[2019] UKFTT 0408 (TC)

Limited Liability Partnerships – Business Property Renovation Allowance claims – whether in accordance with an earlier decision, HMRC had power to open enquiries for Limited Liability Partnerships under section 12AC of the Taxes Management Act 1970 (TMA) – no - whether in accordance with an earlier decision, closure notices issued by HMRC under section 28B of TMA were valid - no - whether enquiry into Limited Liability Partnership returns should have been made under Finance Act 1998, Schedule 18, paragraph 24 – yes - appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07223

Appeal numbers: TC/2017/2838 & 2839

BETWEEN

INVERCLYDE PROPERTY RENOVATION LLP
CLACKMANNANSHIRE REGENERATION LLP **Appellants**

-and-

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

TRIBUNAL: JUDGE RUTHVEN GEMMELL WS

Sitting in public at Edinburgh on 29 and 30 April 2019

Keith Gordon and Ximena Montes Manzano, of Temple Tax Chambers, for the Appellants
Ross Anderson, Advocate, instructed by the Office of the Advocate General for Scotland, for the Respondents

DECISION

INTRODUCTION

1. Inverclyde Property Renovation LLP ("IPR") and Clackmannanshire Regeneration LLP ("CR" and collectively as "the LLPs") brought, as a preliminary issue, before the Tribunal ("I" or "me") an amended ground of appeal namely:–

> "In accordance with the earlier decision of the Court of Session in *Spring Salmon and Seafood Limited, Re Petition for Judicial Review* [2004] Scot CS, 39 (hereinafter "*SSS*"), HMRC had no powers to open an enquiry under TMA 1970, section 12AC and, therefore, there is no valid notice under section 28B."

Legislation- see Appendix 1

Case Law – see Appendix 2

2. The LLPs' Skeleton Argument dated 25 March 2019 stated that an enquiry into the LLPs' returns should have been made under the provisions of the Finance Act 1998, schedule 18 paragraph 24 (the Corporation Tax Self-assessment Provisions) and if HMRC wanted to challenge the relevant return of any of the LLPs' members, they should have opened an enquiry into those members' own returns under section 9A of the Taxes Management Act ("TMA").

3. The LLPs stated that their case did not rely on any lacuna in the legislation but was a straightforward case of HMRC having followed the wrong procedural course of action and, furthermore, subject to statutory limits, HMRC might still be able to remedy the situation through their powers to make discovery assessments.

4. The LLPs contend that as a result of the conclusion which HMRC reached in the course of their enquiry, both the Notice of Enquiry already issued under section 12AC TMA and the subsequent Closure Notice issued under section 28B TMA were invalid and the appeals against the notices should be allowed.

5. HMRC's Skeleton Argument, dated 10 April 2019, stated that the carrying on by a Limited Liability Partnership ("llp") of a business "with a view to profit" is a requirement for the tax transparent treatment of a llp under section 863 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") and that the LLPs' principal contention on the merits of the appeal is that they were carrying on business with a view to profit. HMRC's principal contention on the merits of the appeal is that none of the LLPs were carrying on business with a view to profit; the LLPs are thus not to be treated as transparent for tax purposes; and as a result the LLPs, being bodies corporate for the purposes of section 112A of the Corporation Tax Act 2010 (hereinafter "CTA"), ought to have made company tax returns.

6. HMRC say that having received a partnership return from the LLPs pursuant to notices to file, they were entitled to open an enquiry under section 12A TMA and to issue a Closure Notice under section 28B TMA.

7. At the outset of the hearing it was noted that the issue of whether or not the taxpayers had been carrying on a business "with a view to profit" had not been established. Had the appeal followed its original course, that matter could have been decided before considering the purely legal issue on this the first, and lowest, rung of the legal appeal ladder for UK tax matters. Accordingly, no assumption could be made for the purposes of this hearing of whether in fact the LLPs had met the "view to profit" condition or not.

8. The substantive appeal concerns a dispute between the LLPs and HMRC concerning the quantification of the LLPs' claims for Business Property Renovation Allowance (a capital allowance provided for by part 3A of the Capital Allowances Act 2001 ("CAA")).

9. The LLPs say that HMRC issued purported Closure Notices pursuant to TMA sections 28B(1) and (2) on 24 February 2017 to IBR and CR in which they denied that claims for Business Property Renovation Allowance ("BPRA") on two bases:–

(a) that the LLPs did not carry on a business with a view to profit and their activities are, accordingly, to be treated for tax purposes as carried on by the LLPs themselves and not by their members in partnership (section 863(1) ITTOIA), and

(b) that the LLPs should be regarded as not having incurred expenditure to the extent that it has been met by a public body (the Capital Allowances Act 2001, section 532).

10. Partnerships do not pay tax in the United Kingdom but instead their profits and losses are attributable to the partners so that the partners (based on their own individual circumstances) pay tax on their own share of profits or may be entitled to reliefs in respect of their own share of any losses, sections 848 and 850 ITTOIA. The LLPs say that in reality a llp is a body corporate (section1 Limited Liability Partnership Act 2000). Accordingly, it would ordinarily be subject to corporation tax, (section 1121 CTA).

The Deeming Provisions

11. This, however, is subject to the deeming provisions in ITTOIA section 863 (which apply for income tax purposes) and a corresponding provision in the CTA section 1273 (for corporation tax purposes).

12. Insofar as is relevant, section 863 is set out in the following terms:

(1) Limited Liability Partnerships

> section 863 (1) - For income tax purposes, if a limited liability partnership carries on a trade, profession or business with a view to profit —
>
> (a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such),
>
> (b) anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and
>
> (c) the property of the limited liability partnership is treated as held by the members as partnership property.
>
> References in this subsection to the activities of the limited liability partnership are to anything that it does, whether or not in the course of carrying on a trade, profession or business with a view to profit.
>
> section 863(2) - For all purposes, except as otherwise provided, in the Income Tax Acts—
>
> (a) references to a firm or partnership include a limited liability partnership in relation to which subsection (1) applies,
>
> (b) references to members or partners of a firm or partnership include members of such a limited liability partnership,

(c) references to a company do not include such a limited liability partnership, and

(d) references to members of a company do not include members of such a limited liability partnership.

Limited Liability Partnerships ("llps")

13. Limited Liability Partnerships were introduced from 6 April 2001 by the Limited Liability Partnership Act 2000 ("LLP Act") which states:

Section 1 Limited Liability Partnerships

(1) There shall be a new form of legal entity to be known as a limited liability partnership.

(2) A limited liability partnership is a body corporate (with legal personality separate from that of its members) which is formed by being incorporated under this Act; and—

(a) in the following provisions of this Act (except in the phrase "overseas limited liability partnership"), and

(b) in any other enactment (except where provision is made to the contrary or the context otherwise requires),

references to a limited liability partnership are to such a body corporate.

(3) A limited liability partnership has unlimited capacity.

(4) The members of a limited liability partnership have such liability to contribute to its assets in the event of its being wound up as is provided for by virtue of this Act.

(5) Accordingly, except as far as otherwise provided by this Act or any other enactment, the law relating to partnerships does not apply to a limited liability partnership.

Section 2 Incorporation document etc.

(1) For a limited liability partnership to be incorporated—

(a) two or more persons associated for carrying on a lawful business with a view to profit must have subscribed their names to an incorporation document,

(b) the incorporation document or a copy of it must have been delivered to the registrar, and

(c) there must have been so delivered a statement ... made by either a solicitor engaged in the formation of the limited liability partnership or anyone who subscribed his name to the incorporation document, that the requirement imposed by paragraph (a) has been complied with.

