Neutral Citation Number: [2019] EWCA Civ 1392

Case No: A3/2018/1260

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
JUDGE BERNER AND JUDGE SINFIELD
Appeal number UT/2015/0134

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before :

LORD JUSTICE MCCOMBE
LORD JUSTICE HAMBLEN
and
SIR BERNARD RIX

- -

Between :

WILLIAM ANDREW TINKLER	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

- -
- -

Roger Thomas QC and Emma Pearce (instructed by **One Legal**) for the **Appellant**
Michael Jones (instructed by **the General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing date : 16 & 17 July 2019

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Approved Judgment

Lord Justice Hamblen :

Introduction

1. This appeal concerns whether the Respondents ("HMRC") gave a valid notice of enquiry under s.9A of the Taxes Management Act 1970 ("TMA 1970") to the Appellant, Mr Tinkler, of their intention to enquire into his 03/04 self-assessment tax return ("the Return").

2. HMRC contend that valid notice was given by sending a copy of the notice to Mr Tinkler to his accountants, BDO Stoy Hayward LLP ("BDO"). The Upper Tribunal ("UT") found for HMRC on this issue, reversing the decision of the FTT on this point. Mr Tinkler appeals from that decision.

3. Alternatively, HMRC contend that, if no valid notice was given, Mr Tinkler is estopped by convention from contending otherwise. The UT found against HMRC on this issue, reversing the decision of the FTT on this point. HMRC cross-appeal from that decision by Respondent's Notice.

The legal framework

4. Section 9A TMA 1970 relevantly provides:

> "**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;
>
> …
>
> (3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act."

5. In the present case, in order to enquire into the Return HMRC had until 31 January 2006 to give a notice of enquiry under s.9A.

6. Section 115 TMA 1970 sets out how a notice of enquiry may be given:

> "**S115 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.
>
> (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if so given, sent, served or delivered to or on 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…"

7. The parties were agreed that notice could be given if it was sent to Mr Tinkler's usual or last known place of residence. HMRC purported to do so by sending the notice to Mr Tinkler at an address at Heybridge Lane, Cheshire ("Heybridge Lane"). The FTT found that this was not his usual or last known place of residence and that he never received the notice. This is no longer in issue.

Factual background

8. On 11 January 2005, Mr Tinkler signed an engagement letter ("the Engagement Letter") with BDO, appointing the firm as his "tax agent and adviser".

9. The Engagement Letter asked Mr Tinkler to sign and return a form published by HMRC, Form 64-8, which authorised HMRC (then the Inland Revenue) to communicate with BDO in certain circumstances regarding Mr Tinkler's tax affairs.

10. On 12 January 2005, BDO sent Mr Tinkler's completed Form 64-8 to HMRC. The Form 64-8 gave Mr Tinkler's address as Station Road, Appleby, Cumbria ("Station Road").

11. On 31 January 2005, the Return was provided to HMRC. The Return showed Mr Tinkler's address as c/o WA Developments Int Ltd at the Station Road address.

12. On 1 July 2005, Mr Tinkler's address on HMRC's system was changed from Station Road to Heybridge Lane. The FTT found as follows in relation to this change of address:

> "31. There was no evidence why this change was made but it is I find more likely than not that it was a change made or requested by Mr Mackay, as on the same day Mr Mackay opened or purported to open an enquiry into Mr Tinkler's return for tax year 2003/4. I also find it most likely Mr Mackay amended the TBS without any notification from Mr Tinkler or anyone acting on his behalf: as Heybridge Lane had ceased to be a residence of Mr Tinkler nearly a year before and even the lease had expired six months before, it is most unlikely anyone would give notification to HMRC that Heybridge Lane was still Mr Tinkler's address.

> 32. ….I accept the appellant's case that the change to the TBS system was made by Mr Mackay without any notification from, or discussions with, Mr Tinkler or anyone on his behalf".

13. By a letter dated 1 July 2005 ("the Letter") addressed to Mr Tinkler at Heybridge Lane, HMRC wrote purporting to inform Mr Tinkler that they "intended enquiring into" the Return. The letter was headed as a "Notice Under S9A Taxes Management Act 1970". The officer stated that he was copying the letter to "your accountants BDO Stoy Hayward". The FTT found that the letter arrived at Heybridge Lane, but that Mr Tinkler did not receive it because it was not forwarded on to him.

