[2021] UKFTT 0210 (TC)

TC08160

Corporation Tax – UK-US Double Tax Convention – UK resident company with shares "stapled" to those of US company – Whether also resident in US – Whether carrying on a business through US permanent establishment – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/08123

BETWEEN

G E FINANCIAL INVESTMENTS **Appellant**

-and-

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

TRIBUNAL: JUDGE BROOKS

The hearing took place on 16 – 19 March 2021. With the consent of the parties, the hearing was by video using the Tribunal video platform. A face to face hearing was not held because of the restrictions imposed as a result of the coronavirus pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Philip Baker QC and John Brinsmead-Stockham, instructed by Slaughter and May, for the Appellant

Hui Ling McCarthy QC and Barbara Belgrano, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The Appellant, G E Financial Investments ("GEFI"), appeals against a decision of HM Revenue and Customs ("HMRC"), dated 24 May 2017 and confirmed on 29 September 2017 following a review, to amend its corporation tax returns to exclude credit claimed for foreign tax by way of double tax relief for its accounting periods ended 31 December 2003 to 31 December 2008 (inclusive).

2. Philip Baker QC and John Brinsmead-Stockham appeared for GEFI. HMRC were represented by Hui Ling McCarthy QC and Barbara Belgrano. Their submissions, both written and oral, have been greatly appreciated. However, although carefully considered, in reaching my conclusions in this matter, it has not been necessary to refer to each and every argument advanced on behalf of the parties.

FACTS AND ISSUES

3. The following 'Statement of Agreed Facts and Issues' was produced by the parties:

> "**A. INTRODUCTION**
>
> (1) This appeal is concerned with whether GEFI is entitled to a credit (ie foreign tax credit) against United Kingdom ("UK") corporation tax for tax that GEFI paid in the United States of America ("US") in respect of its accounting periods for the years ended 31 December 2003 – 31 December 2008 (the "relevant period").
>
> (2) The issue in this appeal falls to be determined by the application of the UK-US double taxation convention, signed on 24 July 2001, as amended by the amending protocol signed on 19 July 2002 (the "Convention")[1]. References in this decision to an "Article" are references to articles of the Convention.
>
> **B. SUMMARY OF THE FACTS**
>
> (3) A detailed summary of the facts relevant to this appeal is set out below (see paragraph 4).
>
> **C. MATTERS OF COMMON GROUND AND ISSUES IN DISPUTE**
>
> (4) It is common ground that GE Financial Investments (USA) LP (the "LP") was treated as transparent from its inception until the end of the relevant period for the purposes of UK tax.
>
> (5) It is common ground that, throughout the relevant period, GEFI was "*a resident of [the UK]*" for the purposes of the Convention, by virtue of Article 4(1).
>
> (6) It is common ground that GEFI was liable to US federal income tax under US domestic law, on the basis that US domestic law regarded it as a US corporation.
>
> (7) The issues in dispute between the parties are as follows:
>
> Issue 1:
>
> (8) Did the share staple between GEFI and GE Financial Investments Inc. ("GEFI Inc.") have the effect that GEFI was "*a resident of the [US]*" for the purposes of Article 4 of the Convention throughout the relevant period?
>
> Issue 2:
>
> (9) If the answer to Issue 1 is "no", then:

[1] The Convention was given effect in UK law by Double Taxation Relief (Taxes on Income) (The United States of America) Order 2002 (SI 2002/2848), from 1 April 2003 onwards, for the purposes of UK corporation tax.

(a) did GEFI carry on business in the US through a permanent establishment situated therein within the terms of Article 7; and

(b) if GEFI did carry on business in the US through a permanent establishment situated therein,

(i) was US tax payable under the laws of the US in accordance with the Convention for the purposes of Article 24(4)(a) of the Convention; and

(ii) if so, is the UK required, pursuant to Article 24(4)(a) of the Convention, to give relief against US tax levied?

D. PROCEDURE

(10) GEFI filed UK company tax returns for each of its accounting periods in the relevant period. In each of those company tax returns GEFI claimed a credit for US federal income tax that it had paid in respect of that accounting period.

(11) HMRC opened an enquiry under Finance Act 1998 Schedule 18 ("Schedule 18") paragraph 24 into each of GEFI's company tax returns for the relevant period, and subsequently issued, on 24 May 2017, closure notices under Schedule 18 paragraph 32(1) in respect of those enquiries. The closure notices issued by HMRC amended GEFI's company tax returns so as to deny GEFI's claims for foreign tax credits for the relevant period, in their entirety.

(12) The table below summarises the procedural steps taken in respect of each accounting period of GEFI in the relevant period:

Year	Date of Return	Amount of tax in issue (£)	Enquiry Notice	Closure Notice
2003	18/05/2003	4,657,943.10	30/11/2005	24/05/2017
2004	23/02/2006	12,878,320.50	04/12/2006	24/05/2017
2005	15/12/2006	22,362,972.90	13/11/2007	24/05/2017
2006	27/11/2007	29,402,774.40	15/12/2008	24/05/2017
2007	16/12/2008	28,871,480.40	16/12/2009	24/05/2017
2008	23/11/2009	26,739,670.56	12/10/2010	24/05/2017
Total		**124,913,161.86**		

(13) GEFI appealed to HMRC against the closure notices, in time, by way of a letter, dated 25 May 2017 and requested a review of the decisions contained in the closure notices. HMRC confirmed those decisions in a Review Conclusion Letter, dated 29 September 2017.

(14) GEFI lodged a notice of appeal with the Tribunal on 25 October 2017."

4. The appendix to the 'Statement of Agreed Facts and Issues' contains the following summary of the facts relevant to this case:

"**A. ENTITIES**

(1) The information set out in the paragraphs below refers to the whole of the relevant period (i.e. the accounting periods for the years ended 31 December 2003 – 31 December 2008), unless stated otherwise.

General Electric Capital Corporation ("GECC")

(2) GECC was a company incorporated in the US.

(3) At all times relevant to this appeal GECC was a wholly owned member of the group of companies headed by the General Electric Company (the "GE group").

GELCO Corporation ("GELCO")

(4) GELCO was a company incorporated in the US.

GE Capital Investments ("GECI")

(5) GECI was a private unlimited company, incorporated in the UK. GECI was also a wholly owned member of the group of companies headed by the General Electric Company.

(6) GECI was the parent company of GEFI Inc. and GEFI Ltd, from the beginning of the relevant period until 30 December 2009 when GEFI Inc purchased the entire issued share capital of GEFI Ltd from GECI in the context of the dissolution of the LP.

GE Financial Investments Inc ("GEFI Inc")

(7) GEFI Inc was a Delaware corporation, incorporated on 26 June 2003.

(8) The Certificate of Amendment to the Certificate of Incorporation of GEFI Inc, dated 26 June 2003, provided that:

> "*No shares of common stock of [GEFI Inc] may be transferred to any person unless the transferee of such shares of common stock simultaneously receives (i) all shares of common stock of [GEFI Inc.] then outstanding and (ii) all of the then outstanding ordinary dollar shares…in [GEFI Ltd]*".

(9) The office address of GEFI Inc was in Connecticut, US.

(10) At all times relevant to this appeal, GEFI Inc was a wholly owned direct subsidiary of GE Capital Investments.

GE Financial Investments Ltd ("GEFI Ltd") – the Appellant

(11) GEFI Ltd was a UK private limited company, incorporated on 19 February 1997 as Hikenear Limited, and changed its name to GEFI Ltd on 4 July 2003.

(12) GEFI Ltd was dormant from 31 August 1997 to June 2003.

(13) At all times relevant to this appeal, the registered office of GEFI Ltd was located in the UK.

(14) At all times relevant to this appeal, the accounting period of GEFI Ltd was the year ended 31 December.

(15) On 27 June 2003, GEFI Ltd adopted a Memorandum and Articles of Association by special resolution. The Articles of Association provided, at Article 8.3A, that:

> "*no Ordinary Dollar Shares in the capital of the Company shall be transferred unless there are transferred to the transferee at the same time all of such Ordinary Dollar Shares for the time being in issue and all of the Common Stock in [GEFI Inc] for the time being outstanding.*"

(16) The authorised share capital of GEFI Ltd was also increased so as to consist of:

(a) £1,000 divided into 1000 shares of £1 each; and

(b) $1,500,000,000 divided into 1,500,000,000 ordinary shares of $1 each.

(17) At that time GEFI Ltd had an issued share capital of 2 ordinary shares of £1 each, both of which were owned by GECI.

(18) The directors of GEFI Ltd during the relevant period included the following persons:

(a) Roy Clark (appointed 20/06/2003, resigned 30/06/2006);

(b) Zachary Citron (appointed 20/06/2003, resigned 11/07/2003; appointed 15/07/2003, resigned 21/04/2017);

(c) Stephen Dwyer (appointed 30/06/2006, resigned 03/05/2017);

(d) Pamela Green (appointed 20/06/2003, resigned 31/10/2005);

(e) Paul Hitchin (appointed 30/06/2006, resigned 06/03/2007); and

(f) Gillian Wheeler (appointed 30/06/2006, resigned 27/06/2017).

(19) GEFI Ltd was UK-resident for UK tax purposes throughout the relevant period by virtue of its incorporation in the UK.

(20) GEFI Ltd directly owned two UK-resident subsidiaries during the relevant period:

(a) on 24 June 2003, GEFI Ltd acquired the entire issued share capital of GE Leveraged Loans Holdings Limited, and held those shares throughout the relevant period; and

(b) on 3 November 2003, GEFI Ltd acquired the entire issued share capital of First National Home Finance Limited ("FNHF Ltd") from GECI in consideration for the issue of 376,535,263 ordinary $1 shares. GEFI Ltd sold its shares in FNHF Ltd on 1 July 2004.

(21) GEFI Ltd re-registered as an unlimited Company on 30 December 2009 and changed its name to GE Financial Investments.

GE Financial Investments (USA) LP (the "LP")

(22) The LP was a Delaware Limited Partnership, formed on 27 June 2003 pursuant to an Agreement of Limited Partnership between GEFI Inc., as general partner, and GEFI Ltd, as limited partner (the "LP Agreement"). The LP Agreement records that the formation was in accordance with the Delaware Revised Uniform Limited Partnership Act (the "Delaware LP Act").

B. CREATION OF THE LP

Capital Contributions to the LP

(23) The original capital contributions made by GEFI Ltd and GEFI Inc. to the LP were in the form of promissory notes issued by GELCO. Those promissory notes originated as a single promissory note for $900,000,000 issued by GELCO to GECC on 1 October 1995 (the "original promissory note").

(24) On 26 June 2003, the original promissory note was replaced by two promissory notes that represented 99% and 1% of the principal and accrued interest on the original promissory note, respectively (the "replacement promissory notes").

(25) The replacement promissory notes (with a principal value of $1,510,584,466 and $15,258,429, respectively) were issued by GELCO to GECC.

(26) On 27 June 2003 the replacement promissory notes were transferred down the GE corporate group from GECC to GEFI Ltd and GEFI Inc.

Formation of the LP

(27) The LP was formed on 27 June 2003, pursuant to the LP Agreement. The terms of the LP Agreement record that:

(a) The purposes of the LP were to (i) hold directly or indirectly financial receivables and other assets, and companies carrying on a financial trade and engage in activities related or incidental thereto, and (ii) engage in any and all lawful activities to which the General Partner and the Limited Partner agreed.[2]

(b) The registered office of the LP was located at [address in], Wilmington, New Castle County, Delaware, US.[3]

(c) GEFI Inc was admitted as general partner of the LP, and GEFI Ltd was admitted as the limited partner.[4]

(d) GEFI Inc took a 1% interest in the LP, GEFI Ltd took a 99% interest.[5]

(e) The partners undertook to make a capital contribution to the LP by way of the transfer of the replacement promissory notes to the LP. Accordingly, the partners contributed promissory notes in the following principal amounts to the LP:

(i) GEFI Ltd - $1,510,584,466; and

(ii) GEFI Inc. - $15,258,429.[6]

(28) GEFI Ltd and GEFI Inc. transferred the replacement promissory notes to the LP on 27 June 2003, as required by the terms of the LP Agreement. The replacement promissory notes constituted the first two loan receivables held by the LP (ie "Loan 1" and "Loan 2", respectively).

