[2016] UKFTT 170 (TC)

TC 04960

Appeal number: TC/2013/1063

INCOME TAX – whether notice of enquiry validly given – notice not given to taxpayer's usual or last known place of residence – enquiry known to agent – sufficient notice to taxpayer – taxpayer in any event estopped from asserting invalidity of enquiry – preliminary issue decided in HMRC's favour

FIRST-TIER TRIBUNAL
TAX CHAMBER

WILLIAM ANDREW TINKLER **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at The Royal Courts of Justice, the Strand, London on 14 and 15 December 2015

R Thomas QC, instructed by One Legal, for the Appellant

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

PRELIMINARY DECISION

1. HMRC issued a closure notice to the appellant on 12 August 2012 which amended (or purported to amend) the appellant' tax return for the year 2003/4. The appellant appealed. During the course of preparing that appeal for hearing, an issue arose between the parties about whether HMRC had ever properly opened an enquiry into the appellant's tax affairs. The appellant was permitted to amend his grounds of appeal to include this matter.

2. It was accepted by both parties that if the enquiry had not been properly opened, then the closure notice was invalid to assess the appellant. The Tribunal therefore directed that the question of whether the enquiry had been properly opened should be determined as a preliminary issue as it was a discrete point, unconnected with the main dispute, and had the potential to dispose of the litigation by itself should the appellant be successful on the issue. This decision notice determines that preliminary issue.

The evidence

Mr Tinkler

3. Mr Tinkler made two witness statements. He was cross examined but his evidence was not really challenged and I accept it.

Mrs Elizabeth Tinkler.

4. Mrs Tinkler gave a single witness statement. No one had any questions for her on her evidence and I accept it.

Mr Barrett

5. Mr Barrett was the HMRC officer and customer relationship manager for Mr Tinkler from 2013. He was unable to give any evidence about what actually happened in 2005 as he had very little to do with Mr Tinkler's affairs at that time. He was able to give evidence about HMRC procedures. I accept his evidence in so far as it was factual and not speculative.

6. At that time, the HMRC officers with closest connection with Mr Tinkler's affairs were a Mr Mackay and Mrs Robinson. Neither of these officers were called to give evidence: I was told Mrs Robinson had no recollections of events and HMRC had not even approached Mr Mackay to give evidence as he had been retired for some years and was now in very poor health.

Mr Terry Jones

7. The appellant sought to include in the bundle a letter dated 11 Dec 2015 written by a Mr Terry Jones, a partner at BDO which contained a statement about BDO's relationship with Mr Tinkler at the relevant period (critically 2005). I will refer to him as Terry Jones, to distinguish him from Mr Jones, counsel for HMRC. Terry Jones was not called as a witness. I was told he was unavailable to give evidence due to the serious illness of his wife. The appellant accepted I would give less weight to his letter in his absence.

8. HMRC objected to its admission in evidence. Mr Jones pointed out the various matters on which he had concerns with it. I asked why no attempt had been made to obtain this evidence earlier and it seems it was only on Mr Thomas' arrival on the appellant's legal team two weeks before the hearing that the desirability of having evidence from BDO was appreciated: by that point Terry Jones was already on long term leave from his office due to his wife's illness and difficult to get hold of.

9. Although I considered that there was no good reason for this evidence not being obtained much earlier, I admitted the statement but with the caveat that in the absence of the witness I might put little or no weight upon it. My decision on what weight to put on it is at §52 below.

10. From the evidence of the above witnesses and the documents in the case I make the following findings of fact.

The facts

Mr Tinkler's connection with Heybridge Lane

11. From about 1991 Mr and Mrs Tinkler owned and, with their children, lived at Wynda Wath, Great Asby, Cumbria ('Wynda Wath').

12. In late 2003, one of Mr Tinkler's companies, W A Developments Ltd ('WAD') bought Newby Grange, Crosby on Eden, Carlisle, Cumbria ('Newby Grange').

13. At some point in about October 2003, Mr Tinkler took a lease of 57 Heybridge Lane, Prestbury, Cheshire, SK10 4ER ('Heybridge Lane'). The reason for this was that Mr Tinkler had business in the area, including the purchase of a company with a head office in Manchester, which required his presence for long hours. As this was some distance from Wynda Wath, he needed somewhere to stay and preferred to rent than stay in an hotel. I find Mr Tinkler stayed at Heybridge Lane at various times from October 2003 until around August 2004. And some letters were delivered to him at that address and received by him (for instance, a letter from a tax adviser as well as some letters from HMRC).

14. In April 2004, Mr and Mrs Tinkler separated. From then on Mr Tinkler spent less time at Wynda Wath but he continued to stay there on occasions as he remained on good terms with his wife and wished to see his children.

15. Mr Tinkler made his greatest use of Heybridge Lane at this juncture: between April and August 2004 he stayed there nearly half the time. When not at Heybridge Lane, he was largely travelling abroad on business and also spending time at Wynda Wath and Newby Grange.

HMRC's TBS system

16. HMRC maintained a list of addresses notified for taxpayers within their self assessment computer system (referred to as 'TBS'). Mr Tinkler's address for correspondence held in this system was shown as Wynda Wath up to 24 July 2004. The self assessment system recorded the Heybridge Lane address from 28 April 2004, and the TBS system itself was updated with this address on 24 July 2004 when the Wynda Wath address was dropped. I find it is more likely than not that this change was made following a request by Mr Tinkler's then accountants because there was a telephone exchange between them and HMRC on 7 April in which they said they would notify HMRC of Mr Tinkler's new address and requested a repayment he was due was made to that address. And that repayment was sent to Heybridge Lane in early May 2004 and there is no suggestion it was not received). The date also fits in with Mr Tinkler's evidence as it was then he split from his wife and increased his use of the Heybridge Lane address.

17. In August 2004, Mr Tinkler bought Newby Grange from his company and this became and has remained his home. I find that his use of Heybridge Lane ceased at around this time, although the lease did not expire until January 2005.

18. The Heybridge Lane address was used by Mr Tinkler's solicitors on various official papers relating to the acquisition of the company mentioned in XXX above. For instance, forms submitted in February 2004 show Mr Tinkler's usual residence as Heybridge Lane. Mr Tinkler did not sign all of the forms and pointed out that he would not have read the ones which he did sign; nevertheless he accepts he knew his solicitors acting for him on this purchase did use the Heybridge Lane address. A companies house form from late in 2004 also shows the Heybridge Lane address as Mr Tinkler's usual residence, although he had in fact stopped living there by that date. The form was completed by the company secretary and Mr Tinkler may not have seen it. Shortly after this, right at the end of 2004, another return was submitted for a different company on which the Heybridge Lane address had been pre-printed but then struck out by hand and the Station Road one (see below) substituted.

19. HMRC wrote to Mr Tinkler at the Heybridge Lane address on 2 December 2004 opening an enquiry into his 2002/3 return. On the same day HMRC wrote to J F W Robinson &Co who then representing Mr Tinkler's affairs on his behalf with HMRC notifying them of the opening of the enquiry. There was no suggestion that these letters were not received. At this time Heybridge Lane was the address for correspondence shown on the TBS system but Mr Tinkler had ceased living there: he had a system for mail to be forwarded to him (see below at XXX).

BDO's involvement

20. On 10 January 2005, Mr Tinkler signed an engagement letter with BDO Stoy Hayward under which BDO were engaged to complete Mr Tinkler's tax return. The letter stated additional work, such as 'dealing with Inland Revenue enquiries into your tax return', would be a separate engagement for which additional fees would be charged.

21. It required Mr Tinkler (as he did) to sign a 64-8 which is an Inland Revenue form authorising HMRC to correspond with the taxpayer's agent. In respect of this form, the engagement letter stated under the heading 'Dealing with the Inland Revenue' that

> "…the Inland Revenue will treat this as authority to correspond with us [ie BDO], 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."

22. BDO then sent a letter to HMRC on 12 January 2005 notifying HMRC that they were agents for Mr Tinkler; they enclosed form 64-8 in which Mr Tinkler authorised HMRC to correspond with BDO on his behalf. In this letter BDO acknowledged the opening of the enquiry into 2002/3.

23. The form 64-8 gave Mr Tinkler's address as Station Road, Appleby, Cumbria ('Station Road'). This was the address of a company owned by Mr Tinkler, W A Developments Ltd ('WAD') which was also Mr Tinkler's employer. Station Road was a business address and not a residential address. Mr Tinkler never lived there.

24. 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]….

