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UT (Tax & Chancery) Case Number: UT/2023/000062

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Rolls Building, London

Heard on: 25/26 June 2024
Judgment date: 6 September 2024

CORPORATION TAX – acquisition of intangible fixed assets and goodwill by LLP from its members (who were each members of same corporate group) – interaction of "related party" provisions in Part 8 CTA 2009 with Part 17 (s1259) CTA 2009 requirement to calculate corporate partner's profits as if trade carried on by notional UK resident company – whether HMRC correct that ownership characteristics of such notional company reflected ownership of LLP which meant "related party" rule breached and debits on amortisation of assets accordingly denied– yes – appeals dismissed – appellants' argument that changes by FA 2016 were defective and could not be remedied under Inco Europe approach rejected on obiter basis

Before

MR JUSTICE TROWER
JUDGE SWAMI RAGHAVAN

Between

(1) MULLER UK AND IRELAND GROUP LLP
(2) MULLER DAIRY UK LIMITED
(3) ROBERT WISEMAN AND SONS LIMITED
(4) TM UK PRODUCTION LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants:	Peter Trevett KC and Francis Fitzpatrick KC, Counsel, instructed by Ernst & Young LLP
For the Respondents:	Christopher Tidmarsh KC, Imran Afzal, Tomos Rees, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

Introduction

1. 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, the well-known dairy product multinational. In 2013 the second, third and fourth appellants (the "**Corporate Members**") transferred their trade together with intellectual property (such as trademarks and domain names) and goodwill to the first appellant ("**LLP**") in return for membership units of LLP. After the transfers had occurred the transferred assets were recorded at their fair value in LLP's accounts and then amortised over five years.

2. The question of how profits of a partnership are calculated when a member of the partnership is a company is addressed by s1259 Corporation Tax Act 2009 ("**CTA 2009**"), a provision within Part 17 CTA 2009, the scope of which is at the heart of this appeal. The profits of the trade are taken to be the amount that "(3)(a) …would be the amount of the profits of the trade chargeable to corporation tax if a… UK resident company carried on the trade". Section 1259(3) therefore directs a statutory fiction whereby profits are calculated in respect of what both parties and the First-tier Tribunal (Tax Chamber) ("**FTT**") called a notional company. Section 1273 CTA 2009 provides that a limited liability partnership, which is carrying on a trade with a view to profit, is to be treated for corporation tax ("**CT**") purposes as if it were a partnership.

3. The central issue of statutory interpretation with which this appeal is concerned relates to the interaction between s1259 and the intangible assets provisions within the CT regime. The intangible assets provisions are contained within Part 8 CTA 2009 and entitle companies to claim debits on the amortised depreciation of intangible assets such as intellectual property and goodwill which have been acquired. This entitlement is, however, only available if the acquirer is not a "related party" ("**the related party exception**"). A party will be a "related party" to another if it controls, or is controlled by, the other, or if the parties are subject to common control.

4. The appellants' deduction in respect of the amortisation of the intellectual property and goodwill held by LLP was denied by HMRC on the basis the appellants were considered by HMRC to be related parties. The appellants say that was wrong because the calculation of the notional company's profits prescribed by s1259 does not refer to its ownership characteristics (i.e. who was assumed to own or control the notional company and in what proportions). The notional company was thus incapable of being a "related party" to the Corporate Members and accordingly LLP was entitled to claim the relevant debits in computing its profit.

5. In its decision published as *Muller UK & Ireland Group LLP and others v HMRC* [2023] UKFTT 00221 (TC), the FTT, in agreement with HMRC, rejected the appellants' case that they were not "related parties". The FTT held that, in line with the Corporate Members' holding of all the membership units of LLP, they were also to be treated as controlling the notional company posited under s1259, with the consequence that they were related parties to LLP and therefore could not claim the relevant debits. With the permission of the FTT, the appellants now appeal to the Upper Tribunal arguing that the FTT's conclusion was wrong in law. The central issue remains whether the appellants were related parties which in turn depends on the effect of s1259(3) and whether the ownership characteristics of a partnership are to be attributed to the notional company for which that section provides.

Background / Facts

6. We can set out the background facts briefly. These are taken from a selection of the facts the FTT found, which it in turn had sourced from the parties' agreed facts. We also refer to the LLP agreement.

7. On 7 May 2013, LLP was incorporated by the Corporate Members: Muller Dairy UK Limited ("**MDUK**"), Robert Wiseman & Sons Limited ("**RWS**") and TM UK Production Limited ("**TMUK**"), who were all resident for tax purposes in the UK. Each Corporate Member was a wholly owned direct or indirect subsidiary of TM Dairy (UK Holding) Sarl ("**TM Dairy**"), incorporated in Luxembourg.

