Neutral Citation: [2024] UKFTT 00271 (TC)

Case Number: TC09117

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/00542

Scheme Reference Number – Maltese company – strike out application -European law not applicable – HMRC did not issue SRN to Appellant – appeal struck out

Heard on: 20 February 2024
Judgment date: 27 March 2024

Before

TRIBUNAL JUDGE ALASTAIR J RANKIN MBE

Between

OCULUS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Satu Kamal LLM of Counsel

For the Respondents: Ms Rebecca Murray of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The form of the hearing with the consent of the parties was by video using the Tribunal video hearing system. The documents to which I was were referred were an electronic Hearing Bundle containing 6,253 pages, HMRC's Skeleton Argument dated 13 February 2024, the Appellant's Skeleton Argument dated 14 February 2024 and in accordance with directions agreed at the hearing HMRC's submission on the application of European Law dated 26 February 2024, the Appellant's response (undated) and HMRC's response by email dated 8 March 2024.

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

3. This was an application by HMRC to strike out the Appellant's appeal lodged on 7 February 2023 whereby the Appellant sought to have HMRC's decision to issue a Scheme Reference Number ('SRN') set aside.

BACKGROUND

4. The Appellant, a company registered in Malta with registration number C80628, provides the services of its workers to third parties. It operates in the UK through an agent, Griffith Anderson Limited ('GAL'). On 22 September 2022, HMRC wrote to GAL indicating that it was contemplating issuing an SRN under subsections (3) and (5) of section 311 of Part 7 of the Finance Act 2004 (the 'DOTAS' regime) to GAL. This was on the basis that GAL had made payments to its workers which, by HMRC's own admission, did not give rise to a liability to income tax under UK laws ('Direct Payments'). It was not in contention that the making of direct payments to workers by way of loans or the direct provision of other credit to workers does not give rise to a liability to income tax under UK domestic laws.

5. GAL made representations to HMRC to the effect that the arrangements did not constitute 'notifiable arrangements' as a matter of domestic law. Notwithstanding that being the case, GAL had, on 12 January 2023, been notified by HMRC of an SRN.

6. The Appellant sought to have the SRN set aside.

7. On 19 May 2023 HMRC applied to have the appeal struck out on the basis that this Tribunal had no jurisdiction in the matter. HMRC's application was made under rule 8(2)(a) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules") on the ground that the FTT does not have jurisdiction to hear an appeal by the Appellant.

8. GAL were persons HMRC reasonably suspected to be promoters of arrangements, to which the SRN 05773516 had been allocated. GAL is a company registered in the UK, which carries on a trade in the UK, and which was incorporated on 6 April 2018 with Gemma Claire Askew as a sole director. Following the review of scheme user evidence, HMRC formed the view that the conditions in section 310D(1) of Finance Act 2004 ("FA 2004") were met.

9. Section 310D FA 2004 provides:

> "310D Notice of potential allocation of reference number: arrangements and proposals suspected of being notifiable
>
> (1) This section applies where—
>
> (a) HMRC have become aware that—
>
> (i) a transaction forming part of arrangements has been entered into,
>
> (ii)…, or

(iii)…, and

(b) HMRC have reasonable grounds for suspecting that the arrangements are notifiable….

(2) HMRC may issue a notice to a person explaining that, unless the person is able to satisfy HMRC, before the end of the notice period, that the arrangements are not notifiable…, HMRC may allocate a reference number to the arrangements….

(3) But HMRC may not issue a notice under this section before the end of the period of 15 days beginning with the day on which they first become aware that the condition in paragraph (a)(i)… of subsection (1) is met.

(4) A notice under this section must be issued to any person who, on the day the notice is issued, HMRC reasonably suspect to be a promoter in relation to the arrangements or proposal.

(5) A notice under this section may be issued to any other person who HMRC reasonably suspect to be involved in the supply of the arrangements or proposed arrangements.

10. In other words HMRC (i) became aware that transactions forming part of certain arrangements ("the Arrangements") had been entered into, (ii) had reasonable grounds to suspect that the Arrangements were notifiable, and (iii) reasonably suspected that GAL was a promoter in relation to the Arrangements.

