Neutral Citation: [2024] UKFTT 00067 (TC)

Case Number: TC09039

FIRST-TIER TRIBUNAL
TAX CHAMBER

Birmingham Tribunal Centre

Appeal reference: TC/2020/04198

INCOME TAX – gilt strips scheme - sections 9A and 115 of the Taxes Management Act 1970 – section 7 of the Interpretation Act 1978 - whether HMRC gave the taxpayer a notice of enquiry – yes – whether an estoppel by convention arose – no – appeal dismissed

Heard on: 5 June 2023
Judgment date: 16 January 2024

Before

TRIBUNAL JUDGE RICHARD CHAPMAN KC

Between

ALASTAIR CATTRELL

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Paul Lynam, Tax Consultant.

For the Respondents: Mr Joshua Carey and Mr Sam Way, both of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs.

DECISION

INTRODUCTION

1. This is an appeal against HMRC's closure notice dated 5 February 2014, amending Mr Cattrell's 2003/2004 self-assessment tax return.

2. The dispute relates to Mr Cattrell's investment in a scheme ("the Scheme") marketed to him by a firm of accountants, PricewaterhouseCoopers ("PWC"), involving gilt strips (being a divided part of a UK Government bond, with "strips" being an acronym for "separately traded and registered interest and principal securities"). In short, HMRC decided that, through such investment, Mr Cattrell had participated in tax avoidance transactions. HMRC duly reduced the economic loss resulting from the arrangements from the £950,000 claimed by Mr Cattrell to £4,560. A closure notice dated 5 February 2014 demanded a payment to HMRC in the sum of £366,932.50, calculated as the difference between the £199,346.75 repayment pursuant to the claim in the return and the tax assessed of £167,586.10.

3. Mr Cattrell sought a review of the closure notice. After a long period of agreed postponement, HMRC upheld the decision by a letter dated 19 August 2020. Mr Cattrell appeals to this tribunal by a notice of appeal dated 30 November 2020. HMRC agree to an extension of time for Mr Cattrell to bring this appeal.

4. Mr Cattrell does not take issue with the substance or quantum of the closure notice. Instead, the dispute is in respect of two issues: first, whether or not the enquiry was validly notified to Mr Cattrell; and, secondly, whether or not Mr Cattrell is estopped from relying upon any invalidity.

THE FACTUAL BACKGROUND

5. The background was not in dispute and was supported by the witness evidence and documents before me. As such, I make findings of fact to the following effect.

6. Mr Cattrell was introduced to the Scheme by PWC. HMRC summarised how the Scheme operated in a letter dated 17 October 2013. Mr Cattrell did not dispute this summary at the hearing, but, as no findings are required as to the substance of the Scheme and given that there was no witness evidence in this regard, I set it out in full below as my findings as to what HMRC presented as their understanding of the Scheme, rather than making any findings as to the accuracy of that understanding.

> "HMRC View of Gilt Strip Scheme Marketed by PricewaterhouseCoopers in 2003-04
>
> A. Outline of scheme
>
> 1. The taxpayer establishes a trust of which they are settlor and beneficiary. They may also act as trustee for the settlement (along with their spouse), or the trustees may be business associates. The amount settled is sufficient to cover the cost of the strips under the option given to the trust.
>
> 2. The taxpayer buys short dated UK Gilt Strips ("strips") from Kleinwort Benson Bank, with or without borrowing.
>
> 3. The taxpayer grants a call option over the strips to their trust, at no cost to the trust. The option confers on the holder the right to acquire the strips for 9% of their market value. The option is "in the money" and has transferred most of the value of the strips to the trust. The option must be exercised within a specified period.

> 4. The option is contingent on the movement of the FTSE, such that the FTSE must be at or below a specified level on the specified date. The exercise period referred to in (3) begins once the contingency has been met.
>
> 5. The taxpayer sells the encumbered strips to a purchaser (Investec Bank) for an amount which matches 9% of the market value. The taxpayer claims a large loss amounting to 91% of the market value of the strips.
>
> 6. At the same time the trustees agree to sell the option to the same purchaser as the strips (Investec have agreed to buy the option on the understanding that they can buy the strips at the same time).
>
> 7. The taxpayer, the taxpayer as trustee, and the purchaser enter into a single contract of purchase and sale encompassing both the sale of the strips and the option. The purchaser then holds the strips unencumbered.
>
> 8. The taxpayer claims a loss to set against their income under para 14A(1) Schedule 13 Finance Act 1996; the difference being (as para 14A(3)(b) puts it) where *"the amount paid buy him for the strips exceeds the amount payable on the transfer ..."*. Costs of acquisition or transfer of the strips are excluded from the loss.
>
> 9. The amount received from the option by the trust is said by the taxpayer to be exempt from Capital Gains tax under Sect 115 TCGA 1992 and not otherwise chargeable to income tax. We do not agree this analysis, and consider that the profit arising to the trust on the sale of the option is chargeable to income tax.
>
> 10. The taxpayer and trust are, at the end of the transactions, in financial terms broadly where they started from apart from fees and costs. The taxpayer has 'lost' broadly what the trust 'gained'.
>
> 11. The Gilt Strip scheme was planned and implemented to save tax and not for investment performance."