25. The webpage at the link at the time read 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.

Events of 2005

26. Mr Tinkler's self assessment tax return for the year 2003/04 was filed on the due date of 31 January 2005. This return showed his address as c/o W A Developments Int Ltd at the Station Road address.

27. On 24 February 2005 HMRC's TBS system was changed to show the Station Road address rather than the Heybridge Lane address for Mr Tinkler. It is more likely than not that this change was made by someone within HMRC reacting to either or both the 64-8 and the tax return and so I find.

28. On 15 March 2005 Mr Tinkler wrote to HMRC enclosing the tax he owed as shown in his self assessment tax return for 03/04. His letter did not include his address. HMRC responded on 1 April 2005 to the Station Road address (which was now his address on HMRC's TBS system) pointing out Mr Tinkler's liability to interest and penalties on the late payment. HMRC also wrote to Mr Tinkler at the Station Road address on 3 May 2005 with his self assessment statement of account.

Mr Tinkler's continuing connection with Wynda Wath

29. The P60 issued by W A Developments Ltd to Mr Tinker around 6 May 2005 showed Mr Tinkler's address as Wynda Wath as did the online submission of the P60 return to HMRC. Mr Tinkler was also able to produce other letters sent by other persons to him at Wynda Wath up to 2006: he had still resided there on occasion after the marriage break up while his children remained there (XXX) and in any event either collected or had forwarded to him any mail which arrived there for him.

30. However, at some point after August 2004 when he moved into Newby Grange and before September 2005, Wynda Wath ceased to be the home of Mrs Tinkler and their children because Mr and Mrs Tinkler attempted a reconciliation and Mrs Tinkler and the children moved into Newby Grange. In September 2005, Mrs Tinkler decided to rent out Wynda Wath. The significance of this was not appreciated in the hearing and I was given no evidence as to the precise date that Wynda Wath ceased to be lived in by his family and therefore (on his evidence) ceased to be any kind of a residence for Mr Tinkler. It was clearly in or after August 2004 and before September 2005. In these circumstances, I find that the appellant has failed to prove that Wynda Wath was still a residence of his in May 2005.

The address change in the TBS system

31. On 1 July 2005, Mr Tinkler's address on the TBS system was changed back to Heybridge Lane from Station Road. 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. It may be that Mr Mackay did this because he preferred to write to Mr Tinkler opening an enquiry at what he believed to be a residential address rather than care of a business address, but the motive does not matter. The important point is that 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.

The Letter

33. HMRC's case is that a letter ('the Letter') dated 1 July 2005 was sent to Mr Tinker at Heybridge Lane by Mr Mackay. The appellant did not accept that the Letter was ever posted.

34. The contents of the Letter, however, were not in dispute as a copy was sent to BDO. The Letter gave notice that the writer intended to enquire into Mr Tinkler's 2003-4 return; it also stated it would be copied to BDO Stoy Hayward ('BDO') and would cover capital gains and something referred to as the 'W A Developments Ltd conditional share scheme'. The covering letter to BDO also asked 8 questions in relation to disposal of properties in the Ukraine.

35. BDO acknowledged receipt of the copy Letter on 6 July 2005. They promised replies to the 8 questions on the property disposal by 22 August 2005. They then explained that Mr Tinkler had in year 2003/4 entered into a transaction involving gilts which had (they said) realised a loss; they said the transaction should have been included on the 03/04 tax return and were it not for the open enquiry they would amend the return to include it, but they could not,

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

36. On 14 July 2005 HMRC sent to Mr Tinkler also, I find, at the Heybridge Lane address, a tax repayment cheque for £43,138.29. That cheque was never cashed. I accept that the letter and cheque were never received by Mr Tinkler, as if they had been more likely than not the cheque would have been cashed. The repayment was chased by BDO on behalf of Mr Tinkler in October 2005 (see XXX); this led to cancellation of the cheque by HMRC and its replacement by a BACS transfer.

Was the Letter ever sent or received?

37. The appellant's case was that on the balance of probabilites the Letter was not posted because it had never been received by Mr Tinkler and HMRC could not produce a clean copy of it. (HMRC only had a copy of the copy sent to BDO, identifiable as such as the address was struck through).

38. It was also the appellant's case that the Letter was not received by Mr Tinkler. I accept this: this was Mr Tinkler's evidence and in any event I have accepted that he did not receive the tax repayment sent by HMRC to the same address two weeks later (XXX). I accept that (as the appellant says) this was not a coincidence; in my view the reason Mr Tinkler failed to receive both was more likely than not to be the same. Indeed, I also accept he did not receive the information notice posted a few months

later (see XXX) to Heybridge Lane. I find the reason Mr Tinkler failed to receive all three communications sent to Heybridge Lane at this time was more likely than not to be the same.

39. So was the Letter ever posted? As the appellant said, there were four options:

(a) The Letter was not sent;

(b) The Letter was posted but did not arrive at Heybridge Lane;

(c) The Letter did arrive, but was not forwarded to Mr Tinkler;

(d) The Letter was forwarded by post but did not arrive at Mr Tinkler's new address.

40. Failure of postal service? I consider options (b) and (d) remote possibilities. It is well known that post is more likely to arrive than not and in any event, as I have said, I consider it more likely than not that the same cause was at the root of Mr Tinkler's failure to receive all three letters and it would be stretching coincidence for all three of them to have gone astray in the postal system, either when originally posted or when forwarded on (if they ever were). Moreover, there was no evidence that any of the letters were returned to HMRC which would be a real possibility if they went astray in the postal system.

41. Indeed, in so far as the question of its receipt at Heybridge Lane is concerned, if it is proved the Letter was posted, then it is deemed by law to have arrived. This is s 7 of the Interpretation Act 1978 which provides that where it is proved to have been posted, a letter is deemed to arrive unless the contrary is proved:

> **S 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.

42. The appellant's only attempt to prove the contrary was to point out (as I accept) that Mr Tinkler did not receive the Letter. But that proves nothing as Mr Tinkler had ceased to visit Heybridge Lane nearly a year earlier and his lease had expired nearly six months earlier. Moreover, for reasons explained below at XXX, his mail forwarding arrangement was most unlikely to be effective once the property was re-occupied and the appellant did not even suggest that the property was left empty. So I find that the appellant has not proved the contrary. So if the Letter was posted, I find that it arrived.

43. Letter not posted? So I discard options (b) and (d). So was the reason that Mr Tinkler did not receive the Letter because it was never posted? I accept that HMRC have produced nothing such as someone who remembered the letter being posted or even a log to show posting. All I have is the receipt by BDO of the copy letter and

covering letter. However, it seems unlikely that Mr Mackay would send a copy of the Letter to BDO (clearly properly stamped as it arrived) but fail to send the Letter, or to send it without the correct postage, to Mr Tinkler; moreover it would be stretching coincidence for HMRC to have failed to post three letters to Mr Tinkler (on the basis it is more likely than not that the cause of non-receipt of all three letters was the same). Lastly, the fact that the letter was not received by Mr Tinkler does not (to my mind) indicate it was not posted because there is a very plausible reason why Mr Tinkler did not receive it as I explained in the preceding paragraph and revert to below. So my conclusion is that it is more likely than not that the Letter was posted and I therefore find that it was.

44. Not forwarded? The remaining possible reason for the failure of Mr Tinkler to receive the Letter was that it arrived at Heybridge Lane but was not forwarded on to him. Now I find that the only mail forwarding arrangement for Heybridge Lane of which the appellant gave evidence was that he had left it to the property agent to forward post on to him.

45. There is evidence that arrangement worked at least while Mr Tinkler still had possession of the property (bearing in mind the lease did not expire until January 2005) as post addressed to him at this address at around about this time was received by him (see XXX). However, it stands to reason that such an arrangement would fail as soon as the property was re-occupied, as the post would then be received by the new occupier with whom Mr Tinkler had no such arrangement. I had no evidence on when Heybridge Lane was re-occupied but it seems the failure of any post to be forwarded on to Mr Tinkler some months after his lease expired is considerably more likely than not to be the result of the re-occupation of the property. That would be a reasonable and indeed probable explanation of why three letters from mid-2005 and after from HMRC were never received by Mr Tinkler. So I find the Letter was received at Heybridge Lane but Mr Tinkler did not receive it because it was not forwarded on to him.