14. By a further letter dated 1 July 2005 ("the BDO Letter"), HMRC wrote to BDO stating that "I enclose for your information a copy of the S9A TMA 1970 notice, which has today been issued to your client" in respect of the Return. It attached a copy of the Letter, the version of which before the Court had the address crossed out and "Copy" written in manuscript. It also raised some questions about Capital Gains.

15. On 6 July 2005, BDO responded by letter and acknowledged receipt of the BDO Letter advising of HMRC's intention to enquire into the Return. The letter stated that BDO would respond to the questions raised in relation to Capital Gains in due course. It also referred to a Gilt Strip loss which had mistakenly not been included in the Return, but pointed out that the Return could not be amended "as the Return is now the subject of a s9A TMA 1970 enquiry". A repayment was nevertheless sought in relation to the loss.

16. HMRC responded by letter dated 12 July 2005, noting the Gilt Strip loss claimed but saying that "no repayment will be made until after the enquiry is concluded".

17. HMRC chased the Capital Gains information requested by letter and by telephone and the request was responded to by a letter from BDO on 24 November 2005.

18. On 30 August 2012, HMRC issued a Closure Notice to Mr Tinkler in respect of the Return, purporting to amend the Return and to disallow certain losses claimed by Mr Tinkler. Mr Tinkler appealed to the FTT.

19. In addition to the arguments made in respect of his substantive appeal, Mr Tinkler contended that there was a preliminary issue determinative of that appeal, namely that HMRC had failed to give him a valid notice of enquiry and that the Closure Notice and its conclusions were therefore also invalid. The FTT directed that this preliminary issue be heard separately, followed (if necessary) by the substantive appeal.

The tribunal decisions

20. Following a hearing on 14-15 December 2015, in a decision promulgated on 9 March 2016, the FTT reached the following conclusions material to the appeal:

    (1) Notice of enquiry to a taxpayer is validly given if received by his agent, provided that the agent has actual or apparent authority to receive notices on behalf of the principal.

(2) BDO did not have apparent or actual authority to receive a notice of enquiry on Mr Tinkler's behalf.

(3) An estoppel by convention had arisen which prevented Mr Tinkler from arguing the preliminary issue and it would be unconscionable for Mr Tinkler to go back on the shared mistaken assumption and deny that HMRC had opened a valid enquiry.

21. Mr Tinkler appealed to the UT in relation to conclusions (1) and (3). HMRC issued a Respondent's Notice in relation to conclusion (2).

22. The UT upheld the FTT's conclusion (1), but otherwise reached different conclusions. The result was that the decision of the FTT was upheld on the sole ground that notice of enquiry had been received by Mr Tinkler's duly authorised agent, BDO.

23. The UT gave Mr Tinkler permission to appeal against its decision. HMRC has issued a Respondent's Notice seeking, if necessary, to uphold the decision on the grounds that the UT should have held that there was an estoppel by convention, as the FTT had found.

The issues on the appeal

24. The issues are:

(1) Whether valid notice of a s.9A enquiry was given by the copy notice sent to BDO in the BDO Letter – Issue (1).

(2) If not, whether Mr Tinkler is estopped by convention from denying that HMRC had opened a valid enquiry – Issue (2).

Whether valid notice of a s.9A enquiry was given by the copy notice sent to BDO in the BDO Letter.

25. Mr Tinkler disputes that valid notice was given on three grounds:

(1) BDO did not have actual or apparent authority to receive a notice of enquiry on Mr Tinkler's behalf – ground (i).

(2) Even if BDO had such authority, notice under s.9A must be given to the "taxpayer" and cannot be given to an agent, absent an express agreement with HMRC – ground (ii).

(3) Even if notice could be given to an authorised agent, notice was not validly given as the copy notice provided to BDO for information purposes did not purport to be and was not a s.9A notice – ground (iii).

26. I shall address ground (i) and the issue of authority first.

27. The Engagement Letter included the following description 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."

28. The Engagement Letter included a specific paragraph which addressed dealing with the Inland Revenue, the Form 64-8 and Inland Revenue forms and notices as follows:

> "**4 Dealing with the Inland Revenue**
> Please sign and return the enclosed Revenue form 64-8, which authorises the Inland Revenue to send us copies of formal notices and will enable us to access your statement of account on line. 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."

