[2018] UKUT 0073 (TCC)

Appeal number: UT/2015/0134

INCOME TAX – whether notice of enquiry validly given – notice not given to taxpayer's usual or last known place of residence – copy notice sent to agent for information and acknowledged - whether agent authorised to accept notice – whether taxpayer estopped from asserting invalidity of enquiry – whether actual knowledge of enquiry by taxpayer sufficient notice

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

WILLIAM TINKLER

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Roger Berner
Judge Greg Sinfield

Sitting in public at Royal Courts of Justice, Strand, London, WC2A 2LL on 19 and 20 September 2017

Roger Thomas QC and Emma Pearce, counsel, instructed by One Legal, for the Appellant

Michael Jones, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. In 2012, the Respondents ('HMRC') issued a closure notice amending, or purporting to amend, Mr Tinkler's self-assessment tax return for 2003–04. Mr Tinkler appealed to the First-tier Tribunal (Tax Chamber) ('FTT') against the closure notice in 2013. In the course of preparing for the hearing of the appeal, Mr Tinkler was permitted to introduce a new ground of appeal, namely that HMRC had never validly opened an enquiry into Mr Tinkler's tax return for 2003-04 because HMRC had failed to give notice of their intention to enquire into the return to Mr Tinkler within the time allowed. Both parties accepted that if the enquiry had not been properly opened then any closure notice would not have been validly issued. The FTT directed that the question of whether the enquiry had been properly opened should be determined as a preliminary issue.

2. The FTT (Judge Mosedale) heard the preliminary issue on 14 and 15 December 2015. In a decision released on 9 March 2016 with neutral citation [2016] UKFTT 170 (TC) ('the Decision'), the FTT decided the preliminary issue in HMRC's favour. The detailed findings of the FTT are set out and discussed below. Save as otherwise indicated, paragraph references in square brackets in this decision are to the paragraphs in the Decision.

3. Mr Tinkler now appeals, with permission of this Tribunal, against the Decision and HMRC cross appeal by way of Respondents' Notice. For the reasons given below, we have concluded that HMRC's appeal is allowed and Mr Tinkler's appeal must be dismissed.

Factual background

4. So far as material to this appeal, the facts as agreed or found by the FTT are as follows.

5. In October 2003, Mr Tinkler rented a house in Heybridge Lane, Prestbury, Cheshire because he had business in the area. At the time, Mr Tinkler also lived with his wife and children in Great Asby, Cumbria. Between October 2003 and August 2004, Mr Tinkler stayed at Heybridge Lane at various times and received correspondence there including some letters from HMRC. In April 2004, Mr and Mrs Tinkler separated. Between April and August, Mr Tinkler stayed at Heybridge Lane approximately half the time. HMRC's self-assessment computer system showed Mr Tinkler's address for correspondence as the marital home in Great Asby until 24 July 2004 when it was changed, with effect from 28 April, to Heybridge Lane.

6. In August 2004, Mr Tinkler bought a property, Newby Grange, from his company. Newby Grange became and remained Mr Tinkler's home. Around this time, Mr Tinkler ceased to use Heybridge Lane although his lease did not expire until January 2005. Certain correspondence sent by HMRC to Mr Tinkler at Heybridge Lane in December 2004 was received by him. Mr Tinkler had an arrangement with the property agent for mail to be forwarded to him but that came to an end at some point before July 2005.

7. On 11 January 2005, Mr Tinkler signed an engagement letter, dated 10 January, with BDO Stoy Hayward ('BDO') appointing the firm as his "tax agent and adviser".

The letter included the following descriptions of the services to be provided by BDO to Mr Tinkler:

> "1.1 We will prepare your personal tax return together with all supporting schedules and check the Inland Revenue's calculation of your self-assessment tax.
>
> …
>
> 1.6 We will deal with the Inland Revenue regarding any amendments required to your return and prepare any amended returns which may be required.
>
> 1.7 We will deal with all communications relating to your return addressed to us by the Inland Revenue or passed to us by you.
>
> …
>
> 1.10 If work is required which is outside the scope of this letter, for example dealing with Inland Revenue enquiries into your tax return, then this will be a separate engagement for which additional fees will be chargeable."

8. The letter also asked Mr Tinkler to sign and return a form 64-8 authorising the Inland Revenue to send BDO copies of formal notices. The letter stated that the effect of signing the form was that:

> "In practice the Inland Revenue will treat this as authority to correspond with us, in which case they will not correspond with you except to the extent that they are formally required to do so. However, this authority does not apply to all Inland Revenue forms and notices. You should therefore always send us the originals or copies of all communications you receive from the Inland Revenue."

9. The form 64-8 contained the following statements:

> "3 What this authority means
>
> This authority allows us to exchange information about you with your agent, and to deal with them on any matters within the responsibility of the Inland Revenue.
>
> Once we have received your authority we will start sending letters and forms to your agent. But sometimes we need to send them to you as well as, or instead of, your agent. For the latest information on what forms we send automatically visit our website at [web address] …."

10. The relevant page on the website at the time stated as follows:

> "Enquiry forms
>
> HMRC has agreed with the professional bodies that where there is an 'enquiry', HMRC will correspond with the agent where one is authorised. The practical effect of the agreement is that while a formal notice of enquiry must be given to the client, correspondence can be addressed to the agent."