8. On 1 July 2013, pursuant to asset transfer agreements dated 28 June 2013, the Corporate Members transferred their trades, including certain intangible fixed assets (brands, licenses and software) and goodwill to LLP in return for Membership Units in LLP.

9. The term "Membership Unit" was defined in the LLP Agreement as:

> "one unit in the capital of the LLP having a nominal value of £1 each."

10. The Membership Units were received in the following proportions, comprising the entirety of what was described in the agreed facts annexed to the FTT's decision as the Equity Interest in LLP: MDUK: 51.21%, RWS: 29.63%, TMUK: 19.16%. The proportions were set by reference to the value of the assets transferred.

11. The transferred assets were recorded in LLP's accounts at their fair value and were amortised over five years on a straight-line basis. In computing LLP's profits for inclusion in the Corporate Members' tax returns, a deduction was claimed for amortisation of the transferred assets for the accounting periods ending 31 December 2013, 2014, 2015, 2016, 2017 and 2018. HMRC opened enquiries into the tax returns of each of LLP and the Corporate Members for the tax years ended 5 April 2014, 2015, 2016 and 2017. The appeals to the FTT were against the closure notices HMRC issued to LLP and the Corporate Members.

Law

12. A number of propositions about how corporate members of a limited liability partnership are to be taxed were helpfully common ground. There is also no dispute that on the facts LLP was a limited liability partnership which was carrying on a trade with a view to profit, with the consequence, pursuant to s1273 CTA 2009, that its members were to be treated, for CT purposes, as if it were a partnership.

13. Part 17 of CTA 2009, as explained by the overview provision in s1256(1), contains special rules about partnerships. Section 1257 CTA 2009 provides that persons carrying on a trade in partnership are referred to collectively as a "firm". The key provision in Part 17 for the purposes of this appeal is s1259 CTA 2009. It applies where a member of a partnership which carries on a trade is a company within the charge to CT, as is the case with the Corporate Members. The section provides as follows:

> "**s1259 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…."

14. The Corporate Members are UK resident so the applicable subsection as between (3) and (4) is subsection (3). However, both subsections (3) and (4) use a similar form of words and subsection (4) is relevant to an argument made by the appellants based on *BCM Cayman LP and another v HMRC* [2022] UKUT 198 (TCC) *("**BCM UT**")*. We will come back to it in that context. The amount of a corporate member's profits is determined by asking what the profits of the trade chargeable to CT would be if a company (*UK resident* in the case of subsection (3), or *non-UK resident* in the case of subsection (4)), carried on the trade. The words in subsection (2) "is taken to be" and the references in subsections (3) and (4) to "would be the amount…if" make provision for a deemed state of affairs for the purpose of calculating the amount of the firm's profits. The use of this language has also variously been described as calling for an "assumption" or making a "statutory direction" or creating a "statutory fiction" – we use the terms interchangeably.

15. The issue on this appeal is how this deeming provision relates to the regime for intangible assets which allows acquirers of certain assets to claim deductions, but denies them where the parties are "related parties". The intangible assets regime is contained within the provisions of Part 8 of CTA 2009. It is common ground that the brands, licenses and software which were transferred to LLP in 2013 are within the definition of "intangible fixed assets" in s712 CTA 2009 and that the goodwill is treated as an intangible fixed asset pursuant to s715 CTA 2009.

16. Section 882(1)(b) CTA 2009 provides that for Part 8 to apply the intangible assets had to be ones which:

"are acquired by the company on or after [1 April 2002] from a person who at the time of the acquisition [was] **not a related party** in relation to the company" (emphasis added).

17. Section 835 CTA 2009 then defines "related party" 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…"

18. For the purposes of CTA 2009, the definition of the word "company" is contained in s1121 Corporation Tax Act 2010. It means "any body corporate or unincorporated association, but does not include a partnership…".

19. The term "control" is defined by s836 CTA 2009 and 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".

20. Section 838(4) CTA 2009 provides that, for the purpose of determining whether a person (A) has "control" of a company, A was to be treated as having rights and powers of a person connected with A. Section 843 CTA 2009 provides that "a person is connected with a company if they are related parties because of section 835(2) or (3)."

21. It is not in dispute that, if LLP were to be treated as a company, the Corporate Members would have exercised control over LLP for the purposes of s836 CTA 2009. The proposition that this should therefore mean that the *notional company* contemplated by s1259(3) is also deemed to be controlled by the Corporate Members is at the heart of HMRC's argument, but is disputed by the appellants. However the parties accept that, if HMRC are right and the proposition is correct, then the Corporate Members and the notional company will be "related parties", and the appellants will be ineligible to claim the debits sought on amortisation of the relevant assets.