29. Form 64-8, which can be downloaded online, is headed "Authorising your agent". At the top of the form it is said that the notes on the back should be read before completing the form. On the front of the form it provides that the agent is authorised "to act on my behalf in connection with any matters within the responsibility of the Inland Revenue". The back of the form contains 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 www.inlandrevenue.gov.uk/sa/agentlist.htm or contact any Inland Revenue office…"

30. At that time the relevant page of the website to which the link took the taxpayer was headed "Self Assessment: The forms we send to agents". It then listed various forms. Following that list it stated as follows:

> "**Enquiry forms**
>
> The Inland Revenue has agreed with the professional bodies that where there is an 'enquiry', the Inland Revenue 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."

31. The FTT held that the Form 64-8 set out BDO's apparent authority. Although it gave the agent very wide authority, allowing HMRC to deal with the agent "on any matters within the responsibility of" HMRC, this was qualified by the reference to forms which need to be sent to the taxpayer and by the linked website page, the content of which must be read as part of the Form 64-8. Construing the documents as a whole, the FTT concluded as follows:

> "116. The clear implication of the website is that HMRC would give notification of an enquiry to the taxpayer and not to the agent. The form 64-8 therefore did not give apparent authority for the agent to receive notification of an enquiry from HMRC because HMRC had said, in something that must be treated as part of the 64-8, that they would not give notice to the agent.
>
> 117. 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. Whereas, had that qualification not been made on the website, the agent receiving notification of the enquiry would have no reason to believe that their client had been informed direct by HMRC and they ought to know that they themselves ought pass on the information.
>
> 118. If I were to ignore what the website said, and treat BDO as an agent authorised by the 64-8 to receive notice of an enquiry, that would put taxpayers in an unfair position: HMRC could give valid notice of the enquiry to the taxpayer's agent and not to the taxpayer, while at the same time (by the wording on the website) effectively represent to the agent that there was no need for the agent to inform their client of the enquiry because HMRC would have done so direct. That is not right: the effect of the 64-8 saying 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".

32. The UT disagreed with this conclusion. It held that the note on Form 64-8 in relation to forms and the linked website page did not qualify the general authority conferred in relation to "any matters within the responsibility of" HMRC, which would include the receipt of letters, forms and notices of enquiry. The UT also held that:

> "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…."

33. On behalf of Mr Tinkler, Mr Roger Thomas QC supports the reasoning and decision of the FTT, and submits, in particular, that:

(1) The UT erred in failing to consider the framework within which Form 64-8 was executed by Mr Tinkler and sent to HMRC in deciding what representation was made by the form.

(2) Anyone who executed that form should have been aware of the contextual limitations imposed by HMRC themselves on the appointment of an agent to deal with matters on the taxpayer's behalf, namely that a formal notice of enquiry was a document which *had* to be sent to the taxpayer and *not* to the taxpayer's agent.

(3) One would not, simply by signing and returning a Form 64-8, appoint one's tax adviser as agent to receive a formal notice of enquiry under s.9A, because such documents would not and could not be served on the agent.

(4) If the creator of the form (HMRC) explains to those who are to use the form that they will not send notices of enquiry to the agent appointed, the form cannot be properly understood as a means of notifying the creator that, notwithstanding that, the agent appointed is authorised to receive such notices.

34. Mr Michael Jones for HMRC supports the reasoning and decision of the UT and submits, in particular, that:

(1) Mr Tinkler's reliance on the guidance notes and website is misplaced and that there is nothing in the material on which he relies which cut down or qualified the breadth of the statement made by Mr Tinkler to HMRC that BDO was authorised to act on his behalf "in connection with any matters within the responsibility of" HMRC.

(2) Since apparent authority is a legal relationship between the principal and the third party which is created by a representation made by the principal to the third party about the scope of the agent's authority, what matters are the representations as to BDO's authority made by Mr Tinkler to HMRC, not the statements made by HMRC in the notes to the Form 64-8.

(3) The statement relied on by Mr Tinkler as cutting down the scope of BDO's apparent authority does not support his argument as it does not say that a notice of enquiry would *only* be sent to the taxpayer personally and not to his authorised agent.

