



TC06839

Appeal number: TC/2017/06599

Income tax - application by Appellant for closure notice - tax avoidance scheme - whether HMRC had validly issued and served a Notice of Enquiry - HMRC unable to produce a copy of the notice providing evidence of issue and postage –section 115 TMA 1970 and section 78 Interpretation Act 1978 - whether evidence of service of notice - yes - application dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARK JAMES

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER NOEL BARRETT**

Sitting in public at Tribunal Tax Service, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA on 24 May 2018

Mr Gary Clarkson for the Appellant

Mr Christopher Shea, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

5 1. This is an application by Mr Mark James (“the Appellant”), for a direction by the Tribunal under s 28A Taxes Management Act 1970 (“TMA 1970”) requiring HMRC to issue a closure notice (within a specified period) in respect of the enquiry into his 2006-07 Self-Assessment tax return, on the basis that neither he nor his agent received the Notice of Enquiry issued under s 9A TMA 1970.

10 2. The questions for the Tribunal to determine are whether HMRC issued a Notice of Enquiry into the Appellant’s self-assessment tax return for 2006-07 on 18 November 2008, and if so, whether the notice was received by the Appellant.

3. HMRC say that the Notice of Enquiry was issued and validly served and that because of ongoing enquiries there are reasonable grounds for not issuing a closure notice within a specified time.

15 **Decision**

4. We dismissed the application. Our reasons are set out below.

Background

20 5. On 1 August 2007 HMRC wrote to the Appellant informing him that they intended to enquire into his claim for 2006-07 loss relief under s 381 Income and Corporation Taxes Act 1988.

25 6. HMRC informed the Appellant that their enquiry related to his individual claim for loss relief of £1,002,024 arising from the ‘Liberty Fund 3 Limited Partnership’, a disclosed tax avoidance scheme which was being considered by HMRC. HMRC had agreed the terms of a representative sample agreement with the scheme promoter, Mercury Tax Strategies Limited. The Appellant as a member of the scheme had agreed to be included in the agreement enquiry.

7. HMRC informed the Appellant that they intended to exercise their discretion not to give effect to the Appellant’s loss relief claim, either by repayment or discharge, until further enquiries were complete.

30 8. HMRC enclosed a copy of the “Special Compliance Office Investigations” booklet entitled “Code of Practice 8” - which applies to cases where serious fraud is not suspected. The booklet explained how HMRC intended to conduct their enquiries and how a taxpayer may request that the enquiry be concluded.

35 9. On 20 May 2008, HMRC wrote to the Appellant, again at his home address, advising him that they had, on that date, opened an enquiry into his 2006-07 return relating to his partnership interest in the Liberty Fund 3 Limited Partnership. HMRC explained that until their enquiries into the Partnership were completed, that part of

his return would remain the subject of an open enquiry. A copy of the correspondence was sent to the Mercury Tax Group.

5 10. On 18 November 2008, a further Notice of Enquiry was issued by HMRC, regarding a capital gains losses claim relating to ‘The Excalibur Scheme’ (Number 61550101), another tax avoidance scheme. The notice was issued within the time limit specified within s 9A (2)(a) TMA 1970, that is within 12 months of the filing date of 31 January 2008. HMRC say that the notice would have been received by the Appellant well before 31 January 2009.

10 11. The ‘Excalibur Scheme’ was a ‘bed and breakfast’ scheme designed to generate a capital loss using the 30 day share matching rule in TCGA 1992 s 106A(5) in order to claim the loss against income under ICTA 1988 s 574, now ITA 2007 s 131.

12. The Appellant says that neither he nor his agent received HMRC’s letter of 18 November 2008 enclosing the Notice of Enquiry and that as there had been no valid service of the Notice of Enquiry, he was entitled to ask for closure of the enquiry.

15 13. On 3 May 2014, the Appellant informed HMRC that he had appointed Reynolds Porter Chamberlain to act as his professional adviser in respect of:

‘any enquiries and appeals against assessments and determinations made on me arising from the planning known as the Excalibur income tax scheme.’

20 14. On 17 November 2014, HMRC wrote to the Appellant inviting him to settle his tax liabilities, referring in particular to the Excalibur tax avoidance scheme and observing that he had joined the group of taxpayers represented by Reynolds Porter Chamberlain in respect of litigation relating to the matter. A copy of HMRC’s letter was sent to Reynolds Porter Chamberlain. The Appellant was asked to respond no later than 20 February 2015.

