NOE letter is therefore, by s 7, deemed to have been received unless the appellant can prove that it was not.

33. The evidence: I find on the basis of the evidence of Mr R Thomas, and his brother Mr S Thomas, both directors of the appellant company, that the White House was not only the postal address for the company but also the residential address of Mr S Thomas. He lived there at the relevant time with his wife and one adult child. Mr R Thomas also was present on occasions in the house as an annex to the house was the company's place of business and place of employment of its two directors.

34. HMRC produced, as I have said, a Royal Mail receipt for delivery of the NOE letter. This contains, as I have said, the same reference number as Ms Hendon's form and that form showed the White House address. It was also, as I have said, signed 'Thomas'. Prima facie, therefore, it shows that delivery of the NOE letter was made to the White House to a person named 'Thomas'.

35. Messrs R and S Thomas are sure that they did not receive the NOE letter and this evidence was unchallenged. I did not have evidence from any of the other inhabitants of or visitors to the White House and so it remains a possibility that a close family member of Messrs Thomas may have signed for the NOE letter.

36. The appellant does not accept this. Its explanation is that the Royal Mail, if it delivered the NOE letter, delivered it somewhere other than the White House and the signature 'Thomas' was not signed by anyone present in the White House.

37. The appellant produced a list of signatures of the various persons with the surname Thomas who lived at or visited the White House, including their own signatures. It was their case, which HMRC did not dispute, that none of these signatures resembled the one on the Royal Mail receipt. It was HMRC's case that the cause of the dissimilarity was that it was most likely the person taking delivery of the letter was asked to sign, not paper, but a handheld electronic machine using some kind of electronic pen. As I take judicial notice of the fact that, now and in 2015, persons receiving 'signed for' deliveries are asked to 'sign' using such machines, I agree with HMRC. I also consider it obvious that signatures obtained by such means may well be dissimilar to a person's normal signature signed with pen on a piece of paper lying on a flat, stationary surface. So I put little weight on the dissimilarity of the signatures.

38. But I do put weight on the similarity of the signature on the receipt to the signature on another similar receipt obtained by HMRC on a parcel sent to the appellant at the White House five months later in June 2015. I accept Mr Stewart's evidence that this parcel comprised bundles for a hearing which took place in December 2015. Mr Thomas had no recollection of receiving the bundles, but did not dispute HMRC's case that they had sent them, they had been received, and used by the appellant in the December 2015 hearing. I find it more likely than not that the bundles were delivered when this second receipt was obtained and that Mr R Thomas

took possession of them. I also find it seems more likely than not that the same person signed for the bundles as signed for NOE letter.

39. The appellant's explanation for who had signed for the NOE letter (and therefore presumably the bundles) was that it was no one at the White House. Mr S Thomas' evidence was that sometimes a neighbour would sign for a parcel using the name 'Thomas'. I consider it very unlikely that a Royal Mail postman would attempt to deliver a 'special delivery' letter which had to be signed for to a neighbour of the addressee and there was no evidence this had ever happened. Moreover, it seems unlikely that a neighbour, however obliging, would sign for such a letter using a name which was not their own. While Mr S Thomas evidence was that this had happened with a parcel, there was no evidence it had ever happened with a special delivery letter and I consider it inherently unlikely.

40. Messrs Thomas point out that years before the General Commissioners in another case involving the appellant had accepted that a notice of enquiry sent by ordinary post had not been received by the appellant. This is not evidence of anything: the fact that the General Commissioners had accepted non-delivery in that case did not give any support to the appellant's case that this notice of enquiry sent by special delivery had been delivered to somewhere other than the White House.

41. I think that more likely than not that what happened is that someone at the White House, whose surname was 'Thomas' signed for the NOE letter and five months later for the bundles. I accept that that person was neither of the Messrs Thomas. And while whichever Ms Thomas had taken receipt of the bundles then must have handed them on to Messrs Thomas, it seems likely that the NOE letter went astray within the house.

42. As I have said, the Interpretation Act deems service of the notice to take place at the time it would take place in the normal course of post if the envelope was properly addressed, stamped and posted. HMRC have proved this. To rebut this presumption of effective service, the appellant must prove that that the letter was not delivered to the White House. It has failed to prove this. Therefore I find that HMRC did give notice of enquiry to the appellant on 13 January 2015 to open an enquiry into its return for year ended 30 April 2013.

43. Therefore there was an open enquiry when the information notice was given on 15 April 2015 and Condition A was met.

Was Condition B met?