C. ACTIVITIES OF THE LP

Further Loans

(29) In addition to the loans represented by the replacement promissory notes, which the LP acquired when it was formed (as outlined at paragraph 4(28) above) the LP made three loans; details of those loan transactions are set out below.

Loan 3 (1 July 2004)

(30) On 1 July 2004 a number of transactions occurred. First, GEFI Ltd sold its shareholding in FNHF Ltd to GE Money Home Lending Holdings Ltd for a price to be adjusted following a professional valuation. The initial cash payment was £619,502,911.

(31) Second, GEFI Ltd made a loan to GEFI Inc. of $11,237,783 (the "GEFI Inc. loan").

(32) Third, pursuant to a Contribution Agreement, the partners made further capital contributions to the LP in the following amounts:

(a) GEFI Ltd – $1,112,540,497;

(b) GEFI Inc – $11,237,783

(33) Finally, on 1 July 2004, the LP made a loan of $1,123,778,280 to GELCO ("Loan 3").

[2] Clause 2 of the LP Agreement
[3] Clause 3 of the LP Agreement
[4] Clause 5 of the LP Agreement
[5] Clauses 9, 10 and Schedule 1 of the LP Agreement
[6] Clause 8 of the LP Agreement

(34) Loan 3 was extended and amended by agreement between the LP and GELCO on 30 November 2009 stating it had effect from 1 July 2009. The amendment was approved at a meeting of the board of directors of GEFI Inc. on 17 November 2009.

Loan 4 (31 July 2006)

(35) GEFI Ltd made a further contribution of $204,277,654 to the LP on 31 July 2006. A corresponding contribution to the LP of $2,103,211 was made by GEFI Inc. on the same date. A Contribution Agreement was signed on 15 September 2006 to record the terms of these contributions.

(36) On 31 July 2006, the LP extended a revolving credit facility to GECC of up to $14,119,033 ("Loan 4").

(37) The facility was amended on 15 September 2006 (with the amendment stating that it had retrospective effect from 31 July 2006) so as to increase the limit to $206,380,865.

Loan 5 (7 December 2006)

(38) On 7 December 2006, the LP made a term loan of $210,599,515 to GELCO ("Loan 5").

Profits

(39) GEFI Ltd made a return (i.e. profit) from the LP's loan portfolio in each year of the relevant period, as set out in the following table:

Year	Profit
2003	$27,120,098
2004	$83,011,386
2005	$136,361,682
2006	$173,620,069
2007	$192,196,812
2008	$177,330,905

Distributions

(40) The LP made a number of distributions to its partners during the relevant period, including the following:

Year	Distribution to GEFI Ltd	Distribution to GEFI Inc
2004	$10,314,312	$104,185
2005	$69,666,682	$703,704
2006	$72,717,500	$734,520
2007	$114,960,000	$1,161,212
2008	$89,248,500	$901,500

D. DISSOLUTION OF THE LP

(41) On 31 December 2009 the LP was dissolved following the transfer of GEFI Ltd's interest in the LP to GEFI Inc.

(42) On the same date, GEFI Ltd adopted new Articles of Association which did not contain a provision equivalent to Article 8.3A.

E. US FEDERAL INCOME TAX

(43) GEFI Ltd paid the following amounts of US federal income tax during the relevant period:

Year	US tax paid ($)
2003	10,314,312
2004	31,156,499
2005	54,673,566
2006	70,508,329
2007	65,892,935
2008[7]	70,787,750
Total	**303,333,391**

(44) In each year of the relevant period, the US tax paid exceeded the amount of UK tax due (in the absence of any credit for double taxation relief).

F. DISCUSSIONS BETWEEN HMRC AND IRS

Residence (Article 4(5) of the Convention)

(45) The competent authorities of the UK and the US held discussions under Article 4(5) of the Convention to "*endeavour to determine by mutual agreement the mode of application of this Convention to [GEFI Ltd]*". No agreement was reached between the two competent authorities on the point.

Mutual Agreement Procedure (Article 26 of the Convention)

UK claim

(46) Protective claims were made by GEFI Ltd under Article 26 of the Convention, in time, for each of the years 2003-2007.

(47) On 6 November 2014, GEFI Ltd made a formal claim under Article 26 to the UK competent authority in respect of every year in the relevant period, seeking relief from double taxation ("the UK MAP claim"). On 10 February 2015, the UK competent authority declined to admit the UK MAP claim into the MAP procedure.

(48) Subsequently, in October 2015, the UK and US competent authorities agreed to enter into MAP discussions on the question of whether GEFI Ltd carried on business in the US through a permanent establishment situated therein. No agreement was reached between the two competent authorities.

US Claim

(49) Protective claims were made by GEFI Ltd under Article 26 of the Convention, in time, for each of the years 2003-2007.

(50) On 6 November 2014, GEFI Ltd made a formal claim under Article 26 to the US competent authority in respect of every year in the relevant period, seeking relief from double taxation (the "US MAP claim").

[7] The US tax liability for 2008 remains subject to a reduction of approximately $9 million due to the carry-back of a US tax loss from 2009. If this occurs, the US tax paid for 2008 would still exceed the UK tax due for 2008 (in the absence of any credit for double tax relief)

(51) Further protective claims were made by GEFI Ltd on 21 August 2018 under Article 26 of the Convention for each of the years 2003-2008."

5. In addition to the Statement of Agreed Facts and Issues, further consideration of contemporaneous documents and aspects of US Federal Income Tax Law, particularly in relation to stapling and the treatment of partnerships under Delaware law will, hopefully, provide a better understanding to the background to the case.

Contemporaneous documents

6. The objects of GEFI are set out in its Memorandum of Association, which as is noted at paragraph 4(15) above, was adopted by a special resolution passed on 27 June 2003. The objects included:

> "(A) To carry on business as a general commercial company and to carry on any trade or business whatsoever.
>
> (B) To hold directly or indirectly financial receivables and other assets including (but not limited to) shares or stock in any company carrying on a financial trade.
>
> …
>
> (D) To advance, deposit or lend money, securities, plant, machinery, equipment and property to or with such persons and on such terms as may seem expedient, to discount, buy, sell and deal in bills, notes, warrants, coupons, and other negotiable or transferable securities or documents.
>
> (E) To carry on any other trade or business whatever which can in the opinion of the Board of Directors be advantageously carried on in connection with or ancillary to any of the businesses of the Company.
>
> …
>
> (L) To lend and advance money or give credit on any terms to (with or without security) and to receive money on deposit or loan upon any terms from any person, firm or company (including without prejudice to the generality of the foregoing any holding company, subsidiary or fellow subsidiary of, or any other company associated in any way with, the Company), to enter into guarantees, contracts of indemnity and suretyships of all kinds, to receive money on deposit or loan upon any terms, and to secure or guarantee in any manner and upon any terms the payment of any sum of money or the performance of any obligation by any person, firm of company (including without prejudice to the generality of the foregoing any such holding company, subsidiary, fellow subsidiary or associated company as aforesaid)."

7. The LP Agreement between GEFI (the limited partner) and GEFI Inc (the general partner) included, in addition to those summarised at paragraph 4(27)(a) above, the following clauses:

> "**6. *Powers.*** The powers of the General Partner include all powers, statutory and otherwise, possessed by general partners of limited partnerships under the laws of the State of Delaware.
>
> …
>
> **17. *Powers of Partners.*** Except as expressly provided in this Agreement, all management powers over the business and affairs of the Partnership shall be vested exclusively in the General Partner. No limited partner (except as otherwise provided in this Agreement) shall have any management power or control over the business and affairs of the Partnership. Therefore, the General Partner shall have the powers now or hereafter granted a general partner of a

> limited partnership under the Act [the Delaware Revised Uniform Limited Partnership Act 6 Del C 17-101] or under any other applicable law and except as otherwise expressly provided in this Agreement shall have the full power and authority to do all things and on such terms as it, in its sole discretion, may deem necessary or appropriate to conduct the business of the Partnership.

8. Although the activities of the LP are summarised at paragraph 4(29) – (40) above, these are set out in more detail in a chronology, which also identified the various personnel involved, attached as an appendix to a letter of 26 May 2010 from the UK Tax Director of GE Capital Europe Limited to HMRC. Although the chronology included the LP's activities during 2009, this has been omitted from the following summary as that year is not within the relevant period and therefore not part of this appeal.

2003

(1) The formation of the LP and capital contributions by the partners on 27 June 2003;

2004

(2) Payment instructions for value dated 12 March 2004 and 14 September 2004, showing interest payments in cash of $9,848,485 and $570,012 respectively, moving from GELCO's bank account to the LP's bank account and an equal amount of cash moving from the LP's bank account to the two partners in their partnership proportions , as partnership distributions. The 12 March 2004 instructions was signed by Robert Tomasetti, a GE Corporate Tax Staff member in Stamford, Connecticut. GEFI used the amounts distributed to settle its US tax liability.

Payment instructions were GE Treasury's procedure for approving cash flows to and from GE group entities and that such instructions are "typically" signed by management personnel from GE's Treasury, Finance and/or Tax departments who were responsible for the transaction concerned;

(3) On 1 July 2004 GEFI Inc resolved to enter into a contribution agreement with the partners to receive further funds from them of over $1.1 billion and lend an equivalent amount to GELCO. The unanimous written consent of the directors was signed by Brian Wenzel and Richard Calo, both then directors of GEFI Inc and members of GE Treasury staff in Stamford. The rate on the loan was proposed by GE Treasury Staff in Stamford and approved by the boards of GEFI Inc and GELCO. This was reflected in a payment instruction dated 1 July 2004 showing the funds moving from bank accounts of the partners to the LP's bank account and then to GELCO's bank account. The payment instruction had multiple signatories but included that of Jan Martin, a GE Corporate staff member in Stamford.

(4) On 1 July 2004 GEFI Inc, on behalf of the LP signed a $1.1 billion Term Loan Agreement with GELCO. The interest rate was 4.55% and the signatory for GEFI Inc was Richard Calo.

(5) At the end of 2004 the LP had three loans with a face value of $2,793 million and in 2004 had earned an interest return of $83 million of which $10 million was received and distributed to partners and the balance compounded into the loan.

2005

(6) Payment instructions for value dated 17 March 2005, 21 June 2005, 12 September 2005, 15 September 2005 and 26 October 2005 showing interest payments in cash of $30,500,000, $25,000,000, $1,925,000, $12,500,000 and $445,386 respectively, moving from GELCO's bank account to the LP's bank account and an equal amount of cash moving from the LP's bank account to the two partners in their partnership proportions ,

as partnership distributions. The signatories to the payment instructions were Robert Tomasetti and Jan Martin. GEFI used the amounts distributed to settle its US tax liability.

(7) At the end of 2005 the LP had three loans with a face value of $2,861 million and had earned an interest return of $137 million of which $70 million was received and distributed to partners and the balance compounded into the loan.

2006

(8) Payment instructions for value dated 13 January 2006, 14 March 2006, 15 June 2006 and 15 September 2006 showing interest payments in cash of $22,250,000, $20,202,020, $15,500,000 and $15,500,000 respectively, moving from GELCO's bank account to the LP's bank account and an equal amount of cash moving from the LP's bank account to the two partners in their partnership proportions, as partnership distributions. Although the chronology does not record who signed the 13 January 2006 payment instruction, the signatories to the other payment instructions were Robert Tomasetti and Jan Martin. GEFI used the amounts distributed to settle its US tax liability.

(9) On 5 June 2006 GEFI Inc resolved to approve and ratify the five distributions made to GEFI in 2005. The Unanimous Written Consent of the directors of GEFI Inc was signed by Richard Calo.

(10) On 11 July 2006 GEFI Inc resolved to enter a contribution agreement with the partners to receive further funds from them of a value of over $200,000 and also to lend an equivalent amount to GELCO on terms set out in a loan agreement between the LP and GELCO. The Unanimous Written Consent of the directors of GEFI Inc was signed by Richard Calo.