22. The basis for this was explained by the FTT at [79] of its decision, which was not challenged on this appeal. The FTT recorded that the appellants accepted that, if it were to be assumed that there was a single notional company in relation to a partnership for the purposes of s882(1)(b) CTA 2009, and, if that notional company were to be regarded as an actual company for the purposes of the related party definition in s835 CTA 2009:

> (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).

23. What is not explicit from the above analysis is the basis upon which each Corporate Member (through the rights and powers attributed to it through the other Corporate Members to which it was connected) had control of LLP. In other words what was the nature of any given Corporate Member's rights and powers which gave them control? We did not understand this to be in issue and it appears to us to that each Corporate Member's control derives from their holdings of Membership Units in LLP and their status as members which gave them rights and powers to appoint persons to the decision making board of LLP. Understood within the framework of the terms of s836 CTA 2009, their powers under the LLP agreement, a "document regulating the [*LLP*]", thus enabled them "to secure that the [LLP's] affairs are conducted in accordance with [the Corporate Member's] wishes".

Appellants' and Respondents' case in outline and the FTT's reasoning

24. As identified by the FTT, the issue between the parties turned on a "short but difficult" point of statutory interpretation. In this section we seek to summarise the key propositions from the FTT's reasoning necessary to understand the parties' arguments. In broad outline, the issue in dispute is whether adoption of the statutory fiction in s1259 imports the related party provisions in Part 8 so as to disallow deductions for intangibles as HMRC argue, which the appellants dispute.

25. The appellants' case is that the Corporate Members were not related parties of the notional UK resident company, and rests on their argument that the *only* assumption that can be made about the notional company, consistent with the wording and purpose of the legislation, is that such company carries on the trade of LLP. No assumption is warranted regarding the notional company's *ownership* or by whom it was controlled. As the notional company has no shareholders, no members and no articles of association or other document regulating it, no relationship of control can be found to exist between the Corporate Members and the notional company. The FTT therefore erred in holding that s1259 directed an assumption that the trade of LLP is being carried on by a UK resident company in which each Corporate Member has the same voting rights and powers as such member has in LLP.

26. HMRC's case is that the FTT was right to attribute the Corporate Member's ownership and control of LLP to the notional company. HMRC emphasised that the purpose of the deeming is to enable the calculation of LLP's profits on which the Corporate Members are taxed and that the related party provisions were simply part of the calculation process for working out such profits.

27. The FTT sought to reflect the appellants' main argument in terms of the following proposition explained in [103] of its Decision. That even if the concept of a "related party" had relevance in the context of the notional company calculation, the fact that the person called "B" referred to in s835(1) was required to be a company meant that on an application of the terms of the definition, none of the Corporate Members could be said to be a "related party" of the notional company.

28. Before addressing that core issue the FTT dealt with an initial, more basic, argument it understood the appellants to have been making. The appellants say that this argument was not

part of their case, and they did not in any event pursue it on this appeal, but we think that it is appropriate to explain the point, albeit briefly. The point was that s882(1)(b) CTA 2009 was incapable of applying for the simple reason that the notional company was no more than a statutory construct for calculation purposes and was not "an actual or deemed company".

29. The FTT rejected what it had understood to be the appellants' argument in short order, considering it was "impossible" to carry out the notional company computation required by s1259 without asking whether the notional company assumed to carry out the calculation had acquired the relevant assets/goodwill in one of the related party scenarios described ([111]). In the same way that the actual transactions carried out by the partnership informed the notional company calculation, so too did the actual identities of the counterparties to such transactions for precisely the same reasons. The FTT thus rejected the proposition that just because the company was notional, the identity of the person from whom the partnership acquired the relevant assets was somehow irrelevant. As the FTT explained at [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."

30. The FTT then moved on to reject the appellants' more sophisticated core argument by holding that the notional company was a statutory fiction which represented the partnership as a whole. The FTT considered it followed logically from the assumption that the trade was being carried on by a notional company that where the term "related party" appeared in one of those computational provisions, it was appropriate to make that same assumption when applying the term "related party". That meant " s835 should apply in the context of s882 by reference to the notional company whose taxable profits are being calculated and not by reference to the partnership" ([117(2)]). The application of the related party rules was part of the calculation of profits, and as directed by s1259, for the purposes of that calculation it was to be assumed it was the notional company carrying on the trade ([117(3)]).

