Neutral Citation Number [2025] UKUT 00023 (TCC)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Applicant: Assembly Global Networks Ltd	Tribunal Ref: **UT-2024-000097**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

RECONSIDERATION OF APPLICATION FOR PERMISSION TO APPEAL FOLLOWING HEARING

DECISION NOTICE

JUDGE RUPERT JONES

Introduction

1. The Applicant, Assembly Global Networks Ltd ("AGN"), applies to the Upper Tribunal (Tax and Chancery) ("UT") for permission to appeal the decision of the First-tier Tribunal (Tax Chamber) ("the FTT"), released on 3 April 2024 ("the Decision"). The appeal was decided by the FTT following a hearing conducted on 14 March 2024.

2. The FTT decided a preliminary issue: whether HMRC's Enquiry Letter dated 15 July 2022 had been received at AGN's registered office by 31 July 2022, the last date on which HMRC were able to open a valid enquiry into AGN's claim for a research and development credit contained in its amended Corporation Tax return.

3. The Tribunal found in favour of HMRC stating its conclusion at [7] of the Decision:

> 'I found that the Enquiry Letter had been properly addressed and franked and that it had been posted on 18 July 2022. I agreed with Mr Baig that there was no ordinary course of postal deliveries in the week ending 22 July, but found that the ordinary course of post had resumed on Monday 25 July. AGN failed to show non-receipt, and the Enquiry Letter was therefore deemed to have been delivered on 28 July 2022. As a result, I determined the Preliminary Issue in favour of HMRC.'

4. By a decision dated 1 July 2024 ("the PTA Decision"), the FTT refused permission to appeal the Decision to the UT on the grounds of appeal pursued by the Applicant. The Applicant renewed its application to the UT for permission to appeal in-time on 31 July 2024.

5. I refused permission to appeal to the Upper Tribunal on the papers in a decision dated 7 October 2024. The Applicant requested that permission to appeal be reconsidered at an oral hearing.

6. I held an oral hearing by video (CVP) on 12 December 2024. Mr Baig appeared as counsel on behalf of the Applicant and Mr Holt appeared as a litigator for HMRC. I am grateful to them both for their submissions.

7. References in square brackets [] are to paragraphs in the Decision or PTA Decision.

UT's jurisdiction in relation to appeals from the FTT

8. An appeal to the Upper Tribunal from a decision of the FTT can only be made on a point of law (section 11 of the Tribunals, Courts and Enforcement Act 2007). The Upper Tribunal has a discretion whether to give permission to appeal. It will be exercised to grant permission if there is a realistic (as opposed to fanciful) prospect of an appeal succeeding, or if there is, exceptionally, some other good reason to do so: Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.

9. It is therefore the practice of this Chamber of the Upper Tribunal to grant permission to appeal where the grounds of appeal disclose an arguable error of law in the FTT's decision which is material to the outcome of the case or if there is some other compelling reason to do so.

The grounds of appeal

10. I refused permission to appeal in relation to the extensive written grounds of appeal for the reasons given in my decision dated 7 October 2024.

11. Mr Baig concentrated on three matters which he submitted constituted errors of law in the FTT's Decision on the basis that it failed to take into account relevant evidence or misconstrued or misunderstood or mistook relevant evidence.

12. The grounds engage the test in *Edwards v Bairstow* [1956] AC 14 (HL) for when an error of law may be established in relation to a finding of fact– ***"n****o person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal"* **-** not simply that there was insufficient evidence to support the FTT's factual findings but there was no evidence at all or that the findings were perverse or unreasonable. In *Volpi v Volpi* [2022] EWCA Civ 464 ("Volpi"), Lewison LJ set out a more recent summary of the legal position in an appeals on points of law challenging findings of fact. It is contained in the PTA Decision and I do not repeat it.

13. If a finding of fact is to be challenged as made in error of law, the onus is on the Appellant to identify all the evidence which was relevant to each finding and show that it was one the tribunal was not entitled to make– see *Georgiou v Customs and Excise Commissioners* [1996] STC 463, at 476:

> "… for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged;

> secondly, show that it is significant in relation to the conclusion;
> thirdly, identify the evidence, if any, which was relevant to that finding; and
> fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make.
> What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court."