(2) The incorporation document must—

(a). . . . .

(b) state the name of the limited liability partnership,

(c) state whether the registered office of the limited liability partnership is to be situated in England and Wales, in Wales, in Scotland or in Northern Ireland,

(d) state the address of that registered office,

(e) give the required particulars of each of the persons who are to be members of the limited liability partnership on incorporation,

(f) either specify which of those persons are to be designated members or state that every person who from time to time is a member of the limited liability partnership is a designated member.

(g) include a statement of initial significant control.

(2ZA) The required particulars mentioned in subsection (2) (e) are the particulars required to be stated in the llps register of members and register of members' residential addresses.

(2A). . . . .

(2B). . . . .

(3) If a person makes a false statement under subsection (1) (c) which he—

(a) knows to be false, or

(b) does not believe to be true,

he commits an offence.

Section 4 Members.

(1) On the incorporation of a limited liability partnership its members are the persons who subscribed their names to the incorporation document (other than any who have died or been dissolved).

(2) Any other person may become a member of a limited liability partnership by and in accordance with an agreement with the existing members.

14. Mr Gordon emphasised that section 1(2) states that an llp is a body corporate and section 1(5) which provides that except, as far as otherwise provided by the LLP Act or any other enactment, the law relating to partnership does not apply to a llp.

The Tax Treatment of llps

15. The tax treatment for a llp for Income and Corporation Tax purposes was first addressed in the Finance Act 2001 at section 75 which came into force on the same day as the Limited Liability Partnerships Act 2000, namely 6 April 2001.

16. This introduced section 118ZA into the Income and Corporation Taxes Act 1988 ("ICTA 1988") and as part of "the Tax Law Rewrite Project" these provisions in the ICTA 1988 were superceded by section 863 ITTOIA and section 1273 CTA.

Submissions on section 863 ITTOIA

17. The LLPs say that there are two different deeming provisions each with a different scope and given that they are in successive subsections, this is clearly deliberate and which was not only intentional but it also makes good administrative sense. They say that section 863(1) provides that for income tax purposes (CTA 2009 section 1273(1)) makes a similar provision for corporation tax purposes) the activities of a llp are treated as carried on by the members of the llp in partnership (rather than by the llp). Accordingly, when (and only when) the deeming condition is engaged there will be no liability to corporation tax as far as the actual profits of any llp are concerned.

18. Section 863(2) is worded in a markedly different way. The deeming in that subsection is expressly applied for "all purposes…..in the Income Tax Acts". Where relevant, that deeming requires statutory references to "firm" or "partnership" to be extended so as to cover llps. The LLPs emphasise that the two deeming provisions apply if, and only if, the llp carries on a trade, professional business with a view to profit (ITTOIA section 863(1)) and the deeming in subsection 2 is expressly limited to "a Limited Liability Partnership" in relation to which subsection (1) applies. Accordingly, where this condition is not met, then the deeming does not take place and instead a llp is treated no differently from various other entities that come within the definition of "company" for tax purposes.

19. This the LLPs say is the reason behind HMRC's first challenge against the LLPs in that they have concluded that they did not intend to carry on business with a view to profit and, therefore, the losses suffered cannot (so say HMRC) be allocated to their respective members. Accordingly, HMRC's case is that the deeming in section 863(1) is not available and self-evidently the deeming in section 863(2) is similarly unavailable.

20. The LLPs at this stage in their Skeleton Argument raised a "rather philosophical question" as how to deal with this situation where in the course of an enquiry opened on the assumption that section 863(2) is engaged, it is later concluded by HMRC that section 863(2) is not engaged because there has been a failure to meet the view to profit criteria. The LLPs say this question can be easily resolved: either section 863(2) applies or it does not and HMRC must accept the full consequence of their conclusions.

21. The LLPs say that Parliament has carefully ensured that this dilemma need never be addressed and this is down to the different scope of the deeming provisions in the two subsections. For administrative tax provision (in the TMA and Schedule 18 Finance Act 1988), the deeming never applies. Accordingly, for these administrative purposes, a llp is always subject to the Schedule 18 provisions – whether or not the llp carries on business with a view to profit. This is achieved by the fact that Parliament limited the deeming (in section 863(2) ITTOIA and in section 1273(2) CTA). These terms in the Income Tax Acts and the Corporation Tax Acts are defined terms and do not include the TMA. In other words the LLPs say -

(a) If the statutory deeming applies, Income Tax and Corporation Tax are paid as if a llp is a partnership;

(b) if the statutory deeming does not apply, Income and Corporation Tax are paid as if a llp is a company; but

(c) in either event the tax administration provisions apply on the basis that llps are companies.

22. HMRC say that Schedule 18 of the Finance Act 1988 is properly to be considered to be an enactment which "relates to corporation tax" since the Finance Act 1988 section 117(1)

provides that the provisions of Schedule 18 are to have effect in place of the provisions of Part II and Part IV of the TMA "so far as they relate to corporation tax" and that "they" must relate to the provisions of the TMA. If the provisions of the TMA can be said to "relate to corporation tax, provision of the TMA may also be said to relate to income tax".

23. HMRC say there is no definition of the "Income Tax Acts" in ITTOIA, so reference must be made to the Interpretation Act 1978. "The Tax Acts" in terms of Schedule 1 to the Interpretation Act 1978 means "the Income Tax Acts and the Corporation Tax Acts". These are also defined:

(a) "The Income Tax Acts means 'all enactments relating to income tax, including any provisions of the Corporation Tax Acts which relate to income tax'";

(b) "The Corporation Tax Acts means 'the enactments relating to the taxation of income and chargeable gains of companies and of company distributions (including provisions relating to income tax)'".

24. HMRC say that the introductory words of section 863(1) ITTOIA – "for income tax purposes" are general and not limited to any defined series of enactments such as the "Income Tax Acts". Section 863(1), they say, alone is sufficiently wide in its terms to provide them with power to enquire into partnership returns made by the LLPs for income tax purposes on the basis that the view to profit condition in section 863(1) ITTOIA applies under section 12AC, TMA. The power under section 12AC (4) extends to anything contained in the return or required to be in the return. The whole thrust of partnership returns submitted for the LLPs was that they were carrying on business with a view to profit and this was something that was properly a matter of enquiry.

25. Section 863(2) of ITTOIA then proceeds to make various amendments of the Income Tax Acts which are not defined in ITTOIA so that accordingly the Interpretation Act definition applies.

26. HMRC say that if, as the LLPs contend, during an enquiry HMRC conclude that the LLPs were not carrying on a business with a view to profit and so the provisions of section 863 could no longer apply, it would render it legally impossible for the enquiry to have been validly made. Consequently, the LLPs' position is that this would remove retrospectively the section 12AC power to enquire and remove any power to issue a Closure Notice in respect of the enquiry which has been opened into the partnership return.

27. HMRC say that this analysis is fundamentally flawed and that if an enquiry into a partnership return is made in respect of a partnership return, it can be validly open under section 12AC and cannot become invalid because of a conclusion reached in the course of the enquiry.