11. On 12 January 2005, BDO sent HMRC the form 64-8 in which Mr Tinkler authorised HMRC to correspond with BDO on his behalf. The form 64-8 gave Mr Tinkler's address as the address of a company in Appleby, Cumbria owned by Mr Tinkler. It was a business address and Mr Tinkler had never lived there. Mr Tinkler's self-assessment tax return for 2003-04 was filed at the end of January. It showed his address as care of the company in Appleby. On 24 February, HMRC changed Mr Tinkler's address on their system from Heybridge Lane to the Appleby address.

12. On 15 March 2005, Mr Tinkler wrote to HMRC to pay the tax shown as due on his return for 2003-04. The letter did not give any address. HMRC replied on 1 April in a letter addressed to Mr Tinkler at Appleby pointing out that he was liable to interest and penalties for late payment. HMRC wrote again to Mr Tinkler at Appleby on 3 May.

13. On 1 July 2005, without any request from Mr Tinkler or anyone on his behalf, HMRC changed his address on their system from Appleby to Heybridge Lane. On the same day, HMRC sent a letter to Mr Tinkler at Heybridge Lane. The letter stated that HMRC intended to enquire into Mr Tinkler's 2003-04 return and that the enquiry would cover 'Capital Gains and the W A Developments Ltd conditional share scheme'. The letter was received at Heybridge Lane but never forwarded to Mr Tinkler who, by then, no longer leased or lived at that address. HMRC also sent a copy of the letter to BDO with a covering letter which asked certain questions in relation to a Ukrainian property transaction. The covering letter commenced:

> "I enclose for your information a copy of the s9A TMA notice, which has today been issued to your client in respect of his return of income for the year ended 5 April 2004."

14. BDO acknowledged receipt of the copy of HMRC's letter to Mr Tinkler on 6 July 2005. In their letter to HMRC, BDO stated that the 2003-04 return should have included a transaction that had realised a loss and they would have amended the return to include the loss but they could not:

> "as the Return is now the subject of a s 9A TMA 1970 enquiry."

15. On 14 July 2005, HMRC sent a cheque for £43,138.29 repaid tax to Mr Tinkler at Heybridge Lane. The letter was never received by Mr Tinkler and the cheque was never cashed. BDO later chased HMRC for the repayment. HMRC cancelled the cheque and made the repayment of tax by BACS directly into Mr Tinkler's bank account.

16. In a letter to HMRC dated 24 November 2005, BDO provided the information requested about the Ukrainian property transaction. The FTT found that BDO probably liaised with Mr Tinkler's personal assistant ('PA') about the answers to the questions raised by HMRC in their letter of 1 July to BDO. The FTT inferred, from that and from contemporaneous notes written by an HMRC officer, that BDO had told Mr Tinkler and/or his PA of the HMRC enquiry into Mr Tinkler's 2003-04 return before BDO responded to HMRC about the Ukrainian property transaction in November 2005.

17. HMRC subsequently decided that Mr Tinkler was not entitled to the income tax loss of £2.5m he had claimed in his 2003-04 tax return and, on 30 August 2012, issued a closure notice that amended the return to reduce the loss claimed to nil. Mr Tinkler appealed to the FTT.

Legislative framework

18. The legislation relevant to this appeal can be stated quite shortly. At the material time, section 9A of the Taxes Management Act 1970 ('TMA 1970'), so far as is material, provided:

> "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) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the filing date;

(b) …"

19. Section 115(2) TMA 1970 provides:

> "115 Delivery and service of documents
>
> ...
>
> (2) Any notice or other document to be given … under the Taxes Acts may be served by post, and, if to be given … to … any person by the Board, by any officer of the Board, or by or on behalf of any body of Commissioners, 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, or
>
> (b) ..."

20. Section 7 of the Interpretation Act 1978 ('IA78') 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."

21. Mr Roger Thomas QC, who appeared with Ms Emma Pearce, for Mr Tinkler, observed that since section 9A does not require service of the notice of enquiry, it is section 115(2) which is relevant. In the case of an individual, the sub-section permits HMRC to give 'the notice or other document' by serving it addressed to the taxpayer 'at his usual or last known place of residence, or his place of business or his place of employment'.

The Decision

22. The preliminary issue for the FTT was whether HMRC had given valid notice of their intention to open an enquiry within the meaning of section 9A TMA. HMRC contended that they had given notice to Mr Tinkler by two methods, either of which was sufficient, namely by:

(1) posting the letter dated 1 July 2005 to Mr Tinkler at Heybridge Lane; and

(2) sending a copy of the letter dated 1 July 2005 to BDO.

23. HMRC also contended that if the notice had not been served by either or both of those two methods then Mr Tinkler was estopped from denying that the enquiry was validly opened.

24. Mr Tinkler did not accept that Heybridge Lane was his usual or last known place of residence on 1 July 2005. He also contended that, in order to be valid, the notice of enquiry must have been received by him.

25. The FTT held, at [71], that the notice of enquiry must be received by the taxpayer within the enquiry window to be effective and that, by section 115 (2) TMA and section 7 IA78, the taxpayer was deemed to have received the letter if it was sent to, among other places, his usual or last known place of residence if posted so as to arrive in the ordinary course of post at a time before the enquiry window closed. The FTT found that Heybridge Lane was not Mr Tinkler's usual place of residence in July 2005. The FTT then considered whether Heybridge Lane was, to HMRC's knowledge, Mr Tinkler's last known place of residence at the time the letter was sent. The FTT reviewed the correspondence between HMRC and Mr Tinkler and BDO before concluding that Heybridge Lane was not Mr Tinkler's last known place of residence.

