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UK Tax Disputes Digest

Winter 2024

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Introduction

Welcome to the winter 2024 edition of our UK Tax Disputes Digest: a high-level summary of key developments in contentious tax over the last few months for heads of tax, finance directors, general counsel and other in-house professionals.

As with previous editions, we have seen a continued increase in HMRC activity across various areas. Both individual and corporate taxpayers would be well-advised to check their tax position as soon as possible to prepare for any potential HMRC investigation into their tax affairs.

In this edition, we look at just a few of these developments, including in relation to the latest series of HMRC nudge campaigns.

We also cover a number of notable tax cases and other interesting procedural decisions. This includes the most recent case law developments on the unallowable purpose test within the loan relationship rules, the meaning of fixed establishment for the purposes of VAT grouping and a recap of the Budget and other recent developments.

About the team

With 14 partners in our London office, the CMS tax team is one of the largest in the City and advises high-profile clients across a wide range of sectors and all areas of tax. As part of that general tax practice (and the CMS global network with tax capability in over 70 offices), our tax team regularly helps both individuals and corporates with all aspects of tax dispute prevention, management and resolution.

The CMS disputes team is one of the UK's leading contentious practices with some 500 disputes lawyers in the UK alone. We regularly appear before all courts and have more sector and practice expertise among our disputes lawyers than any other firm. We are one of only a few firms to routinely appear in The Lawyer's annual reports on leading cases both for first instance and appeal cases.

The firm's contentious tax practice pools the resources of the CMS tax and disputes teams, including dedicated tax disputes specialists.

For more information on our team and the type of work we undertake, please see here.

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In focus: Unallowable purpose – further developments

The Supreme Court has recently refused permission to appeal in three prominent unallowable purpose cases. Further, the First Tier Tribunal has found in favour of HMRC in another dispute relating to unallowable purpose, which HMRC may view as giving rise to further ammunition for it to use in similar disputes.

During 2024, the Court of Appeal heard three cases relating to unallowable purpose, which have been the subject of more detailed discussion in earlier editions of this publication. These cases were: *BlackRock Holdco 5 LLC v HMRC* ([2024] EWCA Civ 330); *Kwik-Fit Group Ltd v HMRC* ([2024] EWCA Civ 434); and *JTI Acquisition Company (2011) Ltd v HMRC* ([2024] EWCA Civ 652). There had been much speculation as to whether there would be further taxpayer appeals in these cases, which represent significant victories for HMRC, but it has now been confirmed that the Supreme Court has refused permission to appeal in all three of these cases.

Therefore, for now, the Court of Appeal's judgments in these cases remain the leading caselaw in this evolving area of tax law.

However, developments nevertheless continue apace. The FTT recently published its decision in *Syngenta Holdings Ltd v HMRC* ([2024] UKFTT 998 (TC)). The taxpayer is a member of a group undertaking global agriculture business, operating in the crop protection and seed markets. It is headquartered in Switzerland and operates worldwide, including in the UK.

In 2011, a new UK holding company, Syngenta Holdings Ltd, was incorporated, in order to make an intra-group acquisition of the shares in Syngenta Limited, which

owned the UK sub-group. The consideration was cash and an issue of new shares in Syngenta Holdings Limited, the cash element being funded by an intra-group loan from the group's treasury company, Syngenta Treasury NV.

Syngenta Holdings Ltd sought deductions for the interest payments on its intra-group loan from the treasury company. HMRC challenged the deductions on the basis of unallowable purpose, essentially on the basis that this was a "tax optimisation project" aimed at pushing debt down into the UK, because there was UK tax capacity.

One factor which appears to have been relevant is that the corresponding interest receivable in the hands of Syngenta Treasury NV would be subject to an effective tax rate of only approximately 5%. This is resonant of HMRC's recent guidance on unallowable purpose, which refers (at Example 12) to a scenario in which the interest receivable is not taxable due to the existence of losses, so that there is an overall "net global tax benefit", as being a scenario in which HMRC's view is that the unallowable purpose legislation might apply. However it is notable that Syngenta is a case involving deductions in the UK relating to debt entered into to fund the acquisition of shares in a UK company, which might (aside from the difference in tax rates as between the debtor and creditor) have been expected to fall within HMRC's guidance, as being a situation in which HMRC's view is that the unallowable purpose rule will not normally apply.

The taxpayer argued that its directors were independent and took their role seriously. To the extent that they were aware of the purposes of the wider group, that simply formed part of their background understanding. They did not assume the wider group purpose. The main purpose of the taxpayer's directors was to obtain the funds necessary to make the acquisition, which was considered to be a good investment which would achieve a good return for shareholders.

The FTT concluded that the sole purpose of entering into the loan was an unallowable purpose, which was that of playing a part in a group project, by obtaining UK tax deductions through making interest payments on the loan. Therefore, the FTT said that there was no need for it to consider just and reasonable apportionment of the debits between allowable and unallowable purposes.

This is the latest in a line of decisions in HMRC's favour. Given the extent to which HMRC has succeeded in recent litigation, it seems inevitable that further disputes will follow. When entering into loans, evidence as to purpose will be key. Potential challenges to deductibility should be anticipated and advice should be sought at an early stage. Taxpayers which have previously taken positions in relation to deductibility issues may now need to review those positions in light of these recent cases, whether as part of audit processes or in response to HMRC enquiries.

