The 64-8 Question

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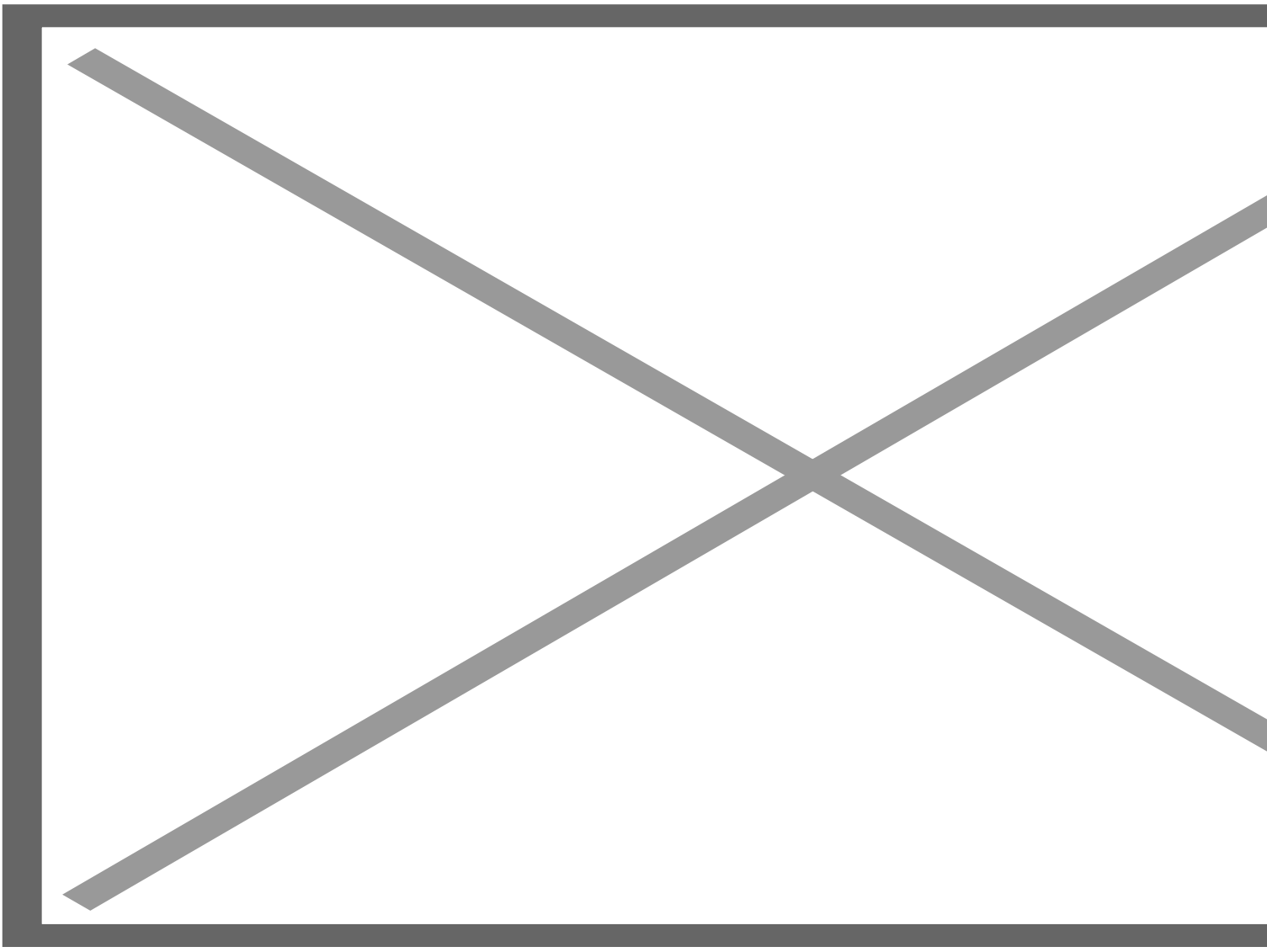

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Keith Gordon considers a recent Upper Tribunal case which looks at one consequence of a client signing a form 64-8

Key Points

What is the issue?

The recent decision of the Upper Tribunal in *Tinkler v HMRC* could change the understanding that all statutory notices are required to be sent to a taxpayer personally.