31. The FTT also held that, for each corporate member of a partnership, the notional company was to be treated as having the ownership [or control] characteristics of the partnership as a whole. On the facts of this case that meant the notional company would be treated as having three owners (the three Corporate Members) ([117(5)]). As regards the ownership characteristics it was accepted that if, contrary to the appellants' case those could be attributed to the notional company, then the requirement for control was satisfied as between each Corporate Member and the notional company ([117(6)]). The FTT clarified that did not require it to be assumed the rights and powers were to be assumed to be shares, or that any assumption need be made that each Corporate Member was a "shareholder" of the notional company. It

noted the concept of "control" and "major interest" was based on the power to secure the wishes of a person and that each Corporate Member did have such power (in conjunction with the attribution of the control of the others because the Corporate Members were related as between themselves ([117(7)]). The FTT did not consider that voting or economic rights in relation to a partnership under a partnership agreement were conceptually different from rights in relation to a company under a company's articles of association.

32. The FTT had also earlier noted that:

(1) declining to treat the notional company as not having any existence when reading s835 would create injustice and absurdity ([117(4)(c)]). This was a reference to a point HMRC made that it would be irrational if corporate members who would not be entitled to an intangibles deduction if the intangibles were held in a company which they owned (because of the related party exception), could then sidestep the exception by instead holding the assets through a partnership they owned.

(2) The Upper Tribunal's decision in *BCM UT*, which the appellants relied on, shed no light on the issue. We consider that case further in our discussion section below but in short the FTT agreed with HMRC's analysis that *BCM UT* was not a case "about the manner in which the process of computing the notional company's taxable profits [was] to be conducted" ([107] to [109]).

Grounds of appeal and parties' submissions in outline

33. The appellants' grounds of appeal to the Upper Tribunal contend that the FTT erred in its analysis. The parties' cases now focus more keenly on the proposition that the ownership characteristics of the notional company should be regarded as matching the ownership characteristics of LLP. The appellants' key points are first that the FTT was wrong to make the specific related party rules in Part 8 inform the interpretation of s1259 given s1259 was a freestanding generic provision. There is nothing, the appellants argue, in the statutory words which suggested the assumption argued for and the FTT was wrong to dismiss the relevance of *BCM UT*. Second, HMRC's concerns that the appellants' interpretation would mean the related parties provisions could be avoided by insertion of a partnership were not a reason to read in words. The concerns were overstated in any case given the legislation contained a targeted anti-avoidance provision. Third, the appellants' reading was consistent with the statutory history in relation to which it was acknowledged by HMRC in a Statement of Practice that the substantively same predecessor provision (s114 Income and Corporation Taxes Act 1988 ("**TA 1988**")) did not, in respect of other regimes (loan relationship and derivatives) cover provisions analogous to the related party provisions.

34. HMRC support the FTT's decision for the reasons it gave. Their position can be summarised as follows:

(1) the statute must be considered as a whole and the FTT's approach was entirely consistent with the deeming required by s1259;

(2) the FTT was right to consider *BCM UT* did not assist;

(3) the appellants' interpretation gives rise to perverse results;

(4) the statutory history is irrelevant given the nature of the CTA 2009 as a consolidating act and in any event HMRC's Statement of Practice is now accepted by HMRC to be incorrect, and in any case does not assist.

Discussion

35. This appeal turns on the correct interpretation of a statute. In that regard, the decision of the Supreme Court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16 at ([10]) emphasises "the central importance" of identifying the legislation's purpose.

36. The purpose of the statutory provision is also of central importance in a more specific context. Section 1259(3) CTA 2009 requires the fiction or deeming of a notional UK resident company. When interpreting the scope of a statutory deeming provision, the Supreme Court in *Fowler v HMRC* [2020] UKSC 22 (per Lord Briggs at [27]) cited with approval a number of propositions that had been collated from the authorities and summarised by Lord Walker in *DCC Holdings (UK) Ltd v IRC* [2011] 1 WLR 44 at [37-39]. These included the following guidance:

> "(1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose, the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
>
> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
>
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
>
> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, at 133:
>
> > "The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.""

37. We also have in mind the general principle, that in construing the legislation, it is necessary to have regard to the statute as a whole. Mr Tidmarsh KC, who appeared for the Respondents, referred us to *R(O) v Home Secretary (SC(E))* [2022] UKSC 3 at [29] where the Supreme Court explained:

> "The courts in conducting statutory interpretation are seeking the meaning of the words which Parliament used: ...Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained."

In this case, the general purpose behind s1259 is common ground and was helpfully explained in the appellants' skeleton argument prepared by Mr Trevett KC and Mr Fitzpatrick KC.