46. I reach that conclusion despite considering the case of *Tanir v Tanir* [2015] EWHC 3363 where the court upheld the master's finding that the claim form had not been posted. In that case (as this) a copy of the claim form was served on someone else (in that case, the claimant) with a statement it had been posted/served; nevertheless it was held the form had not been served on the intended recipient (the defendant) because the copy of it had not been completed (as it should have been) with the date of postage, date of deemed service and the date for reply. The court also appeared to accept it had not arrived [24]. Here, however, there are no such contrary indications suggesting that the Letter was not posted: firstly, I have no evidence it was not received at Heybridge Lane and secondly, it was not a form requiring insertion of date of posting. The best Mr Thomas can point to is that HMRC retained only a copy of the copy sent to BDO but it seems to me that retention of two copies of the same letter might well be seen as superfluous and that is more likely to be the explanation for this failure than that the Letter was not posted.

47. As I have said, my conclusion is that on the balance of probabilities the Letter was posted to Heybridge Lane, and did arrive. The evidence in this case is quite different to that in *Tanir*.

The reply to the Letter

48. BDO did not stick to their self-imposed deadline of 22 August for their reply to the (purported) opening of the enquiry. HMRC sent reminders to BDO on 26 August and 25 October. At the same time, on 25 October, Mr Tinkler was sent (at the Heybridge Lane address) a formal information notice under s 19A TMA 1970. As I have said above, I accept that he did not receive this either.

49. The letter to BDO in October triggered a series of phone calls between BDO (Mr Eves) and HMRC in which BDO queried why Mr Tinkler had not received a tax repayment he was expecting. As I have said, HMRC were told Mr Tinkler no longer used the Heybridge Lane address to which the cheque had been sent and HMRC agreed to pay by BACS transfer. Mr Tinkler's TBS record was then updated on 1 November 2005 with Station Road as his address.

50. BDO eventually provided the information requested by HMRC in the enquiry letter about the Ukrainian property in a letter to HMRC of 24 November 2005.

51. I agree with HMRC that it is appropriate to infer from HMRC's contemporaneous notes that there was some contact between Mr Tinkler and BDO at this time. Mr Eves of BDO was recorded as saying 'most of then (sic) information has been obtained' in order to reply to the 03/04 enquiry and he also provided HMRC with the Station Road address for Mr Tinkler and his bank details.

52. Mr Tinkler has no recollection of any conversation with BDO about this. And Terry Jones' letter states that the information to answer the enquiries was provided to HMRC without 'formally' corresponding with Mr Tinkler. The appellant takes this to mean that there was no contact at all between Mr Tinkler and BDO over the matter; HMRC takes it to mean that there was informal contact at least with Mr Tinkler's PA if not with Mr Tinkler himself. As I consider the letter ambiguous on this point, and Terry Jones was not present to explain what he meant, I have decided to disregard his evidence on this. I accept Mr Tinkler does not recollect any contact.

53. However, despite the terms of the engagement letter, it is clear that BDO did deal with the Ukraine property aspect of the enquiry. As the engagement letter entitled BDO to further fees but BDO did not enforce this, it seems BDO dealt with the Ukraine property aspect of the enquiry as a matter of goodwill. And it seems very improbable to me that a firm of accountants would deal with a tax enquiry, even (and perhaps especially) if as a matter of goodwill, without informing their client or at least, in this case, Mr Tinkler's PA.

54. I take in account that it was certainly apparent that Mr Tinkler gave his PA a considerable degree of trust and authority, for instance she opened his post and at one point he indicated he signed what she brought him to sign. He said that to an extent

his PA had his authority to deal with his tax advisers and indeed put together the information BDO had needed to compile his 03/04 tax return. Mr Tinkler accepted that BDO may have contacted his PA if they had needed more information for their 24 November letter giving the requested answers to the enquiry (see below) and that he may well not have known had they done so. He considered it likely that Mr Eves would have spoken to his PA about which address to write to. He did not know whether she knew about the enquiry, although their relationship was such he would have expected she would bring important things, such as a tax enquiry, to his notice.

55. Based on all this it seems to me most likely that in October 2005 at the time of the exchange of phone calls with HMRC, BDO would have liaised either or both with Mr Tinkler or his PA over his current address and bank details and more likely than not they would have liaised with her over the answers to the enquiry. Either she failed to inform Mr Tinkler or Mr Tinkler has forgotten.

56. And while I accept Mr Tinkler has no recollection of being informed of the enquiry by his PA or BDO, nevertheless my impression from the evidence is that Mr Tinkler has complex tax affairs involving complex schemes and open enquiries, all of which he largely left to his advisers and PA; I think it quite likely he would not have attached great significance to it had he been told in 2005 of the enquiry and that therefore ten years later he might well not recollect being told of it. Moreover, it is also possible his PA knew of the enquiry and failed to tell him. But what does seem unlikely to me is that BDO would actually deal with the enquiry (even as a matter of goodwill without charging fees) without either informing their client (or his trusted PA) of what they were doing or checking the accuracy of the answers they were giving HMRC. So I conclude that before BDO actually responded to HMRC in November 2005 either or both Mr Tinkler and/or his PA were told by BDO of the enquiry.

The Law

57. The Taxes Management Act 1970 ("TMA") sets out the law on how HMRC can open an enquiry into a taxpayer's self assessment return:

> **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 a return under secion 9ZA of this Act.

58. It was accepted that HMRC had to give notice by 31 January 2006 to open a valid enquiry into Mr Tinkler's return for 2003-4; the Letter, if it was sent, was sent well in time as it was dated 1 July 2005. The issue was whether it gave notice at all within the meaning of s 9A TMA.

59. HMRC's case was that they gave notice by two methods, equally valid:

(1) They posted the Letter to Mr Tinkler at the Heybridge Lane address;

(2) They posted a copy of the Letter to BDO.

60. Lastly, it was their case that if they were wrong about this, the appellant was estopped from denying that the enquiry was validly opened.

Case I: was notice given via the Letter?

61. I have recited s 9A TMA above. HMRC must give in time notice of intention to open an enquiry to the taxpayer. S 115 TMA sets out how this can be done:

> **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, or
>
> ….

62. As s 9A TMA did not require the notice of enquiry to be served, the applicable sub-section is s 115(2). The parties were agreed that notice could be given if it was sent to Mr Tinkler's usual or last known place of residence. The appellant did not accept that the Heybridge Lane address was Mr Tinkler's usual or last known place of residence at the date of the Letter.

Must a notice of enquiry be received as well as sent?

63. It was also the appellant's case that a notice of enquiry must be received as well as sent. For this proposition they relied on *Holly* [2000] STC SCD 50. In that case, HMRC sent the taxpayers notices of enquiry mere days before the closing of the enquiry window. The tribunal found that, due to postal delays, the notices failed to arrive until after the enquiry window had closed. The Special Commissioner decided that s 9A TMA meant that notices which were posted had to be received by the taxpayer and that applying s 7 Interpretation Act 1978 (above at XXX) the notices had

not actually been received until after the enquiry window had closed even though they ought ordinarily to have been received before.

64. The decision is not binding on this Tribunal but the appellant considers that it was rightly decided and I should follow it. I accept it was rightly decided on the question which was in front of the Tribunal, but it is not authority for a general proposition that in all cases a notice of enquiry must be received by the taxpayer to be valid.

65. It is obvious the case cannot be authority for such a proposition as that would conflict with the language used by Parliament in s 115 TMA. That permits a notice of enquiry to be sent to the taxpayer's *usual or last known place of residence.* If Parliament had meant that a notice of enquiry had to be actually received by the taxpayer, Parliament would not have bothered specifying where it could be sent: as clearly it could only be sent to wherever the taxpayer actually was. By use of the words 'last known', Parliament was clearly contemplating the possibility that the taxpayer might not receive the notice of enquiry as it could be sent to his last known address even though it was not his actual address.

66. Indeed, as the appellant accepted, while s 115 TMA was permissive, it was intended to give HMRC protection. In other words, HMRC could send a notice of enquiry by any means, but if HMRC used the means specified in s 115(2) TMA, the notice of enquiry would be validly opened if and when the letter arrived at that address even if the taxpayer did not actually receive it.

