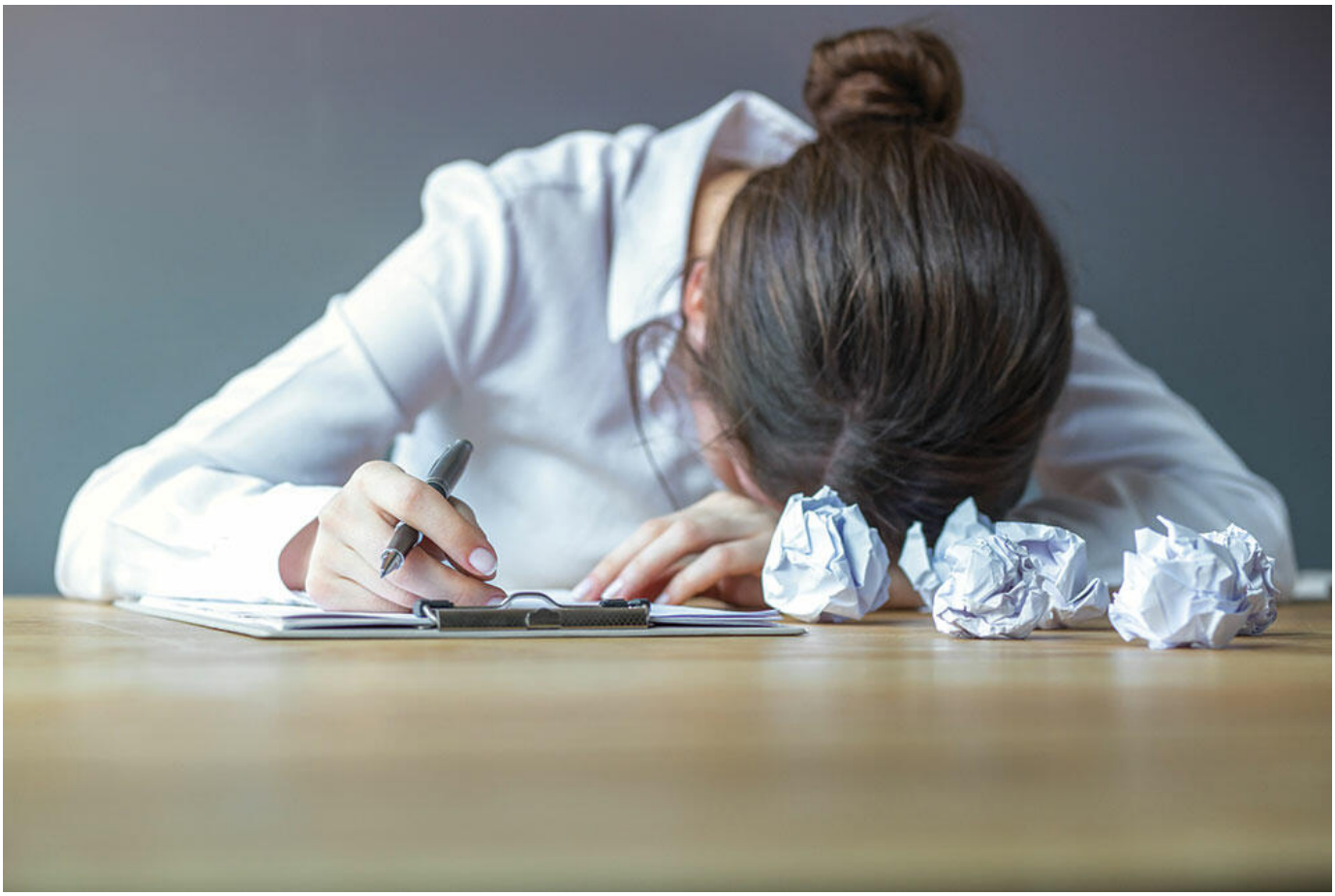
The Benchdollar Question

Management of taxes



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Keith Gordon considers the Supreme Court’s decision in a case where a taxpayer’s noti ce of enquiry was sent to the wrong address

Key Points

What is the issue?