25 15. On 13 February 2015, Mr James requested that the deadline be extended to 20 March 2015. HMRC agreed the request. The accountant adviser to the Appellant at the time was Mr Robert Shannon of KPMG LLP. Mr Shannon discussed the settlement opportunity with HMRC and requested draft settlement calculations. Mr Shannon said nothing to indicate that the Notice had not been received by the
30 Appellant.

16. On 8 March 2016, the Appellant requested details of all open enquiries, open appeals and associated assessments. His letter was forwarded to Ian Armstrong, who had been conducting the enquiries into the Appellant’s 2009-10 tax return.

35 17. On 13 April 2016, Officer Ian Armstrong of HMRC responded that there were “no open enquiries”.

18. On 1 June 2016 Mr Clarkson of Trident Tax Limited responded on the Appellant’s behalf, noting that there were no open enquiries into the Appellant’s personal tax affairs and in the circumstances asked that all outstanding repayments be

made to the Appellant, referring in particular to a “substantial sum still retained by the Revenue from the 2007 tax year”.

19. On 28 June 2016 Mr Clarkson wrote to Mr Armstrong noting that he had not received a response and that the validity of HMRC’s enquiry position was “central to the consideration of both the assessment position as was also the Accelerated Payment Notices that may have been or were about to be issued”.

20. On 12 July 2016, Officer Armstrong replied to the effect that a payable order had been sent to the Appellant on 20 June 2016 for the year 2013-14, and that his only involvement with the Appellant was in respect of his check of the Appellant’s self-assessment tax return for the year 2009-10, which was concluded in October 2013.

21. Mr Clarkson wrote to Mr Armstrong again on 18 January 2017 requesting repayment of the withheld 2006-07 overpayment. Mr Armstrong was able to trace the lead officer for the Excalibur enquiries and referred the matter on.

22. Mrs Saunders, the Excalibur caseworker having conduct of the matter, confirmed on 30 January 2017 that she would respond to the repayment request. She responded to the Appellant on the same date, advising him that there was an open enquiry into the 2006-07 tax return relating to the Excalibur Scheme and apologising for Mr Armstrong’s earlier misleading response.

23. On 17 February 2017, the Appellant wrote to HMRC reiterating that he was unaware of an open enquiry relating to the Excalibur Scheme, and that neither he nor his accountant had received a copy of the Enquiry Notice. He requested copies of the Enquiry Notice and said that he had appointed Trident Tax Limited to act on his behalf in respect of the Excalibur Scheme and the related enquiry into the Appellant’s 2006-07 return. HMRC were asked to note that Reynolds Porter Chamberlain was no longer representing him.

24. On 20 March 2017, Mrs Saunders wrote to Mr Clarkson acknowledging receipt of the Appellant’s letter, and advised that the Notice of Enquiry had been issued on 17 November 2008 and sent on 18 November 2008, although unfortunately she was unable to access the file or a copy of the Notice issued. She nonetheless issued copies of screenshots from HMRC’s compliance computer system to record open enquiries confirming that the section 9 Notice for tax year 2006-07 was issued.

25. Mrs Saunders commented that there was no indication from the Appellant’s tax adviser Robert Shannon of KPMG when he telephoned HMRC on 18 February 2015 that the Appellant was previously unaware of the enquiry and no mention was made that the Notice had not been received.

26. On 15 August 2017 Mr Clarkson wrote to HMRC maintaining that no Notice of Enquiry had been issued and that therefore the enquiry into the Appellant’s 2006-07 return had to be closed and any associated repayments processed.

27. At the hearing of the application HMRC confirmed that they had been unable to produce a copy of the letter of 18 November 2008 or the Notice of Enquiry. HMRC

accepted that this is unsatisfactory, but asserted that on the evidence it is much more likely than not that the Notice was issued. Having shown that on a balance of probabilities the Notice was issued and posted to the Appellant, the onus is on him to prove the letter did not arrive.

5 Evidence

28. The evidence consisted of a joint document bundle which included a copy of the correspondence between the parties, HMRC self-assessment records, witness statements for HMRC by Mark Warr, an Officer of HMRC's counter avoidance directorate and Sukvinder Ahluwalia, an Officer in HMRC's Wealthy and Mid-sized Business Compliance Directorate. The Appellant did not attend the hearing and did not provide a witness statement. We were provided with relevant legislation and case law authorities.