26. The FTT then considered whether notice of the section 9A TMA 1970 enquiry had been validly given by means of the copy of the letter sent to BDO. The FTT held that notice of an enquiry to a taxpayer is validly given if it is received by an agent, provided that the agent had actual or apparent authority to receive notices on behalf of the principal. The FTT agreed that BDO was Mr Tinkler's agent and there was no dispute that BDO had received notice of HMRC's intention to open the enquiry but the FTT concluded that BDO had neither apparent authority nor actual authority to receive such notice on behalf of Mr Tinkler.

27. In relation to apparent (or ostensible) authority, ie what representations Mr Tinkler had made to HMRC about the extent of BDO's authority, the FTT concluded that while form 64-8, read on its own, gave an agent authority to receive notifications from HMRC on behalf of a taxpayer, the wording was qualified by a reference to content on HMRC's website which limited that authority and clearly implied that HMRC would give notice of an enquiry to the taxpayer and not to an agent. Accordingly, the FTT concluded that, so far as HMRC knew, BDO had no apparent authority to receive the notice of enquiry on behalf of Mr Tinkler.

28. In relation to actual authority, ie what authority Mr Tinkler had actually conferred on BDO, the FTT, relying on the wording of form 64-8 and the engagement letter between Mr Tinkler and BDO when read together, concluded that BDO did not have actual authority to receive notices of enquiry on behalf of Mr Tinkler.

29. The FTT then considered whether Mr Tinkler's PA was his agent for the purpose of receiving notice of an enquiry. As Mr Tinkler had made no representations to HMRC that his PA had any authority to receive notice of an enquiry, it was clear that she had no apparent authority to do so. The FTT was, however, satisfied that Mr Tinkler had given his PA extensive authority in respect of his tax affairs and that she had actual authority, as between her and Mr Tinkler but unbeknownst to HMRC, to receive notice of the enquiry. As stated above, the FTT found that BDO had told Mr Tinkler or his PA about the HMRC notice of enquiry no later than 24 November 2005 when BDO replied to HMRC's request for information about the Ukrainian property transaction. In either event, Mr Tinkler had actual knowledge of the enquiry before the relevant enquiry window closed in January 2006. Accordingly, the FTT found in favour of HMRC on the preliminary issue.

30. Even though it was not necessary to do so, the FTT considered whether, if HMRC had failed to notify him properly of the opening of the enquiry, Mr Tinkler was estopped from taking this point in his appeal. HMRC relied on the principle of estoppel by convention as described by the Court of Appeal in *Dixon & Anor v Blindley Heath*

Investments Ltd & Anor [2015] EWCA Civ 1023, [2017] 3 WLR 166 ('*Blindley Heath*') at [72] – [102]. From that case, the FTT identified four requirements that must be satisfied before a person can be estopped by conduct, namely:

(1) a shared, mistaken assumption;

(2) both parties must have acted on the assumption;

(3) the assumption must have been communicated between them; and

(4) it must be unconscionable to go back on that shared but mistaken assumption.

31. Unlike in *Blindley Heath*, HMRC sought to rely on the conduct of an agent, ie BDO, of one of the parties. Specifically, HMRC relied on the letter dated 6 July 2005, from BDO which acknowledged receipt of the notice of enquiry. The FTT concluded that, so far as HMRC were concerned, BDO had apparent authority to represent Mr Tinkler in the enquiry and its actions and beliefs were attributable to him. The FTT found that BDO and HMRC had a shared (but for this purpose assumed to be mistaken) assumption that there was a valid enquiry into Mr Tinkler's 2003-04 tax return and that, because BDO was Mr Tinkler's agent, BDO's actions and beliefs were to be attributed to Mr Tinkler. The FTT considered that the mistaken assumption had been communicated between HMRC and BDO in the acknowledgement of the letter dated 1 July 2005 and response to it in November 2005. The FTT also concluded that both parties acted on the assumption in that BDO did not amend the return because they believed there was an open enquiry and HMRC did not seek to re-issue the enquiry letter. Finally, the FTT held that it would be unconscionable for Mr Tinkler to go back on the shared mistaken assumption and deny that a valid enquiry had been opened by HMRC in 2005. On that basis, the FTT would have found for HMRC on the issue of estoppel by convention if it had been necessary to do so.

Grounds of appeal

32. In summary, Mr Tinkler disputes the FTT's conclusions on the two points that the FTT determined against him, namely that he had actual knowledge of the notice of enquiry either directly or through his PA and that he was estopped from denying that HMRC had validly opened an enquiry. HMRC submit that the FTT reached the correct conclusions on those points for the right reasons. In their Respondents' Notice, HMRC further contend that the FTT should also have held that BDO had apparent and/or actual authority to receive notice of an enquiry on behalf of Mr Tinkler and should have dismissed his appeal for that reason.

Discussion

Actual or apparent authority of BDO

33. For reasons that will become apparent, it is convenient first to consider HMRC's argument that the FTT was wrong to conclude that BDO had neither apparent nor actual authority to receive notice of an enquiry on behalf of Mr Tinkler. Mr Thomas said that the FTT was absolutely right on this point: BDO had no authority to receive notice of the enquiry as agent of Mr Tinkler.