Other notable tax cases

The Commissioners for HMRC v Professional Game Match Officials Ltd [2024] UKSC 29

The Supreme Court has dismissed the taxpayer's appeal in this case concerning the employment classification status of part-time football referees, which were supplied by the taxpayer ("**PGMOL**") to officiate individual matches.

The issue at stake was whether PGMOL should deduct income tax and the employer's national insurance contributions from the payments it makes to such referees. This turned upon whether the relationship between PGMOL and the referees was governed by a contract of employment.

The issue before the Court was whether two of the three criteria from the employment-classification test established in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 were met, pursuant to the terms of the individual match contracts between PGMOL and the referees which it supplied. These criteria were: (i) mutuality of obligation; and (ii) sufficient degree of control.

The Court found that the ability for both the referee and PGMOL to cancel the engagement at any time without penalty did not negate mutuality of obligation. While the contract remained in being, the parties were under mutual obligations.

On control, the Court clarified that direct control is not necessary, nor is it required that the employer has power to intervene in every aspect of the performance of an employee's duties. Rather than looking to the practical reality, the key question is whether there are theoretical rights that contractually entitle the employer to intervene. The Court considered that PGMOL had effective sanctions to exercise control of the referees. Referees could be penalised for breaches, via being denied opportunities to officiate at future matches, and PGMOL could reduce a referee's share in a merit payment based on their performance.

Having established that the first two limbs of *Ready Mixed Concrete* were made out, the Supreme Court remitted the case back to the FTT to apply the third limb of Ready Mixed Concrete to the individual match contracts (whether, in the light of all relevant circumstances, the contracts were contracts of employment) and so determine the employment status question.

Ian Austick v The Commissioners for HMRC [2024] EWHC 2175 (Ch)

This case concerned an application by the taxpayer under the Civil Procedure Rules 1998 ("**CPR**") Part 8 for a determination from the High Court that he had no liabilities beyond those shown in his self-assessment tax returns.

The purpose of the taxpayer's claim was to attempt to prevent HMRC from recovering a payment in respect of partnership losses made to him in 2001. The taxpayer claimed to carry back (to 1997-98) a share of partnership losses for 2000-01 and received a tax repayment of £35,000. HMRC subsequently enquired into the partnership return and issued closure notices in 2003, eventually settling the partnership's appeal by agreement in 2011 on the basis that the losses were significantly reduced, hence reducing the taxpayer's share of those losses. .

HMRC argued that bringing what would normally amount to judicial review claims by way of an ordinary Part 8 claim was an abuse of process, in particular as Part 8 has longer limitation periods compared to judicial review. The High Court agreed with HMRC on this point, and confirmed that the taxpayer's claim should have been brought by judicial review because in substance it challenged the consequences of HMRC's processes to recover tax considered wrongly repaid. The Court held that "*There is … no reason in principle to depart from the general rule that, if the substance of the claim relates to public law issues, the proceedings should be brought by way of judicial review, simply because the bringing of proceedings has been triggered by HMRC's threat of enforcement action.*"

The Commissioners for HMRC v Payroll & Pension Services (PPS Umbrella Company) Ltd [2024] EWCA Civ 995

This case involved a without notice application by HMRC for the appointment of provisional liquidators (the "**Application**") in respect of Payroll and Pension Services (PPS Umbrella Company) Limited ("**PPS**"), under section 135 of the Insolvency Act 1986. The application had been made by HMRC on the grounds that PPS had been involved in payroll fraud and was unable to meet its NIC liability.

The Court of Appeal concluded that the High Court had been right to insist on HMRC providing a cross-

undertaking in damages from HMRC when it acceded to HMRC's application for the appointment of provisional liquidators.

HMRC advanced several arguments that they should not be required to give such undertaking, including that the application constituted a public law enforcement action. This was rejected by the Court, which found that HMRC was acting in its capacity as a creditor, and that the proceedings were aimed at recovering money owed and preserving assets, not at enforcing public law in a broader sense. Lewison LJ held that "*Departure from the well-established practice of requiring a cross-undertaking in damages on the appointment of a provisional liquidator where the applicant is HMRC seeking to recover unpaid tax would … confer on HMRC an entirely unwarranted public interest immunity for the consequences of unjustified initiation of such proceedings; and would encourage indiscriminate initiation of proceedings at the unjustifiable expense of an individual.*"

The Court also rejected HMRC's arguments that (i) the amount of the cross-undertaking should be monetarily limited, reasoning that, as a government body with substantial resources, it should be able to meet any potential liability arising, and (ii) the public interest in recovering unpaid taxes should exempt HMRC from providing the cross-undertaking, given their actions were primarily aimed at debt recovery.

Refinitiv Limited & Ors, R (on the application of) v The Commissioners for HMRC [2024] EWCA Civ 1412)

The Court of Appeal has (i) dismissed the taxpayers' appeal against the Upper Tribunal's decision not to allow a judicial review claim in respect of diverted profits tax ("**DPT**") charging notices for the 2018 accounting period ("**DPT Notices**") issued by HMRC and (ii) concluded that the DPT Notices were not in conflict with an earlier agreed and expired advance pricing agreement (the "**APA**") entered into between the appellants and HMRC.

