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CLIENT BRIEFING

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The FTT in *Barclays* decides that a US company providing support services to the UK business through a UK branch could not be part of a VAT group because it did not have sufficient resources to constitute a fixed establishment in the UK at the time of the application to join the VAT group. In *Muller* the UT concludes the FTT had been right to conclude that corporate members of an LLP are related parties of the LLP for the purposes of the intangibles regime. *Brindleyplace* is a rare example of a taxpayer winning a purpose case on the FTT's finding that there was no tax avoidance. HMRC publishes guidelines for transfer pricing compliance which set out HMRC's compliance expectations and highlight common risk areas and best practice approaches to assist UK businesses and transfer pricing specialists.

Barclays: VAT grouping

The First-tier Tribunal (FTT) determined in *Barclays Service Corporation and another v HMRC* [2024] UKFTT 785 (TC) that HMRC was entitled to reject the application by BESL, acting as representative member of the Barclays VAT group, for BSC, a company incorporated in the US with a branch in the UK, to join the VAT group. BSC makes supplies of services to the Barclays Corporate Group, including to BESL and other members of the VAT group. The UK branch was established to manage the delivery of BSC's services to non-US recipients and the delivery of services to BSC from non-US service providers.

Under the UK's VAT grouping rules, where a foreign company is eligible to join a UK VAT group registration and does so, all of that company's activities are then subsumed within the UK VAT group registration, rather than solely the activities of that company's UK branch. This is described as a 'whole establishment' approach, rather than, as is common in EU countries, an 'establishment-only' approach. In order for a foreign company to join a UK VAT group it must have a 'fixed establishment' in the UK. Even if it has a fixed establishment in the UK, HMRC is entitled to refuse an application for a company to join a VAT group in certain circumstances where it is necessary for the protection of the revenue (VATA s 43B(5)(c)).

Fixed establishment

The FTT left the precise meaning of the terms 'established' and 'fixed establishment' to be determined in a subsequent case, proceeding on the assumption that Barclays' proposition, that for the UK branch to be a fixed establishment on 1 December 2017 (the date of the application and which the parties agreed was the relevant date that the eligibility requirements for grouping fell to be assessed) it required, on that date, sufficient human and technical resources in the UK to make a meaningful commercial contribution to BSC, was correct. However, the FTT concluded, with particular reliance on the opinion of Advocate General Kokott in *Welmory* (Case C-605/12) [2015] STC 515, that this required the UK branch to have comparable control to an owner over the relevant human and technical resources and that on 1 December 2017 it did not meet that requirement.

Protection of the revenue

Although the FTT did not have to determine this in light of the finding that the requirements for VAT grouping were not satisfied, they considered there was no loss to the revenue that goes beyond the normal consequences of VAT grouping and so HMRC would not have succeeded on refusing the application on this basis. Both parties had agreed the aim of VAT grouping was administrative simplification, but disagreed as to what this meant. HMRC argued the benefit was merely a VAT accounting benefit with fewer transactions to reflect. However, the FTT agreed with Barclays that the aims of VAT grouping went beyond this and sought to provide freedom to structure a business in the way that best meets its commercial aims and to allow a group of companies to be taxed in the same way as a single company organised on a divisional basis.

We note that there was a consultation in 2020 on whether UK VAT grouping should move from a 'whole establishment' basis to an 'establishment-only' basis but the majority of responses were that 'whole establishment' makes the UK rules more attractive than 'establishment-only' as the latter can lead to additional VAT costs when recharging internal costs. As the responses published in 2021 were generally in favour of maintaining current practices, the government decided not to take the matter further and to leave the rules as they are.

Muller: interaction of intangible fixed assets rules and partnership taxation

In *Muller UK & Ireland and others v HMRC* [2024] UKUT 273 (TCC) the Upper Tribunal (UT) had to consider the interaction of the statutory fiction in CTA 2009 s 1259 (calculate profits of a partnership as if it were a notional UK resident company) and the related parties rule in the intangibles regime in CTA 2009 Part 8. The three corporate members of the LLP had transferred their respective trades to the LLP including certain intangible assets and goodwill in return for membership units of the LLP. The transferred assets were recorded in the LLP's accounts at fair value and amortised over five years on a straight-line basis. A deduction was taken for amortisation in the calculation of the taxable profits of the LLP for inclusion in the members' tax returns but HMRC challenged this on the basis that the intangible fixed assets (IFA) regime did not apply as the assets were acquired from related parties.