34. There has never been any dispute that BDO received a copy of the notice of enquiry with a covering letter in July 2005. There is also no doubt that BDO was Mr Tinkler's agent: form 64-8 states "I Mr William Andrew Tinkler authorised BDO Stoy

Hayward LLP to act on my behalf in connection with any matters within the responsibility of the Inland Revenue." The issue for the FTT was whether BDO had authority to receive notice of the enquiry on behalf Mr Tinkler. The FTT accepted that the position was as stated in *Bowstead and Reynolds on Agency* (20th edition) ('*Bowstead*') at paragraph 8-204:

> "A notification given to an agent is effective as such if the agent receives it within the scope of his actual or apparent authority, whether or not it is subsequently transmitted to the principal, unless the person seeking to charge the principal with notice knew that the agent intended to conceal the notification from the principal."

35. The passage from *Bowstead* relied on what was said in *Tanham v Nicholson* (1872) LR 5 HL 561. The FTT also observed that it was consistent with the comments, albeit obiter, of Hoffman LJ, as he then was, in *El Ajou v Dollar Land Holdings Plc* [1994] 2 All E R 685 at 703:

> "…there are cases in which the agent has actual or ostensible authority to receive communications, … on behalf of the principal. In such cases, communication to the agent is communication to the principal."

36. We agree with the FTT in [107] that there is nothing in section 9A of the TMA that disapplies the normal rules of agency so as to require express authorisation by the taxpayer for the agent to receive a particular kind of notice. As the FTT stated, all that is required is actual or apparent authority for the agent to receive notices on behalf of the taxpayer in order for service of the section 9A notice on the agent to be service on the taxpayer. We do not agree, however, with the FTT's conclusion that BDO had neither apparent or actual authority to receive the notice of enquiry.

37. In relation to apparent authority, the FTT reached its conclusion based on its construction of the terms of Form 64-8 when read together with HMRC's website. We have set out above (at [9] and [10]) the material parts of the notes on the reverse of Form 64-8 and the relevant web page.

38. The FTT, in [116], said that the clear implication of the website was that HMRC would give notification of an enquiry to the taxpayer and not to the agent and, in [117], that the effect of the website must have been that agents would believe that direct notification of an enquiry would be given to their client by HMRC and that therefore they were under no obligation to inform their client of it. The FTT concluded, in [118], that the effect of the Form 64-8 stating that HMRC would inform the client direct of an enquiry meant that, so far as HMRC knew, the agent had no apparent authority to receive notices of enquiry.

39. We consider that the FTT misapplied the doctrine of apparent authority and misconstrued Form 64-8 in reaching its conclusion on this point. We agree with HMRC that apparent authority is conferred by the representations made by the *principal* to a third party about the scope of the agent's authority. This is made clear in the statement of the doctrine in *Bowstead* at paragraph 8-010:

> "Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such

> other person had the authority that he was represented to have, even though he had no such actual authority."

40. In paragraph 8-011 of *Bowstead*, the authors observe that the English version of the doctrine is plainly based on the notion of a representation by the principal. It follows, therefore, that, in considering the scope of BDO's apparent authority, what matters are the representations made by Mr Tinkler to HMRC and not the statements made by HMRC as to their future conduct in respect of the principal and the agent.

41. The representation made by Mr Tinkler, namely as to his authorisation of BDO to act on his behalf in the terms set out in Form 64-8, was in the widest possible terms. It stated that BDO was authorised to act on behalf of Mr Tinkler in connection with any matters within the responsibility of HMRC. The first note on the back of the form reinforced the general nature of the authorisation by stating that it allowed HMRC to exchange information about Mr Tinkler with BDO and to deal with them on any matters within HMRC's responsibility. The note relied on by the FTT is the second note on the back of the form which states that HMRC would sometimes need to send letters and forms to Mr Tinkler as well as, or instead of, BDO. On the website, HMRC say that where there is an 'enquiry', they will correspond with the agent where one is authorised. The FTT considered that the practical effect of the second note and the statement on the website is that the agent has no apparent authority to receive a formal notice of enquiry.

42. We do not consider that the note and web page go that far. The second note on Form 64-8 says only that HMRC sometimes need to send communications to the taxpayer as well as, or instead of, the agent without specifying what communications must be sent to the taxpayer and not to the agent. The website states that "formal notice of enquiry must be given to the client" but does not say that it cannot also be given to the client through the agent. That statement does not inhibit what happened in this case, namely that HMRC purported to send notice of an enquiry to Mr Tinkler, although it was never received by him, and successfully sent a copy of that notice, for information purposes, to BDO, the agent he had authorised.

43. Even if the relevant page on the website could be read as saying that notice of an enquiry must only be given to the client, that would amount to nothing more than a representation by HMRC to Mr Tinkler and BDO of what HMRC must do and says nothing about the extent of BDO's apparent authority as agent of Mr Tinkler. BDO's apparent authority is established and its scope defined as far as HMRC are aware by the wording of Form 64-8. As we have already said, the authorisation of BDO to act on Mr Tinkler's behalf in Form 64-8 was in the widest possible terms. It was given by Mr Tinkler to BDO in circumstances where it is plain, as a matter of law, that notices, including notice of an enquiry, may be given to taxpayers through their duly authorised agents. The authority must be taken therefore to include such lawful processes as the receipt of notice of enquiry as agent for the taxpayer, unless such authority is clearly excluded. There was no express exclusion in the Form 64-8 itself, and an exclusion cannot be inferred from the statements on the HMRC web page.