67. And s 115(2) operates with s 7 IA 78 so HMRC can prove arrival and th etiem of arrival at that address by relying on the (rebuttable) presumption in that section. And this is the explanation for the *Holly* case and why it is of no help to the appellant in this case. In *Holly,* the notice of enquiry was sent to the taxpayer's usual place of residence and therefore notice was given to the taxpayer as per s 115(2) TMA except that it was given too late as the taxpayer could rebut the presumption and prove the actual date of receipt. Indeed, I note in passing that if instead of being received late, the notice of enquiry had not been received at all in *Holly*, the outcome would have been the same. In other words, *Holly* is distinguishable from this case as the taxpayer in *Holly* actually lived at the address to which the notice was sent and could give evidence about whether or not the letter actually arrived and when it arrived. S 115(2) provides greater protection to HMRC where a notice is sent to the taxpayer's last known but not actual address because it is harder for the taxpayer to rebut the presumption contained in s 7 IA 78. The moral of the law is that it is in the taxpayer's interests to keep HMRC apprised of his currrent address.

68. Here, unlike *Holly,* if Heybridge Lane was Mr Tinkler's last known place of residence, he cannot rebut the presumption that the letter was received in the normal course of post because (not being in occupation of Heybridge Lane) he could not prove the contrary.

69. The appellant also relied on *Re a debtor* [1992] STC 771. The question in that case was whether notice of tax due had been given to the taxpayer in accordance with

s55(9) TMA and s 115 TMA. HMRC relied on service by post to the taxpayer's place of business. But the appellant could prove at the time in question the property had been re-possessed by the bank and had ceased to be the taxpayer's place of business. It was not and had never been his residence. The appeal was effectively allowed because s 115(2) does not permit service to a "last known" place of business.

70. Again that case is of no help to the appellant here. If Heybridge Lane was at the date the Letter was sent, the appellant's usual or last known place of residence, service would be effective on the day it would ordinarily be expected to arrive unless the appellant can prove that the letter did not arrive or arrived on a different date. And, as I have already said, the appellant cannot prove that the letter did not arrive. The appellant cannot rely on s 7 IA 78 as the appellant did not have possession of the property at that date and did not know who did and therefore is not in a position to give any evidence about whether or not the Letter arrived. I have already found that it did.

71. In summary, the law is that a notice of enquiry must be received by the taxpayer within the enquiry window to be effective, but the taxpayer is deemed by s 115(2) and s 7 IA 78 to have received it if it was sent to any place specified in s 115(2) unless the taxpayer can prove the letter did not arrive or arrived after the enquiry window closed.

72. So if Heybridge Lane was Mr Tinkler's last known place of residence, the enquiry was validly opened by the Letter sent there.

What is the usual or last known place of residence?

73. But was Heybridge Lane the appellant's usual or last know place of residence? Not even HMRC suggested that it was in July 2005 Mr Tinkler's usual place of residence. I have found it ceased to be a residence in around August 2004 and certainly before January 2005 when the lease expired (XXX). It was not his usual place of residence in July 2005.

74. But was it his last known place of residence in July 2005? There is no authority on this exact phrase or at least none brought to my attention. I think it is obvious that the reference to "last known" is a reference to HMRC's knowledge. Beyond that, HMRC referred me to *Berry v Farrow* [1914] 1 KB 632 where court had to consider the meaning of 'last known place of abode' which was used in the TMA 1880. Bankes J said

> "..what…is the meaning of the expression 'usual or last known place of abode'…? It is, I think, clear that the object of the notice is to give the person charged an opportunity of challenging the correctness of the assessment…and a construction should therefore be adopted which would include some place at which the notice would be likely to be brought to his attention…."

The Judge decided that the address on which the notice was served in that case was not the taxpayer's place of abode, as it was the office of his company at which he rarely visited; it was therefore not his usual or last known place of abode.

75. I think what the Judge said here must be seen in context. I think the expression 'usual or last known place of residence' shows Parliament was trying to strike a balance between the taxpayer being given actual notice of an enquiry while at the same time giving constructive notice of an enquiry to a taxpayer who does not keep HMRC up to date with his address. If Parliament were concerned only with actual notice, they would have simply required actual service and not bothered with s 115(2) at all.

76. My attention was also drawn to the CPR which uses a very similar phrase. Both parties referred me to *Marshall and Rankine v Maggs* [2006] EWCA Civ 20. This was a case of service under the CPR and the question was whether service had been made at the individual's 'usual or last known residence'. In that case, the Court of Appeal unanimously decided at [68] that the phrase 'last known residence' could not include a place where the person concerned had never resided. That finding is not relevant here: the appellant did reside at Heybridge Lane at various times and in particular it was a residence of his from April to August 2004. The Court of Appeal in *Marshall*, however, went on to make non-binding comments (obiter) on the meaning of 'last known residence':

> "[71]…In our view, knowledge in this context refers to the serving party's actual knowledge or what might be called his constructive knowledge, ie knowledge which he could have acquired exercising reasonable diligence"

77. The appellant relies on this dicta. HMRC had received in May 2005 the P60 which specified Wynda Wath as Mr Tinkler's residence. And his self assessment return in January 2005 had given the Station Road address. At best, says the appellant, Wynda Wath was Mr Tinkler's last known residence to HMRC. At the very least, says the appellant, HMRC were on notice that Heybridge Lane was not Mr Tinkler's current address and should have raised enquiries.

78. HMRC did not agree that the reference to last known place of residence would have the same meaning in the TMA as the similar phrase in the CPR: in other words, HMRC did not accept that HMRC were required to exercise some due diligence for the purposes of s 115(2) TMA. However Mr Jones did not really suggest any reason why the two phrases would have different meanings.

79. Nevertheless, I do accept that a different level of due diligence may be required for s 115(2) than for the CPR. A claimant and defendant might have no relationship and certainly the defendant may have no responsibility to keep the claimant informed of his current address. On the other hand, HMRC do require taxpayers to complete tax returns, a part of which requires the taxpayer to inform HMRC of their address. So a taxpayer does have some sort of responsibility or duty to keep HMRC appraised of their address and therefore the obligation on HMRC to make enquiries about the taxpayer's address are, I think, less than they would be on a claimant using the CPR.

80. But in principle I think the dicta in *Marshall v Maggs* apply and HMRC have some responsibility for ascertaining the taxpayer's address. When the Court of Appeal said that some due diligence would be required of the claimant, they were referring to

"knowledge which he could have acquired exercising reasonable diligence". My view is that where taxpayers are required to notify HMRC of their address, I do not think an exercise of reasonable diligence would oblige HMRC in all cases (before sending a letter) to make enquiries to find out if the taxpayer has moved. But I do think 'reasonable diligence' would oblige HMRC to make reasonable enquiries when they have indications that the address they have for the taxpayer is no longer current. If reasonable enquiries do not advance the situation, then they need go no further and must rely on what information they have.

81. In this case, the appellant had chosen to give his business address for correspondence on his tax return and, not long before the Letter was sent, his employer had indicated a residential address other than the one held by HMRC.

82. Mr Jones suggested that neither of the two circumstances should have put HMRC on notice of a change of address. So far as the return was concerned, it was clear that Station Road was a business and not residential address (because it said c/o WAD). So there was nothing here to indicate that Heybridge Lane was no longer Mr Tinkler's residence.

83. I do not agree: HMRC were on notice that Mr Tinkler no longer wished HMRC to write to him at Heybridge Lane; although Mr Tinkler had given no explanation for this, it was always a possibility it was because the address was no longer his.

84. Mr Jones also suggested that the P60 was irrelevant as it was notification from his employer. However, there is nothing in s 115(2) to require the notification of the taxpayer's address to be given by the taxpayer. It is just a question of the usual or last known [to HMRC] place of residence. However, it seems to me that there is one valid reason for ignoring the P60, although there is no evidence it was known to HMRC. And that is that at the relevant time of notification, I have found it was not Mr Tinkler's residence. The P60 (on the balance of probabilities) was wrong for the reasons given at XXX.

85. Nevertheless, the combination of these address notifications, in my opinion, should have put HMRC on notice that Heybridge Lane might not be a current residential address and I consider that in exercise of reasonable due diligence HMRC should have made enquiries of what Mr Tinkler's residential address actually was. Yet I have found that they made no such enquiries (XXX).

86. Moreover, my findings are that if HMRC had used either of the two addresses they had been given (Station Road and Wynda Wath) then Mr Tinkler would have received the Letter. Station Road was his business address and the evidence was that post sent there for him would be seen by him (via his PA); and while Wynda Wath had ceased to be his residence at that point, the evidence was that he still collected post from there (it was not rented out until after September 2005). Moreover, Mr Tinkler had not in any way sought to avoid receiving post from HMRC. He had kept them apprised of a current address and he had an agent acting for him. I find it more likely than not that if Mr Mackay had asked Mr Tinkler, or Mr Tinkler's PA or BDO for confirmation of his current address, he would have been told to send the Letter

either to Station Road or Newby Grange, and Mr Tinkler would have received it. Mr Mackay would not have been told to use Heybridge Lane.

