Neutral Citation: [2023] UKFTT 221 (TC)

Case Number: TC08742

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House

Appeal reference: TC/2019/02299

CORPORATION TAX – acquisition of intangible fixed assets and goodwill by a limited liability partnership (the "LLP") from its members, each of whom was a member of the same corporate group – consideration of whether, in calculating the taxable profits of the trade for each member of the LLP, the assets in question should be treated as falling within Part 8 of the Corporation Tax Act 2009 ("Part 8") on the basis that they were not acquired by the LLP from a "related party" – held that, because the first stage in determining the taxable profits of each member of the LLP required the computation of the taxable profits of the trade carried on by the LLP if a UK resident company carried on the trade, the provisions in Part 8 were applicable in calculating the taxable profits of each notional company and should apply in the case of each notional company as if it were an actual company owned in the same way as the LLP – consequently, in this case, because each member was a "related party" of each other member, each member was a "related party" of each notional company for the purposes of Part 8 and the assets in question did not fall within Part 8 as regards each notional company – even if that were not the case, the effect of changes made by the Finance Act 2016 was that, for each notional company, the assets in question fell outside Part 8 so far as concerned debits accruing in relation to the assets on and after the effective date of the changes - appeals dismissed

Heard on: 6 and 7 February 2023
Judgment date: 22 February 2023

Before

TRIBUNAL JUDGE TONY BEARE
MR JOHN WOODMAN

Between

MULLER UK & IRELAND GROUP LLP
MULLER DAIRY UK LIMITED
ROBERT WISEMAN & SONS LIMITED
TM UK PRODUCTION LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Mr Peter Trevett KC and Mr Francis Fitzpatrick KC, instructed by Ernst & Young LLP

For the Respondents: Mr Christopher Tidmarsh KC, Mr Imran Afzal and Mr Tomos Rees, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

Introduction

1. These appeals raise a short but difficult question of statutory interpretation. The enactments to which the appeals relate are all set out in the Corporation Tax Act 2009 (the "CTA 2009") and, in this decision, unless another enactment is expressly specified, all section numbers and references to Parts refer to the relevant section or Part of the CTA 2009.

2. The question arises as a result of debits for tax purposes which have been claimed by the Second Appellant ("MDUK"), the Third Appellant ("RWS") and the Fourth Appellant ("TMUK") by virtue of their membership interests in the First Appellant, a limited liability partnership incorporated under the Limited Liability Partnership Act 2000 (the "LLP").

The facts

3. There is no dispute between the parties in relation to the relevant facts. They have agreed some detailed facts which we have set out for the record in the Appendix to this decision. Those facts constitute our findings of fact for the purposes of these appeals but, for present purposes, it is merely necessary to note the following summary:

Background

(1) the LLP was incorporated on 7 May 2013 by MDUK, RWS and TMUK (together, the "Corporate Members");

(2) each Corporate Member is incorporated and resident for tax purposes in the United Kingdom (the "UK");

(3) both before and after the incorporation of the LLP, each Corporate Member was a wholly-owned direct or indirect subsidiary of TM Dairy (UK Holding) Sarl ("TM Dairy"), an entity incorporated in Luxembourg;

The transactions

(4) on 1 July 2013, the Corporate Members transferred their trades, which, prior to that date, had been individually carried on by the respective companies, and certain assets to the LLP in return for membership units in the LLP pursuant to asset transfer agreements dated 28 June 2013;

(5) the assets transferred by the asset transfer agreements included certain brands, licences and software, together with goodwill. It is agreed that the brands, licences and software fall within the definition of "intangible fixed assets" in Section 712 and that the goodwill falls to be treated for UK corporation tax purposes in the same way as an intangible fixed asset pursuant to Section 715. In the rest of this decision, the brands, licences, software and goodwill so transferred are referred to as the "Material Assets";

(6) the Material Assets were the subject of a valuation report by Ernst & Young LLP dated 28 June 2013 and the values set out in the report were used to determine the values of the Material Assets acquired by the LLP and the membership units in the LLP that each Corporate Member received in return for transferring the Material Assets which it owned;

(7) as a result of the transfers made by the asset transfer agreements:

(a) MDUK received 51.21% of the membership units in the LLP;

(b) TMUK received 19.16% of the membership units in the LLP; and

(c) RWS received 29.63% of the membership units in the LLP;

The accounting

(8) the Material Assets were recorded at their fair value in the accounts of the LLP and then amortised over five years on a straight-line basis in those accounts. It is agreed by the parties that:

(a) each of the LLP's accounts was prepared in accordance with generally-accepted accounting principles ("GAAP");

(b) the values at which the Material Assets were initially recorded in the LLP's accounts were the fair values of the Material Assets at the time of acquisition by the LLP; and

(c) the amortisation which appeared in the LLP's accounts in respect of the Material Assets was appropriately and correctly calculated;

Tax returns

(9) in computing the profits of the LLP, to be included in each Corporate Member's company tax return for the accounting periods ended 31 December 2013, 2014, 2015, 2016, 2017 and 2018, a deduction was taken for the amortisation of the Material Assets;

The dispute

(10) on various dates between 4 June 2015 and 7 December 2018, the Respondents opened enquiries (the "Enquiries") into the tax returns of the LLP for the tax years ended 5 April 2014, 2015, 2016, and 2017 and of the Corporate Members for each Corporate Member's accounting periods ended 31 December 2013, 2014, 2015 and 2016 (together with the tax years ended 5 April 2014, 2015, 2016 and 2017, "the Relevant Periods");

(11) following receipt of an application to the First-tier Tribunal dated 6 November 2018 to close the Enquiries, the Respondents closed the Enquiries into the LLP's tax returns for the Relevant Periods on 23 January 2019 and closed the Enquiries into the Corporate Members' tax returns for the Relevant Periods on 24 January 2019; and

(12) the appeals are against the conclusions stated in, and the amendments made by, the closure notices issued to the LLP and the Corporate Members for the Relevant Periods.

THE LEGISLATION

Introduction

4. The legislation which is relevant to this decision can most conveniently be divided into two groups:

(1) the legislation in Part 17, which sets out how a UK limited liability partnership which is carrying on a trade, and the members of that limited liability partnership, are to be treated for UK corporation tax purposes; and

(2) the legislation in Part 8, which sets out how the gains and losses of a UK resident company in respect of intangible fixed assets and goodwill are to be brought into account for UK corporation tax purposes.

Part 17

5. As regards the first group, Section 1273 provides that a UK limited liability partnership which is carrying on a trade with a view to profit, and the members of that limited liability

partnership, are to be treated for UK corporation tax purposes as if the limited liability partnership were a partnership.

6. Since it is common ground that the LLP was a limited liability partnership which carried on a trade with a view to profit, the LLP was required by Section 1273 to be treated as if it were a partnership. Accordingly, in the rest of this decision, we will refer to the LLP as if it were a partnership. Although we will not refer expressly to limited liability partnerships, as such, all references to a partnership should be taken to include a limited liability partnership carrying on a trade with a view to profit, such as the LLP.

7. Section 1259 is the provision in the CTA which deals with the UK corporation tax treatment of a partnership and its members. It provides as follows:

"1259 Calculation of firm's profits and losses

(1) This section applies if a firm carries on a trade and any partner in the firm ("the partner") is a company within the charge to corporation tax.

(2) For any accounting period of the firm, the amount of the profits of the trade ("the amount of the firm's profits") is taken to be the amount determined, in relation to the partner, in accordance with subsection (3) or (4).

(3) If the partner is UK resident—

(a) determine what would be the amount of the profits of the trade chargeable to corporation tax for that period if a UK resident company carried on the trade, and

(b) take that to be the amount of the firm's profits.

(4) If the partner is non-UK resident—

(a) determine what would be the amount of the profits of the trade chargeable to corporation tax for that period if a non-UK resident company carried on the trade, and

(b) take that to be the amount of the firm's profits.

(5) The amount of any losses of the trade for an accounting period of the firm is calculated, in relation to the partner, in the same way as the amount of any profits…."

8. Section 1259 is subject to certain specific computational rules in Section 1260 but none of those is relevant in the present context.

9. The question of precisely how Section 1259 applies, in particular in the context of Part 8, is the critical point at issue in these proceedings.

10. In this decision, we will refer to:

(1) the injunction in Section 1259(3) above - to the effect that, in the case of a UK resident corporate member of a partnership, the amount which is to be taken to be the partnership's profits is the amount of the taxable profits of the trade "if a UK resident company carried on the trade" – as a "statutory fiction"; and

(2) consequently, the fictional UK resident company in question as the "notional company".

Our use of the latter term is merely for the sake of simplicity. It should not be taken as indicating any conclusion on our part as to the extent to which the UK resident company to which the statutory fiction refers should be seen as having an existence beyond that which is required by the statutory fiction.

11. The CTA 2009 was a consolidating Act. The predecessor provision to Section 1259 was Section 114 of the Income and Corporation Taxes Act 1988 ("Section 114") and the relevant part of Section 114 said as follows:

"So long as a trade is carried on by persons in partnership, and any of those persons is a company, the profits and losses … of the trade shall be computed for the purposes of corporation tax in like manner, and by reference to the like accounting periods, as if the partnership were a company, and without regard to any change in the persons carrying on the trade…".

Part 8

12. The second group of provisions are part of the code set out in Part 8 dealing with the treatment of intangible fixed assets and goodwill for UK corporation tax purposes. In very broad terms, the code so created is an accounting-based regime pursuant to which a corporation tax payer is subject to corporation tax in respect of intangible fixed assets and goodwill on the profits and losses shown in its accounts in respect of those assets.

13. In that regard, Section 729 provides that:

"If in a period of account a loss is recognised in determining a company's profit or loss in respect of capitalised expenditure on an intangible fixed asset –

(a) by way of amortisation ....

a corresponding debit must be brought into account for tax purposes."

14. The regime in Part 8 was introduced by the Finance Act 2002 (the "FA 2002") and took effect from 1 April 2002. Prior to the introduction of the new regime, intangible fixed assets and goodwill were subject to tax on the basis of the generally-applicable historic distinction within the UK tax legislation between capital items and revenue items. In moving to a new accounting-based regime in the FA 2002, it was necessary for Parliament to create a clear divide between those intangible fixed assets and goodwill which were intended to fall within the new regime and those intangible fixed assets and goodwill which were intended to remain subject to the old rules. The provision which Parliament introduced to do this was Section 882. At the time when the LLP acquired the Material Assets from the Corporate Members, the opening part of Section 882 said as follows:

"Application of this Part to assets created or acquired on or after 1 April 2002

(1) The general rule is that this Part applies only to intangible fixed assets of a company ("the company") that—

(a) are created by the company on or after 1 April 2002,

(b) are acquired by the company on or after that date from a person who at the time of the acquisition is not a related party in relation to the company…"

(c) are acquired by the company on or after that date in case A, B or C from a person who at the time of the acquisition is a related party in relation to the company…"

15. Section 882 then went on:

(1) to refer to some additional provisions in Sections 883 to 889 which explained when assets were to be treated as being created or acquired (Section 882(2));

(2) to describe in detail the three cases (A, B and C) referred to in Section 882(1)(c) as set out above (Sections 882(3) to 882(5));

(3) to provide that the general rule was subject to provisions in Sections 890, 892, 893, 895, 897 to 899 and 905 (Section 882(6)); and

(4) to provide that the section did not restrict the application of the new regime to royalties in accordance with Section 896 (Section 882(7)).

16. None of those additional provisions has any direct relevance to the question which is at issue in the present proceedings and therefore we have not set them out in this decision.

17. It may be seen that, in the context of assets which had been acquired by the relevant company, as opposed to assets which had been created by the relevant company – which is to say, in Sections 882(1)(b) and 882(1)(c) – a fundamental threshold question was whether the person from whom the assets had been acquired was a "related party" to the company in question. Assets which had been acquired on or after 1 April 2002 from a person who was not a "related party" to the company in question fell within the regime automatically whereas assets which had been acquired on or after that date from a person who was a "related party" to the company in question fell within the regime only if certain other conditions were met – in other words, fell within Case A, Case B or Case C, as mentioned above.

18. The definition of a "related party" for the purposes of Part 8 as a whole was set out in Section 835. At the time when the LLP acquired the Material Assets from the Corporate Members, the relevant parts of Section 835 provided as follows:

"835 "Related party"

(1) This section explains when a person ("A") is a "related party" in relation to a company ("B") for the purposes of this Part.

(2) In a case where A is a company, A is a related party in relation to B if—

(a) A has control of, or holds a major interest in, B, or

(b) B has control of, or holds a major interest in, A.