28. HMRC say that, on the LLPs' analysis, HMRC would have been constrained to accept that the LLPs were carrying on business with a view to profit, which would entirely defeat the purpose of empowering HMRC to enquire into a partnership return. HMRC say it is not easy to understand how an enquiry opened under section 12AC into a partnership return can ever be concluded if the conclusion is reached that a llp is not entitled to tax transparent status.

29. Consequently, HMRC say that Parliament cannot have intended that the Notice of Enquiry and Closure Notice would somehow become invalid depending on the conclusion reached. "A statute is designed to be workable", Lord Dunedin famously remarked "and the interpretation thereof by a court should be to secure that object, unless crucial omissions or a clear direction makes that end unattainable": *Whitney v IRC* [1926] AC 37 [at 52]".

30. HMRC refer to the Supreme Court case of *Tower MCashback LLP 1 and Another v HMRC* [2011] UKSC 19, [2011] STC 1143 [at 7] where the provisions of section 118ZA of the Income and Corporation Taxes Act 1988 were considered by Lord Walker who stated that:

> "a limited liability partnership established under the Limited Liability Partnership Act 2000 has a legal personality separate from those of its members but if it carries on a trade it is, under section 118ZA of the Income and Corporation Taxes Act 1988, taxed as if it were an ordinary non incorporated partnership".

He continued…..

> "The most important provisions of the self-assessment regime as it applies to llps are to be found in section 12AA, 12AB, 12AC, 28B, 31 and 31A of TMA".

This is relied upon by HMRC.

31. HMRC say that the Supreme Court has proceeded on the basis that section 12AC and section 28B TMA apply to llps as they apply to partnerships, as has the Court of Appeal in *Eclipse Film Partners No 35 LLP v Revenue and Customs Commissioners* [2015] EWCA Civ, 95, [2015] STC, 1429 and also in cases before the High Court and Tax and Chancery Chamber of the Upper Tribunal.

32. The LLPs say that *Tower MCashback* is based on an assumption that (1) the TMA was applicable, (2) that the issue before the court was a narrow one, and (3) the issue of whether or not the TMA applied to the type of enquiry and Closure Notice was not put before the Court.

33. The LLPs say that it has been assumed for the last ten years that the HMRC procedure used in relation to the LLP is used in relation to the LLPs is the correct way forward. They say that the only two cases that considered the point before me are the *Spring Salmon and Seafood Limited, Re Petition for Judicial Review* [2004] STC 444 and *MDL Property Consultants LLP v HMRC* [2017] UKFTT 894.

Spring Salmon and Seafood Limited ("SSS")

34. The interpretation at the heart of this hearing was addressed by the Outer House of the Court of Session (Lady Smith) in *SSS*. The LLPs say that *SSS* is the only authority dealing directly with this point and that HMRC have successfully relied upon it in litigation in dealing with other provisions of the TMA (see *GDZ Suez Teesside Ltd v HMRC* [2017] STC 1622 at [113]*)*.

35. The issue in *SSS* was whether or not a statutory Notice of Enquiry needed to be in writing and the question turned on the same point at the heart of this case as to whether the TMA is part of the Tax Acts [at 18 and 22]. The *SSS* referred to a statutory "family tree" published in the 43rd Edition of Tolley's Yellow Tax Handbook [and the same family tree appears with some consequential amendments in the latest, 59th, Edition].

36. The statutes give the following definitions:

(a) The Taxes Acts, defined in TMA section 118 to mean:

(i) the TMA itself; together with

(ii) the Tax Acts;

(iii) enactments relating to capital gains tax.

(b) The Tax Acts is defined in the Interpretation Act 1978, Schedule 1 to mean:

(i) The Income Tax Acts; and

(ii) The Corporation Tax Acts

(c) The Income Tax Acts, defined in the Schedule 1 to mean:

(i) All enactments relating to income tax;

(ii) The Corporation Tax Acts are given an equivalent definition.

37. The LLPs say that, within the TMA itself, it is clear that the Act is not considering itself to be part of the Tax Acts and, similarly, the TMA is not considering itself to fall within the meaning of "the Income Tax Acts" which necessarily is a subset of the Tax Acts. This conclusion was described as "clear" by Lady Smith [at 22].

38. LLPs say this distinction is logical. The TMA is not a substantive tax Act but a collection of provisions which enables the collection, assessment and management of taxes by HMRC (and procedures on any appeal).

39. They refer for authority for this to Lord Carnwath JSC in (*R (on the application of Derry) (Respondent) v the Commissioners for HMRC* [2019] UKSC 19) where he states [at 20], "The TMA, as its title implies, is concerned principally with the management of tax rather than fixing liability. Although it dates back to 1970, it has been subject to substantial amendment since then in particular with the introduction of self-assessment".

40. HMRC say that the argument made on their behalf in *SSS* was one which was open to them on the facts of the case at the time but today would be made squarely on the basis of authority.

41. HMRC say that the argument made on behalf of HMRC in a different context some 15 years ago does not prejudge the LLPs' arguments in the present case or the proper construction of provisions for llps introduced for subsequent tax years.

42. HMRC distinguish the submission accepted by Lady Smith that the TMA did not form part of the Tax Acts and that the definition in section 131 ICTA did not, therefore, apply on the grounds that:

(1) The facts of the case concerned accounting periods of a company which predated the introduction of llps and the deeming provisions contained, subsequently, in section 863(1) ITTOIA.

(2) In *SSS*, the validity of the Notice of Enquiry was judicially reviewed; and in the present case, a Closure Notice has been issued in respect of the enquiry and that Closure Notice has been appealed;

(3) The proper ratio decided in *SSS* is that a notice actually received by someone authorised by a company to receive it, is validly served on the company and that no particular formality is required for a Notice of Enquiry". The dicta in *SSS* at [23] that the TMA is separate and distinct from the group of statutes referred to as "the Tax Acts in that section" was not necessary for the decision in the case, which was principally concerned with whether the terms of section 155 TMA were mandatory;

(4) That Mr Patrick Hodge's, now Lord Hodge, JSC, analysis in *R De Silva v HMRC (2017)* UKSC 74, [2017] STC 2483 [at 12] giving the opinion of the Supreme Court which refers to "the provisions of the TMA so far as they concern income tax" is different to his approach in *SSS*, where he represented HMRC.

(5) Whilst it is often possible and helpful to illuminate statutory divisions in a diagram as is done in Tolley's Yellow Tax Handbooks, the diagram has no legal status

and the statute is properly to be construed under reference to the words of the Interpretation Act 1978 and not to the diagram;

(6) Lady Smith in *SSS* did not have the benefit of (a) an analysis of the natural and ordinary meaning of the definition of "Income Tax Acts" under reference to the long title and the content of TMA; or (b) the analysis contained in the Appendix to Judge Thomas' decision in *MDL (*not all of which is supported by HMRC but which it was submitted comes to the correct conclusion); and

(7) A decision of a Lord Ordinary considering a petition to the supervisory jurisdiction of the Court of Session, though entitled to respect it, is not binding on other Lords Ordinary, still less on Tribunal Judges hearing statutory appeals;

(8) If *SSS* is to be applied and followed, the concluding reasoning of *SSS* must be applied to LLPs which is that they are personally barred from taking the jurisdiction point. That is to say, having made a partnership return, having received a Notice of Enquiry under section 12AC, and, at least in the case of IRC, not sought its withdrawal under section 12 AAAA; having sought a Closure Notice under section 28B; and having appealed the Closure Notice, the LLPs are now personally barred from claiming that HMRC had no power to issue the Notice of Enquiry or Closure Notice [39].