(11) On 31 July 2006 GEFI Inc signed a revolving credit agreement (as lender), on behalf of the LP with GECC (as borrower). On 15 September 2006 the agreement was amended by increasing the amount lent to $206 million. The interest rate was USD Libor plus 25 basis points. The signatory for GEFI Inc was Margie Brajdic as President of GEFI Inc. She was a member of the GE Treasury staff in Stamford.

(12) On 15 September 2006 GEFI Inc, on behalf of the LP, signed the contribution agreement with the partners, Margie Brajdic, as one of the GEFI Inc directors, signed for the LP

(13) On 7 December 2006 GEFI Inc, on behalf of the LP, signed a $210 million term loan agreement with GELCO. The document was signed by Margie Brajdic on behalf of GEFI Inc. The rate on the loan (5.3%) was proposed by GE Treasury staff in Stamford and approved by the boards of GEFI Inc and GELCO along with the other loan terms. This was reflected in a payment instruction for value on 7 December 2006 showing funds moving from the bank account of GECC to the LP's bank account and from the LP's bank account to GELCO's account. The payment instruction was signed by Robert Tomasetti and Marianne Keegan.

(14) At the end of 2006 the LP had four loans with a face value of $3,169 million and had earned an interest return of $175 million of which $73 million was received and distributed to partners and the balance compounded into the loan.

2007

(15) Payment instructions for value dated 7 March 2007, 14 March 2007, 13 June 2007 and 13 December 2007 showing interest payments in cash of $22,000000, $3,030,303, $22,000,000 and $30,000,000 respectively, moving from GELCO's bank account to the LP's bank account and an equal amount of cash moving from the LP's bank account to

the two partners in their partnership proportions, as partnership distributions. The signatories to the payment instructions were Robert Tomasetti and Marianne Keegan. GEFI used the amounts distributed to settle its US tax liability.

(16) At the end of 2007 the LP had four loans with a face value of $3,247 million and had earned an interest return of $194 million of which $116 million was received and distributed to partners and the balance compounded into the loan.

2008

(17) Payment instructions for value dated 15 January 2008, 13 March 2008, 12 June 2008 and 11 September 2008 show interest payments in cash of $150,000, $30,000,000, $30,000,000 and $30,000,000 respectively, moving from GELCO's bank account to the LP's bank account and an equal amount of cash moving from the LP's bank account to the two partners in their partnership proportions, as partnership distributions. The 16 January 2008 payment instruction was singed by Robert Tomasetti and Marianne Keegan with the signatories to the other payment instructions being Robert Tomasetti and Jan Martin. GEFI used the amounts distributed to settle its US tax liability.

(18) On 21 April 2008 GEFI Inc resolved to approve and ratify the four distributions made to GEFI in 2006. The Unanimous Written Consent of the directors of GEFI Inc was signed by Margie Brajdic.

(19) On 25 June 2008 and on 15 December 2008 GEFI Inc held board meetings by telephone to review the LP's recent lending activity. Both the 25 June 2008 and 14 December 2008 meetings were attended by directors Margie Brajdic (presiding) and Peter Graham (both of whom were based in Stamford), Malvina Iannone, a legal counsel in the GE Corporate Tax staff in Stamford (as secretary), Margaret Gonzalez (paralegal in the GE Corporate Tax staff in Stamford), Robert Tomasetti and Margaret Hodge (from the GE Treasury accounting "centre of excellence" based in Ireland).

(20) On 17 November 2008 GEFI Inc resolved, by unanimous consent, to review and approve the LP's lending activity in the second quarter of 2008. The resolution was signed by Margie Brajdic and Peter Graham, the directors of GEFI Inc.

(21) At the end of 2008 the LP had four loans with a face value of $3,336 million and had earned an interest return of $179 million of which $90 million was received and distributed to partners and the balance compounded into the loan.

Management accounting and reporting

(22) For GE management's reporting purpose the LP's loan assets fell within a GE Treasury "management entity" covering a large number of GE legal entities engaging in Treasury related activities.

(23) Bookkeeping for the LP's loan portfolio was performed by Treasury "centres of excellence" in Bermuda (up to 2006) and Ireland (from 2006). This was administrative work and no partnership decisions were taken by personnel located in either jurisdiction.

9. The extent of the participation in the loan transactions by the various entities and the individuals involved can be identified by the email exchanges between them.

10. An example, in relation to the 2004 transactions (Loan 3, see paragraph 4(30)–(34), above), is the email chain commencing on 11 May 2004, under the subject heading 'GECC/GELCO Loan Partial Refinancing Via StapleCo'. With an email sent by Robert Tomasetti to various individuals and copied to, amongst others, Richard Calo. This explained that:

> "Consumer Finance is currently in the process of restructuring its regulated and non-regulated platforms in the UK. As a result of the restructuring [GEFI] Ltd (aka StapleCo) will received GBP700MM it will need to deploy. One alternative us of the cash is to refinance a portion of GELCO's borrowings from GECC.
>
> To this end, [GEFI] Ltd would contribute the USD equivalent of the £700MM ($1.2 billion) to GE Financial Investments (USA) [LP]. The LP would then lend $1.2 billion to GELCO, which in turn would pay down a portion of its debt with GECC. At the end of the day, GELCO's borrowings from the [LP] would total $2.8 billion ($1.6 billion Q2 03 plus $1.2 billion 03 04."

Responding, on 12 May 2004, Tim Radermacher of GE Commercial Finance noted:

> "From a GELCO stand alone reporting point of view we will probably just want to document the business purpose for such a significant transaction.
>
> I would imagine GELCO is getting a better interest rate from the [LP] then GECC, or better financing terms or something along those lines."

Mr Tomasetti replied, on 14 May 2004:

> "Thanks for the follow-up …
>
> I'm not aware of any business purpose requirement for the cash refinancing of an intercompany loan. We are simply refinancing a portion of the GECC loan under the same terms and conditions. It may be worthwhile for GELCO to reflect the refinancing via a corporate resolution."

11. In his reply, on 17 May 2004, Mr Radermacher requested that Mr Tomasetti send the particulars of the refinancing to the appropriate individual who would "see to it that this refinancing is appropriately documented" by GELCO and copied to himself and Fleet's General Counsel. Having agreed to do this Mr Tomasetti sent an email to Zach Citron, on 25 June 2004 in which he explained:

> "I'll be in Sweden next week for the Nordic Country meeting. Per the email below, please send all GELCO docs (complete with an explanation and execution instructions) to [Mr Radermacher and the others to which Mr Radermacher had referred in his email]."

When asked by Mr Citron, who was based in the UK, in an email dated 28 June 2004, what should be done with the documents, unanimous board resolutions for GEFI Inc, Mr Tomasetti explained, by email that same day, that these should be sent to Richard Calo, a director of GEFI Inc, "with clear execution instructions".

12. Later that same day, 28 June 2004, Mr Citron sent an email to Mr Calo and the others, as requested by Mr Tomasetti, advising them that the refinancing was to take place the following Thursday and that the documents "should be in final form for signing tomorrow". That email continued:

> "GELCO's involvement is a USD loan from [the LP] to GELCO. I attach a draft sent to me by Bob [Tomasetti] last week, The precise amount of loan principal will be the GBP proceeds of the share sale by GEFI Ltd (Stapleco) (about GBP 620 million), converted to USD at the spot rate. External counsel from King and Spalding are reviewing this and other documents and I expect final drafts to be circulated tomorrow …"

13. An email sent by Mr Citron on 30 June 2004 to Richard Calo and Brian Wenzel, directors of GEFI Inc (which was copied to amongst others Mr Tomasetti), under the subject heading, 'GELCO-GEFI USA LP Loan Agreement', stated:

> "Please see below (I'll also copy you in on King and Spalding's comments on the draft loan agreement which Bob Tomasetti gave me last week). Obviously you need to be happy with this as you are the officers of GEFI Inc, so please talk to the GELCO folks directly or (whilst Bob is travelling) use me as an intermediary if you have comments back to GELCO."

14. The email below to which Mr Citron referred was that which he had sent earlier that day to individuals, including Mr Radermacher and others who appear to be concerned with GELCO, in which he had said:

> "I have just had a conversation with Tom Rock and Gretchen Steadry (from Fleet) about the GELCO loan agreement. I started off by acknowledging that I had no input into the draft I got from Bob Tomasetti last week (and which forms the basis of the draft of draft Andrew Gasper of King and Spalding has circulated) but, as Bob is travelling, I would try to respond to their points in the interests of getting the thing signed.
>
> They were uncomfortable with some clauses (eg 5(d)) dealing with stopping GELCO selling its assets outside the GE group and we've agreed that we'll adopt whatever is standard in GE internal loan documents, and … put it in the agreement.
>
> On clause 3(b) – stating the assumption that GELCO is single A rated and that the spread is calculated on that assumption, and that GELCO will get an updated credit rating (and the rate changed if appropriate) Tom and Gretchen were not comfortable with GELCO agreeing to obtain a credit rating. We therefore agreed that this would be re-jigged to say that the Lender wished to review and confirm the correctness of the single A rating and Borrower would give Lender information reasonably required to do this, and then parties would, acting reasonably, agree if rating (and spread) should be changed."

Later on 30 June 2004 Mr Citron sent the following email to Mr Calo and Mr Wenzel:

> "FYI. This is GE Treasury's preference – the 4.25% fixed rate is based on giving GELCO a[n] AA rating (which is supported by the rating given to some GELCO pref shares in the market place)."

15. On 10 July 2006 in an email sending precedents to "help document the proposed further contribution" to the LP and noting that "GEFI Inc as GP should of course consider if investment in GELCO is a good idea ie consider rate of return and creditworthiness of GELCO", Mr Citron asked Mr Tomasetti:

> "Any thoughts on who could replace Rich [Calo] as director of GEFI Inc? Is there a replacement for him?"

16. In an email, dated 11 July 2006 (in relation to Loan 4 which is described in paragraph 4(35) – (37), above) to, amongst others Mr Citron and Mr Calo, Mr Tomasetti gave instructions for the consideration and execution of the documents attached. These included a GEFI Inc 'Unanimous Consent' document, GEFI Inc and GEFI Contribution Agreement and LP and GELCO Term Loan Agreement and Promissory note. Mr Citron responded to the email later that day to say:

> "The rate in the loan agreement is 4.55%, which I think was the rate under the previous loan in 04. But haven't interest rates gone up since then? It looks like 12 month USD Libor at the moment is 5.7% – and this loan is for 5 years, I think we need to be happy that we've got a "sensible" rate in the loan. As a benchmark, what is GELCO otherwise paying to Corp 001?"

17. A subsequent email sent on 23 October 2006 to Mr Tomasetti and Ms Keegan by Mr Citron stated:

> "We're going to want to get the US LP mentioned below [ie the LP] to make a decision about using the $200m mentioned below asap and certainly before year end ... To that end, Marianne [Keegan], who is a good person to answer question below at appropriate rate to lend USD to a Single A rated US company for a term of 5 years? And what does Corp 001 pay on cash pool type deposits today?
>
> Although I'm prodding this along please bear in mind it's really something for the US LP to think about and decide."

18. In relation to Loan 5, described in paragraph 4(38) above, Robert Tomasetti sent the following email to, amongst others, Margie Brajdic, a director of GEFI Inc on 5 December 2006:

> "On Thursday (7 December) [the LP] will extend a 5 year term loan to GELCO. This will be the fourth in a series of term loans that [the LP] has made to GELCO since June of 2003. GELCO will use the funds to repay a portion of its loan from GECC."

The loan agreement was attached to the email which continued with instructions to Ms Brajdic to sign the agreement on behalf of the LP in her capacity as director of GEFI Inc and send a scanned copy of it back to Mr Tomasetti. Ms Brajdic responded by email later that day:

> "Will sign today and send via interoffice email.
>
> Out of curiosity, what are the tax savings/other economic rationale behind the transaction?"