What does it mean to me?

Advisers should now review the 64-8s in place and try to determine what authority it ostensibly gives concerning the adviser's status as agent.

What can I take away?

The importance of carefully considering the wording on the 64-8 and for advisers to understand what it can actually mean for them and their clients.

I have been working in the tax profession for over 26 years and it is fair to say that I have seen quite a number of changes in that period. However, one matter that has not changed (if one ignores the increased scope over the years) is the existence of a form known as the '64-8'. Being a non-statutory document, it has until now avoided much controversy, except perhaps its name: I have always referred to it as a 'sixty-four eight', whereas others (particularly those trained within HMRC – who after all ought to know) tend to call it a 'sixty-four dash eight'.

That debate notwithstanding, the form has so far as I understand to be the case been used to permit HMRC to send copy correspondence about a taxpayer to the taxpayer's adviser and, in the case of more detailed correspondence, to allow that correspondence to be conducted solely with the adviser so as not to alarm or burden the taxpayer. What I have always understood to be the case is that statutory notices (for example, assessments, requirements to submit a tax return, notices of enquiry, closure notices and the formal letters issued at the various stages of an internal review) are all required by law to be sent to the taxpayer personally. Indeed, earlier in my career, I was aware of the difficulty that one particularly high-profile client had in trying to get a notice to submit a tax return sent to his adviser. Although different interpretations are no doubt possible, this limited purpose of a 64-8 is consistent with the rubric of the current version of the form: 'This authority allows us to exchange and disclose information about you with your agent and to deal with them on matters within the responsibility of HM Revenue and Customs (HMRC), as specified on this form.' The recent decision of the Upper Tribunal in *Tinkler v HMRC* [2018] UKUT 73 (TCC), however, could change that understanding forever.

Background to the case

In 2012, a closure notice was issued to Mr Tinkler in relation to an enquiry into his 2003/04 tax return. Mr Tinkler appealed against the notice and duly notified the appeal to the First-tier Tribunal. Before the First-tier heard the appeal, an additional ground was introduced to the effect that there was not in fact any valid enquiry (and therefore no valid closure notice), because Mr Tinkler had not received a notice of enquiry as required by the Taxes Management Act 1970 s 9A. The question was then made the subject of a preliminary hearing which took place in December 2015, with a decision issued some three months later.

Facts of the case

In January 2005, Mr Tinkler signed an engagement letter by which he appointed BDO Stoy Hayward ('BDO') as his 'tax agent and adviser'. At the same time, a form 64-8 was signed by Mr Tinkler. As BDO's letter explained, the form allows 'the Inland Revenue … to correspond with us, in which case, they will not correspond with you except to the extent that they are formally required to. However, this authority does not apply to all Inland Revenue forms and notices.' BDO's explanation seems to chime in with my understanding of the 64-8 (as

summarised above). Furthermore, the 64-8 itself, as signed by Mr Tinkler, noted 'sometimes, we need to send [letters and forms] to you as well as, or instead of, your agent'. There was also a reference to the Revenue's website which, at the time, read: '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'.

HMRC wrote to Mr Tinkler on 1 July 2005 in order to open an enquiry into his 2003/04 tax return. They sent that letter to an old address (seemingly, having unilaterally revised their records from a valid address) and the letter was not received by him. A copy of the letter, however, was sent to BDO together with a covering letter and this was promptly acknowledged by BDO. The First-tier agreed with Mr Tinkler (on the facts) that the 'original' enquiry notice could not be deemed to have been received (as it was not sent to his last known place of residence or business (per TMA, section 115(2)). Furthermore, on the basis of the wording of the form 64-8 and the engagement letter, it considered that the 'copy' sent to BDO was similarly insufficient to make the enquiry valid. However, the First-tier considered that BDO had discussed the existence of the enquiry with Mr Tinkler's personal assistant within the enquiry window and, through her, Mr Tinkler was given notice of the enquiry before the relevant time limit.

Mr Tinkler appealed against the decision but HMRC 'cross-appealed' arguing that the copy notice sent to BDO was also sufficient to constitute notice of the enquiry.