43. The LLPs say that the decision by Lady Smith, that the provisions of section 115 TMA were not mandatory, was because she accepted the submission that section 831 ITTOIA did not apply. It is, therefore, central to the case. Furthermore, the LLPs say:

(1) The case was heard in 2004 sometime after the introduction of the llp legislation and at which time returns from llps would have been received by HMRC. In any event, the creation of llps has not changed the interpretation of section 832 of ICTA which became section 863(1) of ITTOIA.

(2) That the case was rightly decided and, in any event, is binding on me.

(3) That HMRC rely on *SSS* when it suits them and their submission that when *SSS* was cited in *GDF Suez Teesside Ltd* v *The Commissioners for HM Revenue and Customs* (2017) UKUT *0068 STC* 1622 [at 113] it was for the proposition that no particular form was required for a Notice of Enquiry, is wrong.

(4) A notice in writing was not necessary [at 113] because and only because the provision of the TMA did not apply and that was because the TMA was seen as a separate statute.

(5) The issue of whether the decision was binding on me was raised again in relation to consideration of the First-tier Tribunal case MDL which is considered in more detail below.

(6) There is no reason to distinguish *SSS* and that their position is not inconsistent on the merits of the appeal. They say that if llps carry on their business with a view to profit, the deeming provisions of sections 836(1) and (then 2) apply but, in any event, whether they apply or not, it can never extend to the TMA.

(7) That for administrative purposes every llp is a company and not a partnership and cited *Benham (Specialist Cars) Ltd v HMRC* [2015] UKFTT 0330 (TC) as authority that the parties to a tax dispute cannot confer jurisdiction on a Tribunal which a Tribunal does not have.

44. Reference was made to *Odhams Leisure Group Ltd v HMRC [1992] STC 332 a* Queens Bench decision case in which Mr Justice McCullough stated "All parties until the arrival in the

court, had acted as if the matter was in the jurisdiction of the value added tax tribunal. Be that as it may, jurisdiction cannot be conferred on a statutory tribunal by the consent of those appearing before it, nor can it be conferred by the tribunal itself".

45. On the issue of whether the *SSS* case is binding on me, Mr Gordon, an English barrister, stated that it was, and Mr Anderson, a Scottish advocate, said that it was not.

46. Mr Anderson referred to *Abbot v Philbin (1960)* CH 27 AFFD (1961) AC352 as authority that ordinarily it would be proper for the appellate courts of each country to follow the approach taken by the other to the construction of UK legislation. Mr Anderson says that references to the "Court of Session" in that case were references to the Inner House of the Court and not the Outer House.

47. In *Marshall Clay Products v Caulfield* [2004] ICR 699 [at 32], Lord Justice Law stated that English courts were not bound to follow the decision of Scottish courts and vice versa so the Employment Appeals Tribunal in England, for example, was not bound by decision even of the Inner House of the Court of Session and it would be "constitutional solecism" to suggest otherwise.

48. In *R On the Application of Premier Foods (Holdings) Ltd v Revenue & Customs Commissioners* (2015) EWHC 1483 (Admin), 2015 STC 2384 [at19], Mr Justice Supperstone did not consider he was bound by a decision of the First Division of the Inner House presided over by Lord Hope of Craighead not least because he considered the decision to have been superseded and the decision should not now be regarded "as good law".

49. Mr Anderson's submission was that only decisions of the Inner House of the Court of Session would be binding on me on the basis that appeals from the Special Commissioners, the predecessor to the First-tier Tribunal, would have passed to the Court of Exchequer which was part of the Inner House of the Court of Session and not the Outer House. Similarly, although Outer House judges sit as members of the Upper Tribunal, they sit as members of the Upper Tribunal and not as Outer House judges. Mr Anderson, however, confirmed that all judicial review applications would normally begin in the Outer House and, as in the case of *SSS*, may relate to tax legislation.

50. It would seem anomalous that an Upper Tribunal decision would be binding on me but an Outer House judgment in relation to a tax matter, notwithstanding that it had not been considered by the Court of Exchequer, would not also be binding on me.

51. Whether or not that is the position, my view is that I agree with Lady Smith's judgment in *SSS* and consider that to be good law.

MDL Property Consultants LLP

52. As in *SSS*, *MDL Property Consultants LLP v HMRC* [2017] UKFTT 894, a First -tier Tribunal, Judge Thomas [at 35 - 42], considered "whether TMA was part of the Income Tax Acts" and whether a notice was served incorrectly by HMRC.

53. Judge Thomas considered that he was bound by the decision of Lady Smith in *SSS* and following that decision decided that the llp was not a partnership, that the appellants were not partners, and that the purported notice to file a return given to them was not a valid notice to require the nominated member of the llp to make and deliver a return under section 12AA TMA.

54. Judge Thomas in reaching this decision specifically reminded HMRC [at 53] of their right to appeal and to consider whether to review his decision to consider whether it was wrong in law. HMRC did not appeal the decision.

55. Judge Thomas, however, because of "his doubts about the correctness of the decision" and because it is possible that he was mistaken in his view of what *SSS* decided, somewhat unusually, to set out his own views on the matter in an appendix to the judgment.

56. In this he stated "if it were not for *SSS* then I would have held that notwithstanding the definition of the 'Taxes Act' in section 118(1) TMA, the Income Tax Acts include TMA. He then made reference to the Interpretation Act 1978 which contains the definition of 'The Income Tax Act' as all enactments relating to income tax, including any provisions of the Corporation Tax Acts which relate to income tax".

57. He then put forward his view [at 109] that "'relating to' is a term of the widest import" and found it difficult to see why a distinction should be made between what might be regarded as a substantive law eg the Income Tax Act 2007 and the adjectival law eg the TMA, the provisions of which relate to income tax.

58. He then went on to say [at 111] that there is support for his view but that it "depends where you start in the TMA, or somewhere else in the Income Tax Act 2007 where section 959 says: '(1) This section deals with the application of the provisions of *the* Income Tax Acts about time limits for making assessments'. Those time limits are to be found in TMA and nowhere else."

59. He continued [at 126 and 127] "On the other hand, section 109A TMA says: 'Chapter 3 of part 2 of CTA 2009 (rules for determining residence of companies) applies for the purposes of this Act as it applies for the purposes of the Corporation Tax Acts' . This makes it clear the TMA is not part of the CTA and is fully consistent with the definition of the Taxes Acts in section 118(1)". HMRC stated that whereas they agreed with the conclusions of Judge Thomas' appendix, they did not respectfully agree with this statement.

60. HMRC say that Judge Thomas was not persuaded by the reasoning in *SSS* and that the decision should not be followed because

(a) MDL was a decision on the papers, without the benefit of argument.

(b) Judge Thomas misdirected himself in relation to the authority of a decision of the Lord Ordinary sitting in the Outer House of the Court of Session.

(c) The decision in MDR went against Judge Thomas's better judgment.

(d) Broadly the analysis of Judge Thomas in the appendix to his decision is to be preferred, and

(e) The decision should not be followed for similar reasons of precedent as HMRC outlined in relation to why they say *SSS* should not be followed.

61. The LLPs say that HMRC have chosen a selective view of which parts of the decision they wish to accept and those they wish to reject and that his actual judgment is consistent with *SSS*.