In his reply, also on the same day, Mr Tomasetti explained:

> "The interest income on the loan [the LP] makes to GELCO helps our thin cap/interest position in the UK. The LP is a US limited partnership which is 99% owned by a UK affiliate. The interest earned by the partnership flows through to the UK limited partner [GEFI] for thin cap/interest cover calculation purposes. The greater amount of income the UK affiliate earns (this type of income does not generate any incremental UK tax), the greater the amount of income expense we can incur in the UK.
>
> Hope this helps."

19. Minutes of a meeting of the Board of Directors of GEFI Inc, held on 25 June 2008, record that two directors, Margie Brajdic and Peter Graham were present and that the meeting, which lasted 30 minutes, was also attended by Mr Tomasetti. After noting that the purpose of the meeting was to review the lending activity of GEFI Inc for the first quarter of 2008, the minutes continue:

> "Following the commencement of the meeting, Mr. Tomasetti provided some background information to the Board. He explained that the Corporation was formed to be the general partner of a US limited partnership, GE Financial Investments (USA) LLP (the "Partnership"). The Corporation's activity has been limited to receiving capital contributions, borrowing from and lending to related parties and making contributions to the Partnership.
>
> …
>
> Following a question from Mr Graham relating to the relationship of the lender and borrower which was addressed by Mr. Tomasetti, the directors passed the following resolution:
>
> RESOLVED, that the lending activity of the Corporation during the first quarter of 2008 is hereby approved and ratified in all respects."

20. Additionally, a 'Memorandum of Acknowledgement', dated 29 December 2009, between GELCO (as Borrower), the LP (as Lender) and GELCO was entered into by the parties:

> "… in order to confirm and acknowledge that, notwithstanding that GECC is listed as the lending party under the Loan Agreements, effective from June 27, 2003, the lender under the Loan Agreements has been Lender."

US Federal Income Tax Law

21. Both parties adduced expert evidence on US federal income tax law. Abraham N M Shashy Jr produced a report, dated 21 March 2019, on behalf of GEFI and Michael J Miller prepared a report, dated 23 May 2019, and a supplemental report, dated 18 February 2021, for HMRC.

22. On 12 March 2021 Mr Miller produced a second supplemental report, which was updated on 13 March 2021, in response to a paragraph in GEFI's skeleton argument which referred to the expert evidence confirming that there was "no doubt" that GEFI would be regarded as a resident of the United States by the US revenue authorities for the purposes of Article 4(1) of the Convention. However, in his supplemental report Mr Miller confirmed that for the "avoidance of doubt" he had, "not been asked to consider" and had "reached no conclusion as to whether GEFI Ltd. was a resident of the United States, or whether the IRS, the US Revenue Authority, considered GEFI Ltd. to be a resident of the United States, under Article 4(1) of the Convention, on the facts presented where the share staple did in fact occur."

23. The two experts prepared a Joint Memorandum, dated 31 July 2019, confirming that, although each had been asked different questions in their respective instructions, there were no points of material disagreement between them with regard to the content or conclusions of either report.

24. On the basis of this expert evidence it is clear that US federal income tax law distinguishes between "domestic" and "foreign" corporations. Under s 7701(a)(4) of the US Internal Revenue Code of 1986, as amended (the "Code"), a "domestic" corporation is a corporation "created or organized under the laws of the United States" or in any one of the fifty states or the District of Columbia. A "foreign" corporation is defined by s 7701(a)(5) of the Code as any corporation that is not a domestic corporation.

25. Unlike a domestic corporation, which is liable to tax on its worldwide income under s 11 of the Code, a foreign corporation is generally subject to US federal income tax on two classes of income, first in the case of a foreign corporation that is engaged in the conduct of a trade or business within the US at some point during the taxable year, income that is considered to be "effectively connected" with such US trade or business; and secondly interest, dividends, rents, salaries, wages, premiums, annuities and various other types of income from US sources that are considered to be "fixed or determinable annual or periodical" and that are not effectively connected income.

26. However, s 269B of the Code ("s 269B") provides:

> "**(a) General rule**.— Except as otherwise provided by regulations, for purposes of this title—
>
> > **(1)** if a domestic corporation and a foreign corporation are stapled entities, the foreign corporation shall be treated as a domestic corporation.
>
> …
>
> **(c) Definitions.**— For purposes of this section—

> **(1) Entity**.— The term "entity" means any corporation, partnership, trust, association, estate, or other form of carrying on a business or activity.
>
> **(2) Stapled entities.**— The term "stapled entities" means any group of 2 or more entities if more than 50 percent in value of the beneficial ownership in each of such entities consists of stapled interests.
>
> **(3) Stapled interests.**—Two or more interests are stapled interests if, by reason of form of ownership, restrictions on transfer, or other terms or conditions, in connection with the transfer of 1 of such interests the other such interests are also transferred or required to be transferred.
>
> **(d) Special rule for treaties.**— Nothing in section 894 or 7852(d) or in any other provision of law shall be construed as permitting an exemption, by reason of any treaty obligation of the United States heretofore or hereafter entered into, from the provisions of this section.
>
> **(e) Subsection (a)(1) not to apply in certain cases**.—
>
> **(1) In general.**— Subsection (a)(1) shall not apply if it is established to the satisfaction of the Secretary that the domestic corporation and the foreign corporation referred to in such subsection are foreign owned.
>
> **(2) Foreign owned.**—For purposes of paragraph (1), a corporation is foreign owned if less than 50 percent of—
>
> (A) the total combined voting power of all classes of stock of such corporation entitled to vote, and
>
> (B) the total value of the stock of the corporation,
>
> is held directly (or indirectly through applying paragraphs (2) and (3) of section 958(a) and paragraph (4) of section 318(a)) by United States persons (as defined in section 7701(a)(30))."

27. As a result of the amendment by GEFI Inc to its Certificate of Incorporation (as described in paragraph 4(8), above) and the adoption by GEFI of Article 8.3A to its amended Articles of Association (as described in paragraph 4(15), above), the shares of GEFI were "stapled" to the stock of GEFI Inc. As such, GEFI and GEFI Inc were stapled entities throughout the relevant period and, as the exceptions in s 269B(e) do not apply, GEFI was treated by s 269B(a)(1) as a domestic corporation for the purposes of US federal income tax law and therefore liable to US federal income tax on its worldwide income.

28. In his report Mr Shashy stated that:

> "… there is no material difference between a corporation that is actually domestic (and viewed as a resident in the US, that is, subject to taxation on worldwide income) and one that is deemed to be domestic for purposes of US tax law (and similarly viewed as a resident of the US, in the sense that it is subject to taxation on worldwide income)."

Mr Miller, in his report, confirmed that, for US tax purposes, the share staple had an analogous effect to incorporation in the US.

29. However, there are differences in the treatment for US federal income tax purposes of a stapled foreign corporation treated as a domestic corporation under s 269B to that of an actual domestic corporation. By regulation, a stapled foreign corporation is treated as a foreign corporation for purposes of the US branch profits tax under s 884 of the Code and is unable to join in the filing of a consolidated return under s 1501 of the Code. Also, under s 269B(d) a

stapled foreign corporation is precluded from a claim to an exemption from US income tax by reason of any treaty obligation of the US. Mr Miller's report notes:

> "11. Similarly, Treasury Regulations section 1.269B-I(e)(1) provides that "A stapled foreign corporation that is treated as a domestic corporation under section 269B may not claim an exemption from US income tax or a reduction in US tax rates by reason of any treaty entered into by the United States." The Treasury Regulations illustrate this rule with the following example, which seems on point here:
>
> > **Example.**
> >
> > FCo, a Country X corporation, is a stapled foreign corporation that is treated as a domestic corporation under section 269B. FCo qualifies as a resident of country X pursuant to the income tax treaty between the United States and Country X. Under such treaty, the United States is permitted to tax business profits of a Country X resident only to the extent that the business profits are attributable to a permanent establishment of the Country X resident in the United States. While FCo earns income from sources within and without the United States, it does not have a permanent establishment in the United States within the meaning of the relevant treaty. Under paragraph (e)(1) of this section, however, FCo is subject to US Federal income tax on its income as a domestic corporation without regard to the provisions of the US-Country X treaty and therefore without regard to the fact that FCo has no permanent establishment in the United States.
>
> 12. It bears emphasizing that, in the above example, FCo is taxed on its worldwide income regardless of whether such imposition of US tax is permitted under the US-Country X treaty."

30. Additionally, although he was not asked to do so, Mr Miller considered it "appropriate" for him, "to point out" that the US Treasury Department "appears to take the view" that a stapled Dutch corporation is a resident of the US within the meaning of Article 4(1) of the income tax treaty in effect between the US and the Netherlands that was signed on 18 December 1992.

31. His report stated:

> "30. Article 4(1) of the 1992 US-Netherlands Treaty generally provides (in pertinent part) that "the term 'resident of one of the States' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature, or that is an exempt pension trust, as dealt with in Article 35 (Exempt Pension Trust) and that is a resident of that State according to the laws of that State, or an exempt organization, as dealt with in Article 36 (Exempt Organizations) and that is a resident of that State according to the laws of that State."
>
> 31. Like Article 4(1) of the Convention, Article 4(1) of the US-Netherlands Treaty requires that the criterion for taxation, if not expressly listed, must be "of a similar nature" to the listed criteria. In this context, a Memorandum of Understanding accompanying the 1992 U.S.-Netherlands Treaty (the "1992 MOU") provides in part as follows:
>
> > **II. In reference to paragraph 4 of Article 4 (Resident).**
> >
> > It is understood that, if a company is a resident of the Netherlands under paragraph 1 of Article 4 (Resident) and, because of the

> application of Section 269B of the Internal Revenue Code, such company is also a resident of the United States under paragraph 1 of Article 4 (Resident), the question of its residency for the purposes of the application of the Convention shall be subject to a mutual agreement procedure as laid down in paragraph 4 of Article 4 (Resident).
>
> 32. The 1992 MOU appears to presuppose that a stapled Dutch corporation is a resident of the United States under Article 4(1) of the 1992 US-Netherlands Treaty.
>
> 33. In 2004, the 1992 US-Netherlands Treaty was amended by a protocol, but the general definition of the term "resident of one of the States" as set forth above was not changed. A new Memorandum of Understanding accompanied the 2004 protocol and the updated Memorandum of Understanding includes a provision regarding stapled entities that is identical in all material respects to the above-quoted provision from the 1992 MOU."

32. Both experts having addressed whether the LP would have been considered to have been engaged in or carrying on a trade of business in the US, as recognised by US domestic law, concluded that GEFI would, if it was not treated as a domestic corporation under s 269B, be treated as engaged in trade or business within the US if the LP was considered to be engaged in trade or business. However, both experts agreed that whether the LP was so engaged was extremely fact dependent and, given the general rule that there would need to be some regular and continuous activity, neither considered it likely that the level of activity conducted by the LP, even if all within the US, would be sufficient for it to be regarded under US domestic law as being engaged in a trade of business in the US and, accordingly Article 7 of the Convention (business profits) would not apply.

Delaware Law

33. Although HMRC did not adduce any expert evidence on Delaware law, GEFI instructed Melissa Stubenberg, a director of the Delaware law firm of Richards, Layton & Finger PA, to prepare an expert report on aspects of Delaware partnership law. She confirmed in that report that, under Delaware partnership law (the Delaware Revised Uniform Limited Partnership Act (6 Del.C.) that:

> (1) a Delaware limited partnership is a separate legal entity which may contract, sue and be sued and hold title to property in its own name;
>
> (2) the general partner in a Delaware limited partnership is an agent of the limited partnership for the purposes of its business, purposes or activities and is liable for all obligations of the limited partnership;
>
> (3) a limited partner in a Delaware limited partnership is not liable for the obligations of the limited partnership unless it is also a general partner or, in addition to the exercise of the rights and powers of a limited partner, it participates in the control of the business; and
>
> (4) a Delaware limited partnership will be dissolved automatically where, in a limited partnership with two partners, one partner transfers its interest in the limited partnership to the other partner.

