Neutral Citation Number: [2020] EWHC 3489 (Admin)

Case No: CO/281/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2020

Before :

SIR ROSS CRANSTON
Sitting as a judge of the High Court

- -

Between :

The Queen on the application of CHRISTOPHER MITCHELL	**Claimant**
- and -	
COMMISSIONERS FOR HER MAJESTYS REVENUE AND CUSTOM	**Defendant**

- -
- -

KEITH M. GORDON and XIMENA MONTES MANZANO (instructed by **Jefferies, Solicitors**) for the **Claimant**
MARIKA LEMOS (instructed by **HMRC**) for the **Defendant**

Hearing dates: 10 December 2020

- -

JUDGMENT

SIR ROSS CRANSTON:

Introduction

1. This is an application for permission to apply for judicial review following an order by Andrews J (as she then was) dated 13 July 2020 that it be considered at an oral hearing.

2. By her order this claim is to be treated as the lead case of 89 other cases which raise materially the same arguments and have been case-managed along with it. For convenience I will call all these claimants the case managed claimants.

3. The claimant seeks permission to challenge the decision by HMRC to issue a notice under section 28B(4) of the Taxes Management Act 1970 ("the 1970 Act") which amends his self-assessment return to deny claimed loss relief as a member of Twofold First Services LLP ("Twofold"). The decision to issue the notice is said to be ultra vires the statutory power of section 28B(4). The other case managed claimants similarly challenge notices issued in their cases.

4. In outline, the claimants having lost their challenge on the substance of their tax avoidance arrangements are now seeking to argue that HMRC should fail since it followed the wrong procedural track in its inquiries into them.

Background

5. Twofold is a limited liability partnership ("LLP") incorporated on 1 July 2011 under the Limited Liability Partnerships Act 2000. Its tax avoidance measures were described in *First De Sales Limited Partnership v HMRC* [2018] UKFTT 106 (TC), when the tribunal struck out the taxpayers' appeals. In short, Twofold acquired an agricultural estate for about £250,000, which it leased for an annual

rent of about £3000. (Later some additional land was let on an annual rent of £8,880) .It issued an information memorandum designed to attract investors with its tax avoidance arrangements. An estate manager based in Jersey was employed at £40,000 pa.

6. As part of these tax avoidance arrangements, Twofold entered into a Deed of Restrictive Undertakings with the estate manager and 3P Limited in the Cayman Islands. Pursuant to that Deed, he gave an undertaking that restricted him from being involved in a business that competed with that of Twofold or from soliciting its clients. £200m was paid to 3P as consideration for the deed, and a further £300m in March 2012. The argument was that the payments for the restrictive deeds were tax deductible, and Twofold's consequent losses were to be treated as losses of its members.

7. The arrangements of Twofold, along with those of other LLPs, Trident First Services LLP and Trident Second Services LLP, and of First De Sales Ltd Partnership, were considered by the FTT, when the partnerships appealed against closure notices HMRC issued them on the basis that the payments under the deeds were not deductible. In the notices HMRC asserted that the LLPs were not carrying on a trade or business with a view to a profit. FTT Judge Richards concluded that the partnerships' appeals had no reasonable prospect of success and struck them out.

8. The Upper Tribunal (Tax and Chancery Chamber) (Carr J and Judge Sinfield) dismissed the taxpayers' appeal on 27 November 2018: *First De Sales Limited Partnership v HMRC* [2018] UKUT 0396 (TCC). In the course of doing so it said that the facts the judge had set out were uncontroversial and there was no

challenge to them on the appeal: para [9]. The Court of Appeal refused permission to appeal.

9. The claimant was a member of Twofold. He had filed a self-assessment tax return for the two years ended April 2013 claiming losses passed through from the LLP. An enquiry was commenced by HMRC on his tax returns under section 12AC(6) of the 1970 Act. On 27 December 2019, HMRC issued the notice at issue in this case under section 28B(4) of the 1970 Act stating that his LLP losses were not allowable deductions.

10. The claimant contends that HMRC did not have the power to issue the notice under section 28B(4), because the conditions provided in that section for doing so were not met. Section 28B deals with the issue of notices in relation to an enquiry under section 12AC of the Act in the case of partnership returns. In simple terms the argument is that, as an LLP, Twofold is not a partnership falling under these sections and that the statutory code applying is contained in Schedule 18 of Finance Act 1998.

