Neutral Citation: [2024] UKFTT 00364 (TC)

Case Number: TC09153

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2017/06569

INCOME TAX – notice of intention to enquire into a return – section 9A Taxes Management Act 1970 – notice treated as received in ordinary course of post– section 7 Interpretation Act 2007 – whether notice treated as received in time – no – post-cessation trade relief – section 96 Income Tax Act 2007 – whether payments were "qualifying payments" within section 97 Income Tax Act 2007 – no

Heard on: 8 September 2023
Judgment date: 2 May 2024

Before

TRIBUNAL JUDGE ASHLEY GREENBANK

Between

ANTHONY DENNISON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant, in person

For the Respondents: Mr Paul Marks, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

THE FORM OF HEARING

1. The form of the hearing was V (video) using the Tribunal video hearing system with all parties and representatives attending remotely. The documents to which I was were referred were a hearing bundle of 640 pages, an authorities bundle of 229 pages, an additional witness statement of Mr Dennison (to which I refer below) together with additional documents of a further 45 pages. I was also referred to several other authorities during the hearing.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

INTRODUCTION

3. This is an appeal by the appellant, Mr Anthony Dennison, against a decision in a closure notice issued by the respondents, the Commissioners for His Majesty's Revenue and Customs ("HMRC"), following an enquiry into Mr Dennison's return for the 2009/10 tax year. In that closure notice, HMRC denied Mr Dennison's claim to post-cessation trade relief under section 96 of the Income Tax Act 2007 ("ITA 2007").

4. In addition to his claim that he was entitled to post-cessation trade relief, Mr Dennison also claims that HMRC's notice of enquiry was issued out of time.

APPLICATION TO ADDUCE ADDITIONAL EVIDENCE

5. Before I turn to the Tribunal's decision on those issues, I should record the Tribunal's decision on a procedural matter, which the Tribunal addressed at the beginning of the hearing. I will address the facts of this case in detail later in this decision notice, but I need to set out some of the procedural history at this stage together with the background facts that are relevant to the procedural issue. As I understand it, these facts are not disputed.

6. This appeal has a chequered history. The appeal was initially heard by the First-tier Tribunal (the "FTT") on 7 May 2019. The decision of the FTT following that hearing, which was issued on 22 May 2019, was set aside by a consent order signed by the parties on 29 June 2021 and endorsed by the Upper Tribunal on 13 July 2021. Pursuant to that order, the appeal was remitted to this Tribunal to redetermine the original appeal.

7. The order of the Upper Tribunal also specified that:

> (1) Mr Dennison should not be required to give further evidence as a note of his evidence had been agreed and could be relied upon by this Tribunal;
>
> (2) the bundle for the original hearing before the First-tier Tribunal should be relied upon by this Tribunal, together with the agreed note of evidence.

8. On 23 August 2023 – just over two weeks before the date of the hearing – Mr Dennison filed and served a supplementary witness statement given by Mr Dennison with additional documents. The additional documents included: extracts from HMRC's manuals, extracts from HMRC's website from 11 August 2023, extracts from gov.uk website from 11 August 2023 setting out delivery times for communications sent by Government departments, print outs from the website "Constantly Confused" including comments on the late delivery of letters and communications from HMRC, and anonymised communications from HMRC in relation to the affairs of other taxpayers.

9. HMRC objected to the supplementary witness statement being accepted in evidence. HMRC's main point was that the current proceedings were simply a continuation of the

original proceedings in this case. Under the directions for the original hearing, witness evidence was to be filed on or before 31 January 2019. In the consent order, the Upper Tribunal had made specific directions that the original bundle with the addition of the note of Mr Dennison's evidence at the initial hearing should be relied upon by this Tribunal. It was now too late to adduce additional evidence (relying upon *Denton v White* [2014] EWCA Civ 90 as applied by the FTT in *Wm Morrison Supermarkets Plc v HMRC* [2021] UKFTT 0106 (TC) at [42]-[47]).

10. Mr Dennison argued that there was nothing in the consent order to prevent him from adducing further evidence. Furthermore, subsequent communications from the Tribunal regarding the current hearing suggested that he was entitled to adduce further evidence at any time up to and including the hearing.

11. Subject to the matters that I have set out below, I decided not to permit Mr Dennison to rely upon the supplementary witness statement and the additional documents as evidence.