29. In evidence, Officer Mark Warr said that he had researched the records relating to the enquiry into the Appellant's 2006-07 Self-Assessment Tax Return. He explained that:

- i. HMRC's 'Specialist Investigations Division', in Southampton and Bristol were responsible for making the enquiries into the Excalibur tax avoidance scheme [DOTAS 61650101]. Enquiries into the individual tax returns of those individuals using the scheme were mostly opened by HMRC's Personal Tax Compliance (PTC) teams on the instructions of Special Investigations. If the user was dealt with by another specialist section of HMRC, such as Complex Personal Returns (CPR), they would be asked to open the enquiry instead, and retain possession of the enquiry records.
- ii. All cases to be opened were referred to HMRC's Risk and Intelligence Service, (RIS) to prepare a standard information package (SIP). All SIPs contained a copy of Special Investigation's guidance to compliance staff on opening the enquiries. Documents and information were requested from a representative sample of users only. The Appellant was not one of the sample users and would not therefore have been asked to provide any documents and information.
- iii. No further correspondence was issued to the users who were not part of the representative sample between the date of opening the enquiry and the issue of the settlement opportunity letter of 17 November 2014 in respect of the Excalibur arrangements.
- iv. In 2011, responsibility for all the non-specialist enquiries was allocated to Southampton. A record was held from this date, of all enquiries held in that office. The Appellant does not appear on this list.
- v. On 3 May 2014, the Appellant authorised Reynolds Porter Chamberlain LLP (RPC) to act on his behalf in respect of any HMRC enquiries into the Excalibur scheme.

- vi. On 17 November 2014, a generic letter was issued to all users of the Excalibur avoidance scheme offering a settlement opportunity.
- vii. On 13 February 2015, a response was received from the Appellant requesting an extension to the deadline for a response until 20 March 2015 whilst he reviewed the position with his legal advisors.
- viii. The agent, Robert Shannon of KPMG, telephoned on 16 February 2015 also requesting an extension to the deadline.
- ix. Mr Warr says that he returned the agent's telephone call on 18 February 2015 agreeing to the extension and to providing calculations of the additional tax and interest that would be due under the terms of the settlement. He was unable to locate any files for the Appellant at the time and so created new ones to store the subsequent correspondence. Copies of documents are stored both electronically and in paper files in most enquiry cases.
- x. He provided calculations of the additional tax and interest to the agent on 23 February 2015.
- xi. No response was received from either the taxpayer or agent following the issue of the calculations.
- xii. He established from HMRC's enquiry recording system (CQI) that the enquiry was opened by Sukhvinder Ahluwalia from the Complex Personal Returns (CPR) team in Birmingham on 18 November 2008. The overpayment of £264,947.19 arising for 2006-07, as a result of the Excalibur losses was withheld due to the enquiry and had been transferred to a suspense account on 17 November 2008. A statement to this effect was issued to the Appellant on 10 December 2008. The generic notice stated: "Under the authority of s59B (4A) TMA 1970 I shall not currently be making any repayments in relation to this claim."
- xiii. Mrs Ahluwalia had responded that the Appellant was one of a number of cases deselected as a CPR case in 2009 and that the open enquiry cases were transferred to the Personal Tax Compliance (PTC) team in Birmingham. Mrs Ahluwalia was unable to find electronic copies of the enquiry letters in the Controlled Access Folder (CAF).
- xiv. Mr Warr said that he could only conjecture why the enquiry officer on the PTC team in Birmingham did not refer to SI regarding the Excalibur aspect on receipt of the enquiry papers. This would have made clear that the records should have been transferred to the Southampton team.
- xv. The caseworker has been unable to locate the name of the officer assigned the case on the PTC team in Birmingham at the time of the transfer. There have been numerous reorganisations of PTC (part of Individuals & Public Bodies I&PB since 2009) involving changes of personnel and office locations. Given the elapsed time, this makes tracing the officer currently holding the enquiry

folder near to impossible unless they have made the appropriate note on the Self- Assessment system which is not the case here.

- 5 xvi. Applications have been made to all other officers who have had any involvement in the enquiry according to system notes but none have been able to locate any electronic or paper files for the Appellant which contain copies of the opening notices.