The three appellants were UK resident companies ("**TRC**") in the Thomson Reuter group in relation to which valuable IP was held in Thomson Reuters Global Resources ("**TRGR**") (a Swiss resident entity part of the same group). Between 2008 and 2018 TRC provided enhancement services to IP held by TRGR, which TRGR used to make profits that were taxed at much lower rates in Switzerland. The IP was sold by TRGR in 2018 to a new joint venture company for a very substantial gain.

The APA covered the period between 2008 to 2014, under which the parties agreed a cost-plus transfer pricing ("**TP**") methodology in respect of certain transactions, which included the fees paid by TRGR to TRC for specified IP related services. Following expiry of the APA and the introduction of the DPT regime in April 2015, HMRC formed the view that it was no longer appropriate to use the cost-plus TP methodology in relation to the IP services supplied by TRC to TRGR and that a profit-split methodology should be used instead. HMRC issued DPT Notices for accounting periods 2015 to 2018 (albeit only the DPT Notices relating to the 2018 accounting period were the subject matter of the appellants' challenge).

TRC argued that the services provided between 2008 and 2014 had been taxed on the basis of cost-plus TP methodology as agreed under the APA and it was wrong to tax them again on a profit split basis in 2018.

The Court of Appeal upheld that TRC's 2018 accounting period fell outside the temporal limits and effective scope of the APA and it was not a period to which the APA related within the meaning of section 220 of the Taxation (International and Other Provisions) Act 2010.

R (on the application of Cobalt Data Centre 2 LLP and another) v The Commissioners for HMRC [2024] UKSC 40

This Supreme Court decision addressed the eligibility for 100% capital allowances under the Enterprise Zone Allowance ("**EZA**") regime. Such allowances are available for expenditure incurred in constructing buildings in a site within an enterprise zone under section 298(1) of the Capital Allowances Act 2001 ("**CAA 2001**"), provided that the expenditure is incurred either "(a) within 10 years after the site was first included within the zone or (b) if the expenditure is incurred under a contract entered into within those 10 years, 20 years after the site was first included in the zone".

The case concerned a "**Golden Contract**", which was entered into by two wholly-owned subsidiaries, the "**Developer**" and the "**Contractor**", of the owner of the Cobalt Business Park (the "**Park**"), which was within the Tyne Riverside Zone (the "**Zone**"). The contract was entered into soon before the tenth anniversary of the Park's inclusion within the Zone. "Golden Contracts" provide for multiple construction projects between which the developer is entitled to and must choose. After the initial ten-year period, the Developer and Contractor purported to exercise rights to select and change projects under the Golden Contract, as well as amend the contract, resulting in the construction of three new buildings which significantly differed from the plans under the original Golden Contract.

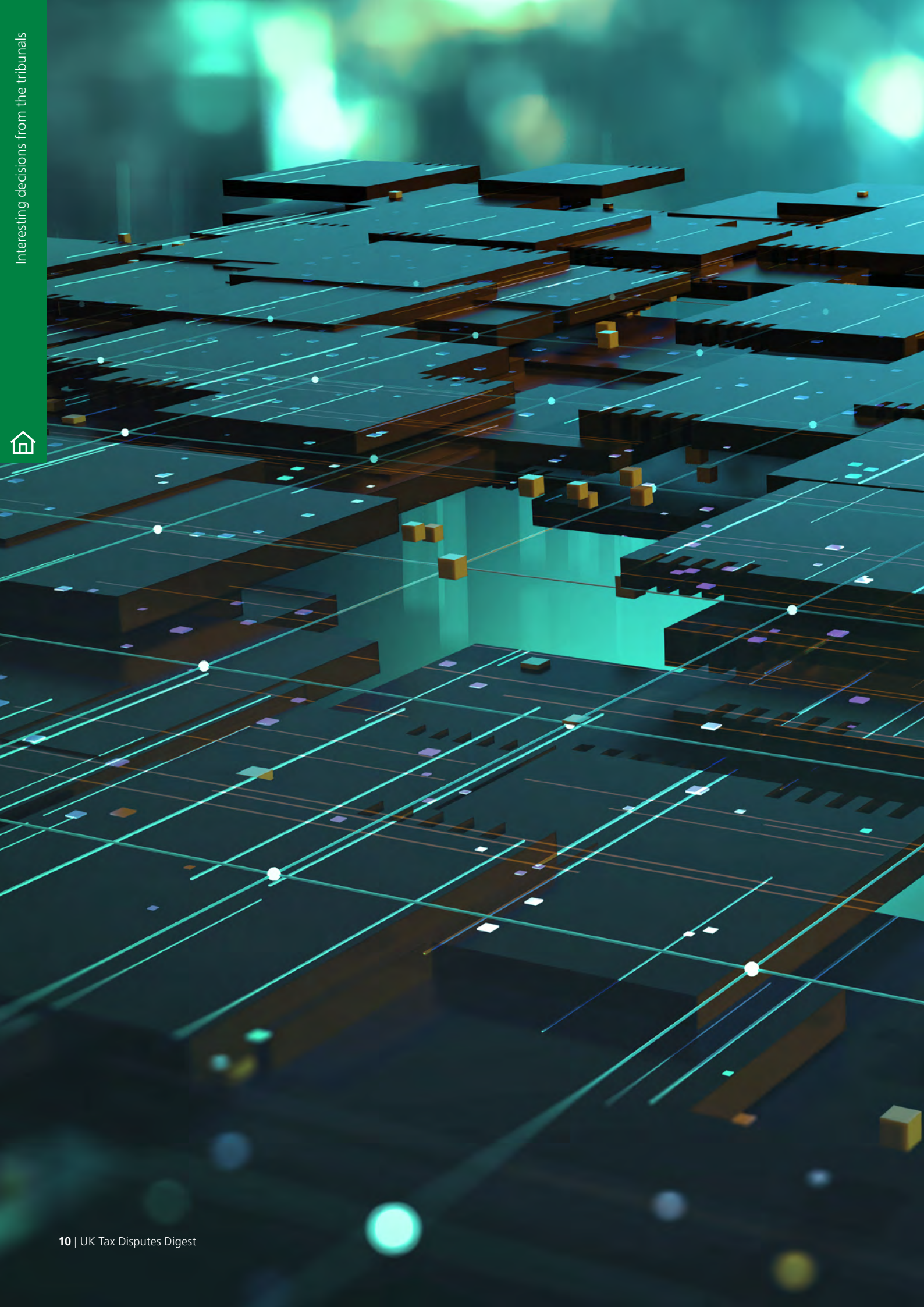
On the basis that the Golden Contract had been entered into by the tenth anniversary of the Park being designated within the Zone, the taxpayers (who had bought the benefit of the Golden Contract and claimed the capital allowances at issue) argued that the expenditure they incurred within twenty years of the

