Revenue and Customs Commissioners v Inverclyde Property Renovation LLP and another

[2020] UKUT 161 (TCC)

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

LORD TYRE AND JUDGE RAGHAVAN

27, 28 APRIL, 27 MAY 2020

Return – Self-assessment – Enquiry – Closure notice – Validity – LLPs filing partnership returns including claim for business premises renovation allowances – HMRC opening enquiries into returns and issuing closure notices – HMRC concluding LLPs not transparent for tax purposes and should not have filed partnership returns – Whether closure notices valid – Whether HMRC entitled to open enquiries under relevant legislation – Taxes Management Act 1970, ss 12AC, 28B – Finance Act 1998, Sch 18, para 24 – Income Tax (Trading and Other Income) Act 2005, s 863(1), (2).

The taxpayers ('the LLPs') had submitted partnership tax returns including claims for business premises renovation allowances. The Revenue and Customs Commissioners ('HMRC') opened enquiries into the tax returns under s 12AC[a] of the Taxes Management Act 1970, and subsequently issued closure notices under s 28B[b] of the 1970 Act concluding that the LLPs were not carrying on a business with a view to profit and, as such, their activities were to be treated as carried on by the LLPs and not their members in partnership within the meaning of s 863[c] of the Income Tax (Trading and Other Income) Act 2005. The LLPs were therefore not transparent for tax purposes and should not have filed partnership tax returns. The LLPs were not entitled to claim the allowance. The LLPs appealed to the First-tier Tribunal ('FTT') on the ground that HMRC had no power to open an enquiry under the income tax self-assessment provisions in s 12AC of the 1970 Act and that therefore there were no valid closure notices issued under s 28B of the 1970 Act. They submitted that the enquiries should have been made under the corporation tax self-assessment provisions in para 24[d] of Sch 18 to the Finance Act 1998. The FTT agreed and held that no valid closure notices had been issued. They held that the provisions of s 863(2) of the 2005 Act, which deemed references to a partnership to include an LLP carrying on a business with a view to profit, did not apply to provisions contained in, or treated as being contained in, the 1970 Act. If the statutory deeming applied, income tax and corporation tax were payable as if the LLP was a partnership; if it did not apply, income tax and corporation tax were payable as if the LLP was a company. In either event, the tax administration provisions of the 1970 Act applied on the basis that the LLP was a company. The appeals were struck out on the grounds that the FTT had no jurisdiction in relation to the proceedings. HMRC appealed. They

a Section 12AC is described at [11], below.

b Section 28B is described at [11], below.

c Section 863, so far as material, is set out at [6], below.

d Paragraph 24 of Sch 18 is described at [14], below.

contended that the enquiries had been correctly made under s 12AC of the 1970 Act, and that the closure notices under s 28B had been validly issued, regardless of whether the LLPs were ultimately found to have been carrying on business with a view to profit. The validity of the enquiry depended on the type of tax return submitted. If, as a result of the enquiry, it was established that an LLP was not carrying on a business with a view to profit, that did not retrospectively invalidate the notice or consequent enquiry. The appropriate course of action would have been to amend the partnership return to zero, issue closure notices to the LLP and to its members, and require the LLP to submit a company tax return. The Upper Tribunal considered whether HMRC had opened and closed the enquiries using the correct provisions. Consideration was given, inter alia, to s 1 of and para 1 of Sch 1 to the Interpretation Act 1978.

Held – Subsection (1) (the imposition of liability stated to apply 'for income tax purposes') and sub-s (2) (the interpretive provision stated to apply 'for all purposes … in the Income Tax Acts') of s 863 of the 2005 Act should be read together as a coherent structure for regulating the income tax treatment of LLPs. The different purposes afforded an explanation for the difference in the opening words of the two subsections. Neither subsection was intended to have either a wider or narrower scope than the other. The issue of whether HMRC were entitled to open enquiries into and issue closure notices to the LLPs under the administrative provisions of the 1970 Act was not determined by sub-s (1) alone but came down to the proper interpretation of sub-s (2), and in particular whether the expression 'the Income Tax Acts' was capable of including provisions of the 1970 Act concerned with income tax. Section 1 of the Interpretation Act 1978 stated that every section of an Act took effect as a substantive enactment without introductory words. The word 'enactment' did not solely refer to a whole Act; it was capable of referring to a section of an Act. Paragraph 1 of Sch 1 to the Interpretation Act 1978 defined 'the Income Tax Acts' as 'all enactments relating to income tax, including any provisions of the Corporation Tax Acts which [related] to income tax'. The words 'all enactments relating to income tax' ought therefore to be read as referring not only to whole Acts relating to income tax but also to any section of an Act, including the 1970 Act, relating to income tax. HMRC were entitled to issue notices requiring the submission of the partnership tax returns. The LLPs had no proper legal basis for treating them as notices to file company tax returns. What they had submitted were partnership tax returns filed in response to a notice requiring submission of partnership tax returns. The appropriate form of enquiry for HMRC to open was an enquiry under s 12AC of the 1970 Act. The notices of enquiry and the closure notices were accordingly validly issued, even though one of the conclusions in the closure notices was that the LLPs were not carrying on business with a view to profit and ought not to have filed partnership tax returns. The FTT had therefore erred in law. The appeal would accordingly be allowed (see [34]–[38], [56], [57], below). *Wakefield and District Light Railways Co v Wakefield Corp* [1906] 2 KB 140 and *John Lyon's Charity v London Sephardi Trust* [2018] QB 1163 applied; *R (on the application of Spring Salmon and Seafood Ltd) v IRC* [2004] STC 444, *Bartram v Revenue and Customs Comrs* [2012] STC 2144 and *MDL Property Consultants LLP v Revenue and Customs Comrs* [2017] UKFTT 894 (TC) not followed.

Notes

For limited liability partnerships generally, see Simon's Taxes B7.107.

For self-assessment enquiries, see Simon's Taxes A6.401.

For the Taxes Management Act 1970, ss 12AC, 28B, see the Yellow Tax Handbook 2019–20, Part 1a, pp 70, 84.

For the Finance Act 1998, Sch 18, para 24, see the Yellow Tax Handbook 2019–20, Part 1a, p 1965.