(3) In a case where A is a company, A is a related party in relation to B if A and B are both under the control of the same person…"

19. Section 835(3) was expressed to be subject to certain exceptions in Section 835(4) but none of those exceptions is relevant in the present case.

20. At the time when the LLP acquired the Material Assets from the Corporate Members:

(1) Section 836 provided that, for the purposes of Part 8, "control", in relation to a company, "means the power of a person to secure that the company's affairs are conducted in accordance with the person's wishes—

(a) by means of the holding of shares or the possession of voting power in or in relation to the company or any other company, or

(b) as a result of powers conferred by the articles of association or other document regulating the company or any other company";

(2) Section 838 provided that, for the purpose of determining whether a person (A) had "control" of a company, A was to be treated as having rights and powers of a person connected with A; and

(3) Section 843 provided that "a person is connected with a company if they are related parties because of section 835(2) or (3)".

21. For completeness, we should mention that Section 837 contained a definition of a "major interest" – another term to which Section 835 referred – but, for reasons which will become clear, it is unnecessary to set that definition out in this decision.

22. Finally in relation to the legislation in Part 8, certain amendments were made to Section 882 by Section 52 of the Finance Act 2016 (the "FA 2016"). That provision inserted the following new provisions into the Section after Section 882(5):

"(5A) References in this section to one person being (or not being) a related party in relation to another person are to be read as including references to the participation condition being met (or, as the case may be, not met) as between those persons.

(5B) References in subsection (5A) to a person include a firm in a case where, for section 1259 purposes, references in this section to a company are read as references to the firm.

(5C) In subsection (5B) "section 1259 purposes" means the purposes of determining under section 1259 the amount of profits or losses to be allocated to a partner in a firm.

(5D) Section 148 of TIOPA 2010 (when the participation condition is met) applies for the purposes of subsection (5A) as it applies for the purposes of section 147(1)(b) of TIOPA 2010."

23. The above provisions were stated in Section 52(5) of the FA 2016 to "have effect in relation to accounting periods beginning on or after 25 November 2015" and then Sections 52(6) and 52(7) of the FA 2016 provided as follows:

"(6) For the purposes of subsection (5), an accounting period beginning before and ending on or after 25 November 2015 is to be treated as if so much of the accounting period as falls before that date, and so much of the accounting period as falls on or after that date, were separate accounting periods.

(7) An apportionment for the purposes of subsection (6) must be made—

(a) in accordance with section 1172 of CTA 2010 (time basis), or

(b) if that method produces a result that is unjust or unreasonable, on a just and reasonable basis."

24. It may be seen that the new Section 882(5A) introduced by Section 52 of the FA 2016 extended the definition of a "related party" in Section 882 to include circumstances where the "participation condition", as defined in Section 148 of the Taxation (International and Other Provisions) Act 2010 (the "TIOPA"), was met as between the two persons in question. For reasons of brevity, we will not set out in this decision the terms of Section 148 of the TIOPA, together with the interpretive provisions relating to that Section in Sections 157 to 163 of the

TIOPA. It suffices for present purposes to say that each Corporate Member will have satisfied the "participation condition" (as so defined) in relation to the LLP at the time when the LLP acquired the Material Assets because the same company – TM Dairy - was directly or indirectly participating in the management, control or capital of the relevant Corporate Member and the LLP.

THE SUBMISSIONS OF THE PARTIES

Introduction

Common ground

25. At the hearing of these appeals, it was common ground that:

(1) the taxable profits of the trade carried on by the LLP were to be determined, in relation to each Corporate Member, in accordance with Sections 1259 et seq.. This required, in respect of each accounting period of the LLP:

(a) the determination of the amount of the profits of the trade chargeable to corporation tax "if a UK resident company carried on the trade"; and then

(b) the allocation of the profits as so determined between the Corporate Members in accordance with the LLP's profit-sharing arrangements;

(2) the Material Assets were all either "intangible fixed assets" as defined in Section 712 or goodwill to be treated pursuant to Section 715 in the same manner as an intangible fixed asset for the purposes of Part 8; and

(3) the fact that:

(a) the profits of the trade of the LLP chargeable to corporation tax were to be determined if a UK resident company carried on the trade; and

(b) the Material Assets were either intangible fixed assets or fell to be treated as intangible fixed assets

meant that, in the case of the Material Assets, those profits were to be determined in accordance with the provisions of Part 8.

The Appellants' position – a summary

26. The area of dispute between the parties turned on exactly how the provisions of Part 8 should apply in the case of a partnership. In particular, their dispute centred on the manner in which Section 882(1) should apply in the case of a partnership given that that provision limited the application of Part 8 to assets acquired on or after 1 April 2002:

(1) from a person who was not a "related party"; or

(2) from a person who was a "related party" but only in one of the three circumstances set out in Section 882.

27. Mr Trevett, who was representing the Appellants, submitted that, to the extent that the taxable profits of the notional company related to the Material Assets, Part 8 should apply on the basis that the Material Assets fell within the regime in Part 8. This was because, in applying the provisions of Section 882(1) to the notional company arising as a result of the statutory fiction, those assets should not be treated as having been acquired by the notional company from a "related party".

28. His primary submission in this regard was that Section 1259 was no more than a computational provision which merely required the profits of the partnership to be calculated as if "a UK resident company carried on the trade". It did not deem the partnership to be a company or clothe the notional company required to be assumed for the purposes of the

calculation with any particular characteristics. Instead, the company in question was purely notional, generic and unspecific. It did not actually exist and it was not deemed to exist. That meant that, although one had to take into account the actual transactions into which the partnership entered in order to determine the taxable profits of the notional company, the notional company was incapable of having any "related party". In short, it was not permissible to take into account in calculating the taxable profits of the notional company under Part 8 the identity of the person from whom the intangible fixed assets or goodwill in question had been acquired.

29. In the alternative, even if, contrary to the view set out above, it was necessary to consider whether the notional company had acquired the assets from a "related party", when one turned to the definition of "related party" in Section 835, one had to apply that definition by reference to the partnership because the notional company did not actually exist and was not deemed to exist. When one did that, one found that a partnership was incapable of having any "related parties" because a partnership was not a company and so could not be "B" for the purposes of Section 835(1). As a result, none of the members of the partnership was capable of falling within any of the provisions in that section.

30. Consequently, on either analysis, all that was necessary in this case for the Material Assets to fall within the regime in Part 8 was that they had been acquired by the LLP on or after 1 April 2002.

The Respondents' position – a summary

31. Mr Tidmarsh, who was representing the Respondents, disagreed. He submitted that Section 882 set out comprehensive rules for determining which intangible fixed assets and goodwill were to be included in the regime described in Part 8 and which were not. This meant that, in the case of a partnership which had acquired intangible fixed assets and goodwill, it was impossible to calculate the taxable profits of the partnership as if it were a company, as the statutory fiction required, without:

(1) applying the whole of Section 882(1)(b) and asking oneself whether the intangible fixed assets and goodwill had been acquired from a "related party"; and

(2) then, in addressing the question of whether or not the disponor was a "related party", assuming that the partnership was in fact a company owned in the same way as the partnership.

32. Once one did that in the present case, it was clear that each Corporate Member was a "related party" of the notional company whose taxable profits were being determined and this meant that the Material Assets fell outside Part 8 so far as the notional company was concerned.

The FA 2016

33. Mr Tidmarsh added that, even if he was wrong in that primary submission, the position had been put beyond doubt in relation to debits accruing on and after the effective date of the amendments to Section 882 made by the FA 2016. Those amendments made it clear that, at least so far as those debits were concerned, each Corporate Member was to be regarded as having been a "related party" of the notional company at the time of acquisition, because they widened the definition of "related party" with effect from the effective date of the change to encompass persons who satisfied the "participation condition" (as defined in Section 148 of the TIOPA) in relation to a partnership and each Corporate Member did satisfy that condition in relation to the LLP.

34. Mr Trevett submitted that the change in law purportedly made by the FA 2016 was ineffective for two reasons. The first was that any extension to the definition of the term

"related party" made after the Material Assets had been acquired could not change the fact that, at the time when the Material Assets had been acquired, the Corporate Members were not "related parties". The second was that, even if the extension could, in principle, have had that retrospective effect, the relevant provisions had been drafted deficiently and could not properly be construed as having had that effect.

The issues

35. It may be seen that the point in dispute in these appeals is a very narrow one, which is the manner in which the statutory fiction imposed by Section 1259 is to be applied in the context of Sections 882(1)(b) and 835.

36. In relation to the legislation as it stood before the enactment of the FA 2016, the Appellants allege that, since the statutory fiction is merely for the purpose of computing the taxable profits of the trade and Section 1259 refers to "a" company, the Section is not to be taken to deem the LLP to be a company for the purposes of determining whether each Corporate Member was a "related party", whereas the Respondents say that it is impossible to calculate the taxable profits of the notional company without addressing the question of whether each Corporate Member was a "related party" on the basis that the LLP actually was a company and taking into account the actual ownership of the LLP.

37. In relation to the amendments made by the FA 2016, the Appellants allege that the amendments are incapable of applying because the amendments do not affect acquisitions made before the amendments became effective and have, in any event, been drafted deficiently, whereas the Respondents say that the amendments do apply to deprive the Corporate Members of relief for debits accruing in respect of the Material Assets on and after the amendments took effect.

38. We should stress that those are the only issues between the parties.

The submissions in more detail

The position before the enactment of the FA 2016

Common ground

39. It was common ground that, as with all legislation:

(1) the relevant legislation in this case should be interpreted purposively and applied to the facts viewed realistically;

(2) the primary focus should be on the words actually used in the statute and not on the context in which the provision was enacted or the apparent mischief which the provision had been enacted to remedy. As Lord Neuberger had held in *Williams v Central Bank of Nigeria* [2014] UKSC 10 at paragraph [72]:

> "When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material,and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613, "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used""; and

(3) in accordance with the injunction of Henderson J (as he then was) in *Gripple Limited v The Commissioners for Her Majesty's Customs and Excise* [2010] EWHC 1609 (Ch) ("*Gripple*") at paragraph [12], where the legislation contains a detailed and

prescriptive code, "there is little room for a purposive construction and there is no substitute for going through the detailed conditions, one by one, to see if, on a fair reading, they are satisfied".

40. The parties were also agreed that, in this case, the provision pertaining to the calculation of the taxable profits of partnerships which was relevant was Section 1259 – the provision which was in force at the time when the LLP acquired the Material Assets – and not its statutory predecessor, Section 114.

41. However, the parties disagreed in relation to the construction of the relevant legislation to which the principles described in paragraph 39 above gave rise.

The Appellants' position

42. Mr Trevett submitted that the starting point in the process had to be Section 1259 (and Part 17 as a whole) as those provisions were of general application in relation to partnerships, before taking into account any specific computational provisions. They made it clear that a partnership was not itself an assessable entity. Instead, as part of the process of calculating the taxable profits which were assessable on each UK resident member, it was first necessary to calculate the taxable profits of the partnership as if it were a UK resident company. This required one to take into account the actual transactions into which the partnership had entered and then to calculate the profits arising out of those transactions on the hypothesis that the partnership was a company. However, it went no further than that. It did not require some more generally-applicable assumption that the partnership was a UK resident company or deem the partnership to be a UK resident company. Nor did the statutory fiction require the notional company to be assumed to have any particular characteristics. The reference was simply to "a company", generically. That meant that, when one considered in the case of each Corporate Member how Section 882 should apply in the present case in relation to the LLP's acquisition of the Material Assets, one had to conclude that Section 882(1)(b) was satisfied.

43. Mr Trevett explained that this conclusion arose for one of two alternative reasons, both of which were based on the fact that the LLP was not actually a company and was not deemed to be a company by Section 1259.

44. The first reason was that, as the LLP was not actually a company and was not deemed to be a company by Section 1259, the limitation in Section 882(1)(b) to assets acquired from a person who was not a "related party" was simply incapable of applying in relation to the acquisition of the Material Assets by the LLP. The fact that there was no actual or deemed company making the acquisition meant that there could be no "related party" in relation to the acquiror. The part of Section 882(1)(b) which referred to whether or not the disponor of the relevant intangible fixed assets or goodwill was a "related party" was therefore impossible to apply. Consequently, it was unnecessary to read the definition of "related party" in Section 835 at all. Instead, the test imposed by Section 882(1)(b) should be treated as being satisfied in relation to the Material Assets simply because the Material Assets were, as a matter of fact, acquired by the LLP on or after 1 April 2002.