7. Mr Cattrell invested in the Scheme through, and advised by, PWC. On 14 September 2004, he filed his self-assessment return in respect of the year ending 5 April 2004, which included a claim for losses in the sum of £950,000 resulting from his investment.

8. HMRC subsequently enquired into the Scheme and Mr Cattrell's involvement in it. HMRC say that a notice of enquiry was given on 28 April 2005, whereas Mr Cattrell disputes that this was issued, served or received. These matters are of course heavily contested and so I make my findings in this regard below rather than within this background section of this decision.

9. Other taxpayers unconnected to Mr Cattrell had also invested in the Scheme. Discussions therefore took place between HMRC and PWC in respect of challenges to the Scheme and the investments made through PWC as a whole.

10. Following discussions between HMRC and PWC, HMRC wrote to PWC on 8 June 2005 with a proposed representative sample agreement ("the RSA"). In essence, the RSA provided for taxpayers to sign up to the RSA, a number of whom would be selected as samples to be subject to detailed enquiries ("the Samples"), and the remainder of whom would await the outcome of the detailed enquiries into the Samples. The terms of the RSA are important and so I set them out in full:

> "a. Her Majesty's Revenue and Customs (HMRC) intends to enquire into all Gilt Strip (GS) loss claims made on 2003-2004 tax returns, Richard Richmond will co-ordinate all such enquiries where the claim arises from Gilt Strip planning advice given by PricewaterhouseCoopers (PwC).

b. Detailed enquires into claims involving the same planning (together with the attendant costs to the individual, their professional advisers and HMRC) may be reduced by the following administrative arrangement. All individuals claiming GS losses as a result of advice given by PwC should consider being part of a "representative sample arrangement" (RSA). This letter outlines what is involved.

c. In summary, HMRC will make detailed enquiries into an appropriate sample of claims and expect to apply the results to the RSA population. The RSA does not affect the statutory rights and obligations of either the individual or HMRC.

d. PwC will represent all individuals in the RSA in connection with GS loss enquiries even if the individual uses another adviser in connection with other matters.

e. Variations in the GS planning used or in the circumstances in which it is carried out may require separate samples for each variant. HMRC and PwC will discuss this.

f. PwC will explain the terms of the RSA to clients who have made GS loss claims arising from PwC planning and will notify HMRC of those who agree to be included in the RSA. Being in the RSA reduces costs but until numbers are known, HMRC cannot determine the sample size or start detailed enquiries.

g. PWC and HMRC have agreed a cut off date of 22 July 2005. By that date PwC will have identified those individuals who wish to be included in the RSA and will provide HMRC with a list showing:-

- the individual's full name and address;
- the taxpayer reference (UTR);
- the amount of GS loss claimed; and
- the date of the sale of the gilt strips giving rise to the GS loss claimed.

h. After receiving the list HMRC will select the sample (or samples if variations emerge) and advice PwC of the names of the individuals within the sample. Richard Richmond will co-ordinate (and in most cases conduct) the enquiries and will address correspondence with PwC. The appropriate Code of Practice will be issued in these cases and any third party enquiries needed will be carried out in accordance with HMRC practice. If these enquiries cannot be settled by agreement then litigation may become necessary.

i. HMRC will open enquiries into all other individuals within the RSA but will not request information and documentation relating to the GS loss claims. Any enquiries into matters other than the GS loss claim will be pursued as normal by the individual's local tax office.

j. During the course of the enquiries into the individuals included in the sample(s), neither HMRC nor PwC and/or their client will seek closure notices in respect of enquiries into other individuals within the RSA. Neither PwC nor their clients will press for repayments (so far as they relate to GS loss claims) pending the outcome of the sample enquiries).

k. HMRC is unable to predict the time to completion of the enquiries into the sample claims but will work closely with PwC at all stages.

l. Either party can withdraw from the RSA at any time.

> m. HMRC will carry out detailed enquiries into all GS loss claims made by individuals not within the RSA or where they withdraw from it.
>
> n. If an RSA is expected, existing enquiries can be put on hold by arrangement with HMRC.
>
> o. Please confirm PwC's agreement to the above by signing and returning a copy of this letter."

11. By a letter dated 22 July 2005, PWC wrote to HMRC enclosing a list of clients who had accepted the RSA. This list included Mr Cattrell.

12. Samples were then identified and were the subject of detailed enquiries. Mr Cattrell was not one of those Samples.

13. After the completion of those detailed enquiries, HMRC made settlement offers to various participants in the RSA, including Mr Cattrell. HMRC stated as follows in a letter to Mr Cattrell dated 17 October 2013:

> "In 2003-04 you used a scheme promoted by PricewaterhouseCoopers (PWC) which involved transactions in gilt strips This has been under enquiry with HMRC. You entered into a Representative Sample Agreement with us whereby scheme documents were supplied by a sample of cases. As a result of this Agreement we have not corresponded with you direct. However we have now provided a without prejudice proposal for settlement of our enquiry and I am therefore writing to you to confirm the details of this opportunity, set out HMRC's view of why the scheme fails, why it gives rise to an assessable profit and how we propose to deal with scheme participators who decide not to withdraw their claim."