Park being designated within the Zone qualified for 100% capital allowances under section 298(1)(b) of the CAA 2001.

The Supreme Court unanimously dismissed the taxpayers' appeal from the Court of Appeal, holding that section 298(1)(b) can only apply to expenditure if, by the tenth anniversary of a site being included in a zone, there has been a contractual relationship under which the expenditure had been agreed upon in terms, or where expenditure arose from building work on the site that the developer had a contractual right to require.

The Court found that the expenditure in question did not meet this test because the Golden Contract did not permit changes from one project to another, as had occurred in this case. Additionally, there was no contractual commitment to the Contractor within the initial ten-year period to carry out the construction that was the subject of the expenditure.

In addition, the court noted that whether changes were a variation or replacement of the Golden Contract did not affect the operation of section 298. However, it addressed the principle, stating that in most cases the intention of the parties determines whether a change amends or replaces the principal agreement. The discussion concerning where there is a variation of a contract, as opposed to a rescission and the creation of a new contract, is likely to be of wider significance than in the narrower tax context of this case.



Interesting decisions from the tribunals

FTT considers the application of SDLT anti-avoidance legislation to a real estate transaction

In *Brindleyplace Holdings S.À R.L v The Commissioners for HMRC* [2024] UKFTT 00808 (TC)), the FTT gave detailed consideration to the meaning of the term 'tax avoidance' in an SDLT context, finding in favour of the taxpayer.

Background

A property investment partnership ("**BP ELP**") owned real estate (the "**Properties**"). At the outset. The partners in BP ELP were: (i) the trustee of a JPUT ("**Trustee**"); (ii) a Scottish limited partnership ("**Carry LP**") ; and (iii) the general partner of BP ELP.

BP Holdings, (the "**Appellant**"), a Luxembourg company, purchased pursuant to a sale and purchase agreement ("**SPA**"): (i) 99.8% of the units in the JPUT; (ii) the entire issued share capital of the GP; and (iii) the partnership interest held by the Carry LP in BP ELP.

An entity under the same ownership as the Appellant ("**BPPS**") acquired the remaining 0.2% of the interests in the JPUT.

In accordance with the terms of the SPA, on the same day the Appellant paid, for and on behalf of BP ELP, an amount to Barclays Bank to discharge BP ELP's debt owed to Barclays Bank.

A few weeks subsequently, the Appellant subscribed for the issue of additional units in the JPUT, the consideration being satisfied by the issue of a promissory note to the JPUT.

On the same day, the following took place: (i) The JPUT contributed the promissory note to BP ELP by way of capital; (ii) BP ELP assigned the promissory note to the Appellant in discharge of the debt; and (iii) BPPS redeemed its units in the JPUT.

Also on the same day, the Trustee distributed its interest in BP ELP in specie to the Appellant upon the termination and winding up of the JPUT.

BP ELP was terminated and upon its winding up, the Properties were distributed to the Appellant, the sole limited partner in BP ELP. The effect was therefore that the Appellant became the sole legal and beneficial owner of the Properties, which had a market value of £130 million.

The Appellant's SDLT returns were challenged by HMRC, on the following bases.

First HMRC argued that the distribution by the Trustee of its interest in BP ELP in specie upon the termination and winding up of the JPUT was a Type A transaction within paragraph 14(3A) Schedule 15 FA 2003, so that SDLT is payable in respect of chargeable consideration equal to the market value of the properties.

In order for there to be a Type A transaction, the relevant statutory provision requires that there must have been consideration in money or money's worth given by or on behalf of the person acquiring a partnership interest. The Appellant argued that no such consideration was given by or on behalf of BP Holding for the acquisition of the interest in BP ELP and therefore this was not a Type A transaction. The only consideration given by BP Holding was not for a partnership interest but, instead, the sum paid to the JPUT in consideration for additional units in the JPUT.