45. Mr Trevett went on to say that, if we were not persuaded by the argument set out above, and we considered that the whole of Section 882(1)(b) had to be applied, on its terms, to the present facts, then an alternative basis for reaching the same conclusion was that, when one turned to consider the terms of the definition of "related party" in Section 835, none of the Corporate Members was a "related party" of the LLP. This was because, as the LLP was not actually a company and was not deemed to be a company, the LLP could never be the entity referred to as "B" in Section 835(1) and therefore none of the Corporate Members satisfied any of the tests set out in that section. Thus, none of them was a "related party" so far as the LLP was concerned.

The Respondents' position

46. In response, Mr Tidmarsh said that both Section 1259 and Section 882 were part of the same enactment and it followed that they should be construed, so far as possible, consistently and so as to fit together. That was not to say that the construction of those provisions which the Respondents were proposing was in any way based on what was said to be the purpose of the legislation and without regard to the actual words used in the legislation. On the contrary, it was the right way to construe the words actually used. It was therefore entirely consistent with the approach of Henderson J in *Gripple*.

47. Turning to the first reason given by Mr Trevett as to why the Material Assets in this case should be treated as falling within Part 8 in determining the taxable profits of the notional company, it was important to note that Section 882 was the gateway to the operation of Part 8. The heading to the section, along with the use of the word "only" in the preamble to Section 882(1), made it clear that a company could fall within the regime in Part 8 in respect of particular intangible fixed assets or goodwill only if one of the three provisions in Section 882(1) applied to the creation or acquisition of those assets. The section was comprehensive in nature and left no possibility that a company might fall within the regime in respect of intangible fixed assets or goodwill in any circumstances other than those specified in Sections 882(1)(a), (b) or (c).

48. By way of expanding on the above, in order for Part 8 to apply to any asset in determining the taxable profits of the notional company for the purposes of Section 1259, each of the following conditions needed to be satisfied in relation to the asset:

(1) first, the asset needed to be held by a company (see the preamble to Section 882(1));

(2) secondly, the asset needed:

(a) to have been created on or after 1 April 2002 (see Section 882(1)(a)); or

(b) to have been acquired by the company on or after 1 April 2002 from a person who was not a "related party" at the time of acquisition (see Section 882(1)(b)); or

(c) to have been acquired by the company on or after 1 April 2002 from a person who was a "related party" at the time of acquisition but where one of Case A, Case B or Case C applied (see Sections 882(1)(c), and 82(3) to 882(5));

(3) thirdly, the asset needed to have been acquired for use on a continuing basis in the course of the company's activities (see the definition of an "intangible fixed asset" in Section 713) or to be goodwill; and

(4) fourthly, the asset needed not to be held:

(a) for a purpose which was not a business or other commercial purpose of the company; or

(b) for the purpose of activities in respect of which the company was not within the charge to corporation tax

(see the negative conditions in Section 803).

49. It was therefore self-evident from the way in which the legislation had been structured that, in order for Part 8 to apply to any asset in determining the taxable profits of the notional company, it was not sufficient for the notional company merely to have satisfied the first, third and fourth condition and only part of one of the limbs of the second condition. Instead, the whole of one of the limbs of the second condition needed to have been satisfied too. This

meant that it was not sufficient for the notional company merely to have acquired the relevant intangible fixed assets or goodwill on or after 1 April 2002. To adopt that approach would involve disregarding a crucial part of the language which Parliament had chosen to use in Section 882(1)(b).

50. Moreover, although (at a stretch) it might be possible to regard the notional company as satisfying the second part of the fourth condition - to the effect that it was within the charge to corporation tax in respect of its activities - simply on the basis of the language used in Section 1259(3) itself and without regard to any specific characteristics of the partnership to which the notional company related, it was implicit in the third condition that, in order to satisfy that condition, the notional company had to be invested with the characteristics of the partnership to which it related. In other words, the notional company needed to be treated as carrying on the trade which the partnership was in fact carrying on if it was to satisfy that condition.

51. As for the second reason given by Mr Trevett as to why the Material Assets in this case should be treated as falling within Part 8 in determining the taxable profits of the notional company – which was that the Corporate Members were not "related parties" of the notional company under Section 835 because the LLP was not a "company" for the purposes of applying that definition - there was no reason to apply Section 835 in the context of Section 882(1)b) on a basis other than the assumption that the notional company was an actual company with the ownership attributes of the LLP. This was simply a logical corollary of the fact that Section 835 was being considered in the context of determining the taxable profits of a notional company, as required by Section 1259. It did not involve any extension of the statutory fiction required by Section 1259 beyond the computation process. It was instead simply an integral part of that computation process. In the same way that a notional company had to be assumed for the purpose of applying Section 882(1)(b), so a notional company had to be assumed for the purpose of construing the terms of Section 835 in the context of Section 882(1)(b). They were both part of the computation process.

Deeming

Introduction

52. It may be seen from the above description that there was a difference between the parties as to whether or not Section 1259 was a deeming provision.

The Appellants' position

53. Mr Trevett said that Section 1259 was not a deeming provision. It merely required the determination of what would have been the taxable profits of the trade carried on by the partnership in question if a UK resident company had carried on that trade. There was no sense in which this required a company to be deemed to exist. Instead, the company to which the section referred was no more than a statutory fiction required for computational purposes. Once that computation was carried out, the purpose of the section was fulfilled and the notional company had no further role to play. In particular, in this context, no deeming as to the ownership characteristics of the notional company was required.

The Respondents' position

54. For his part, Mr Tidmarsh said that, although the word "deemed" did not appear in Section 1259, the operation which was required to be carried out by the section was to treat as existing something which did not in fact exist and that operation could properly be described as "deeming". Indeed, in the leading textbook on statutory interpretation, Bennion, Bailey and Norbury on Statutory Interpretation ("Bennion"), the authors had pointed out that the language used to set up a statutory hypothesis varied and that "[the] traditional form of words 'shall be deemed' has generally given way to expressions such as 'treated as', 'regarded as'

or ‘taken to be’. Whatever form is used the effect is the same” (see Bennion at paragraph [17.8]). Mr Tidmarsh said that, in this case, Section 1259 had used one of those very phrases in that Section 1259(3)(b) expressly instructed the reader, after determining the amount of the taxable profits of the notional company in Section 1259(3)(a), to “take that to be the amount of the firm’s profits”.

55. He added that, in order to make sense of the statutory fiction which was required by the section, the notional company had to be allocated attributes. This was consistent with the dicta of Peter Gibson J in *Marshall v Kerr* [1994] STC 638 (“*Kerr*”) at 649 to the following effect:

“For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.”

56. It was also consistent with the conclusion in Bennion that “[the] effect of the authorities discussed below may be summarised as being that the intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further.”

57. Critically, the Respondents were not saying that the notional company should be deemed to have an existence beyond that needed for the purpose of computation. They were merely saying that the statutory fiction needed to encompass the whole of the computation process and not just part of it.

The Appellants’ reply

58. Mr Trevett made the following five points in response to the submissions set out in paragraphs 54 to 57:

(1) first, the language in Section 1259(3)(b) on which Mr Tidmarsh had relied to establish deeming was nothing to the point because Section 1259(3)(b) operated after the taxable profits of the notional company had been determined and not as part of the determination process. The way in which Section 1259(3) operated was, first, to require the taxable profits of the notional company to be determined and, secondly, to deem those taxable profits (as so determined) to be the taxable profits of the partnership. There was no deeming required at the first stage of that process, which was the one with which we were concerned. The deeming was just a part of the second stage of the process;

(2) secondly, the ownership characteristics of the notional company were wholly irrelevant to the process of determining the taxable profits of the notional company. The taxable profits of the notional company could be determined without regard to those ownership characteristics. It therefore followed that, in taking account of those ownership characteristics, the Respondents’ approach involved deeming the notional company to have an existence which extended beyond the computational;

(3) thirdly, the consequence of the Respondents’ approach was that the notional company had necessarily to be a shape-shifting legislative chameleon in that its meaning in the context of any particular statutory provision would depend on the precise terms of that statutory provision. That could not be the correct way to apply the

legislation. The notional company had to have the same meaning across all of the different legislative regimes pursuant to which its taxable profits were being determined;

(4) fourthly, the Respondents' approach involved looking through the wrong end of the telescope. They were looking at Part 8 first of all and then using the terms of the provisions in that part to establish what Section 1259 had to mean in order for that part to work properly. The correct approach to the legislation was to start with Section 1259 because that section, and the rest of Part 17, were of general application in relation to partnerships, before taking into account any specific computational provisions, and then apply the statutory fiction required by Section 1259 in the context of the various parts of the legislation which were pertinent to that computation; and

(5) finally, if Parliament had intended the legislation to operate in the manner in which the Respondents were alleging, then it would have had to set out detailed rules in Section 835 in relation to how the concepts of "control" and "major interest" would operate in the case of a partnership. This would not be straightforward in the case of a partnership with variable profit shares, as was the case in relation to the LLP.

Applicable case law

The Appellants' position

59. Mr Trevett said that the Appellants' construction of the legislation was supported by the recent decision of the Upper Tribunal in the case of *BCM Cayman LP and another v The Commissioners for Her Majesty's Revenue and Customs* [2022] UKUT 198 (TCC) ("*BCM*"). He said that, in *BCM*, the Upper Tribunal had:

(1) confirmed that Part 17 set out an entirely free-standing regime for the taxation of profits arising in a partnership (see paragraph [96]);

(2) rejected the taxpayer's proposition that the effect of Section 1259 was that a corporate member of a partnership was to be treated as if it carried on the activities of the partnership directly (see paragraph [161]);

(3) held as follows in relation to a non-UK resident corporate member of a partnership:

"(3) If the company partner is non-UK resident, then s 1259(4) imposes a statutory direction to '(a) determine what would be the amount of the profits of the trade chargeable to corporation tax if a non-UK resident company carried on the trade' and '(b) take that to be the amount of the firm's profits.' The subsection is not expressed to be a deeming provision and it applies by giving a statutory direction to calculate profits of the company partner as if 'a non-UK resident company carried on the trade'.

(4) The use of the indefinite article was, in our view, intended to ensure that the assumption in para (a) extends only to the calculation of profits for the purpose of s 1259 and had no other effect. If Parliament had intended the assumption in that paragraph to have a general effect on the way profits were ascertained and the classification of loan relationships, then, at the very least, it would have used the words 'if the partner itself carried on the trade' (or to the same effect)"; and

(4) held that, although the language used in Section 114 – the predecessor provision to Section 1259 – was slightly different from the language used in Section 1259, those differences were not material in the context of the interest deductibility issue which it was addressing in *BCM*

(see paragraph [161]).

60. Mr Trevett said that, although the conclusions set out above were drawn in relation to a corporate member of a partnership which was a non-UK resident company within the charge to corporation tax, they also applied, by logical extension, in a case where the relevant corporate member of the partnership was a UK resident company. What this demonstrated was that the assumption which Section 1259 required to be made did not have a general effect on the way profits were ascertained or the classification of loan relationships.

61. He submitted that the same approach had been taken by Park J in the case of *Davies v Hicks* [2005] STC 850 ("*Davies*"). In *Davies*, the Respondents had attempted to extend a statutory fiction required for computational purposes – namely, the fiction that shares which had been the subject of a disposal could be matched with shares which were acquired on the following day – to mean that the settlement which was the disponor of the shares in question continued to hold the shares when the trustees of the settlement became non-UK resident between the time of disposal and the time of acquisition. They had thus argued that the change in residence of the trustees triggered a deemed disposal of the shares under Section 80 of the Taxation of Chargeable Gains Act 1992 even though, in reality, the trustees did not hold any shares at that time. In that regard, Park J had held that:

(1) this would involve an unwarranted and impermissible extension of the computational statutory fiction into other areas of the legislation; and

(2) once the relevant computation had been made, the purpose of the statutory fiction had been fulfilled and the fiction was not to be read across into a quite separate provision of the chargeable gains legislation.

In Mr Trevett's view, the Respondents' approach in the present case involved a similar error to the one which they had made in *Davies*.

The Respondents' position

62. Mr Tidmarsh said that the Respondents' construction of the legislation did not involve taking the statutory fiction in Section 1259 any further than for the purposes of computation. As such, it was entirely consistent with the decision in *BCM*. It was merely the case that the computation itself required certain characteristics to be imputed to the notional company. In *BCM*, the taxpayer, which was a member of a trading partnership, had attempted to use the trading attributes of the partnership to impart a trading nature to the loan which the taxpayer had taken out in order to acquire its interest in the partnership. It was not surprising that the Upper Tribunal had rightly rejected that proposition. It involved an attempt to extend the statutory construct beyond the computational and into a characterisation of the nature of the loan taken out by the partner. However, that proposition was a long way from the approach which the Respondents were adopting in this case.