14. I am not satisfied that there were any arguably material errors of law in the FTT's findings of fact.

15. I address Mr Baig's points in turn.

16. First, he submitted that the FTT misunderstood and mistook the evidence given by HMRC Officer Bethan Morris, in particular that contained in her exhibit BM/2 - a report in the Excel Spreadsheet in the screen shot. He submitted that all that it recorded was that the two documents – the Enquiry Notice and the copy letter to Mr de Mello ('the Copy letter') - were sent for printing. He argued that the evidence before the FTT was that the entries in the columns for 'Completed date' as 16 July 2022, 'Received date' as 15 July 2022 and Job Status as 'completed' were only to confirm that the documents had been sent for printing. It was not evidence that the documents were in fact printed. The FTT therefore erred in relying on this spreadsheet as evidence to make a finding that the letters were printed (let alone enveloped or franked).

17. Mr Baig submitted that there was simply no evidence that the Enquiry letter had been printed and also argued that Officer Morris had given evidence under cross examination which undermined the finding that the letter was printed. This was because she was unable to confirm that it had been printed. He relied upon his schedule of her answers given in cross examination (the schedule was not agreed by HMRC):

> 1. In cross examination, Officer Bethan Morris confirmed that she drafted and sent the letters for printing on 15/7/2022. Upon sending it to print, her involvement in the process ended.
>
> 2 Officer Morris confirmed in cross examination that she had no knowledge of what happened after she had sent the letters for printing.
>
> That is, she could not confirm if the Enquiry Letter to AGN was printed, put inside a correctly addressed envelope, franked, sorted and delivered to Royal Mail for further sorting and delivery.
>
> 3 Officer Morris confirmed in cross examination that she had no knowledge of what the column headings or entries in the BM2 Exhibit meant.
>
> This was confirmed by her both during cross examination and re-examination.
>
> 4 Officer Morris confirmed that she was "unsure" what "Royal Mail via DSA" meant [in the Excel Spreadsheet].

> 5 Officer Morris confirmed that she does not know what "ENVO 1-1" under the column headed "Mailing Envelope" meant [in the Excel Spreadsheet].

18. I reject this ground as unarguable. The FTT was entitled to draw inferences from exhibit BM/2 and in addition there was direct written evidence in Officer Morris's statement concerning the meaning of BM/2. This was evidence in support of the findings that the FTT made that the Enquiry letters was printed and it was reasonable for the FTT to take into account and place weight upon it. Officer Morris's statement records at paragraphs 5-10:

> 4. On 15 July 2022 I drafted a compliance check opening notice via HMRC's Shared Experience to Exploit Software (SEES) system for accounting period ending 30 September 2020 to the Appellant, as well as a compliance check opening notice for accounting period ending 30 September 2020 to Luciano De Mello who was registered as the Appellant's accountant. The SEES system automatically sends letters created in this manner to HMRC's central print service ("HCPS") once the print option has been selected. The print ready file is then sent overnight (after 8pm each day) by the Chief Digital and Information Officer ("CDIO") system to HMRC's print supplier ready to be printed the following day.
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> 5. I selected the print option on 15 July 2022, resulting in the opening notices being sent to HMRC's central print service, and noted Caseflow HMRC's internal case management system to this effect. I exhibit a screenshot of this note at Exhibit BM1.
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> 6. The letter would have been printed for enveloping on 16 July 2022. As this was not a HMRC working day, the letter would have been enveloped and collected for delivery on Monday 18 July 2022.
>
> 7. Once printed, the print provider sends a report back to CDIO's (HMRC) system to confirm the print of the letter. The details of each printing job are added to this report (the Office Mail Advanced Daily Report or the "OFMA report").
>
> 8. I have been provided with a document from HMRC's central print service of the OFMA report (an Excel spreadsheet), listing all items of post that were submitted for printing on 15 July 2022 via HCPS. This document shows the letters that HMRC sent in the post. I exhibit an extract from that document at Exhibit BM2.
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> 9. The extract of the OFMA report shows my e-mail address as the "User Email". The Appellant's name can be seen in the "Job Reference". The extract shows my print job's status as "Completed". Further, as can be seen from the extract, the "Completed Date" is "16/07/2022". This indicates that, on 16 July 2022, the system printed and prepared the 18-page documents for collection by Royal Mail, (although, as explained above, the letter would have been enveloped and collected for delivery on Monday 18 July 2022).
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> 10. 1 also refer to two PDFs. The document names are "SEES_145a8a59-dc62-4b7e-9e21-fe627f3ea982.pdf" and "SEES_5125487c-18be-487b-b7fa-afa3df1799e0.pdf." When opened, these documents are copies of the enquiry notice that I issued as described above.
> The first is addressed to the Appellant itself and the second to Luciano De Mello. I exhibit the two documents as Exhibits BM3 and BM4 respectively.