(4) As this case itself shows, HMRC do in fact send notices of enquiry to both the taxpayer and his agent. HMRC would not do that if it was not considered to be within the scope of the Form 64-8 authority.

35. It is common ground between the parties that the extent of BDO's apparent authority depends on the proper interpretation of Form 64-8. This was the relevant document crossing the line between Mr Tinkler and HMRC which addressed the issue of BDO's authority.

36. Form 64-8 needs to be interpreted in context and I shall assume in HMRC's favour that this includes the fact that it is legally possible for a notice of enquiry to be validly given to an authorised agent of the taxpayer, even without an express agreement with the HMRC (ground (ii)).

37. Form 64-8 is HMRC's own form and its terms are determined by HMRC. It sets out the terms upon which it is agreed that HMRC will be able to deal with the taxpayer's agent. By so agreeing, the taxpayer is necessarily representing that his agent has corresponding authority to deal with HMRC. The authority represented matches or mirrors the terms upon which it is agreed that HMRC may deal with the agent.

38. It is correct that Form 64-8 allows HMRC to deal with the agent "on any matters within the responsibility" of HMRC. I accept that that wording is wide enough to cover the receipt of forms on behalf of the taxpayer.

39. Form 64-8 must, however, be interpreted as a whole and all parts of it considered. It includes a specific section dealing with the sending of forms to agents which states in terms that some forms "need" to be sent to the taxpayer "instead" of the agent. That is contained in a paragraph which immediately follows a statement of the general authority conferred and under the general heading: "What this authority means". Reading those paragraphs together, what this "means" in terms of authority conferred is that it does not extend to the specific case of forms which have to be sent to the taxpayer "instead" of the agent. HMRC is not seeking to be allowed to send those forms to the agents, and equally no matching representation is being made of the agent's authority to receive such forms.

40. As to the forms that will be sent to the taxpayer "instead" of the agent, these are identified in the linked website page which must be regarded as being incorporated by reference into Form 64-8. That website page lists a number of forms which HMRC "send to agents". It then includes a specific paragraph dealing with "Enquiry Forms". This refers to an agreement reached with professional bodies that in relation to an

enquiry HMRC will correspond with the agent, but that the "formal notice of enquiry" "must" be given to the taxpayer rather than the agent.

41. Interpreting Form 64-8 together with the linked website page, HMRC are acknowledging that a "formal notice of enquiry" is a form which "must" be sent to the taxpayer "instead" of the agent and that the authority to deal with the agent is limited to correspondence in relation to such enquiries, reflecting an agreement made with professional bodies.

42. In my judgment this is a clearly expressed limitation on the general authority being sought by HMRC and the corresponding represented authority of the agent. This is, moreover, a matter of deliberate decision in the light of the agreement made between HMRC and professional bodies.

43. It is also understandable that there should be such a limitation. The giving of a notice of enquiry is an important step with serious and immediate consequences. The tax return can no longer be amended and the taxpayer's liability for the year in question will not be settled until the enquiry is closed which may, as in this case, take years. It is also a notice which has to be given within a specified time limit. It is therefore unsurprising that HMRC should refer to it as a "formal notice of enquiry" and treat it differently to other forms and pursuant to a specific regime agreed with professional bodies.

44. I accordingly agree with the FTT that Form 64-8 did not give BDO apparent authority to receive a notice of enquiry on Mr Tinkler's behalf.

45. I also accept Mr Thomas QC's further submission that HMRC did not in any event rely on BDO having such authority. HMRC acted in accordance with the stated position in Form 64-8 and the accompanying website page. The "formal notice of enquiry" was purportedly sent to Mr Tinkler. No such notice was sent to BDO. BDO received a copy of the notice sent to Mr Tinkler for information purposes. Whether or not it is capable of amounting to the giving of a notice under s.9A (ground (iii)), it did not purport to be a notice. Unlike the notice to Mr Tinkler, it was not headed as a s.9A notice; it refers to the notice "which has today been issued to your client"; it states that the copy notice is enclosed "for information", and it makes no request for the notice or information of it to be passed on to Mr Tinkler.