63. In addition, this case was distinguishable from the situation in *Davies*. In *Davies*, the Respondents had tried to extend a statutory construct which was required for the purposes of a particular chargeable gains computation into other areas of the chargeable gains legislation. In contrast, in this case, the Respondents were not straying beyond the computation in question in their application of the statutory construct. They were not saying that Section 1259 should be regarded as having continuing effects after the computation had been completed. They were merely saying that, in order properly to carry out the computation required by Section 1259, it was necessary to take account of the characteristics of the notional company imparted by the characteristics of the partnership from which it had derived. The notional company computation could not properly be completed without taking into account those attributes.

Other material

The Appellants' position

64. Mr Trevett pointed out that the Appellants' approach in this context was entirely consistent with, and therefore supported by:

(1) the terms of a statement of practice issued by the Inland Revenue in 1998 in relation to the application of the loan relationships, foreign exchange and financial instruments legislation to partnerships which included companies – "SP4/98"; and

(2) the terms of a statement issued by the Inland Revenue on 8 November 2000 announcing a package of changes which were designed to enhance the competitiveness of the UK tax system – "Inland Revenue 5".

65. Both SP4/98 and Inland Revenue 5 related to Section 114 but, as the Upper Tribunal had noted in *BCM*, the language used in Section 114 was not materially different from the language used in Section 1259 in this respect. Indeed, if a distinction could be drawn in this respect between the language in Section 1259 and the language in Section 114, it was even clearer in Section 1259 than in Section 114 that no deemed company was created. This was because, whereas Section 114 stated that the taxable profits of the trade were to be computed "as if the partnership were a company", Section 1259 merely said that the taxable profits of the trade carried on by the partnership were to be computed as if a UK resident company carried on the trade.

66. In SP4/98, the Inland Revenue had said that:

(1) Section 114 required that the profits of a partnership were to be computed for the purposes of corporation tax as if the partnership were a company, separate from any company which was a partner (see paragraph [4]);

(2) the effect of Section 114 was to treat the partnership for tax purposes as itself being a party to the loan relationships, entitled to assets and subject to liabilities which gave rise to exchange differences and entitled to rights, or subject to duties, under options and contracts falling within the financial instruments legislation (see paragraph [6]);

(3) accordingly, partnerships should prepare computations of profits and losses from any trade on the basis that the loan relationships, foreign exchange and financial instruments legislation applied to it as if it were a company (see paragraph [10]);

(4) this meant that it would be possible for a partnership to make an election to match liabilities which would otherwise give rise to exchange gains and losses against certain assets denominated in the same currency held by the partnership and that, conversely, a corporate partner would not be able to make an election to match any liability other than its share of a partnership liability against an asset held by the partnership (see paragraphs [33] and [34]); and

(5) however, the statutory fiction described above did not extend to making a partnership a "company" for the purposes of applying the connected person legislation in the loan relationships legislation and a partnership was therefore not connected with any of its members who provided loans to the partnership (see paragraph [22]).

67. Inland Revenue 5 included a technical note suggesting areas in which the legislation relating to loan relationships, foreign exchange and financial instruments could be improved and modernised. The technical note:

(1) stated that two areas of the then-applicable legislation which had given rise to problems were the connected persons rules in the loan relationships legislation and the tax treatment of partnerships which included corporate members (see paragraph [2.3]);

(2) suggested that the definition of "control" which applied for the purposes of identifying connected persons might be narrowed (see paragraphs [5.2], [5.3] and [5.9] to [5.13]); and

(3) noted that:

(a) the application of the connected persons rules where companies were members of partnerships had caused difficulties;

(b) in accordance with SP4/98, the connected persons rules did not apply where a company lent money to or borrowed from a partnership; and

(c) it seemed illogical for this to be the case where a partner had sufficient interest in a partnership to control it (see paragraphs [3.20] and [3.21]).

68. Mr Trevett explained that the difficulties noted in SP4/98 and Inland Revenue 5 had led to amendments to the loan relationships legislation in the FA 2002 – now set out in Sections 380 to 384. That legislation specifically disapplied Section 114 in calculating the profits and losses arising from the loan relationships of a partnership, treating each member of the partnership as a party to the partnership's loan relationships and setting out rules for determining when the connected persons rules should apply to a loan relationship between a partnership and one of its members.

69. The FA 2002 had also introduced the derivatives regime and the same approach had been adopted in drafting the legislation creating that regime. The relevant legislation – now set out in Sections 619 to 622 – also disapplied Section 114 in calculating the profits and losses arising from the derivative contracts of a partnership and required each member of the partnership to be treated as a party to those derivative contracts.

70. The FA 2002 had also brought into existence the regime which was now in Part 8 and yet, for reasons no-one could explain, the regime had not included similar provisions to those set out in the same Act in relation to loan relationships and derivative contracts. The result was that it was clearly the intention of Parliament that Section 114 (and now Section 1259) should apply in calculating the profits and losses arising to each UK resident corporate member of a partnership in respect of the partnership's intangible fixed assets and goodwill. It followed that, so far as concerned the application of the legislation to the intangible fixed assets and goodwill of a partnership, the position was identical to the one which had pertained in relation to loan relationships before the changes in law brought about by the FA 2002 and it could be seen that the connected persons rules did not apply in relation to loan relationships between a partnership and one of its members at that time.

The Respondents' position

71. Mr Tidmarsh reminded us that the task on which we were engaged was to determine what Parliament meant when it enacted the relevant legislation and that the relevant legislation in this case was Section 1259 and not its predecessor, Section 114.

72. It followed that the Respondents' interpretation of Section 114 prior to the enactment of the FA 2002 was irrelevant to our conclusion for two reasons – it did not represent the views of Parliament and it related to a different statutory provision from the one which we were presently considering.

73. He added that, in any event, there were hints in SP4/98 that the reason for the statement of practice was not so much that the provisions in relation to connected persons in the loan

relationships legislation did not apply in the case of partnerships but more that taxpayers were encountering considerable practical difficulties in applying the legislation in that area and therefore the Respondents had decided that the simplest solution was to disapply the legislation.

74. Mr Tidmarsh submitted that the changes made by Parliament to the loan relationships regime in the FA 2002 (and the terms on which the derivative contracts regime was created in that Act) did not come close to showing that Section 114 did not have effect in the context of the loan relationships regime (and could not have had effect in the context of the derivative contracts regime) in the manner in which the Respondents were now contending in relation to the regime in Part 8. The changes merely demonstrated that, in the context of the loan relationships and derivative contracts regimes, Parliament wished to introduce complex rules for taxing transactions with connected parties which involved excluding the application of Section 114. Section 114 might have worked perfectly well in the context of those regimes had those complex rules not been introduced.

75. Moreover, reverting to the point that Part 17 was part of the same piece of legislation as Part 8 and that the two sets of provisions should therefore, so far as possible, be construed consistently so as to fit together, it would be perverse if Parliament, having set out in Section 882 a comprehensive code for determining which assets were to be subject to Part 8, were, in the very same Act, to have created a loophole for companies acting through partnerships. If there was a way of construing the CTA 2009 in a way that rendered the legislation consistent and logical, then that approach should be adopted ahead of a construction which produced the opposite result.

The "related party" definition

The Appellants' position

76. The Appellants pointed out that the fact that the notional company was not an actual or deemed company and therefore could not be "B" for the purposes of Section 835(1) was not the only difficulty with attempting to apply the definition of "related party" in the context of a partnership. There were some others.

77. For instance:

(1) the statutory fiction required by Section 1259(3) operated separately in relation to each UK resident corporate member of a partnership. In other words, a separate notional company carrying on the entire trade of the relevant partnership was required to be assumed for each such corporate member (with the result that, for example in this case, there were three notional companies and not just one;)

(2) it followed that, even if the notional company were to be capable of qualifying as "B" in Section 835(1), each such notional company would be wholly-owned by the relevant corporate member in the partnership to which it related. No other member in the partnership would have any interest in the relevant corporate member's notional company (with the result that, for example in this case, each Corporate Member would have its own wholly-owned notional company under the statutory construct;) and

(3) the above highlighted why it was inappropriate to apply the "related party" definition in Section 835 to a notional company as if it were an actual company because doing so would mean that each UK resident corporate member in a partnership, no matter how limited its economic or voting rights and powers in relation to the partnership, would fall to be treated as a "related party" of the notional company which it wholly-owned and that could not be the correct result.

78. A separate point was that, even if it were to be assumed that:

(1) there was just one notional company in relation to a partnership for the purposes of Section 882(1)(b) and not a separate notional company for each UK resident corporate member; and

(2) that notional company were to be regarded as an actual company for the purposes of the "related party" definition in Section 835,

the relevant legislation set out no clear basis on which to determine which corporate members of the relevant partnership had "control" of, or held a "major interest" in, that single notional company. There was certainly no basis for ascribing share capital to the notional company and, even if there were, the rights and powers attaching to that share capital were not specified. As such, in the general case, where the members of the partnership were not "connected" with each other for the purposes of Sections 842 and 843, and therefore no member was to be attributed the rights and powers held by any other member under Section 838, it was wholly unclear how to determine which members of the partnership should be treated as having "control" of, or as having a "major interest" in, the notional company.

79. Having said that, the Appellants accepted that, if the assumptions described in paragraphs 78(1) and 78(2) were to be made in this case, then:

(1) each Corporate Member would be a "related party" of each other Corporate Member pursuant to Section 835(3) because each of them was under the "control" of TM Dairy pursuant to Section 836;

(2) this would mean that each Corporate Member was "connected" with each other Corporate Member pursuant to Section 843(4);

(3) this, in turn, would mean that the rights and powers of each Corporate Member could be attributed to each other Corporate Member pursuant to Section 838(4); and

(4) therefore, each Corporate Member would have "control" of the single notional company pursuant to Section 835(2).

The Respondents' position

80. The Respondents position in relation to this question was somewhat different from the one set out above. In their view, as long as the notional company could be "B" for the purposes of Section 835, then:

(1) the notional company was to be treated as having the same ownership attributes as the partnership in question. In other words, in the present case, the Corporate Members should be treated as holding shares in the notional company carrying rights and powers which equated to the rights and powers which they held as members of the LLP; and

(2) in any event, since:

(a) the test in Section 835(2) simply required the Corporate Members to have "control" of the LLP pursuant to Section 836; and

(b) the test of "control" in Section 836 did not distinguish between rights and powers held by way of share capital and rights and powers held otherwise than by way of share capital,

whether or not the Corporate Members were to be treated as holding share capital in the notional company made no difference to the outcome. In either case, assuming that the notional company could be "B" for the purposes of Section 835, as the Respondents considered that it could be, it was clear that each Corporate Member had "control" of the notional company pursuant to Section 835(2).

The FA 2016

Introduction

81. Turning to the question of whether the new provisions introduced by Section 52 of the FA 2016 might affect the position, Mr Trevett said that there were two reasons why those provisions had no impact on the issue in dispute in the present case.

No retrospective effect

The Appellants' position

82. The first reason was that the acquisition of the Material Assets in this case had occurred in 2013 and the change in law had not taken effect until 25 November 2015 (the "Effective Date"). Section 882(1)(b) looked at the position as it stood at the time when the relevant assets were acquired. It required the disponor to be a person other than a "related party" at the "time of the acquisition". It followed that, even if each Corporate Member were to have become a "related party" of the notional company comprising the LLP by virtue of the change in law, that change in law would have occurred after the "time of the acquisition" and therefore could not affect the application of Part 8 to the Material Assets at any point.

The Respondents' position

83. In response to Mr Trevett's first reason, Mr Tidmarsh made two submissions.

84. The first was that corporation tax was an annual tax and therefore the conditions in Section 882 needed to be re-examined in each accounting period in which a deduction for an expense was claimed to see if, at that time, one of the conditions in Section 882(1) was satisfied in relation to the asset to which that expense related. It followed that, even if the legislation did not operate in the manner for which the Respondents were contending in accounting periods commencing prior to the Effective Date, it was clear that, in relation to accounting periods commencing (or deemed to commence) on or after the Effective Date, each Corporate Member was a "related party" of the notional company and therefore none of the conditions was so satisfied. Thus, debits accruing on and after the Effective Date were to be treated as accruing in respect of assets falling outside the Part 8 regime.