Bartram

62. HMRC drew attention to the case of *Bartram v Revenue and Customs Commissioners* [2012] UKUT (STC) 2144, an Upper Tribunal decision where the principal issue was whether an appeal could be made to the Tribunal against a determination made by HMRC under section 28C of TMA, in circumstances where the taxpayer had not made a self-assessment return. The taxpayer's main submission was that section 197 of FA 1994 defined a determination as an assessment and that a right of appeal against a determination, therefore, existed under section 31(1) (d) TMA.

63. Judge John Clark stated that "Even if, despite my view above, it were to be accepted that section 197(1), FA 1994 defined a determination as an assessment, there is a further obstacle to overcome in order to bring that "assessment" within section 31(1) (d), TMA 1970. Section 197(1) refers only to "the Tax Acts" which it does not define…".

64. He then went on to examine the statutory provisions [at 47 and 48] and concluded "There is no basis for including TMA 1970 in the definition of the Tax Acts". He continued [at 51] the "TMA 1970 forms part of what is defined in section 118(1) TMA as 'the Taxes Acts'. However, that does not make it part of The Tax Acts".

65. HMRC say this case can be distinguished because that appeal was concerned with section 197 FA 1994 and that provision had been repealed in its entirety.

66. The LLPs say HMRC have downplayed the decision based on their disagreement with [at 37] the Judge's statement that "Although the Finance Act 1998 did repeal section 197, this was only in relation to corporation tax; section 197 continues to apply for other purposes". The LLPs say that whereas Schedule 27 of the Finance Act 1998 appears to repeal section 197 they refer to section 117(2) of the Finance Act 1998 and that whereas it had no relevance to corporation tax, so it was repealed, it continued to have "vitality".

67. I consider I am bound by the decision in *Bartram* and consider it covers at the same point of principle in *SSS* and agree with Judge John Clark that whereas the TMA forms part of what is defined as the Taxes Acts it does not make it part of the Tax Acts and that although the expressions may look similar, they are not the same.

68. As Judge John Clark succinctly stated "the use of apparently similar expressions to express different meanings does not make the task of construing the respective expressions at all easy. However, the very fact that section 118 (1), TMA has to define 'The Taxes Acts' as including itself *and* (the judge's emphasis) 'the Tax Acts' is an indication that TMA 1970 itself recognises that it does not form part of the Tax Acts".

69. HMRC say they could only carry out Enquiry and Closure Notices under Schedule 18 of the Finance Act 1998 if the LLPs had completed a corporate tax return. If they had completed a corporate tax return it would be wholly unsuitable for a llp. Accordingly, they completed a partnership tax return which HMRC say makes sense. HMRC also say that when completing a partnership tax return llps have to consider whether they are carrying on a business with a view to profit and, if they are not, or are unsure whether their activities meet that criteria they can highlight their concerns to HMRC and invite HMRC to respond accordingly.

70. HMRC say that the whole purpose of the provisions of the Finance Act 2001, the precursor to ITTOIA section 863 provisions, was to provide the members of llps with individual reliefs and HMRC say these can only be provided if there is transparency.

71. HMRC refer to section 12AA(1) TMA which provides that where a trade, profession or business is carried on by two or more persons in partnership then, for the purposes of facilitating the establishment of:

> (a) the amount in which each partner is chargeable to income tax for any year of assessment is so chargeable and the amount payable by way of income tax by each such person; and
>
> (b) the amount in which each partner chargeable to corporation tax for any period is so chargeable, an officer of the Board may give a notice under section 12AA(2) or (3) or both.

72. Notices to make partnership returns were given to the LLPs and in relation to IPR no notice was given to withdraw such a notice.

73. The LLPs made returns pursuant to the section 14 notices which were thus partnership returns in terms of section 12AA(10A) and HMRC gave notices of enquiry under section 12AC and Closure Notices were subsequently issued under section 28B.

74. HMRC say that paragraph 24 of Schedule 18 to the Finance Act 1998 can only apply where there has been a company tax return but that the whole point of the case is that in each case the LLPs made partnership returns and not company tax returns.

Is the TMA an Enactment Relating to Income Tax?

75. HMRC refer to the Interpretation Act 1978, definition of the Taxes Act and to the diagram in the yellow handbook (Tolley's) which they say is helpful but does not represent the law.

76. They say it is clear from the Interpretation Act definitions that a particular provision of a particular enactment may fall within the definition of both the Income Tax Act and the Corporation Tax Acts. As a result it would be possible to represent these diagrammatically by way of overlapping circles.

77. HMRC also refer to the long titles of the Taxes Management Act which is "an Act to consolidate certain of the enactments relating to income tax, capital gains tax and corporation tax, including certain enactments relating also to other taxes". The long title of the Income Tax Act 2007 is "an act to restate with minor changes certain enactments relating to income tax and for collective purposes".

78. Section 1(3) of the Income Tax Act adopts the Interpretation Act 1978 Schedule 1 definition of "the Income Tax Act" as being "all enactments relating to income tax". As authority that the long title is a legitimate guide to legislative intention, HMRC refer, *inter alia*, to *Black Clawson International Limited v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591 at 647.

79. HMRC say that it is also clear from sections 1 and 119(3) TMA that it relates to both income tax and corporation tax. Section 119(3) provides that "this Act so far as it relates to income tax or corporation tax shall be construed as one with the principal Act" – the principal Act is the ICTA 1988.

80. HMRC say that the phrase "relating to" means in terms of the Supreme Court decision in *Imperial Tabaco Limited v The Lord Advocate* [2012] UKSC 61,, that the TMA relates to income tax and it does not have only a loose or consequential connection with income tax.

Partnership Returns

81. HMRC say that the provisions of section 12AA provide for ordinary partnership returns to be made where a trade, professional business is carried on, and that the purpose is to ascertain the amount in which each partner is chargeable to income tax or corporation tax, taking into account any relief or allowance.

82. Section 12AB(1)(a)(i) requires a statement, a partnership statement, of the amounts which include any reliefs or allowances in relation to a section 42(7) claim which in turn, amongst other things, refers to section 3 of the Capital Allowances Act ("CAA"). The CAA at section 3(2) says "the claim must be included in a tax return" and at section 3(2A) that "any claim for an allowance under Part 3(A) Business Premises Renovation Allowances (BPRA) must be separately identified as such in the return".

83. They cite section 3(3) CAA:- "tax return" means "(a) for income tax purposes a return required to be made under TMA 1970 and (b) for corporation tax purposes, a company tax return requires to be made under Schedule 18 to the FA1998….." and refer to the Finance Act 1998 section 117 entitled "Company Tax Returns, Assessments and Related Matters" which incorporates Schedule 18 into the TMA so far as it relates to corporation tax. Section 117(2) states that Schedule 18 to this Act, the Finance Act 1998, the Taxes Management Act 1970 and the Tax Acts, shall be construed and have effect as if that Schedule were contained in that Act.

84. HMRC refer to Schedule 18 of the Finance Act 1988:-

(a) at paragraph 2(1) which states that a company that is chargeable to tax for an accounting period and has not received a notice requiring a company tax return, must give notice to the Inland Revenue that it is so chargeable,

(b) at paragraph 3(1) entitled "Company Tax Returns" which states "that the Inland Revenue may by notice require a company to deliver a company ('Company Tax Return') of such information of accounts statements and reports….. as may reasonably be required by the notice" and to,

(c) at paragraph 3(2) which states "different information, accounts, statements and reports may be required by different descriptions of company".

