

## HMRC Responds to Landmark Case on UK Tax Treatment of Delaware LLCs

### ***Business as usual for UK taxpayers following Supreme Court decision in Anson v HMRC?***

HM Revenue and Customs (HMRC) has published its response to the UK Supreme Court's decision in the landmark double taxation case of *Anson v Commissioners for Her Majesty's Revenue & Customs* [2015] UKSC 44.<sup>1</sup>

Earlier this year, we [reported on the UK Supreme Court's decision](#) in *Anson*, in which it was held that a UK taxpayer, Mr. Anson, was entitled to relief under the UK/US double taxation treaty (the Treaty) for US taxes paid on his share of the profits of a Delaware LLC (the LLC).<sup>2</sup> At the time of that last report, HMRC had not published its response to the UK Supreme Court's decision, leaving many unanswered questions with regards to the UK tax treatment of US LLCs.

### **Background**

Mr. Anson was a member of the LLC, which managed a number of venture capital funds. Since a Delaware LLC is generally treated as transparent for US tax purposes (unless an election is made to the contrary), Mr. Anson was liable to US federal and state taxes on his allocable share of the LLC's profits.

Mr. Anson was resident, but non-domiciled, in the UK for tax purposes, meaning that he was subject to UK income tax on both any UK-source income and any non-UK source income remitted to the UK. After paying tax in the US on his allocable share of the LLC's profits, Mr. Anson remitted the balance of his profit share to the UK, and was therefore liable to UK income tax on that balance (subject to any relief available under the Treaty).

In *Anson*, HMRC argued that Mr. Anson had received a distribution from the LLC and therefore no double taxation relief was due because the US taxes had been charged on the allocable share, rather than on the distribution, of the LLC's profits (the Treaty provides that US taxes are allowed as a credit against any UK tax "computed by reference to the same profits or income").

The Supreme Court concluded that Mr. Anson was entitled to relief under the Treaty as the income on which he paid US tax was the same as the income on which he was liable to pay UK income tax. The Supreme Court's decision was based on expert testimony heard before the First Tier Tribunal (the FTT), on the basis of which the FTT had concluded that certain Delaware statutory provisions, when combined with the terms of the agreement constituting the LLC, meant that Mr. Anson was entitled to the profits of the LLC as they arose — prior to, and independently of, any subsequent distribution of the LLC.

The decision in *Anson* left many open questions and how the ruling would affect the general UK tax treatment of income arising from Delaware and other US LLCs remained unclear.

### **HMRC's Response to *Anson***

HMRC has stated that it considers the *Anson* decision to be confined to the specific facts of that case and that consequently:

- Where US LLCs have been treated as companies within a group structure, HMRC will continue to treat the US LLCs as companies.
- Where a US LLC has itself been treated as carrying on a trade or business, HMRC will continue to treat the US LLC as carrying on a trade or business.
- HMRC will continue its existing approach to determining whether a US LLC should be regarded as issuing share capital.
- Individuals claiming double taxation relief and relying on the decision in *Anson* will be considered on a case-by-case basis.

### **Comment**

HMRC's view that the Supreme Court's decision in *Anson* is confined to the specific facts of that case is, whilst perhaps correct, rather unhelpful. As stated above, the Supreme Court based its decision on an analysis of the interaction between certain provisions of Delaware law and the agreement constituting the Delaware LLC in question. The same analysis likely applies to many Delaware LLCs and possibly even to other US LLCs, but HMRC's response does not specifically address this point. Instead, UK tax resident members of US LLCs in a potentially similar position to Mr. Anson will need to contact HMRC on an individual basis to argue their case for an application of double taxation relief.

HMRC's confirmation that it will continue to treat US LLCs as companies within a group structure, although not in issue in *Anson*, is welcome for group structures that include Delaware LLCs, which both HMRC and UK taxpayers have long treated as opaque for UK tax purposes. HMRC's further confirmation that it will continue to treat US LLCs as carrying on a trade or business was likewise not in issue in *Anson*. Indeed, the Supreme Court agreed with HMRC that the LLC itself, rather than the LLC's members, carried on the business of the LLC.

The Supreme Court and the FTT held that the LLC in *Anson* had nothing equivalent to share capital. HMRC's confirmation that it will continue to apply its existing approach in determining whether a US LLC should be regarded as issuing share capital therefore provides reassurance that the decision in *Anson* will not impact upon the various UK tax reliefs which rely on companies having ordinary share capital (such as group relief or stamp duty group relief).

On a literal reading, HMRC's response only refers to existing US LLCs. Although it is likely that HMRC will take the same view of new US LLCs created after the date of HMRC's published response to *Anson*, taxpayers will not have any legal protection to that effect. Without further guidance from HMRC, it may be necessary or prudent for newly-formed US LLCs to obtain a specific tax ruling to guarantee their tax treatment. Further, newly formed US LLCs wishing to be "opaque" for UK tax purposes should carefully draft their formation documents to ensure that they can be suitably differentiated from the LLC in *Anson*.

---

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**Sean Finn**

sean.finn@lw.com  
+44.20.7710.1142  
London

**Karl Mah**

karl.mah@lw.com  
+44.20.7710.1179  
London

**Jack Prytherch**

jack.prytherch@lw.com  
+44.20.7710.3085  
London

**You Might Also Be Interested In**

**[New Tax Audit Regime Constitutes a Sea Change for Partnerships](#)**

**[OECD Publishes Final BEPS Project Reports](#)**

**[Commenters Weigh in on Proposed Regulations for Determining MLP Qualifying Income](#)**

**[Diverted Profits Tax: A Blueprint for Global Anti-Avoidance Regimes?](#)**

---

*Client Alert* is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at [www.lw.com](http://www.lw.com). If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit <http://events.lw.com/reaction/subscriptionpage.html> to subscribe to the firm's global client mailings program.

**Endnotes**

---

<sup>1</sup> Revenue and Customs Brief 15 (2015): HMRC response to the Supreme Court decision in *George Anson v HMRC* (2015) UKSC 44, published September 25, 2015, available at <https://www.gov.uk/government/publications/revenue-and-customs-brief-15-2015-hmrc-response-to-the-supreme-court-decision-in-george-anson-v-hmrc-2015-uksc-44/revenue-and-customs-brief-15-2015-hmrc-response-to-the-supreme-court-decision-in-george-anson-v-hmrc-2015-uksc-44>

<sup>2</sup> Latham & Watkins *Client Alert* Number 1866, UK Supreme Court Forces HMRC to Rethink its Tax Treatment of Delaware LLCs (August 14, 2015), available at <https://www.lw.com/thoughtLeadership/lw-uk-supreme-court-tax-treaty-decision>