THE ISSUES

34. I now turn to the issues as set out in the statement of agreed facts and issues (see paragraph 3(8) and (9), above):

(1) Did the share staple between GEFI and GEFI Inc have the effect that GEFI was "*a resident of the [US]*" for the purposes of Article 4 of the Convention throughout the relevant period?

(2) If the answer to Issue 1 is "no", then:

(a) did GEFI carry on business in the US through a permanent establishment situated therein within the terms of Article 7; and

(b) if GEFI did carry on business in the US through a permanent establishment situated therein,

(i) was US tax payable under the laws of the US in accordance with the Convention for the purposes of Article 24(4)(a) of the Convention; and

(ii) if so, is the UK required, pursuant to Article 24(4)(a) of the Convention, to give relief against US tax levied?

35. As in the hearing, I shall refer to issue (1) as the "Residence Issue" and issue (2) as the "Permanent Establishment Issue".

ISSUE 1 – RESIDENCE ISSUE

36. It is common ground that GEFI was resident in the UK throughout the relevant period. The issue between the parties is whether it was also resident in the US during that period for the purposes of Article 4 and, in particular, whether Article 4(1) should be interpreted to include a share staple as "*any other criterion of a similar nature*" to domicile, residence, citizenship, place of management and place of incorporation under which a person, in this case GEFI, is liable to tax in the US on its worldwide income.

Law

37. Article 4 of the Convention provides:

> **4. Residence**
>
> 1. Except as provided in paragraphs 2 and 3 of this Article, the term "resident of a Contracting State" means, for the purposes of this Convention, any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State.
>
> …
>
> 5. Where by reason of the provisions of paragraph 1 of this Article a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the mode of application of this Convention to that person. If the competent authorities do not reach such an agreement, that person shall not be entitled to claim any benefit provided by this Convention, except those provided by paragraph 4 of Article 24 (Relief from Double Taxation), Article 25 (Non-discrimination) and Article 26 (Mutual Agreement Procedure).

38. In *Fowler v HMRC* [2021] 1 All ER 97, [2020] UKSC 22 Lord Briggs (with whom Lord Hodge, Lady Black, Lady Arden and Lord Hamblen agreed) observed, at [16] that:

> "Guidance as to how the Treaty is to be interpreted as a whole is to be found in the Vienna Convention on the Law of Treaties, concluded in May 1969, in OECD commentaries on the OECD Model Tax Convention ("the MTC"), on

which the Treaty is based, and in some UK authorities. Beginning with the Vienna Convention, article 31 provides, so far as is relevant, that:

> '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. …
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.'

He continued, at [18], by explaining that although the OECD Commentaries are updated from time to time and may post-date a particular double taxation treaty they are nevertheless to be given such persuasive force as aids to interpretation as the cogency of their reasoning deserves.

39. Article 4(1) of the 2000 version of the OECD Model Tax Convention ("MTC"), which applied when the Convention was signed in 2001, provided:

> "(1) For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein."

This differs from Article 4(1) of the Convention in that the MTC does not refer to "*citizenship*" or "*place of establishment*" as relevant criteria for establishing residence which are included in the Convention.

40. The OECD commentary on Article 4 of the MTC states:

> "**Preliminary Remarks**
>
> 1. The concept of "resident of a Contracting State" has various functions and is of importance in three cases:
>
> a) in determining a convention's personal scope of application;
>
> b) in solving cases where double taxation arises in consequence of double residence;
>
> c) in solving cases where double taxation arises as a consequence of taxation in the State of residence and in the State of source or situs.
>
> …
>
> 3. Generally the domestic laws of the various States impose a comprehensive liability to tax — "full tax liability" — based on the taxpayers' personal attachment to the State concerned (the "State of residence"). This liability to tax is not imposed only on persons who are "domiciled" in a State in the sense in which "domicile" is usually taken in the legislations (private law). The cases of full liability to tax are extended to comprise also, for instance, persons who stay continually, or maybe only for a certain period, in the territory of the State. Some legislations impose full liability to tax on individuals who perform services on board ships which have their home harbour in the State.
>
> 4. Conventions for the avoidance of double taxation do not normally concern themselves with the domestic laws of the Contracting States laying down the conditions under which a person is to be treated fiscally as "resident" and, consequently, is fully liable to tax in that State. They do not lay down standards which the provisions of the domestic laws on "residence" have to fulfil in order that claims for full tax liability can be accepted between the

> Contracting States. In this respect the States take their stand entirely on the domestic laws.
>
> 5. This manifests itself quite clearly in the cases where there is no conflict at all between two residences, but where the conflict exists only between residence and source or situs. But the same view applies in conflicts between two residences. The special point in these cases is only that no solution of the conflict can be arrived at by reference to the concept of residence adopted in the domestic laws of the States concerned. In these cases special provisions must be established in the Convention to determine which of the two concepts of residence is to be given preference."

41. In relation to paragraph 4(1) of the MTC the OECD Commentary states:

> "8 Paragraph 1 provides a definition of the expression "resident of a Contracting State" for the purposes of the Convention. The definition refers to the concept of residence adopted in the domestic laws (cf Preliminary remarks). As criteria for the taxation as a resident the definition mentions: domicile, residence, place of management or any other criterion of a similar nature. As far as individuals are concerned, the definition aims at covering the various forms of personal attachment to a State which, in the domestic taxation laws, form the basis of a comprehensive taxation (full liability to tax). It also covers cases where a person is deemed, according to the taxation laws of a State, to be a resident of that State and on account thereof is fully liable to tax therein (eg diplomats or other persons in government service). In accordance with the provisions of the second sentence of paragraph 1, however, a person is not to be considered a "resident of a Contracting State" in the sense of the Convention if, although not domiciled in that State, he is considered to be a resident according to the domestic laws but is subject only to a taxation limited to the income from sources in that State or to capital situated in that State. That situation exists in some States in relation to individuals, eg in the case of foreign diplomatic and consular staff serving in their territory. According to its wording and spirit the provision would also exclude from the definition of a resident of a Contracting State foreign-held companies exempted from tax on their foreign income by privileges tailored to attract conduit companies. This, however, has inherent difficulties and limitations. Thus it has to be interpreted restrictively because it might otherwise exclude from the scope of the Convention all residents of countries adopting a territorial principle in their taxation, a result which is clearly not intended.
>
> …
>
> 8.2 Paragraph 1 refers to persons who are "liable to tax" in a Contracting State under its laws by reason of various criteria. In many States, a person is considered liable to comprehensive taxation even if the Contracting State does not in fact impose tax. …"

42. Paragraphs 27 to 32 of the OECD Commentary set out 'Reservations on the Article' by various countries. Canada reserves the right to use the place of incorporation or organisation with respect to company and failing that deny dual resident companies the benefits under the Convention (paragraph 27). Japan and Korea reserve their position on the rights under Article 34 and other Articles in the MTC and instead of "place of effective management" wish to use in their conventions the term "head or main office" (paragraph 28). France reserves the right to amend the Article in its tax conventions to specify that French partnerships must be considered as residents of France (paragraph 29). Turkey reserves the right to use the "registered office" criterion in addition to the "place of effective management" for determining the residence of a person other than an individual (paragraph 30). Mexico and the US reserve

the right to use a place of incorporation test and failing that they deny dual resident companies benefits (paragraph 31). Germany reserves the right in relation to a partnership that is deemed to be a resident of the Contracting State where its effective management is situated (paragraph 32).

43. The expression "*any other criterion of a similar nature*" has been the subject to academic consideration.

44. Marcel Widrig, in the chapter "*The Expression 'by reason of His Domicile, Residence, Place of Management ….' As Applied to Companies*" in Guglielmo Maisto's *Residence* of *Companies under Tax Treaties and EC Law* (BFD, 2009), refers to the three criteria specified in the OECD MTC rather than those of the Convention and states:

> "**8.1 Introduction**
>
> …
>
> Since the concept of residence in the OECD M[T]C refers to the concept of residence adopted in the domestic laws, the OECD M[T]C lists a number of connecting criteria that are typically used in the domestic laws for defining residence. These criteria are domicile, residence, place of management or any other criterion of similar nature. However, there are countries that provide for different connecting criteria in their domestic laws that may result in amendments in their respective double tax treaties compared to the OECD M[T]C.
>
> …
>
> **8.2. Role of domestic law in connection with connecting factors**
>
> …
>
> Generally speaking, residence for the purpose of the OECD M[T]C means a personal attachment to a State which leads to a comprehensive, or "full tax liability".
>
> …
>
> 8.2.4. Meaning of "other criteria of similar nature"
>
> The term 'other criteria of similar nature' has to be interpreted in the context of the other examples of connection criteria referring to domestic tax laws. Any other criterion next to domicile, residence or place of management which leads to unlimited liability to tax according to domestic law has to be similar to one of these three connecting criteria. All the three connecting criteria have to a certain extent a local connection, meaning that the term 'other criteria of similar nature' has to have a certain local character of a factual nature.
>
> …
>
> On the other hand, a criterion which leads to taxation but not on a comprehensive basis may not be considered as criterion of similar nature. As such, being engaged in a trade or business in the United States leads to taxation of income related thereto but the engagement in a trade or business is not considered a criterion of similar nature since no full tax liability results thereof."

45. Having discussed the position in France and Italy, Widrig continues:

> "Contrary to this, the law of incorporation of a company is according to doctrine not a criterion similar to one of the listed connection criteria of Art. 4(1) OECD M[T]C because it lacks the effective personal attachment to a territory. The place of incorporation is similar to nationality, which does not

need to have any personal connection with a given territory contrary to the connecting criteria of residence, domicile and place of management. …

Finally, the mere recognition of a company by the international private law of the country of activity is not a criterion of similar nature, either."

46. Widrig concludes the chapter by stating:

"The connecting criteria "domicile, residence, place of management or any criterion of a similar nature" in the OECD M[T]C ensure that only companies that have unlimited liability to tax based on sufficient local connection are entitled to double tax treaty benefits. Since these connecting criteria refer directly to domestic tax laws, they have to be interpreted according to domestic rules.

…

It is a generally accepted view that the term "or any criterion of a similar nature" includes the statutory seat or a criterion with a similar factual nature. This holds also true in case of deemed residence rules to the extent the underlying connecting criterion has a certain local nexus. The place of incorporation alone, however, is typically not considered as a criterion of sufficient local connection. Accordingly, the United States as well as Canada, which both connect unlimited liability to tax to the place of incorporation, reserved their right to use this criterion as well in their double tax treaties. With the limitation on benefits tests introduced in its double tax treaties, the United States achieves a local connection of the company applying for double tax treaties as well."

47. *Klaus Vogel on Double Taxation Conventions*, which like Widrig refers to the OECD MTC criteria, states:

"56. Domestic tax provisions contain several further connecting factors that also give rise to full liability to tax (eg, nationality, unlimited tax liability on request, deemed full liability to tax of diplomats, place of incorporation or even marriage to a resident). However, as mentioned before (at m.no. 49), the reference in Article 4(1) OECD and UN MC to the domestic laws of the Contracting States is not unqualified (ie, not all connecting factors giving rise to full liability to tax are sufficient). Rather, the connecting factors have to be 'of a similar nature' to the listed connecting factors: domicile, residence and place of management.

57. There are two possibilities for interpreting the term 'of a similar nature': Under a (broader) functional interpretation, any domestic feature triggering unlimited tax liability is sufficient. In contrast, a (narrower) territorial understanding requires both unlimited liability to tax and a territorial connection between the taxpayer and the State concerned. In our view the territorial interpretation is preferable. All other connecting factors listed in Article 4(1) OECD and UN MC contain a territorial link between the taxpayer and the State taxing his worldwide income. Furthermore, the functional interpretation would reduce the listed connecting factors to mere examples of 'liable to tax' without any additional merit Not requiring a territorial connection of any kind between the taxpayer and the State would also blur the line between the source State and the residence State."