87. For this reason, applying *Marshall v Maggs* I find that Heybridge Lane was not Mr Tinkler's last know place of residence.

88. I note in passing that, were it not for HMRC having constructive knowledge as per *Marshall v Maggs* that Heybridge Lane was not his address, then I would have found Heybridge Lane was Mr Tinkler's last known place of residence. This would be on the grounds that the notification of Station Road did not count as it was not a residential address and the P60 did not count because at the date of notification it had ceased to be a residential address of Mr Tinkler's. So Heybridge Lane would have been the last place of residence known to HMRC but for, as *Marshall v Maggs* shows, that phrase implies a duty to make at least some enquiries where HMRC have received indications that the address they hold may no longer be valid.

89. In conclusion, Heybridge Lane was not an address for Mr Tinkler within the terms of s 115(2): it was not Mr Tinkler's usual or last known place of residence and it was not his place of employment. S115(2) does not apply to deem receipt at Heybridge Lane to be receipt by Mr Tinkler. Moreover, as I have found as a matter of fact that Mr Tinkler never received the copy posted there, HMRC can only show that the enquiry was validly opened if they can show notice of the enquiry was actually given to Mr Tinkler by means other than the posting of the Letter to Heybridge Lane.

Case II: was notice given via the copy Letter to BDO?

90. HMRC's next position was that Mr Tinkler had actual or constructive knowledge of the opening of the enquiry because BDO or Mr Tinkler's PA received notice of it.

Other methods of service possible?

91. HMRC's case is that as s 115(2) provides (see XXX above) that an enquiry notice 'may' be served by post, it does not require service by this method and other methods are therefore valid. For authority, HMRC rely on *R (oao Spring Salmon and Seafood)* at [33[[2004] STC 444, *Partito Media Services Ltd* [2012] UKFTT 256 (TC) at [32-38], *Fulbrook* [2015] UKFTT 209 (TC) at [64]. HMRC also relied on *Hastie & Jenkerson (a firm) v McMahon* [1990] 1 WLR 1575 for authority which supported a proposition that the purpose of service was to make known the contents of a document to the recipient.

92. The appellant accepts the proposition that s 115 does not rule out other methods of giving actual notice to the taxpayer of an enquiry under s 9A TMA but say that HMRC would have to show that as a matter of fact the taxpayer actually knew before the end of the enquiry window that HMRC had opened an enquiry. As a matter of fact, says the appellant, HMRC cannot do this because Mr Tinkler was actually unaware of the notice of enquiry until many years after closure of the enquiry window.

93. I agree that as a matter of law s 115 does not set out the only methods by which notice of an enquiry can be given to a taxpayer, but that if s 115 methods are not used, there is no deemed giving of notice. HMRC must prove notice was actually given to the taxpayer within the enquiry window.

Service on an agent possible?

94. The second limb to HMRC's case here is that notice was actually given to Mr Tinkler because, says HMRC, notice was actually given to Mr Tinkler's agent when Mr Mackay sent to BDO a copy of the Letter under a covering letter. HMRC put forward the proposition of law that receipt of a notice by an agent within the scope of his actual or apparent authority can be treated as receipt by principal, relying for this proposition on *R (oao Spring Salmon and Seafood)* (above) at [37], *Partito (above)* at [16] and *Fulbrook* (above) at [64]. In the *Spring Salmon* case, Lady Smith said:

> "[32] service or intimation of a notice of enquiry does not appear to be a step that calls for special formality but rather falls in the category of cases where it is recognised that the purpose of service of a notice is to see to it that the recipient is informed. ….
>
> [33] I would, however, add that s 115 is not, in my view, prescriptive. It certainly sets out a means by which the Revenue can put effective intimation beyond doubt but these are not the only means by which intimation may be achieved….

95. The appellant's response to this was that that *Spring Salmon and Seafood* was only authority for service on an agent being sufficient if the taxpayer has expressly agreed with HMRC that service could be on an the agent. But I agree with HMRC that Lady Smith did not say that: she discussed that scenario as that was the fact pattern in the particular case in front of her. She did not say that on no other occasion would service on the agent be sufficient. Whether it would be sufficient is therefore a matter of general law.

96. HMRC also rely on *Pine* [2014] UKFTT 356 (TC):

> [14] [S 115(1)] to our minds is a permissive provision. It says that the notice 'may' be so delivered or sent. It does not require that only those methods be used. What is required by section 8 is that the obligation to make the return be brought to the notice of the taxpayer.
>
> It seems to us that in relation to earlier tax years Mrs Pine appointed the firm as her agents to deal with HMRC, and that they remained her agents in 2013 for the purposes of dealing with her 2011/12 return.
>
> We find that in these circumstances the delivery of the notice to the firm requiring the making of a return was for the purposes of section 8 the giving of notice to Mrs Pine, even though it was neither given to her physically nor delivered to her place of residence or last known place of residence. The nature of agency is that the agent is given authority to affect, or alter, the legal position of his principal: the receipt by the agent within the scope of his actual or apparent authority of notice may be treated as receipt by the principal. The giving of the

> letter to the firm brought the requirement in it to its notice, and because the firm was dealing within the scope of its actual authority from Mrs Pine, is to be treated as bringing it to her notice. It was therefore notice to her as required by section 8.

97. This is of course only an FTT decision: is it right? HMRC cited to me *Bowstead and Reynolds on Agency* (20th edition):

> 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.

98. The authority cited for this in Bowstead was *Tanham v Nicholson* (1872) LR 5 HL 561. This was a case where a mentally incapacitated tenant lived in a house with, and whose affairs were managed by, his three children, on one of which notice to quit the house was served. The daughter in question said she had destroyed the notice without informing her father and the question was whether valid notice to quit had been served on the father.

99. Lord Hatherley said:

> Because, if once you have constituted your servant your agent for the purpose of receiving such a notice, the question of fact as to whether that servant has performed his duty or not, is not one which is any longer in controversy. When once you constitute your servant your agent for that general purpose, service on that agent is service on you – he represents you for that purpose – he is your alter ego and service upon him becomes an effective service upon yourself. (page 568)

100. Lord Westbury decided the case on a different basis which is that notice left at the house was sufficient to bring it to attention of tenant unless it was actually proved to contrary (and he said on facts it was not) but he did say at page 575

> "…It is not necessary for the Plaintiff to shew that the sons were the recognised agents of the father. That would put it in quite a different light; because, then, if the notice came to the hands of the agent it came to the hands of the principal….

In other words, although it was not the basis of his decision, Lord Westbury agreed with the proposition made by Lord Hatherley. Lord Colonsay also said that service on the servant is service on the master if there is nothing to rebut the servant's status as agent (see pages 576-577). It seems to me that *Bowstead* correctly reflects the law as explained in this House of Lords' decision, albeit in peculiar circumstances far removed from those of this case.

101. Mr Thomas did not accept this was the ratio of the case and suggested that it was limited to cases where the agent lived in the same house with the principal. But that is too narrow: while the fact that a person or servant lives in the same house with his or her master may give that person an actual or apparent authority to receive a notice to quit, the actual basis of the decision was that if an agent has actual or

apparent authority to receive a notice, then the notice is effective whether or not the agent communicates the notice to the principal. It was not limited to the facts of the case.

102. Mr Thomas' next line of attack was to say the rule was only a rebuttable presumption: in other words, if it could be proved the principal had not received the notice, it did not matter if the agent had had actual or apparent authority to receive it and had received it. But again that is not what the case decided: Lord Westbury did say that a notice left at the house was presumed to be known to the tenant unless the contrary was shown, and decided the case on that basis, but (as I have cited above) he agreed with the other two Law Lords that notice given to an agent to receive notices was received by the principal whether or not it was actually communicated to him.