46. It is a requirement of the doctrine of apparent authority that the third party relies on the representation of authority which has been made. As set out in the definition of apparent authority in Article 72 at 8-022 of *Bowstead & Reynolds on Agency* (21st edition), the third party has to deal with the agent "on the faith of" the representation made. This is discussed further at 8-024 by reference to the cases there cited. As stated at 8-024(2) – "The third party must have relied on the representation".

47. For all these reasons, and those given by the FTT, HMRC are unable to establish that BDO had apparent authority to receive a s.9A notice.

48. As to actual authority, both the FTT and the UT regarded this as turning on the same issue as apparent authority and the proper interpretation of the Form 64-8. In my judgment they were correct so to do.

49. The Letter of Engagement contained a specific paragraph 4 addressing dealings with HMRC and formal notices. It requested Mr Tinkler to sign and return the Form 64-8. It summarised the effect of the Form 64-8, explaining that it enabled HMRC to correspond with BDO rather than Mr Tinkler. It also set out limitations on the authority conferred, and specifically that such authority "does not apply to all Inland Revenue forms and notices" and that some would be sent only to Mr Tinkler and that he should then send BDO all such communications. I agree with the FTT that the effect of this paragraph and the signing of the Form 64-8 was to confer authority on BDO to deal with the HMRC in accordance with the terms of the Form 64-8. It provided the matching or mirroring authority on BDO to the terms upon which it was agreed that HMRC could deal with the agent by the Form 64-8. It was therefore subject to the same limitations, including a lack of authority to receive a s.9A notice of enquiry on Mr Tinkler's behalf.

50. Mr Jones sought to place reliance on the wording of paragraph 1.7 of the Engagement Letter whereby BDO was to "deal with all communications relating to your return addressed to us by the Inland Revenue". He submitted that it was difficult to envisage what else might be covered by this paragraph other than an enquiry. There are, however, informal communications about a return that may be made without any enquiry being opened. There are also communications which may follow once an enquiry has been opened. The specific issue of authority in dealings with HMRC and of formal notices is addressed in and governed by paragraph 4, rather than this general provision.

51. In conclusion, BDO had neither actual nor apparent authority to receive a s.9A notice on behalf of Mr Tinkler and the UT erred in concluding otherwise. This means that the copy notice enclosed with the BDO letter was not effective as a s.9A notice. Given that no s.9A notice was validly sent to Mr Tinkler, and that he never received such a notice, it follows that no valid s.9A notice was given in this case.

52. In these circumstances it is not necessary to address Mr Tinkler's further grounds (ii) and (iii). The appeal must accordingly succeed unless HMRC can establish that Mr Tinkler is estopped by convention from denying that a valid enquiry was opened and that the UT erred in concluding otherwise.

Whether Mr Tinkler is estopped by convention from denying that HMRC had opened a valid enquiry.

53. 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."

54. The parties were agreed that the principles governing estoppel by convention arising out of non-contractual dealings are conveniently summarised in the judgment of

Briggs J in *HMRC v Benchdollar Limited and Ors* [2009] EWHC 1310 (Ch), [2010] 1 All ER 174 at [52]. This summary was approved by the Court of Appeal in *Blindley Heath Investments Ltd & Anor v Bass* [2015] EWCA Civ 1023, [2017] Ch 389 at [91], subject to one qualification explained at [92]. If that qualification is made to the first paragraph of the summary, the amended summary is as follows:

> (1) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. The assumption must be shown to have crossed the line in a manner sufficient to manifest an assent to the assumption.
>
> (2) 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.
>
> (3) 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.
>
> (4) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
>
> (5) 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.

55. In relation to the requirement of injustice or unconscionability, in *Benchdollar* at [44] Briggs J found that "valuable guidance" was to be found in the following passage in the judgment of Dixon J in the High Court of Australia in *Grundt v. The Great Boulder Proprietary Goldmines Ltd* (1937) 59 CLR 641 at 675-6:

> "Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it. But the law does not leave such a question of fairness or justice at large. It defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied. A brief statement of the recognised grounds of preclusion is contained in the reasons I gave in Thompson v. Palmer (1933) 49 CLR at page 547, and it is convenient to repeat it: - "whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual and other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct, …; or because

> knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption.""