> (1) I agreed with HMRC that the current proceedings should be regarded as a continuation of the proceedings, which led to the original hearing in May 2019. However, the directions for the original hearing (which set the date of 31 January 2019 as the date for witness statements to be filed) were precisely that – directions for the original hearing and not for the current hearing.
>
> (2) That having been said, I accepted that the directions given in the consent order, whilst not precluding the possibility of an application being made to introduce additional evidence, were based on an assumption that this hearing would proceed on the basis of the evidence that was available at the hearing in May 2019.
>
> (3) The three-stage approach in *Denton* did not so naturally apply to a case such as this where there was no breach of the FTRs or directions given by the Tribunal. In exercising its discretion to admit new evidence under rule 15 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTRs"), it might be more appropriate to follow the approach of Carr J in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38]. The Tribunal must also have regard to the overriding objective to deal with cases fairly and justly (FTR 2(1)).
>
> (4) Although the original directions did not apply to this hearing, the application was undoubtedly "late" given the time that had elapsed since the original hearing and the proximity of the date for the new hearing to the time that this application was made. There was a material risk that the date for the hearing would have to be adjourned to permit HMRC an appropriate opportunity to respond to any new evidence.
>
> (5) It was therefore for Mr Dennison to show good reason for the introduction of the new evidence and reasons why the new evidence should be admitted at this late stage. With the exception of some of the statements in the witness statement and the extracts from HMRC's manuals, much of the additional evidence was of limited relevance – it referred to the Post Office practice in 2023 rather than in 2012. If the evidence had been admitted, it would only have been just and fair to permit HMRC time to produce additional evidence to rebut the information produced by Mr Dennison. That would have required the adjournment of the hearing.

12. Having reviewed the supplementary witness statement and the attached documents, it was apparent that much of the witness statement comprised additional submissions. There was no objection from HMRC to Mr Dennison advancing those statements as submissions. To that extent, I agreed to treat the supplementary witness statement as a revised skeleton rather than as evidence. Equally HMRC did not object to Mr Dennison referring to passages

from HMRC's manuals, which had been quoted in this witness statement, in support of his submissions.

FACTS

13. I have set out most of my findings of fact in this section. However, I also make findings of fact later in this decision notice when I address the evidence that is relevant to the individual issues that are before this Tribunal. As I understand it, there is no material dispute between the parties about the facts in this section.

14. On 30 March 1998, Mr Dennison became a salaried partner in the solicitors' firm known as "Rowe Cohen". On 1 May 1999, he became an equity partner.

15. In April 1998, Mr Dennison acquired a beneficial interest in shares in Legal Report Services Limited ("LRSL"), giving him a 33% shareholding in the company.

16. Following Mr Dennison's acquisition of the shares in LRSL, Rowe Cohen entered into agreements with LRSL, under which LRSL would arrange for medical examinations of clients of Rowe Cohen in return for a fee. Mr Dennison acted as a representative of Rowe Cohen in negotiating those agreements. He did not declare his interest in LRSL to Rowe Cohen.

17. In late 2003, LRSL demanded a payment of £400,000 from Rowe Cohen said to represent overdue fees for work done. Mr Dennison advised the other partners in Rowe Cohen that he had negotiated with LRSL to obtain the best terms available, being a discount of £57,500 and the ability to pay by monthly instalments. The other partners were not aware of Mr Dennison's interest in LRSL. The partners in Rowe Cohen agreed to pay the fees.

18. On 27 February 2004, Mr Dennison sold his shares in LRSL to Expedia Services Holdings Limited ("Expedia") for £1.5 million.

19. On 28 February 2007, Rowe Cohen ceased trading. Mr Dennison ceased to be a partner in Rowe Cohen on 1 March 2007.

20. In or around June 2007, the former partners in Rowe Cohen discovered that Mr Dennison had sold shares in LRSL for £1.5 million in 2004.

21. On 9 September 2008, Mr Dennison's former partners filed a claim against Mr Dennison and various other defendants in the High Court. The claim was for breach of contract and breach of equitable and common law duties, in respect of which the former partners sought damages and an account of profits made by Mr Dennison, including salary and consultancy fees paid by LRSL to Mr Dennison, profits from the sale of shares in LRSL, and a loan note issued by Expedia in the amount of £100,000 which Mr Dennison had acquired on the sale of his shares in LRSL

22. Following his former partners' discovery of his interest in LRSL, Mr Dennison reported himself to the Solicitors Regulation Authority ("SRA"). In March 2009, the SRA initiated disciplinary proceedings against Mr Dennison at the Solicitors' Disciplinary Tribunal ("SDT").

23. On 8 September 2009, a settlement was reached between Mr Dennison and his former partners to settle the High Court case. Under the terms of the settlement, Mr Dennison agreed to pay a total of £300,000 in two instalments to his former partners and agreed to release his interest in the loan note issued by Expedia, as a result of which Expedia agreed to pay £100,000 to the former partners in Rowe Cohen.

24. The loan note was released. The two payments were made in September 2009 and on 30 April 2010.

25. On 10 November 2009, Mr Dennison submitted his Income Tax Self-Assessment ("ITSA") return for the year ended 5 April 2009 showing total income from partnerships of £132,679 of which £55,577 was from Dennison Greer Solicitors. The return showed tax payable of £47,441.84.

26. In or around November 2009, the SDT found that Mr Dennison had acted dishonestly and in breach rules regarding the conflict of interest. He was fined £23,500. The SRA appealed the punishment to the High Court.

27. On 4 January 2011, Mr Dennison submitted his ITSA return for the tax year 2009/10, showing total income of £146,128.20. All of this income was derived from his share of profits as a partner in Dennison Greer Solicitors. The return showed tax payable of £52,472.62.