103. In any event, that *Bowstead* has correctly summarised the law is also apparent from the much more recent case of *El Ajou v Dollar Land Holdings Plc* [1994] 2 All E R 685 CA which HMRC relied on for the same proposition as in *Tanham*. Hoffman LJ in *El Ajou* said various things about the state of the law regarding agents; about agents 'authorised to receive communications', albeit in an aside not necessary for him to decide the case in front of him (obiter), he said:

> "…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.' (page 703)

104. The appellant relies on the fact that this is obiter and therefore not binding on me and in any event Hoffman LJ's authority for the proposition was *Tanham.* But I think Mr Thomas misunderstood *Tanham* and even if neither *Tanham* nor *El Ajou* are binding on me, nevertheless I think that they correctly represent the law of agency. This is because it is an integral part of the common law doctrine of agency that the outsider to the agency can rely on appearances and is not affected by the private and unknown relationship between the agent and principal: the doctrine of apparent agency binds the principal to the outside appearance of agency even if privately he has not given his agent actual authority. In other words, the private relationship between agent and principal does not affect the third party relying on the outward appearance of agency. So if an agent has apparent authority to do something (such as receive a notice on behalf of the principal), the fact that as between himself and his principal the agent fails to do as he should (such as to inform the principal of receipt of the notice) cannot affect the right of the outsider giving the notice to rely on the appearance of agency. So emphatically I do not agree with Mr Thomas that the rule is a rebuttable presumption. It is not. It is an absolute rule that service on an agent with actual or apparent authority to receive notices is service on the principal, whether or not the agent informs the principal of the notice.

105. It may be that Bowstead is right to say that the outsider would be estopped from relying on any apparent authority to receive a notice if the outsider actually knew that the agent had not communicated the notice to his principal, but that it does not matter here where there is no suggestion that HMRC knew that BDO had no instructions

from Mr Tinkler when they wrote to HMRC about the enquiry (see XXX). (And indeed, for the reasons given above at XXX I find BDO did have instructions.)

106. In any event, the appellant did not accept that the doctrine of agent to receive communications applied in the context of s 9A and referred me to another FTT case, *Coolatinney and others* [2011] UKFTT 252 TC. Although *Coolatinney* was a case on a different tax with different legislative provisions on enquiries, in practice the relevant part of the legislation was the same as s 9A TMA. In that case HMRC opened enquiries by sending the enquiry letter to the appellant and a copy with a covering letter to the agent. However, the enquiry letter was invalid as it referred to enquiries into something inapplicable to the appellant; the letter to the agent, however, referred to the matter into which HMRC did wish to enquire. So it was HMRC's case that the notification to the agent was sufficient to open the enquiry. The Tribunal ruled:

> 20. We also find that the only documents we can consider in relation to the question whether a valid notice had been given to an Appellant are those that were actually sent to the Appellant itself. Paragraph 12 Schedule 10 FA 2003 makes it clear that notice must be given to the purchaser. Accordingly we cannot have regard to the letters sent by HMRC on 4 November 2008 to the Appellant's advisers, and we reject Mr Angiolini's submission that, in the case of the two transactions for which the enquiry window remained open at that time, those letters, read in conjunction with preceding correspondence, would be sufficient to satisfy the statutory requirements.

107. *Coolatinney* is not binding on this Tribunal any more than *Pine* (or *Partito* or *Fulbrook).* And as a matter of law, I agree with HMRC that *Coolatinney* does not fully reflect the true legal position: the Tribunal in that case simply did not consider the law of agency and for that reason what it says is simply not persuasive. I consider that *Pine* and not *Coolatinney* reflects the law as explained by the House of Lords in *Tanham* and the Court of Appeal in *El Ajou v Dollar Land Holdings Plc.* Where the TMA required notice to be given to a person, there is no reason at all to suppose Parliament intended to oust the normal rules of agency. So where, for instance, as in *Spring Salmon and Seafood* the agent was expressly authorised to receive a notice on behalf of the taxpayer, that notice was given to the taxpayer when it was given to the agent. I also agree that because the normal rules of agency were not ousted from s 9A, that express authorisation by the taxpayer for the agent to receive a particular kind of notice is not required. All that is required is actual or apparent authority for the agent to receive notices, including the kind of notice in question, in order for service on the agent of the s 9A notice to be service on the taxpayer.

Was BDO an agent authorised to receive communications?

108. BDO undoubtedly did receive notice of the enquiry. The appellant accepts that BDO received a copy of the Letter together with a covering letter: BDO clearly understood that there was an enquiry as they replied to the letter and ultimately provided answers to the questions raised in the enquiry.

109. But for that to be service on the taxpayer, BDO must have had actual or apparent authority to receive such a notice on behalf of its client, Mr Tinkler.

110. I was not addressed on burden of proof. In tax cases, it normally rests on the taxpayer. It was the taxpayer's case that HMRC had not validly opened the enquiry and therefore for the appellant to show that BDO had neither apparent nor actual authority to receive notice of the enquiry. In practice, the burden of proof made no difference to the outcome.

111. Apparent authority: it does not matter whether BDO had actual authority to receive communications if they had apparent authority to do so. Apparent authority exists where the principal has represented to the other party that the agent has actual authority even if the agent does not have such authority. So in determining whether there is apparent authority, I have to look at what representations Mr Tinkler made to HMRC about the extent of BDO's authority.

112. Neither parties' submissions on BDO's authority drew a clear distinction between actual and apparent authority but I think there is a clear distinction, so, for instance, the terms of the engagement letter between Mr Tinkler and BDO is quite irrelevant when considering apparent authority as the terms of it were not known to HMRC.

113. When determining the extent of BDO's apparent authority I must consider the 64-8 as this was signed by Mr Tinkler and given to HMRC: it set out BDO's apparent authority. No other communication between Mr Tinkler and HMRC was drawn to my attention which gave BDO any wider apparent authority. So the limit of BDO's apparent authority is in the 64-8, including any document referred to in the 64-8.

114. By itself, the 64-8 gave the agent very wide authority and in my view would have constituted BDO as an agent to receive notifications from HMRC on behalf of the taxpayer. This is because of the first paragraph under "3" set out above was in wide terms: XXXX

115. However, the second paragraph under "3" as set out above in XXX clearly qualified the immediately preceding paragraph and it qualified it by reference to content on HMRC's website. That content must therefore be read as part of the 64-8. And that content stated, as I have said:

> 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. (my emphasis)

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. And this seems to be only right: 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.

119. I would also agree with the appellant that there was nothing in the covering letter sent to BDO with the copy Letter that would have put BDO on notice that HMRC had not followed their own policy to inform the taxpayer direct: the inclusion of the copy letter itself plus the failure to ask BDO to pass on the information to the taxpayer would only have reinforced the message from the website that HMRC would give the notice direct to the taxpayer and not the taxpayer's agent. So BDO had no apparent authority as between BDO and HMRC to accept notice of enquiry on behalf of Mr Tinkler.

120. While I accept that Lady Smith in *Spring Salmon* held that the "copy" notification to the agent could be proper notice of an enquiry, that was in circumstances where it was clear that the agent had actual and apparent authority to receive such notification. She said:

> [37] …I do not, however, conclude that the fact that she 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 as 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 agent] 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 agent] because of the nature of the parties' agreement.

121. In this case, however, the point is that there was no actual or apparent authority for BDO to receive notice of enquiry because such authority was effectively excluded by the qualification to the 64-8 contained on the website: therefore the fact that the agent only received a copy of the enquiry notice could only have reinforced the view that BDO had no authority to receive notice of the enquiry. However, had they had such authority, the "copy" nature of the notification they received would not have prevented it being actual notification.

122. Actual authority: So the remaining question is, whatever the state of HMRC's knowledge about BDO's authority to receive a notice of enquiry, did in fact BDO have actual authority to receive such a notice on behalf of Mr Tinkler? And that is a question of what the agreement was as between Mr Tinkler and BDO.

123. The engagement letter is relevant to this question. The appellant's position is that the engagement letter excluded BDO from dealing with any HMRC enquiries into the tax return (XXX) so, says the appellant, BDO had no actual authority to receive notice of the enquiry. I do not agree. The engagement letter did not exclude BDO's ability to receive notice of an enquiry, it merely provided for further fees to be payable if replies were given to an enquiry. Moreover, the fact of the matter is that BDO did deal with the enquiry without any further engagement letter and the appellant did not suggest that BDO were acting beyond scope of their authority so it appears BDO's authority was wider in any event at least to the extent of dealing with an enquiry.

124. Secondly, the appellant said there was no actual authority to receive communications such as a notice of enquiry because the engagement letter itself recognised that HMRC's policy was to send some notices, including notices of enquiry, direct to the taxpayer (see XXX). I do not accept the appellant's reading of this. That part of the engagement letter did not say HMRC would not correspond with BDO over matters with which they also sent notice to the taxpayer: it just indicated that this might happen and therefore the client should always keep BDO informed and not just assume HMRC copied everything to BDO. It was not a clause intended to limit BDO's actual authority.

