

Electronic delivery

By **Tim McCormack**

The timeous dispatch and receipt of documents is often questioned in legal proceedings, particularly where time limits apply and penalties are incurred. Historically these claims have arisen as a result of using traditional surface mail providers, but now electronic delivery mechanisms can be used, and these can also be examined in court when they appear to fail. A question to be considered is whether the case law with regard to traditional surface mail is relevant to issues that arise from electronic delivery mechanisms.

In general terms both methods appear to be identical, in that each involves a sender, a receiver and a delivery mechanism provider. Both methods can result in the same arguments, such as:

- (i) The sender says he sent the item on time.
- (ii) The recipient says he never received it.
- (iii) The delivery provider says he delivered the item to the correct address.

There are additional underlying arguments as well, such as whether:

- (i) The sender used the correct address.
- (ii) There was a delay in delivery by the deliverer.
- (iii) The recipient provided the correct address to the sender.

This article questions whether both electronic and surface mail are truly comparable in the face of the law. One of the best sources for examples in this regard can be found in Tax Tribunal cases. Many of Her Majesty's Revenue and Customs (HMRC) Tax Tribunal cases are the result of appeals against late penalties or the refusal of claims where HMRC believes the appellant has missed the relevant deadline. The Tribunal judge has often to determine, in accordance with the evidence laid before the court, when a claim was made, taking into account the method of delivery.

When there is a dispute as to whether an item that is entrusted to the post to be delivered has arrived, logically there are two possibilities:¹ to rely on the evidence of the sender, claiming it posted the article in question, or rely on the evidence of the recipient that the post did not arrive. In English law, the matter is determined from the point of view of the sender, and in *Quintain Estate Development Plc v Customs and Excise*,² the judge accepted the evidence that the sender placed a voluntary disclosure form, VAT 652, in an envelope addressed to the Commissioners, and in turn placed the envelope into the internal office post tray. An office junior subsequently posted the item, together with other items of post that day, inside a pillar box directly outside Quintain's office. The claim was held to have been made to the Commissioners.

Proving physical delivery is difficult. It is possible to require a signature on receipt, whether the signature is provided in writing or electronically, but the obtaining of a signature does not necessarily mean that the intended recipient signed for the item of post. A physical item can be delivered to a physical address without the need to identify a particular person. Anyone can receive a postal item on behalf of the addressee at the physical address specified on the item. It is generally accepted that regardless of the physical recipient at the address in question, the addressee will ultimately receive the item.

When delivering an item by e-mail, not only can the date and time of sending be established (although this evidence can be manipulated), but also the address to which the item was being sent and, most importantly, whether or not it was delivered. This is not as straightforward as it may seem. For instance, the internal mail system of large organisations will be involved in interpreting the intended recipient of the item and the delivery of the item to that person or department. With an e-mail, the sender addresses the e-mail to the recipient as follows:

¹ For instance, this issue was considered in *Household Fire Insurance v Grant* (1878–79) LR 4 Ex D 216, where the majority of the members of the Court of Appeal indicated that the rule for the post is that acceptance is effective even if the letter never arrives. Bramwell LJ disagreed in his dissenting judgment.

² [2004] UKVAT V18877.

xxx.yyy@zzzzz.com, where xxx.yyyy identifies the recipient within the organisation, whose mail server rests on the domain name zzzzz.com.

The difference between physical mail entrusted to the post and e-mail is illustrated below:

	Physical	E-mail
Name	Joe Bloggs	Joe.Bloggs
Address Line 1	HMRC	@hmrc.gov.uk
Address Line 2	Bristol	
Address Line 3	TD12 4DH	

In the example above, it can be seen that while the physical address carries more detail, it provides only enough for the item to be delivered to a physical address. It is for the internal mail system of HMRC to deliver it to the correct Joe Bloggs, and it may be necessary to interrogate the contents to do so. This is an important point when comparing physical mail to electronic mail, because it appears that the case law does not consider it relevant for an organisation to have to accept and interrogate all electronic items received to ensure they reach the intended recipient.

On the face of it, the e-mail address, if correct, appears to contain all of the information required to deliver it to the intended recipient within HMRC. However, that is not always the case. The case that caused me to write this article is *Edgbaston Golf Club Ltd v Revenue and Customs (VAT – REPAYMENTS: Vat – repayments)*,³ which was heard before Judge Kevin Poole and Mr Ian Perry on 6 March 2018 before the United Kingdom First Tier Tribunal (Tax). Judge Poole commented at [29]:

‘The difficulty with the appellant’s case, however, is that it did not send the claim to the correct email address. That is the modern equivalent of misaddressing a letter sent through the postal service, but with the added factor that even a single misplaced character in an email address means the email will not reach its destination.’

This article aims to demonstrate that Judge Poole’s interpretation is not correct, although this decision was not challenged by the appellant, who was represented by Glyn Edwards, a chartered tax advisor of MHA MacIntyre Hudson LLP, or the Respondent, who was represented by Karleen Ellis, a Presenting Officer of HM Revenue and Customs.