28. On 22 February 2011, the High Court gave judgment in the SRA's appeal. The High Court increased Mr Dennison's punishment to strike him from the roll of solicitors. Mr Dennison appealed that decision to the Court of Appeal.

29. In a letter dated 28 April 2011, Mr Dennison made a claim, through his advisers at BTG Tax, for post-cessation trade relief. The claim was made by way of an amendment to his return for the tax year 2009/10. The claim related to expenses of £250,000 being the forfeiture of the loan note of £100,000 and the first settlement payment of £150,000. The parties dispute the time at which this amendment should be treated as made.

30. HMRC say that they treated this letter as an amendment to Mr Dennison's return for the tax year 2009/10 and as a claim first to set off the expenses against Mr Dennison's total income of £146,128.20 for the tax year 2009/10 and then to carry back the excess (being £103,871.80) for set-off against income for the tax year 2008/09. (I was not given any explanation as to how the carry back operates as a matter of law, but nothing turns on the point. The taxation of Mr Dennison's income in the tax year 2008/9 is not in issue in this appeal.)

31. Also in the letter of 28 April 2011, Mr Dennison indicated that a claim for the second settlement payment of £150,000 would be made to be set-off against his income for the tax year 2010/11.

32. On 31 January 2012, Mr Dennison filed his ITSA return for the tax year 2010/2011. The return did not contain a claim for the £150,000 of claimed post-cessation expenses to be deducted. The amount of income tax payable under Mr Dennison's self-assessment in connection with his partnership profits was £62,144.69. The tax was paid.

33. On 3 April 2012, the Court of Appeal upheld the High Court's findings. Mr Dennison was struck-off the roll of solicitors.

34. By a letter dated Friday 27 July 2012, from HMRC to Mr Dennison, HMRC sought to notify Mr Dennison that they were opening an enquiry into his return for the tax year 2009/10. This letter was not copied to Mr Dennison's then agents, Smith & Williamson. There is also a dispute between the parties as to when this letter was posted and received.

35. HMRC also say that, on 27 July 2012, there was a conversation between HMRC and Mr Dennison's agent in which oral notice of intention to enquire into Mr Dennison's return for the tax year 2009/10 was given. Once again, the content of this conversation is disputed.

36. On 28 February 2014, following the enquiry, HMRC issued a closure notice disallowing the claim for post-cessation trade relief and bringing into charge the amount of tax which was not collected as a result of the amendment, being:

(1) £42,682.63 for the tax year 2008/09; and,

(2) £52,472.62 for the tax year 2009/10.

37. On 27 March 2014, Mr Dennison appealed against the closure notice.

38. On 12 January 2015, HMRC rejected the appeal and offered a review of the matter, which Mr Dennison accepted.

39. On 24 July 2017, the review was concluded. The review upheld the closure notice.

40. On 21 August 2017, Mr Dennison notified his appeal to the Tribunal.

THE ISSUES BEFORE THE TRIBUNAL

41. There are two issues before the Tribunal.

(1) whether the notice of enquiry was out of time;

(2) whether Mr Dennison was entitled to post-cessation trade relief in respect of the expenses.

42. I will deal with the issues in that order.

WAS THE NOTICE OF ENQUIRY WAS OUT OF TIME?

43. Mr Dennison's case is that HMRC's notice of enquiry which was contained in the letter dated 27 July 2012 was out of time. As a result, the closure notice is invalid.

The relevant legislation

44. It will aid my explanation of this first issue if I first set out the relevant legislation.

45. Section 9ZA of the Taxes Management Act 1970 ("TMA") permits a taxpayer to amend a return by giving notice to HMRC within 12 months of the filing date. It provides, so far as relevant:

> **9ZA Amendment of personal or trustee return by taxpayer**
>
> (1) A person may amend his return under section 8 or 8A of this Act by notice to an officer of the Board.
>
> (2) An amendment may not be made more than twelve months after the filing date.
>
> …

46. Section 9A TMA provides that HMRC may enquire into a return by giving notice to the taxpayer within the time allowed, which, where a tax return is amended, is the date up to and including the quarter day following the first anniversary of the date on which the amendment was made. It provides, again so far as relevant:

> **9A Notice of enquiry**
>
> (1) An officer of the Board may enquire into a return under section 8 or 8A 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.

47. The parties' arguments in this case focus on the time at which the amendment to the taxpayer's return for the tax year 2009/10 was made and the notice of intention to enquire into the amended return was given. In each case, some of the arguments turn on the application of the provisions of section 7 of the Interpretation Act 1978 ("IA 1978"), which provide a presumption as to the time at which a notice sent by post may treated as given. It provides:

> **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.

The parties' submissions in outline

48. As I have mentioned, Mr Dennison's case is that HMRC's notice of intention to enquire into his return for the tax year 2009/10, which was contained in the letter dated 27 July 2012, was out of time; as a result, HMRC were not entitled to enquire into his return, and the closure notice was invalid.