Finance Act 2020; section 12ABZAA of 1970 Act

11. Section 104 of the Finance Act 2020 was introduced to address what the government regarded as the illegitimate use of LLPs as tax avoidance vehicles. It inserted section 12ABZAA into the 1970 Act with general retrospective effect. It was announced in March this year and enacted on Royal Assent in July. It applies where a person delivers a purported partnership return [subsection (1)(a)] and the LLP does not carry on a business with a view to profit in the relevant period [subsection (1)(c)]. The section provides that for the purposes of the relevant enactments the relevant return is treated as a partnership return:

subsection (2). Subsection (5) defines purported partnership return to mean anything that (a) purports to be a partnership return, and (b) is in a form, and is delivered in a way, that a partnership return could have been made and delivered in a corresponding partnership case. "Corresponding partnership case" is defined to mean a corresponding case in which the LLP in question carries on a business with a view to profit in the relevant period.

Upper Tribunal determination in *Inverclyde*

12. Earlier this year, on 27 May, the Upper Tribunal (Tax and Chancery Chamber) issued its decision in *HMRC v Inverclyde Property Renovation LLP* [2020] UKUT 161 (TCC). The tribunal was constituted by Lord Tyre, a commercial judge in the Court of Session, and Judge Raghavan, a member of the Tax and Chancery Chamber of the Upper Tribunal. The Tribunal examined arguments along the lines of those advanced for the claimants in this judicial review.

13. In that case two LLPs filed partnership tax returns and made claims for business premises renovation allowance. After inquiries HMRC issued closure notices concluding that the LLPs were not carrying on a business with a view to a profit and therefore not entitled to claim the allowance.

14. Central to the UT's decision was section 863 of the Income Tax (Trading and Other Income) Act 2005 ("the 2005 Act"). Generally speaking, that provides that for income tax purposes, if an LLP carries on a trade, profession or business with a view to profit, all its activities are treated as carried on in partnership by its members. In other words, the LLP is treated for income tax purposes in the same way as an ordinary partnership. It is thus regarded as tax transparent with its profits and losses allocated proportionately among its members. There are

parallel provisions in section 1273 of the Corporation Tax Act 2009 as regards corporation tax.

15. On the taxpayers' appeal it was said that HMRC had no power to open an enquiry under the income tax self-assessment provisions in section 12AC of the 1970 Act, 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 provisions.

16. The FTT agreed: [2018] UKFTT 106(TC). That was because section 863 of the 2005 Act provides in s.863(2) that for all purposes "in the Income Tax Acts" references to a partnership included an LLP. Earlier authority - *Bartram v HMRC* [2012] STC 2144 and *Spring Salmon & Seafood Ltd, Re Petition for Judicial Review* [2004] STC 444 - had established that the expression "the Tax Acts" did not include the 1970 Act. Accordingly, the FTT held, the words in s.863(2), "in the Income Tax Acts", likewise did not encompass that Act. Thus HMRC had had no power to open an enquiry into the tax returns of the LLPs under the 1970 Act and thus no power to issue the closure notices.

17. The Upper Tribunal allowed the appeal. As regards the 1970 Act, it said that given its legislative history section 863(1) was concerned with the imposition of liability as between a LLP and its members, whereas section 863(2) was an interpretative provision, mapping LLPs into existing statutory provisions: para. [34]. Given the legislative history, both subsections should be read together as a coherent structure for regulating the income tax treatment of LLPs (with section 1273 providing a similar coherent structure for regulating their corporation tax treatment) and neither subsection is intended to have either a

wider or narrower scope than the other: para. [35]. As regards the subsections, subsection (1) dealt with liability, not assessment and enforcement: para. [36].

18. As to the expression "the Income Tax Acts" in subsection (2), that was capable of including provisions of the 1970 Act concerned with income tax, since section 1 of the Interpretation Act 1978 ("the 1978 Act") provided that every section of an Act takes effect as a substantive enactment without introductory words: paras. [37]-[38].