Vogel continues in relation to Nationality/Citizenship:

"60. *cc*. *Not Optional Unlimited Tax Liability*. Provisions of domestic law that deem a person to be fully liable to tax generally do not qualify as a similar criterion. They cover cases in which a person generates no income in his

> residence State, but derives income in another State, which may be taxed there in an unlimited manner. In such circumstances, the residence State may find itself unable to take the personal circumstances into account for taxation purposes. Such provisions are contained in the domestic laws of EU Member States as a result of the ECJ's judgments in *Schumacker* and *Gerritsse*. The link is established through income derived rather than a personal connection to a State so that there is no sufficient territorial link to the State concerned. Moreover, the provisions often do not give rise to comprehensive taxation, but are limited to taxation from a 'source' in any such State.
>
> 61. *dd. Neither Nationality/Citizenship nor Listing in an Official Register nor Marriage to a Resident.* Some States, like the US, base overall taxation on nationality. Admittedly. nationality constitutes a strong connection between a country and an individual: It is a long-standing link, not easy to acquire anew and several civil rights, such as the right to vote, are based on it. However, it does not create a territorial link. A national of a country may never have set foot on that State's territory (eg, when born in a foreign country). Therefore, nationality often is referred to as the prototype of a personal or legal – but not territorial – link to a State. This means that nationality – unless stated otherwise in the treaty – is insufficient for establishing residence. Indeed, the US does not consider nationality as a territorial criterion. It instead establishes an alternative connecting factor in addition to residence, which is mentioned expressly in Article 4(1) [of the MTC].
>
> 62. In some countries, residence status may stem from registration in an official register (eg, in Italy, residence can be based on a listing in the official register of the Italian resident population, creating an irrebuttable presumption of tax residence for direct tax purposes). Registration does not qualify as a criterion 'of a similar nature' because there is no effective personal attachment to the territory of the State. Neither can the spouse of a taxpayer be considered a resident for tax treaty purposes simply because he is married to a resident of one Contracting State. Just like nationality, it establishes merely a legal or personal rather than a territorial link.
>
> 63. *ee. Not Place of Incorporation.* The place of incorporation as well as other strictly formal connecting factors, like the recognition of a company by the international private law of a country, lack a territorial link and therefore do not qualify as criteria 'of a similar nature'. Similar to nationality with respect to individuals, corporate entities can be incorporated according to the laws of a country where it had no factual presence of any kind (operational, management, etc.). Again, it is a purely legal criterion."

48. I should also mention the 1992 MOU. Mr Miller drew attention to this in his expert report (see paragraphs 30 and 31, above) concluding that it appears to presuppose that a stapled Dutch corporation is a resident of the US for the purposes of the US-Netherlands treaty.

49. Mr Baker submits that the 1992 MOU is clarificatory and confirms that the US authorities regarded such a stapled corporation to be a resident of the US, a position accepted by the Dutch revenue authorities. However, I agree with Ms McCarthy that, in the absence of any similar memorandum between the UK and US, it is not possible to derive any assistance from the 1992 MOU (which was specifically negotiated between the US and the Netherlands), in interpreting Article 4(1) of the Convention.

50. Neither, for that matter, can I derive any assistance from the view of the IRS which would appear, from correspondence referred to me by Mr Baker, to be that it considered GEFI was resident in the US. The correspondence, as Mummery J observed in *Inland Revenue Comrs v Commerzbank AG* [1990] STC 285, at 301-302, in relation to a joint statement issued in

1977 by the IRS and the Board of Inland Revenue setting out their agreement on the treatment of dividends and interest as commercial profits under the Convention:

> "… has no authority in the English courts. It expresses the official view of the Revenue authorities of the two countries. That view may be right or wrong. Although art XXA authorises the competent authorities to communicate with each other directly to implement the provisions of the convention and 'to assure its consistent interpretation and application' it does not confer any binding or authoritative effect on the views or statements of the competent authorities in the English courts."

51. In the absence of any domestic authority in relation to the expression "*any other criterion of a similar nature*", I was referred to a decision of the Supreme Court of Canada, *Crown Forest Industries v Canada* [1995] 2 SCR 802. This case concerned a company, Norsk, incorporated in the Bahamas which had a place of management in the US and contended that it was resident of the US for the purposes of the 1980 Canada-US Income Tax Convention. Article 4 of that Convention provided:

> "For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation or any other criterion of a similar nature, but in the case of an estate or trust, only to the extent that income is derived by such estate or trust is liable to tax in that State, either in its hands or in the hands of its beneficiaries.

It should be noted that this is different from Article 4 of the Convention as, unlike the Convention, it does not exclude from the definition of "resident of a Contracting State" any person who is liable to tax in respect only of income from sources or capital in that State.

52. The Court held that Norsk's liability to US tax did not emanate from its place of management but by its engagement in a trade or business effectively connected to the US. In relation to whether this was a "criterion of a similar nature" Iacabucci J, giving the unanimous judgement of the Canadian Supreme Court, said:

> "39. Nevertheless, the analysis does not end here. Should the respondent successfully demonstrate that "engaged in a business in the US" is a criterion of a nature similar to the enumerated grounds, then Norsk will be deemed to be a resident under the Convention.
>
> I agree with the appellant that the most similar element among the enumerated criteria is that, standing alone, they would each constitute a basis on which states generally impose full tax liability on world-wide income: *Klaus Vogel on Double Taxation Conventions* (1991), at pp. 154-59; Joseph Isenbergh, *International Taxation: U.S. Taxation of Foreign Taxpayers and Foreign Income*, vol. I (1990), at pp. 326-27. In this respect, the criteria for determining residence in Article IV, paragraph 1 involve more than simply being liable to taxation on some portion of income (source liability); they entail being subject to as comprehensive a tax liability as is imposed by a state. In the United States and Canada, such comprehensive taxation is taxation on worldwide income. However, tax liability for the income effectively connected to a business engaged in the US, pursuant to s. 882 of the Internal Revenue Code, amounts simply to source liability. Consequently, the "engaged in a business in the US" criterion is not of a similar nature to the enumerated grounds since it is but a basis for source taxation.
>
> In sum, I endorse the following excerpt of the judgement of Décary JA (at p. 6115):

> ‘To say that Norsk, which is not liable to tax by reason of its place of management, is liable to tax by reason of a criterion of a similar nature because its place of management is one of the factors to be considered in determining the very reason of its liability to tax, ie the conduct of a business ..., is to beg the question and try to enter through a door that has already been closed.’”

53. He continued:

> “45. I accept the appellant and intervener's [the US Government] submission that, since the application of the Convention is to be limited to taxpayers bearing full tax liability in one of the contracting parties, then Norsk cannot benefit from the Convention and is consequently not to be characterized as a resident under Article IV, paragraph 1. As shall become apparent in the discussion *infra*, the courts below departed from the historical *raison d'être* of international tax treaties when proposing that the *Canada-United States Income Tax Convention (1980)*, covers taxpayers liable only to source taxation in one of the contracting parties.”

54. Iacabucci J, after noting the importance of isolating “exactly whom the Convention was intended to benefit” and having considered various Canadian authorities, said:

> “50. … Naturally, were Norsk to be a domestic corporation, it could properly benefit from the Convention since it would be subject to double taxation on the rental income in the U.S. (by virtue of its residency) as well as in Canada (by virtue of the “source” principle).
>
> …
>
> 57. The Commentaries to the OECD Model Convention as well as academic sources indicate that generally the domestic laws of the contracting states employ residence to apply on “full-tax liability”: paragraphs 3 and 8 to the Commentary to Article IV in Nathan Boidman, L. Frank Chopin and Alan W. Granwell, “Tax Effects for Canadians of the New US Code and Treaty Residency Rules (Part Two)” (1985), *14 Tax Mgmt. Int’l J* 183, at pp. 184-85. So, too, does the American Law Institute, *Federal Income Tax Project – International Aspects of United States Income Taxation II – Proposals on United States Income Tax Treaties* (1992), at pp. 127-28:
>
> Under the prevailing practice, a country entering into an income tax treaty extends the benefits of the treaty to a person or entity that is a “resident of (the other) Contracting State”. “Residence”, in turn, is defined in terms of taxing jurisdiction. A person or entity is considered resident in a country if that country asserts an unlimited right to tax his or its income – that is, a right based upon the taxpayer’s personal connection with the country (as opposed to the source of the income or other income or asset-related factors). The test of residence requires that the person or entity claiming treaty benefits be “fully taxable” in the residence country, in the sense of being fully subject to its plenary taxing jurisdiction.
>
> Full tax liability is not satisfied in a case where an entity is liable to tax in a jurisdiction only on a part of its income.
>
> 58. The authority for the proposition that only those who are liable to tax on their world-wide income can be justifiably considered residents for the purposes of international taxation conventions is found in the first sentence in Article 4 of the OECD Model Convention and the absence of the second sentence in the *Canada-United States Income Tax Convention (1980)* does not detract therefrom. This is because the second sentence is relevant to a situation

> in which a person is considered a resident under domestic law but where that person, by reason of a special privilege, nevertheless is not subject to tax on the basis of world-wide income. Paragraph 8 of the Commentary on Article 4 of the OECD Model Convention addresses this point"

55. The material parts of paragraph 8 of the OECD commentary to which Iacabucci J, referred are set out above (in paragraphs 41). Having then discussed the UN Model Convention, he continued:

> "62. … In this connection, I find persuasive the submission that only those corporations that are liable to taxation for the full amount of their world-wide income meet the definition of "resident" in the *Canada-United States Income Tax Convention (1980).* This appears to me to be the intention of the contracting parties.

56. Iacabucci J concluded, at [68]:

> "2. As such, the only way for Norsk to benefit from residency status under the Convention is if source taxation on a business effectively connected with the contracting party constitutes a criterion similar to the other enumerated criteria in Article IV (residence, place of management, place of incorporation, domicile). It is not similar, since all of the other criteria constitute grounds for taxation on world-wide income, not just source income.
>
> 3, The parties to the Convention intended only that persons who were resident in one of the contracting states and liable to tax in one of the contracting states on their "world-wide income" be considered "residents" for purposes of the Convention."

Discussion and Conclusion

57. Mr Baker contends that a share staple under s 269B of the Code falls within the expression "*any other criterion of a similar nature*" as it is a criterion enacted under the domestic law of a contracting state (the US) for the imposition of full or worldwide taxation. The connecting factors chosen, domicile, residence, incorporation etc, all impose worldwide taxation and are, Mr Baker submits, consistent with the OECD wording and the Convention which, in addition to the connecting features of the OECD MTC, include citizenship and incorporation. This approach, he says, is "fully supported" by the OECD commentary, which does not refer to a territorial link or connection and emphasises full or worldwide taxation. However, if the expression "*any other criterion of a similar nature*" does impose a territorial link or connection, Mr Baker submits that this requirement is satisfied by the share staple.

58. In support of his primary argument Mr Baker contends that paragraphs 4 and 8 of the OECD Commentary establish two points "very clearly". First, that it is a matter of domestic law whether or not full or worldwide tax liability is imposed on a particular company; and secondly, that it is a criterion under domestic law which imposes a worldwide tax liability, including any rule that deems a person to be a resident that is the key to understanding the phrase "*residence*" including "*any other criterion of a similar nature*". He submits that such an approach is consistent with the decision of the Supreme Court of Canada in *Crown Forest*.

59. Ms McCarthy contends that an approach in which the connecting factors, of domicile, residence, citizenship etc, are sufficient in themselves to be "*criterion of a similar nature*" if they have the result of imposing a worldwide tax liability, deprives the words "*by reason of*" of all meaning and reduces the list of connecting factors to mere examples. It also, she says, renders otiose the reservations on Article 4 set out at paragraphs 27 – 32 of the OECD Commentary on Article 4 (see paragraph 42, above) and misinterprets the word "*similar*", as any other criterion which subjects a person to tax on their full or worldwide tax is a criterion of the "*same*" rather than a "*similar*" nature.

60. As such, she submits, for there to be "*criterion of similar nature*" there must, in addition to the imposition of a worldwide liability to tax, also be an attachment or connection to a contracting state.

61. I agree with Ms McCarthy when she says that the construction of Article 4 of the Convention advanced on behalf of GEFI does not require the presence of the words "*by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any criterion of a similar nature*". If these words are omitted a "*resident of a Contracting State*" would, as Ms McCarthy submits, be defined as "*any person who, under the laws of that State, is liable to tax*". As is clear from the second sentence of Article 4(1), this would not include any person liable to tax in that state "*in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State*", ie it would only include as a resident a person liable to full or worldwide taxation.