30. In evidence, Officer Sukhvinder Ahluwalia said that as part of her role in HMRC's Complex Tax Returns Team Compliance Directorate, she opened enquiries under s 9A TMA 1970 into tax returns. She said that:

- 10 i. At the time, or a few days before she issued the Notice of Enquiry to the Appellant and his agent, she would have received instructions from her colleagues at SCI looking at the [Avoidance: Capital Gains Losses - Excalibur Scheme (no 61650101)] to open an enquiry into 2006-07 and issue the notice to the Appellant and his agent. Ms Ahluwalia said that the historical record shows that she issued the Notice and filed manual copies in a manual enquiry folder. Unfortunately due to a transfer of records and files in March 2009 (the time of a Directorate change), the manual enquiry folder could not be located.
- 15
- ii. Ms Ahluwalia said that she instructions from SCI colleagues and would have followed the instructions to open the s 9A enquiries.
- 20 iii. She could not recall issuing the particular notice to Mr James but it is her belief that she issued this notice as per the records kept by the department, because the note on the record is familiar and included the sort of set wording that she was using at that time. There was only a very small possibility that she would have made the note and not issued the notice.
- 25 iv. The notices at the time were printed, one copy was kept in the file and another was put in the 'post out tray' for it to be enveloped by the person dealing with that job on the day, ready to be collected by the postman. The type of post that would have been used was Royal Mail second class.
- 30 v. HMRC's retained 'SA statement' shows a credit transferred out of £264,947 on 17 November 2008. Ms Ahluwalia said this was done by her as the case owner and related to an overpayment identified from processing Mr James' 2007 tax return.
- 35 vi. In HMRC's SA Statement there is an entry "S 9A Notice + COP issued" (which means, enquiry notice and factsheet) "on 18/11/2008" initials "SRA" (which were her initials) "B3" (which meant the document was filed at folder B, document 3 in the manual enquiry file).
- vii. There is another entry "Case Registered as Enquiry on 18/11/2008, Done Y" "SRA". This note confirms that she made the note at the time of issuing the notice or just after issuing the notice.

- viii. The CQI workbench entry was HMRC's method of recording enquiries and actions taken.
- ix. A CQI entry states: "Opening letter 17/11/2008 SRA B4". "Opening Letter" is the wording she used where she issued the notice to the agent. The name and address of the agent she issued the notice to would have been the address held on the Self-Assessment (SA) record at the time and there is no note of any change since the notice was issued.
- x. The address she would have issued the notice to would have been the address held on the SA system at the time.

10 **Legislation**

31. Section 9A TMA1970 states that, as far as is relevant,

(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"),

15 s28A TMA1970 states that, as far as is relevant,

(4) The taxpayer may apply to the [tribunal] for a direction requiring an officer of the Board to issue a [partial or final closure notice] within a specified period.

20 (6) The [tribunal] shall give the direction applied for unless . . . satisfied that there are reasonable grounds for not issuing [the partial or final closure notice] within a specified period.]

Section 115 TMA specifies how HMRC may deliver and serve documents:

Section 115 Delivery and service of documents

(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.

25 (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person [by HMRC] may be so served addressed to that person--

(a) at his usual or last known place of residence, or his place of business or employment,

30 or...

Section 7 Interpretation Act 1978 deems documents given by post to be delivered in the ordinary course of post, unless the contrary is proved:

Section 7 - References to service by post

5 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.

Case Law

The Law with regard to service of a notice sent to a last known place of residence was explained in *Tinkler v HMRC* [2016] UKFTT 170 (TC) in paragraphs 63 to 72.

10 At paragraph 71 Judge Mosedale stated in summary as follows,

71. In summary, the law is that a notice of enquiry must be received by the taxpayer within the enquiry window to be effective, but the taxpayer is deemed by s 115(2) and s 7 IA 1978 to have received it if it was sent to any place specified in s 115(2) unless the taxpayer can prove the letter did not arrive or arrived after the enquiry window closed.

15 The Appellant’s case

32. In the Notice of Appeal, Mr Gary Clarkson the Appellant’s agent states

“Neither Mark James, nor his agent received an enquiry notice for the tax year 2006 - 07. Due to the ongoing enquiry a copy of the notice was requested multiple times including on 17 February 2017 and 7 July 2017.

20 In HMRC’s letter of 20 March 2017, Officer Mrs E Saunders stated that an enquiry notice had been prepared and issued to Mr James by HMRC officer Sukvinder Ahluwalia on 17 November 2008 and dated 18 November 2008. However a copy of the notice was not enclosed due to the fact that Mrs Saunders was “currently unable to access the file with the copy of notice issued”.

25 I wrote to Mrs Saunders on 7 July 2017 and 15 August 2017 to ask whether she was subsequently able to access the file she referred to in a letter her 20 March 2017.

30 As of today I have not received a response. By definition there is no notice given unless the recipient has seen it so the notice must be physically received by the enquiry deadline. Therefore given that HMRC are unable to provide a copy of the notice and the fact that neither my client nor his agent have actually received or seen the notice HMRC does not have a valid enquiry.”

HMRC’s submissions

33. The Appellant’s sole ground for the application is that there was no service of the Notice of Enquiry into his 2006-07 return relating to the Excalibur Scheme.