For the Income Tax (Trading and Other Income) Act 2005, s 863, see the Yellow Tax Handbook 2019–20, Part 1b, p 970.

Cases referred to

Bartram v Revenue and Customs Comrs [2012] UKUT 184 (TCC), [2012] STC 2144.

John Lyon's Charity v London Sephardi Trust [2017] EWCA Civ 846, [2018] QB 1163, [2018] 2 WLR 1016, [2017] All ER (D) 83 (Jul).

Margott (as representative member of MDL Property Consultants LLP) v Revenue and Customs Comrs [2017] UKFTT 894 (TC).

Pepper (Inspector of Taxes) v Hart [1992] STC 898, [1993] AC 593, [1993] 1 All ER 42, 65 TC 421, HL.

R (on the application of Amrolia) v Revenue and Customs Comrs, R (on the application of Ranjit-Singh) v Revenue and Customs Comrs [2020] EWCA Civ 488, [2020] STC 877.

R (on the application of Cobalt Data Centre 2 LLP) v Revenue and Customs Comrs, Cobalt Data Centre 2 LLP v Revenue and Customs Comrs [2019] UKUT 342 (TCC), [2020] STC 23.

R (on the application of Derry) v Revenue and Customs Comrs [2019] UKSC 19, [2019] STC 926, [2019] 1 WLR 2754, [2019] 4 All ER 127.

R (on the application of Reid) v Revenue and Customs Comrs, Reid v Revenue and Customs Comrs [2020] UKUT 61 (TCC), [2020] STC 622.

R (on the application of Spring Salmon and Seafood Ltd) v IRC [2004] STC 444, sub nom *Spring Salmon and Seafood Ltd v A-G for Scotland* (2004) 76 TC 609, 2004 Scot (D) 31/2, 2004 SLT 501, Ct of Sess.

Revenue and Customs Comrs v SSE Generation Ltd [2019] UKUT 332 (TCC), [2020] STC 107.

Tower MCashback LLP 1 v Revenue and Customs Comrs [2011] UKSC 19, [2011] STC 1143, [2011] 2 AC 457, [2011] 3 All ER 171, 80 TC 641; *rvsg in part* [2010] EWCA Civ 32, [2010] STC 809.

Wakefield and District Light Railways Co v Wakefield Corp [1906] 2 KB 140, DC.

Whitney v IRC [1926] AC 37, 10 TC 88, HL.

Appeals

The Revenue and Customs Commissioners ('HMRC') appealed against the decision of the First-tier Tribunal (Judge Gemmell) released on 24 June 2019 ([2019] UKFTT 408 (TC)) allowing an appeal by Inverclyde Property Renovation LLP and Clackmannanshire Regeneration LLP ('the LLPs') against closure notices issued by HMRC under s 28B of the Taxes Management Act 1970 concluding that the LLPs were not entitled to claim business property renovation allowance on the ground that they were not carrying on a business with a view to profit. The facts are set out in the decision.

Julian Ghosh QC and *Michael Ripley* (instructed by the *Office of the Advocate General for Scotland*) for HMRC.

Keith Gordon and *Ximena Montes Manzano* (instructed by *Keystone Law*) for the LLPs.

The tribunal took time for consideration.

27 May 2020. The following decision was released.

LORD TYRE AND JUDGE RAGHAVAN.

INTRODUCTION

[**1**] The respondents in these two appeals ('the LLPs') are two limited liability partnerships who made claims for business property renovation allowance. The appellants ('HMRC') opened enquiries into the LLPs' tax returns and subsequently issued closure notices concluding that the LLPs were not carrying on a business with a view to profit and not therefore entitled to claim the allowance. The LLPs appealed to the First-tier Tribunal ('FTT'): [2019] UKFTT 408 (TC).

[**2**] One of the LLPs' grounds of appeal was that HMRC had had no power to open an enquiry under the income tax self-assessment provisions in s 12AC of the Taxes Management Act 1970 ('TMA'), and accordingly that there had been no valid closure notices under s 28B of that Act. The LLPs argued that any enquiry should have been made under the corporation tax self-assessment provisions in Sch 18 to the Finance Act 1998. The FTT accepted the LLPs' argument and held that no valid closure notices had been issued. The appeals were struck out under r 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273, on the ground that the FTT had no jurisdiction in relation to the proceedings.

[**3**] HMRC now appeal to the Upper Tribunal ('UT') against the FTT's finding. The issue is one of statutory interpretation; there are no material facts in dispute. The matter is therefore at large for this Tribunal to determine.

LIMITED LIABILITY PARTNERSHIPS

[**4**] Limited liability partnerships were created as a new form of legal entity by the Limited Liability Partnerships Act 2000. In terms of s 1(2) of that Act, a limited liability partnership is a body corporate, with legal personality separate from that of its members, which is formed by being incorporated under the Act. Section 1(5) provides that, except as otherwise provided by the 2000 Act or any other enactment, the law relating to partnerships does not apply to a limited liability partnership.

[**5**] For a limited liability partnership to be incorporated, two or more persons associated for carrying on a lawful business with a view to profit must subscribe their names to an incorporation document and deliver it to the registrar of companies (the 2000 Act, s 2(1)). On incorporation, the subscribers become the members of the limited liability partnership (s 4(1)). Thereafter any other person may become a member with the agreement of the existing members (s 4(2)).

TAXATION OF LIMITED LIABILITY PARTNERSHIPS

[**6**] Provisions governing the taxation of income of limited liability partnerships were inserted into the Income and Corporation Taxes Act 1988 by s 75(1) of the Finance Act 2001. These were consolidated as s 863 of the

Income Tax (Trading and Other Income) Act 2005 ('ITTOIA 2005'). Section 863 (as subsequently amended) is central to the present appeal. Subsections (1) and (2) provide as follows:

> '(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.
>
> (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.'

[7] Subsections (3) and (4) of s 863 provide that sub-s (1) continues to apply to a limited liability partnership that is no longer carrying on a trade, profession or business with a view to profit if either (a) the cessation is only temporary, or (b) it is in the course of being wound up (otherwise than by a liquidator) following a permanent cessation, provided that the winding up is not for reasons connected with tax avoidance and the period of winding up is not unreasonably prolonged.