85. HMRC say that these provisions emphasise the neutrality of the view to profit condition in the incorporation of a llp and also emphasise the provisions in the CAA which indicates that when a BPRA claim is being made for income tax purposes it has to be made under the TMA.

86. Accordingly, HMRC say that the use of a partnership return is expressly envisaged when individuals are claiming allowances for income tax purposes.

87. The LLPs say that where there is an ordinary partnership, it must make a partnership tax return. There is nothing in section 42(6) that says that it applies to llps and it would be a major solecism to describe an llp as an ordinary partnership, that is to say, a business carried on by *partners and in partnership* (emphasis added) which is never satisfied in the case of an llp as it is a business carried on *by the llp* (emphasis added).

88. The LLPs say that section 42(6) does not help HMRC as partnerships are tax transparent in all areas and if the partnership does something, it is treated as though the partners are carrying out the action. Accordingly, the ordinary consequence is that the individual partners could be forgiven for thinking that they should make the claim but Parliament decided it does not want multiple claims, so the TMA provides that one is made in a partnership return.

89. Claims for capital allowances, therefore, are made under partnership returns but the position with llps is different. The tax transparency does not always occur as the answer to the view to profit condition and whether they are entitled to the allowances may be unknown. It is inevitable that the beneficiary of the BPR claim may be either the llp or the members and Parliament could have put in a rule for llps to mirror section 42(6) in the returns but it did not.

90. Consequently, they say the statutory words are there and are fully workable and in any event do not turn on the question as to whether any Notice of Enquiry or Closure Notice should be carried out under Schedule 18 of the Finance Act 1998.

91. The LLPs say that HMRC have followed the route of opening an Notice of Enquiry and therefore a Closure Notice, all predicated on their use of a partnership return and their belief that Schedule 18 cannot be used in order to continue and close their enquiries.

92. The LLPs say that the fault is in the hands of HMRC who could easily design a tax return for llp members with those who are individuals providing information for their self-assessment

returns and for those corporate members and their allocation of the amounts due to corporation tax.

Sword Services Limited (SS)

93. Mr Anderson referred to *Sword Services and Others v HMRC* [2016] EWHC 1473 [Admin], a case presided over by Mr Justice Cranston which concerned [at 3] challenges to Partnership Payment Notices and whether the provisions of Schedule 32 of the Finance Act 2004, section 15 applied to general practitioners and as a matter of statutory construction whether they applied or not to a llp. The High Court held that Partnership Payment Notices (PPN s) can be issued to llps. The PPNs were also found to be valid as the relevant partners were aware of enquiries being opened even if official notices were not sent to them.

94. The second ground of appeal considered whether under the relevant provisions of the TMA, HMRC had issued a Notice of Enquiry in relation to partnership returns for general partnerships and llps. It was submitted that this decision was not technically binding upon me and, on obtaining a fuller copy of the decision, it was noted that *SSS* had neither been referred to nor considered.

95. HMRC considered Mr Justice Cranston's comments [at 37] in relation to the separate provisions for accelerated payments in Schedule 32 of the Finance Act 2014 "in relation to partnerships". He said "Schedule 32 is headed 'Accelerated Payments and Partnerships', and the effect of its paragraph 2(a) is that Chapter 3 of Part 4 of the Finance Act 2014 does not apply where 'a tax enquiry is in progress in relationship to a partnership return'."

96. [At 39] "Tax enquiry is defined in section 202(2) to include:

> (a) An enquiry under section 9A of 12AC of the TMA (enquiries into self-assessment returns for income tax and capital tax), including an enquiry by virtue of notice being deemed to have been given under section 9A of that Act by virtue of Section 12 AC(6) of that Act…". He continued his analysis:- "'Partnership return' is defined in paragraph 1(2) to mean 'a return in pursuance of a notice under section 12AA (2) or (3) of the TMA 1970'".

97. Counsel for *SS* said that as the Limited Liability Partnership Act 2000 makes it clear that a limited liability partnership is a separate legal entity and unless otherwise provided, the ordinary law of partnerships does not apply. Accordingly, if llps are to be treated in the same way as ordinary or general partnerships, specific provision has to be made.

98. As an example of a specific provision, Counsel for *SS* [at 56] referred to section 1273(1) of the CTA which treats the activities of the llp, carrying on a trade or business with a view to profit, as being carried on by the members in partnership and not by the limited partnership as such.

99. Mr Justice Cranston [at 59] states "the idea of a separate approach interpreting tax statutes is rightly dead and buried. The words in tax legislation must be interpreted in light of the context and the scheme of the Act as a whole. Regard must be had to the purpose of the provisions, a literal and formalistic approach being eschewed".

100. He continued [at 60] "In ordinary parlance, the terms 'partnership' and 'partners' cover both general and limited liability partnerships and their members. There is no reason why this should not be the case with Schedule 32 of the Finance Act, not least with the introductory words of paragraph 3. Certainly, limited liability partnerships take corporate form. However, the default terms for their internal affairs are taken from the Partnership Act 1890 (Limited

Liability Partnership Regulations 2001, 2001 IS NO 1090 Reg 7) and they are probably best regarded as having a hybrid legal character".

101. In relation to the second challenge and the validity of the notices of enquiry, Mr Justice Cranston stated [at 69] "First there is an obligation in Section 12AA(6) of the TMA that a partnership tax return must contain the name and details of each of the partners and a declaration by the person making the return, that it is to the best of his knowledge and belief correct and complete" and [at 70] "In my view it does not lie in the mouth of someone failing to comply with a legal obligation to identify its existence to a public authority and to attest to the truth of what it is telling it, to complain when the public authority does not then send it a Notice of Enquiry into the information proffered. It is perhaps an example of the principle operating in other parts of the law, *ex turpi causa non oritur actio* or, in new money, an action does not arise from a base cause".

102. HMRC say LLPs are the same as partnerships and that *SS* covers the same consideration as this Tribunal.

103. The LLPS emphasise that although it may be the 'closest rerun' of the *SSS* point, the *SSS* is binding on me, was not binding on the High Court in *SS* and the [*SSS*] decision was neither considered nor even mentioned in that case.

104. The LLPs say that:

(a) The judgment also makes no attempt to address the distinction between the Taxes Management Act and the Taxes Act.

(b) It is incorrect to say that if the taxpayer fails to do something they cannot complain to HMRC for their own failures. If the LLPs had failed to tell HMRC of their relevant partners when HMRC notified the wrong partners, what else could HMRC do?

(c) Tax statutes are no longer subject to special rules of interpretation; that that principle is right in its context but that *SS* did not consider the whole picture.

(d) It is incorrect to say that if the taxpayer fails to do something they cannot complain to HMRC for their own failures and if the LLPs had failed to tell HMRC of their relevant partners when HMRC notified the wrong partners, what else could HMRC do?

(e) Tax statutes are no longer subject to special rules of interpretation which principle is right in its context but that *SS* did not consider the whole picture and there are occasions when a literal and more holistic approach is needed, especially where there are prescriptive codes.

(f) The words "ordinary parlance" do not provide a full and a perfect answer of the meaning of what a tax return is, as given [at 25] in *Revenue and Customs Commissioners v Cottar* [2013] UKSC 69; 1 WLR 3514. Using ordinary parlance, it is not always the full answer and in relation to this case, there are legislative steps that make it clear that llps should be treated as companies.