44. In light of our conclusion that BDO had apparent authority to receive notices of enquiry on behalf of Mr Tinkler, we can deal briefly with the FTT's conclusion, at [125], that BDO did not have actual authority. The FTT based its decision on its conclusion that Form 64-8 did not give BDO apparent authority to receive notices of enquiry and, as the engagement letter made the Form 64-8 part of the agreement between BDO and Mr Tinkler, that agreement did not confer actual authority on BDO.

As we have concluded that the Form 64-8 authorised BDO to receive notice of an enquiry, it follows that we consider, for the same reasons, that BDO also had actual authority.

Is notice of an enquiry through an agent valid notice to the taxpayer?

45. The next question that arises is whether the service of a copy of notice of an enquiry on a properly authorised agent is valid notice through the agent. The FTT quoted paragraphs 37 and 38 from the judgment of Lady Smith in the Court of Session in *R (oao Spring Salmon & Seafood Ltd) v HMRC* [2004] STC 444 ('*Spring Salmon*'):

> "37. … I do not, however, conclude that the fact that [the HMRC officer] appears to have had it in mind that the original notice was being sent to the petitioners with a copy of it being sent to the agents deprives the communication to the agents of having the character of valid intimation.
>
> 38. The petitioners' approach appeared to involve regarding the sending of the copy of the notice of enquiry to the agents as something other than effective notification because notice of enquiry had also been sent to the petitioners … I do not construe the statutory provisions as directing that one and only one notice of enquiry can be sent. … what was recorded [in a meeting between the parties] was agreement to the effect that, as regards intimation of any notice of enquiry, the petitioners would be content if it was sent to their agents. … Had the Revenue not sent a notice of enquiry to the petitioners, effective intimation of the notice to enquiry would, accordingly, have been achieved by sending the letter … to [the agents] enclosing a copy of the notice … it would follow that there had still been valid intimation by means of the notice of enquiry sent to [the agents] because of the nature of the parties' agreement."

46. We respectfully agree with Lady Smith that a copy of the notice of enquiry sent to an agent can be effective notification to the principal even where the copy is sent for information purposes and not explicitly by way of service. At [32], Lady Smith expressed the view, with which we also respectfully concur, that the intimation, or giving, of notice of an enquiry is not a step which calls for special formality, but rather "falls into the category of cases where it is recognised that the purpose of service of a notice is to see to it that the recipient [and, we would add, the principal if the recipient is a duly authorised agent] is informed." Accordingly, the fact that the copy notice to BDO was expressed to be for BDO's "information" is nothing to the point: any notice is for the purpose of providing information. In this case that information, that an enquiry had been opened, was provided to BDO in its own right and also, having regard to the apparent authority which BDO had to receive notices on behalf of Mr Tinkler, to Mr Tinkler through the agency of BDO.

47. Mr Thomas argued that *Spring Salmon* turned on the fact that there was a specific agreement between HMRC and the parties relating to service and that it was not a Form 64-8 case. We do not accept that there is any distinction between the agreement in *Spring Salmon* and Form 64-8. Both are agreements or authorisations concerning dealings with agents. There is nothing in Form 64-8, as we have construed it, or in section 9A of the TMA, that precludes the sending of a copy of a notification of an enquiry to BDO from being valid notification to Mr Tinkler and we see no reason in principle to make such a distinction.

Conclusions on actual or apparent authority of BDO

48. For those reasons, we agree with HMRC that they gave notification of their intention to open an enquiry to Mr Tinkler when they sent the copy of the letter dated 1 July 2005 to his agent, BDO. Accordingly, HMRC's appeal is allowed and Mr Tinkler's appeal must be dismissed.

Estoppel by convention

49. Although not necessary for our decision, we set out our views on the applicability of the principle of estoppel by convention because we heard argument on it and our conclusions differ from those of the FTT in some respects.

50. Before the FTT, HMRC submitted that, on the assumption that the letter of 1 July 2005 to BDO had not constituted notice to Mr Tinkler of HMRC's intention to open an enquiry, Mr Tinkler was in any event estopped from denying that the enquiry had been validly opened by the conduct of his agent, BDO. HMRC relied on BDO's acknowledgement, in the letter dated 6 July 2005, of receipt of the copy notice of enquiry and that there was an open enquiry. As described in [30] - [31] above, the FTT distilled the description of estoppel by convention provided by the Court of Appeal (Longmore, Jackson LJJ and Hildyard J) at [72] – [75] of the judgment in *Blindley Heath* into four elements that are required to establish estoppel by convention. The FTT then went on to find that all four elements were present in this case.

51. Mr Thomas did not accept that the FTT had accurately summarised, at [139] of its decision, what was said in *Blindley Heath* and *HMRC v Benchdollar Limited and Others* [2009] EWHC 1310 (Ch) ('*Benchdollar*'). Mr Michael Jones, who appeared for HMRC, submitted that the four requirements set out by the FTT at [139] were correctly derived from *Blindley Heath*.