19. Given the legislative history, the tribunal held that their conclusion was not affected by the LLPs' submission that section 118 of the 1970 Act draws a clear distinction between the Tax Acts (defined in the 1978 Act as the Income Tax Acts and the Corporation Tax Acts) on the one hand, and "this Act" on the other.[1] There was no compelling reason to treat the expressions "this Act" and "the Tax Acts" in section 118(1) as mutually exclusive. If the reference to the Tax Acts includes sections of the 1970 Act relating to income tax, any overlap with the scope of "this Act" was of no practical significance. Nor was the reference to "this Act" otiose, since the 1970 Act has always contained provisions capable of applying to other taxes, most obviously capital gains tax: paras. [38]-[39].

20. The tribunal then distinguished *Bartram* and *Spring Salmon*: they contained no reference to section 1 of the Interpretation Act 1978 and were decided on different statutory provisions: paras. [40].

[1] Section 118(1) of the 1970 Act provides that in this Act, unless the context otherwise requires, "the Taxes Acts" means this Act and (a) the Tax Acts and (b) the Taxation of Chargeable Gains Act 1992 and all other enactments relating to capital gains tax.

21. Both parties argued that their interpretation produced a more workable scheme for returns by and enquiries into the returns of limited liability partnerships, but for reasons set out at length the tribunal preferred HMRC's account: paras. [44]-[55]. In particular the tribunal concluded that a finding that a LLP which had submitted a return under the 1970 Act was not carrying on a business with a view to profit did not retrospectively invalidate the issuing of a closure notice or associated procedural steps. Section 12AC(4) of that Act had a wide ambit - "anything contained in the return" – and could cover a conclusion that the wrong return had been submitted: para. [48].

22. The tribunal then went on to analyse why, contrary to the LLPs' submission, the tax management provisions in Schedule 18 of the Finance Act 1998 were unsuitable to be applied to all limited liability partnerships regardless of whether or not they are carrying on a business with a view to profit: paras. [53]-[55].

Ground 1

23. Ground 1 of the judicial review is that HMRC had no statutory right to exercise any powers under s.28B(4) of the 1970 Act on the basis that, as a matter of fact, the deeming provisions found at section 863 of the 2005 Act are not applicable in respect of the claimant's case, because Twofold was not carrying on business with a view to profit. In reply HMRC point to the Upper Tribunal determination in *Inverclyde* and to section 12ABZAA of the 1970 Act.

24. In my view section 12ABZAA of the 1970 Act is a complete answer to this ground and means it is bound to fail. Inserted in 2020 with retrospective effect to address this type of tax avoidance arrangement, it means that where an LLP has completed a partnership return under s.12AA of that Act, but does not carry

on a business with a view to profit, HMRC may issue a closure notice to the LLP under sections 28B(1) and (2) of the 1970 Act, and then issue a notice under s.28B(4) to the members of the LLP. The claimants are all members of LLPs and section 12ABZAA applies to their case.

25. Mr Gordon submitted that the section does not apply for two reasons. The first was that it has not been established that the condition in subsection (1)(c) is satisfied, namely, that the LLP did not carry on business with a view to profit in the relevant period. In his submission, there had been no judicial finding to this effect. *First De Sales Limited Partnership v HMRC* [2018] UKFTT 106 (TC) was a strike out application and there were no findings of fact. Furthermore, HMRC had not adduced evidence, needed to establish a non-profit making intention as a matter of fact, with the claimant having the opportunity to challenge the evidence.

26. There are two answers to this. First, this court is generally not a forum for disputing matters of fact. If the claimant had intended to challenge the assertions of HMRC that the LLP was not carrying on business with a view to a profit, he should have raised the matter some time ago – HMRC had made the assertion to this effect as early as in the closure notice in November 2015 - and not, as Mr Gordon did, on the day of the hearing. That being the case, the court must accept HMRC's assertions to this effect.

27. Moreover, there is an air of unreality to the claimant's case. As outlined earlier, the evidence before the tribunal was that the LLPs were paying huge sums for the restrictive undertakings for an estate manager who was being paid a relatively modest annual salary to run a relatively modest estate. It was clear

that the payments had no commercial rationale and that the LLPs were being run not with a view for them to make profits but losses, which could then be used as deductions by their members. In effect that is what the tribunal established, and its findings were accepted on appeal in the Upper Tribunal (as indicated earlier, in para. [9]).

28. Mr Gordon's second contention was that section 12ABZAA does not apply because the definition of purported partnership return in subsection (5) refers to a return in a corresponding partnership case, the definition of which presupposes that the nature of the return will depend on whether section 863(2) is satisfied, but on his interpretation that provision has no effect here.