19. The FTT gave sufficient reasons for its findings at [41] of the decision regarding the printing of the Enquiry letter:

> 41. I make the following findings of fact:
> (1) The Enquiry Letter and the copy letter to Mr de Mello were sent for printing. I

make that finding on the basis of Ms Morris's unchallenged evidence.
(2) Both those letters were printed on Saturday 16 July 2022. This finding is made in reliance on the following:
(a) The exhibit gives that as the "completion date"; and
(b) Ms Morris's unchallenged evidence that post was not enveloped or despatched on Saturdays, so the task that was completed on 16 July 2022 was therefore the printing.
(3) Both letters were enveloped on Monday 18 July. This finding is made on the basis that:
(a) the exhibit shows that the "envelope" column had been completed; and
(b) Ms Morris's evidence that letters sent on Friday were enveloped the following Monday.
(4) On Monday 18 July, both the Enquiry Letter and the copy letter to Mr de Mello were printed and enveloped and ready to be sent out.
(5) Both envelopes were franked. That finding is supported by the column headed "tariff name", which was completed. It is also consistent with the long-established presumption of regularity, expressed by Lindley LJ in *Harris v Knight* (1890) 15 PD 170:
"The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability."

20. The findings and reasons given are consistent with the written evidence of Officer Morris and not inconsistent with Mr Baig's note of the oral evidence given in cross examination. They consist of reasonable inferences that were available to be drawn. It is also worth noting that exhibit BM/2 was not Officer Morris's spreadsheet but one created by the print provider (see paragraphs 7 and 8 of the statement) so when it refers to a job being completed the FTT was entitled to draw the inference that this was the print provider saying so rather than Officer Morris saying so.

21. I also agree with the FTT's reasons for refusing permission to appeal on this ground at paragraph 14(1) in which the Judge explicitly rejects the argument and rejects other points made about the findings on the printing, enveloping, addressing and franking of the Enquiry Letter at 14(2)-(5):

14. The first group of submissions relates to the Enquiry Letter:
(1) The column headed "completion date" on the print-out from HMRC's system could not refer to the printing of the Enquiry Letter but must instead refer to the sending of that Letter for printing. The print-out was provided by the print service, as is clear from Officer Morris's evidence (unchallenged on that point). I reasonably concluded that the task which had been "completed" by the print service was the printing of the Enquiry Letter. That was a finding of fact the Tribunal was entitled to make.
(2) It was not open to the Tribunal to find that the Enquiry Letter addressed to AGN had been physically printed. I carefully considered all the relevant evidence, including both the documents as well as Officer Morris's evidence under cross-examination, before making that finding, see [41]. It was a finding the Tribunal was entitled to make on the basis of the evidence.
(3) There is no evidence whatsoever which points towards the Enquiry Letter addressed to AGN being enveloped. It was Officer Morris's unchallenged evidence that letters sent to the print service Friday were enveloped the following Monday, see