(g) For ordinary partnerships which can have hundreds of partners, the statute says that they should complete a partnership return and, if an enquiry is deemed, it will be into every partner's return. As regards llps, the only difference is that HMRC have to tell the members of their enquiry. Administration is under section 9A for individual members and under section 29 for corporate members.

(h) The reference to the Partnership Act 1890 takes no account of section 1(5) of the Limited Liability Partnership Act which states "accordingly, except as otherwise

provided by this Act or any other enactment, the law relating to partnerships does not apply to a llp. To say that in ordinary parlance general partnerships and limited liability partnerships are the same, does not accord with section 1(5)".

(i) Mr Justice Cranston assumes the llps made a partnership return in terms of section 12AA and so assumes that section 32 should apply to llps. The point was not made to the judge that llps' returns under Schedule 18 are company tax returns.

(j) The llp regulations fall within section 1(5) because it represents a sensible working model and is a clear example of the statute having to make express provisions for llps. It is for that reason, rather than ordinary parlance, that they may be considered the same.

(k) Agree that a llp is a hybrid and that Schedule 32 was enacted to combat tax avoidance but refer to *Derry,* which was also about tax avoidance, but submit that a mere reference to tax avoidance is insufficient reason to interpret the law differently. In *Derry* the Supreme Court instructed in favour of the taxpayer notwithstanding that tax avoidance was in the background.

(l) That the codes work; they simply have to be applied properly and that the Judge's approach was to disregard the deeming in Section 1273. Mr Justice Cranston [at 63] pointed out that the deeming was conditional but was then incorrect to ignore section 1(5) and state that section 1273, which might change as a result of the view to profit criteria being met, had no bearing whatsoever on the construction of Schedule 32. In doing so the judge has filled a gap in the legislation which is not needed as this should only be considered when it is not clear what Parliament means.

(m) There is an adequate code and one that is not conditional on the view to profit condition and that the contention that there is meaningful distinction between Section 863 and Section 173 is incorrect. The only difference is that the former relates to a trade business or profession whereas the latter refers to a trade or business on the basis that a corporate entity would not normally carry on a profession at the time the legislation was enacted.

105. In conclusion LLPs say that the *SS* decision is not binding being an English case; that it is contrary to *SSS* and which, in any event, was not considered in *SS* and that there are more reasons not to follow it rather than reasons to follow it What *SS* does is illustrate that anyone can "reap the conclusion of a statute "if they start from the wrong point.

106. HMRC say that:

(a) That it is not likely that the consistent approach of opening enquiries under section 12AC and Closure Notices under section 28B for a llp is incorrect and although there are inconsistent decisions that is a formidable body of authority and that the safe course for me is to favour HMRC's interpretation of the Court of Appeal and Supreme Court cases cited before me.

(b) The use of a partnership return is essential so that individuals can claim reliefs and they do so because of the tax transparency.

(c) That a company tax return cannot do the job of a partnership return because it cannot allocate profits and losses of individual members.

(d) There is no power in CAA Schedule 3 to enquire into the affairs of non-companies and that none of the mirror-image provisions found in the TMA which deal with

corrections and amendments to a partnership tax return can be inferred in the individual returns of partners and members.

107. The LLPs say that for every llp their tax administration is governed entirely by the TMA and that the implication of HMRC's submissions is that partnerships must be subject to the Income Tax Acts, but many partnerships and llps have corporate members so that when a LLP puts forward a partnership return, it is not relevant who the members are.

108. They say that underlying the llp is the inherent assumption that it is carried on with a view to profit but that that is the wrong starting point. The statutory definition of an ordinary partnership is at section 1 of the Partnership Act 1890 Partnership is: "the relationship which subsists between persons carrying on a business with a view of profit". This assumption applies to all partnerships but Parliament made it clear that there is statutory deeming for a llp that is conditional on a view to profit being made. The assumption that a llp is "established with a view to profit" is a condition that applies only at incorporation and that there must be many llps whose businesses come to an end and in the winding up process there can be tax liabilities so that inevitably any tax returns are made under Schedule 18.

109. The LLPs say that HMRC take from *Cotter* that the word "return" is limited to the entries on the form that leads to the tax calculation. The LLPs say that the *ratio* of *Cotter* on the facts is that the return is limited to those entries that feed into the tax calculations and that *Derry* confirms *Cotter* but distinguishes it because the TMA is not a substantive set of provisions because it is administrative only.

110. The LLPs say that if there is a gap in legislation it may be permissible for a court to fill the gaps but this should only be where it is not clear what Parliament means. They say this is not the case here because there is an adequate code and one that is not conditional on the view to profit condition. They say there is no meaningful distinction between section 863 (1) and section 1273(1)

111. The LLPs say that, following *Derry a*nd *Cotter* there is no reason there should only be one form of tax return and HMRC could design a form that would cover the issue of apparently going down a particular route and then following it which the LLPs say is incorrect if the deeming provisions do not apply.

112. The LLPs say that HMRC have started from the wrong starting point. They refer to section 42 TMA and in particular to sections 42(6) and 42(7) (c) and confirm that where there is an ordinary partnership, a return must be made on a partnership tax return. They say, however, there is nothing in section 42(6) that says it applies to a llp and it would be a major solecism to describe a llp as "carried on by persons in partnership" as that is never satisfied in the case of a llp where it exists "as a business is carried on by the llp".

Decision

113. For the reasons already stated, I consider the decision in *SSS* is good law and I agree with Lady Smith that it is "clear" that the TMA is not considering itself part of the Taxes Act and consequently agree with the judgment, rather than the appendix, which I find contradictory, of Judge Thomas in *MDL.* I also consider myself bound by *Bartram* and was not persuaded that the case was sufficiently distinguished to be put to one side.

114. Similarly, I consider that an analysis of the natural and ordinary meaning of the definition of "Income Tax Acts" under reference to the long title and content of TMA and the strength of an enactment which "relates to" are not sufficiently forceful enough to change that interpretation on the particular point of law raised in this appeal which is whether HMRC had

powers to open an enquiry under section 12AC and a notice under section 28B of TMA in light of the *SSS* decision.

115. I consider that a llp is in reality a body corporate in terms of section 1 of the LLP Act and accordingly it would be ordinarily subject to corporation tax in terms of section 1121 CTA, noting that for corporation tax purposes, the definition of "company" is broadly drafted and includes anybody corporate as well as unincorporated associations.

116. This, however, is subject to the deeming provisions of section 863 for income tax purposes and section 1273 for corporation tax purposes. The former provides for income tax purposes the activities of a llp are treated as carried on by the members of the llp in partnership and once (and only once) the deeming condition is engaged there will be no liability to corporation tax so far as the actual profits of any llp are concerned.

117. Section 863(2) applies the deeming for all purposes "in the Income Tax Acts" where the deeming requires statutory references to "a firm" or "a partnership" to be extended to cover llps.

118. The deeming only takes place if, and only if the llp carries on a trade profession or business with a view to profit and the deeming in subsection (2) is expressly limited to "a limited liability partnership in relation to which subsection (1) applies".

119. Where the view to profit condition is not met, that is to say the deeming does not take place, the llp which in any event may have individual or corporate members; it falls within the definition of "company" for tax purposes.

120. This, as Mr Anderson succinctly put it, raises an issue of whether a "provision which confers on HMRC power to enquire cease to apply if; in exercising the power, HMRC conclude the return which has been the object of the enquiry should never have been made".