The key question was whether the corporate members of an LLP were 'related parties' of the LLP for the purposes of CTA 2009, s 882(1). This depends on whether the effect of s 1259(3) is that the ownership characteristics of a partnership are to be attributed to the notional company. The definition of 'related party' in the legislation was amended by FA 2016 s 52 with effect for accounting periods commencing on or after 25 November 2015 but the decision in this case is of interest for its consideration of how, both before and after the legislative change, the IFA rules apply to a partnership.

How far does the statutory fiction extend?

The taxpayers argued that the statutory fiction in s 1259, which requires you to calculate the profits of the LLP's trade as if a 'UK resident company carried on the trade', refers to a notional, generic company without any specific characteristics and so cannot be capable of having a 'related party'. There was no dispute that the purpose of s 1259 is to 'calculate the profits and losses of the firm'. But the parties disagreed on what the concept of calculation includes.

According to the UT '[t]he extent of deeming will be commensurate to the statutory purpose'. The purpose here is the calculation of profits and calculation may include rules on what and how much is to be included. To make the calculations work, the UT considered it necessary to attribute the ownership characteristics of the partnership to the ownership of the notional company. The UT considered the related party provisions are 'part and parcel of the calculation process' and so fall within the purpose of the deeming. The UT accordingly concluded the FTT had not erred in its conclusion that the LLP and the corporate members were related parties and consequently could not claim the relevant debits.

FA 2016 issue

In case the UT was wrong on the 'related party' issue it went on to discuss HMRC's argument that in respect of accounting periods beginning on or after 25 November 2015 the related party condition was not satisfied because of amendments brought in by FA 2016 s 52 to the definition of 'related party'. The UT agreed with the FTT that the new provisions did apply to deny deductions in the relevant accounting periods even though the date of the transfer of assets to the partnership preceded 25 November 2015. This is because corporation tax is an annual tax and s 52 is concerned with the conditions for eligibility of debits sought to be made in a given period, irrespective of the date of acquisition of the relevant intangibles.

Brindleyplace: purpose test in SDLT rules

The FTT in *Brindleyplace Holdings SARL v HMRC* [2024] UKFTT 808 TC had to consider whether, as the taxpayer argued, there was no SDLT on the relevant transactions or if, as HMRC argued, a combination of provisions in the SDLT legislation applied to increase the SDLT liability from nil to around £8m. The FTT found in favour of the taxpayer that no SDLT was due on either transaction.

A simplified version of the facts is that the taxpayer, BPH, acquired units in a Jersey Property Unit Trust (JPUT) which held an interest in a property investment partnership, BP ELP, which held a number of properties in Birmingham. The JPUT structure was then collapsed with the interest in BP ELP being distributed in specie to BPH. The properties were then distributed by BP ELP to BPH on the winding up of BP ELP with BPH claiming group relief from SDLT.

HMRC challenged both the nil SDLT on the transfer of the interest in BP ELP (arguing it was a 'Type A' transfer of an interest in a property investment partnership under FA 2003 Schedule 15 paragraph 14(3A)) and the nil SDLT on the transfer of the properties from BP ELP to BPH (arguing that group relief should be denied or, alternatively, that the conditions of FA 2003 s 75A were met). HMRC failed on all grounds but it is the challenge to the group relief that we wish to explore here.

Group relief for an intra-group transfer of land is denied under FA 2003, Schedule 7 paragraph 2(4A) in respect of a transaction which is either not affected for bona fide commercial reasons, or which forms part of arrangements of which the main purpose, or one of the main purposes, is the avoidance of liability to tax. HMRC argued that there was no commercial reason for the transfer of the properties to BPH once the JPUT had been acquired and that the only reasons for doing so were tax reasons. The FTT concluded that the transaction was for bona fide commercial purposes as it would reduce complexity in the holding structure and reduce administration costs.