14. HMRC were of the understanding as at 25 November 2013 that Mr Cattrell intended to accept such a settlement offer and to withdraw his loss claim. However, on 26 November 2013, Mr Cattrell's representatives (who were not PWC) made it clear that he was still pursuing, and so would not be withdrawing, his loss claim.

15. HMRC issued the closure notice on 5 February 2014. Mr Cattrell appealed to HMRC on 25 February 2014. Further correspondence passed between Mr Cattrell's new representatives (again, not PWC) on 27 November 2019 and 29 November 2019. A formal review was requested on behalf of Mr Cattrell on 7 January 2020, which resulted in HMRC providing their view of the matter on 6 February 2020. Further submissions were made on behalf of Mr Cattrell on 3 April 2020. It is common ground that this was the first time that Mr Cattrell contended that there was no valid notice of enquiry given. HMRC upheld their earlier decision in a letter dated 19 August 2020, including their position that a notice of enquiry had been issued and served on 28 April 2005.

16. As set out above, Mr Cattrell appeals by a notice of appeal dated 30 November 2020. The first ground for appeal is Mr Cattrell's contention that the notice of enquiry was not issued, served or received. The second ground for appeal contends that HMRC were wrong to disallow the loss claim but does not provide any detail as to why, stating that, "HMRC contend that the PwC gilt strip scheme is ineffective for tax purposes. Mr Cattrell does not accept this point." As set out above, this second (and only substantive) ground is no longer pursued.

PRELIMINARY POINTS IN RESPECT OF THE EVIDENCE

17. I will make further findings of fact below when considering the relevant issues in turn. However, I make the following preliminary points at this stage.

18. First, the parties agree that the burden of proof in respect of the notice of enquiry issue is upon HMRC to establish that a valid notice of enquiry was given and sent and (if established)

the burden passes to Mr Cattrell to establish that it was not received. As regards estoppel by convention, the burden of proof is upon HMRC as it is HMRC who raises it and relies upon it. The standard of proof in all these respects is of course that of the balance of probabilities.

19. Secondly, I have read witness statements and heard oral evidence on behalf of HMRC from Mr Kevin Walker (the HMRC officer dealing with the matter since August 2020) and on behalf of Mr Cattrell from Mr Cattrell himself, and Mr Paul Gayton (Mr Cattrell's tax advisor from 2008). I also read a witness statement from Mr Cattrell's wife, Lorraine Cattrell. Mrs Cattrell did not attend to give evidence and so, whilst I take her evidence into account where relevant, the weight of that evidence is to be reduced by virtue of her not being available to be cross-examined by HMRC. Further, I read a witness statement from Mr Lynam. However, Mr Lynam, in his capacity as representative of Mr Cattrell, decided not to rely upon that witness statement upon the basis that it constituted either submissions (which he could still make on Mr Cattrell's behalf in opening or closing) or expert witness evidence in circumstances where there was no permission for expert evidence.

20. Thirdly, I have formed the view that Mr Walker, Mr Cattrell and Mr Gayton (being the only witnesses to give oral evidence) were each giving evidence which they genuinely believed to be correct and that they were doing their best to assist the tribunal. Notwithstanding this, their evidence suffered from shortcomings, albeit in different ways.

21. Mr Walker's first dealings in this matter were in August 2020. As such, he does not give first hand evidence as to what happened prior to his involvement, particularly in 2005 at the time that HMRC say the notice of enquiry was issued and served. Instead, I take his evidence as to matters prior to his involvement to be a commentary upon documents and a generic explanation as to HMRC's processes.

22. Mr Cattrell was trying to remember events which took place in 2005 in respect of his dealings with PWC (particularly in respect of the RSA) and his understanding of whether a notice of enquiry was sent. I therefore keep in mind the unreliability of human memory and the comments of Leggatt J as he then was in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) ("*Gestmin*") at [15] to [22] (as referred to in Mr Carey and Mr Way's submissions).

> "*Evidence based on recollection*
>
> [15] An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> [16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> [17] Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called

‘flashbulb’ memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description ‘flashbulb’ memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness’s memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

[18] Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party’s lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

[20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness’s memory has been ‘refreshed’ by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness’s memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

[21] It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

> [22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

23. This is of course not to say that Mr Cattrell's evidence should not be accepted simply because it was a long time ago. Instead, I note that it is of particular relevance to the present case that Mr Cattrell's honesty and confidence in the truth of his recollections must still be weighed against findings or inferences drawn from documents and known or probable facts.