[8] Section 1273 of the Corporation Tax Act 2009 contains parallel provisions, *mutatis mutandis*, for corporation tax.

[9] The effect of these provisions is that a limited liability partnership that carries on a trade, profession or business with a view to profit is treated for income tax and corporation tax in the same way as an ordinary partnership: it is regarded as transparent, and its profits and losses are allocated proportionately among its members. The converse is that where in a given period a limited liability partnership does *not* carry on a trade, profession or business with a view to profit, neither of the sub-ss (1) or (2) of s 863 applies to it (except as provided by sub-ss (3) and (4)). As a body corporate, it is chargeable to corporation tax and is not treated as transparent.

PARTNERSHIP TAX RETURNS AND ENQUIRIES

[10] The tax returns, and enquiries into the returns, of partnerships are governed by TMA ss 12AA to 12AD. Section 12AA(2) empowers an officer of HMRC to give notice to the partners requiring a person identified in the notice (usually the nominated partner) to submit a partnership return. The return

must, in terms of s 12AB, include a partnership statement showing the amount of income that has accrued to the partnership, and each partner's share of that income. Each partner must then, under s 8(1B), include that share in his personal tax return.

[**11**] The partnership return having been submitted, TMA s 12AC empowers an officer to enquire into it if, within the time allowed (normally 12 months), he gives notice of enquiry to the partner who delivered the return. Any such enquiry is completed, according to s 28B, when an officer, by a closure notice, informs the person to whom notice of enquiry was given that he has completed his enquiry and states his conclusions. The closure notice must either state that no amendment to the return is needed, or make the amendments required to give effect to the officer's conclusions. If the partnership return is amended, the officer must also give notice amending each partner's personal or (as the case may be) company tax return so as to give effect to the amendments of the partnership return. Any conclusion stated or amendment made by a closure notice under s 28B is subject to a right of appeal under s 31 to the FTT.

COMPANY TAX RETURNS AND ENQUIRIES

[**12**] The statutory provisions governing company tax returns and enquiries are contained in Sch 18 to the Finance Act 1998. In terms of s 117(2) of the 1998 Act, Sch 18, TMA and 'the Tax Acts' are to be construed as if the schedule were contained in TMA.

[**13**] The provisions of Sch 18 generally (but not exactly) mirror the self-assessment rules applicable to individuals and partnerships. Paragraph 3 empowers an officer to require a company, by notice, to deliver a company tax return. Paragraph 7 requires every company tax return to include a self-assessment of the amount of tax payable by the company for that period. If the company carries on a trade or business in partnership, its return must include any amount stated in a partnership return to be its share of partnership income. There is, of course, no provision for allocation of a company's profits among its members.

[**14**] The company tax return having been submitted, para 24 empowers an officer to enquire into it if, within the time allowed (again normally 12 months), he gives notice of enquiry to the company. As with individuals and partnerships, any such enquiry is completed, according to para 32, when an officer, by a closure notice, informs the company that he has completed his enquiry and states his conclusions. The closure notice must either state that no amendment of the company tax return is needed or make the amendments required to give effect to the conclusions stated in the notice.

INTERPRETATION OF STATUTORY PROVISIONS

[**15**] It is convenient to set out here the following statutory provisions concerning interpretation which are relevant to the arguments in this appeal:

- TMA s 118(1) provides that in that Act, unless the context otherwise requires, 'the Taxes Acts' means that Act and
  - (a) the Tax Acts and
  - (b) the Taxation of Chargeable Gains Act 1992 and all other enactments relating to capital gains tax.
- The Interpretation Act 1978, Sch 1, para 1 includes the following definitions:

- 'The Tax Acts' means the Income Tax Acts and the Corporation Tax Acts.
- 'The Income Tax Acts' means all enactments relating to income tax, including any provisions of the Corporation Tax Acts which relate to income tax.
- 'The Corporation Tax Acts' means the enactments relating to the taxation of the income and chargeable gains of companies and of company distributions (including provisions relating to income tax).

• The Interpretation Act 1978, s 1 provides that every section of an Act takes effect as a substantive enactment without introductory words.

THE LLPS' TAX RETURNS

[**16**] Each of the LLPs submitted a tax return on the form entitled 'Partnership Tax Return', being the form prescribed by HMRC under TMA s 113(1) for use by partnerships. In those returns they claimed business premises renovation allowances. HMRC opened enquiries into the returns in exercise of their powers under TMA s 12AC. Both enquiries were concluded by the issuing of a closure notice under s 28B. The inspector's conclusions were the same in each case, *mutatis mutandis*:

> **'My conclusions**
>
> Firstly, that the LLP does not carry on a business with a view to profit and, as such, its activities are treated as carried on by the LLP and not by its members in partnership (section 863, Income Tax (Trading and Other Income) Act 2005). It is, therefore, not transparent for tax purposes and should not have filed a … PTR [ie partnership tax return].
>
> Secondly, that the LLP "is to be regarded as not having incurred expenditure to the extent that it has been … met (directly or indirectly) by— (a) a public body …" (section 532, Capital Allowances Act 2001). The definition of a public body includes a local authority – such as … the Council.
>
> **My amendments**
>
> I am amending the LLP's PTR to remove all of the entries in order to reflect my first conclusion.'

[**17**] In each case the LLP appealed to the FTT on the following grounds:

> '1. The LLP is carrying on a business with a view to profit.
>
> 2. HMRC are wrong to disallow any expenditure by virtue of CAA 2001 [ie Capital Allowances Act 2001], s532.
>
> 3. HMRC's interpretation of "on or in connection with" is too narrow and therefore expenditure has been wrongly disallowed under CAA 2001, section 360B.
>
> 4. 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, HMRC have no powers to open an enquiry under TMA 1970 section 12AC and therefore there is no valid notice under section 28B.'