11. Accordingly, on 29 September 2022, HMRC issued a notice to GAL under section 310D(3). A section 310D Notice was never issued to the Appellant. Subsequently, HMRC formed the view that GAL had failed to satisfy them before the expiry of the notice period (namely 29 October 2022) that the Arrangements were not notifiable and accordingly, on 4 January 2023, HMRC allocated an SRN in relation to the Arrangements under section 311 FA 2004, which provided insofar as relevant:

"311 Allocation of reference number to arrangements

(1) This section applies in—

(a)…, or

(b) a subsection (3) case.

(2) ..

(3) A "subsection (3) case" is a case where—

(a) notice in relation to arrangements… has been issued in accordance with section 310D (notice of potential allocation of reference number),

(b) the notice period has expired, and

(c) the person to whom the notice was given has failed to satisfy HMRC, before the expiry of the notice period, that the arrangements are not notifiable.

(4) "The notice period" means—

(a) the period of 30 days beginning with the day on which the notice under section 310D is issued, or

(b) such longer period as HMRC may direct.

(5) HMRC may allocate a reference number to the arrangements or, in the case of a proposal, the proposed arrangements, subject to subsection (6)…."

12. Despite the Appellant's claims in an e-mail odated16 November 2022 about GAL being an agent acting on its behalf, HMRC continued to reasonably suspect GAL to be or to have been a promoter in relation to the arrangements. On 12 January 2023, HMRC notified GAL of the SRN under section 311A FA 2004. At this time and subsequently, the Appellant has not provided sufficient information to HMRC about its activities in relation to the arrangements to give HMRC reasonable suspicion that it is a promoter of the arrangements

and is the reason why, to date, HMRC has not notified the SRN to the Appellant. Section 311A provides:

> "311A Duty of HMRC to notify persons of reference number
>
> (1)…
>
> (2) If a reference number is allocated in a case within section 311(3), HMRC must notify the following of the number—
>
> (a) any person who HMRC reasonably suspect to be, or to have been, a promoter in relation to the arrangements or the proposed arrangements, and
>
> (b) any other person who HMRC reasonably suspect to be, or to have been, involved in the supply of the arrangements or the proposed arrangements.
>
> (3) The duty in subsection (2) applies irrespective of whether the notice under section 310D as a result of which the reference number was allocated has been issued to the person concerned."

13. A right of appeal against the allocation of an SRN is conferred by section 311B(2) FA 2004, which provides insofar as relevant:

> "311B Right of appeal: section 311(3) case
>
> (1) This section applies where HMRC have allocated a reference number to arrangements… in a case within section 311(3).
>
> (2) A person who has been notified of the reference number may appeal to the tribunal against its allocation.
>
> (3) An appeal under this section may be brought only on the following grounds—
>
> (a) that, in issuing the notice under section 310D as a result of which the reference number was allocated, HMRC did not act in accordance with that section;
>
> (b) that, in allocating the reference number, HMRC did not act in accordance with section 311;
>
> (c) that the arrangements are not in fact notifiable arrangements….
>
> (4) Notice of appeal under this section must be given to the tribunal in writing before the end of the period of 30 days beginning with the day on which the person is notified of the number by HMRC.
>
> (5) Notice may be given after that time if the tribunal give permission.
>
> (6) The notice of appeal must specify the grounds of appeal.
>
> (7) On an appeal under this section, the Tribunal may affirm or cancel HMRC's decision.
>
> (8) If the tribunal cancel HMRC's decision, HMRC must withdraw the reference number.
>
> (9) Bringing an appeal under this section does not prevent—
>
> (a) a power conferred by this Part from being exercised, or
>
> (b) a duty imposed by this Part from continuing to apply."

14. HMRC contended that the reference to "a person who has been notified" in subsection (2) of section 311B can only mean a person notified by HMRC under section 311A and since the Appellant was not notified of the SRN, it does not have a right of appeal under section 311B or otherwise.

15. HMRC also contended that section 311B, does not confer a right of appeal on the Appellant, even if the Appellant can prove all or any of the following:

> (i) that the Appellant was in fact acting as a promoter in relation to the Arrangements (whether because GAL was acting as a mere nominee, agent and bare trustee for the Appellant or otherwise),
>
> (ii) that HMRC ought to have known or reasonably suspected this, and

(iii) that HMRC ought to have notified the Appellant of the allocation of the SRN under section 311A.

16. More generally, HMRC claimed that no other legislative provisions confer a right of appeal on the Appellant. HMRC contended that GAL is not being treated differently as a result of it being registered in Malta, therefore there is no discrimination and the Appellant's EU rights are not infringed.