There follows a brief description of sending an e-mail.⁴

E-mails are transmitted between the sender and the receiver using (at the minimum) three separate systems. First is the sender’s e-mail server, secondly the recipient’s e-mail server, and thirdly the transport mechanism, usually the internet, using a protocol known as SMTP (simple mail transfer protocol). Both the recipient’s and the sender’s e-mail server may be the same e.g. Microsoft Outlook, but for the purposes of this article, assume they are different.

First, to send an e-mail, the sender must have an e-mail address. This is undertaken by the administrator of the sender’s e-mail server. The e-mail server stores the information about your e-mail address and can use it to direct incoming e-mails to your inbox. It is important to note that your e-mail server is the only server that can uniquely identify you. Your e-mail address consists of two parts: the first part (before the ‘@’) is the data your e-mail server uses to identify you uniquely, and the second part is the data the internet uses to uniquely identify your e-mail server. The internet has no knowledge whatsoever of your unique internal address, only the address of your server. Just as with physical mail, the postlady knows where you live or work, but she does not know what desk you sit at, if you sit at a desk.

You send an e-mail to your intended recipient. Your e-mail server knows who you are and looks at the address you want it sent to. It takes the last two bits of the e-mail address e.g. outlook.com, and asks a DNS server on the internet (a domain name server) which IP (internet protocol) address it should send the e-mail to. Your e-mail server could, at this stage, receive a message from the DNS specifying that it does not recognise the domain name. If this occurs, your e-mail server will usually send you a message indicating that the ‘host’ name could not be found and your message could therefore not be delivered. In physical terms, it is the same as the Royal Mail

³ [2018] UKFTT 189 (TC).

⁴ The process of sending an e-mail is described in detail on Wikipedia at https://en.wikipedia.org/wiki/Email_address.

returning a letter you sent with the message 'Address not found' written on the envelope.

All going well, your e-mail server finds the address of the mail server it is directed to send your message to, and sends it over the internet. The mail server of your intended recipient receives it. This is the really important point, and in physical terms this is the point where the postman delivers your letter through the post box of your addressee. In both electronic and physical terms, your message has been delivered.

The recipient's e-mail server interrogates the first part of the e-mail address that you provided, that part which should uniquely identify the intended recipient. At this point the recipient's e-mail server may not be able to identify the recipient, perhaps because of a misspelling, or as Judge Poole put it at [29]: 'That is the modern equivalent of misaddressing a letter sent through the postal service, but with the added factor that even a single misplaced character in an email address means the email will not reach its destination.'

At this stage, with an unidentified recipient, the recipient's e-mail server should normally (this is entirely up to the e-mail server administrator) automatically send a reply to your sender's address, indicating that it had been unable to identify the recipient and the message could not be delivered. However, the point to note is that the message *has* been delivered and automatic reply or no automatic reply, a discrepancy now exists between what happens in the physical world and that which happens with the electronic medium of delivery. In the physical world, from the moment the letter is handed to the postlady, the failsafe mechanism of manual interrogation of the address takes place, even after automated sorting machines fail to recognise the handwritten address. Misspelling occurs frequently and invalid post codes are used, yet the letter will more often than not arrive at its intended destination due to the manual examination by a human being of both the address and (once it arrives at the physical location) sometimes the content.

The comment (at [29]) that sending an e-mail is the 'modern equivalent of misaddressing a letter sent through the postal service' is, on the face of it, correct. However, the wrong interpretation was made, and the comparison between the two methods of delivering mail should have been examined more closely. The Royal Mail prides itself in making every effort to deliver misaddressed mail to the correct

address by manual intervention. From deciphering unreadable handwriting to solving mysterious puzzles (e.g. the white house at the end of the street where the pub is in Helston), employees of the Royal Mail take great care to ensure the post arrives at its intended destination. They use the information that has been provided to them to the maximum benefit of both the sender and the intended recipient.

In addition, the Royal Mail delivers postal items to a postal address, not a specific recipient. In the case of HMRC, they would receive thousands of postal items every day, and it is HMRC's internal postal delivery system that ensures the correct item is delivered to the intended recipient. It is important to note that this internal system requires manual intervention and interpretation of what the sender has put on the envelope in order to determine the appropriate recipient within the organisation. As an example, a postal item addressed to Martin Nuter (note a missing 't') at HMRC will most likely arrive at the desk of Mr Nutter, and he will then assess whether indeed the item in question was for his attention or not. If a claim was refused because a letter had not been received, it is possible to make a case if it could be shown that the address was only wrong in the absence of a 't'. The members of the Tribunal accepted that once a letter has been posted, a claim will have been made, notwithstanding the postal packed did not arrive.