Mr Tinkler sought to argue that a copy notice sent to his advisers did not amount to a notice of enquiry being sent correctly. HMRC questioned whether it was fair for Mr Tinkler to argue the point at all when HMRC and his agents had previously acted in

the shared mistaken belief that the enquiry had been validly opened.

What does it mean for me?

The Supreme Court outlined the principles to be applied when considering whether an estoppel by convention applies. It noted that the Taxes Management Act 1970 was permissive, in as much as taxpayers and HMRC can agree to statutory notices being given in ways other than as specified in the Act.

What can I take away?

Ultimately, this is a further reminder of the need for tax advisers to ensure that statutory enquiries are properly opened before they (or their clients) start to supply HMRC with information to which they are not entitled.

In the June 2018 issue of Tax Adviser, my article ‘The 64-8 questi on’ considered what was then a recent decision of the Upper Tribunal. It concerned the case of a Mr Tinkler who, in the course of an appeal against a closure notice, argued that the underlying enquiry was invalid because the notice of enquiry had been sent to Mr Tinkler’s old address and, therefore, Mr Tinkler had not received notice of the enquiry within the statutory period. The Upper Tribunal had concluded that, under the law of agency, the copy notice sent to Mr Tinkler’s advisers amounted to notice being given to Mr Tinkler and, therefore, the notice of enquiry had in fact been correctly served.

In my article, I expressed my discomfort with the Upper Tribunal’s decision and I must admit to having been somewhat relieved when, a year or so later, the Court of Appeal allowed Mr Tinkler’s appeal. However, HMRC chose to appeal against that decision, albeit on a different point: being whether it was fair for Mr Tinkler to argue the point at all when HMRC and his agents had previously acted in the shared mistaken belief that the enquiry had been validly opened.

The facts of the case

At the beginning of 2005, Mr Tinkler’s files at HMRC showed his residential address as being in Cheshire.

Mr Tinkler’s 2004 tax return was submitted by the due date of 31 January 2005. At roughly the same time, Mr Tinkler completed a form 64-8 appointing BDO Stoy Hayward (BDO) as his agents. Both the tax return and the 64-8 showed Mr Tinkler’s address as one in Cumbria. HMRC’s computer records were duly updated to show the address in Cumbria.

However, on 1 July 2005, HMRC’s records were revised so as to show Mr Tinkler’s residential address as back in Cheshire. On the same day, a notice of enquiry was sent to that address, with a copy being sent to BDO.

As part of its initial response, BDO advised HMRC that it wished to make an amendment to Mr Tinkler’s return, so as to claim losses from a ‘gilt strip scheme’ entered into by him. In accordance with the Taxes Management Act (TMA) 1970 s 9B, that amendment would not be given effect until the end of the enquiry.

BDO also responded to HMRC’s questions arising from the enquiry but then ceased doing so, leading to a series of reminders from HMRC. The last of those reminders triggered a series of telephone calls, in the course of which it transpired that HMRC had sent a cheque to Mr Tinkler at his Cheshire address.

As Mr Tinkler had not received the cheque, it was cancelled; and HMRC once again updated its records to show the Cumbria address. In November 2005, BDO answered HMRC’s outstanding questions.

In due course, HMRC considered that the gilt strip scheme was ineffective and, when issuing a closure notice in 2012, refused to give effect to Mr Tinkler’s amendment. Mr Tinkler appealed against that refusal and the case proceeded to the tribunal. However, a couple of months before the First-tier Tribunal hearing, Mr Tinkler raised, as a preliminary issue, the question as to the validity of the enquiry itself. (If the enquiry had not been validly opened, then HMRC could not have deferred giving effect to the amendment of Mr Tinkler’s return. Any challenge to that amendment should have been by way of valid enquiry within the statutory timeframe, in that case by 31 July 2006.) HMRC countered by saying that the doctrine of ‘estoppel by convention’ precluded

Mr Tinkler from challenging the validity of the enquiry after it was too late for HMRC to rectify its error.

The First-tier Tribunal duly considered the questions as to whether the enquiry was validly opened; and, if not, whether Mr Tinkler was ‘estopped’ from denying the validity of the enquiry.