17. HMRC claim that since the Appellant has no right of appeal according to HMRC, this Tribunal has no jurisdiction to hear this appeal and I must strike out the proceedings.

18. The Appellant has contended that there are directly effective EU law rights invoked in this appeal. First, the Appellant is a Maltese company. It has invoked the Right to Free Movement of Capital ('FMOC'). FMOC is EU law which has been unilaterally retained by the UK Parliament according to the Appellant. The argument of the Appellant is that the making of loans or similar benefits-in-kind by it to its workers give rise to the issuance of the SRN. The issuing of the SRN would in turn decimate its business. At the very least, the issuing is 'potentially dissuasive' from the provision of these benefits and is therefore an infringement of FMOC. It is an unjustified and disproportionate one too, especially as under FMOC a liability to tax simply cannot arise in relation to the benefits as though they were outright payments. The same is true insofar as domestic law is concerned – as direct payments from the agency do not give rise to a charge to tax under Part 7A of ITEPA or sections 23A to 23E of ITTOIA.

19. The Appellant argued that FMOC has direct effect and for the avoidance of doubt, general principles of EU law such as direct effect which applied on 'IP completion day' continue to apply at the date of this application being made. This has been recently confirmed by the Court of Appeal in *Tower Bridge GP Ltd v Revenue and Customs Commissioners* [2022] EWCA Civ 998.

> " 111. Retained EU case law means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day. Against that changed legal landscape I turn to the post-Brexit cases."

20. The principle of 'direct effect' has been enshrined since a decade before the accession of the UK to the EU according to the Appellant and domestic procedural laws and practices are subjected to directly effective rights such as Fundamental EU Treaty Freedoms. Lord Millett stated in *Autologic Holdings plc and others v Inland Revenue Commissioners* [2005] 4 All ER:

> "[62] It is sufficient to say that three propositions are well established. First, it is for the legal system of each member state to identify the court or tribunal which has jurisdiction to determine disputes involving individual rights derived from Community law, provided that full effect is given to such rights; second, in the United Kingdom the computation of a taxpayer's taxable profits for the purpose of determining his liability to tax is within the exclusive jurisdiction of the commissioners; and third, owing to the primacy and direct effect of Community law, the commissioners, in exercising their jurisdiction, are not only entitled but bound to give effect to Community law, disregarding any provisions of domestic law which are inconsistent with it or which make it impossible or excessively difficult to apply."

It follows, according to the Appellant, that the procedural objections which HMRC has raised, based on the Rules (or other domestic legislation), cannot take precedence over the principle of direct effect and, indeed, the position is actually the opposite according to the Appellant. None of the authorities cited by HMRC relate to EU law and they are not on point.

21. It is also worthy of note according to the Appellant that unlike other Fundamental Treaty Freedoms, FMOC is not person-specific. As follows from the wording of Article 63 TFEU, that the freedom attaches to the movement of the capital itself. It may be invoked by any person. In the present case, the relationship between the Appellant and GAL is extremely close – as one is the agent of the other and the present contention arises from acts carried out by the agent on behalf of its principal. For the principal not to be able to actively participate in the defence of its own business would be contrary to the EU principles of equivalence and effectiveness. These are described by the ECJ as follows:

> "2. In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)." (Case C-432/05 *Unibet (London) Ltd*

22. The Appellant contends that it has a right of freedom of movement of capital under EU law, and/or the EU-UK Trade and Cooperation Agreement, and/or the EU-UK Withdrawal Agreement, which rights are infringed by sections 310D-311B of FA 2004, such that those sections do not apply. HMRC submits that this contention is misconceived.

23. As the question of the applicability of European law was not properly argued at the hearing, I directed both parties to produce submissions on this point.

HMRC'S SUBMISSION ON APPLICABILITY OF EU LAW

24. Section 2 of the European Communities Act 1972 ("ECA 1972") provided that all rights and obligations created by EU law were without further enactment to have legal effect in the UK. Section 1 of the European Union (Withdrawal) Act 2018 ("WA 2018") provided that the ECA 1972 was to be repealed on "exit day", defined by section 20 as 29 March 2019 (subject to certain savings made by section 4). Critically, section 5 of the WA 2018 provided that the principle of the supremacy of EU law does not apply to any enactment made on or after exit day.