62. By contrast the construction of Article 4 advanced by HMRC requires both worldwide taxation **and** a connection or attachment to the contracting state concerned. In my judgment, this is the correct approach as it takes into account the common feature or similarity of domicile, residence, citizenship etc, in the context of the Convention, ie that they are all criteria providing, in addition to the imposition of a worldwide liability to tax, a "*connection*" or "*attachment*" of a person to the contracting state concerned. Such an interpretation is consistent with Widrig (see paragraphs 44 - 46, above) and Vogel (see paragraph 47, above) and *Crown Forest* which, as Ms McCarthy submits, when properly understood in context is authority for the proposition that full or worldwide taxation is a necessary feature of the connecting criterion but is not sufficient of itself.

63. Having concluded that "*criterion of a similar nature*" does require a connection or attachment to the contracting state, in this case the US, it is necessary to consider whether, in the present case, such a connection or attachment exists.

64. Mr Baker, relying on the expert evidence, particularly of Mr Miller that, for US tax purposes, the share staple had an analogous effect to incorporation in the US (see paragraph 28, above), says that there was a connection between GEFI and the US not only in the form of stapling to a US corporation, GEFI Inc, but also by GEFI being 100% owned by a US corporation.

65. Ms McCarthy, however, contends that share stapling, although it demonstrates a connection between two entities or more precisely their shareholders, does not represent a connection between a stapled entity, GEFI, and the relevant state, the US. Although her further submission, that, other than the imposition of a worldwide liability to US tax, share stapling has no US law consequences at federal or state level (eg it does not carry with it US filing or reporting obligations or make a stapled overseas company's constitutional documents subject to or dependent on US law), was not supported by evidence, I agree that, given the differences that do exist for tax purposes (see paragraph 29, above) the connection or attachment is between the stapled entities rather than to the country concerned.

66. Therefore, in the absence of the necessary connection or attachment by GEFI to the US, and despite Mr Baker's persuasive submissions to the contrary, I do not consider that GEFI was a resident of the US for the purposes of Article 4 of the Convention by reason of the share staple between it and GEFI Inc. As such it is necessary to consider Issue 2, the Permanent Establishment Issue.

ISSUE 2 – PERMANENT ESTABLISHMENT ISSUE

67. This issue, which arises as HMRC have succeeded on Issue 1, is in two parts:

(a) did GEFI carry on business in the US through a permanent establishment situated therein within the terms of Article 7 (Issue 2(a)); and

(b) if GEFI did carry on business in the US through a permanent establishment situated therein:

(i) was US tax payable under the laws of the US in accordance with the Convention for the purposes of Article 24(4)(a); and

(ii) if so, is the UK is required, pursuant to Article 24(4)(a) give relief against that US tax (issue 2(b)).

Issue 2(a)

68. Issue 2(a) consists of two elements, first whether GEFI carried on business in the US and secondly whether it did so through a permanent establishment there. Taking the second element first, Articles 5, defines "permanent establishment" for Convention purposes as "*a fixed place of business through which the business of an enterprise is wholly or partly carried on*."

69. Although Mr Baker contends that it is common ground that GEFI through its participation in the LP had a fixed place of business in the US, the offices available to GEFI Inc the general partner of the LP in Stamford, Connecticut, Ms McCarthy explained that HMRC do not accept that such common ground exists and that its position remained as set out in the letter, dated 5 October 2015, to GEFI's solicitors, which stated:

> "… we would say that, although HMRC has, with caveats, accepted that there was space available to the LP in GE's offices, we cannot see that there was any activity there that amounted to carrying on a business."

HMRC's statement of case, at paragraph 38, reiterated the position stating:

> "In the present case, HMRC contends that even if the GE offices in Stamford qualify as the only viable candidate for a US fixed place of business of the LP (because GE staff there acted on behalf of the General Partner of the LP), [GE]FI's activities in the US were too limited to amount to carrying on a "*business*" there."

Additionally, the Statement of Agreed Facts and Issues does not refer to GEFI as having a permanent establishment or fixed place of business in the US as would have been expected had this been common ground between the parties.

70. However, Ms McCarthy confirmed that, should I conclude that the activities of the LP are sufficient to amount to the carrying on of a business, there is no separate dispute as to whether that business is carried on in Stamford, Connecticut, or some other location.

71. As such, it is therefore necessary to consider what is in effect the only issue between the parties under issue 2(a), namely whether, as it contends, GEFI by its participation in the LP carried on a business in the US or, as HMRC argue, it did not.

Law

72. The term "business", is defined by Article 3(2)(d), as including, "*the performance of professional services and other activities of an independent character*". Article 3(2), which contains a general rule for interpretation of undefined terms, provides that the term shall:

> … have the meaning which it has at that time under the law of that State for the purposes of the taxes to which this Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

The Commentary to Article 3(1)(h) of the OECD MTC (which is in the same terms as Article 3(2)(d) of the Convention) notes in relation to 'The term "business":

> "10.2 The Convention does not contain an exhaustive definition of the term "business", which under paragraph 2, should generally have the meaning which is has under the domestic law of the State that applies the Convention."

73. Therefore, as it is the UK that is applying the Convention in this case, it is necessary to consider the meaning of "business" as understood in UK law. In relation to this Lord Diplock as observed in *Town Investments Ltd v Department of the Environment* [1978] AC 359, at 383:

> "The word 'business' is an etymological chameleon; it suits its meaning to the context in which it is found. It is not a term of legal art and its dictionary meanings, as Lindley LJ pointed out in *Rolls v Miller* (1884) 27 Ch D 71, 88, embrace
>
> > 'almost anything which is an occupation, as distinguished from a pleasure – anything which is an occupation or duty which requires attention is a business.'"

74. In *South Behar Railway Company Ltd v Inland Revenue Comrs* [1925] AC 476 Lord Sumner, at 487, who considered that a company which received an annuity and declared dividends was "carrying on any trade or business or any undertaking of a similar character, including the holding of investments" within the meaning of the s 52(2)(a) of the Finance Act 1920, did not attach "much importance to the domestic operations of declaring and paying dividends, remunerating directors and presenting reports, but the operation of receiving and thus discharging the annuity payments goes on continuously, and, however simple, it is not a mere passive acquiescence."

75. The issue of whether a company ("MML") had carried on any business "within the ordinary meaning of the word" arose in *Salaried Persons Postal Loans Ltd v HMRC* [2005] STC (SCD) 851. The Special Commissioner (Dr Avery Jones), having reviewed the relevant authorities, said, at [10]:

> "I derive the following principles from the authorities.
>
> (1) A company need not carry on a business (indeed that is assumed by s 13) but there is a prima facie inference that it does so when it puts its property to gainful use by letting it out for rent (*American Leaf*). The inference is a strong one, see the first paragraph from the quotation from American Leaf.
>
> (2) It may be relevant that the company was carrying out one of the principal objects stated in its memorandum (*American Leaf* in distinguishing an observation of Pollock MR in *IRC v Westleigh Estates Co Ltd* [1924] 1 KB 390 at 409, 12 TC 657 at 686; *Land Management Ltd* [2002] STC (SCD) 152 at [24] where the Special Commissioner took into account that the company was incorporated for carrying on a business of an investment nature).
>
> (3) The act of receiving bank deposit interest having ceased one trade before starting another was not the carrying on of a business (*Jowett*).
>
> (4) In a case such as the present the only business that MML might be carrying on is that of investment (*Jowett*).

Applying these principles, the Special Commissioner concluded that the merely renting out property in that case was not a business.

76. In an appeal against that decision (*HMRC v Salaried Persons Postal Loans Ltd* [2006] STC 1315), which was essentially on *Edwards v Bairstow* grounds, Lawrence Collins J, observed:

> "54. Whether or not a business is carried on is a question of fact, and the fact that the company receiving rents in *American Leaf* was held to be carrying on a business does not mean that MML is carrying on a business or that the Special Commissioner should have decided that the facts of this case were closer to those of *Land Management Ltd* than to those of *Jowett v O'Neill*. 'Rents' may constitute income from a source consisting of a business; and will do if they are received in the course of carrying on a business of putting the taxpayer's property to profitable use by letting it out for rent (see *American Leaf Blending Co Sdn Bhd v Director-General of Inland Revenue* [1978] STC 561 at 564-565, [1979] AC 676 at 683). The Special Commissioners' conclusion in *American Leaf* – that, in carrying out the object set out in its memorandum, a company was, as a matter of law, conclusively carrying on a business – was not a conclusion of fact, but of law. The Privy Council would not endorse the view that any isolated act of a kind that is authorised by a memorandum if done by a company necessarily constitutes the carrying on of a business: [1978] STC 561 at 564-565, [1979] AC 676 at 683. The Special Commissioner properly considered the effect of MML's memorandum of association and correctly concluded that it was a relevant but (implicitly) not a determinative factor: see also *John M Harris (Design Partnership) Ltd v Lee (Inspector of Taxes)* [1997] STC (SCD) 240 at 243. In the case of a company (by way of contrast with an individual) letting out property for rent, it may not be easy to envisage circumstances, in practice, which would displace the prima facie inference that the company was carrying on a business (see [1978] STC 561 at 565, [1979] AC 676 at 684). The Privy Council did not say that this inference could not be displaced and, indeed, envisaged that it might be rebutted (ibid). In MML's case, the facts are strong enough to and do rebut the prima facie inference; and having properly considered all the relevant facts and the strength of the inference from *American Leaf*, the Special Commissioner was entitled to decide the issue in the respondent's favour."
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> …
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> 59. The terms and expressions 'trading' and 'carrying on business' used in s 13 are not used or used only in contradistinction to dormancy. The heads of business envisaged by tax law are 'trades, professions, vocations and investment'; and there is not a general head of business which falls within (in whole or in part) the alleged lacuna between trading, carrying on business or dormancy: *Jowett (Inspector of Taxes) v O'Neill and Brennan Construction Ltd* [1998] STC 482 at 487 and 489. But there may be the receipt of income or gain otherwise than from a trade, profession, vocation or investment and outside the context of dormancy. In the circumstances, the Special Commissioner considered the correct question and he arrived at the correct answer."

77. Having noted, at [69], that the fact that its memorandum permitted the letting of property was not determinative and did not, "necessarily lead to the conclusion that MML carries on or has carried on a business", Lawrence Collins J continued:

> "70 … The Special Commissioner was entitled to take into account that the lettings of the West Regent Street premises took place in 1966 (over 30 years before the years under consideration) and, since cessation of the money lending trade on November 30, 1995, there had been nothing indicative of business in MML.
>
> …
>
> 73. The Special Commissioner was entitled, in my judgment, to come to the view on the facts that MML did not carry on an investment (or any other)

> business, especially in the light of the following matters: MML did not purchase the West Regent Street premises as an investment; it did nothing in the relevant years except receive the rents from its agent, and authorise a rent review; and the premises were a small part of its assets. This was a case of a company left with former trading premises which it let out without any active participation or management."

78. In *Jowett (HM Inspector of Taxes) v O'Neill & Brennan Construction Ltd* (1988) 70 TC 566, a case cited by the Special Commissioner, a company had ceased a business and had, before the commencement of a new activity, deposited £100,000 at a bank. The issue before Park J, on appeal from the Special Commissioner (Mr Shirley), was whether the company was carrying on a business given its counsel had conceded that it was not carrying on an investment business merely by having its money on deposit at the bank. At 575 Park J said:

> "I have already referred to the *American Leaf Blending* case [1979] AC 676. There is nothing in that case which means that Mr Shirley must have misdirected himself in law. The effect of the particular sentence on which the Revenue principally rely (which I have quoted earlier in this judgment) both taken by itself and read with the surrounding passages, all of which Mr Shirley sets out in his decision, is that although the normal conclusion when a company lays out its assets and earns an income return is that it is carrying on a business, that is not inevitably so as a matter of law. There can be exceptional cases where it is not. Mr Shirley did not expressly say that this was one of them, but that is clearly implicit in his decision. In my judgment, it was a view which, on the facts of the case, he was entitled to take. Indeed, I would have taken the same view myself."