24. I also note that Mr Lynam submitted that Mr Cattrell's evidence should be accepted unless HMRC successfully challenged the veracity of his evidence or his credibility in the course of cross-examination. This intertwines two different points: whether or not the evidence is challenged and how that evidence is assessed against contrary evidence, documents and inferences. It is correct that HMRC must challenge Mr Cattrell's evidence in order to submit that it is not to be accepted. Here, it is clear that HMRC challenges Mr Cattrell's evidence, not least because he was cross-examined on it. Mr Cattrell's evidence is then to be considered, keeping in mind the comments of Leggatt J in *Gestmin* as set out in paragraph 22 above. Indeed, this can be seen from the judgment of Arnold J in *Okolo v Revenue and Customs Commissioners* [2012] UKUT 416 (TCC) (a case which Mr Lynam particularly relies upon) at [32] to [34]:

> "[32] The second main point made by counsel for Mr Okolo was that, in dismissing Mr Okolo's account as implausible at [17], the Tribunal had failed to consider the far greater implausibility of the only alternative possibility. That was that that Mr Okolo, a person with no apparent experience of the building industry and employed full-time in a completely unrelated sector, should have carried on a substantial and highly profitable contractor's business in his spare time; that the turnover of that business should have been generated entirely in cash and the profits hidden in some unexplained manner; that he should then have abandoned that profitable business entirely despite its being far more lucrative than his normal employment; and that he should have decided to evade tax on the profits, not by the simple expedient of failing to declare the income, but by volunteering in one batch, and under no pressure from HMRC, tax returns for all four years complete with invented figures for expenditure.
>
> [33] Counsel for HMRC had no real answer to this point other than to submit that it was for the Tribunal to assess Mr Okolo's credibility. In my judgment that is not a sufficient answer. The Tribunal did not base its rejection of Mr Okolo's case on his demeanour when giving evidence. On the contrary, it recorded that Mr Okolo 'appeared to give his evidence earnestly'. Rather, the Tribunal based its decision on the objective implausibility of Mr Okolo's case. I agree with the Tribunal that, at first blush, it appears implausible; but I agree with counsel for Mr Okolo that the alternative is even more implausible. Furthermore, when considering the credibility of Mr Okolo's account, the

> Tribunal failed properly to test it against the documentary evidence, namely the bank statements and loan documents. Yet further, the essence of HMRC's case is that Mr Okolo has not produced any credible evidence to substantiate his claimed expenses; but it is equally true to say that he has not produced any credible evidence to substantiate his claimed turnover either. In short, there is simply no credible evidence that Mr Okolo carried on any business or trade as either a property developer or a builder during the four years in question.
>
> [34] Finally, I would add that, in the absence of any challenge to Mr Okolo's evidence to the Tribunal that he had not developed, refurbished or redecorated any properties other his own residence, it was not open to the Tribunal to disbelieve that evidence: see *Phipson on Evidence* (17th edn) at para. 12-12 and the authorities cited in footnote 32, in particular *Markem Corp v Zipher Ltd* [2005] EWCA Civ 267; [2005] RPC 31 at [50]–[61]. Counsel for HMRC submitted that this rule of evidence did not apply in the First-tier Tribunal. I do not accept that submission. This rule of evidence is simply an application of the principles of natural justice which apply in all courts and tribunals."

25. Mr Gayton was first appointed as Mr Cattrell's tax advisor in 2008. As such, he cannot give any evidence of his own as to what happened in 2005 and, in fairness to him, does not seek to do so other than to note that Mr Cattrell's previous tax advisors said nothing to Mr Gayton or his firm about the existence of any enquiry.

26. Fourthly, I have taken into account the documents referred to me by the parties.

NOTICE OF ENQUIRY

The Legal Framework

27. There was no dispute as to the legal framework in respect of the requirement for HMRC to give a notice of intention to enquire into a taxpayer's self-assessment return.

28. Sections 9A(1), (2) and 115(1),(2)(a) of the Taxes Management Act 1970 ("TMA 1970"), in their form in force at the relevant time, provide as follows:

> "9A Notice of enquiry
>
> (1) An officer of the Board may enquire into a return under section 8 or section 8A of this Act if he gives notice of his intention to do so ("notice of enquiry").
>
> (a) to the person whose return it is ("the taxpayer").
>
> (b) within the time allowed
>
> (2) The time allowed is –
>
> (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the filing date;
>
> (b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;
>
> (c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.
>
> For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October.
>
> ...
>
> 115 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 to be 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
>
> ..."

29. Section 7 of the Interpretation Act 1978 ("the IA 1978") provides for service to be deemed to have been effected in the following circumstances:

> "7. 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."

The Evidence

30. The relevant evidence on behalf of HMRC is as follows:

(1) A copy of the notice of enquiry is not available. Mr Walker said that he had seen from computerised notes that the enquiry documents were in a store room in Cardiff in 2014. There was no electronic record at that time and so the paper folder would have been held. However, the computerised notes also show that the enquiry was closed after the closure notice was issued. Mr Lynam put to Mr Walker that this was a mistake because the appeal was still pending, to which Mr Walker agreed. Mr Lynam also put to Mr Walker that the normal process is to keep a paper file and not destroy it until six years after the end of the enquiry, to which Mr Walker also agreed.