25. The EU-UK Withdrawal Agreement ("the Withdrawal Agreement") was entered into in order to establish the terms of the UK's orderly withdrawal from the EU and entered into force on 17 October 2019. Article 127 provided that EU law should continue to apply during a transition period, ending on 31 December 2020. As an international treaty, the Withdrawal Agreement did not form part of domestic law and therefore could not give rise to any legal rights or obligations in domestic law, unless it was incorporated into domestic law, or otherwise given effect, by statute.

26. The European Union (Withdrawal Agreement) Act 2020 ("WAA 2020") was enacted to give effect to the Withdrawal Agreement. Section 1 of the WAA 2020 inserted a new section 1A into the WA 2018. Section 1A(1)-(4) provided that, despite its repeal on exit day, the ECA 1972 was to continue to have effect in domestic law on and after exit day. However, section 1A(5) provided that subsections (1)-(4) were repealed on "IP completion day", defined by section 39 as 31 December 2020.

27. Thus, the WAA 2020 had no effect after 31 December 2020. Section 5(1) of the WA 2018 was repealed and replaced by a new section 5(A1) of the WA 2018 by section 3 of the Retained EU Law (Revocation and Reform) Act 2023 with effect from 31 December 2023. The new section 5(A1) of the WA 2018 provides that the principle of the supremacy of EU law is not part of domestic law, and that this applies in relation to any enactment, whenever enacted.

28. Referring back to the legislation quoted in paragraph 13 above, sections 310D and 311B were inserted into FA 2004 by section 122 of, and schedule 31 to, FA 2021, which received Royal Assent on 10 June 2021. Furthermore, sections 311 and 311A were amended, also by section 122 of, and schedule 31 to FA 2021, to reflect the position of those sections for 'subsection 3' cases as defined in section 311(3) FA 2004.

29. The arrangements in question are a 'subsection 3' case. HMRC have not notified the Appellant of the SRN allocated to the arrangements because HMRC have never reasonably suspected them of being a promoter of the arrangements and consequently the Appellant does not have a right of appeal (section 311B(2)).

30. On 7 February 2023 the Appellant purported to appeal to the Tribunal against the issue of a Scheme Reference Number to GAL. As at that date, section 5(1) of the WA 2018 was in force, with the effect that the principle of the supremacy of EU law did not apply to sections 310D-311B. As from 31 December 2023, section 5(A1) of the WA 2018 applies instead, but with the same effect. HMRC maintain that at all material times, by virtue of section 5(1) or section 5(A1) of the WA 2018, the principle of the supremacy of EU law no longer applies to domestic law, and therefore the Appellant's purported EU right of freedom of movement of capital cannot override sections 310D-311B.

31. In any event, and for completeness, HMRC submitted that EU law would not have been engaged, because there is no evidence that (i) sections 310D-311B restrict the Appellant's freedom of movement of capital, let alone (ii) do so in a discriminatory way given that sections 310D-311B apply in exactly the same way to an EU entity as they do to a UK entity.

32. The Appellant's counsel referred at the hearing to article 215 of the EU-UK Trade and Cooperation Agreement, and appeared to contend that it provides the Appellant with a directly effective right of freedom of movement of capital. However, the Agreement is a treaty which has not been incorporated into, or given effect under, domestic law. It follows that it does not give rise to any rights to the Appellant, let alone rights capable of overriding sections 310D-311B. In any event, article 5(1) of the Agreement itself provides that it shall not be construed as conferring rights on persons other than the parties to the Agreement, save for certain exceptions not relevant to this appeal.

APPELLANT'S SUBMISSION ON APPLICABILITY OF EU LAW

33. Section 2 of the European Communities Act 1972 ('ECA 1972') provided that all rights and obligations created by EU law were without further enactment to have legal effect in the UK. Article 63 TFEU ('FMOC') is such a right.

34. Section 4(1) of the Withdrawal Act 2018, as originally enacted, retained those rights. Section 5, as originally enacted, maintained the supremacy of EU law. It is accepted by the Appellant that this did not apply to enactments made after the exit day. Both these sections have now been repealed. In particular, section 4 has been amended by section 2 of the Retained EU Laws (Revocation and Reform) Act 2023 and section 5 has been amended by section 4(6) of that act, when read in conjunction with section 22(3) of that act and Regulation 3(b) of SI2023/1363. Both of these changes take effect from the end of 2023. However, until the end of 2023, FMOC was a supreme law other than in relation to an enactment passed after the 29th March 2019.