The Upper Tribunal's decision

The Upper Tribunal (Judges Roger Berner and Greg Sinfield) agreed with the First-tier's analysis of the law of agency. In particular, they agreed that section 9A does not override the usual position which is that a party (here HMRC) can validly communicate with a person with actual or ostensible authority to receive communications. However, the Upper Tribunal disagreed with the First-tier about the authority in the present case. In particular, the Upper Tribunal interpreted the wording on the 64-8 so as to confer both ostensible and actual authority on BDO to act as Mr Tinkler's agent in relation to the receipt of documents on Mr Tinkler's behalf.

The Upper Tribunal also considered that receipt by an agent of what purported to be merely a copy of an enquiry notice for information can be (and was in this case) sufficient to trigger the opening of an enquiry. Consequently, the preliminary decision was against Mr Tinkler and his enquiry was held to have been validly opened.

Commentary

I must admit to being somewhat uncomfortable with the decision and my comments that follow (both in this section and the next) should make it clear why. From a legal perspective (despite the experience of the two judges involved), I am not persuaded that the right decision was reached. Most importantly, section 9A (as do other provisions dealing with statutory notices) goes out of its way to make it clear that such notices must be sent to the taxpayer and therefore gives the impression that the statute does not consider that receipt by a third party is sufficient. Indeed, this impression is reinforced by those particular provisions within the TMA which make it clear that statutory references to the taxpayer may be treated as including 'a person acting on [the taxpayer's] behalf'. This is particularly acute in section 49I (which provides interpretation for the internal review rules). Section 49I(2) makes such a provision (i.e. extending references to a taxpayer to the taxpayer's agent) but then expressly excludes from this the various formal stages of the internal review process.

It strikes me as odd that a taxpayer need not receive (say) an assessment which can (according to *Tinkler*) be served solely on an adviser with a valid 64-8, but HMRC must notify the taxpayer personally of any offer of internal review. It is not clear whether or not the Upper Tribunal was taken to those other provisions within the TMA (at least one of which has been unchanged since 1970 and can be traced at least as far back as the Finance

Act 1949). Those other provisions do, in my respectful view, suggest that (whilst section 9A might not on its own override the common law of agency) the entirety of the Act does (or, at least, properly construed, should be interpreted as if it did). Furthermore, the decision could lead to different situations depending on whether a taxpayer's relationship with an adviser is governed by English, Scots or Irish law where the law of agency has evolved differently.

However, assuming the decision to be correct in law, it does serve as a reminder how important it is to consider carefully the wording on the 64-8 and for advisers to understand what it can actually mean for them and their clients.

I also wonder whether the decision taken by HMRC to argue in the Tribunals that a signed 64-8 authorises HMRC to send statutory notices to advisers without any copy being sent to the taxpayer personally could cause shockwaves amongst the Department because of the consequences of the decision. I do fear that the decision to litigate the point was taken in a desire to win the case at all costs and without much thought as to the wider repercussions.

What to do next

This particular case, strictly, turns on the specific wording of the 64-8 signed by Mr Tinkler and it is likely that the wording of the authorisation has not changed for a long time. However, there is a chance that a very old 64-8 would not have the same effect as Mr Tinkler's. It will be an aggravating task, but advisers should now review the 64-8s in place and try to determine what authority it ostensibly gives concerning the adviser's status as agent. Similarly, with regards to actual authority in the engagement letters. If you are unhappy with the outcome of the present case, one option would be to write to HMRC and make it clear that the 64-8 remains in place but not so as to allow HMRC to serve statutory notices on the adviser.

A potentially less cumbersome exercise (especially if the procedure is already being undertaken) is to ensure that advisers' incoming mail is date-stamped. This means that, where an enquiry letter (say) is sent both to the adviser and the client, time limits will be met if either is received on time.

One possible upside of the decision is that it allows HMRC to send most notices direct to advisers, thereby cutting out the taxpayer altogether. Let's see how readily HMRC accept that notices to file tax returns can be sent to someone other than the taxpayer personally. I suspect that their reaction will be that they cannot be sent to agents because of the wording of the TMA. Ironic isn't it?

Different considerations will need to be given to online authorisation where the client is not required to provide a physical signature.

Perhaps, given the uncertainties that this case has given rise to, the CIOT and ATT should have urgent discussions with HMRC as to what status a 64-8 will be given in the future, espcially in the evolving online world and in light of MTD. Maybe there will now be a new form, on whose name we can all agree.