85. The second submission was that this way of applying Section 882(1) following the change in law was apparent from the terms of Sections 52(5) to 52(7) of the FA 2016. Those provisions had stipulated that the change in law was to take effect in relation to accounting periods beginning on or after the Effective Date but then, crucially, had gone on to provide for any accounting period which straddled that date to be split into two so that the part of the straddling accounting period falling prior to that date was to be treated as a separate accounting period from the part of the straddling accounting period falling on and after that date. Mr Tidmarsh said that, if the change in law was incapable of affecting acquisitions of assets made prior to the Effective Date, as the Appellants were alleging, then there would have been no reason for the draftsman to have provided for the straddling accounting period to be split into two in this manner.

Ineffective drafting

The Appellants' position

86. Mr Trevett said that the second reason why the new provisions could have no impact on the issue in dispute in the present case was that, even if they were capable of having effect in relation to debits accruing in accounting periods commencing (or deemed to commence) on or after the Effective Date, the language used in the new provisions was predicated on an assumption by the draftsman that Section 1259 required references in Section 882 to "a company" to include references to a partnership. That was how Section 882(5B) had been worded. For the reasons which he had already explained, that assumption was incorrect.

Section 1259 had no such effect. The notional company to which reference was made in Section 1259 was solely for the purpose of determining the taxable profits of the partnership. It had no wider effect than that and, consequently, Section 882(5B) was a nonsense and was ineffective in extending in relation to partnerships the change made by Section 882(5A) in relation to companies.

The Respondents' position

87. Mr Tidmarsh conceded that the new Section 882(5B) was not happily worded. He agreed that the new provisions were not very easy to apply because Section 1259 did not, in and of itself, expressly require references in Section 882 to "a company" to be read as including references to a partnership. All that Section 1259 said was that the taxable profits of the trade carried by a partnership were to be calculated as if the trade was being carried on by a notional company.

88. However, it was clear from the language used in the new Section 882(5B) that the draftsman had assumed that to be the case. As a result, there were only two possible approaches to construing the new provisions. Either they had had no effect at all – as the Appellants were submitting – or they could be construed on the basis that the assumption made by the draftsman as to the impact of Section 1259 on the application of Section 882 was correct and therefore resulted in an extension to the definition of "related party" in the partnership context.

89. There were a number of reasons why the latter was the preferred approach.

90. First, the former approach involved giving no effect whatsoever to the new provisions whilst the latter gave effect to the stated purpose underlying the introduction of the new provisions in the explanatory notes which had accompanied the introduction of the draft clauses that became Section 52 of the FA 2016. It was clear from the Court of Appeal decision in *Flora v Wakom (Heathrow) Limited* [2006] EWCA Civ 1103 ("*Flora*") at paragraph [16] that explanatory notes accompanying draft legislation were an admissible aid to construing the legislation insofar as they cast light on the objective setting or contextual scene of the statute or the mischief at which the legislation was aimed.

91. In this case, the summary at the start of the explanatory notes in question had stated that "[the] clause confirms that arrangements involving bodies such as partnerships or Limited Liability Partnerships (LLPs) cannot be used to move assets into the Part 8 rules in ways that were not intended by the legislation". The background section of the notes had then gone on to say that:

(1) the clause was confirmatory in nature;

(2) the Respondents:

(a) had "identified arrangements that use bodies such as partnerships or LLPs to transfer assets in ways that aim to bring the assets within the new rules without an effective change of economic ownership"; and

(b) "did not consider that these arrangements work in the way that they are claimed to work"; and

(3) the arrangements were "not effective to avoid the Part 8 commencement rules".

92. Moreover, as something which was of relevance to Mr Tidmarsh's second submission in relation to Mr Trevett's first point – at paragraph 85 above - paragraph [10] of the explanatory notes stated categorically that "[the] rules apply to debits and credits irrespective of when the relevant transfers of intangible fixed assets took place".

93. Mr Tidmarsh said that the terms of the explanatory notes made it clear that the purpose of the legislation was to counteract claims that Part 8 applied to assets that were transferred to a partnership or limited liability partnership without an effective change in economic ownership and that that purpose should be taken into account in construing the new provisions.

94. Secondly, Mr Tidmarsh submitted that the Respondents' approach to the new provisions was consistent with the proposition set out by the Court of Appeal in *GDF Suez Teesside Limited v The Commissioners for Her Majesty's Revenue and Customs* [2018] EWCA Civ 2075 ("*GDF Suez*") at paragraph [87] to the effect that, "[where] an Act makes textual amendments to an earlier Act the intention is usually to produce a revised text that may be construed as whole" although "[the] original wording…may be used as an aid to interpreting the meaning of words that are unaltered."

95. This meant that, when one looked at the CTA 2009 after the amendments effected by the FA 2016 had been made, it was necessary to look at the Act as a whole regardless of the fact that the amendments might have had an effect on other sections of the Act. And, looking at the CTA 2009 as a whole following the amendments made by the FA 2016, it was clear that Section 882(5B) was predicated on the assumption that the effect of Section 1259 was to require references in Section 882 to "a company" to include references to a partnership.

96. Thirdly, Mr Tidmarsh said that it had been held in previous cases such as the House of Lords decision in *Inco Europe Limited v First Choice Distribution (a firm)* [2000] 1 WLR 586 ("*Inco HL*") that it was permissible for a court to correct obvious drafting errors in legislation in certain narrowly-defined circumstances. Those were where "the court [is] abundantly sure of three matters:

(1) the intended purpose of the statute or provision in question;

(2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and

(3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.

The third of these conditions is of crucial importance."

97. The Court of Appeal had adopted a similar approach in correcting an obvious drafting error in the stamp duty land tax legislation – see *Pollen Estates Trustee Co Limited v The Commissioners for Her Majesty's Revenue and Customs* [2013] 1 WLR 3785 ("*Pollen*") at paragraphs [45] to [49].

98. In this case, it was clear that:

(1) the amendments to Section 882 made by the FA 2016 were intended to ensure that Part 8 did not apply when assets were transferred to a partnership without an effective change in economic ownership;

(2) if the effect of the language in the new Section 882(5B) was that the changes did not have that effect, then that was inadvertent; and

(3) the substance of the provision which Parliament would have made was that, in circumstances where an intangible fixed asset or goodwill was acquired by a partnership on or after 1 April 2002 from a disponor who satisfied the participation condition (as defined in Section 148 of the TIOPA), Section 882(1)(b) was not satisfied.

99. Adopting that approach in the present case, a court or tribunal was permitted to read certain additional words into Section 882(5B) so that it read as follows (with the additional words in italics):

"References in subsection (5A) to a person include a firm where, for section 1259 purposes, references in this section to a company are read as references to *a company carrying on the trade of the firm and, in such a case, references in this section to a company are read as references to* the firm."

The Appellants' response

100. In his closing submission, Mr Trevett responded to the points made by Mr Tidmarsh in paragraphs 87 to 99 above as follows.

101. As regards the admissibility of the explanatory notes as an aid to construing the new legislation, he pointed out that:

(1) first, explanatory notes could not have the effect of overriding the clear words in the relevant legislation. At the end of paragraph [16] and in paragraph [17] of *Flora*, the Court of Appeal had qualified its earlier words by pointing out that the wishes and desires of the Government, or the expectations of the Government, were not the same as the will of Parliament. The task of the court or tribunal in each case was "to see what is the intention expressed by the words enacted" (see Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 ("*Asylum Support*") at paragraphs [2] to [6]). This meant that the expectations and intentions of the Government as set out in the terms of explanatory notes could not override the clear meaning of the words actually used in the legislation. As Brooke LJ had put it in Flora at paragraph [17]:

> "We are all too familiar with statutes having a contrary result to that which the Government expected through no fault of the courts which interpreted them";

(2) secondly, the explanatory notes were worded in a curious manner. They referred repeatedly to the intention of the legislation as it stood prior to the enactment of the new provisions without stating what that intention was. This was a particularly significant omission in that the explanatory notes also suggested that the amendments were purely confirmatory in nature and did not change the scope of the legislation. The only intimation of the purpose of the legislation was the statement in the explanatory notes to the effect that it was designed to cover arrangements which involved the use of partnerships and limited liability partnerships to bring intangible fixed assets within Part 8 without an effective change in economic ownership. That statement, in and of itself, shed no light on the question of whether Section 1259 was intended to apply in the case of Part 8; and

(3) one thing which was clear was that the intention of the legislation as it stood prior to the enactment of the new provisions was that Section 1259 should apply in the context of Part 8. That was clear from the fact that, in the very same Act as that in which the regime which was now in Part 8 was introduced (the FA 2002), Parliament had specifically disapplied Section 114 in the context of the loan relationships and derivative contracts regimes but had not done the same in the context of the regime which was now in Part 8.

102. As regards the question of whether the deficient drafting in Section 882(5B) could be remedied by applying the principles set out in *Inco HL*, he said that:

(1) the present circumstances were very different from those pertaining in *Inco HL*. In that case, there was the clearest possible evidence of a simple mistake in statutory

drafting – a provision which was expressed to be no more than a consequential amendment had, through defective drafting, eliminated an existing statutory right of appeal. That was a very long way from legislation which simply didn't work, coupled with vague explanatory notes; and

(2) *Pollen* could be seen as something of high point of judicial intervention in statutory codes and, in any event, it pertained to stamp duty land tax and not corporation tax.

DISCUSSION

The position before the enactment of the FA 2016

Introduction

103. In relation to the terms of the original legislation before its amendment pursuant to Section 52 of the FA 2016, it may be seen that the Appellants seek to justify the inclusion of the Material Assets in the notional company calculation under Part 8 on two grounds.

104. The first is that the requirement in Section 882(1)(b) to the effect that the relevant intangible assets or goodwill needed to be acquired from a person other than a "related party" was simply incapable of applying. This is because the notional company was no more than a statutory construct for the purpose of computing the taxable profits to be allocated to the relevant Corporate Member. It was not an actual or deemed company. As such, the very concept of a "related party" had no meaning in the context of the relevant calculation.

105. The second, and quite distinct, ground is that, even if the concept of a "related party" did have relevance in the context of the notional company calculation, the terms of the "related party" definition and, in particular, the fact that "B" in Section 835(1) was required to be a company, meant that, when one applied the terms of the definition, none of the Corporate Members could be said to be a "related party" of the notional company.

106. The Respondents oppose both of those propositions and we have concluded that they are right to do so.

BCM

107. Before setting out the reasons for our conclusions, we think it is important to say something about the decision in *BCM*, as it is a recent case which touches on the effect of Section 1259 to which Mr Trevett referred in support of his submissions. In our view, the decision in *BCM* sheds no light whatsoever on the issues which we are addressing in this case. The question at issue in *BCM* was whether the appellant - a non-UK resident company which had borrowed to acquire interests in a UK trading partnership - could claim relief for the interest which it incurred in respect of its borrowings as trading expenses. In seeking that relief, the appellant submitted that the fact that the UK partnership in which it had acquired the interests by using the borrowings was carrying on a trade meant that the borrowings had been taken out for the purposes of that trade. In making that submission, the appellant sought to rely on the fact that a partnership has no independent personality for tax purposes with the result that each partner should be regarded as carrying on the trade of the partnership directly. In paragraph [161] of its decision, the Upper Tribunal rejected that proposition. In so doing, it noted that:

(1) Section 1259 was a computational provision and that it was "highly improbable that Parliament would have intended this section to determine whether a loan relationship was a trading or non-trading loan relationship"; and

(2) there was nothing in the section which required the assumption that the corporate member in question carried on the trade, far less that it had borrowed for the purpose of the trade.

108. It was in that context that the Upper Tribunal made the observations which it did about the language in Section 1259(4) and, in particular, the use of the indefinite article in that section to refer to the notional company. In making those observations, the Upper Tribunal were saying that the mere fact that the first stage in the process of computing the taxable profits of a non-UK resident corporate member of a trading partnership required the assumption that the trade of the partnership was being carried on by a notional non-UK resident company did not mean that the actual non-UK resident corporate member whose taxable profits were being determined should be regarded as carrying on the trade of the partnership. That was not a surprising conclusion but it sheds absolutely no light on the questions we are addressing in these appeals. As Mr Tidmarsh rightly observed, these appeals are about the manner in which the process of computing the notional company's taxable profits is to be conducted. They are not about attempting to extend, beyond the computational process, the statutory fiction which is required by Section 1259.

109. For these reasons, we do not think that the decision in *BCM* is of any assistance to the Appellants in relation to either of the two propositions described in paragraphs 104 and 105 above.