29. In my view this goes nowhere. The definition of corresponding partnership case in section 12ABZAA(5) contains a comparator, a corresponding case in which the LLP in question does carry on a business with a view to profit in the relevant period. In the comparator case section 863 applies, as established by the Upper Tribunal in *Inverclyde*, which for the reasons I explain shortly is to be applied.

Ground 2

30. Ground 2 is that HMRC had no statutory right to exercise any powers under sections 12AA, 12AC, 28B and 50(9) of the 1970 Act in relation to the LLPs and their members even if Twofold was trading with a view to a profit. This ground is essentially that the FTT's determination in *Inverclyde* was correct and the Upper Tribunal was wrong, in particular in rejecting the argument that these provisions of the 1970 Act do not apply to LLPs trading with a view to a profit but that instead Schedule 18 of the Finance Act 1998 governs.

31. For the claimant Mr Gordon contended that the Upper Tribunal decision in *Inverclyde* was wrong for a number of reasons. First, he submitted, the Upper Tribunal's reasoning was flawed; secondly, its decision was contrary to the earlier *Bartram* and *Spring Salmon* decisions and should not be applied; and thirdly, its conclusion was wrong as regards workability. Mr Gordon raised an additional point of difference, namely, that *Inverclyde* related to a notice under s.28B(1), whereas these claimants' notices were issued under section 28B(4), which in his submission could not apply where section 863(2) was not in play.

32. In *R (on the application of Rowe) v HMRC* [2017] EWCA Civ 2105, Arden LJ noted without demur that the judge in that case had followed a decision of the Upper Tribunal as a matter of judicial comity: [119]. There are other authorities along the same lines, for example, *R (on the application of Rowe) v HMRC* [2015] EWHC 2293 (Admin), [83], per Simler J (as she then was). That seems to me the correct approach in this case. Unless I consider it wrong, and I do not, I should follow the Upper Tribunal decision in *Inverclyde*, especially in a specialist area such as this. In passing I recall the distinguished constitution of the Upper Tribunal on this occasion.

33. As to the *Bartram* and *Spring Salmon* decisions, *Bartram* was decided on different legislative provisions than those at issue in this case, and in *Spring Salmon* the point at issue was a secondary consideration in Lady Smith's reasoning. In my view the Upper Tribunal in *Inverclyde* gave cogent reasons for departing from them, which I cannot see are wrong.

34. As to workability, that is a secondary consideration in statutory interpretation, a point Mr Gordon accepted, and in any event the Upper Tribunal addressed the

point at some length. Finally, on the LLPs' case that the management provisions of Schedule 18 should apply, not the 1970 Act, the tribunal offered a lengthy analysis as to why that argument was unacceptable.

35. Mr Gordon's additional point, not considered he said by the Upper Tribunal in *Inverclyde*, was that section 28B(4) of the 1970 Act could not apply since "partner" there could not apply to a LLP member when the deeming provisions of section 863(2) of the 2005 Act (references to members of partnerships include members of LLPs) did not apply.

36. There are two reasons that this is a bad point. First, although the Upper Tribunal in *Inverclyde* did not consider the matter expressly it is clear that it contemplated HMRC making consequential amendments to partnership returns when it went on to find that the enquiry was not invalidated if it transpired that the LLP was not carrying on a business with a view to profit. More importantly, I accept HMRC's submission that it would be an absurd interpretation that a closure notice properly issued in respect of a partnership return as defined did not also empower it to issue a section 28B(4) notice in respect of the individuals or corporate bodies named as 'partners' in that return.

Delay

37. HMRC contends that there has been delay. Large number of the claims were filed very close to the last day of the three-month time limit in CPR 54.5(1)(b) – one was filed after this – and thus were not filed promptly as required by the rule.

38. Given the view I have taken on the substantive points there is no need for me to address the issue.

Conclusion

39. For the taxpayers, Mr Gordon contended that the threshold for permission was not high. However, in light of the anti-avoidance measure in section 12ABZAA of the 1970 Act, and the Upper Tribunal decision in *Inverclyde*, I have reached the conclusion that this application is not only unarguable but bound to fail. The same applies to the applications for judicial review of all case managed claimants. Accordingly, I refuse permission, and in line with the submission of HMRC record the claims as bound to fail under CPR 23.12.

40. Following a submission by HMRC, I grant permission to cite the decision in the context of other similar applications.