52. Giving the judgment of the Court in *Blindley Heath*, Hildyard J described estoppel by convention in the following terms:

> "72. Estoppel by convention is a form of estoppel that was originally developed by the common law courts … Traditionally it was conceived as a rule of evidence that precluded the party estopped from leading evidence to rebut the recital or assumption. However, and especially since the decision of this court in *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84, its principles have largely been explained in equitable terms and expanded as another variant of equitable estoppel.
>
> 73. Estoppel by convention is not founded on a unilateral representation, but rather on mutually manifest conduct by the parties based on a common, but mistaken, assumption of law or fact: its basis is consensual. Its effect is to bind the parties to their shared, even though mistaken, understanding or assumption of the law or facts on which their rights are to be determined (as in the case of estoppel by representation) rather than to provide a cause of action (as in the case of promissory estoppel and proprietary estoppel) … If and when the common assumption is revealed to be mistaken the parties may nevertheless be estopped from departing from it for the purposes of regulating their rights inter se for so long as it would be unconscionable for the party seeking to repudiate the assumption to be permitted to do so …
>
> 74. The Judge began the relevant part of her Judgment by setting out the passage from Chitty on Contracts (31st ed.) para 3-107 where the editors

state that estoppel by convention arises when the parties have acted on an assumption:

> 'the assumption being either shared by both or made by one and acquiesced in by the other. The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any representation or promise. It can arise by virtue of a common assumption which was not induced by the party alleged to be estopped but which was based on a mistake spontaneously made by the party relying on it and acquiesced in by the other party.'

75. The Judge reminded herself that the parties must have conducted themselves on the basis of the shared assumption and that the shared assumption must have been communicated between them. It is not sufficient for one or (even) both parties to have acted on the assumption if there is no communication of that assumption, but she pointed out … that the necessary communication may be effected by the conduct of one party which is known to the other, provided that such conduct is

> 'very clear conduct crossing the line … of which the other party was fully cognisant.'

She might well have added that such communication could, a fortiori, be effected when both parties conduct themselves towards each other on the basis of the assumption. She further reminded herself that the estoppel could only operate if it was unconscionable for one or other party to seek to rely on the true position contrary to the parties' assumption."

53. At [91], Hildyard J referred to the summary of the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings by Briggs J (as he then was) in *Benchdollar* at [52]. That summary was as follows:

> "(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
>
> (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it.
>
> (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
>
> (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
>
> (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

54. In relation to the summary, the Court of Appeal's only comment was at [92]:

> "As to (i) above, we do not think there must be expression of accord: agreement to the assumption (rather than merely a coincidence of view, with both proceeding independently on the same false assumption) may be inferred from conduct, or even silence … However, something must be shown to have 'crossed the line' sufficient to manifest an assent to the assumption."

55. Briggs J's summary in *Benchdollar* was derived largely from the judgment of the Court of Appeal in *Keen and Anor v Holland* [1984] 1 WLR 251 ('*Keen v Holland*'). During the second day of the hearing, we asked whether that judgment might have a bearing on the application of the principle of estoppel by convention in this case. At [46] of *Benchdollar,* Briggs J said:

> "Much time was taken up with analysis of a passage from the judgment of Oliver LJ in *Keen v Holland* … The primary basis of the decision in that case was that it was not possible to avoid the protection afforded by the Agricultural Holdings Act 1948 either by contract, or by an alleged convention estoppel contained in a contract. Thus, Oliver LJ said [at 261]:
>
> > 'The terms of s 2(1) are mandatory once the factual situation therein described exists, as it does here, and it cannot, as we think, be overridden by an estoppel even assuming that otherwise the conditions for an estoppel exist … having regard to the purpose of the Act of 1948, it cannot be said to be unconscionable for the tenant who is protected by it to rely upon the protection which the statute specifically confers upon him.'
>
> It was common ground that no such protection is afforded by the Limitation Act 1980, the parties being free in effect to contract out of it, by substituting a longer or shorter limitation period for that provided by the Act."

56. During the hearing we put it to the parties that the ratio of *Keen v Holland* appeared to be that estoppel by convention cannot override the specific protection afforded by an Act of Parliament. We raised the question whether section 9A of the TMA might provide such protection. After considering the question, Mr Thomas indicated, and subsequently confirmed in writing, that his view was that the principle in *Keen v Holland* is not of material assistance in resolving this case. We take a different view. It seems to us that, like the Agricultural Holdings Act 1948 which was the subject of *Keen v Holland*, it not possible for HMRC and taxpayers to agree that the time limits in section 9A of the TMA shall not apply or should be extended. Immediately following the passage from *Keen v Holland* quoted by Briggs J above, Oliver LJ observed:

> "Once the protection attaches, the jurisdiction to grant possession is exercisable only subject to the statutory provisions and it is a little difficult to see how the parties can, by estoppel, confer on the court a jurisdiction which they could not confer by express agreement."

57. We consider that Oliver LJ's comments apply with equal force to section 9A of the TMA. This leads us to conclude that the principle of estoppel by convention does not operate to preclude a taxpayer from relying on the protection of the notice and limitation period provisions in section 9A. We do so for two reasons. The first is that the basis of the principle of estoppel by convention is that the parties agree to act on an assumed state of facts or law which is erroneous. Where there can be no agreement, there can be no estoppel by convention even if one or both parties operate under a mistaken assumption. HMRC and taxpayers cannot amend or disapply the provisions of section 9A by agreement and so to permit or require them to do so by estoppel by convention would be illogical when there is no conventional basis for such an estoppel. The second reason is that, even if we are wrong and the parties could modify the application of section 9A by agreement, we agree with Oliver LJ in *Keen v Holland* that it could not be said to be unconscionable for the taxpayer to choose to rely on the protection which the statute specifically confers upon him.

58. Our conclusion therefore is that, in light of the statutory protections conferred by section 9A of the TMA, no recourse may be had to estoppel by convention in this case. But in case we are wrong on that point, we turn to consider whether, on the facts of this case, the FTT was right to find that Mr Tinkler was estopped from denying that he had been notified of the opening of the enquiry.