[**18**] The reference in the fourth ground of appeal is to a case reported under the name *R* (*on the application of Spring Salmon and Seafood Ltd*) *v IRC* [2004] STC 444, (2004) 76 TC 609: a decision of Lady Smith in an application to the Outer House of the Court of Session for judicial review in which the applicant company challenged the validity of a notice of enquiry given under para 24 of

Sch 18 to the Finance Act 1998. The company argued *inter alia* that a notice of enquiry had to be in writing, and in support of that proposition founded upon s 832(1) of the Income and Corporation Taxes Act 1988 which (read short) stated that 'in the Tax Acts' notice meant notice in writing. Senior counsel for the Commissioners countered this argument with the following submission:

> '[22] Further, s 832 did not … apply to the interpretation of the provisions of TMA. Section 118 of TMA provided that it and the "Tax Acts" were two separate entities. That approach is demonstrated diagrammatically in the "family tree" of tax legislation that is set out in the 43rd edition of *Tolley's Yellow Tax Handbook,* from which it is clear that the expression "Tax Acts" does not include TMA.'

That submission was accepted by Lady Smith, who observed:

> '[23] … I agree that s 832(1) of ICTA does not apply so as to affect the interpretation of the provisions of TMA. It seems clear that TMA is separate and distinct from the group of statutes referred to as "the Tax Acts" in that section. …'

THE FTT'S DECISION

[**19**] The FTT (Judge Gemmell) held that the provisions of s 863(2) (above), which deem references to a partnership to include a limited liability partnership carrying on a trade, profession or business with a view to profit, did not apply to provisions contained in, or treated as being contained in, TMA. In so holding, the FTT followed the conclusion of Lady Smith in *Spring Salmon,* and also two other judgments to the same effect: one a decision of the UT in *Bartram v Revenue and Customs Comrs* [2012] UKUT 184 (TCC), [2012] STC 2144, and the other a decision of the FTT in *Margott* (*as representative member of MDL Property Consultants LLP*) *v Revenue and Customs Comrs* [2017] UKFTT 894 (TC), that the expression 'the Tax Acts' did not include TMA, and accordingly held that the words 'For all purposes, … in the Income Tax Acts' in s 863(2) likewise did not encompass TMA. In the FTT's view, the interpretation contended for by the LLPs was workable: if the statutory deeming applied, income tax and corporation tax were payable as if the limited liability partnership was a partnership; if the statutory deeming did not apply, income tax and corporation tax were payable as if the limited liability partnership was a company; but in either event, the tax administration provisions of TMA applied on the basis that the limited liability partnership was a company.

[**20**] In contrast, the FTT expressed concern regarding the workability of HMRC's contention that the deeming provisions in s 863(2) extended to tax administration. What would be the position where a limited liability partnership completed a partnership return on the basis that it was carrying on a business with a view to profit, but was subsequently found not to have been? Parliament could not have intended that a notice of enquiry and closure notice would somehow become invalid depending upon the outcome of the enquiry. Difficulties would also arise in relation to a limited liability partnership that was unsure whether or not, in any given year, it had carried on its activities with a view to profit: on HMRC's approach, it would be uncertain which statutory return route required to be taken.

[**21**] It followed that any enquiry into the LLPs' returns ought not to have been made under TMA s 12AC, but rather under the corporation tax provisions in Sch 18 to the Finance Act 1998. If HMRC had wished to challenge

the relevant return of any of the LLPs' members, they should have opened enquiries into the members' own returns under TMA s 9A. As no valid closure notices had been issued to the LLPs, the case was struck out.

ARGUMENT FOR HMRC

[**22**] On behalf of HMRC it was submitted that the enquiries had been correctly made under TMA s 12AC, and that the closure notices under s 28B had been validly issued, regardless of whether the LLPs were ultimately found to have been carrying on business with a view to profit. The validity of the enquiry depended upon the type of tax return submitted by the taxpayer: an enquiry could only be an enquiry into a return. In this case both LLPs had submitted partnership returns, pursuant to notices under s 12AA, because the reliefs they were claiming were only available to view-to-profit (or 'transparent') partnerships, and so the *vires* for any enquiry was derived from s 12AC. Without such an enquiry, the return would stand and become final (cf *Tower MCashback LLP 1 v Revenue and Customs Comrs* [2010] EWCA Civ 32, [2010] STC 809, Moses LJ in the Court of Appeal at paras [2], [18] and [19]).

[**23**] As regards the giving of a notice under s 12AA requiring the submission of a return, it was sensible for HMRC to ask for a partnership return, given that the 2000 Act envisaged that limited liability partnerships would be created for the purpose of carrying on a business with a view to profit. If, however, as a result of the enquiry it was established that an LLP was not carrying on a business with a view to profit, that did not retrospectively invalidate the notice or the consequent enquiry. The appropriate course of action for HMRC to take would be to amend the partnership return to zero, issue closure notices to the LLP and to its members, and (if necessary) require the LLP to submit a company tax return. There were no time limits that would prevent such a course.

[**24**] Section 863(1) was sufficient of itself to deem all limited liability partnerships carrying on a business with a view to profit to be partnerships 'for income tax purposes'. Such deeming had to encompass the three stages of liability, assessment and enforcement in relation to income tax, as identified by Lord Dunedin in *Whitney v IRC* [1926] AC 37 at 52, 10 TC 88 at 110, including in particular ss 12AC and 28B. Not only did that conclusion follow from the plain meaning of the words used, but it was the only one consistent with the scheme of the legislation, in which the compliance and enforcement rules relating to partnerships were designed to deal with them on the basis that they were transparent for tax purposes. It was inconceivable that Parliament would intend to exclude the compliance rules designed for such entities. Moreover there was no alternative compliance regime that could apply to them; Sch 18 could not apply because they were not companies for the purposes of the Corporation Tax Acts and not subject to corporation tax. Nor could Parliament have intended that enquiries would have to be opened into the tax returns of every member of every limited liability partnership; that was what s 12AC(6), which deemed the giving of a notice of enquiry to a partnership to include the giving of a notice of enquiry to each partner, was designed to avoid.