38. In summary, s1259 and its statutory predecessors (including s114 TA 1988) date back to the introduction of CT in 1965. Calculation of profits for the purposes of CT differed in some respects from the calculation of profits for the purposes of Income Tax ("**IT**") (for instance differing basis year periods). An issue arose where a partnership had both corporate members subject to CT and individual members subject to IT. If, when computing the partnership profits and attributing those to the members, the corporate member's profits were computed under IT rules those members would be taxed under the IT rules rather than the CT rules despite the fact the members were companies. To address that, the statutory direction in s1259(3) provided for it to be determined what the profits of the trade chargeable to CT would be if a UK resident company carried on the trade. A share of those profits would then be attributed to the corporate member in accordance with the partnership profit sharing ratios.

39. Against that background, there is no dispute that the specific purpose of the provision, consistent with its aim and its wording is to *calculate* the profits and losses of the firm. As will be seen the parties disagree however on what is included within the concept of calculation.

40. Section 1259 does not address the specific mechanics of how a UK resident company will calculate its profits and losses. For that it is necessary to turn to various other provisions within CTA 2009, the relevant ones being those in Part 8 in respect of intangibles and goodwill, and in particular the exception to the application of those provided in the rules concerning "related parties". As Mr Trevett's oral submissions acknowledged, these provisions, are basically "anti-avoidance". They have the effect of disallowing deductions "for obvious reasons so you cannot engineer deductions by transactions between companies under common control".

41. Those provisions are drafted with companies in mind and the definition of "company" specifically excludes partnerships. In that context, it is not surprising that, in describing what amounts to control, there is a focus on the classic case of a company limited by shares and with a memorandum and articles of association. However, it is important to recognise, that a limited company with a share capital is only one, albeit well-understood, instance where control can be demonstrated. The concept of control is formulated in a much broader way in the relevant provisions. The concept captures not only control arising out of holding shares but also control arising out of "voting power", in circumstances in which such holding or power results not only from "articles of association" but also from any "other document regulating the company or any other company". That breadth of scope is deliberate, given the definition of "company" is not limited to companies limited by shares, but extends to "any body corporate or unincorporated association", which therefore may be regulated by any number of different forms of document.

42. In short, a company with a share capital is no more than the principal example which the statute has in mind as the type of entity in respect of which control may have to be established for the purposes of identifying its related parties. The fundamental point as regards control is that it arises where a person is able to "secure that the company's affairs are conducted in accordance with the person's wishes" pursuant to rights which arise out of the circumstances identified in s836(a) and/or (b) CTA 2009.

43. It follows that, although in general terms a partnership is specifically excluded from being a "company", there is no reason in principle why the concept of control, given the high level at which it is stated, cannot be applied to the relationship between members of a partnership

and the partnership in circumstances in which some other provision treats a partnership as if it were a company for a particular purpose. It also follows that we do not accept that the language used in s836 CTA 2009 to describe the concept of control is not capable of encapsulating the relationship between a limited liability partnership and its members, in a context in which s1259 directs that such limited liability partnership be treated as if it were a company for the purpose of computing its profits.

44. Mr Trevett, noting how the FTT had balked at attributing share capital to the notional company, criticised the FTT's interpretation as not explaining how to map the ownership and control rights of a partnership onto a notional company. He emphasised that s1259 does not make any attribution of memorandum, articles of association or voting control to the notional company. However, in our view, that misses the point. The task is to see if the control requirements are satisfied (which is possible in respect of a partnership given the broad way in which "control" is drafted). What matters is the outcome, i.e. whether the broad concept of control is established, itself leading to a conclusion on whether the related party requirement is or is not satisfied. It does not involve any determination of whether or how holdings of membership units under an LLP agreement might translate into some kind of corporate analogue of shareholding or guarantee rights.

45. The next question is whether, on this basis, the related party provisions (and more particularly s835) are capable of extending to the notional company. In other words the issue between the parties is the extent to which, if at all, the elements which establish ownership or control of the partnership can be attributed to the ownership of the notional company. In agreement with HMRC, and for the reasons we explain, we do not regard the absence of specific words treating the notional company as having the ownership attributes of the relevant partnership to mean that those related party provisions are somehow incapable of applying.

46. The extent of deeming will be commensurate to the statutory purpose. As discussed, that purpose is calculation of the profits. Calculation in this context is not simply an exercise of identifying the arithmetic process to be applied to given amounts, but may also include rules on what, or the extent to which, amounts are to be included within that process. Checking that the related party exception does not apply in order to know whether debits for amortisation of intangibles may be deducted is just as much part of the calculation as the subtraction of the amortised amount in order to derive the profits figure from which the appellants' profit shares can be derived.