49. Mr Dennison says that an amendment to his return was made by the letter from his agent, BTG Tax, dated 28 April 2011 and the notice of intention to enquire into that return was given in HMRC's letter of 27 July 2012. He says that notice was out of time on either of two bases:

> (1) The letter of 28 April 2011 was sent by first class post on 28 April 2011, which was a Thursday. In the ordinary course of post, that letter would be treated as arriving on either 29 or 30 April 2011. In those circumstances, the relevant quarter day for the purposes of Section 9A TMA was 30 April 2011, and the notice sent by letter dated 27 July 2012 was demonstrably out of time.
>
> (2) Even if the amendment had to be treated as having been received on or after 1 May 2011 so that the relevant quarter day was 31 July 2012, HMRC's notice of intention to enquire into the return which was dated 27 July 2012 was not received before the relevant quarter day and could not be treated as received on or before the relevant quarter day by Section 7 IA 1978. Once again, the notice was out of time.

50. Mr Marks, for HMRC, disputes these submissions. In any event, he says that the evidence shows that there was a conversation between HMRC and Mr Dennison's agent on 27 July 2012, in which HMRC's intention to enquire into the return would have been communicated to Mr Dennison's agent. He says that oral notice was, in the second case given by Mr Dennison, adequate notice within Section 9A(1) TMA and so the notice was given in time. Mr Dennison disputes this submission.

Discussion

51. Subject to the questions around Mr Marks's submission that the notice of intention to enquire into the return was given in the conversation between Mr Dennison's agent and

HMRC, this issue turns on the times at which the two letters – the first from the agent to HMRC dated 28 April 2011 and the second from HMRC to Mr Dennison dated 27 July 2012 – were received or should be treated as received for these purposes. It is only a question of the date of receipt of the relevant letters. It is common ground between the parties that the notices had to be received to be given for the purposes of Section 9ZA and Section 9A TMA, but there is no dispute that both letters were received by the intended recipient.

The amendment to the return

52. Mr Dennison relies on section 7 IA 1978. He says that the letter dated 28 April 2011 was posted by first class post on Thursday 28 April 2011 by his agent, BTG Tax, and therefore would most likely have been received by HMRC on Friday 29 April 2011 or Saturday 30 April 2011 in the ordinary course of post. He points to other letters that form part of the evidence before me from his various agents to HMRC as evidence that his agents' practice was to send letters by first class post and those letters were consistently received within one or two days of the date on the letter according to the date stamp applied by HMRC on receipt of those letters.

53. Mr Dennison says that HMRC's only evidence that 28 April 2011 letter was received on or after 1 May 2011 is the internal date stamp, which purports to show that the letter was received on 4 May 2011. HMRC have not put forward any other evidence of their internal procedures to show that the date stamp was consistently applied in accordance with their usual practice on the date of receipt of the letter. It had to be remembered that Monday 2 May 2011 was a bank holiday, and it was not inconceivable that a letter received by HMRC over the bank holiday weekend had not been stamped until Thursday 4 May 2011.

54. HMRC say that this letter was received on 4 May 2011. This was shown by the internal date stamp on the letter. There is no other evidence of the date of receipt of the letter. The presumption in section 7 IA 1978 does not apply where "the contrary is proved". The date stamp is adequate proof.

55. Where a party seeks to rely upon the presumption in section 7 IA 1978, it seems to me that that party must bear the burden of showing that the conditions for the presumption to arise are met. If the conditions are met, the presumption arises. The burden must also be on the party sending the notice or letter to show the date on which the letter or notice was posted and the manner in which it was posted, whether by first class or second class post or some form of special delivery, for the purpose of deciding when a letter should be treated as delivered "in the ordinary course of post". It then falls to the other party to prove to the contrary – that is, that the letter did not arrive in the ordinary course of post.

56. As regards the amendment to the return, it is for therefore Mr Dennison to show, on the balance of probabilities, that the conditions for the presumption to arise are met. He must show that the letter of 28 April 2011 was properly addressed, prepaid, and posted on 28 April 2011. The evidence that Mr Dennison has brought that these conditions are met are the letter itself, and his understanding, as set out in the note of evidence from the original hearing, that letters were posted by his agent on the date of the letter. On the balance of probabilities, I accept that the letter was properly addressed, prepaid, and posted on the date which appears on the letter.

57. As to whether the letter was sent by first class post, that is a more difficult matter. The only evidence that I have is Mr Dennison's statement in the note of his evidence for the original hearing to the effect that he spoke to his agent who confirmed that all letters were sent by first class post. Mr Dennison also sought to rely on other letters posted by his various advisers to HMRC, most of which appear to show that they were date stamped as received by HMRC within one or two working days of the date of the letter. The other letters to which

Mr Dennison refers are sent by other advisers, not by BTG Tax, and are not evidence of a consistent practice by BTG Tax.

58. In any event, even if I accept that the letter was posted by first class post, in my view, the date stamp is good evidence that the letter was received on 4 May 2011 or shortly before that the date. That evidence is supported by the date stamp on the other letters to HMRC to which Mr Dennison refers, which seem to show that, at that time, HMRC were consistently prompt in applying the date stamp following the receipt of letters.