[**25**] In the alternative, if s 863(1) was not enough of itself to make clear that the TMA provisions applied to limited liability partnerships carrying on a business with a view to profit, s 863(2) did so. It applied 'for all purposes'. The reference in the opening words of s 863(2) to 'the Income Tax Acts' included TMA provisions relating to income tax. The word 'enactment' in the definition of the Income Tax Acts in the Interpretation Act 1978 (above) was not

restricted to whole Acts: it could apply to any legislative provision which achieved a distinct objective: see s 1 of the Interpretation Act and *John Lyon's Charity v London Sephardi Trust* [2017] EWCA Civ 846, [2018] QB 1163, [2018] 2 WLR 1016, Briggs LJ at para [39]. The definition of 'the Taxes Acts' in TMA s 118(1) should not therefore be read as drawing a distinction between the Tax Acts on the one hand and TMA on the other. The contrary interpretation favoured by Lady Smith in *Spring Salmon*, by the UT in *Bartram* and by the FTT in *MDL* was wrong and should not be followed. Reference was made to a number of cases all of which had proceeded on the assumption that the TMA partnership tax return provisions applied to limited liability partnerships. If there was any ambiguity, the settled practice principle should be applied in favour of that interpretation.

[**26**] There were two possible explanations for the difference in the introductory wording as between the two subsections. One was that sub-s (2), referring to 'all purposes', was intended to include purposes other than income tax purposes, such as definitional purposes. The other was that the difference was intended to recognise that sub-s (1) was concerned with liability whereas sub-s (2) was concerned with enforcement and compliance. In any event it was clear from various extra-statutory materials (Explanatory Notes to ITTOIA 2005 at paras 1807–1810; Government observations on the draft Limited Liability Partnership Bill at para 80) that Parliament intended TMA to apply to limited liability partnerships.

ARGUMENT FOR THE LLPS

[**27**] On behalf of the LLPs it was submitted that the FTT had reached the correct decision, and that the appeal should be refused. HMRC's authority to require a tax return from the LLPs emanated from the rules for companies. They were not entitled to conduct enquiries under TMA but should instead have proceeded under the provisions of Sch 18 to the Finance Act 1998. It was emphasised that the LLPs were not attempting to exploit a lacuna in the legislation; if HMRC had proceeded correctly, there was a coherent set of administrative rules that ensured that the correct amount of tax was paid.

[**28**] The relevant management code for *all* limited liability partnerships (regardless of whether or not they were carrying on a business with a view to profit) was Sch 18. Limited liability partnerships were bodies corporate and were deemed to be companies for all corporation tax purposes, including tax management provisions. Schedule 18 applied to all company tax returns and not just corporation tax returns; there was no need for returns to be of a uniform type. The purpose of s 863 was to reflect the general policy that limited liability partnerships were to be treated as tax transparent, but that transparency was conditional on carrying on a business with a view to profit. Depending on the activities of a limited liability partnership, the deeming provisions in s 863(1) and (2) were effectively switched on and off.

[**29**] Section 863(1) was of limited scope and contained nothing relating to the administrative provisions of TMA. What mattered for present purposes was the meaning of the phrase 'in the Income Tax Acts' in the opening words of sub-s (2). That phrase did not extend to TMA, or to Sch 18. In s 118(1), TMA clearly distinguished itself from 'the Tax Acts' by creating the further encompassing label 'the Tax**es** Acts'. Had the TMA been within the Tax Acts, this provision would have been unnecessary. The cases of *Spring Salmon*, *Bartram* and *MDL* had been correctly decided. The decision in *John Lyon's Charity* was not of assistance because the wording of s 118(1) did not allow use

of the 'enactment' argument. The distinction between provisions imposing liability, ie the Tax Acts, on the one hand and the management provisions of TMA on the other hand had been emphasised by the Supreme Court in *R (on the application of Derry) v Revenue and Customs Comrs* [2019] UKSC 19, [2019] STC 926, [2019] 1 WLR 2754 (Lord Carnwath at paras [20] and [36]–[37]). The extra-statutory materials to which reference had been made did not assist HMRC; rather, they showed that despite the matter having been raised, Parliament saw no difficulty with the meaning of the expression 'the Tax Acts' or its interpretation in *Spring Salmon*.

[30] Returns were not submitted unilaterally but in response to a notice. In the case of a limited liability partnership, the taxpayer was entitled to assume that the notice was issued under para 3 of Sch 18, because that was within the *vires* of HMRC. The return was also therefore submitted under that paragraph. It made no difference that the return was headed 'Partnership Tax Return'; there was nothing on it to say that it was a return under s 12AA. To allow the heading on the return to determine the issue would be to allow form to rule substance.

[31] In any event, even if HMRC were entitled to treat the return as made under s 12AA, further difficulties arose at the enquiry stage. Under the correct statutory code there was no 'partner' who could have made and delivered the return, and so HMRC would be unable to issue a notice of enquiry under s 12AC. The only workable approach was to assume that the notice had been issued under the correct statutory code, and to issue a notice of enquiry under para 24 of Sch 18. Further problems would arise in relation to closing the enquiry: a closure notice under s 28B could only be issued to a partner and not to a member of a limited liability partnership. All of these difficulties were avoided if the limited liability partnership's return was correctly treated as a company tax return.

[32] It was accepted that on this analysis HMRC were obliged to open enquiries under TMA s 9A on the members of the limited liability partnership, on a protective basis, because there was no provision equivalent to s 12AC(6). But that was merely a consequence of the difference between the partnership (TMA) and limited liability partnership (Sch 18) codes. It was not an onerous obligation, and had the positive advantage of informing members about the enquiry, rather than their being deemed to know of it. The return would include a list of members and their respective profit allocations.

DECISION

Interpretation of section 863

[33] The issue to be determined is whether HMRC were entitled, as they contend, to open enquiries into and issue closure notices to the LLPs under the provisions of TMA. In our opinion the starting point in addressing that issue is the proper interpretation of s 863.