35 34. HMRC say there are a number of contrary indicators to the Appellant’s assertion that he did not receive the notice:

- The Appellant’s memory cannot be a reliable indicator of whether a particular letter arrived at a time nearly ten years ago. It would be surprising to have a

specific memory of a particular letter arriving after such a lapse of time and it is even more problematic for the Appellant to know as a matter of fact that he did not receive it.

- 5 • The Appellant's return for 2006-07 created a substantial credit of £264,947. HMRC say that the probability is that a person who was owed such a large sum would chase payment unless they were aware of the reason why it was not being paid. In this case the reason is clearly the opening of the enquiry.
- 10 • On 3 May 2014 the Appellant authorised RPC to act on his behalf with regard to the Excalibur Income Tax Scheme. HMRC say this indicates that the Appellant was in receipt of the Enquiry Notice and aware his return was under enquiry.
- 15 • There was correspondence with regard to a settlement opportunity at the beginning of 2015. None of the responses received from either the Appellant or his representative suggested any doubt in their mind that there was an open enquiry that needed settling.

35. The Appellant may suggest that the gap in correspondence between the opening of the enquiry in November 2008 and November 2014 (the date of HMRC's settlement letter), casts doubt on the existence of the enquiry. HMRC say this is explained by the evidence of Mr Mark Warr. Enquiries were conducted by way of a sample of those participating in the scheme and it is therefore not surprising that other participants would not have received further correspondence whilst the scheme enquiries continued.

36. The Appellant refers to HMRC's letter of 13 April 2016 in which Officer Armstrong states that, "*As far as I am aware you do not have any open enquiries*". HMRC assert that not only does the evidence show that Mr Armstrong's letter was wrong, but that it must have been clear to the Appellant it was wrong. Apart from the s 9A TMA 1970 enquiries, there were also Sch 1A(5) TMA 1970 and s 12AC TMA 1970 enquiries into the 2006-07 Liberty Fund 3 Limited Partnership that the Appellant was also aware of.

37. The onus is on HMRC to prove they issued the Notice of Enquiry. Once HMRC have proved issue, s 115 TMA 1970 and s 7 Interpretation Act (IA) 1978 put the onus on the Appellant to prove it was not received. The standard of proof is the civil standard on the balance of probabilities.

38. HMRC rely on the evidence of Officers Warr and Ahluwalia and assert that the evidence proves on the balance of probabilities that the 2006-07 Notice of Enquiry was served on the Appellant.

39. HMRC accept that the onus is on HMRC to show under s 28A (6) TMA 1970 that there are reasonable grounds for not closing the enquiry. The enquiry remains open and ongoing.

40. The witness evidence of Officer Mark Warr explains the process by which enquiries were opened, why there is little correspondence in this case and the general background leading up to this Application.

5 41. The witness evidence of Officer Sukhvinder Ahluwalia shows that it is more likely than not that the 2006-07 Notice of Enquiry was issued by her and dispatched by second class post to the Appellant's address.

42. Her evidence shows the notice was issued on 17 November 2008 and served on 18 November 2008. The Notice was issued within the time limit specified within s 9A(2)(a) TMA 1970 i.e. within 12 months after the filing date.

10 43. Officer Ahluwalia is able to confirm that the departmental records show her as issuing the Notice of Enquiry and that she would have made notes of this when issuing the Notice and such Notice would be despatched by Royal Mail second class post. It is her belief that she issued the Notice and that it is most unlikely that she would note all the records, including noting where, in the enquiry file, a copy of the
15 Notice could be found and then not issue the Notice.

44. This is further supported by Officer Ahluwalia having transferred out of the SA account the credit of £264,9475 created by the 2006-07 Self-Assessment Return.

45. Officer Ahluwalia also confirms that the address she issued the Notice to would have been the address shown on departmental records at the time. It is not alleged that
20 the Appellant's address as recorded by HMRC changed at any time prior to the date of service of the Notice.

Conclusion

46. It is clear, from the chronology of events, the exchange of correspondence between the parties, telephone conversations, and other evidence that the Notice of
25 Enquiry was issued and posted to the Appellant. As we are satisfied that HMRC have established that the Enquiry Notice was issued and posted, it is then deemed to be served. We do not accept that the Appellant has then proven, as he must, that the Notice was not received by him. We also find that HMRC has reasonable grounds for not issuing a closure notice within a specified period.

30 47. We therefore dismiss the application.

48. 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

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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.

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**MICHAEL CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 26 NOVEMBER 2018