59. For these reasons, in my view, on the balance of probabilities, the 28 April 2011 letter was received by HMRC on or shortly before 4 May 2011, but after 1 May 2011. I find as a fact that that was the case. As HMRC have proved to the contrary, the presumption in section 7 IA 1978 does not apply.

The notice of intention to enquire into the return

60. Given my conclusions in relation to the amendment to the return, I must now consider whether the notice of intention to enquire into that return was given on or before the relevant quarter day. The relevant quarter day was 31 July 2012, which was a Tuesday.

61. The notice of intention to enquire into the return was given in HMRC's letter dated 27 July 2012. The evidence that I have seen that this letter was properly addressed, prepaid and posted as required by section 7 IA 1978 is the letter itself and the fact that Mr Dennison does not dispute that the letter was received. On that basis, I find that the letter was properly addressed, prepaid and posted so that the presumption in section 7 IA 1978 can arise.

62. As to the date on which the letter was posted, Mr Marks says that I should accept that the date shown on the letter is the date on which it was posted. HMRC, however, offered no other evidence of its internal procedures to show that this letter was posted on that date.

63. Mr Dennison referred me to the decision of the First-tier Tribunal in *Melvyn and Carol Langley v HMRC* (Appeal Ref: TC/2022/02449), from which it would appear that HMRC brought forward evidence of its own internal procedures and records to show when a notice was dispatched (*Langley* [18]). He questioned why HMRC did not put forward any such evidence in this case. Mr Dennison also says that it is clear from that decision that, for routine letters such as this, HMRC's practice was to send the letter to a central printer so that the letter would be dispatched on the day following the date which appeared on the letter (see *Langley* [18]). Mr Dennison also referred to evidence of other letters from HMRC to his agents and to himself, which were received a considerable period after the date on the letter as evidence that HMRC may not have sent this letter on the date which is shown.

64. Other than the date on the letter, there is no evidence that points to a particular date on which this letter was sent. In these circumstances, it seems to me that the best approach is to take into account the evidence (or lack of evidence) surrounding the date of posting if and when I need to consider the date on which the letter would have been received in the ordinary course of post for the purpose of section 7 IA 1978.

65. On that issue, HMRC rely on the presumption in section 7 IA 1978 that the notice was received in the ordinary course of post. There is no evidence as to the date on which the letter containing the notice was received. Mr Dennison has not been able to show any specific date. As Mr Dennison has not proved to the contrary, the presumption in section 7 will apply.

66. I must therefore decide when the letter would have been received in the ordinary course of post. HMRC accept that the letter was sent by second class post. I have been referred by the parties to various items of evidence as to when a letter would have been received in the ordinary course of post if it was posted in the second class mail. That evidence includes:

(1) the former Queen's Bench Division Practice Direction issued on 8 March 1985 in which it was stated:

> To avoid uncertainty as to the date of service, it will be taken (subject to proof of the contrary) that delivery in the ordinary course of post was effected: (a) in the case of first class mail, on the second working day after posting; (b) in the case of second class mail, on the fourth working day after posting.
>
> Working days are Monday to Friday, excluding any bank holiday.

(2) the Royal Mail Code of Practice in 1999 promises that 98% of letters will be delivered within three working days of posting but defines working days as Monday to Friday inclusive;

(3) a printout of a page from the Royal Mail website of 3 July 2012 in which Royal Mail state that they will aim to deliver second class post by "the third working day after posting, including Saturdays";

(4) a page from a Royal Mail presentation entitled "Our Services" and dated 2017 which describes the service standard for second class post as "within 2-3 working days, including Saturday";

(5) evidence from Mr Dennison's first witness statement, showing the date of receipt by Mr Dennison's advisers of letters from HMRC, which appears to show that letters from HMRC were received by his advisers on average four working days after the date shown on the letter, but not including Saturday as a working day;

(6) a letter from HMRC to Smith & Williamson dated 13 July 2015 – then Mr Dennison's agent – which was stamped as received within three working days of the date of the letter.

67. Mr Dennison also points to HMRC's current Customer Compliance Manual at paragraph CCM12120 which states:

> **CCM12120 - Opening and Working Enquiries: Date when a notice is given**
>
> The notice of enquiry must be received by the customer(s) before the time limit. The Courts assume that second class post takes 4 working days to be delivered, and first class post takes 2 working days. Working days do not include Saturdays, Sundays or Bank Holidays. So, for example, if your enquiry notice was posted second class on 18 July 2008, the Courts would assume that the customer(s) had not received it until 24 July (19 and 20 July 2008 are a Saturday and Sunday respectively).
>
> You should always make sure that you post your enquiry notice at least 4 working days and, wherever possible, 7 working days before the date on which the enquiry window will close. This is to allow for the possibility of the notice being returned RLS, or for an unexpected disruption to the postal service. Although the tax credit enquiry window can close on a variety of dates, depending on the circumstances of the case, the two most common dates will be
>
> 31 July - e.g., for 2006/7 enquiries, 31 July 2008
>
> 31 January - e.g., for 2006/7 enquiries, 31 January 2009.
>
> The dates by which you should, wherever possible, post your enquiry notice for these two enquiry window dates will be

> 31 July 2008 - 22 July 2008
>
> 31 January 2009 - 21 January 2009.
>
> It is not possible to set out here every conceivable closing enquiry window date, along with the date by which you should issue your enquiry notice. You should, however, adopt the same approach (calculating back 7 working days) in every case.