(2) Mr Walker also said that HMRC do not have a record of the notice of enquiry having been posted to Mr Cattrell. He said that this is not uncommon as they were not sent separately to general correspondence and so would not have been sent by registered or recorded delivery.

(3) Mr Walker gave evidence as to his understanding as to how post was generally dealt with at the time, although he accepted that there were some variations from office to office. He said that enquiry notices would be printed, one copy would be kept on the file and one copy would be put in the "post out tray" together with all other external correspondence. This would then be placed in an envelope by the person dealing with post on that day, and would then be collected by the postman. Second class postage would be used.

(4) References to a notice of enquiry appear on various documents which were before the tribunal.

(5) A note appears on what is called the "Compliance Quality Initiative" or "CQI" system with "S9A Notice + COP issued" under the heading "Actions", "28-04-2005" under the heading "Action Date" and "Y" under the heading "Done". Mr Walker explained that, as a matter of HMRC's procedures, this was a standard entry used to

indicate that the enquiry notice and factsheet had been issued. He said that this was a manual entry rather than being automatically populated from any other data source. He also said that, as a matter of procedure, the address which would have been used would have been the address on HMRC's self-assessment system database.

(6) A note appears on the Computerisation of PAYE system ("COP system", although to be distinguished from the factsheet referred to as COP on the CQI system note referred to at paragraph 30(3) above) with the narrative "2004 enquiry S Parker" followed by a telephone number. There is no date shown but this pre-date changes made for the 2007 and 2008 returns. Mr Walker's evidence as to HMRC's procedures is that notes on the COP system are made by officers carrying out coding integrity checks.

(7) The self-assessment system notes also include an entry on 4 May 2005 with the narrative "2004 Enquiry S Parker" followed by a telephone number. Mr Walker notes that, contrary to a suggestion by Mr Lynam to the contrary, the dates of entries on the self-assessment system notes cannot be backdated or changed as they are automatically generated contemporaneously when the note is added.

(8) Mr Walker explained that HMRC's personal tax compliance team undertook enquiries into the Scheme on instructions provided by the complex personal returns team ("the CPR Team"). The CPR Team compiled a spreadsheet which included Mr Cattrell's name, unique taxpayer reference, a "Y" in a column with the heading "03-04 Enquiry", and "28 April 2005" in a column with the heading "Date of Enquiry". A copy of the spreadsheet was before the tribunal with all details redacted other than the column headings and Mr Cattrell's details.

(9) An internal memorandum dated 13 June 2005 from Mrs Parker (an Officer of HMRC) to Mr Richmond (of HMRC's CPR Team) states as follows under the heading "My Taxpayer" A K Cattrell" followed by his unique taxpayer reference number:

> "Following a memo from the CPR Team in Birmingham Solihull advising us that Mr Cattrell had utilised the PWC scheme for which you are the expert an Enquiry was opened into the 2004 Return. Since there was no representative agreement in place a request for all information required was needed.
>
> My opening letter was issued 28 April and I have now been advised by Price Waterhouse Coopers that we should not be taking action on individual cases following a meeting between them and yourself.
>
> Can you please confirm this is the case?"

(10) Mr Richmond responded to this with an email dated 13 June 2005, stating that no further action was needed at that time.

(11) A further internal memorandum dated 1 September 2005 from Mr Richmond to the CPR Team refers to Mr Cattrell as "Your Taxpayer" and states that, "You opened a 2003-2004 enquiry on 28 April 2005," and goes on to explain that the RSA had been entered into.

(12) Mr Walker accepted in the course of his cross-examination that it was hypothetically possible that the systems could say that the notice of enquiry had been sent without the notice actually being posted.

31. The relevant evidence on behalf of Mr Cattrell is as follows:

(1) Mr Cattrell does not recollect ever having received a notice of enquiry.

(2) The matter was so significant to him that he would not have failed to notice or to recollect it.

(3) Mr Cattrell also stated in his witness statement that, "I do not recollect ever having received any such Notice. And I'm certain that if HMRC had written to me in regard to this, then the matter is so significant to me that I would not have failed to notice or recollect it. .... If HMRC had so written to me then I would have contacted PwC immediately about it. I would also now recollect having done that: which I do not. And I would have kept a file of the relevant correspondence: which again I have not done. He also said that PWC sent him a boilerplate letter, as a result of which he telephoned PWC. He was told that he had not been personally mentioned in discussions with HMRC and that HMRC was looking into the scheme in general.

(4) In the course of his oral evidence, Mr Cattrell gave further evidence about his dealings with PWC. He said that he never formally appointed PWC to act on his behalf and that his dealings with HMRC were through his own accountants. However, he did have discussions with PWC following 2004 and in 2005. He knew through this contact with PWC that PWC had been having discussions between HMRC and PWC, that there were some sample cases being looked at and that he was not one of the samples. PWC told him that his case was fine and nothing to be concerned about. He then did not hear anything from PWC and assumed that everything was acceptable to HMRC.