35. The Appellant would submit that the effect of section 311 of the Finance Act 2021 is not such that FMOC can be said to have been impliedly repealed. Rather, section 311 is subject to FMOC. Six points are made in support of this proposition. A seventh point is then made which deals with the position in the event that section 311 does in fact represent a repeal.

36. First, section 311 is introduced by the Finance Act 2021, which is recognised as a 'money bill' for the purposes of the Parliament Act 1911. This gives rise to the deduction that the bill is only concerned with taxation and other financial matters.This in turn means that any matter beyond such things, such as the repeal of FMOC or any other alteration of the constitution, cannot have been an intended part of that act. Parliament are very conscious of this balance between its two houses – as reflected by the caveat in the original section 7(4)(b) of the Withdrawal Act 2018. Much though the Respondent may wish for it to be the case, the Withdrawal Act, which relates to the EU, ought not to have disturbed longstanding internal UK constitutional arrangements in a way whereby the House of Commons became entitled to make legislation unilaterally in cases where it previously could not have. As it happens, the Retained EU Law (Revocation and Reform) Act 2023, which did repeal EU laws, did receive the consent of the House of Lords.

37. Second, both the section which incorporated FMOC, section 2 of the ECA 1972, and that which then retained it, section 4 of the Withdrawal Act 2018, are constitutional provisions and cannot be repealed by implication. As Laws LJ states of the former in *Thorburn v Sunderland City Council and other appeals* [2002] EWHC 195 (Admin):

> [63] Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes. I should add that in my judgment general words could not be supplemented, so as to effect a repeal or significant amendment to a constitutional statute, by reference to what was said in Parliament by the minister promoting the Bill pursuant to Pepper v Hart [1993] AC 593, [1993] 1 All ER 42. A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and State, by unambiguous words on the face of the later statute.

FMOC is a 'fundamental' EU freedom which is not just of constitutional importance, but also of a macro-economic one. Continued reliance is placed by the City of London on it in retaining its place as a key financial centre of the continent and it is questionable as to whether Parliament would have sought to overrule it so obliquely. The suggested repeal is said to arise not through a provision which refers to FMOC itself or even through a provision which sets substantive tax laws which disregard the FMOC. Rather, this is done through a supplementary, administrative provision which would not appear to have any bearing on the Right other than to specialists in the laws of the EU.

38. Third, section 5(1) simply provides that the principle of the supremacy of EU law does not apply to any enactment passed or made on or after 'IP completion day'. Insofar as an enactment enacted prior to IP completion day is concerned, the supremacy of EU law does continue to apply by reason of section 5(2). It is the timing of the enactment of the legislation concerned which governs whether or not the supremacy of EU law applies. Section 311 is, in this context, a 'hybrid' section – it is a post-IP completion day measure which simply allows

for a new measure to be taken by HMRC (i.e. publication) in relation to a supposed mischief which is prescribed by a pre-IP completion day law – section 306 of the FA 2004. Section 311 simply latches on to this earlier identified mischief but does not expand upon - or even purport to expand upon - what the threshold for the meeting of a 'relevant arrangement' is. That threshold, codified by FA 2004, remained subject to EU law. For reasons given in relation to Justification above, the dissuasion of the provision of credit by FA 2004 itself cannot have been justified where that provision did not meet the EU test of 'tax avoidance' (as elaborated upon above). Accordingly, the provision of credit cannot have fallen within the definition of 'relevant arrangements' unless they were also artificial arrangements and the subjective intention of the parties verified.

39. Fourth, the consequences of the section 311 are punitive and, as argued in the application, constitute the bringing of a criminal charge for the purposes of Article 6 of the ECHR. In *Thorburn,* Laws LJ was concerned that a criminal charge could be created by an implied repeal of an earlier act.

40. Fifth, the argument that Parliament would have intended to limit FMOC is even more grievous when it is considered that the UK government has, in entering into the EU-UK Trade and Co-operation Agreement 2020 ('TCA') on 30 December 2020 and ratifying it as recently as 30 April 2021, undertaken that it would allow for FMOC. Heading I of the TCA relates to Trade and Title II of Heading I liberalises various transactions. In addition to the specific rules which apply to these, Article 215 is also applied to them (and to investments generally):

> Article 215
> Capital movements
> 1. Each Party shall allow, with regard to transactions on the capital and financial account of the balance of payments, the free movement of capital for the purpose of liberalisation of investment and other transactions as provided for in Title II of this Heading.