68. Much of the evidence to which I have been referred does not relate to the period during which this letter was sent and is therefore of limited relevance to the question before me. Other parts of the evidence (in particular, the Royal Mail website and service description) are more aspirational. Other parts of the evidence are disputed.

69. I have also been referred to various decisions of the courts and tribunals (including *Steele v HMRC* [2018] UKFTT 0547 and *Wing Hung Lai v Bale* [1999] STC(SCD) 238), but I did not gain much assistance from them.

70. The evidence is therefore not particularly conclusive. However, I have come to the conclusion that, on the balance of probabilities, the notice of intention to enquire into the return in this case was received after 31 July 2012 and so was given out of time. My reasons for reaching this conclusion are as follows:

(1) The evidence concerning the date on which the letter itself was originally posted is limited to the date on the letter. HMRC have offered no other evidence of their internal procedures or of their own records to show that the letter would have been posted on that date.

(2) Even if I accept that the letter was posted on 27 July 2012, the letter would only be treated as arriving on or before 31 July 2012 in the ordinary course of post if it could be treated as being received within three working days and if Saturday is treated as a working day for this purpose.

(3) If I were to accept that the 27 July 2012 letter would have been received in the ordinary course of post by 31 July 2012, that would be to adopt the most optimistic timing assumptions given by any of the evidence to which I have been referred (i.e. that the letter was posted on 27 July 2012, that second class post will arrive within three working days in the ordinary course of post, and that I should count Saturday as a working day).

(4) That seems to me inappropriate. The presumption in section 7 IA 1978 is a presumption that the notice has been given. For the most part, it operates against the recipient. It seems to me that I should therefore err on the side of caution in coming to a view as to the period required before a notice will be treated as having been received in the ordinary course of post for the purposes of that presumption. That approach is consistent with the former Queen's Bench Division Practice Direction, which referred to delivery in the ordinary course of post being treated as effected on the fourth working day after posting in the case of second class post (and not treating Saturday as a working day).

(5) Furthermore, the time limits for giving notice of intention to enquire into a return are an important part of the mechanism by which certainty is given to the taxpayer. They should not be eroded by adopting the more optimistic assumptions on deemed service of the notice.

71. For these reasons, on the facts of this case, I find that the letter of 27 July 2012 would not have been received by Mr Dennison in the ordinary course of post on or before 31 July 2012.

72. Although it is not directly relevant, I am confirmed in my conclusion by the fact that my approach is consistent with HMRC's current guidance to which I was referred by Mr Dennison. That guidance suggested that letters sent by second class post should be sent at least four working days before any relevant time limit and where possible at least seven working days before any relevant time limit. It assumes that Saturday is not a working day. That seems to me to be prudent guidance.

73. Mr Marks also says that the notice of intention to enquire into the return was given in a telephone conversation between HMRC and Mr Dennison's then agents on 27 July 2012. He refers to the following items of correspondence which were included in the hearing bundle:

> (1) a letter of 10 October 2011 from Mr Blunkett of HMRC to Mr Walker of BTG Tax in which Mr Blunkett set out in some detail HMRC's technical position on the substantive issues and concluded by notifying Mr Walker that he intended to instruct his colleagues to resume collection of the tax due;
>
> (2) a letter of 9 May 2012 from Mr Blunkett to Mr Walker in which Mr Blunkett notified Mr Walker that if no further response was forthcoming from Mr Dennison "the debt will be released for collection";
>
> (3) a letter from Mr Walker, then of Smith & Williamson, dated 25 May 2012 in which Mr Walker informed Mr Blunkett that he should be in a position to respond fully to the letter of 9 May 2012 "by the end of June";
>
> (4) a letter from Mr Walker, of Smith & Williamson, to HMRC dated 3 September 2012, which referred to a telephone conversation on 27 July 2012 noting, amongst other things that Smith & Williamson were seeking a formal opinion from counsel and asking if HMRC would be prepared to consider methods of alternative dispute resolution as a means of resolving the dispute.

74. From this, Mr Marks submitted that even if the notice of intention to enquire into the return would not have been received in the ordinary course of post by 31 July 2012, it was clear from the course of the correspondence that notice had, in any event, been given in the conversation on 27 July 2012.

75. I reject that submission. There is no evidence of the content of the conversation that is referred to in the letter from Smith & Williamson of 3 September 2012. There is no reference in the letter to notice of intention to enquire having been given as part of the conversation of 27 July 2012. I accept that Mr Dennison and his advisers appear to have proceeded on the assumption that an enquiry had been opened at some point, but it has been no part of HMRC's case on this appeal that any form of estoppel is operating in this case.