47. One of the points the appellants make is that calculation will still be possible on their interpretation; it will just be that the "related party" exception would never be breached. However, in our view, that would not give effect to the purpose of applying all of the calculation rules. These rules (s882 of CTA 2009) contemplate an enquiry into whether a control relationship exists between the person from whom the assets were acquired and the person who is seeking the deduction (and, if it does, denies the deduction on anti-avoidance grounds). If it were not to be determined whether a relationship of control existed between the Corporate Members and the notional company - that aspect of the calculation would not be applied in a partnership context and a standard but crucial piece of the calculation process would be missing.

48. Reaching this view does not, as the appellants suggest amount to judicial legislation by reading in words which are not there. The legislative mandate is to calculate profits by reference to a UK-resident company carrying on the trade. As Mr Tidmarsh rightly pointed out, a literal reading of the provision, whose terms only require that the notional company is carrying on the

trade would not imply that assets used in the trade were acquired in the same way and at the same time and from the same person as they were actually acquired by the partnership. To that extent the notional company mirrors reality for that purpose. Consistent with that and in order to make the calculation provisions work, it is, we consider necessary to attribute the ownership characteristics of the partnership (and the outcome on whether they result in the requisite control) to the ownership of the notional company. This does not mean making assumptions about every kind of attribute a company might have, for instance whether it is public or private; crucially it is only the characteristics necessary to calculate profits which require attribution.

49. For these reasons, we do not consider that the FTT erred in its conclusion. Given the notional company was there to fulfil a calculation purpose its characteristics could not be viewed in isolation but had to be considered in the context of the particular calculation provision sought to be applied. In reaching that conclusion, we have taken into account other arguments on which the appellants also relied in support of their submission that the FTT was wrong. We explain our views on these points below.

FTT wrong not to rely on BCM UT?

50. The first of these specific points relies on the Upper Tribunal's reasoning in *BCM UT*[1]. The appellants say the FTT was wrong to dismiss the relevance of that case. The appellants refer in particular to the Upper Tribunal's analysis that the reference to "a" non-UK resident company

> "…was intended to ensure that the assumption in s1259 extended only to profit calculation 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).".

51. Although the issues there concerned a notional non-UK resident company as referred to in s1259(4), the points the appellants rely on were equally applicable to their arguments on s1259(3). However, the relevant issue in that case had nothing to do with the correct accounting treatment for an acquisition of intangibles. Rather, it was whether a non-UK resident corporate member could claim relief for interest incurred on its borrowing to acquire an interest in a UK trading partnership. The taxpayer submitted that the effect of s1259 was that the corporate member was to be treated as if it carried on the activities of the partnership directly and that the corporate member, should therefore be treated as if it were carrying on the trade of the partnership (alternative asset management). In order to obtain the relevant relief the corporate member had to establish that the loan relationship was for the purposes of the trade it carried on.

52. The Upper Tribunal rejected the taxpayer's argument for a number of reasons: As the title to s1259 stated, the section was concerned with the calculation of a firm's profits which are then allocated between the partners. In that context, it was "highly improbable" that Parliament would have intended the provision to have the effect of determining the trading or non-trading nature of loan relationships. Nothing in the relevant subsections required "the assumption that the company partner carries on the trade, far less that that it has borrowed for the purpose of that trade". The only assumption was that a non-UK resident partner had carried on the trade.

[1] Subsequent to the FTT Decision in this case, *BCM UT* was affirmed by the Court of Appeal in *BCM Cayman LP and another v HMRC* [2023] EWCA Civ 1179 ("***BCM CA***").

That did not require the same assumption to be made against the corporate partner itself or applied to the ascertainment of its profits more generally ([161]).

53. We do not consider that *BCM UT* helps the appellants' case given the particular issues involved. It was a case where the real corporate member was seeking to have an assumption attributed to itself by reference to the assumption the legislation required regarding the notional company (viz. that it was carrying on the trade of the partnership) in circumstances where the corporate member's challenge to the FTT's finding of fact that the corporate member was not carrying on any trade had failed. The current case concerns the converse situation, namely, to what extent are the real circumstances regarding ownership and control as they pertain to a real entity (LLP) to be attributed to the notional company? The Upper Tribunal's essential point was that the statutory assumption was only for calculating the corporate members' share of the partnership profits – it did not extend to provision against the corporate members' profits more generally. If it had been intended to do so, it would have been worded differently. In our view, the reasoning in *BCM UT,* insofar it is confirmed that any assumption or statutory fiction did not extend beyond calculation of the corporate member's profits, is in fact more consistent with HMRC's construction as to the scope of s1259. As the related party provisions are part and parcel of the calculation process, so too they fall within the purpose of the deeming.