Further, HMRC argued that group relief is not available in respect of the distribution of the Properties to the Appellant, upon the termination and winding up of BP ELP, on the basis that paragraph 2(4A) Schedule 7 Finance Act 2003 applied to deny group relief. That provision applies in respect of a transaction which (a) is not effected for bona fide commercial reasons, or (b) forms part of arrangements of which the main purpose, or one of the main purposes, is the avoidance of liability to tax.

Finally, HMRC argued that section 75A FA 2003 applied, so as to impose SDLT by reference to a "notional transaction".

Section 75A applies where: (i) one person (V) disposes of a chargeable interest and another person (P) acquires it or a chargeable interest deriving from it; (ii) a number of transactions are involved in connection with the disposal and acquisition; and (iii) the sum of the amounts of SDLT payable in respect of the transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

It was common ground that, because the Properties were, prior to the transactions, owned by BP ELP, the partners in BP ELP must be V for these purposes. However, the partners in BP ELP had changed over time. HMRC argued that V is the person who had owned the Properties before any of the steps in the transaction had been undertaken. However, the Appellant argued that V is the person who owned the property immediately before the chargeable interest was transferred, i.e. when BP ELP distributed the Properties to the Appellant.

Decision

As regards whether there was a Type A transfer, the Tribunal had regards to the terms of the relevant legislation and also, as an aid to interpretation, the explanatory notes to the legislation. The Tribunal found for the taxpayer, concluding that the legislation required that the consideration must have been paid for the partnership interest, and not for something else. Because the only consideration had been given for something other than the partnership interest, the legislation did not apply.

As regards group relief, the Tribunal found in favour of the taxpayer, concluding that a decision to purchase units and then subsequently to take advantage of the SDLT group relieving provisions did not amount to tax avoidance. This conclusion was reached on the basis that it, "does not … mean that the parties are not facing the economic consequences of their decision or using a tax relief for a purpose or way not intended by Parliament".

The Appellant also succeeded on section 75A. The discussion on the application of section 75A was elliptical, but it appears that the parties accepted that for the purposes of section 75A the notional transaction to be taxed (instead of the actual transaction) was that between the partners in the partnership, as vendors, and the Appellant, as purchaser. HMRC contended that the limited partner in the partnership at the relevant time was the JPUT and hence no group relief was available on the notional transaction, so that there was a charge pursuant to section 75A. However, the Tribunal agreed with the Appellant that the identity of the vendors should be determined by the identity of the partners in the partnership at the date the properties were transferred and noted that further support was given to that view by the rule that defers the effective date of a notional transaction to when (broadly) all of the connected steps have been effected. At that point, the Appellant was the limited partner, so at the relevant time all vendors (the limited partner and the general partner) were in a group with the purchaser (the limited partner) so group relief would apply to the notional transaction.

Comment

It will be interesting to see whether this case will be appealed, given that it would seem to be a significant defeat for HMRC. The discussion in this case of what constitutes tax avoidance is particularly interesting and of wider potential importance.

UT allows HMRC's appeal in a case concerning the application of the IR35 legislation, setting aside the FTT's decision and remaking it to dismiss the taxpayer's appeal

In *The Commissioners for HMRC v S & L Barnes Limited* [2024] UKUT 00262 (TCC), the UT allowed HMRC's appeal against the decision of the FTT, finding that the FTT had erred in its interpretation and / or application of the third stage of the *Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 ("***Ready Mixed Concrete***") test, including by taking into account irrelevant factors and failing to take into account relevant factors.

Background

The defendant, Mr Barnes had worked as a commentator with Sky Sports since 1994. In the period relevant to the appeal, S & L Barnes Limited ("**SLB**"), Mr Barnes' personal service company, entered into two contracts with Sky TV Limited for the provision of Mr Barnes' services. The first contract covered the period from 1 June 2013 to 31 May 2017 and the second contract covered the period from 1 June 2017 to 31 May 2019. During the time periods of the contracts, Mr Barnes' main engagements were with Sky, The Times and The Sunday Times. Mr Barnes also worked for non-Sky broadcasters in covering the 2015 and 2019 World Cups and undertook various commitments with other media organisations.

In its analysis of the contracts in place, the FTT viewed both the first contract of 1 June 2013 to 31 May 2017 and the second contract of 1 June 2017 to 31 May 2019, as a singular, hypothetical contract. At the FTT, SLB conceded that the mutuality of obligation and control tests in *Ready Mixed Concrete* were satisfied. However, in its application of the third stage of the *Ready Mixed Concrete* test, being whether the other provisions of the hypothetical contract are consistent with it being a contract of service, the FTT gave weight to 12 identified factors which it concluded pointed away from Mr Barnes being in employment. Accordingly, the FTT ruled in favour of SLB, concluding that the hypothetical contract would not be one of employment. HMRC appealed to the UT on the grounds that the FTT had made errors of law in applying the third stage of the *Ready Mixed Concrete* test.

Decision

The UT allowed HMRC's appeal and set aside the FTT's decision. The UT decided to remake the decision, by identifying and weighing the contractual terms indicative of each of (i) employment; and (ii) self-employment; against one another.

The hypothetical contract, the principal terms of which were laid out before the FTT and appended to the UT judgment, contained the following terms:

- a 4-year contract, with the option to extend by 2 years;
- no right of substitution;
- a right of first call for 228 days a year;
- exclusivity rights; and
- an absence of financial risk.

In addition, the overall length of the relationship between Mr Barnes and Sky was 25 years.

