



UK Supreme Court Decision in *Anson v. HMRC* Reverses Established Tax Treatment of US LLCs

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In its July 1, 2015 decision in the case of *Anson v. HM Revenue & Customs* (2015 UKSC 44), the Supreme Court of England and Wales ruled that a Delaware limited liability company was “transparent” for UK income tax purposes. A UK resident member, therefore, was liable for UK taxes on the profits of the LLC as they arose, and not on the subsequent distribution of those profits. The Supreme Court’s decision contradicts the long-standing position of Her Majesty’s Revenue and Customs (HMRC) with respect to taxation of UK resident members of US LLCs.

HMRC’s Historic Position

The UK imposes a tax to its residents on income “arising from possessions out of the United Kingdom.” For a UK resident, a membership interest in an LLC organized in the US qualifies as such a foreign possession. Any income arising from the US LLC interest is therefore subject to UK tax.

Prior to the Supreme Court’s July 1 decision, HMRC’s practice was to treat Delaware (and other US) LLCs as “opaque,” taxable entities for UK tax purposes. Under HMRC’s historic approach, income would not arise to a UK resident as LLC profits were earned. Instead, the UK resident would be liable for UK taxes only when the LLC made distributions to such UK resident.

Background Decision

The contested issue in *Anson* was a taxpayer’s ability to claim relief from double taxation under applicable provisions of the UK/US tax treaty (Treaty). Mr. Anson was a UK resident and a member, as well as one of the founders, of HarbourVest Partners LLC, a Delaware LLC carrying on business in Boston, Massachusetts. The business of the LLC consisted of the management of a number of venture capital funds. The LLC had no economic interest in the funds, but earned fees from its investment management activities. When Mr. Anson remitted his share of the LLC’s profits (net of US tax) to the UK, HMRC sought to subject that remittance to UK income tax.

The Treaty and domestic UK law granted relief from double taxation such that taxpayers would receive a UK tax credit against tax computed by reference to the same income as that on which US taxes were calculated. Mr. Anson sought relief under the Treaty, arguing that US taxes had already been calculated and paid on the same income (the LLC profits) remitted to the UK.

Two lower UK courts, the Upper Tribunal and Court of Appeal, had previously agreed with HMRC’s position and ruled in *Anson* that, because an LLC member didn’t have a proprietary



right to any of the LLC's assets, the LLC's profits could not belong to the member. Therefore, US tax on a member's share of the LLC's profits and UK tax on a member's distributions did not constitute double tax on the "same income" and a UK resident member of a US LLC was not entitled to double tax relief under the Treaty.

The unanimous decision of the Supreme Court in *Anson* reversed the Court of Appeal and concluded that Mr. Anson was entitled to his share of the profits as they arose and as they were allocated to him (independent of any subsequent distribution). His "income arising" in the US, therefore, was his share of the LLC's profits, not the subsequent distribution. Because it was the same income that was subject to tax under UK law, Mr. Anson was entitled to double taxation relief.

Possible Implications

While the Supreme Court's decision was beneficial to Mr. Anson, meaning he could claim relief for double taxation on the same income, it creates confusion and possible detriments for other UK resident members of US LLCs. Corporate taxpayers, for instance, may have previously taken the position that they were not liable for UK taxes on LLC profits until distributed, and that they were entitled to an exemption from UK tax on the distribution. Treating the income of the LLC as taxable to the UK resident member as it arises, with the ability to claim double tax relief, complicates the UK taxpayer's reporting position.

It should also be noted that *Anson* was decided narrowly on its own facts, and the Supreme Court focused on the specific provisions of the LLC operating agreement in question and the Delaware LLC Act. The decision leaves open the question of whether it may be possible to draft an LLC agreement or to choose an alternate jurisdiction in order to create an "opaque" or "transparent" LLC to best suit the taxpayer's own situation. If so, then taxpayers may now have available to them a form of "check the box" regime available for business entities under U.S. Treasury Regulations.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

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