59. The relevant principles are those derived from *Blindley Heath* and *Benchdollar*, to which we have referred above. Those principles have also been considered more recently by the Court of Appeal in *Stevensdrake Ltd v Hunt* [2017] EWCA Civ 1173 ('*Stevensdrake*'). That case concerned a claim for fees made by a firm of solicitors against a liquidator. The liquidator contended that he was only liable for the fees if a recovery was made out of which the fees could be paid. At first instance, the Judge had found for the liquidator both as a matter of contract and, alternatively, on the basis of estoppel by convention. The solicitors appealed. In the Court of Appeal, Hamblen LJ described the estoppel as follows:

> "60. As summarised in Chitty on Contracts (32nd edition) at 4-108:
>
> > 'Estoppel by convention may arise where both parties to a transaction "act on assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other." The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable (typically because the party claiming the benefit has been "materially influenced" by the common assumption) to allow them (or one of them) to go back on it.'
>
> 61. In considering this issue the Judge referred to the summary statements of the doctrine made by Lord Steyn in *Republic of India v India Steamship Co Ltd* [1988] AC 878 at 913E-F and the Court of Appeal in [*Blindley Heath*] at [72] - [73]. Both these cases are referred to in the footnote to the passage cited from *Chitty*, which is in broadly similar terms to Lord Steyn's summary."

Hamblen LJ held that, in adopting that approach, the Judge had directed himself appropriately in law.

60. Having reviewed the authorities, it appears to us that the FTT accurately summarised, at [139], the elements that must be established before estoppel by convention may arise. We turn now to examine the FTT's conclusions on whether the conditions for the application of the principle of estoppel by convention were met. In doing so we take as a necessary assumption that (contrary to the conclusion we have reached) the notification to BDO did not constitute notice of the enquiry to Mr Tinkler, and that the enquiry was accordingly invalid.

61. The first of the four conditions is that there must be a shared (mistaken) assumption. The FTT found, at [146], that BDO and HMRC had a shared assumption that there was a valid enquiry into Mr Tinkler's 2003-04 tax return and that, because BDO was Mr Tinkler's agent, BDO's assumption was to be attributed to Mr Tinkler. It seems clear that there was such an assumption. HMRC assumed that they had correctly given notice of the enquiry to Mr Tinkler (the alternative only has to be stated to be seen as not credible) and BDO's belief that there was an enquiry that had been opened can be seen from the letter from BDO, dated 6 July 2005, which acknowledged receipt of a copy of the notice of enquiry.

62. The third condition, which it is convenient to examine second, is that the assumption must have been communicated between the parties. The FTT considered that the mistaken assumption had been communicated between HMRC and BDO in BDO's acknowledgement of the letter dated 1 July 2005 and HMRC's response to it in November 2005. In our view, those responses do not meet this condition, as properly understood. As Briggs J made clear in *Benchdollar*, it is not enough that the parties share a common assumption. The second part of his summary makes clear that the party alleged to be estopped must have expressed the assumption in such a way that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it. At [94] of *Blindley Heath*, the Court of Appeal noted that the Judge in that case was apparently not referred to, and did not separately address, the requirement that the party alleged to be estopped may properly be said to have "assumed some element of responsibility" for the assumption but held that it did not matter in the particular circumstances of that case as all parties shared responsibility. That cannot be said, in our view, in this case. We consider that the FTT should have considered the extent to which Mr Tinkler, either alone or through his agent BDO, assumed some element of responsibility for the assumption that the enquiry had been validly opened, in the sense of conveying to HMRC an understanding that he expected them to rely on.

63. In our view the letter, dated 6 July 2005, from BDO and further communication in November 2005 do not show that BDO intended HMRC to rely on the correspondence as showing that the enquiry had been validly opened. The communications were simply in response to HMRC's letter of 1 July 2005 to BDO which enclosed the copy of the letter to Mr Tinkler. This seems to be accepted by Mr Jones in his skeleton argument where he says that BDO expressly stated to HMRC that they considered such an enquiry was open (in fact, the letter of 6 July says no more than "the Return is now the subject of a s 9A TMA 1970 enquiry") but then continues:

> "It is necessarily implicit in BDO's statement, and in the common assumption generally, that the enquiry was valid and had been opened in time since otherwise it could not be a s.9A enquiry."

64. We do not consider that an implied communication of an assumption is sufficient to meet this condition for the application of the principle of estoppel by convention. It seems to us that the correspondence between BDO and HMRC were entirely consistent with a shared common assumption which both Briggs J in *Benchdollar* and the Court of Appeal in *Blindley Heath* held was not enough. What BDO did was no more than assume that HMRC's assertion (which was itself based on HMRC's assumption as to the position) in the letter of 1 July 2005 to BDO that Mr Tinkler had been given notice of the opening of the enquiry was correct.

65. At [75] of Hildyard J's judgment in *Blindley Heath*, the Court of Appeal, in discussing the approach of the Judge below, set out what was required for there to be effective communication of a shared assumption by conduct. The Court held that such communication may be effected by the conduct of one party which is known to the other, provided that such conduct is very clear conduct crossing the line of which the other party was fully cognisant. It also said that such communication could be effected when both parties conduct themselves towards each other on the basis of the assumption. In our view, there is nothing in the FTT's findings that shows that there was "very clear conduct crossing the line" by Mr Tinkler or BDO that was intended to lead HMRC to assume that the enquiry had been validly opened. The nearest that the

FTT comes to making such a finding is when it concluded that BDO did not amend Mr Tinkler's return because they believed there was an open enquiry and HMRC did not seek to re-issue the enquiry letter because they believed it had been validly opened. In our view, those facts cannot be described as communication of a shared assumption that the enquiry had been validly opened by very clear conduct. They were not mutually agreed positions and are both equally consistent with a shared common assumption about the validity of the enquiry.