In the First-tier Tribunal, HMRC won on both grounds. On Mr Tinkler’s appeal, the Upper Tribunal would have found for Mr Tinkler on the estoppel point, stating that ‘the principle of estoppel by convention does not operate to preclude a taxpayer from relying on the protection of the notice and limitation period provisions in section 9A’. However, this was of little benefit to Mr Tinkler because the Upper Tribunal had concluded that the enquiry had in fact been validly opened.

Mr Tinkler appealed again to the Court of Appeal, which allowed his appeal, holding that the enquiry had not been validly opened and agreeing that the doctrine of estoppel by convention was not applicable in the present case.

HMRC then appealed against the decision to the Supreme Court, but only on the estoppel point.

The Supreme Court’s decision

The case came before Lord Hodge, Lord Briggs, Lady Arden, Lord Burrows and Lady Rose. Their decision is reported as HMRC v Tinkler [2021] UKSC 39.
The court outlined the principles to be applied when considering whether an estoppel by convention applies. These had been summarised by Mr Justice Briggs (as he then was) in another case involving HMRC, HMRC v Benchdollar Ltd [2009] EWHC 1310 (Ch), albeit subject to one qualification arising in the non-tax case of Blindley Heath Investments Ltd v Bass [2015] EWCA Civ 1023. (Benchdollar did not concern the tax code as such but the Limitation Act 1980, which requires HMRC to commence enforcement proceedings for National Insurance liabilities within six years.)

The Benchdollar summary (as subsequently qualified in Blindley Heath) confirmed that in the context of non-contractual dealings between X and Y, X may assert an estoppel by convention against Y if and only under the following conditions:

1. There is a common (albeit incorrect) assumption that is expressly shared between X and Y, either by conduct or by words.
2. Y’s expression of that common assumption must be such that Y may properly be said to have assumed some element of responsibility for it, in the sense of

conveying to X an understanding that Y expected X to rely upon it.
3. X must have relied upon the common assumption, to a sufficient extent, rather than merely upon X's own independent view of the matter.
4. That reliance must have occurred in connection with some subsequent mutual dealing between X and Y.
5. Some detriment must thereby have been suffered by X, or benefit thereby have been conferred upon Y, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

The Court of Appeal had considered it to be highly relevant that the original error had been HMRC's when considering the extent to which Mr Tinkler's insistence upon the statutory position was unconscionable. However, the Supreme Court considered that on the facts of the case that factor had been given too much weight by the Court of Appeal. The Supreme Court, further disagreeing with the Court of Appeal, also concluded that the fact that BDO gave answers to HMRC in response to HMRC's 1 July 2005 letter was an acknowledgement of the fact that it too considered a valid enquiry to have been opened. Perhaps more importantly, BDO unilaterally asserted that the proposed amendment to the return could not be effected immediately, because there was by now an open enquiry into the return.

On this basis, the Supreme Court considered that the first four conditions for estoppel by convention were met. And the consequence that HMRC was thereby deprived of an opportunity to challenge the proposed amendment to Mr Tinkler's return satisfied part of the fifth. However, as the Supreme Court itself asked, 'What about unconscionability?' The court would not remove the test altogether (citing, as examples, fraud or duress on the part of the estoppel raiser), but said that in most other cases 'unconscionability is unlikely to add anything once the other elements of estoppel by convention have been established'. Accordingly, the fact that HMRC was the party whose error started off the problem did not prevent the fifth condition from being met.

This left just one major question, being whether the statutory scheme overrode the estoppel by convention doctrine. Distinguishing earlier (non-tax) case law on the subject, the Supreme Court noted that TMA 1970 was permissive, inasmuch as taxpayers and HMRC can agree to statutory notices being given in ways other than as specified in the Act (including by notice to Mr Tinkler's advisers). Accordingly, the statutory scheme was not undermined by HMRC asserting an estoppel by convention in this case.

For these reasons, HMRC's appeal was allowed.

Commentary

By limiting its ground of appeal to the estoppel point, HMRC has implicitly accepted that the notice of enquiry was not validly served, thereby confirming that the First-tier and Upper Tribunals had reached the wrong answer on that point. The concerns I expressed in my previous article can therefore be laid to rest.