125. However, while the engagement letter was irrelevant to the question of BDO's apparent authority, I consider the 64-8 was as relevant to the question of BDO's actual as apparent authority because it was a term of the engagement letter that Mr Tinkler sign the 64-8 and it was therefore a part of the agreement between BDO and Mr Tinkler. BDO knew from reading the 64-8 what authority Mr Tinkler had represented to HMRC that he had given to BDO and therefore what authority BDO actually had. And as I have said the 64-8 did not give BDO apparent authority to receive notices of enquiry. From that, coupled with what the engagement letter said about the importance of Mr Tinkler forwarding all notices from HMRC to BDO, I

find that it cannot be said that BDO had actual authority to receive notices of enquiry on behalf of Mr Tinkler.

Was Mr Tinkler's PA an agent authorised to receive communications?

126. However, I agree with HMRC that as a matter of fact both Mr Tinkler's PA and BDO were agents of Mr Tinkler. But although his PA was clearly an agent of Mr Tinkler of some sorts, did she have actual or apparent authority to receive notice of enquiry on behalf of Mr Tinkler, and if she did, was she actually given notice of the enquiry?

127. Apparent authority: So far as apparent authority was concerned, Mr Tinkler had made no representations to HMRC that his PA had any authority in respect of his tax affairs and certainly no representation that she could receive a notice of enquiry. He had not signed a 64-8 in her favour. It seems to me that her involvement in his tax affairs was known only to Mr Tinkler and BDO. So she had no apparent authority to receive notice of an enquiry into Mr Tinkler's tax return.

128. Actual authority: here the question is the extent of her actual authority given to her by Mr Tinkler. I find she had extensive authority. She had originally given the instructions to BDO about the contents of the tax return (XXX) and Mr Tinkler accepted that BDO may have liaised with her over the replies given by BDO to the enquiry (XXX) and that he would not know about it unless he actually was required to sign something. She had authority to deal with Mr Tinkler's post (XXX) and the implication of what Mr Tinkler said is that his PA would have seen and opened the notice of enquiry had it been sent to Station Road. Mr Tinkler accepted that BDO may have told his PA that there was an enquiry, and although he would have expected her to pass on this message, he did not suggest that it was beyond the scope of her actual authority to be told of the enquiry.

129. The question is not whether her duties required her to pass on any notification but whether she was authorised to receive such notification. I am satisfied that as between her and Mr Tinkler, and unbeknownst to HMRC at the time, she had extensive authority in respect of Mr Tinkler's tax affairs and she did have actual authority (as between her and Mr Tinkler) to receive tax notifications, including of an enquiry, into Mr Tinkler's affairs.

130. Did she receive notification? The appellant's case is that I must infer that the PA did not receive notification of the tax enquiry because he has no recollection of her informing him of the enquiry and he would have expected her to have informed him if she knew of it.

131. However, I have concluded for reasons given at XXX that either Mr Tinkler or his PA or both had actual knowledge of the enquiry via BDO at this time. Even if of the two of them it was only Mr Tinkler's PA who knew, that is sufficient to fix Mr Tinkler with knowledge, because I have already found his PA had actual authority to receive notifications of tax enquiries on behalf of Mr Tinkler.

What form must a notice of enquiry take?

132. But would such knowledge of Mr Tinkler and/or his PA, received from BDO and not from HMRC, be enough for s 9A TMA to constitute notice of the enquiry?

133. Both parties were agreed that no particular form for opening an enquiry was prescribed by law. S 9A TMA required only that notice of the enquiry should be given "to" the taxpayer within the time allowed; s 115 TMA said that a notice which had to be given "may" be served by post. Therefore, it seems, that a notice of enquiry does not have to be in writing at all (see *R (oao Spring Salmon & Seafood Ltd) v HMRC* [2004] STC 444 at [23]. Lady Smith also said:

> "[32] service or intimation of a notice of enquiry does not appear to be a step that calls for special formality but rather falls in the category of cases where it is recognised that the purpose of service of a notice is to see to it that the recipient is informed. ….

134. I agree that if HMRC can show that Mr Tinkler, or an agent of his authorised to receive such notification, actually knew of the enquiry before the enquiry window closed in January 2006, then they have fulfilled the requirements of s 9A even if notification was not formally given or even given verbally and informally by someone other than HMRC, such as BDO. And I find that is what must have happened at some point before BDO sent the November 2005 letter to HMRC, and so on that basis the appeal must be dismissed.

Estoppel

135. For the sake of completeness I move on to consider the third ground on which HMRC opposed this part of the appellant's appeal. What I say is said on the assumption that I am wrong in my conclusion in the previous paragraph.

136. This third ground is that even if HMRC had failed to properly notify Mr Tinkler of the opening of the enquiry, Mr Tinkler was estopped from taking this point in his appeal. Firstly, HMRC relied on *R (oao Spring Salmon & Seafood Ltd) v HMRC* [2004] STC 444 at [23]. In that case, Lady Smith said, in a ruling that was not binding (obiter) as she had decided the appeal in HMRC's favour on the grounds that notice to the agent was notice to the taxpayer, as follows:

> [38]…Reliance was placed on the fact that not only did the petitioners, through their agent, tell the Revenue to send the notice of enquiry to the other agents, …but, that having been done, [those agents] entered into correspondence with the Revenue stating that they would give a full response to the questions contained in the covering letter and that they were gathering information to enable them to do so. …it was not until after the 12-month period for intimation of a notice of enquiry had expired that the petitioners asserted that the notice had been invalid. That was in circumstances where the petitioners' director…appeared to have been aware of the potential for such an argument within a very short time of having received the notice….the Revenue had been led to believe, from [the agents'] letters, that the petitioners did not dispute their right to make enquiries. In all the

> circumstances, the petitioners had a duty to advise the Revenue prior to the expiry of the period within which a notice to enquiry could be validly sent, if they disputed the validity of the one which they had received.
>
> [39]….far from speaking up to indicate that the petitioners considered that there was defect in the intimation of the notices, the impression was given that the petitioners' agents and therefore the petitioners, accepted that they required to respond to the enquiries that were being made by the Revenue….In the event, it is not necessary for me to determine the issue of whether or not the petitioners are personally barred from now challenging the validity of the notice enquire but had it been, I would have agreed with the submission for the respondent and found that they were.

137. That case was a Scottish case about a Scottish principle, personal bar. HMRC's case is that 'personal bar' in Scottish law is equivalent to estoppel in English law – in this case estoppel by representation or estoppel by convention.

138. HMRC also rely on *Blindley Heath Investments Limited* [2015] EWCA Civ 1023 where the unanimous judgment was given by Hildyard J in an appeal about the doctrine and principles of estoppel by convention:

> [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*… 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…rather than to provide a cause of action…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…
>
> [75] …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….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.'

> ….such communication could, a fortiori, be effected when both parties conduct themselves towards each other on the basis of the assumption….

139. It can be seen that this kind of estoppel has a number of prerequisites which HMRC must prove in order to win their case on this:

(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 now be unconscionable to go back on that shared but mistaken assumption.

140. Unlike that case, however, HMRC's position is that (assuming that HMRC failed to validly opening the enquiry), the appellant is estopped by the course of conduct of its agent from denying that there was a valid open enquiry. HMRC rely on BDO's letter of 6 July (XXX) in which BDO acknowledged receipt of the HMRC's letter notifying them of the enquiry and in which they promised to give responses to HMRC's specific questions and that in November 2005 they made good on this promise and answered the questions. At no point until years later did anyone on behalf of Mr Tinkler suggest that the enquiry was not validly opened, while in the meantime both parties had proceeded on the assumption that it was, to the extent that not only did HMRC issue a closure notice, but the appellant appealed it without at that point in time raising as a ground of appeal that there was no valid open enquiry which could be closed.

Agency and estoppel

141. A problem for HMRC in relying on estoppel by convention is that they are relying on the knowledge and acts of BDO and not the knowledge and acts of Mr Tinkler during the critical time, which for reasons explained below at XXX is during the enquiry window which closed in early 2006.

142. So to rely on this estoppel HMRC assert that the knowledge and acts of BDO, as an agent of Mr Tinkler's, is sufficient to create the estoppel. And on this I agree with HMRC that in principle the knowledge and acts of an agent can be attributed to the principal. But the agent must have actual or apparent authority to represent the principal in the matter.