Statutory history

54. The second of the appellants' specific points is that the FTT erred in failing to give weight to the statutory history of s1259. Their case starts by noting that, although the wording of the provisions has changed, the law has not, CTA 2009 being the product of a tax law rewrite project. In *BCM CA* (at [60]) it was noted to be common ground that the relevant provisions of CTA 2009 which had included s1259 "merely repeat and clarify legislation which went before".

55. The predecessor to s1259, s114 TA 1988, had provided 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…".

56. The appellants then relied, in essence, on HMRC's view, as expressed in a Statement of Practice 4/98 ("**SP 4/98**") to the effect that s114 was ineffective in applying provisions analogous to the related party provisions (the connected person rules) contained in other CT subject areas - the loan relationships regime and the derivatives code in Finance Act 1996 ("**FA 1996**"). The view expressed by HMRC in paragraph 22 of SP 4/98 was that the statutory fiction did not extend to making a partnership a "company" for the purposes of applying the connected person legislation (FA 1996 s87(3)), and a partnership was therefore not connected with any of its members who provided loans to the partnership.

57. This was regarded as a defect, but it was not until 2002 that the defect was remedied by disapplying s114 and instead applying specific rules to enable the connected person rules to apply in a partnership context (s82 and Sch 25 FA 2002 (loan relationships) and Paragraph 49 Schedule 2 Finance Act 2002 ("**FA 2002**")). That, the appellants point out, was the same Finance Act which introduced the intangibles regime but no similar specific provisions or rules

were brought in for that regime. In his oral submissions Mr Trevett suggested that the reason why this was not done was "merely a statutory oversight".

58. HMRC now accept that their statement in SP 4/98 to the effect that the fiction did not make the notional company a company for the purposes of what is now s835 is wrong. HMRC also point out that SP 4/98, as a statement of practice, was in any case only HMRC's view of the law and did not reflect what the law in fact was. Moreover neither FA 2002 nor SP 4/98 were part of the legislative history of s114 – the fact that amendments were made premised on one reading of s114 did not change the meaning of that provision.

59. In our view, the statutory history does not, for a number of reasons, assist one way or the other on the issue of interpretation before us.

(1) As regards SP 4/98, HMRC now accept their view of the law was wrong.

(2) That acceptance appears on its face correct to us. Nothing in the words of s114 TA 1988 suggests that the statutory direction made there was incapable of encompassing the connected person rules, in that those provisions needed to be addressed in order to perform the required calculation of profits.

(3) The focus should remain on s1259 CTA 2009 and its particular statutory context, not s114. As Mr Tidmarsh pointed out, the Supreme Court in *R (Derry) v HMRC* [2019] UKSC 19 (at [9] and [10]) endorsed guidance as regards consolidation (that was also applied in relation to a tax law rewrite project which gathered disparate provisions into a single code) to the effect that "the principal inference as to the intention of Parliament is that it should be construed as a single integrated body of law without any need for reference back to the same provisions as they appeared in earlier legislative versions…".

60. The third point was a submission by the appellants that it would be wrong to place reliance on HMRC's submission that, if an irrational or illogical result arises from a particular interpretation, it is appropriate if possible to find a more rational way of construing the relevant provision. In the result, we do not consider it necessary to rely on HMRC's arguments to that effect. We merely observe that HMRC's interpretation is consistent with avoiding the result that the Part 8 deductions would not be available where an acquisition of intangibles was made by one or more corporate members, but would be available where an acquisition was by a partnership controlled by those corporate members. However, the prospect of a peculiar result does not drive us to adopt HMRC's interpretation. It merely confirms that there is good reason to consider that it is likely to be correct. The appellants' submission in reply that it goes too far to say that if an irrational or illogical result arises from an interpretation one must find a rational way of construing it does not therefore arise.

61. The fourth of the appellants' specific points is their argument that the anti-avoidance provision in s864 CTA 2009 would address HMRC's concern. Section 864 is an anti-avoidance provision within Part 8 which provides for arrangements to be ignored where they have a tax avoidance purpose as their main or one of their main objects. As HMRC's concern regarding the consequences of the appellants' interpretation is not an operative part of our reasoning for rejecting the appellant's interpretation we do not need to reach a concluded view on the merits of the appellant's s864 argument.