66. Nothing done by BDO can in our view be regarded as the conveying by that firm of an understanding as to the validity of the enquiry that BDO expected HMRC to rely on. In our judgment, where one party (in this case, HMRC) conveys its own understanding to another party (BDO, or Mr Tinkler through the agency of BDO), which that other party then relies upon, and conducts itself accordingly, that mere conduct, to the extent that it does not go beyond mere acquiescence or acceptance of the assumption communicated by the first party, cannot confer responsibility on the other party for the expression of the common assumption.

67. The fourth condition for the application of the estoppel is that it would be unconscionable for Mr Tinkler to rely on the true position contrary to the parties' assumption. The FTT held that it would be unconscionable for Mr Tinkler to go back on the shared mistaken assumption and deny that a valid enquiry had been opened by HMRC in 2005 because if BDO had not written to HMRC in the belief that there was a valid enquiry then HMRC's error in sending the notice of enquiry to the wrong address would probably have been put right within the time limit. We have already stated that, in our view, it would not be unconscionable for Mr Tinkler to rely on the protections provided by section 9A of the TMA for the reasons discussed in *Keen v Holland* (see above). Put simply, we doubt that reliance on a statutory protection can ever be described as unjust or unconscionable absent a deliberate attempt to induce the person alleging the estoppel to share or acquiesce in a mistaken assumption about the availability of the protection.

68. We should also mention that, in its discussion of estoppel by convention, the FTT referred to the fact that HMRC relied on certain comments by Lady Smith in *Spring Salmon*. We agree with Mr Thomas that the facts of that case were very different from the facts of this one. It is also, obviously, a Scottish case and Lady Smith was considering "personal bar" which, while it may be, as HMRC contended, the equivalent of estoppel by convention, is not necessarily on all fours with it. Also, as the FTT noted, Lady Smith's remarks were obiter as she had already decided the case in HMRC's favour on other grounds. Accordingly, we do not consider that *Spring Salmon* provides any assistance when considering estoppel by convention in this case.

Whether knowledge of the taxpayer of the enquiry is itself valid notice of it

69. Given our conclusion that BDO was authorised to accept notice of the enquiry, we can address Mr Tinkler's remaining ground of appeal, which only arises if we are wrong on that point, quite briefly. Mr Thomas contended that the FTT was wrong to conclude that Mr Tinkler had actual knowledge of the notice of enquiry either directly or through his PA as a result of BDO informing either or both of them about the enquiry no later than 24 November 2005. Mr Jones argued that it is sufficient if Mr Tinkler was told about the enquiry within the relevant time frame as nothing in section 9A of the TMA says that the notice must be in any particular form. Mr Jones speculated that HMRC could give good notice of an intention to open an enquiry by using an aeroplane to write

it in the sky provided they could show that the taxpayer had seen it (it might raise other issues about HMRC's obligation of confidentiality under the Commissioners for Revenue and Customs Act 2005).

70. We do not accept those submissions. We agree instead with Mr Thomas that section 9A of the TMA is prescriptive in that it requires HMRC to give the notice of an intention to open an enquiry to the taxpayer (or his properly authorised agent). Mr Thomas was also correct to say that it is section 115(2) of the TMA that is relevant. In the case of an individual, that sub-section permits HMRC to give 'the notice or other document' by serving it by post addressed to the taxpayer 'at his usual or last known place of residence, or his place of business or his place of employment'. It follows from section 7 IA78 that if the notice is not properly addressed then the notice does not become properly served simply because someone forwarded it to the intended recipient or the intended recipient learns of it from some source.

71. Accordingly, we consider that the FTT was wrong to conclude, at [134], that valid notice under section 9A was given when, as the FTT found, BDO told either Mr Tinkler or his PA of the notification of the enquiry before the enquiry window closed. It follows from our conclusion on this point that it is not necessary for us to consider whether Mr Tinkler's PA was his agent. There was no evidence to suggest that, whether or not she was Mr Tinkler's agent, Mr Tinkler's PA actually received the notice from HMRC and, in our view, it could not be enough that she was told by BDO that there was an enquiry.

72. Similarly, we do not need to consider the findings of fact in relation to the role of Mr Tinkler's PA, nor do we need to consider the burden of proof as it is irrelevant whether BDO, having received the notice as Mr Tinkler's agent, and notice having thereby been given to Mr Tinkler, told Mr Tinkler or his PA about the enquiry. Furthermore, even if, contrary to our conclusion, BDO was not Mr Tinkler's agent for the purpose of receiving notice of the enquiry, then those matters would still be irrelevant as HMRC would not have given the notice to Mr Tinkler or his agent, and neither the mere forwarding of the notice, nor Mr Tinkler's knowledge of it, whether personally or through the agency of his PA (if one were found) could constitute valid notification.

Disposition

73. For the reasons given above, HMRC's appeal against the Decision is allowed and Mr Tinkler's appeal must be dismissed. As the Decision determined a preliminary issue and other issues in the appeal before the FTT remain to be determined, we remit the case to the FTT for a hearing of the substantive appeal.

Costs

74. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Judge Roger Berner
Judge Greg Sinfield

Release date: 13 March 2018