> [41(3)(b)]. There was no dispute that the Enquiry Letter and Mr de Mello's copy letter were sent to the print service on a Friday, the Tribunal was entitled to draw the factual inference that the Enquiry Letter was enveloped the following Monday.
> (4) There is no evidence whatsoever to support a finding that the Enquiry Letter had been correctly addressed. There was no dispute that the address held on file by HMRC for the Appellant was correct. The Tribunal made the reasonable inference that Officer Morris had used that address when drafting the Enquiry Letter. Mr Baig did not put to Officer Morris that the Enquiry Letter had been incorrectly addressed and it formed no part of his submissions.
> (5) There was no evidence to support a finding that the Enquiry Letter was franked. The basis for the Tribunal's finding on this point is at [41(5)]: in particular, the column on the print-out from HMRC's system headed "tariff name" was completed.

22. There is further evidence from which the FTT could reasonably infer that the Enquiry letter was printed (and thereafter sent). This was that the Copy letter, which was sent for printing by Officer Morris at the same time as the Enquiry letter and in the same job as recorded in the spreadsheet from the print department, must have been printed and sent. This is because the Copy letter was received by Mr De Mello in early August 2022 – irrespective of the date on which it was sent and whether it arrived at his previous home address at an earlier date. This supports the FTT being able to draw the inference that the Enquiry letter was likewise printed and sent.

23. The second submission that Mr Baig made was that the FTT erred in its finding at [112] of the Decision in light of the evidence at [46]:

> 46. On 12 April 2023, FITS wrote to HMRC, saying they had contacted Mr de Mello, who had provided the following statement ("Mr de Mello's Statement"):
>
> > "Following your request to outline communication I have had with HMRC concerning the Assembly Global Networks Ltd R and D enquiry letter, I can confirm the following:
> > 1. HMRC sent the letter to my old home address.
> > 2. I received the enquiry letter forwarded by the Post Office during first week of August 2022, I don't recall the exact date but within 2 days of its receipt I sent it on [to] the Assembly Global Networks Ltd.
> > 3. I confirmed this in my call with HMRC the following week."
>
> …
> The postal problems
> 110. Mr Baig also submitted that, given the evidence of postal disruption, the Tribunal should find as a fact that the Enquiry Letter "did not" reach AGN by 31 July 2022. Mr Baig relied on
> the facts about that disruption, see §72 to §74, and I also considered Mr de Mello's evidence see §42ff, on which AGN had relied in correspondence.
> …
> 112. Mr de Mello's evidence also does not assist AGN. He received his copy of the Enquiry Letter in the first week of August, but that copy letter had been forwarded to him from his previous address. There is no evidence as to when the copy letter arrived at that previous address, when it was forwarded, whether it was simply readdressed and so travelled second-class, or on what day in the first week of August it arrived at Mr de Mello's new location. There is thus no evidential basis for a finding of fact that his copy letter arrived at his original address after 31 July 2022.

24. Mr Baig submitted that the FTT had misunderstood and mistaken the evidence concerning the Copy letter. The evidence from Mr de Mello was not that the letter to him

had been sent to his old address and then returned to the post office and resent to his new address or forwarded on to his new address. It was to the effect that he had a mail forwarding facility so that the letter, even though addressed to his old address, was automatically diverted and sent to his new address by Royal Mail. Therefore, the Copy letter had arrived at the previous address by the end of July before being forwarded on to the new address in early August. Thus the FTT erred in finding that the Copy letter had been forwarded from a previous address and arrived at a new address in the first week of August and inferring it had arrived at the previous address in late July, to support a finding that the Enquiry letter had also arrived at AGN in late July. The FTT wrongly decided therefore that the Copy letter's arrival by the end of July supported the Enquiry letter also arriving by the end of July.

25. I reject the submission that this gives rise to any arguable error of law in the FTT's Decision.

26. First Mr de Mello's written evidence recorded at [46] is ambiguous when he states 'HMRC sent the letter to my old address'. I see some force in Mr Baig's submission that the Mr de Mello's statement may have meant that the letter was addressed to his old home address but immediately sent to his new address by virtue of the forwarding facility rather than it being physically sent to and arriving at his old address before being sent again to his new address (either by forwarding it on from that old address or after the letter had been returned to the post office and resent to the new address).