This means that a letter containing the original claim, addressed only to HMRC, London with no post code and no individual addressee, would probably arrive on Mr Nutter's desk thanks to the Royal Mail and manual intervention by HMRC internally. If misaddressing a letter is equivalent to misaddressing an e-mail, then surely it follows that in both cases, on condition that both methods contain sufficient information for the recipient to be identified, the claim should be designated as having been made.

The physical world is not dissimilar to the world of electronic delivery. With e-mail, manual intervention by the owner of the e-mail system is capable of identifying the intended recipient either by noticing the misspelling or by interrogating the contents.

Judge Poole found in favour of HMRC on the basis that the e-mail that was sent from the golf club's accountants did not arrive at its destination, and this meant the claim was not made, leading to the dismissal of the appeal. The e-mail did arrive. It was sent to the correct domain name (hmrc.gov) and the recipient's name was spelled correctly. What was

missing was an additional suffix (.gsi) that was of no relevance to the sender's e-mail system, and only used internally by HMRC.

To test what happens when HMRC receive an incorrectly addressed e-mail, a test e-mail message was sent to joe.bloggs@hmrc.gov.uk. Note that the test e-mail address used did not contain the .gsi suffix that was missing in the original e-mail. The test e-mail successfully arrived at the HMRC mail server, was interrogated and the server found that it had no individual e-mail account for a person known as Joe Bloggs. The HMRC server automatically sent an e-mail by return stating that it could not deliver the e-mail to the intended recipient. Whether or not this automatic system was in place at the time of the original e-mail being sent is irrelevant for the time being (the fact that my e-mail system placed the reply in my junk folder opens another line of legal interpretation which would be a distraction at this point).

In this case, it appears that HMRC will have a copy somewhere of the original e-mail sent to Martin Nutter, but without the .gsi suffix. Of great interest and relevance to the validity of this discussion and this case in particular, is that the e-mail address that automatically replied to my e-mail was postmaster@hmrc.gsi.gov.uk. Note the inclusion of the .gsi suffix.

In the *Edgbaston Golf Club* case, the e-mail address of the intended recipient should have been martin.nutter@hmrc.gsi.gov.uk. Instead, the address that was inadvertently used was martin.nutter@hmrc.gov.uk (missing the .gsi).

The first point to note is that the appeal decision notice stated that the original e-mail was sent on a valid date, and it was not disputed that the e-mail address used was the one stated in court. Therefore it is certain that the message was delivered to the correct e-mail server.

Secondly, what is quite interesting was the fact that the automated message received back on the test e-mail was sent from postmaster@hmrc.gsi.gov.uk, which indicates that the e-mail server is the same one that should have interpreted the individual recipient (martin.nutter) portion of the original e-mail.

Finally, the automated message received back in the test e-mail sent for the purposes of this article contains this declaration:

'HM Revenue & Customs computer systems will be monitored and communications carried on them recorded, to secure the effective operation of the system and for lawful purposes.'

If this were so, and there is no reason to believe otherwise, the HMRC server actually received the e-mail in question, but nobody checked the records to establish that that was so. If this was the case, then clearly HMRC failed to search wherever they record their communication.

Conclusion

Judge Poole introduces equivalence between manual postal systems and electronic delivery mechanisms when he states, at [29]:

'That is the modern equivalent of misaddressing a letter sent through the postal service, but with the added factor that even a single misplaced character in an email address means the email will not reach its destination.'

There are indeed many similarities, yet it seems that the two are treated differently in legal proceedings. An address is checked as part of a manual postal systems by the person delivering the mail prior to it reaching the destination. In comparison, such checking is not performed until the e-mail arrives at the destination mail server.

Finally, the Tribunal commented at [29] that:

'Unfortunately, Mr Taylor made a mistake and did not include the crucial ".gsi" element in the email address to which the claim was intended to be sent.'

As previously explained, the '.gsi' element in the address is not crucial. The sender intended the recipient to be HMRC regardless of the employee designated to take charge of the matter. The test e-mail reached HMRC, which means it can be reasonably concluded that HMRC received a copy of this e-mail, but failed to interrogate the contents of it in order to identify the correct recipient. This is comparable to a letter being sent by post addressed only to HMRC. It is quite certain that all such postal items similarly addressed are opened, interrogated and dispatched to the correct department or person by means of an internal process.

So why not e-mails? Perhaps the practical answer, not discussed by the Tribunal or raised before the Tribunal, is the volume of e-mails received. In a Freedom of Information inquiry to HMRC dated 12 July 2018 for the purposes of this article, HMRC replied that they received 7,998,763 incorrectly addressed e-mails in 2017. Perhaps judges might consider obtaining appropriate technical evidence in such cases, so a clear rule can be established based on empirical evidence, rather than incorrect assumptions.

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After working in IT, **Tim McCormack** owned a small and remote Post Office in the Highlands of Scotland between 2004 and 2010. He subsequently bought a bigger Post Office in Duns in the Scottish Borders, which he and his wife ran for four years until leaving under the Network Transformation Program.