[34] We agree with the distinction drawn by the LLPs between the purposes of sub-ss (1) and (2) respectively of s 863: sub-s (1) is concerned with the imposition of liability as between a limited liability partnership and its members (or, as the LLPs put it, with the 'facts on the ground'), whereas s 863(2) is an interpretative provision, mapping limited liability partnerships into existing statutory provisions. In the course of the hearing, counsel for the LLPs helpfully made reference to the original version of what became s 863, as it would have been inserted into the Income and Corporation Taxes Act 1988

by s 10 of the Limited Liability Partnerships Act 2000. This version, which never in fact came into force, resembled what is now s 863(1), without any equivalent of sub-s (2). One may assume that the view was taken at an early stage that what is now sub-s (1) was insufficient on its own to perform the interpretative function now fulfilled by sub-s (2).

[**35**] We draw two conclusions from this legislative history. Firstly, the two subsections should be read together as a coherent structure for regulating the income tax treatment of limited liability partnerships (with s 1273 providing a similar coherent structure for regulating their corporation tax treatment). Secondly, the different purposes afford an explanation for the difference in the opening words of the two subsections. Subsection (1) is concerned with imposition of liability and is accordingly stated to apply 'for income tax purposes'. Subsection (2) is concerned with interpretation and is accordingly stated to apply 'for all purposes … in the Income Tax Acts'. Read thus, it is in our view clear that neither subsection is intended to have either a wider or narrower scope than the other, and that it would be a mistake to read anything else into the difference in wording.

[**36**] When we turn to apply s 863 to the issue arising in this case, we are not persuaded by HMRC's submission that the matter is determined by sub-s (1) alone. That subsection has a specific purpose, namely to equate the income tax treatment of limited liability partnerships carrying on a business with a view to profit with that of ordinary partnerships, ie to treat them as transparent entities with the tax liability being imposed on the members in the same way that tax liability is imposed on the partners of ordinary partnerships. The wording of the subsection is necessarily different from that of ss 848–850 which provide for transparency of ordinary partnerships, because limited liability partnerships, unlike ordinary partnerships other than Scottish partnerships, are legal entities with separate legal personality. But, as is the case with ss 848–850, s 863(1) has nothing to say about either of the second or third stages identified by Lord Dunedin in *Whitney*, namely assessment and enforcement. As Lord Carnwath pointed out in *Derry* (above), liability and management are separately dealt with by tax legislation, and it would be erroneous to read a provision concerned with the former as determining the latter.

[**37**] The answer to the issue to be determined comes down, therefore, to the proper interpretation of s 863(2), and in particular to whether the expression 'the Income Tax Acts' is capable of including provisions of TMA concerned with income tax. In our view, that question falls to be answered in the affirmative. As we have noted, s 1 of the Interpretation Act 1978 states that every section of an Act takes effect as a substantive enactment without introductory words. (This section re-enacted more or less *verbatim* the terms of s 8 of the Interpretation Act 1889.) In *John Lyon's Charity*, Briggs LJ observed:

> '[39] It is clear (for example from section 1 of the Interpretation Act and *Wakefield and District Light Railways Co v Wakefield Corpn* [1906] 2 KB 140, 145), that the concept of an enactment … is not limited to whole Acts, parts or even sections of an Act. Any provision, long or short, which achieves a distinct objective may be an enactment.'

The reference to *Wakefield and District Light Railways* is to a passage from a first instance judgment in a case which went to the House of Lords on other matters. Ridley J stated:

> 'The word "enactment" does not mean the same thing as "Act". "Act" means the whole Act, whereas a section or part of a section in an Act may be an enactment.'

[**38**] In our view these authorities provide ample support for the proposition that the word 'enactment' is at the very least capable of referring to a section of an Act and not solely to a whole Act. As we understood it, the LLPs did not disagree with this general proposition, but contended that it did not assist with the interpretation of the definition of the Income Tax Acts in the 1978 Act because of the express distinction drawn in TMA s 118(1) between the Tax Acts (consisting of the Income Tax Acts and the Corporation Tax Acts) on the one hand and 'this Act' on the other. We do not accept that this is so. The definition of 'the Tax Acts' now in the Interpretation Act 1978 was previously in s 526(1) of the Income and Corporation Taxes Act 1970, enacted at the same time as TMA. In its original form, the definition of 'the Taxes Acts' in TMA s 118(1) was 'this Act' and the Tax Acts as defined in s 526(1). Nothing turns on the chronology of the various statutes and consolidations, except that at the time of the 1970 consolidations, the meaning of the word 'enactment' as used in successive Interpretation Acts and as explained in *Wakefield and District Light Railways* must have been well known to the draftsman. The words 'all enactments relating to income tax' ought therefore, in our view, to be read as referring not only to whole Acts relating to income tax but also to any section of an Act, including TMA, relating to income tax. That construction is reinforced by the fact that the definition of the Income Tax Acts and the reference to every section of an Act taking effect as a substantive enactment are currently contained in the same legislation, namely the latest iteration of the Interpretation Act.

[**39**] Nor, in our view, is any doubt cast on the above analysis by the reference in TMA s 118(1) to 'this Act'. If, as we have held, the reference to the Tax Acts includes sections of TMA relating to income tax, any overlap with the scope of 'this Act' is of no practical significance. Nor is the reference to 'this Act' otiose. As was pointed out by senior counsel for HMRC, TMA contains – and has since its inception contained – provisions capable of applying to other taxes, most obviously capital gains tax. There is accordingly no compelling reason to treat the expressions 'this Act' and 'the Tax Acts' in s 118(1) as mutually exclusive.

Previous case law on the meaning of 'the Income Tax Acts'

[**40**] In adopting this approach we are respectfully differing from the view taken by Lady Smith in *Spring Salmon*, by the UT in *Bartram* and by the FTT in *MDL*. It does not appear that reference was made in any of these cases to s 1 of the Interpretation Act 1978 or to *Wakefield and District Light Railways*, and they all pre-date the judgment of Briggs LJ in *John Lyon's Charity*. (We note that in *Bartram* the taxpayer appeared in person, and that *MDL* was decided without a hearing on the basis of a notice of appeal, HMRC's statement of case, and a written statement by the appellant.) Nor indeed does it appear that these authorities were brought to the attention of the FTT in the present appeal. Clearly the argument presented by HMRC in the present case amounts to a *volte face* from the position adopted by them in *Spring Salmon* and *Bartram* but, be that as it may, we are satisfied that the argument is sound.