143. Irrespective of the issue of whether BDO had actual or apparent authority to receive the notice of enquiry, so far as HMRC were concerned BDO clearly had apparent authority to represent Mr Tinkler in the enquiry. This is what form 64-8 said and there is nothing on HMRC's website to detract from that: far from it, it envisages that the correspondence in the enquiry will be conducted between HMRC and the agent.

144. Did BDO have actual authority to represent Mr Tinkler in the enquiry? Mr Thomas points out that the engagement letter did not cover dealing with an enquiry: nevertheless Mr Tinkler did not suggest that Terry Jones had exceeded his authority in writing the letter of November 2005. The answer to this question does not really matter as apparent authority is enough: but I consider it more likely than not, bearing in mind that Mr Tinkler and Terry Jones had a long relationship, going back a few years before Terry Jones joined BDO, that the engagement letter did not represent the full extent of Terry Jones' actual authority in dealing with Mr Tinkler's affairs. More significantly, for reasons given at XXX, I find that BDO would have had instructions to reply to HMRC. I find that Terry Jones did not exceed his authority in writing the letter of November 2005.

145. So I agree with HMRC that for the purpose of this type of estoppel, the actions and beliefs of BDO are properly attributed to Mr Tinkler.

Shared, mistaken assumption?

146. The mistaken assumption, assuming I am wrong at XXX above, was that there was a valid tax enquiry afoot into Mr Tinkler's 03/4 tax return. This was an assumption shared by HMRC and BDO. As BDO had actual and apparent authority to act on Mr Tinkler's behalf in an enquiry I find that BDO's shared assumption must be attributed to Mr Tinkler.

Was the assumption communicated?

147. As BDO had actual and apparent authority to act on Mr Tinkler's behalf in an enquiry, I find that BDO's assumption must be attributed to Mr Tinkler. The shared assumption that there was a valid enquiry afoot was communicated between HMRC and BDO at the relevant time: not only was it mentioned in the exchange of phone calls summarised at XXX above, BDO replied to HMRC's enquiries in their letter of November 2005.

Did both parties act on that assumption?

148. BDO had actual and apparent authority to represent Mr Tinkler in the enquiry with HMRC and therefore I consider the question is whether BDO acted on that shared (mistaken) assumption. And it is clear that they did. They failed to make a claim which could not be made during an open enquiry (XXX), they wrote to HMRC in November 2005 with answers to the questions raised by HMRC as part of the enquiry. BDO continued to act under the (mistaken) assumption; for instance, they wrote a letter to HMRC in 2009 which referred to the open enquiry.

149. HMRC also acted under the (mistaken) assumption; they pursued answers to their questions, including issuing an information notice which could only have been issued during the course of an open enquiry.

150. Much more significantly, they did not seek to re-issue the enquiry letter. I was not addressed on whether an act of omission counts as well as an act of commission

but in my view it must do. It does not matter whether the response was to the shared assumption was inaction or action, as long as it was clearly different to what it would have been had there been no shared, mistaken assumption.

Is it unconscionable for Mr Tinkler to go back on the assumption?

151. The appellant's position is that Mr Tinkler's case is quite distinct from that in *Spring Salmon.* The judge there said she would have found it unconscionable for the company to assert it was not properly notified of the enquiry because the director was shown to have known of the potential fault with the notification before the enquiry window closed and deliberately chose to say nothing but to act as if the enquiry was properly opened at least until after the enquiry window closed. Nothing like that happened here. Mr Tinkler has no recollection of knowing about the enquiry before 2012 and there is no suggestion that BDO acted as if there were a valid open enquiry in order to lull HMRC into a false sense of security. Indeed, BDO acted in the belief that the enquiry was validly opened.

152. However, while it would have been unconscionable in the circumstances of the *Spring Salmon* case for the company to rely on the defect in the notice when they deliberately misled HMRC by acting as if there was no such defect, such knowing conduct is not a required part of the test of whether asserting the true situation would be unconscionable.

153. Paragraph [73] of *Blindley Heath,* in particular, is discussing the situation of a shared misunderstanding which can nevertheless give rise to a situation where it is unconscionable for one or other party to assert the true position. So it is quite clear that this estoppel does not rely on any kind of knowledge of the misunderstanding or intent to deceive on the part of the person now seeking to resile from the common position. Paragraph [73] is predicated on the basis that it is a mutual misunderstanding. Such an estoppel could theoretically apply here where both BDO and HMRC were under the same mistaken belief that an enquiry had been validly opened.

154. But does anything make it unconscionable for Mr Tinkler to go back on the shared misunderstanding between HMRC and his agent?

155. HMRC's case is that, had they known the validity of the opening of the enquiry was in doubt, they would have simply reissued the enquiry letter within the enquiry window to a correct address, such as Station Road (Mr Tinkler's place of employment). The appellant's agent's positive acts in responding to the enquiry as issued to Heybridge Lane makes it in HMRC's view unconscionable for them now to question the validity of the enquiry.

156. HMRC's case, it seems to me, rests on the proposition that HMRC would have acted differently had the appellant acted differently. It also rests on the proposition that HMRC would have acted differently but for the shared mistaken assumption. In other words, if BDO had not acted in reliance on the belief the enquiry was opened, it would have acted differently and HMRC would have consequentially acted

differently. It also rests on the proposition that HMRC would have acted differently within the enquiry window: anything that would only likely to have been done after the enquiry window closed could have had no effect on the validity of the enquiry and is therefore irrelevant.

157. So would HMRC have acted differently during the time before the enquiry window closed had the appellant acted differently? It seems to me that BDO would have done one of two things if they had not shared the mistaken assumption there was a valid open enquiry (and of course assuming there was no intent to actively mislead). They could have informed HMRC that the enquiry notice was not valid because it had not been received by the appellant, or they could simply have not responded to it.

158. It is clearly more likely than not that if BDO had told HMRC that they did not consider the enquiry letter validly served, then HMRC would have reissued it or a least taken further steps to ensure Mr Tinkler was aware of it. But what if BDO, for whatever reason, had simply not responded to the enquiry letter? Would in these circumstances HMRC have responded by re-issuing the letter of enquiry?

159. I find that in fact HMRC had not been content to let the matter of the enquiry drift: they chased BDO promptly when BDO's self imposed deadline for a reply passed without word, and then again after a lapse of time HMRC issued an information notice (XXX). So I think if HMRC had simply heard nothing at all in response to the original enquiry letter, they would have pursued the matter and they would have pursued it at least as promptly as they did pursue BDO's reply. In the 7 months from the purported opening of the enquiry to the closing of the enquiry window, such efforts made by HMRC to pursue the enquiry may well have led to Mr Tinkler being informed there was an open enquiry.

160. This is of course speculative but when the question for the Tribunal to consider is not what the facts actually were, but what they would have been had circumstances been different, then the Tribunal is called upon to speculate.

161. Mr Thomas says that it is not unconscionable for Mr Tinkler to go back on a shared assumption when he was in no way to blame for HMRC serving the notice of enquiry at the wrong address. But I do not agree that HMRC's responsibility for that mistake is relevant. BDO's letters to HMRC written subsequent to that mistake by HMRC interrupted causation: if BDO had not written to HMRC in the belief that there was a valid enquiry afoot, then I consider (for the reasons given above) it more likely than not that HMRC's original error in sending the notice to the wrong address would have been put right.

162. So my decisions is that all the elements are present to create an estoppel on Mr Tinkler. His agent's acts in dealing with the enquiry must be taken as authorised by him as BDO had both actual and apparent authority to represent him in the enquiry. Therefore, had my finding in paragraph XXX above been otherwise, Mr Tinkler (acting by BDO) and HMRC would have shared a common misapprehension that the enquiry was validly opened, and they both acted on this understanding and it was communicated between them. BDO's actions in response to that common belief in

the valid enquiry led HMRC to acting differently to how they would otherwise have acted and in a way detrimental to HMRC's interests. Therefore, it is unconscionable for Mr Tinkler now to insist on the true state of affairs (or what would be the true state of affairs but for my finding in paragraph XXX) and he would be estopped from doing so.

163. So I would find for HMRC on the basis of this third ground as well as on the basis of the second. The preliminary issue is therefore resolved in HMRC's favour.

164. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

165. If a successful application is made for the period of appeal to run after the issue of the substantive decision, then both parties are directed within 14 days of notice of the success of such application to submit draft directions to the Tribunal to bring the substantive appeal to hearing.

166. If no such application is made, or if it is made but fails, then unless either party objects and such objection is upheld, the substantive appeal will be stayed pending the final outcome of an appeal, if any, from this preliminary decision.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 9 MARCH 2016