[2020] UKUT 161 (TCC)

Appeal number: UT/2019/0139

INCOME TAX — limited liability partnerships – Income Tax (Trading and Other Income) Act 2005, section 863 – whether HMRC had power to open enquiry under Taxes Management Act 1970, section 12AC – whether any enquiry should have been made under Finance Act 1998, Schedule 18, paragraph 24 – whether closure notices issued under Taxes Management Act 1970, section 28B were valid – yes – appeal allowed.

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

v

INVERCLYDE PROPERTY RENOVATION LLP

and

CLACKMANNANSHIRE REGENERATION LLP

Respondents

TRIBUNAL: LORD TYRE
JUDGE RAGHAVAN

Hearing conducted remotely by video conference deemed to be held in Edinburgh on 27 and 28 April 2020

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

Keith Gordon and Ximena Montes Manzano, instructed by Keystone Law, for the Respondents (Inverclyde Property Renovation LLP and Clackmannanshire Regeneration LLP)

DECISION

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").

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 section 12AC of the Taxes Management Act 1970 ("TMA"), and accordingly that there had been no valid closure notices under section 28B of that Act. The LLPs argued that any enquiry should have been made under the corporation tax self-assessment provisions in Schedule 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 rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, on the ground that the FTT had no jurisdiction in relation to the proceedings.

3. HMRC now appeal to the Upper Tribunal 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 section 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, section 2(1)). On incorporation, the subscribers become the members of the limited liability partnership (section 4(1)). Thereafter any other person may become a member with the agreement of the existing members (section 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 section 75(1) of the Finance Act 2001. These were consolidated as section 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 section 863 provide that subsection (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 subsections (1) or (2) of section 863 applies to it (except as provided by subsections (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 sections 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 section 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 section 8(1B), include that share in his personal tax return.

11. The partnership return having been submitted, TMA section 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 section 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 section 28B is subject to a right of appeal under section 31 to the FTT.

Company tax returns and enquiries

12. The statutory provisions governing company tax returns and enquiries are contained in Schedule 18 to the Finance Act 1998. In terms of section 117(2) of the 1998 Act, Schedule 18, the Taxes Management Act 1970 and "the Tax Acts" are to be construed as if the schedule were contained in TMA.

13. The provisions of Schedule 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, paragraph 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 paragraph 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 section 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, Schedule 1, paragraph 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, section 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 section 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 section 12AC. Both enquires were concluded by the issuing of a closure notice under section 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 IR Commrs* [2004] STC 444: 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 paragraph 24 of Schedule 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 section 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:

> "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 (at paragraph 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 section 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 Upper Tribunal in *Bartram v HMRC* [2012] STC 2144 (UT), and the other a decision of the FTT in *MDL Property Consultants LLP v HMRC* [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 section 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 section 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 section 12AC, but rather under the corporation tax provisions in Schedule 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 section 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 section 12AC, and that the closure notices under section 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 section 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 section 12AC. Without such an enquiry, the return would stand and become final (cf *Tower MCashback LLP 1 v HMRC* [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 section 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 IR Commrs* [1926] AC 37 at 52, including in particular sections 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; Schedule 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 section 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 section 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, section 863(2) did so. It applied "for all purposes". The reference in the opening words of section 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 section 1 of the Interpretation Act and *John Lyon's Charity v London Sephardi Trust* [2018] QB 1163, Briggs LJ at para 39. The definition of "the Taxes Acts" in TMA section 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 Upper Tribunal 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 subsection (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 subsection (1) was concerned with liability whereas subsection (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 Schedule 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 Schedule 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 section 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 section 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 subsection (2). That phrase did not extend to TMA, or to Schedule 18. In section 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 section 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 (Derry) v HMRC* [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 paragraph 3 of Schedule 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 section 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 section 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 section 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 paragraph 24 of Schedule 18. Further problems would arise in relation to closing the enquiry: a closure notice under section 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 section 9A on the members of the limited liability partnership, on a protective basis, because there was no provision equivalent to section 12AC(6). But that was merely a consequence of the difference between the partnership (TMA) and limited liability partnership (Schedule 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 section 863.

34. We agree with the distinction drawn by the LLPs between the purposes of subsections (1) and (2) respectively of section 863: subsection (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 section 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 section 863, as it would have been inserted into the Income and Corporation Taxes Act 1988 by section 10 of the Limited Liability Partnerships Act 2000. This version, which never in fact came into force, resembled what is now section 863(1), without any equivalent of subsection (2). One may assume that the view was taken at an early stage that what is now subsection (1) was insufficient on its own to perform the interpretative function now fulfilled by subsection (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 section 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 section 863 to the issue arising in this case, we are not persuaded by HMRC's submission that the matter is determined by subsection (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 sections 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 sections 848-850, section 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 section 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, section 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 section 8 of the Interpretation Act 1889.) In *John Lyon's Charity*, Briggs LJ observed (para 39):

> "It is clear (for example from section 1 of the Interpretation Act and *Wakefield and District Light Railways Co v Wakefield Corporation* [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

section 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 section 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 section 118(1) was "this Act" and the Tax Acts as defined in section 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 Railway* 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 section 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 section 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 Upper Tribunal in *Bartram* and by the FTT in *MDL*. It does not appear that reference was made in any of these cases to section 1 of the Interpretation Act 1978 or to *Wakefield and District Light Railway*, 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 section 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 section 863 did not apply to TMA, and accordingly that a notice to the limited liability partnership under section 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 section 118(1), the Income Tax Acts included TMA. The FTT's principal reason was that the definition in section 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 Schedule 1AB, paragraph 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 at paras 8-10; *Amrolia v HMRC* [2020] EWCA Civ 488, Henderson LJ at para 8; *R (Cobalt Data Centre 2 LLP) v HMRC* [2020] STC (UT) 23, para 121; and *R (Reid) v HMRC* [2020] STC (UT) 622, para 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 *HMRC v SSE Generation Ltd* [2020] STC (UT) 107 at paragraphs 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 v Hart* [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 section 12AA contains the information necessary to give effect to the transparency applied to such limited liability partnerships by section 863(1). The reference in section 12AC(1) to the partner who delivered the return is treated by section 863(2)(b) as a reference to a member of the limited liability partnership. The references in section 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, section 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 Schedule 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 section 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 section 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 paragraph 3 of Schedule 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 section 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 clause 101 of the Finance Bill currently before Parliament which, if enacted, would insert a new section 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 section 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 section 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 section 863(3), section 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 Schedule 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 paragraph 3(1) of Schedule 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 subparagraph (b) can have no application to it. Moreover, in context, the tax liability referred to in subparagraph (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 paragraph 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 section 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 Schedule 18 of a provision equivalent to TMA section 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 Schedule 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 section 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 section 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, section 12AC. The notices of enquiry and the closure notices under section 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 section 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.

LORD TYRE

JUDGE RAGHAVAN

Issued 27 May 2020