[**41**] In *MDL*, a case concerning the imposition of penalties for late delivery of a return, the FTT (Judge Thomas) addressed the question of the application of s 863 to a limited liability partnership on its own initiative, without the benefit

of submissions on the point by either party. The FTT considered itself bound by *Spring Salmon* to hold that s 863 did not apply to TMA, and accordingly that a notice to the limited liability partnership under s 12AA had been invalidly issued. However, in an appendix to its decision, the FTT set out reasons why, were it not for the decision in *Spring Salmon*, it would have held that notwithstanding the definition of the Taxes Acts in TMA s 118(1), the Income Tax Acts included TMA. The FTT's principal reason was that the definition in s 118(1) was there for the purposes of TMA and not for any other Act such as ITTOIA 2005. In addition, the FTT cited a number of examples of statutory provisions, in TMA itself and elsewhere, which appeared to indicate that the expression 'the Income Tax Acts' included provisions relating to assessment and collection contained in TMA. An example is TMA Sch 1AB, para 1(6), concerning claims for relief for overpaid tax, in which reference is made to two schedules of TMA and 'another provision of the Income Tax Acts'. The FTT also, however, identified a provision suggesting the converse. In the present appeal, HMRC did not adopt the reasoning of the FTT in *MDL*, preferring to rely upon the more straightforward proposition that a section of an Act is an enactment. For our part, we regard the examples in the FTT's appendix as providing some limited support for the analysis that we have preferred.

[42] It is also true, as HMRC pointed out, that there are a significant number of court decisions that have proceeded upon an assumption that the return and enquiry regime applicable to limited liability partnerships was the one contained in TMA. Examples provided to us include *Tower MCashback LLP 1* (above) in the Supreme Court, Lord Walker of Gestingthorpe [2011] UKSC 19, [2011] STC 1143, [2011] 2 AC 457, at paras [8]–[10]; *R (on the application of Amrolia) v Revenue and Customs Comrs, R (on the application of Ranjit-Singh) v Revenue and Customs Comrs* [2020] EWCA Civ 488, [2020] STC 877, Henderson LJ at para [8]; *R (on the application of Cobalt Data Centre 2 LLP) v Revenue and Customs Comrs, Cobalt Data Centre 2 LLP v Revenue and Customs Comrs* [2019] UKUT 342 (TCC), [2020] STC 23, at para [121]; and *R (on the application of Reid) v Revenue and Customs Comrs, Reid v Revenue and Customs Comrs* [2020] UKUT 61 (TCC), [2020] STC 622, at paras [31]–[37]. None of those decisions, of course, amounts to authority in favour of HMRC's contention in the present case, because the point was not argued. It would, however, be somewhat surprising, if the approach described was as unworkable as the LLPs submit, that this had not occurred to any of the judges – specialists in the tax field – who were responsible for producing them.

[43] In arriving at our conclusion we have not attached any significant weight to the extra-statutory materials produced by HMRC. We accept, under reference to *Revenue and Customs Comrs v SSE Generation Ltd* [2019] UKUT 332 (TCC), [2020] STC 107, at paras [63]–[65] and the authorities cited there, that these materials are admissible to place legislative provisions into context, notwithstanding that they do not fall within the conditions enunciated in *Pepper (Inspector of Taxes) v Hart* [1992] STC 898, [1993] AC 593 for reference to Parliamentary materials as aids to interpretation. We also accept that the terms of the Government observations on the draft Limited Liability Partnership Bill tend to suggest an intention that limited liability partnerships would be treated as partnerships for the purposes of TMA (albeit that the latter is incorrectly referred to as the Taxes Management Act 1988). Ultimately, however, we base our decision on the terms of the legislation enacted, which had not been formulated at the time when these observations were made.

Does HMRC's interpretation produce a workable scheme?

[**44**] Both parties to the appeal argued that their, and only their, interpretation produced a workable scheme for returns by and enquiries into the returns of limited liability partnerships. In our opinion the submission by HMRC in this regard is to be preferred.

[**45**] In relation to a limited liability partnership carrying on business with a view to profit, the application of TMA is straightforward. A return submitted under s 12AA contains the information necessary to give effect to the transparency applied to such limited liability partnerships by s 863(1). The reference in s 12AC(1) to the partner who delivered the return is treated by s 863(2)(b) as a reference to a member of the limited liability partnership. The references in s 12AC(6) to partners are similarly treated as references to members, thereby avoiding any need for separate enquiries to be opened into the members' tax returns. If the enquiry results in amendment of the partnership return, s 28B facilitates transparency by requiring consequent amendment of the members' tax returns.

[**46**] In relation to a limited liability partnership which is not carrying on business with a view to profit, the position is equally straightforward. Section 863 does not apply to it. The limited liability partnership is not treated as transparent and is liable to corporation tax on its profits, if any. TMA does not apply to it and the process for submission of a company tax return, enquiry and closure is governed by Sch 18 to the Finance Act 1998. Income or losses are not brought into account in the members' returns and there is no automatic need for enquiry into those returns.

[**47**] There remain for consideration two less straightforward circumstances: firstly, where a limited liability partnership submits a partnership return on the basis that s 863 applies to it but is subsequently found in the course of an enquiry (or held following an appeal) not to be carrying on business with a view to profit; and, secondly, where it is uncertain, at the stage of either a notice requiring a return to be submitted or the submission of a return whether or not the limited liability partnership was carrying on business with a view to profit during the period in question.

[**48**] So far as the first of these circumstances is concerned, we accept HMRC's submission that a finding that a limited liability partnership which has submitted a return under the TMA provisions is not carrying on business with a view to profit does not retrospectively invalidate the notice to submit a return, the submission of the return, the opening of an enquiry, or the issuing of a closure notice, so as to render the whole procedure a nullity and preclude any further action by HMRC to secure payment of tax. We see nothing untoward in the concept of an enquiry process that can accommodate an issue as to whether the correct process has been initiated and followed. The potential scope of an enquiry, in terms of s 12AC(4) is wide, extending *inter alia* to 'anything contained in the return'. That, in our opinion, is capable of encompassing a conclusion that the wrong return has been submitted. In practical terms, the HMRC officer responsible for completing the enquiry can give effect to his or her conclusion by amending all of the sums in the enquiry to nil, thereby negating any claims in the return for losses or allowances. If it appears, despite the officer's conclusion that the limited liability partnership is not carrying on business with a view to profit, that there is income or gains chargeable to tax, the officer may then begin what he or she, *ex hypothesi*, regards as the correct process by issuing a notice under para 3 of Sch 18

requiring delivery of a company tax return. No time limits or other difficulties that would prevent such a course of action were drawn to our attention by either party.