What I found particularly remarkable in this case was how the court addressed the unconscionability test. Even in its formulation of the fifth condition, that the detriment suffered by X or the benefit gained by Y makes it 'unjust or unconscionable for the latter to assert the true … position', the court appears to be endorsing the view that X (here, HMRC) must positively show that it would be unjust or unconscionable for the other party to rely on the true legal or factual position. However, in its application of this principle to the facts of this case, the Supreme Court has effectively flipped this condition on its head as if this part of the condition now read 'justice and conscionability do not require the true position to be adhered to'. It will be interesting to see how the textbooks and future cases respond to this apparent change of approach.

Similarly, the court's decision that TMA 1970 is permissive could give rise to a number of interesting debates going forward. No doubt, the court was influenced by the use of the word 'may' in TMA 1970 s 115. However, given the vintage of the statute, the use of the word 'may' is quite likely to have been a reflection of a former drafting style, rather than an example of a truly permissive regime.

However, the term 'permissive' in the context of TMA 1970 is not new; indeed, some tribunal judges have gone so far as to say that HMRC need not adhere to s 115 at all. The Supreme Court's decision does not endorse quite such a far-reaching approach and instead suggests that non-statutory methods of service are acceptable only if mutually agreed. However, even that approach does then lead to the question as to what extent taxpayers and HMRC can contract out of TMA 1970 altogether. It will be recalled that the case of Al Fayed v IRC [2006] BTC 478 previously suggested that entering into a 'forward tax agreement' (by which the tax return process as outlined in TMA 1970 is sidestepped and a fixed sum is paid instead) is definitely going too far.

Furthermore, this case makes interesting reading when read side-by-side with the court's recent decision in the case of Tooth [2021] UKSC 17 (see my article 'Tooth and Consequences' in the July 2021 issue). Two of the court's judges sat in both cases. In Tooth, the court concluded that exceptional delays by HMRC between discovering an under-assessment of tax and HMRC actually remedying this with an assessment were not matters that could be raised in the course of a taxpayer's appeal in the tribunals. In other words, the court concluded that staleness of a discovery was not a concept within TMA 1970; and, therefore, a taxpayer's only remedy in such cases would be to challenge the assessment by way of judicial review.

On the other hand, the court has now concluded that TMA 1970 is not a comprehensive code at all but can be overridden by equitable doctrines such as estoppel; furthermore, there is nothing precluding the tribunals from addressing such questions. The two different stances can in my view be reconciled (just about). However, any review of TMA 1970 would be well advised to look at this area to ensure a more coherent way forward. At the very least, principles of fairness would dictate that it should not be only HMRC that can raise non-TMA based arguments in the tribunals.

Finally, one of the factual mysteries within this case is why did HMRC unilaterally revise the address on Mr Tinkler's records and then promptly issue a notice of enquiry to what was by then an out-of-date address? Had the notice of enquiry been issued to the address on HMRC's records, the whole sorry saga could have been avoided. Accordingly, it is not difficult to discern an element of criticism directed towards the officer who seemingly took it upon himself to 'correct' HMRC's records, without any apparent justification for his actions.

However, in a point that appears to have been overlooked, it is in fact worth noting that the Cumbria address shown on Mr Tinkler's tax return and the 64-8 was in fact a business address and not a residential address. It is therefore possible that the officer spotted that and revised HMRC's records so that it continued to show a residential address for Mr Tinkler and, therefore, his last known place of residence.

Indeed, HMRC originally ran the argument that Cheshire was Mr Tinkler's 'last known place of residence' and, therefore, the notice of enquiry was sent in accordance with the statutory scheme, as TMA 1970 s 115 refers to statutory notices being sent to taxpayers at their 'usual or last known place of residence, or [their] place of

business or employment’. However, a finding of the First-tier Tribunal held that HMRC should have been put on notice that Mr Tinkler no longer lived in Cheshire and that statutory notices should be served at different addresses instead. As a result, HMRC had to rely on different arguments.

What to do next

Ultimately, this is a further reminder of the need for tax advisers to ensure that statutory enquiries are properly opened before they (or their clients) start to supply HMRC with information to which they are not entitled. Even if TMA 1970 is not an exclusive code, the Supreme Court has made it clear that departures from it must be mutually agreed. Where no such agreement has been reached, taxpayers and their advisers are fully entitled to insist upon the strict protections conferred by the statute. Just assuming that HMRC has got it right can lead to problems further down the line.