110. We now turn to consider each of those propositions, in turn.

The first proposition

111. The first proposition is that, in carrying out the notional company calculation required by Section 1259, the requirement in the second part of Section 882(1)(b) – to the effect that the acquisition in question was from a person who was not a "related party" – should somehow be ignored because it is incapable of applying. We emphatically reject that proposition. We agree with the Respondents that the three scenarios laid down in Section 882(1) are intended to be, and are expressed to be, exhaustive of the circumstances in which intangible fixed assets and goodwill fall within the regime in Part 8. It follows that, in a case where a partnership holds intangible fixed assets or goodwill, it is impossible to carry out the notional company computation which is required by Section 1259 without asking whether, in relation to the intangible fixed assets or goodwill in question, the notional company which has to be assumed in order to carry out the computation required by Section 1259 created or acquired the relevant intangible fixed assets or goodwill in one of the three scenarios described in Section 882(1).

112. The Appellants accept that the provisions in Part 8 of the CTA 2009 generally apply in carrying out the notional company calculation and that, in carrying out that calculation, it is necessary to look at the actual transactions entered into by the partnership. However, they claim that, because the notional company is just that – a generic company which is assumed for computational purposes only and not an actual company – the identity of the person or persons from whom the partnership acquired the relevant assets is somehow irrelevant. We disagree. We think that, in the same way that the actual transactions carried out by the partnership inform the notional company calculation, so too do the actual identities of the counterparties to those actual transactions, and for precisely the same reason. It is implicit in carrying out the notional company calculation that all of the actual facts and circumstances surrounding the transactions into which the partnership has entered are taken into account when the notional company calculation is carried out.

113. For the above reasons, we have concluded that, in carrying out the notional company calculation in this case to the extent that it related to the Material Assets, it is necessary to

address the question of whether the Material Assets were acquired from a person who was not a "related party" of the notional company and, hence, whether each Corporate Member was a "related party" of the notional company.

114. We think that the answer in relation to this first proposition is clear.

The second proposition

115. The parties' respective arguments in relation to the second proposition are a bit more finely-balanced.

116. We see some force in the Appellants' submissions to the effect that:

(1) the second proposition is focused not on the language in Section 882(1) itself but instead on a defined term which is used in that section and it is perfectly possible to conclude that, although, in the case of intangible fixed assets and goodwill, the notional company calculation cannot be carried out without asking whether the assets in question have been acquired from a person other than a "related party", there is no compelling need to assume that, in applying the definition of "related party", the partnership itself should be disregarded and instead the definition should be applied to the notional company which has arisen as a result of the statutory fiction;

(2) the language used in Section 835, not surprisingly in the context of a regime which is limited to corporation tax, assumes that it is identifying persons who are "related parties" of a company, referred to as "B" in Section 835(1) and does not deal with the possibility that "B" might be an entity other than a company, such as a partnership. If it is correct that the definition should be applied by reference to the partnership itself, then no Corporate Member was a "related party" of the partnership for the purposes of the notional company computation because an entity other than a company (such as a partnership) cannot be "B" and therefore, on the various tests set out in Section 835, cannot have "related parties"; and

(3) in any event, the computational process described in Section 1259 requires the assumption of not one notional company but one notional company for each corporate member. So, in this case, there were three notional companies and not simply one notional company to consider.

117. Each of the above points has given us pause for thought. However, on balance, we have concluded that, as is the case with the first proposition, the second proposition is incorrect. We say that for the following reasons:

(1) we agree that, in the case of a partnership, it is theoretically possible to conclude that the first proposition is incorrect - and that therefore, in carrying out the notional company calculation, it is necessary to consider whether the intangible fixed assets or goodwill were acquired from a person other than a "related party" – but that the second proposition is correct – and that the terms of the definition in Section 835 are to be applied to the partnership itself and not to the notional company so that there can be no "related party" under the terms of the definition. However, that seems to us to be neither a logical outcome nor the most natural reading of the relevant legislation;

(2) by way of expanding on that statement, Section 1259(3)(a) directs that the taxable profits of the trade are to be calculated as if a UK resident company carried on the trade. This means that the provisions of the tax legislation which relate to the computation of the taxable profits of the trade must be applied on the assumption that the trade is being carried on by a notional company. In our view, it follows logically that, where the defined term "related party" appears in one of those computational provisions, it is entirely appropriate to make the same assumption in applying that

defined term. In the present case, that means that Section 835 should apply in the context of Section 882 by reference to the notional company whose taxable profits are being calculated and not by reference to the partnership;

(3) we should stress that that does not involve taking the notional company into account for some purpose other than in order to carry out the computation which Section 1259(3)(a) requires. In other words, it does not mean that the notional company is being given any greater import or meaning within the body of the tax legislation than is needed to be able to compute the taxable profits of the trade as directed by Section 1259(3)(a). Instead, the notional company is being recognised only in order to carry out the computation as directed. To ignore the existence of the notional company at a stage when the taxable profits of the notional company are still in the process of being calculated by reference to Sections 882 and 835 seems to us to be ignoring the clear injunction set out in Section 1259(3)(a);

(4) picking up on the dicta of Peter Gibson J in *Kerr* referred to in paragraph 55 above, this approach:

> (a) is clearly within the purposes of the statutory fiction to which Section 1259 gives rise;
>
> (b) involves treating as real the consequences and incidents inevitably flowing from or accompanying the injunction in that section to calculate the taxable profits of the trade as if the trade was carried on by a UK resident company; and
>
> (c) does not lead to injustice or absurdity. On the contrary, it seems to us that declining to treat the notional company as having any existence when reading the provisions in Section 835 would create injustice and absurdity;

(5) turning then to the construction of Section 835 in the light of the above conclusions, we agree with the Appellants that Section 1259(3)(a) requires a notional company to be assumed in the case of the computation in relation to each corporate member and not merely the assumption of only one notional company overall. However, we disagree with the Appellants that this somehow means that each notional company so assumed should be regarded as being wholly-owned by the corporate member in relation to whom the notional company is being assumed as part of the computation process. That is not what Section 1259(3) is saying at all. Instead, the section is merely saying that, in the case of each corporate member, the calculation of the taxable profits of the trade which are to be allocated to that corporate member must start with an assumption that the trade of the partnership is carried on by a notional company. That notional company, in each case, is a statutory fiction which represents the partnership as a whole. As such, in each case, the ownership characteristics of the notional company should be regarded as matching the ownership characteristics of the partnership. Putting it another way, just because the notional company is being assumed in order to carry out the calculation in relation to a single corporate member, that does not mean that the notional company in question is to be treated as being wholly-owned by that single corporate member. Instead, for each corporate member, the notional company is to be treated as having the ownership characteristics of the partnership whose existence has given rise to the operation of Section 1259(3)(a). It follows that, in our view, each such notional company would have the same ownership characteristics as does the partnership as a whole, which is to say that, in this case, each such notional company would be treated as having three owners, namely all three of the Corporate Members;

(6) for the reasons set out in paragraph 79 above, each Corporate Member was a "related party" of each other Corporate Member and therefore each Corporate Member should be treated as holding the rights and powers held by all three of the Corporate Members in aggregate. It follows that each Corporate Member had "control" of each notional company pursuant to Section 835(2) and therefore that each Corporate Member was a "related party" in relation to each such notional company;

(7) in saying that, we do not think that it is necessary to go as far as assuming the rights and powers held by each corporate member of a partnership to be "shares" or assuming each such corporate member to be a "shareholder" in the notional company in question. Section 835 and its related definitions do not limit the concept of "control" of, or a "major interest" in, a company to circumstances in which that company has share capital. Both definitions are simply based on the concept of voting control – the power to secure that the affairs of the company are conducted in accordance with the wishes of a person or persons – and it is therefore perfectly possible for a person or persons to have "control" of, or a "major interest" in, a company which has no share capital, such as a company limited by guarantee. In this case, it is clear that, assuming that the definition of "related party" applies to each notional company to which Section 1259 gives rise in the case of the LLP in the same way as it does in relation to an actual company, as we believe to be the correct way of approaching the definition in Section 835, each Corporate Member had "control" of each such notional company for the purposes of Section 835(2) at the time when the LLP acquired the Material Assets and was therefore a "related party" of each such notional company at that time. That is because, after taking into account its own voting rights and powers, and the voting rights and powers of each other Corporate Member, each Corporate Member had the power to secure that the affairs of the relevant notional company were conducted in accordance with its wishes; and

(8) the above conclusion is sufficient to dispose of the second proposition. As we have just explained, on the particular facts with which we have been presented, it is clear that each Corporate Member was a "related party" of each notional company to which Section 1259 gave rise. Nevertheless, we might be tempted to doubt our conclusions in relation to the second proposition if it could be said that there were many identifiable circumstances where applying the definition in Section 835 to notional companies as well as actual companies gave rise to insuperable practical difficulties. We are not persuaded that that is the case. That is because we do not see why, as a matter of principle, voting or economic rights and powers in relation to a partnership under a partnership agreement are conceptually any different from voting or economic rights and powers in relation to a company under a company's articles of association. Moreover, we think that the Appellants have over-stated the potential difficulties in applying the definition in relation to notional companies by referring to fluctuating profit shares (see paragraph 58(5) above). Both the definition of "control" and the definition of "material interest" are based on voting control and not economic control and would therefore be unaffected by fluctuations in profit shares. In any event, this is not the place to consider in detail whether there might be exceptional circumstances in which applying the definition in Section 835 to a particular notional company might give rise to practical difficulties. It is perfectly possible that it was a concern of that nature which led to the enactment of the legislation in the FA 2016 (see paragraph 123 below). All that we will say in this decision is that each case needs to be considered on its own facts and that, in our view, on the facts in this case, each Corporate Member was a "related party" of each notional company at the time when the Material Assets were acquired by the partnership.

Conclusions

118. There are three final observations which we should make in relation to this issue.

119. The first is that we do not agree with the submission made on behalf of the Appellants to the effect that, in agreeing with the Respondents in relation to the two propositions, we are deeming the notional company to have an existence which extends beyond the computational (see paragraph 58(2) above). On the contrary, we think that, contrary to that submission, it is impossible fully to carry out the notional company computation in the context of intangible fixed assets and goodwill, as Section 1259 directs, without taking into account both the identities of the disponors to the notional company and the ownership characteristics of the notional company. That is exactly what the language in Section 882 requires.

120. The second is that we think that there is an inconsistency in the Appellants' position in relation to the two propositions and their assumption that the application of Part 8 is not precluded in this context by the terms of Section 803(b). The latter provision prevents intangible fixed assets or goodwill from falling within Part 8 where they are held for the purpose of activities in respect of which "the company is not within the charge to corporation tax". It is implicit in the Appellants' conclusion to the effect that Part 8 applies in this case that Section 803(b) is inapplicable and therefore that they believe that the Material Assets are to be treated as having been held for the purpose of activities in respect of which "the company is …within the charge to corporation tax". We do not see how that test can be satisfied unless the statutory fiction in Section 1259 is to be taken into account for the purpose of applying Section 803(b). And, if the statutory fiction is to be taken into account for that purpose, why should it not also be taken into account for the purpose of applying Section 882(1)(b) and the definition of "related party" in Section 835 to which that Section refers?

121. The two provisions – Sections 882 and 803(b) – seem to us to have similar standing in terms of computing the taxable profits of the notional company in the context of intangible fixed assets and goodwill. Section 882 is a gateway provision, which identifies the assets which are to be allowed to enter the regime, whilst Section 803(b) is an anti-avoidance provision, which identifies the assets which, although they would otherwise be allowed to enter the regime, are required to be excluded from the regime. We do not readily see how the statutory fiction can be applied to one of them but not the other, as the Appellants' position suggests.

122. The final point is that, without pre-empting the conclusions which we set out below in relation to the impact on the position of the changes made by Section 52 of the FA 2016, the way in which the new Sections 882(5B) and 882(5C) were drafted suggests to us that the proponents of the changes had no doubt that the requirement in Section 882(1)(b) - to the effect that the relevant intangible fixed assets or goodwill needed to be acquired from a person other than a "related party" - was applicable to notional companies as well as to actual companies. That was why Section 882(5B) referred to the fact that, for the purposes of determining under Section 1259 the profits to be allocated to a member of a partnership, the references to "a company" in Section 882 were to be read as including references to a partnership. Although we agree with Mr Tidmarsh that the relevant provisions were not happily worded, we think that it is clear from the language used in Sections 882(5B) and 882(5C) that the proponents of the changes had no doubt that a notional company, as well as an actual company, had to establish that the intangible fixed assets or goodwill in question had not been acquired from a "related party" before Section 882(1)(b) could be satisfied and, thus, that the Appellants' first proposition was clearly incorrect.