In evaluating all of the relevant admissible factors required at the third stage of *Ready Mixed Concrete*, the UT concluded that the true nature of the relationship under the hypothetical contract would have been one of employment.

The UT's view was that the factors pointing towards employment outweighed the factors pointing away from that conclusion: the right of the taxpayer to exploit his work product; his agreement regarding availability; and the fact that the taxpayer was in business on his own account outside his relationship with Sky. On the last of these factors, it was accepted that the taxpayer was his own brand, "The voice of rugby".

The UT's decision was reached without reference to a clause in contracts stating that (broadly) the intention of the parties was that the taxpayer should not be an employee of Sky.

Comment

This case further highlights the complexities of IR35 legislation. However, the UT has provided some useful guidance on the third stage of *Ready Mixed Concrete*, which will be of wider relevance.

FTT confirms that foreign companies need to have a substantial presence in the UK, including adequate human and technical resources, for their branch to qualify as a "fixed establishment", a necessary condition for being treated as a member of a VAT group in the UK

In *Barclays Service Corporation & Anor v The Commissioners for HMRC* [2024] UKFTT 785 (TC), the FTT held that, on the particular facts, the UK branch of a US company did not have sufficient human and technical resources to support an application for VAT grouping. However, the FTT rejected HMRC's alternative arguments that the effect of VAT grouping would have been limited to the specific UK branch, as opposed to the whole US entity, or that HMRC was entitled to reject the VAT grouping application on the grounds of protection of the revenue.

Background

Barclays Service Corporation ("**BSC**") is a US company providing intra-group services to the Barclays group, including IT, HR, strategy and operational services.

At the end of 2017, BSC applied to join the Barclays VAT group. In March 2018 HMRC refused the application on two grounds: first on the basis that BSC did not have a fixed establishment in the UK at that time and secondly on the basis that the application should be rejected for the protection of the revenue.

BSC and Barclays Execution Services Limited ("**BESL**"), as representative member of the VAT group, made an appeal against HMRC's decision of refusal.

Decision

On the first ground, the FTT addressed the question of whether there had been a 'sufficient degree of permanence and a suitable structure in terms of human and technical resources' to meet the requirement for a fixed establishment.

The FTT found that the branch had insufficient human and technical resources at the date of the application.

Having decided this issue in favour of HMRC, it was not strictly necessary for it to consider HMRC's alternative arguments, but the FTT briefly did so.

HMRC had argued that *Danske Bank* (Case C-812/19) imported a territorial restriction into the VAT grouping rules, such that where part of an entity is locally VAT-grouped, that part only should be treated as part of the local VAT group. The FTT declined to conform its interpretation of the VAT grouping rules with *Danske Bank*, noting that any change to the UK's whole establishment approach would have far-reaching implications.

As regards protection of the revenue, the FTT concluded that the VAT savings on admission to the group would have fallen within the normal consequences of VAT grouping, therefore this did not represent a valid reason to decline VAT grouping.

Comment

Overseas entity VAT grouping is a significant issue of relevance to many groups, and this can be a particularly contentious area. It is therefore disappointing that the FTT did not provide its view on the correct test for the application of a fixed establishment for the purposes of the VAT grouping rules, which may have provided useful clarity on this subject.

Upper Tribunal upholds FTT decision denying intangible asset amortisation on the basis that the corporate members which contributed assets to an LLP were its related parties

In *Muller UK and Ireland Group LLP and ors v The Commissioners for HMRC* the UT rejected the taxpayers' appeals against the FTT's decision which resulted in the denial of debits for amortised intangible assets and goodwill contributed to an LLP by its corporate members.

Background

The taxpayers in this case are producers, marketers and distributors of dairy products in the UK and Ireland. In 2013 the second, third and fourth appellants (the "**Corporate Members**") transferred their trade, together with intellectual property and goodwill, to the first appellant (the "**LLP**") in return for membership interests in the LLP. Subsequently the transferred assets were recorded as their fair value in the LLP's accounts and then amortised over five years.

Section 1259 Corporation Tax Act 2009 determines how the profits of a partnership are calculated when a member of the partnership is a company. It provides that the profits of the trade are the amount that, "would be the amount of the profits of the trade chargeable to corporation tax if a…UK company carried on the trade". This provision therefore creates a statutory fiction, by which profits are calculated in respect of a notional company. Section 1273 CTA 2009 provides that an LLP which is carrying on a trade with a view to profit, is to be treated for corporation tax purposes as if it were a partnership.

The central issue in this appeal relates to the interaction of section 1259 and the intangible asset provisions. The intangible assets provisions are contained within Part 8 CTA 2009 and entitle companies to claim debits on the amortised depreciation of intangible assets such as intellectual property and goodwill which have been acquired. However, this entitlement is only available if the acquirer is not a "related party".

The appellants' deduction in respect of the amortisation of the intellectual property and goodwill held by the LLP was denied by HMRC on the basis that the appellants were related parties. The appellants disagreed, on the basis that the calculation of the notional company's profits prescribed by s1259 does not refer to its ownership characteristics (i.e. who was assumed to own or control the notional company and in what proportions). The notional company was thus incapable of being a "related party" to the Corporate Members and therefore the LLP was entitled to claim the relevant debits in computing its profits.

The FTT had agreed with HMRC, rejecting the appellants' case that they were not "related parties". The FTT said that, because the Corporate Members held all the membership units in the LLP, they were to be treated as owning the notional company referred to in section 1259 Corporation Tax Act 2009. The effect was to deny the claim to deduct the relevant debits.

