

Time out

The FTT has allowed taxpayer's post-cessation trade relief claim as HMRC's enquiry was out of time. Alexis Armitage explains all

In *Anthony Dennison v HMRC* [2024] TC09153, the First-tier Tribunal (FTT) allowed the taxpayer's claim for post-cessation trade relief under section 96, Income Tax Act 2007 (ITA), because HMRC's notice of enquiry was out of time and its closure notice was accordingly invalid.

Background

Anthony Dennison became a salaried partner in Rowe Cohen, a firm of solicitors, in March 1998. In April 1998, Mr Dennison acquired a beneficial interest in shares in Legal Report Services Ltd (LRSL), giving him a 33% shareholding in the company. Following Mr Dennison's acquisition of the shares in LRSL, Rowe Cohen entered into agreements with LRSL, under which LRSL would provide certain services to Rowe Cohen's clients in return for a fee. Mr Dennison acted as a representative of Rowe Cohen in negotiating those agreements and did not declare his interest in LRSL to Rowe Cohen, or his fellow partners. In May 1999, Mr Dennison became an equity partner in Rowe Cohen.

In 2003, LRSL demanded a payment of £400,000 from Rowe Cohen for overdue fees for work in had undertaken. The other partners in Rowe Cohen, still unaware of Mr Dennison's interest in LRSL, agreed to pay the fees to LRSL. In February 2004, Mr Dennison sold his shares in LRSL to Expedia Services Holdings Ltd (Expedia) for £1.5 million. In February 2007, Rowe Cohen ceased trading and Mr Dennison ceased to be a partner in the firm in March 2007.

In or around June 2007, the former partners in Rowe Cohen discovered that Mr Dennison had been a shareholder in LRSL and that he had sold shares in LRSL for £1.5 million in 2004. In September 2008, Mr Dennison's former partners filed a claim against him 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 Mr Dennison's former partners sought damages and an account of profits made by him.

In September 2009, Mr Dennison and his former partners reached a settlement under which Mr Dennison agreed to pay £300,000, in two instalments, to his former partners and agreed to release his interest in a loan note issued by Expedia, as a result of which Expedia agreed to pay £100,000 to his former partners. The loan note was released and the two payments were made in September 2009 and in April 2010, respectively.

In a letter dated 28 April 2011, Mr Dennison made a claim, through his advisers BTG Tax, for post-cessation trade relief under section 96, ITA 2007. 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 expenses).

In July 2012, HMRC sought to notify Mr Dennison by letter that it was opening an enquiry into his return for tax year 2009/10, under section 9A, Taxes Management Act 1970. In February 2014, HMRC

then issued a closure notice to Mr Dennison disallowing his claim for post-cessation trade relief and bringing into charge the amount of tax which had not been collected as a result of the amendment, being £95,155.25.

Mr Dennison appealed against the closure notice to the FTT.

FTT decision

The appeal was allowed.

There were two issues for the FTT to determine: (1) whether HMRC's notice of enquiry was out of time; and (2) whether Mr Dennison was entitled to post-cessation trade relief in respect of the expenses.

1. Was HMRC's notice of enquiry out of time? HMRC argued that it had sent Mr Dennison a letter, dated 27 July 2012, notifying him that it was opening an enquiry into his return for tax year 2009/10. This letter was not copied to Mr Dennison's then agents. It was disputed between the parties when this letter was sent and received. HMRC also claimed 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 tax year 2009/10 was given. Again, the content of this conversation was disputed. Mr Dennison argued that HMRC's purported notice of enquiry, which was contained in HMRC's letter of Friday 27 July 2012, was out of time and as a result, the closure notice issued to him was also invalid.

When Mr Dennison amended his self-assessment return, any enquiry notice must have been given (meaning, in this context, 'received') within 12 months of the quarter-day following the date on which the amendment was made. The FTT decided that was by no later than 31 July 2012. In determining this issue, the FTT considered the intricacies of the postal rules, including HMRC's internal practices of posting mail (including the fact that post would often go to another department within HMRC before it was actually posted to taxpayers) and when post is deemed to have been received. First-class post is treated as delivered on the second working day after posting and second-class post, on the fourth day after posting. After considering all of the facts, the FTT determined that HMRC's enquiry notice (dated Friday 27 July 2012) even if posted on that day, was not deemed to be delivered by 31 July 2012. The enquiry was therefore out of time and accordingly, HMRC's closure notice was also invalid.

This conclusion was sufficient for the appeal to be determined in favour of Mr Dennison, but the FTT went on to consider the second issue.

2. If HMRC's notice of enquiry had been in time, would Mr Dennison's claim for post-cessation trade relief have succeeded? On this issue, the FTT concluded that had HMRC issued its enquiry in time, Mr Dennison's post-cessation trade relief claim would have been invalid. This was because the expenses related to claims made against Mr Dennison for breach of contract and breach of equitable and common law duties that he owed to his former partners at Rowe Cohen and which were due to unlawful profits made by Mr Dennison, rather than for damages for defective work carried out. The expenses were therefore not 'qualifying payments', within the meaning of section 97, ITA.

Comment

This decision highlights the importance of carefully checking the date on any letters sent by HMRC as well as considering when any letters were actually received. The Taxes Acts provide for various time periods in which both HMRC and taxpayers must take certain action. HMRC are not slow in taking a limitation argument when the taxpayer is out of time and, similarly, taxpayers should not hesitate to take similar arguments. Parliament has legislated time limits for good reason and they cannot be ignored.

Such a limitation argument ultimately led to Mr Dennison succeeding in his appeal. If HMRC had opened its enquiry a few days earlier, the outcome would have been a less happy one for Mr Dennison. It is also worth noting that HMRC claimed that notice had been given orally on the telephone to Mr Dennison's agent, notwithstanding that HMRC's own guidance states that any notice given must be in writing.

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