121. Does this mean that if HMRC request a llp to complete a partnership return for reasons of transparency to allow individual members of a llp to be taxed correctly and where they decide that the business has not been carried on with a view to profit, make any Notice of Enquiry or Closure Notice invalid?

122. Similarly, where does this leave an llp that is unsure whether it has in any given tax year, rather than at the creation of the llp as required by the LLP Act, carried on its activities with a view to profit. HMRC say that if it is in any doubt it should complete a corporate tax return because the deeming provisions cannot apply but where does that leave the llp if in reality it has carried on its activities with a view to profit?

123. I agree with Judge Thomas that this largely depends on where you start and it is clear from the cases I have been referred to that there has been an assumption that a partnership return should be completed under section 12AA (1) TMA which provides that where a trade professional business is carried on by two or more persons in partnership, the partnership may be given notice to make a partnership return by HMRC. This would only apply if the deeming provisions apply to turn the "hybrid" but corporate llp into a partnership which in turn requires it to meet the view to profit condition and, accordingly, both section 863(1) and (2).

124. I agree with Mr Anderson who stated Parliament cannot have intended that a Notice of Enquiry and Closure Notice would somehow become invalid depending on the conclusion reached. As Lord Dunedin remarked "a statute is designed to be workable".

125. The submissions put forward by the LLPs make the issue of a statutory interpretation as to whether or not there is a view to profit "workable". I favour their submissions that (a) if the statutory deeming applies, income and corporation tax paid as if a llp is a partnership: (b), if

the statutory deeming does not apply, income tax and corporation tax paid as if a llp is a company; but (c) in either event, the tax administration provisions apply on the basis that the llp is a company.

126. I do not consider the cases cited before me, other than *SSS, Bentham* and *MDL*, although well-presented upon, are sufficiently close to the point at issue in the *SSS* decision. The nearest case is SS where I favour the submissions put forward at some length by the LLPs. I find it difficult to accept that ordinarily the terms partnership and partners cover both general *and* limited liability partnerships and I believe that a specific provision has to be made if a llp is to be treated in the same way as ordinary partnerships in terms of section 1(5) of the LLP Act.

127. To the extent that HMRC have issued notices under sections 12AC and 28B in these circumstances and, have done so for a considerable period of time does not make it correct. The fact that this has been assumed in a number of higher authorities but where this point has not been challenged directly in terms of the issue raised in *SSS,* or not at all, does not confirm that it is the correct procedure.

128. It would seem that much of previous HMRC practice may derive from the design of the tax returns, as commented by Lord Hodge in *Cottar,* and Mr Gordon suggests this should be the subject of useful reconsideration.

129. It may also be that it is to the greater convenience of HMRC to proceed on the basis they have but as Mr Gordon stated, subject to statutory limits, and using the Schedule 18 provisions, HMRC may still be able to continue their enquiries by making discovery assessments

130. Accordingly, I agree that any enquiry into the LLP's return should have been in terms of the provisions of Finance Act 1998 Schedule 18 paragraph 24 (the corporation tax provisions) and if HMRC wish to challenge the relevant return of any of the LLP's members they should open enquiries into the members own returns under section 9A TMA , where applicable.

131. In following *SSS,* I do not consider that the LLPs are personally barred from claiming that HMRC had no power to issue the Notice of Enquiry or Closure Notice because they made partnership returns and notices of enquiry, and in the case of IR had not sought its withdrawal, sought Closure Notices under section 28B and appealed the Closure Notices. I do not believe I have the jurisdiction to impose such a personal bar and it is not for the parties, as stated above in *Odhams Leisure Group Limited* to confer that jurisdiction.

132. Accordingly, the appeal is allowed as there were no valid Closure Notices issued to the LLP's and the case is struck out in terms of Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

Right to apply for permission to appeal

133. 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.

W RUTHVEN GEMMELL
TRIBUNAL JUDGE

RELEASE DATE: 24 JUNE 2019

Appendix 1 - Legislation:

1.) Partnership Act 1890 Section 4(2)

2) Taxes Management Act 1970 (TMA)
   a) section 7
   b) section 9A
   c) section12AA
   d) section 12AAA
   e) section 12 AB
   f) section 12AC
   g) section 28B
   h) section 42
   i) section 113
   j) section 117
   k) section 118

3) Interpretation Act 1978 Schedule 1

4) Income and Corporation Taxes Act 1988 (ICTA 1988)
   a) section 118ZA
   b) section 831 (1) and (2)
   c) section 832

5) Finance Act 1998
   a) section 117
   b) Schedule 18, paragraph 3
   c) Schedule 18, paragraph 24

6) Limited Liability Partnership Act 2000 sections1, 3, 4 and 7

7) Capital Allowances Act 2001 section 3

8) Income Tax (Trading and Other Income) Act 2005 sections 848, 850 and 863

9) Income Taxes Act 2007 (ITA)
   a) long title
   b) section 1 (3)

10) Corporation Tax Act 2009 section1121, 1172, 1258 and 1273

11) Tolley's Yellow Tax Hand Book 43rd Edition "family tree"

12) Trolley's Yellow Tax Hand Book 59th Edition "family tree"

Appendix 2 – Cases Referred to

1) *Abbott v Philbin* [1961] AC 352

2) *Odhams Leisure Group Ltd v HM Customs & Excise* [1992] STC 332

3) *Marshalls Clay Products v Caulfield* [2004] ICR 699

4) *Spring Salmon & Seafood Ltd, Re Petition for Judicial Review* [2004] STC 444

5) *Fiona Trust and Holding Corporation v Privalov* [2007] UKHL 40, [2007] BusLR 7 19

6) *Eclipse Film Partners No 35 LLP v Revenue and Customs Commissioners* [2009] STD (SCD) 293

7) *Tower McCashback LLP 1 v HMRC* [2011] UKSC 19, [2011] STC 1143

8) *Bartram v Revenue and Customs Commissioners* [2012] STC 2144

9) *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153

10) *Revenue and Customs Commissioners v Cotter* [2013] 1 WLR 3514

11) *Anson v HMRC* [2015] STC 1777

12) *Eclipse Film Partners No 35 LLP v Revenue and Customs Commissioners* [2015] EWCA Civ 95, [2015] STC 1429

13) *R (on the application of Premier Foods (Holdings Ltd) v Revenue and Customs Commissioners* [2015] EWHC 1483 (Admin), [2015] STC 2384

14) *Bloomsbury Verlag GmbH v HMRC* [2015] UKFTT 660 (TC)

15) *Benham (Specialist Cars) Limited v HMRC* [2016] UKFTT 0330 (TC)

16) *Sword Services Ltd v HMRC* [2016] EWHC 1473

17) *MDL Property Consultants LLP v HMRC* [2017] UKFTT 894

18) *R (on the application of De Silva and another) v Revenue and Customs Commissioners* [2017] *UKSC 74,* [2017] STC 2483

19) *Halborg v EMW Law LLP* [2017] 2 BCLC

20) *GDF Suez Teesside Ltd (formerly Teesside Power Ltd) v HMRC* [2017] STC 1622

21) *Tinkler v HMRC* [2018] UKUT 0073 (TCC), [2018] STC 2295

22) *UKI (Kingsway) Ltd v Westminster City Council* [2018] UKSC 67, [2019] 1 WLR 104

23) *R (on the application of Derry) v Commissioners for Her Majesty's Revenue and Customs* [2019] EWCA Civ 435