76. The burden is on HMRC to show that notice was given to Mr Dennison on or before 31 July 2012. From the evidence before me, HMRC has not proved its case.

77. For the reasons that I have given, I find that the notice of intention to enquire into the return was not given on or before 31 July 2012.

Conclusion

78. It follows that the notice of intention to enquire into the return was given out of time. The enquiry into Mr Dennison's return was not validly opened and so the closure notice issued to Mr Dennison was not valid.

79. My conclusion on the first issue decides this appeal in favour of Mr Dennison. I have, however, heard full argument on the other issue in this appeal and I shall therefore set out my views on it.

The relevant legislation

80. The substantive issue in this appeal relates to Mr Dennison's claim for post-cessation trade relief under section 96 ITA 2007. Section 96 provides relief for certain "qualifying payments" made by a person who has ceased to carry on a trade or profession. At the relevant time, section 96 provided as follows (so far as relevant):

> **96 Post-cessation trade relief**
>
> (1) A person may make a claim for post-cessation trade relief if, after permanently ceasing to carry on a trade–
>
> (a) the person makes a qualifying payment, or
>
> (b) a qualifying event occurs in relation to a debt owed to the person,
>
> and the payment is made, or the event occurs, within 7 years of that cessation.
>
> (2) If the claim is made in respect of a payment, the claim is for the payment to be deducted in calculating the person's net income for the tax year in which the payment is made (see Step 2 of the calculation in section 23).
>
> (3) If the claim is made in respect of an event, the claim is for the appropriate amount of the debt to be deducted in calculating the person's net income for the relevant tax year (see Step 2 of the calculation in section 23).
>
> (4) The claim must be made on or before the first anniversary of the normal self-assessment filing date for the tax year for which the deduction is to be made.
>
> (5) …
>
> (6) This section applies to professions and vocations as it applies to trades (and sections 97 and 98 are to be read accordingly).
>
> …

81. The definition of "qualifying payment" is found in section 97 ITA 2007.

> **97 Meaning of "qualifying payment"**
>
> (1) For the purposes of section 96 a person makes a "qualifying payment" after permanently ceasing to carry on a trade if the person makes a payment wholly and exclusively for any of purposes A to D.
>
> (2) A payment is made for purpose A if it is made–
>
> (a) in remedying defective work done, goods supplied or services provided in the course of the trade, or
>
> (b) by way of damages (whether awarded or agreed) in respect of defective work done, goods supplied or services provided in the course of the trade.
>
> (3) A payment is made for purpose B if it is made in meeting the expenses of legal or other professional services in connection with a claim (a "claim about defects") that–
>
> (a) work done in the course of the trade was defective,
>
> (b) goods supplied in the course of the trade were defective, or

(c) services provided in the course of the trade were defective.

(4) A payment is made for purpose C if it is made in insuring–

(a) against liabilities arising out of any claim about defects, or

(b) against the liability to meet the expenses of legal or other professional services in connection with any claim about defects.

(5) A payment is made for purpose D if it is made for the purpose of collecting a debt which was brought into account in calculating the profits of the trade.

The parties' submissions in outline

82. It is Mr Dennison's case that the payments that he made as part of the settlement with his former partners – being the release of the loan note of £100,000 and the first settlement payment of £150,000 – were qualifying payments within section 97(1) as they were made for the purpose within section 97(2)(b).

83. HMRC say that the payments were not "qualifying payments" for the following reasons:

(1) the payments were not made in respect of "defective work done, goods supplied or services provided in the course of [Mr Dennison's profession]" within section 97(2)(b), but to settle the claim brought by his fellow partners, which related to claim of bad faith and breach of duty;

(2) the payments were not made "wholly and exclusively" for a qualifying purpose because they were also made to benefit Mr Dennison in a personal capacity and/or to preserve Mr Dennison's reputation by avoiding a damaging High Court judgment, which might have been used in the disciplinary proceedings before the SDT;

(3) it is implicit in section 97 that any expense, if it is to qualify for relief, must be of a nature that is deductible as a partnership expense (applying *Vaines v HMRC* [2018] EWCA Civ 45 ("*Vaines*")).

84. Mr Dennison disputes all these assertions. He says:

(1) the payments do fall within section 97(2)(b) ITA 2007:

(a) the essence of the former partners' claims against him was that he negotiated the settlement of the claim by LRSL against Rowe Cohen in a defective way due to a conflict of interest;

(b) section 97(2)(b) does not require the defective "work done" to be work done for a specific customer; it can include work done in the course of the business as a whole;

(2) there is no duality of purpose involved in the payments:

(a) the payments were made to settle the claims that related to work done in the course of his profession as a solicitor with Rowe Cohen;

(b) HMRC's arguments regarding the need to avoid a damaging High Court judgment because of its potential effects on the SDT process confuse the purpose of the payment with an effect of the payment. In any event, in the absence of a settlement of the High Court litigation, there was no prospect at the time of a judgment in the High Court process being forthcoming before the conclusion of the disciplinary proceedings before the SDT and so affecting its outcome.