(5) Mr Cattrell said in his witness statement that he did not agree to be a part of the RSA. However, he accepted during cross-examination that his inclusion within PWC's spreadsheet of clients agreeing to participate in the RSA makes it seem that he was incorrect to say that he had not done so. He said that he struggled with this because it does not match his recollection that he was not a part of the sample.

(6) Although he said in his witness statement that he did not know about the enquiry until 2014, he accepted that it was highlighted to him in HMRC's letter dated 17 October 2013. He had not considered this letter when his witness statement was written because he did not have a copy of this letter and had forgotten about it.

(7) Mrs Cattrell states in her witness statement that Mr Cattrell did not tell her about receiving any notice of enquiry and that the amount of money at stake was so substantial that he would have done so and would have retained a copy of the papers.

(8) Mr Gayton said that Armstrongs (the firm that had previously acted for Mr Cattrell) did not tell him of any enquiry when he began acting for Mr Cattrell in 2008. As he specifically asked them whether there were any open or closed enquiries, he says that he took from this that there were none, that his predecessor was not aware of any, and that they had not received any notice of enquiry.

Submissions

32. Mr Carey and Mr Way submitted that the evidence supported a finding that the notice of enquiry had been issued, sent and received. In particular, HMRC's notes referred to the notice of enquiry. Further, the RSA was predicated upon the basis of a challenge to Mr Cattrell's tax affairs. In addition, there was no mention of the absence of a notice of enquiry in correspondence on behalf of Mr Cattrell (including in the appeal to HMRC against the decision) until 2020. Further, HMRC's records establish that the notice of enquiry was issued and sent by post to Mr Cattrell's address, and so it was deemed to have been properly served unless Mr Cattrell establishes that it was not received, which, HMRC maintain, he cannot do.

33. Mr Lynam submitted that HMRC's evidence was insufficient to establish that it was issued and sent as there is no direct evidence of them doing so. Mr Lynam also submitted that Cattrell's evidence was wholly credible; had he received a notice of enquiry, he would have remembered it, retained it, and discussed it with his wife. The absence of any reference to any

enquiry by Armstrongs corroborates this. He also says that PWC were not authorised to act on Mr Cattrell's behalf and the RSA cannot affect the position. In any event, he submits that PWC told Mr Cattrell that he was not one of the Samples and that he had not been specifically in their discussions with HMRC.

Discussion

34. Having considered all the evidence, I find on the balance of probabilities that the notice of inquiry was issued by HMRC, sent to Mr Cattrell, and received by Mr Cattrell on or about 28 April 2005. This is for the following reasons.

35. First, HMRC's records make repeated references to the notice of enquiry having been issued. These are set out in paragraphs 30(4) to (8) above, which I accept and adopt for this purpose.

36. Secondly, and most persuasively, I infer from the internal memorandum of 13 June 2005 that PWC were aware of the notice of enquiry. Given that there is no evidence (or even any submission) that the notice of enquiry was sent to PWC by HMRC, I infer that PWC learnt of the notice of enquiry and its contents from Mr Cattrell. This inference is further supported by the fact that Mr Cattrell accepts that he had conversations with PWC at about this time and (understandably given the passage of time) his evidence revealed that he did not have any recollection of the detail of what he discussed with PWC. Indeed, as set out above, Mr Cattrell said in his witness statement that if HMRC had written to him about an enquiry he would have contacted PWC about it immediately. I find that, on the balance of probabilities, that is precisely what Mr Cattrell did given the inference that PWC learnt about it from him and Mr Cattrell's evidence that that is what he would do if he had received it.

37. Thirdly, Mr Cattrell's confidence that he did not receive the notice of enquiry is outweighed by the documentary evidence which I have referred to above. It is also inconsistent with his knowledge of the fact of HMRC's investigations. This is, in particular, for the following reasons:

> (1) It is of note that Mr Cattrell's main reason for his view that he did not receive the notice was that he would have remembered something so significant but that he did not know that there was an enquiry into his 2003/2004 self-assessment return until his receipt of HMRC's letter dated 17 October 2013.
>
> (2) However, I find that he knew from his discussions with PWC in 2005 that the Scheme was under challenge.
>
> (3) I also find that Mr Cattrell knew in 2005 that he was a participant in the RSA, albeit that he also knew that he was not one of the Samples. On the balance of probabilities, PWC would not include Mr Cattrell on a list of clients agreeing to participate in the RSA if they were not authorised by Mr Cattrell to do so. Indeed, it appeared from Mr Cattrell's oral evidence that he was confusing the fact that he was not one of the Samples (which was correct) with an assertion that he was not a participant in the RSA (which, I find, was incorrect).
>
> (4) Mr Cattrell's evidence that he thought that the matter had been resolved (or, as he put it, "gone away") because he did not hear from PWC or HMRC about the matter for so long also reinforces the point that he must have been aware that there was a matter to be resolved. It follows that, on the balance of probabilities, Mr Cattrell has failed to remember the notice of enquiry (and that he knew about the notice of enquiry) in the same way that he has failed to remember that he was aware of the enquiry through his discussions with PWC.