The making of credit payments by the Applicant constitutes the making of investments by it. Furthermore, the provision of these benefits in kind also fall within the following transactions provided for in Title II of Heading I of the TCA:

(a) Investment Liberalisation at Article 127 of the TCA.

(b) Cross-border trade in services under Article 134 of the TCA;

(c) Financial services at Article 182 of the TCA;

41. The UK-EU Memorandum of Understanding on Financial Services Cooperation has been signed on 27 June 2023 with the view to promoting international standards (Article 2 and protecting the City of London from dismantlement. In light of these new obligations arising, section 311 ought to be read subject to FMOC. If section 311 were to be construed so as to have overriden FMOC, then the section would be an infringement of the Withdrawal Treaty and to the spirit of the Memorandum.

42. Sixth and in a similar vein to the fifth point, even if section 311 were seen as a repeal of FMOC (which is denied), it does not limit itself to arrangements entered into after the withdrawal of the UK from the EU. In failing to do so, it catches and penalises exercises of FMOC made prior to the withdrawal, in reliance of the law at the time.

43. The principle of non-retroactivity under Article 70 of the Vienna Convention on the Law of Treaties (1969) ('VCLT') means that the withdrawal of the UK does not affect its obligations under the TFEU prior to that withdrawal:

> Article 70 Consequences of the termination of a treaty
>
> 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

Whilst the Withdrawal Agreement does relate to the withdrawal of the UK from the EU (Article 1), it does not address the question of historical obligations arising by reason of the Fundamental Treaty Freedoms such as FMOC - whether by denying them or accepting them. It follows that sub-paragraph (b) of Article 70 applies in relation to those obligations. Even as a matter of domestic law alone, private law rights arising from international agreements have been protected since the decision of the House of Lords in *Playa Larga* [1981] 3 WLR 328. The failure to abide by the UK - insofar as the protection of any exercise of FMOC during the period of the UK's membership of the EU is concerned - would constitute a failure to comply with the VCLT. There are two implications of these. First, that the publication ought not to relate to an exercise of FMOC prior to 31 December 2020. Second, given that section 86 does not limit itself in this way, the argument that it impliedly repeals FMOC is weaker.

44. The Applicant would observe that the VCLT has been recognised by the ECJ as binding:

> It should be noted in that respect that … the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law… It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.

For its part, the UK is a signatory to the VCLT and has reaffirmed its commitment to it under Article 4 of the Trade and Co-operation Agreement.

> Article 4
> Public international law
> 1. The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

A failure to comply with the VCLT would therefore also constitute a breach of the TCA or, even worse, of the law on which it is predicated. This lends support to the fact that section 86 was not intended to impliedly overrule FMOC.

45. Seven, even if section 311 does represent a repeal of FMOC, then it represents a part repeal rather than a full one. Insofar as the underlying particular movement of capital

continued to be protected by FMOC despite the specific repeal represented by section 311 (i.e. by not falling within the definition of 'notifiable arrangements' in the first place), as is the case here, then there can be no dissuasion of the movement of that capital without proportion or justification. Without prejudice to the foregoing, it follows from this that the particular interpretation of this derogation, which is required by EU laws, is a strict one.

46. Mr Kamal then proceeded at length using the following headings: Jurisdiction Otherwise; Infringement: The Law; Infringement: Application here; Article 63 TFEU; and Article 25 of the Withdrawal Agreement.

DECISION

47. Having considered the arguments put forward by both Mr Kamal and Ms Murray I have decided that I prefer Ms Murray's arguments. The principle of the supremacy of EU law no longer applies to domestic law and therefore the Appellant's purported right of freedom of movement of capital cannot override sections 310D-311B.

48. Even if I am wrong on this point EU law would not have been engaged because there is no evidence that sections 310D-311B restrict the Appellant's freedom of movement of capital and do not do so in a discriminatory way given that these sections apply exactly the same way to an EU entity as they do to a UK entity.

49. As the Appellant was not notified of the SRN it does not have a right of appeal. The appeal is therefore struck out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

ALASTAIR J RANKIN MBE
TRIBUNAL JUDGE

Release date: 27th MARCH 2024