56. The argument that there was an estoppel by convention was not raised in advance of the FTT hearing. The argument formed no part of HMRC's case to the FTT nor of their Skeleton Argument, it being raised for the first time in counsel's closing submissions. HMRC failed to call any officer who had been involved either in the sending of the original letter or in subsequent conversations with BDO. Instead, HMRC sought to rely on the documents before the FTT and the cross-examination of Mr Tinkler. This is unsatisfactory. It is always important that the precise nature of an alleged estoppel and of the factual circumstances giving rise to it are clearly articulated. It is also generally desirable that the parties should have a proper advance opportunity to consider any such case and the need for evidence.

57. The FTT found as follows:

(1) There was a shared, mistaken assumption that there was a valid tax enquiry afoot into the Return.

(2) That assumption was communicated by BDO acknowledging the enquiry in its letter of 6 July 2005; the phone calls between HMRC and BDO in November 2005 following up HMRC's chasers for the requested Capital Gains information, and BDO's provision of that information in its letter of 24 November 2005.

(3) BDO acted on the assumption by failing to make a claim which could not be made during an open enquiry and writing in November 2005 with answers to the questions raised by HMRC. HMRC acted on the assumption by pursuing their information requests and not seeking to re-issue the notice of enquiry.

(4) If BDO had not responded to the BDO Letter HMRC would have pursued the matter and this "may well" have led to Mr Tinkler being informed that there was an open enquiry within the enquiry time window, although this "is of course speculative". HMRC's responsibility for the mistake was not relevant and "if BDO had not written to HMRC in the belief that there was a valid enquiry afoot" then it is "more likely than not that HMRC's original error in sending the notice to the wrong address would have been put right". In those circumstances it would be unconscionable for Mr Tinkler to go back on the assumption.

58. The UT held that as a matter of law it is not possible to contract out of the statutory protections conferred by s.9A TMA 1970 and that therefore no recourse could be had to estoppel by convention. Reliance was placed on *Keen and Anor v Holland* [1984] 1 WLR 251 which was said to be analogous.

59. The UT also held that the conditions for establishing an estoppel by convention had not been made out and that the FTT had erred in concluding otherwise. In particular, the UT found that there had been no expression of the common assumption by BDO

"such that he (Mr Tinkler) 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". In relation to that issue the UT found that:

(1) "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."

(2) "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."

(3) "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".

(4) "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."

60. The UT also found that the requirement of unconscionability had not been made out.

61. In support of the UT's factual conclusion Mr Thomas QC submits, in particular, that:

(1) The UT was correct to conclude (i) that it was necessary for the party allegedly estopped to have expressed the assumption in such a way that he might be said to

have assumed some element of responsibility for it; (ii) that, on the facts of this case, there was no such assumption of responsibility; and (iii) that in this case there was an absence of the "very clear conduct crossing the line" required for effective communication of a shared assumption by conduct.

(2) The UT was correct to find that it is not unconscionable for Mr Tinkler to rely on the true position (i.e. that no valid notice of enquiry was given) contrary to the parties' assumption. HMRC's argument amounts to this: that if a taxpayer or his agent is misled into assuming the validity of a state of affairs by an assertion made by an officer of HMRC, the taxpayer is responsible for failing to disabuse the Commissioners of the truth of their own assertion, even though he has no knowledge of the reason why the Commissioners' assertion is incorrect.

62. In challenging the UT's factual decision and supporting the FTT decision Mr Jones submits, in particular, that:

(1) Contrary to the conclusions of the UT, BDO did more than assume that HMRC's position that an enquiry had been opened was correct. They expressly communicated to HMRC in their letter of 6 July 2005 that they considered that Mr Tinkler's 03/04 tax return was "now the subject of a s.9A TMA 1970 enquiry". The enquiry was also mentioned in an exchange of phone calls between BDO and HMRC in October 2005, and in November 2005 BDO addressed HMRC's information request which accompanied the enquiry letter.

(2) These communications amounted to outward expressions by BDO to HMRC conveying that they shared HMRC's understanding that an enquiry was validly opened. BDO had responsibility for those expressions, and thus the shared assumption, having freely made them to HMRC. Nothing more is required to satisfy the requirement that the assumption be communicated between the parties and the UT erred in concluding otherwise.