38. Fourthly, Mr Gayton's evidence did not take the matter any further. Whilst I accept that Armstrongs did not tell him about any enquiry and that it is a proper inference that Armstrongs did not know about it, the significance of this is outweighed by the fact that PWC were dealing with matters relating to the Scheme.

39. Fifthly, Mrs Cattrell's witness statement did not take the matter further as the height of her evidence was that she did not know about the notice of enquiry and that Mr Cattrell would have told her about it if he had received it. Her evidence is also of limited weight because she was not called as a witness and so was not available for cross-examination.

40. Sixthly, I agree with Mr Lynam that Mr Walker's evidence was insufficient to establish that the notice of enquiry was in fact sent by post for the purposes of engaging the deeming provisions of section 7 of the IA 1978. Although Mr Walker was not dealing with the matter in 2005, he is still in principle able to present evidence to explain HMRC's processes. The difficulty is that he noted that there were variations from office to office and so fairly accepted that he did not know that the relevant office said to have sent the notice of enquiry did so in accordance with the general practice or in accordance with some variation of it. However, the inability to meet the conditions for section 7 of the IA 1978 is overridden by my finding of fact (as set out above) that, on the balance of probabilities, Mr Cattrell did receive the notice of enquiry; in order for him to have received the notice of enquiry, it must of course have been sent to him.

41. It follows that the enquiry was valid because HMRC did give a notice of enquiry on or about 28 April 2005. This is sufficient for the appeal to be dismissed.

ESTOPPEL BY CONVENTION

42. In the light of my findings in respect of the notice of enquiry, there is strictly no need to consider estoppel by convention any further. Indeed, the purpose of the estoppel is to preclude Mr Cattrell from relying upon the. Invalidity of the enquiry, whereas (for the reasons set out above) the enquiry was not in fact invalid in any event. However, given that the parties have made submissions on the issue, I address it briefly below.

The Legal Framework

43. There was no dispute as to the relevant principles.

44. In *Tinkler v HMRC* [2022] AC 886 ("*Tinkler*"), the Supreme Court held that an estoppel by convention arises in a non-contractual context where:

> (1) There is an expressly shared common assumption and that something is shown to have 'crossed the line' sufficient to manifest an assent to the assumption.
>
> (2) There is an assumption of responsibility for the common assumption by the party alleged to have been estopped.
>
> (3) The party alleging that there is an estoppel has relied upon the common assumption to a sufficient extent.
>
> (4) The reliance is in respect of subsequent mutual dealings between the parties.
>
> (5) The reliance is to the detriment of the party alleging the detriment or to the benefit of the party alleged to be estopped sufficient for it to be unjust or unconscionable to assert the true legal or factual position.

45. Lord Burrows stated as follows at [45] (quoting from *Revenue and Customs Commissioners v Benchdollar Ltd* [2010] 1 All ER 174, *per* Briggs J, as he then was) and at [49] to [53].

"[45] Having referred to a number of the leading cases on estoppel by convention examined above, including *The Indian Endurance*, *The Vistafjord* and *Keen v Holland*, but not *The August Leonhardt*, Briggs J set out the following very important statement of principles at para 52:

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

...

[49] However, it was unfortunate that Briggs J's first principle made no reference to the need for conduct to have "crossed the line". Soon after *Benchdollar*, Briggs J was presented with the opportunity to make that refinement. In *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] Pens LR 411 ("*Stena Line*") (upheld on appeal without discussing this point at [2011] Pens LR 223) Briggs J accepted the submission of counsel that, by reference to *The August Leonhardt*, his first principle should be amended to include that "the crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred" (at para 137).

[50] Although not referring to *Stena Line*, the same point was made by the Court of Appeal (Longmore, Jackson LJJ and Hildyard J) in *Blindley Heath*. On the facts of that case, the parties to a share sale agreement had conducted themselves on the incorrect assumption that there was no earlier shareholder's agreement by which any sale of the shares first had to be offered to existing shareholders. The parties had forgotten about an earlier shareholders' agreement conferring pre-emption rights. It was held that estoppel by convention applied. The parties had conducted themselves on the basis of a common assumption that there were no valid rights of pre-emption and it would be unconscionable to allow the directors to go back on that assumption. While citing Briggs J's principles with apparent approval, Hildyard J, giving the judgment of the court, at para 92, made clear in relation to the first principle that "something must be shown to have 'crossed the line' sufficient to manifest an assent to the assumption."

[51] It may be helpful if I explain in my own words the important ideas that lie behind the first three principles of *Benchdollar*. Those ideas are as follows. The person raising the estoppel (who I shall refer to as "C") must know that the person against whom the estoppel is raised (who I shall refer to as "D") shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must

(objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption.

[52] It will be apparent from that explanation of the ideas underpinning the first three *Benchdollar* principles that C must rely to some extent on D's affirmation of the common assumption and D must (objectively) intend or expect that reliance. This is in line with the paragraph from *Spencer Bower, The Law Relating to Estoppel by Representation*, 4th ed (2004) p 189, which was cited by Briggs J just before his statement of principles:

> "In the context of estoppel by convention, the question here is whether the party estopped actually (or as reasonably understood by the estoppel raiser) intended the estoppel raiser to rely on the subscription of the party estopped to their common view (as opposed to each, keeping his own counsel, being responsible for his own view)."