123. On the other hand, so far as the second proposition is concerned, the proponents of the changes appear to have been less confident that the existing tests in Section 835 for determining a "related party" were adequate to apply in the context of a notional company in all cases. That was why, at the same time as the new provisions sought to extend the term "related party" to include circumstances where the "participation condition" in Section 148 of the TIOPA was met, the explanatory notes presented the new provisions as merely confirmatory in nature. This suggests to us that the proponents of the changes might have believed that the existing legislation probably achieved its objective but was not certain to do so. Hence, the desire to put the situation beyond doubt. It may be seen from the conclusion we have reached in relation to the second proposition that we think that those concerns were unjustified.

The FA 2016

Introduction

124. The conclusions which we have set out above are sufficient to dispose of these appeals in favour of the Respondents.

125. As such, it is, strictly speaking, unnecessary for us to address the submissions made by the parties in relation to the impact of the new provisions introduced by Section 52 of the FA 2016. That is because those provisions would potentially be relevant only if we had concluded that, prior to their introduction, the notional company should be regarded as satisfying Section 882(1)(b) in relation to the acquisition of the Material Assets. However, in deference to the submissions made by the parties at the hearing, we set out below our conclusions in relation to them. Those conclusions are, of course, founded on the hypothesis that, under the terms of the legislation as it stood prior to the enactment of the FA 2016, no Corporate Member could be or was a "related party" of the notional company at the time when the LLP acquired the Material Assets – which is to say that the conclusions set out in paragraphs 103 to 123 above are wrong.

126. There are two distinct areas of contention in relation to the FA 2016, both of which stem from deficiencies in the drafting of the relevant legislation.

127. The first arises out of the fact that the approach taken by the draftsman was simply to extend the definition of a "related party" for the purposes of Section 882. That gives rise to potential difficulties because the test imposed by Section 882(1)(b) is based on the status of the disponor at the "time of the acquisition". The explicit reference in the Section to the time at which the disponor was required not to be a "related party" inevitably begs the question of whether, in relation to particular assets, simply extending the definition of "related party" with effect from a date falling after the date when those assets were acquired can ever have any effect on debits arising in respect of those assets, whether before, on or after the effective date of the change. For example, in this case, on the hypothesis that no Corporate Member was a "related party" of the notional company at the time when the Material Assets were acquired, how can legislation which purported to extend the meaning of "related party" with effect from a date falling after the date when the Material Assets were acquired have any impact on the application of Section 882(1)(b) in relation to the Material Assets, given that the Section specifies that the "related party" status of a Corporate Member so far as the Material Assets are concerned is to be determined at the "time of the acquisition"?

128. The second area of dispute arises only if the change to the definition of "related party" was capable of having that impact and it relates to the fact that the language used in the new Sections 882(5b) and 882(5C) was clearly predicated on an assumption by the draftsman that Section 1259 required references in Section 882 to "a company" to include references to a partnership. In circumstances where we are operating on the basis of the hypothesis that no

Corporate Member was capable of being a "related party" of the notional company at the time when the LLP acquired the Material Assets – which is the basis on which we are necessarily addressing this question - that assumption was clearly incorrect. Consequently, it is necessary to consider whether those provisions could have any effect whatsoever, founded as they were on a fundamental misapprehension of the way that the existing legislation applied.

No retrospective effect

129. We think that the first of the questions described above is the more difficult of the two.

130. We would start by saying that it is very tempting to conclude that the drafting deficiency mentioned in paragraph 127 above, coupled with the hypothesis on which we are addressing this question, prevents the new provisions from applying at any time to any debits arising in respect of the Material Assets. This for the simple reason that the new provisions were enacted after the LLP acquired the Material Assets and therefore, given the reference in Section 882(1)(b) to the "time of the acquisition", could not affect the way in which that Section applied to the notional company at any stage. In that regard, we do see some force in the argument that the express reference in the Section to the "time of the acquisition" means that the Section applied on a "once-and-for-all" basis at that moment in time and that, as long no Corporate Member was a "related party" at that time, no subsequent change to the definition of "related party" could change the position. If that argument is right, then, in order for the extended definition of "related party" to be read into Section 882(1)(b) when applying that Section in relation to debits accruing on and after the Effective Date in respect of assets acquired before the Effective Date, something more was required than simply providing for the extended definition to apply on and after the Effective Date. For example, it might be said that, in order to have that effect, the new provisions needed to provide expressly that debits accruing on and after the Effective Date were to be calculated as if the extended definition of "related party" had applied at the time of the acquisition. The new provisions did no such thing.

131. If that conclusion is right, then, on the hypothesis that no Corporate Member could be or was a "related party" of the notional company at the time when the Material Assets were acquired, Section 882(1)(b) was satisfied not only before the Effective Date, when the new provisions took effect, but also on and after the Effective Date.

132. However, after giving this question some considerable thought, and recognising that the position is finely-balanced, we have concluded that that is not the right answer. On the contrary, for the reasons which follow, we have concluded that the extended definition of "related party" should be read into Section 882(1)(b) when applying that Section in relation to debits accruing on and after the Effective Date in respect of assets acquired before that date.

133. Three arguments were made by the Respondents in support of this conclusion.

134. The first was that paragraph [10] of the explanatory notes to the clauses which became Section 52 of the FA 2016 stated that "[the] rules apply to debits and credits irrespective of when the relevant transfers of intangible fixed assets took place". As such, the intention of the Government in introducing the new provisions was clearly that the amended definition of "related party" should apply in determining whether debits accruing on and after the Effective Date fell within the regime no matter when the relevant acquisition was made.

135. The second was that Sections 52(5) to 52(7) provided for the new provisions to take effect in relation to accounting periods commencing on or after the Effective Date and then deemed the accounting period current as at the Effective Date to be split into two accounting

periods. Mr Tidmarsh pointed out that the only reason to provide for the accounting period straddling the Effective Date to be split into two accounting periods was that debits accruing on and after the Effective Date in respect of acquisitions made before the Effective Date were intended to be affected by the new provisions. There could be no other reason for splitting the straddling accounting period in this way.

136. The final one was that corporation tax is an annual tax and therefore the question of whether a Corporate Member was a "related party" of the notional company at the "time of the acquisition" had to be revisited in each accounting period in which debits in respect of the Material Assets arose and not on a "once-and-for-all" basis solely at the "time of the acquisition". Upon doing that in this case, the fact that, on and after the Effective Date, each Corporate Member was a "related party" of the notional company at the "time of the acquisition" under the amended legislation meant that debits accruing on and after the Effective Date were outside the regime because Section 882(1)(b) was no longer satisfied in relation to the assets giving rise to those debits.

137. We do not consider the first reason to be persuasive in and of itself.

138. That is because we agree with the point made by Mr Trevett in paragraph 101(1) above to the effect that the decision in *Flora* makes it clear that:

(1) the wishes and desires of the Government are not the same as the will of Parliament; and

(2) an intention expressed in the explanatory notes is incapable of overriding the clear words in the relevant legislation.

As Lord Steyn noted in *Asylum Support* at paragraphs [2] to [6], our task is to discover the will of Parliament "expressed by the words enacted". Thus, in this case, if the will of Parliament as reflected in the wording of the legislation both before and after its amendment was that the question of whether a person was a "related party" needed to be addressed on a "once-and-for-all" basis only at the "time of the acquisition", then no statement to the contrary in the explanatory notes could gainsay that result.

139. The second reason is somewhat more persuasive than the first, given that, although it too depends on a perceived intention in relation to the operative provisions, the intention on which reliance is being placed is reflected not in explanatory notes but in the legislation itself, in the form of the commencement provisions. We agree with Mr Tidmarsh that the only logical reason for splitting the straddling accounting period into two was that the draftsman considered that the extended definition of "related party" would apply to debits accruing on and after the Effective Date in respect of acquisitions made before that date. Indeed, Mr Trevett did not provide us with any other explanation for the terms of the commencement provisions. It follows that, were we to reach a contrary conclusion to the one we have reached, that would have the effect of rendering the commencement provisions, as drafted, redundant. We are naturally reluctant to reach a view which has that consequence.

140. Having said that, we do not think that this second reason, in and of itself, would be sufficient to justify the conclusion we have reached. That is because, as a matter of general principle, the terms of commencement provisions cannot impart a meaning to the operative provisions to which the commencement provisions relate that is at-odds with the language used in the operative provisions themselves. However, in this case, for the reasons which we are about to give, we think that the operative provisions are capable of being construed in a manner which is entirely consistent with the commencement provisions. The commencement provisions are therefore supportive of that conclusion.

141. Turning then to the third reason given by Mr Tidmarsh, we have concluded that it is for that reason that the Respondents should succeed in relation to this question. We believe that it is possible to read the legislation in the manner for which the Respondents are contending and that, in fact, the relevant construction is, on balance, the better reading of the legislation.

142. The starting point is to recognise that corporation tax is an annual tax and that it is necessary to consider afresh in respect of the debits arising in each accounting period whether Section 882(1)(b) is satisfied in respect of the assets which have given rise to those debits. That does not mean that whether or not the disponor is a "related party" needs to be determined afresh in each accounting period by reference to the then-prevailing facts. The relevant time for determining whether a person is a "related party" is always the "time of the acquisition" and only the "time of the acquisition". However, it does mean that, in applying the legislation in the later accounting period and thus considering whether the disponor was a "related party" at the "time of the acquisition", it is necessary to apply the law as it stands in the later accounting period and not simply the law as it stood at the "time of the acquisition". Thus, in this case, once the new provisions took effect, they were required to be taken into account in accounting periods commencing (or deemed to commence) on or after the Effective Date in determining whether each Corporate Member was a "related party" at the "time of the acquisition".

143. As we have said, this approach is appropriate because corporation tax is an annual tax and therefore the conditions for a debit to qualify for relief need to be tested in the accounting period in which the debit arises. It is also consistent with the proposition in *GDF Suez* at paragraph [87] (and set out in paragraph 94 above) to the effect that "[where] an Act makes textual amendments to an earlier Act the intention is usually to produce a revised text that may be construed as whole". In the present context, that means that, once the new provisions took effect, Part 8 was to be construed as if the new provisions had been part of Section 882 *ab initio*. In the words of Hobhouse LJ in the Court of Appeal decision in *Inco Europe Limited v First Choice Distribution (a firm)* [1999] 1 All ER 820 "the effect of an amendment to a statute should be ascertained by construing the amended statute. Thus, what is to be looked at is the amended statute itself as if it were a free-standing piece of legislation and its meaning and effect ascertained by an examination of the language of that statute."

144. We should make it clear that nothing we have said in paragraphs 141 to 143 above is inconsistent with the proposition that "related party" status is to be determined only by reference to the "time of the acquisition" and not on an ongoing basis by reference to the then-prevailing facts. The present circumstances are different from a case where assets are acquired from a person who is not a "related party" and then the disponor becomes a "related party" at some point after the acquisition but at a time when debits in respect of the acquired assets are still accruing. The Respondents accepted that, in such a case, the debits accruing after the disponor became a "related party" as a result of the change in facts would be unaffected by the disponor's change in status to "related party". We agree. As a policy matter, it seems logical to us that the question of whether the person from whom the assets have been acquired is a "related party" should logically be tested only at the "time of the acquisition" and not at any point thereafter. However, that is not to say that, in testing the disponor's status by reference to the facts as they stood at the "time of the acquisition", changes in law which have been made after the "time of the acquisition" but on or before the time when the relevant debits accrued can simply be disregarded. We therefore also agree with the Respondents that a case where the disponor becomes a "related party" by reason of a change in the relevant facts taking place after the "time of the acquisition" is very different from the present circumstances where, after the "time of the acquisition", without any change in the relevant facts, a person may be regarded as having become a "related party" at the "time of the acquisition" by virtue of a subsequent change in law.

145. For the reasons set out above, we believe that, on the hypothesis that no Corporate Member could be or was a "related party" at the "time of the acquisition" prior to the Effective Date, the position would need to be re-examined in relation to debits accruing on and after the Effective Date by taking into account the impact of the new provisions on the definition of "related party".

Ineffective drafting

146. Turning then to the terms of the new provisions themselves, we need to consider whether, on the hypothesis that no Corporate Member could be or was a "related party" at the "time of the acquisition" prior to the Effective Date, the new provisions were effective in depriving each Corporate Member of relief for its appropriate share of the debits accruing in accounting periods commencing (or deemed to commence) on or after the Effective Date.

147. We are again inclined to favour the Respondents' position in this respect. We recognise that, on the basis of the hypothesis on which we are addressing this question, the draftsman of the new Sections 882(5B) and 882(5C) was proceeding on a fundamental misunderstanding of the then-existing statutory framework. It is perfectly clear from the language used in those provisions that the draftsman was under the apprehension that the effect of the statutory fiction was that references in Section 882 to a "company" were to be read as including a partnership in a case where Section 882 was applying in the context of the notional company computation required by Section 1259. As it happens, we think that the draftsman's apprehension was correct. However, for the purposes of this part of the decision, we are necessarily assuming that it was not.