Decision

The UT upheld the FTT's decision, concluding that the partnership's ownership characteristics had to be attributed to the notional company, in order to calculate its profits. The lack of statutory language attributing the partnership's ownership attributes to the notional company were not fatal to HMRC's arguments in that regard.

Comment

The fact that the legislation is silent as to the extent to which the notional company should be regarded as possessing the same attributes as the partnership whose trade it is deemed to carry on gave rise to a difficult point of statutory interpretation. This case is interesting for its approach to determining the extent of the relevant deeming provision and as an illustration of the weight to be placed on the various indicators of legislative purpose.

Other developments

Autumn Budget 2024 – tax administration, compliance and investigation measures

The Chancellor delivered the Autumn Budget 2024, the first fiscal event for the current government, on 30 October 2024. The headline news was dominated by a number of tax increasing measures, but the announcements also included several updates in relation to tax administration, compliance and investigations. In relation to tax administration, compliance and investigations, the government announced:

- a consultation on the implementation of electronic invoicing (e-invoicing) in the UK, to be published in early 2025;
- investment to improve HMRC's customer service, and to transform HMRC into a "digital first" organisation, with a Digital Transformation Roadmap to be published in Spring 2025;
- engagement with stakeholders with a view to improving the tax policy process;
- that in Spring 2025, it would announce a package of measures to simplify tax administration and improve taxpayer experience with a focus on reducing burdens on small businesses;
- confirmation of the recruitment of 5,000 new tax compliance officers. Funding will also be provided for 1,800 debt management staff, and £12 million will be invested to acquire further credit reference agency data to enable HMRC to better target its debt collection activities;
- the commissioning of an independent review of the Loan Charge;
- the introduction of legislation in a future Finance Bill, to take effect from April 2026, to make agencies responsible for accounting for PAYE on payments made to workers who are supplied using umbrella companies;
- a consultation on reforming HMRC's correction powers, exploring changes to HMRC's existing powers and processes, and a potential new power to require taxpayers to correct mistakes themselves;
- a summary of responses to the Call for Evidence in "*The Tax Administration Framework Review: enquiry and assessment powers, penalties and safeguards*", including further consultations on opportunities to reform HMRC's use of behavioural penalties, and ways to improve access to taxpayer alternative dispute resolution and statutory review in order to resolve disputes before they reach the tribunals; and
- an increase in the late payment interest rate charged by HMRC on unpaid tax liabilities by 1.5% points, taking effect from 6 April 2025.

Changes to interest rates for late payments and repayments

In line with the Bank of England Monetary Policy Committee's announcement on 7 November 2024 to decrease the Bank of England base rate from 5% to 4.75%, HMRC announced a reduction in interest rates for late payment and repayment of most taxes. The changes came into effect on 26 November 2024 for non-quarterly instalment payments. Late payment interest is currently set at base rate plus 2.5%, meaning that the interest rate from 26 November 2024 is reduced from 7.5% to 7.25%. Repayment interest is set at base rate minus 1% (with a minimum floor of 0.5%), meaning that the interest rate from that date will be reduced from 4% to 3.75%.

However, as noted above, at the Autumn Budget 2024, the government announced that the percentage charged for late payments in addition to the base rate would increase by 1.5% from 6 April 2025, so that the late payment interest rate will be set at the base rate plus 4%.

Several new sets of Guidelines for Compliance published

Guidelines for Compliance were introduced in November 2021, as part of HMRC's review of tax administration for large businesses. They aim to provide HMRC's perspective on complex, often misunderstood, or new, risks that may arise across various tax regimes. Several sets of guidelines for compliance have recently been released: "GfC7 – Help with risks in transfer pricing approaches", "GfC8 – Help with VAT compliance controls", "GfC 9 – Help with Patent Box computations" and "GfC – 10 Help with Apprenticeship Levy and Employment Allowance"

Help with risks in transfer pricing approaches
These guidelines are intended to help businesses reduce uncertainty in their approach to transfer pricing. The guidelines provide HMRC's expectations of how a UK business should manage its transfer pricing risk and highlight key risk areas where greater scrutiny may be expected and best practice approaches to manage that risk. This includes in relation to designing and selecting transfer pricing policies. In relation to documentation and record keeping, the guidelines provide information on forms of real time information and records to be

obtained, and on common risks and best practice approaches in scoping, preparing and retaining documentation.

Help with VAT compliance controls
These guidelines cover systems and processes which may impact the overall VAT compliance of UK VAT registered businesses who use invoice accounting. This includes controls on sales, purchases and VAT return preparation, which HMRC considers will help businesses reduce the risk of error when accounting for VAT.

Help with Patent Box computations
These guidelines are intended to help companies who elect into the Patent Box regime to provide sufficient detail in their tax computations, as HMRC has identified that a number of compliance checks are caused by a failure to provide such detail. The guidelines share best practice information to be included in the tax computations, common areas where HMRC sees errors in computations, best practice record keeping, and points of contact where there is uncertainty as to how the guidelines should apply to a particular company.

Help with the Apprenticeship Levy and Employment Allowance
These guidelines are intended to help all employers (including companies, charities and public bodies and their related organisations) reduce common errors. In particular, the guidelines focus on the connected entity rules for Apprenticeship Levy and Employment Allowance.