For a similar statement, using the same wording of C's reliance on "the subscription" of D to the common assumption, see the present edition of that work, *Spencer Bower, Reliance-Based Estoppel*, 5th ed (2017), para 8.26. But this is not to suggest that C must be relying solely on D's affirmation of, or subscription to, the common assumption as opposed to C relying on its own mistaken assumption. It is sufficient that, as D intended or expected, D's affirmation of, or subscription to, the common assumption strengthened, or influenced, C in thereafter relying on the common assumption.

[53] As I have already said, both counsel submitted that the *Benchdollar* principles, subject to the *Blindley Heath* amendment to the Þrst principle, applied in this case. I agree. This judgment therefore a–rms that those principles, as amended by *Blindley Heath*, are a correct statement of the law on estoppel by convention in the context of non-contractual dealings. What I have also sought to do is to explain the ideas underpinning the first three principles which may provide assistance in the understanding and application of those principles."

Submissions

46. Mr Carey and Mr Way submitted that the present case was on all fours with *Tinkler*. The common understanding was that a valid enquiry had commenced, which crossed the line because Mr Cattrell agreed to participate in the RSA and, notwithstanding contact with HMRC in 2013 and 2014 (including an appeal to HMRC) did not allege that no notice of enquiry had been served until 2020. The assumption of responsibility relied upon was the positive assertion from PWC on behalf of Mr Cattrell that he would participate in the RSA. HMRC relied upon that mutual understanding that a notice of enquiry had been given by carrying out an enquiry and issuing a closure notice. The mutual dealing was the enquiry itself. The detriment suffered by HMRC was the invalidity of the notice of enquiry and also the corresponding benefit to Mr Cattrell in the sum of £366,932.85.

47. Mr Lynam submitted that estoppel ought not to apply in such cases as it would prevent the statutory protection provided by Section 9A of the TMA 1970. Further, Mr Cattrell did not have any understanding that a notice of enquiry had been given and did not assert the same or assume any responsibility for doing so. In any event, no discussions "crossed the line".

Discussion

48. I do not accept Mr Lynam's submission that estoppel by convention is incapable of overriding section 9A of the TMA 1970 as it is clear from *Tinkler* that it is capable of doing so. Indeed, *Tinkler* also related to an enquiry relating to gilt strips schemes.

49. However, *Tinkler* was a factually different situation as the taxpayer (through his advisor) was actively engaged in responding to the enquiry during the time when a notice of enquiry could have been given. In the present case, however, Mr Cattrell (through PWC) was involved in agreeing to the RSA in 2005 and there was then no contact until October 2013 at the earliest.

50. I find that there was a shared assumption that a notice of enquiry had been given. HMRC were clearly of the view that a notice had been given, as shown from its records and internal memoranda. For the reasons set out above, I find that Mr Cattrell had received the notice of enquiry and so, contrary to Mr Lynam's submissions, did understand that a notice of enquiry had been given (although there is nothing to say that Mr Cattrell understood the legal ramifications of this). However, this shared common assumption did not cross the line. Crucially, the RSA was predicated on the need to issue a notice of enquiry if one had not already been issued. Crucially, paragraph (i) of the RSA provided that, "HMRC will open enquiries into all other individuals within the RSA but will not request information and documentation relating to the GS loss claims." Similarly, paragraph (c) provided that, "The RSA does not affect the statutory rights and obligations of either the individual or HMRC." The RSA did not, therefore, manifest an assent to any assumption that a notice of enquiry had already been given, as the RSA itself catered for the possibility that it had not been given. Although there was no such reservation in the communications in 2013 and 2014 (which did appear to assume that the enquiry was valid) these are after the date upon which a notice of enquiry could have been given under section 9A of the TMA 1970 and so any reliance upon that would not be detrimental reliance as HMRC were by then already out of time.

51. It follows that the RSA did not constitute an assumption of responsibility either, as the RSA did not provide for or otherwise indicate that Mr Cattrell accepted that a notice of enquiry had been given. I accept that he was, through PWC as his agent, indicating (and, indeed, agreeing) that he would participate in the RSA. However, for the reasons set out above, the RSA still on its face envisaged a need to give a notice of enquiry where one had not been given.

52. HMRC did rely upon the mutual understanding by pursuing the enquiry and issuing a closure notice.

53. As in *Tinkler*, the subsequent mutual dealing was the progress of the enquiry itself.

54. However, given that the mutual understanding that a notice of enquiry had been given was correct, there was no detriment to HMRC as, for the reasons set out above, the enquiry was valid.

55. It follows that I find that an estoppel by convention did not arise.

DISPOSITION

56. For the reasons set out above, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

57. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this 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. 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.

RICHARD CHAPMAN KC
TRIBUNAL JUDGE

Release date: 16th JANUARY 2024