148. On that assumption, the new Sections 882(5B) and 882(5C), read literally, had no effect whatsoever. However, the purpose of the relevant provisions was clear, both in the terms of the provisions themselves and by reference to the explanatory notes which accompanied the new clauses that became the provisions. Moreover, the failure of the drafting to achieve the intended purpose was clearly inadvertent and the substance of the provisions which Parliament would have made in the absence of that error was readily apparent. As such, for the reasons given by Mr Tidmarsh and summarised in paragraph 98 above, we think that all three of the conditions which need to be satisfied before the principle set out in *Inco HL* and *Pollen* can apply are satisfied in this case and that that principle can therefore be used to remedy the deficiencies in the drafting of the relevant provisions.

149. For completeness, we should note that the drafting defect in the relevant provisions is, we think, of a different order from the drafting defect which we addressed in paragraphs 129 to 145 above.

150. In the latter case, whilst the method chosen to achieve the change in the definition of "related party" in relation to debits accruing on and after the change in law in respect of assets acquired before the change in law was not entirely felicitous, it is possible, for the reasons we have given, to construe the legislation as it stands in such a way as to give effect to the will of Parliament, as reflected in the commencement provisions (and, as it happens, the intention of the Government, as reflected in the explanatory notes). There is no need to do any violence to the legislation as it stands in order to give effect to that will (and that intention.)

151. In contrast, in relation to the language used in the operative provisions themselves, the drafting defect is much more egregious. We are confronted with operative provisions which, on the basis of the hypothesis on which we are construing them, make no sense in and of themselves and therefore it is necessary apply the principle set out in *Inco HL* and *Pollen* to remedy that deficiency. This is permissible because, even though, on the basis of that hypothesis, the drafting is a nonsense, its intention is perfectly clear on the face of the

provisions and the substance of the provisions which Parliament would have enacted in the absence of that error was readily apparent. There is no need to have recourse to the explanatory notes.

Conclusion

152. Since the Appellant does not dispute that each Corporate Member met the "participation condition" in Section 148 of the TIOPA, it follows that, even if we are wrong to have concluded that, under the legislation at it stood before the FA 2016 was enacted, each Corporate Member was a "related party" at the time when the Material Assets were acquired:

(1) each Corporate Member became a "related party" at the "time of the acquisition", with effect from the Effective Date pursuant to the enactment of the FA 2016;

(2) it follows that, in applying Section 882(1)(b) in the context of debits accruing in respect of the Material Assets in accounting periods commencing (or deemed to commence) on or after the Effective Date, each Corporate Member should be regarded as having been a "related party" of the notional company at the "time of the acquisition" of the Material Assets; and

(3) therefore, each Corporate Member would be precluded from claiming relief for its relevant share of the debits accruing in respect of the Material Assets in those accounting periods.

CONCLUSIONS AND DISPOSITION

153. In ending this decision, we would summarise our conclusions in relation to these appeals as follows:

(1) in computing a UK resident company's share of the taxable profits of a trade carried on by a partnership, the first stage in the computation process required by Section 1259 is to calculate the profits of the trade if the trade was carried on by a UK resident company;

(2) Section 882 sets out exhaustively the entry requirements for intangible fixed assets and goodwill held by a company to be regarded as falling within the regime in Part 8;

(3) as such, the provisions in Section 882 must necessarily apply in determining the profits of the trade carried on by the notional company;

(4) that, in turn, means that, for the purposes of that determination, before being able to conclude that the notional company satisfied Section 882(1)(b) in relation to intangible fixed assets or goodwill acquired by the relevant partnership on or after 1 April 2002, it is necessary:

(a) to consider whether the person who disposed of those intangible fixed assets or that goodwill was a "related party" of the notional company; and

(b) to apply the "related party" definition in Section 835 for that purpose;

(5) in doing so, the statutory fiction requires the notional company to be assumed to be owned in the same way as the partnership in relation to which the computation is being carried out, in the same way that the transactions carried out by that partnership form the basis for the notional company calculation;

(6) that does not involve any extension of the statutory fiction beyond the computational – it is instead simply a natural corollary of the statutory fiction which is necessary in order for the computation which Section 1259 requires to be carried out and it goes no further than that;

(7) that means that, in relation to each Corporate Member, the initial stage in the determination of the taxable profits of that Corporate Member required an assumption that the trade of the LLP was being carried on by a notional company owned by the three Corporate Members together, with each Corporate Member holding the same rights and powers in relation to each such notional company as it held in relation to the LLP;

(8) each Corporate Member was a "related party" of each other Corporate Member because all three Corporate Members were under common "control" (as defined in Section 836) – see Section 835(3);

(9) as a result, each Corporate Member was to be treated as holding, in relation to each such notional company, the rights and powers which both it and each other Corporate Member held in relation to the LLP – see Sections 838(4), 842 and 843;

(10) this means that each Corporate Member was a "related party" of each notional company at the time when the LLP – and hence each notional company - acquired the Material Assets and therefore that the notional company did not at any time fall within Part 8 in relation to the Material Assets;

(11) consequently, the appeals are hereby dismissed; and

(12) if we are wrong in the conclusion we have drawn in paragraph 153(10) above, then the application of the relevant legislation changed as a result of the enactment of Section 52 of the FA 2016 because, following the enactment of that provision, each Corporate Member was to be regarded (in relation to debits accruing in respect of the Material Assets in accounting periods commencing (or deemed to commence) on or after the Effective Date) as a "related party" of the notional company at the time when the Material Assets were acquired and therefore those debits will fall to be disallowed by virtue of the changes made by Section 52 of the FA 2016.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

154. 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.

TONY BEARE
TRIBUNAL JUDGE

Release Date: 22nd FEBRUARY 2023

THE APPENDIX

The following are the facts agreed by the parties in relation to the appeals:

The Appellants

(1) the LLP was incorporated under the Limited Liability Partnership Act 2000 on 7 May 2013 by the Corporate Members, with each Corporate Member subscribing £10,000 for its respective membership share and appointing two directors each to form the LLP's management committee;

(2) the Corporate Members are UK incorporated companies, resident in the UK for the purposes of corporation tax;

(3) both before and after the incorporation of the LLP, MDUK and TMUK were both wholly-owned subsidiaries of an entity incorporated in Luxembourg, TM Dairy (UK Holding) Sarl;

(4) RWS was acquired by MDUK on 1 May 2012 and, from such date, was a wholly-owned indirect subsidiary of MDUK;

(5) the Appellants are producers, marketers and distributors of dairy products in the UK and the Republic of Ireland and are part of the Muller Group, a privately-owned multinational producer of dairy products, currently headquartered in Luxembourg;

The Business Integration

(6) the Muller Group entered the UK market in 1987 after MDUK was incorporated on 23 January 1987 and took on the role of marketing and distributing products in the UK and the Republic of Ireland;

(7) in undertaking this business, MDUK used trade marks owned by a German limited partnership, Molkerei Alois Muller GmbH & Co KG ("MAM KG") under an unwritten licence and subsequently under a written licence granted by Clause 13 of a Supply Agreement (the "2010 Supply Agreement");

(8) initially, products were sourced from MAM KG and imported into the UK;

(9) in 1992, MAM KG started to undertake production activities in the UK through a production branch;

(10) sales and marketing activities were carried out by MDUK;

(11) on 31 October 201, MAM KG granted a trade mark license (the "2011 Licence') to Molkerei Alois Muller (UK) Ltd and Co KG (a partnership registered in Germany) to use trademarks created, used and registered in the UK and Republic of Ireland by MAM KG's UK branch;

(12) the 2011 Licence was assigned to TMUK by Molkerei Alois Muller (UK) Ltd and Co KG on 30 November 2011;

(13) in 2011 the UK production branch, which had previously been a branch of MAM KG but by that time was a production branch of Molkerei Alois Muller (UK) Ltd and Co KG, was incorporated as TMUK;

(14) as a result, from 2011, the Muller Group operated in the UK and the Republic of Ireland through TMUK, which undertook production, and MDUK which carried out marketing and distribution activities;

(15) in February 2012, MDUK's offer to acquire RWS, a large, listed dairy company which had one of the largest liquid milk business in the UK, was accepted;

(16) on 1 July 2013, the Corporate Members transferred their trades, which prior to that date had been individually carried on by the respective companies, and certain assets to the LLP in return for membership units in the LLP pursuant to asset transfer agreements dated 28 June 2013;

(17) the assets transferred by the asset transfer agreements included goodwill and certain intangible fixed assets, including trade marks, domain names and software relating to the former RWS business, and rights to use trade marks and other intellectual property under the 2010 Supply Agreement and the 2011 Licence;

(18) a valuation report was prepared by Ernst & Young LLP dated 28 June 2013;

(19) the valuation report included the following values. When allocating value to the contribution by each Corporate Member to the LLP, the "synergies" were attributed to RWS. While it is not agreed between the parties that the division into the separate items below is appropriate or relevant for tax purposes (in particular whether it is appropriate to divide synergies from the other goodwill transferred by RWS), the values are not disputed. Other cash, debts and assets were also transferred by the Corporate

Members to the LPP as part of the Business Integration, which is why these total figures do not match the total value of the contribution to the LLP by each Corporate Member set out at paragraph (21) below.

£'000	Brand	Licence(s)	Software	Goodwill
MDUK		409,160		127,687
TMUK				143,831
RWS	12,785		3,557	129,012
Synergies				61,618
MUIG LLP	12,785	409,160	3,557	462,148

(20) the valuation report was used to determine the value of the Material Assets transferred by each Corporate Member included in the respective asset transfer agreement (and accordingly the membership units that each Corporate Member received in return). The values assigned to each Corporate Member (as set out in the paragraph below) are not in dispute for the purpose of these appeals;

(21) the membership units and values were as follows:

Member	Initial Contribution	Value of Contribution	Aggregate Contribution	Membership units	LLP Equity Interest
MDUK	£10,000	528,189,000	528,199,000	528,199,000	51.21%
TMUK	£10,000	197,585,000	197,595,000	197,595,000	19.16%
RWS	£10,000	305,603,000	305,613,000	305,613,000	29.63%

(22) in addition, the valuation report formed the basis of the allocation of value to particular assets acquired by the LLP for accounting purposes;

(23) PriceWaterhouseCoopers audited the LLP's accounts, and it is agreed, for the purpose of these appeals, that those accounts are compliant with GAAP;

(24) the recorded fair value of the brand, the licences, the software and the goodwill below in the accounts of the LLP, which are not in dispute for the purpose of these appeals, is as follows:

£'000	Brand	Licence(s)	Software	Goodwill
MUIG LLP	12,785	409,160	4,508	462,148

(25) the difference between the value of the software shown in the accounts of the LLP above is greater than the value of the software contributed by the Corporate

Members due to the acquisition by the LLP of further software after the transfer of assets by the Corporate Members during the period 1 July 2013 and 31 December 2013;

(26) the majority of these were internally-generated;

(27) as a result, they were not recognised in the accounts of the Corporate Members prior to their transfer to the LLP and so no amortisation debits had previously arisen;

(28) RWS had previously recognised a small amount of goodwill and software in its accounts, although the goodwill was separately impaired in the accounts of RWS prior to the transfer to the LLP;

The tax deductions for amortisation

(29) the schedules submitted by the LLP in support of its tax return for the tax year ended 5 April 2014 recorded the acquisition of the Material Assets from the Corporate Members and included the associated amortisation;

(30) in computing the profits of the LLP, to be included in each Corporate Member's company tax return for the accounting periods ended 31 December 2013, 2014, 2015, 2016, 2017 and 2018, a deduction was taken for the amortisation of the Material Assets;

(31) it is agreed, for the purpose of these appeals, that:

(a) the LLP's accounts are GAAP-compliant; and

(b) amortisation was appropriately and correctly calculated on a straight line basis over 5 years;

The Respondents' enquiries

(32) on various dates between 4 June 2015 and 7 December 2018, the Respondents opened the Enquiries into the tax returns of the LLP for the Relevant Periods;

(33) following receipt of an application to the Tribunal dated 6 November 2018 to close the Enquiries, the Respondents closed the Enquiries into the LLP's tax returns for the Relevant Periods on 23 January 2019 and closed the Enquiries into the Corporate Members' tax returns for the Relevant Periods on 24 January 2019; and

(34) the appeals are against the conclusions stated in and the amendments made by the closure notices issued to the LLP and the Corporate Members for the Relevant Periods.