79. In *Ramsay v HMRC* [2013] UKUT 226 (TCC) Judge Berner considered what was meant by "business" in relation to the transfer to a company of a business as a going concern in exchange for shares in order to qualify for roll-over relief in accordance with s 162 of the Taxation of Chargeable Gains Act 1992 ("TCGA"). It was not disputed that Mrs Ramsay and her husband spent around 20 hours a week on various activities in connection with the letting of a property. At [32] he said:

> "Mr Richard Ramsay, appearing for Mrs Ramsay, argued that the reference to "some" activity in this passage indicated that only a modest degree of activity was required. I do not accept that submission. The Privy Council was making the point, simply, that mere passive receipt of rent would not normally be regarded as the carrying on of a business, and that it had to be accompanied by some activity, even if that activity were not continuous. It was not setting a quantitative test as to the degree of activity required to cross the threshold; that remains a question of fact."

80. Having noted, at [61] that it "is the degree of activity as a whole which is material to the question whether there is a business, and not the extent of that activity", Judge Berner continued:

> "64. As I have described it earlier, in my judgment the word "business" in the context of s 162 TCGA should be afforded a broad meaning. Regard should be had to the factors referred to in *Lord Fisher*, which in my view (with the exception of the specific references to taxable supplies, which are relevant to VAT) are of general application to the question whether the circumstances describe a business. Thus, it falls to be considered whether Mrs Ramsay's activities were a "serious undertaking earnestly pursued" or a "serious occupation", whether the activity was an occupation or function actively pursued with reasonable or recognisable continuity, whether the activity had a certain amount of substance in terms of turnover, whether the activity was

> conducted in a regular manner and on sound and recognised business principles, and whether the activities were of a kind which, subject to differences of detail, are commonly made by those who seek to profit by them.
>
> 65. In my judgment, taking the activities of Mrs Ramsay as a whole, I am satisfied that these tests are satisfied. Certain of the individual activities by themselves have little impact on the issue, but overall, taking account both of the day-to-day activities, and the work undertaken by Mrs Ramsay in respect of the early refurbishment and redevelopment proposals, I conclude that the activities fall within the tests described in *Lord Fisher*.
>
> 66. There remains, however, the question of degree. That is relevant to the equation because of the fact that in the context of property investment and letting the same activities are equally capable of describing a passive investment and a property investment or rental business. Although resolution of that issue will be assisted by consideration of the *Lord Fisher* factors, to those there must be added the degree of activity undertaken. There is nothing in the TCGA which can colour the extent of the activity which for the purpose of s 162 may be regarded as sufficient to constitute a business, and so this must be approached in the context of a broad meaning of that term.
>
> 67. Applying these principles, in this case I am satisfied that the activity undertaken in respect of the Property, again taken overall, was sufficient in nature and extent to amount to a business for the purpose of s 162 TCGA. Although each of the activities could equally well have been undertaken by someone who was a mere property investor, where the degree of activity outweighs what might normally be expected to be carried out by a mere passive investor, even a diligent and conscientious one, that will in my judgment amount to a business. I find that was the case here"

Discussion and Conclusion

81. Mr Baker submits that the authorities cited above support the proposition that a "business" may have intermittent and quiescent periods and that as GEFI participated in the LP which made and managed a series of loans in excess of $2.8 billion, received very substantial sums by way of interest and made distributions to the partners, it was carrying on a business. In support Mr Baker referred to GEFI's objects in its Memorandum of Association (see paragraph 6, above) which include "very clear" investment business purposes.

82. Although Ms McCarthy contends that GEFI's objects are not relevant and it is the purposes of the LP, as set out in the LP Agreement (see paragraph 7, above) that should be considered, I agree with Mr Baker that, as it is necessary to consider whether GEFI as the beneficial owner of the interest was carrying on a business, its objects should be taken into account but as Lawrence Collins J observed in *Salaried Persons Postal Loans* (see paragraph 76, above), these are not a determinative factor.

83. Although there can be little doubt that the activities of the LP fit the description of a "serious undertaking" it remains necessary to consider the other factors identified by Judge Berner at [64] in *Ramsay*, namely whether these were actively pursued with reasonable or recognisable continuity, whether they had a certain amount of substance in terms of turnover, whether they were was conducted in a regular manner and on sound and recognised business principles, and whether the activities were of a kind which, subject to differences of detail, are commonly made by those who seek to profit by them.

84. While the loans were conducted on sound and recognised business principles and the sums involved clearly substantial, holding five affiliate loans over the course of approximately six years, especially as only three of these originated with the LP is, in my judgment, more of a passive, sporadic or isolated activity than a regular and continuous series of activities. In this

I agree with Ms McCarthy who submits that there is nothing to suggest that personnel or agents acting on behalf of the LP made or conducted continuous and regular commercial activities in the US. All that appears to have happened was that monies were directed straight to GELCO without negotiating terms or the consideration at a director level as would have been expected from a company carrying on commercial activities on sound business principles.

85. This is also apparent from other emails, such as, for example, at paragraph 18, above in which Ms Brajdic, the director of GEFI Inc was content to sign a loan agreement for a substantial sum and only then, seemingly as an afterthought and "out of curiosity", ask for the reason for the transaction.

86. Additionally, the contemporaneous emails in relation to the LP's loans to GELCO indicate that it was not the directors of GEFI Inc but individuals such as Marianne Keegan, Zachary Citron and Robert Tomasetti, all part of the GE tax department, that were concerned with the loan arrangements, the preparation of documents, facilitating their signature by the directors of GEFI Inc and determining appropriate interest rates albeit for benchmarking as opposed to commercial purposes (eg see paragraph 16, above). Although this appears to have been recognised by Mr Citron in his email of 23 October 2006 to Mr Tomasetti and Ms Keegan, in which he says, "although I am prodding this along, please bear in mind this is really something for the US LP to think about and decide" (see paragraph 17, above) it does not appear to have resulted in any further involvement by the directors of GEFI Inc in the transactions.

87. I should also mention that Mr Tomasetti in his email of 14 May 2004 was "not aware of any business purpose requirement" for the refinancing (see paragraph 10, above) and that it was Mr Citron and Mr Tomasetti who were considering who was best to replace Mr Calo as director of GEFI Inc (see paragraph 15, above).

88. Turning then to the chronology of the LP's activities summarised at paragraph 8, above, it would seem that the only "activities" of the LP in 2003 were its formation and the capital contributions of the partners which fall within Lord Sumner's "domestic operations" rather than business activities.

89. In subsequent years the "activities" described in the chronology includes "payment instructions" which occur throughout the relevant period. It explains that these were "typically" signed by management personnel from GE's Treasury, Finance and/or tax departments who were responsible for the transaction concerned. Although subsequently approved by the directors of GEFI Inc who gave their unanimous written consent these payment instructions do not appear represent any management involvement or decision taken by the general partner at the time of the transactions and, as such, cannot be regarded as business activities.

90. Similarly it would seem that the purpose of the board meetings of GEFI Inc was, as can be seen from the minutes of the short meeting held on 25 June 2008 (see paragraph 19, above), to review, approve and ratify the company's past activity rather than make strategic decisions in relation to its current and subsequent dealings. It would appear from those minutes, in the light of the "background information" provided by Mr Tomasetti to the board and his answer to Mr Graham's question that the board had a very limited involvement in the activities of the company, the role of which as lender under the Loan Agreements was not properly recorded until the 'Memorandum of Acknowledgement' of 29 December 2009.

91. Therefore, notwithstanding its objects, and having regard to the degree of activity as a whole, particularly the lack of participation in the strategic direction of the LP by the directors of GEFI Inc, I have come to the conclusion that GEFI was not carrying on a business in the US through its participation in the LP.

Issue 2(b)

92. Having concluded for the reasons above that GEFI did not carry on business in the US it is not necessary to address Issue 2(b), ie whether, if GEFI had carried out business in the US, US tax was payable under US law and if so whether the UK is required under Article 24(4)(a) to give relief against this US tax.

93. However, having heard arguments on this issue, and in case of any further appeal, I have done so, albeit not as comprehensively as might have been the case had I reached a different conclusion in relation to Issue 2(a). Therefore, for the purposes of Issue 2(b) it must be assumed, contrary to my conclusion, that GEFI was at the relevant period carrying on a business through a permanent establishment in the US.

Law

94. Although Article 11(1) provides that interest arising in a contracting state, here the US, and beneficially owned by a resident of the other contracting state, the UK, shall only be taxable in that other state, ie the UK, Article 11(3) provides:

> The provisions of paragraph 1 of this Article shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State, in which the interest arises, through a permanent establishment situated therein, and the interest is attributable to such permanent establishment. In such case, the provisions of Article 7 (Business Profits) of this Convention shall apply.

While this has the effect of changing the taxing rights between the contracting states, under Article 7 such interest is taxable in the state in which it arises as it has an unrestricted taxing right over business profits attributable to a permanent establishment in that state.

95. Article 24 makes provision for relief from double taxation. Under Article 24(4)(a):

> United States tax payable under the laws of the United States and in accordance with this Convention, whether directly or by deduction, on profits, income or chargeable gains from sources within the United States (excluding, in the case of a dividend, United States tax in respect of the profits out of which the dividend is paid) shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the United States tax is computed.

96. As such, and having concluded that, under the Convention, it was UK resident only, GEFI would nevertheless be entitled to a foreign tax credit under Article 24(4) if it was carrying on business in the US through a permanent establishment and tax was payable in the US under the laws of the US and in accordance with the Convention (Articles 11(3) and 7).

Discussion and Conclusion

97. Ms McCarthy contends that, as a matter of US law, the US did not exercise its taxing rights in accordance with the Convention (Articles 11(3) and 7) but on the basis of its domestic legislation. This, she says, is supported by the expert evidence that the US would have concluded under its domestic law that GEFI was not carrying on a business in the US (see paragraph 32, above) and the example given by Mr Miller in his report and his observation that, FCo in the example which is in the same position as GEFI, would be taxed on its worldwide income regardless of whether such imposition of US tax is permitted under the treaty (see paragraph 29, above).

98. However, I agree with Mr Baker who submits that it is not a question US but, as was the case with regard to Issue 2A (see paragraph 73, above), UK law and that the phrase "*in accordance with the this Convention*" requires that the imposition of US tax is not inconsistent

with the Convention (ie is not tax in an amount in excess of that permitted by the Convention or on sums not taxable in the US under the terms of the Convention). As such, it is not necessary to consider the basis on which the US tax is imposed.

99. Such an approach is consistent with the observation of Patten LJ at [26] – [29] in *Smallwood v HMRC* [2010] STC 2045 which was cited by Lord Briggs at [19] in *Fowler* that the Double Tax Treaty (in that case the UK-Mauritius Treaty):

> "… is not concerned to alter the basis of taxation adopted in each of the contracting states as such or to dictate to each contracting state how it should tax particular forms of receipts. Its purpose is to set out rules for resolving issues of double taxation which arise from the tax treatment adopted by each country's domestic legislation by reference to a series of tests agreed by the contracting states under the [Double Tax Treaty]."

As Lord Briggs went on to say, at [34], the "[Convention] is not concerned with the manner in which taxes falling within the scope of the [Convention] are levied".

100. Therefore, if I had come to the conclusion, in relation to Issue 2(a), that GEFI was at the relevant period carrying on a business through a permanent establishment in the US I would also have concluded that tax was payable by GEFI in the US under the laws of the US on that US-source income in accordance with the Convention and that it was accordingly entitled to relief under Article 24(4)(a). However, I did not.

DECISION

101. Therefore, for the reasons above the appeal is dismissed.

102. Although HMRC, in a letter to the Tribunal, sought a determination in principle Mr Baker confirmed that there was no disagreement between the parties as to the figures or US tax. As there would appear to be no reason why I should not do so, I confirm the sums stated in the closure notices as summarised at paragraph 3(12), above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

103. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 08 JUNE 2021