(3) The unconscionability in this case lay not in Mr Tinkler seeking to rely on the requirements of s.9A but in his seeking to deny that those requirements had been met by HMRC in circumstances where:

(i) his authorised agents had not only acknowledged the enquiry to HMRC, but then proceeded to participate in it until its conclusion; and

(ii) as the FTT found, but for BDO responding to HMRC about the enquiry as it did, HMRC would have taken steps that, more likely than not, would have led to Mr Tinkler being validly notified of the enquiry directly.

63. A striking factual feature of the present case in relation to the alleged estoppel by convention is that any shared mistaken assumption was induced by HMRC's misrepresentation.

64. In the BDO letter HMRC represented to BDO that an enquiry had been opened by the notice of enquiry sent to Mr Tinkler in the Letter. That statement was false.

65. BDO had no reason to doubt the truth and accuracy of what they were being told by HMRC. They thereafter proceeded on the reasonable assumption that what they had been told was true, but at no stage endorsed, affirmed or addressed the truth or accuracy of the statement made to them. The validity of the enquiry was not a matter that was ever referred to or considered in the communications between the parties.

66. In such circumstances, I agree with the conclusion of the UT that BDO/Mr Tinkler never assumed the requisite "element of responsibility for the assumption made". It was HMRC who adopted the relevant mistaken assumption for themselves. BDO played no part in the adoption of that assumption. It was HMRC who occasioned the adoption of that assumption by BDO. BDO did not disabuse HMRC of their mistaken assumption, but it had no reason to do so. It simply assumed that what HMRC told it was true. HMRC did not need or seek assurance from BDO that their assumption was correct, nor was any such assurance given. BDO neither said nor did anything to show that the assumption reflected its own understanding, rather than simply what it had been told by HMRC.

67. I also agree with the UT's conclusion that the requisite unconscionability is not made out. The *Grundt* case is instructive as to the circumstances in which unconscionability may arise. It emphasises the importance of the part played by the person alleged to be estopped in occasioning the adoption of the assumption by the other party. Examples are then given of playing such a part, such as refraining from correcting a known mistake, making representations upon which the assumption was founded, and negligently causing the adoption of the assumption. Whilst these are only examples, they are very remote from the facts of this case and are far more apt to describe the position of HMRC rather than BDO/Mr Tinkler, the party alleged to be estopped.

68. The question of whether it is unconscionable to allow an assumption to be resiled from involves a consideration of the overall justice of case. In the present case that includes the fact that the source of the assumption was HMRC's misrepresentation. It is also relevant that HMRC were at fault in relation to the misrepresentation made. The reason why the enquiry was invalid was because the relevant officer had deliberately made a unilateral decision to send the notice of enquiry to an address at which Mr Tinkler no longer resided rather than to that to which HMRC had been asked to send such correspondence.

69. This is a case in which HMRC have only themselves to blame for what occurred. They were at fault in sending the notice of enquiry to the wrong address. They misled BDO into assuming that an enquiry had been validly opened. BDO did nothing to cause the adoption of the mistaken assumption. In all the circumstances of the present case, any acquiescence by BDO in HMRC's mistaken assumption is insufficient to found unconscionability.

70. The FTT's contrary conclusion was based on the unsupportable assertion that HMRC's responsibility for the mistake is not relevant. In the present case it is highly relevant to any consideration of unconscionability.

71. The FTT also found that if BDO had not done anything then it is more likely than not that HMRC's error would have been put right. It is difficult to see how this stands with their earlier "speculative" conclusion that this "may well" have led to Mr Tinkler being informed of the enquiry. In any event, the focus should have been on what BDO did rather than what it did not do, and the fact that it played no part in the adoption of the assumption by HMRC.

72. For all these reasons, I consider that the UT was correct to conclude that Mr Tinkler is not estopped by convention from denying that HMRC had opened a valid enquiry.

73. In these circumstances it is not necessary to address the legal issue of whether or not it is possible to contract out of the statutory protections conferred by s.9A TMA 1970. I would, however, observe that I would take some persuading that *Keen v Holland* is analogous and that Mr Thomas QC's argument on Issue (1) acknowledges that the requirements of s.9A may be varied by agreement.

74. I would accordingly dismiss HMRC's cross-appeal on Issue (2).

Conclusion

75. For the reasons outlined above I would allow the appeal.

Sir Bernard Rix:

76. I agree.

Lord Justice McCombe:

77. I also agree.