(3) *Vaines* is not relevant to the test in section 96 ITA 2007. There is no requirement that a qualifying payment should also be a partnership expense.

Section 97(2)(b) ITA 2007

85. I should begin by setting out a short summary of some of the facts surrounding the payments made by Mr Dennison under the settlement agreement with the former partners in Rowe Cohen.

86. The terms of the settlement are set out in a deed of agreement dated 8 September 2009. As part of the negotiation of the settlement, various drafts of that agreement had been produced. Some earlier drafts had included in the recitals to the agreement, a summary of the claims that had been brought against Mr Dennison and his fellow defendants. This summary was dropped and not included in the final draft. Under the deed of agreement, Mr Dennison agrees to make the payments to which I have referred at [23] above in full and final settlement of the claims brought against him in the High Court proceedings issued on 9 September 2008.

87. The particulars of claim for those proceedings contain details of claims made by the former partners in Rowe Cohen against various defendants including Mr Dennison as the "First Defendant". The claims against Mr Dennison are for breach of contract and breach of equitable and common law duties. In particular, the particulars of claim assert:

(1) breach by Mr Dennison of equitable duties as a partner in Rowe Cohen owed to the former partners in Rowe Cohen including:

(a) the duty to act honestly and in upmost good faith in the best interests of Rowe Cohen;

(b) the duty not (without the consent of the other partners) to place himself in a position in which his duties to the partners in Rowe Cohen would be in conflict with his interests or duties to a third party;

(c) the duty not (without the consent of his fellow partners) to obtain any benefit or gain from his fiduciary position as a partner in Rowe Cohen;

(d) the duty to account for any benefit or gain obtained or received by him in circumstances where there was a conflict of interest and duty; a duty to account for any benefit or gain obtained or received by him by reason or by use of his fiduciary position; and

(e) his duties of confidentiality to his partners in Rowe Cohen;

(2) breach by Mr Dennison of his contractual duties under the partnership agreement with his former partners in Rowe Cohen; and

(3) breach by Mr Dennison of his duties as a partner at common law or under the Partnership Act 1890.

88. Under the particulars of claim, the former partners in Rowe Cohen claimed, inter alia, an account at any profit derived from Mr Dennison's interest in LRSL including:

(1) any salary or consultancy fees earned by Mr Dennison under arrangements with LRSL; and

(2) any profit made by Mr Dennison on the sale of his interest in LRSL to Expedia.

89. HMRC say that the payments made by Mr Dennison in this case are not made for a purpose that falls within section 97(2)(b). The payments were made to settle the dispute with his former partners under which the former partners claimed an account of unlawful profits

made by Mr Dennison. The payments were not made by way of damages for defective work in the course of Mr Dennison's trade or profession as a partner in Rowe Cohen.

90. Mr Dennison says that section 97(2)(b) is not limited to damages for defective work done as part of his professional work for clients of Rowe Cohen. It can extend to the settlement of claims for other work done in the course of the business. The payments were for defective work by him in negotiating the settlement with one of Rowe Cohen's suppliers (i.e. LRSL) and so fall within section 97(2)(b).

91. Section 97(2)(b) requires that the settlement payments must be made "in respect of defective work done, goods supplied, or services provided in the course of the [relevant trade or profession]". I have not been provided with any authority on the extent of this provision. However, it seems to me that, given its context, its natural meaning is to extend to damages paid (whether as a result of a court order or a negotiated settlement) for work done for, goods supplied, or services provided to customers or clients in the course of the relevant trade or profession.

92. Mr Dennison seeks to describe the payments as being in settlement of claims for defective work done on behalf of his partners in the negotiation of the agreement with LRSL. Even if section 97(2)(b) were capable of extending to such claims, the settlement payments in this case are made to settle a far broader claim that Mr Dennison made unlawful profits as a result of an undisclosed relationship with a supplier to Rowe Cohen. Those claims are not limited to claims for defective work done in the course of Mr Dennison's role as a partner in Rowe Cohen. They relate to breaches of his fiduciary and other duties as a partner, which cannot naturally be described as "defective work done". Furthermore, the compensation claimed by the former partners is not limited to the proceeds of the relationship between LRSL and Rowe Cohen. It is drafted by reference to Mr Dennison's interest in LRSL as a whole and includes all his salary and fees from LRSL and the proceeds of the sale of his interest in the company.

93. It follows that I agree with HMRC that the payments were not "qualifying payments" within section 97 ITA 2007. If I had reached a different conclusion on the question of the timing of the notice of intention to enquire into the return, I would have found that Mr Dennison was not entitled to post-cessation trade relief in relation to these payments.

Other issues

94. My conclusion on the scope of section 97(2)(b) ITA 2007 is sufficient to determine the question of the availability of post-cessation trade relief in these circumstances. I do not need to determine the other questions raised by HMRC and I do not do so.

DISPOSITION

95. For the reasons I have given, I allow this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. 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.

ASHLEY GREENBANK
TRIBUNAL JUDGE

Release date: 2nd MAY 2024