44. It was also HMRC's case that the information notice was effective because condition B was met. I do not need to deal with this because I have found condition A was met, but I deal with it in case this appeal goes higher.

45. Condition B is:

> (6) ..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,
>
> ……

46. The appellant had two submissions to this case. Firstly, it was its position that as a matter of law HMRC could not rely on Condition B because the Information Notice had been (Mr Thomas said) issued in reliance on the open enquiry. Secondly, in any event, said Mr Thomas, there were no suspicions of underassessment.

Information Notice issued in reliance on Condition A?

47. As a matter of fact it seems it is the case that the Information Notice was issued in reliance on Condition A. While this was not put to Mr Stewart directly, his letter of 15 April referred to the enquiry in its title line and included express references to the letter of 9 January 2015 opening the enquiry and the information sought in that letter.

48. However, as a matter of law, I consider that that is irrelevant. Paragraph 21(3) of Sch 36 merely requires that condition A or B (or C or D) is met. There is nothing which requires HMRC to rely on any particular condition when serving the information notice: one or more of the conditions are met or they are not. So even though Mr Stewart did rely on condition A when serving the information notice, its validity could be based on condition B. In practice I find it was valid under both A and B for the reasons given above and below.

Suspicion of underassessment?

49. I find that the appellant had claimed relief of £1,278,000 for amortisation of goodwill in its tax return for the period in question based on a claimed transaction which was said to have taken place on 22 September 2004. It was HMRC's position in other appeals relating to the appellant that this transaction had not taken place. Mr Stewart was therefore of the opinion that the appellant was not entitled to the relief claimed in its 2013 return, and when he opened the enquiry this was one of the matters with which he was concerned and to which the NOE letter referred.

50. On 10 February 2015, this Tribunal issued its decision in *Spring Capital Ltd and others* [2015] UKFTT 66 (TC) where the Tribunal Judge found as a fact that the transactions of 22 September 2004 'was the product of ex post facto imagination rather than a genuine transaction' and 'did not happen; it was simply an invention'. This was known to Mr Stewart when he issued the information notice, asking for information about the amortisation claim amongst other things.

51. Taking this into account, it seems clear that Mr Stewart on the date he issued the information notice had reason to suspect that tax which ought to have been assessed may not have been assessed, in that he had reason to suspect that the taxpayer had claimed a relief to which it was not entitled.

52. The appellant does not accept this. It relied on the oral evidence of Mr Stewart when he said in answer to the question whether he had 'particular suspicions' about

items (2) and (5) in the Information Notice, that he would not use the word 'suspicion', it was merely that he did not understand the entries and it was only a possibility there had been an underdeclaration in respect of those two items.

53. I find that this question and answer related to items (2) and (5) alone and not to item (3) which was the item concerning the amortisation of goodwill. So it is no answer to the finding at §51. Moreover, the question asked by the legislation is whether Mr Stewart 'has reason to suspect [tax]…may not have been assessed'. It did not ask if a particular officer actually suspected actual underdeclaration. I consider that not only did Mr Stewart suspect, and have reason to suspect, that tax may not have been assessed in relation to item (3), he had reason to suspect that tax may not have been assessed in relation to items (2) and (5) as well. For instance, as he explained, with respect to item (5), he was concerned that it appeared investment stocks may have incorrectly been treated as trade stocks which may have resulted in an income deduction for losses to which the company was not entitled. This is 'reason to suspect' that the appellant 'may' have been an under-assessment even if it did not amount to actual suspicion that there had been an underdeclaration.

54. The appellant pointed out that in 2016 it amended its 2013 return to remove the claim for amortisation. I agree with HMRC that this amendment was irrelevant because it occurred long after the issue of the information notice and the conditions in paragraph 21 had to be met at the date the information notice was issued. Even if I am wrong on this, for the reasons given in the immediately preceding paragraph, I find Condition B was met at the time and is still met in relation to items (2) and (5) in any event.

55. In conclusion, I find that Condition B was met too.

Conclusion

56. The only challenge to the validity of the information notice was that (the appellant said) there was no open enquiry at the time it was issued. I have found that there was an open enquiry at the time and moreover, in any event, even if there had not been, the information notice would have been valid because condition B was satisfied.

57. The appeal against the information notice is hereby dismissed.

58. 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.

BARBARA MOSEDALE

TRIBUNAL JUDGE
RELEASE DATE: 8 APRIL 2016