[**49**] The same would appear to apply *mutatis mutandis* if (somewhat less probably) a limited liability partnership were to submit a company tax return on the basis that it was not carrying on business with a view to profit during the period in question, but it emerged following enquiry that it fell within the scope of s 863 and ought to have followed the TMA procedure.

[**50**] Turning to the situation where there is uncertainty regarding the 'transparency' status of a limited liability partnership, there is undoubtedly a degree of awkwardness inherent in either party's analysis. We were not addressed at the hearing on cl 101 of the Finance Bill currently before Parliament which, if enacted, would insert a new s 12ABZAA into TMA that would appear to be designed to address this very issue. That might suggest some unease on the part of the Government that in this regard TMA is not as clear as it might be. We have not, however, taken any account of this in reaching our decision; rather, we are satisfied that the approach advocated by HMRC does provide a workable procedure on the basis of the legislation as it stands.

[**51**] It is appropriate to begin consideration of this matter at the stage of notice being given by an officer to submit a return, since, as the LLPs point out, a return is not submitted in a vacuum but in response to a notice. At this stage the possibility exists that the terms of the notice will require the wrong type of return to be submitted, but a choice must be made. In that regard it should be borne in mind that in terms of s 2(1) of the 2000 Act, the concept of a limited liability partnership, at least at the stage of its inception, is of an association of persons carrying on a lawful business with a view to profit. It is, of course, recognised by both the limited liability partnership legislation and the tax legislation that the entity will not necessarily carry on business with a view to profit at all times continuously throughout its existence. But it does not follow that 'view-to-profit' limited liability partnerships and 'non-view-to-profit' limited liability partnerships should be regarded as entities equally likely to be encountered. The former is likely to be the norm, the latter the exception. In our view it is reasonable for the officer requiring submission of a return to proceed in the first instance on the basis that the limited liability partnership falls within s 863, so that the appropriate return will be one submitted under TMA. That is all the more so when one bears in mind that, in terms of s 863(3), s 863(1) continues to apply to a limited liability partnership during periods of temporary cessation of business and during winding up other than by a liquidator.

[**52**] Moreover, an incorrect choice at the stage of requiring submission of a return does not mean that HMRC have lost their only opportunity to secure payment of the correct amount of tax. The limited liability partnership might decide that the wrong type of return has been required, and submit instead what it considers to be the correct one. And in any event, as we have held, if it is discovered at a later stage that a return has been submitted and enquiry commenced under the wrong procedure, the enquiry can be closed and a return demanded on what with hindsight has turned out to be the correct basis.

The LLPs' alternative approach

[**53**] The alternative approach advocated by the LLPs, namely that the management provisions in Sch 18 apply to all limited liability partnerships regardless of whether or not they are carrying on a business with a view to profit, appears to us to give rise to more intractable difficulties. The 'company tax return' which a company may be required to deliver in terms of para 3(1) of Sch 18 must contain information etc '… (a) relevant to the tax liability of the company, or (b) otherwise relevant to the application of the Corporation Tax Acts to the company'. A transparent limited liability partnership is not subject to the Corporation Tax Acts and so sub-para (b) can have no application to it. Moreover, in context, the tax liability referred to in sub-para (a) is a tax liability under the Corporation Tax Acts, and so this subparagraph cannot apply to a transparent limited liability partnership either. Further difficulties arise from the terms of para 7, which states that every company tax return for an accounting period must include a self-assessment of the amount of tax which is payable *by the company* for that period. This mandatory provision envisages that, whatever its nature, it is the company which is liable to tax. But where a limited liability partnership is transparent, there is no liability on it as such. Nor, given the reference to 'every company tax return', is this a provision that could be adapted or opted out of.

[**54**] Nor are we persuaded that Parliament envisaged that the members of transparent limited liability partnerships would have to be given protective notices of enquiry into their personal tax liabilities. We agree with HMRC's analysis that this is exactly what s 12AC(6) was designed to avoid. It is not the function of TMA to regulate the provision of information by a limited liability partnership to its members.

[**55**] Finally, we regard the omission from Sch 18 of a provision equivalent to TMA s 8(1B), requiring the return of each member of a partnership to include that member's profit share as a clear indication that Parliament did not intend Sch 18 to be the management code for transparent limited liability partnerships. We are not persuaded by the LLPs' suggestion that this is simply a drafting oversight, or that it is somehow addressed by reading the introductory words of s 863(1) as if the section applies 'for [all] income tax purposes'.

CONCLUSION

[**56**] Our conclusion is therefore as follows. In the case of each of the LLPs, HMRC were entitled to issue notices requiring the submission of a partnership tax return. The LLPs had no proper legal basis for treating them as notices to file company tax returns, and what they submitted were, as a matter of fact, partnership tax returns filed in response to a notice requiring the submission of partnership tax returns. That, on what we have held to be the correct interpretation of s 863, was the only course of action consistent with the LLPs' position, which they will have to establish in order to succeed in their appeal against refusal of allowances, that they were carrying on business with a view to profit. It follows that the appropriate – and indeed only – form of enquiry for HMRC to open in each case was an enquiry under TMA, s 12AC. The notices of enquiry and the closure notices under s 28B were accordingly, in each case, validly issued, even though one of the conclusions in the closure notices was that the LLPs were not carrying on business with a view to profit and ought not to have filed partnership tax returns.

[**57**] For these reasons we find that the FTT erred in law. In accordance with s 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, we re-make the decision by holding that the closure notices were validly issued and that there is no basis in law for striking out the appeals. Having done so, we remit both appeals to the FTT for further procedure in relation to the remaining grounds of appeal.

Appeals allowed.