Latest HMRC nudge letter campaigns

The behavioural science of "nudge theory" has become an increasingly used weapon in HMRC's arsenal over the last decade or so – i.e. the idea that people can be better directed towards a desired course of action through suggestion rather than obligation. UK taxpayers may have noticed the same concept at work when completing their online tax returns, where certain information is now pre-populated based on figures held by HMRC (the idea being that the taxpayer will likely accept those figures by default).

Over the last few months, HMRC have launched several new nudge letter campaigns on various issues, as summarised below.

Non-submission of self-assessment tax returns for tax year 2021/2022 (August 2024)
HMRC's Wealthy Team is sending nudge letters to taxpayers who have not submitted a tax return for tax year 2021/2022, but who earn more than £200,000 annually. The specific letter a relevant taxpayer receives depends on whether the taxpayer has registered for self-assessment but has not submitted a tax return, has not registered for self-assessment, or has previously registered for self-assessment but their account is dormant. Recipients are requested to file a tax return for 2021/2022 if they consider one is due, and are warned that penalties for late filing and late payment may apply, as well as statutory interest.

Payment of remittance basis charge (September 2024)
HMRC's Wealthy Team has commenced a nudge letter campaign targeting individuals who it suspects should have paid the remittance basis charge in relation to tax year 2022/2023 but have not done so. One version of the letter is being sent to those who have been UK tax residents for at least seven of the last nine tax years, and must pay a remittance basis charge of £30,000 if claiming the remittance basis. The other version of the letter is being sent to those who have been UK tax residents for at least twelve out of the last fourteen tax years, and must pay a remittance basis charge of £60,000 if claiming the remittance basis. Recipients are instructed to verify their UK residency status within 60 days of the letter's date. If needed, they must amend their 2022/2023 tax return to either claim and pay the remittance basis charge or declare their foreign income and gains, paying tax on the arising basis.

Economic crime levy (September 2024)
HMRC is sending letters to entities that met the criteria for paying the economic crime levy for the financial year from 1 April 2022 to 31 March 2023. These letters serve as a reminder to recipients that they should have submitted a return and paid the levy by September 2023. The recipients are requested to complete these actions as soon as possible to avoid HMRC raising an assessment and imposing penalties.

Individuals with overseas assets, income or gains (September 2024)
HMRC is sending letters to individuals it believes have overseas income or gains on which they should be paying UK tax. The letter states that this information has been obtained through the UK's tax information exchange agreements with other countries. It notes that the information HMRC has received about the individuals' overseas assets, income, or gains does not match what is reported on their tax returns. The letter acknowledges that there may be an explanation for this discrepancy.

Recipients are provided with several potential actions, depending on whether their UK tax has been correctly declared. If the tax has been correctly declared, recipients are asked to complete an enclosed Certificate of Tax Position. If the tax has not been correctly declared, recipients are asked to make a disclosure to HMRC's Worldwide Disclosure Facility. Additionally, letters are being sent to agents of individuals who have received the letter.

Differences in the loss position reported in Company Tax Returns (September 2024)
Letters are being sent to corporate taxpayers who have submitted company tax returns where the loss amounts reported in the CT600 differ from those in the accompanying tax computation. These letters remind recipients of the reform of corporation tax loss rules that took effect on 1 April 2017, which changed the treatment of brought-forward losses. The letter states that HMRC will use the tax computations in the return as the accurate loss amount, rather than the amounts in the CT600 box. Taxpayers are advised to contact HMRC if they disagree with this approach.

Gas safe engineers (October 2024)
HMRC's Individual Small Business Compliance Team is contacting individuals who have registered as a gas safe engineer with the Health and Safety Executive. The letter reminds recipients of their obligation to declare any income received to HMRC, either through PAYE (if employed) or through self-assessment (if self-employed). The letter also requests recipients to verify whether they need to register for self-assessment. If registration is required, they must file a self-assessment tax return within the specified time limit.

Provisional figures in clients' 2022/2023 self-assessment tax returns (October 2024)
HMRC is writing to agents whose clients have included provisional figures in their 2022/2023 self-assessment tax returns. The letters instruct these agents to arrange a convenient time to contact HMRC within three weeks of the date of the letter. If the agents do not make contact within this timeframe, HMRC will follow up again. Additionally, the letter mentions that if the agent believes changes are necessary to a client's previous tax declarations, there may still be an opportunity to make an unprompted disclosure.

Missing self-assessment tax returns for 2022/2023 (October 2024)
HMRC is sending letters to agents whose clients have not submitted a self-assessment tax return for 2022/2023. These clients had previously received a notice to file from HMRC with a deadline of 31 January 2024. The letter requests that recipient agents contact these clients to assist them in filing their returns. Additionally, agents are asked to verify whether the client list in their Agent Government Gateway account is current and to update the records if any clients no longer need to submit a self-assessment return.

Any taxpayers who receive nudge letters, even those confident of their tax position, should seek professional advice as soon as possible. Whilst nudge letters do not make specific accusations and are rarely overtly threatening in tone, they are generally based on actual data held by HMRC. Taxpayers who ignore these letters do so at their peril – failure to take action or respond is likely to mean that there is an imminent risk of HMRC starting an investigation (either under civil procedures or, in cases of suspected fraud, using their criminal powers). Early disclosure may also mitigate penalties.

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