27. However, the finding at [112] was a finding that was open to the FTT on the evidence. Furthermore, even if the FTT has misinterpreted the evidence at [46] and there is an error in the FTT's finding at [112] that the Copy letter had been forwarded from the previous address before arriving in early August (thus supporting an inference the Copy letter arrived at the old address before the end of July), any such error would not be material.

28. The FTT concluded at [112] that: '*There is no evidence as to when the copy letter arrived at that previous address, when it was forwarded, whether it was simply readdressed and so travelled second class, or on what day in the first week of August it arrived at Mr de Mello's new location. There is thus no evidential basis for a finding of fact that his copy letter arrived at his original address after 31 July 2022*'. However, it did not make a finding that the Copy letter did arrive at the original address before the end of July.

29. At [112] the FTT did not rely on the Copy letter arriving at Mr De Mello's old address in late July in support of its finding that the Enquiry letter arrived before the end of July- it did not find that this might also support an inference that the Enquiry letter also arrived before the end of July. It would have been unwise to do so because even if the Copy letter arrived by the end of July it would not help greatly with finding with the Enquiry letter arrived by that time (it being unsafe to conclude that letters sent at the time from the same location to differing addresses, even if sent by the same class of post, would arrive at the same time). Instead, the FTT simply found that the evidence did not assist the Applicant in proving that the Enquiry letter was not delivered by 31 July 2022 (see [110]-[112]).

30. Furthermore, the FTT relied on other reasons for finding the Enquiry letter was deemed to have been delivered by 28 July 2022: these are all the reasons given in the Decision up to [95] when addressing the first three issues in the Decision. Therefore, any error in the finding of fact could not arguably assist the Applicant.

31. The final point relied upon by Mr Baig is that the FTT erred in deciding that the Enquiry letter would have been delivered in the ordinary course of post in the week commencing on Monday 25 July 2022 (and deemed delivered on 28 July 2022) following the postal disruptions in the week commencing 18 July 2022. He submits that the evidence was that the Royal Mail / Postal disruptions affected not simply post in the system in that week: the evidence was that disruptions would continue to occur for post entering the system in the weeks prior to and after 18 July 2022: therefore it was unsafe and an error to find that the letter would have been processed in the ordinary course of post on 25 July 2022 as there was evidence that the disruption to the postal service was likely to have continued in that week.

32. I reject this ground as unarguable. First, Mr Baig did not refer me to any written evidence of there being disruption to the postal service in the week commencing 25 July 2022 that the FTT failed to take into account. I have not been directed to nor seen any evidence from Royal Mail or the Post Office which says what the Applicant now relies upon and which was not considered by the FTT.

33. To the extent that the Applicant in his written submissions[1] relied upon a notice from Royal Mail which states "since 22 July 2022 we have also notified you of Disruptive Events

[1]In his written submissions the Applicant had argued:

> 'The Judge was presented with the following undisputed facts:
> i. A notice by Royal Mail dated 20 October 2022 [HB Page 394] which confirmed that:
> a. During the weeks commencing 4, 11 and 18 July, there were absences across operational staff due to illness at the levels last experienced during the pandemic. The increase in absences, which constituted a Disruptive Event, impacted Royal Mail's ability to deliver all mailing items. The absence levels reached 8%, resulting in approximately 10,400 employees being unable to work – the reasonable conclusion would have been that this must have caused a backlog and thus a further delay in addressing the backlog;
> and
> b. The notice continues to read that "since 22 July 2022 we have also notified you of Disruptive Events relating to extreme hot weather and industrial action" – the reasonable conclusion would have been that this combined with the absences referred to at a above must have caused a backlog and thus a longer delay in addressing the backlog;
> and
> c. The notice informs of further industrial action in August, September and October.
>
> ii. Another notice by Royal Mail dated 18 July 2022 [HB Page 396] confirmed that as a result of the red weather warning issued by the Met Office there would be disruptions on 18 and 19 July.
> iii. A notice by Royal Mail dated 5 July 2022 [HB Page 398] states that 2400 managers will work to rule during 15-19 July and 20-22 July. The Notice goes on to state that: "According to Unite, during the work to rule and strike action"
> a. Deliveries will not be covered
> b. Managers will take their breaks and start and finish on time
> c. Managers will be taking their rest days leaving units with no manger on site
> d. Weekends volunteer operation won't be covered
> e. Units will have no person in control responsible for safety of the staff and buildings
> f. Good will to work extra unpaid hours will cease
> g. Some key services, like next day delivery and tracked items, will be delayed
> h. Postal staff may refuse to cross picket lines or work in unmanaged buildings"
>
> 87. Any reasonable and fair-minded Tribunal would have arrived at the conclusion that the above would have caused a serious backlog of mail items; that this would have meant that service deliveries could not have resumed to the "ordinary course of post" in the week commencing 25 July as the Tribunal concludes at [7, 84, 85 and 90]; and that the mail items would have been delayed. This would have been the experience of any ordinary recipient of postal services.'

relating to extreme hot weather and industrial action" this cannot be reasonably construed as notice that there was disruption in the week commencing 25 July 2022. It is simply evidence that in the period between 22 July 2022 and the notice being issued on 20 October 2022, Royal Mail had notified users of other disruptive events. It was not positive evidence of disruption in the week commencing 25 July 2022 in contrast to the positive evidence that was contained in the notice regarding disruption in the weeks commencing 4, 11 and 18 July 2022.

34. Second, the FTT considered a range of evidence concerning the postal system between 18 and 28 July 2022 including factors having an effect on the ordinary course of post such as the effect of hot weather, postal staff sicknesses caused by the pandemic and industrial action on the processing and delivery of post - see [70]-[95].

35. It performed a detailed multifactorial assessment as to the extent of the disruption to the ordinary course of post and concluded at [84]-[85]:

> 84. However, by Monday 25 July, the position had changed: Royal Mail were again committing to deliver second class post by the normal time limits. There was no industrial action and no hot weather warning. For that week, therefore, there was again an "ordinary course of post", namely three working days for second class letters.
>
> **Application to AGN**
> 85. The Enquiry Letter was posted second class on 18 July 2022. There was no "ordinary course of post" between that date and 23 July 2022. It was still in the system on Monday 25 July 2022, when the ordinary course of post resumed. If the deeming provision applied, the Enquiry Letter would thus be deemed to be delivered in the normal course of post by 28 July 2022.

36. At [84] the FTT specifically found that Royal Mail were committing to deliver second class post by normal time limits by Monday 25 July and the Applicant has not pointed me to any evidence before the FTT that stated that disruptions were continuing in that week and which the FTT failed to take into account. The submission was a generalised assertion which does not satisfy the *Georgiou* criteria. The FTT was reasonably entitled to make the findings that it did on the evidence available to it.

37. I am therefore satisfied that there were no arguable errors of fact in the FTT's Decision. Irrespective of whether I would or would not have made the same findings of fact, these findings were available to the FTT to make on the evidence before it. I could not interfere with the findings on the simple basis that I disagreed with them. It is to be emphasised that findings are made on the balance of probabilities – what is more likely than not – so findings do not equate statements of truth or certainty.

38. Ultimately it was open to the Tribunal to make the findings on the evidence available to it and was not arguably unreasonable nor irrational for the FTT to make the findings. The findings were ones a properly directed Tribunal could reasonably make per *Edwards v Bairstow*. Further the FTT did not arguably fail to take into account any evidence nor make

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I have already rejected these submissions for the reasons given in my written decision refusing permission on the papers.

unreasonable inferences and any arguable mistakes in the findings of fact were not arguably material.

Conclusion

39. Permission to appeal is refused on all grounds because they do not hold realistic prospects of success.

Signed: **Judge Rupert Jones**	**Date: 16 December 2024**
Issued to the parties on:	