At first it appeared that the judge was going to apply the principles from the recent unallowable purpose cases (*BlackRock*, *Kwik-Fit* and *JTI*) to assess whether the taxpayer had an avoidance purpose and then consider if such a purpose was a 'main' purpose. But the FTT concluded that what the taxpayer had done did not constitute tax avoidance in the first place, so there was in this case no need to analyse 'purpose' and 'main'.

It is quite a surprising decision and one which we would expect HMRC to appeal. The way the judge rationalised it was that BPH had a choice whether to acquire units in the JPUT (no SDLT) or to acquire the properties direct (SDLT) and choosing the route with the least SDLT is not tax avoidance. Likewise, the judge considered that taking advantage of the group relief from SDLT on a transfer of the properties to BPH was merely taking advantage of a relief expressly provided for by Parliament. According to the FTT, it did not matter that these two steps took place soon after one another and that it had been planned this way from the outset. But shouldn't this matter when applying a purpose test to arrangements? It is odd that the FTT looked at each transaction separately, rather than the arrangements as a whole, when considering whether there was tax avoidance. The recent caselaw on purpose tests shows the courts taking a more holistic approach to construction and looking realistically at the facts in the round when applying the legislation, construed purposively.

Transfer pricing: Guidelines for Compliance 7

The latest in HMRC's Guidelines for Compliance series comprises more than 100 pages on transfer pricing (TP). They are intended to address differences in interpretation of the OECD's TP guidelines between taxpayers and HMRC and raise the bar for TP compliance in the UK. HMRC makes it clear that the guidelines do not represent any change in HMRC policy but clarify existing policy. It is evident from the guidelines that in HMRC's view taxpayers fall short of the standard HMRC wants to see in TP documentation and that many TP policies are seen by HMRC as risky. HMRC highlights areas for improvement. Financial TP is not covered specifically but many of the best practice suggestions apply regardless of the type of transaction. HMRC may develop further guidelines for compliance in specific risk compliance areas, such as financial transactions, in future.

The guidelines are in three parts. Part 1 is aimed at 'UK tax risk leads' who are responsible for managing and operating a clear and effective TP compliance framework within in scope businesses and are expected to pay diligence to TP risk when signing off provisions. Annex A to Part 1 sets out examples of helpful supporting records and information to back up the analysis and conclusions relating to the TP filings and to evidence TP policy and is expected to be used as a checklist by HMRC audit case teams and customer compliance managers. There is emphasis on contemporaneous retention of supporting records and timely consideration of functional interviews where required to prevent gaps in evidence, particularly after key staff have left the business.

Parts 2 and 3 are aimed at TP specialists. HMRC frequently encounters TP documentation which is 'too high level, insufficiently evidenced or for which functional analysis is not two-sided in nature' and so Part 2, titled 'Common compliance risks', includes suggestions for improving the quality of TP documentation and functional analysis. Part 3 sets out some areas of TP models and designs that are flagged by HMRC as risky and includes best practice suggestions to reduce risk.

As a form of guidance, the guidelines are effective immediately and are part of HMRC's 'known position' so businesses who need to consider whether their transactions fall within the uncertain tax treatment notification obligations should take this into account in order to avoid penalties under that regime.

What to look out for:

- On 15 October, the Court of Appeal is scheduled to hear the appeal in *Refinitiv* on whether HMRC's decision to issue a diverted profits tax charging notice was unlawful on the basis of inconsistency with an earlier advance pricing agreement.
- The consultation on the latest draft HMRC MTT and DTT guidance closes on 23 October.
- The Autumn Budget will be held on 30 October.

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CONTACT

Mike Lane
PARTNER
T: +44 (0)20 7090 5358
E: mike.lane@slaughterandmay.com

Zoe Andrews
PSL COUNSEL & HEAD OF TAX KNOWLEDGE
T: +44 (0)20 7090 5017
E: zoe.andrews@slaughterandmay.com