62. However, if it were necessary to do so, we do not think that s864 would be a complete answer. It only applies when a tax avoidance purpose is established and therefore leaves open

the outcome that the related party rules, which although they have an underlying anti-avoidance purpose do not require a tax avoidance purpose to be established, would not apply, as arguably they ought to, where a partnership was interposed. In other words there would still be an anti-avoidance concern that would not be addressed arising from transactions between related parties even if there were no requisite purpose to trigger s864.

Other errors alleged

63. The appellants also take issue with three further points the FTT made (at [119] to [123]), after it had concluded that the appellants' interpretation was incorrect. The FTT billed these points as "final observations". In our view none of these disclose any error of law.

64. First, the appellants say the FTT was wrong at [119] to say that it was "impossible fully to carry out the notional company computation…as s 1259 directs without taking into account both the identities of the disponors to the notional company and the ownership characteristics of the notional company". The appellants submitted that this was wrong because it is clearly possible to apply the rules - they would simply give the result the related party exception was not satisfied as it was not possible for the notional company to have related parties. We do not think that the FTT was discounting the possibility that it is possible to apply the computation, even if, on the appellants' interpretation, the related party exception would never be satisfied. It was just saying that in those circumstances the exercise would not amount to "fully" carrying out the computation in the sense it was intended to be used, i.e. by looking to the reality of the circumstances to see if a relationship of control existed. On the basis of the conclusion it had reached, this was a legitimate observation to make.

65. Second, the appellants submit that the FTT was wrong (at [120]) to suggest there was an inconsistency in the appellants' position in relation to s803(b) CTA 2009, which provides for an exclusion where the assets were held for the purpose of activities in respect of which "the company is not within the charge to corporation tax". According to the FTT, on the one hand the appellants were implicitly saying that the statutory direction in s1259 applied to prevent s803(b) CTA 2009 from taking the relevant assets out of the scope of Part 8, yet on the other the appellants were saying s1259 did not apply in relation to the "related party" definition in s835.

66. That inconsistency appears to us to relate only to what we have earlier called the more basic argument that the FTT considered was before it, but which the appellants do not pursue: that the "related party" provisions could not apply because the notional company was not a company. The FTT's point was that there was an inconsistency on the one hand to say there was a company within the charge to CT (relying on s1259) to escape s803, but then to argue that no company existed for the purpose of the related party exception in s882(1)(b). We agree with HMRC there was no error in that observation, but in any event, the point has fallen away in light of the appellants' arguments on this appeal.

67. Third, the appellants argue that the FTT erred when (at [122] to [123]) it observed that subsequent legislative provisions (s882(5B) and s882(5C) CTA 2009 introduced by s52 of Finance Act 2016 ("FA 2016")) suggested that "the proponents of the changes had no doubt that the related party requirements applied to notional companies as well as actual companies" ([122]). These changes are relevant to the alternative case which we address below. While the appellants argue that the FTT's reliance on FA 2016 was misplaced, we do not think that the FTT was relying on what the proponents of FA 2016 thought that the law in fact was. It was simply noting the consistency which at best was merely by way of comfort for the conclusion on interpretation it had already reached.

68. In conclusion, we consider that the FTT was correct to reject the statutory interpretation advanced by the appellants. We are also not persuaded that the appellants have identified any errors of law in the FTT's reasoning as to why HMRC's interpretation of the scope of s1259 was to be preferred. That is sufficient to dispose of this appeal and it is not therefore necessary for us to deal with the arguments HMRC made in the alternative. However, in recognition of the detailed submissions we received on this point we will address the arguments but do so as briefly as possible.

FA 2016 issue (relevant only if we were wrong on the issue above and the "related party" issue above should be decided in the Appellants' favour)

69. HMRC argued that, even if the appellants were correct in their case that s1259 did not extend to the related party provisions then, in respect of accounting periods commencing or deemed to commence on or after 25 November 2015 the related party condition was not satisfied because of amendments extending the definition of "related party" brought in by the FA 2016.

70. Section 52 FA 2016 provides so far as relevant as follows:

> "**Intangible fixed assets: pre-FA 2002 assets**
>
> (1) Chapter 16 of Part 8 of CTA 2009 (pre-FA 2002 assets) is amended as follows.
>
> (2) In section 882 (application of Part 8 to assets created or acquired on or after 1 April 2002), after subsection (5) insert—
>
> '(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.'
>
> …

71. The amendment thus extends the definition of "related party" by reference to the "participation condition" in TIOPA 2010 (the Taxation (International and Other Provisions) Act 2010). We do not set that out as it is not in dispute that the appellants would, as regards the relevant accounting periods, breach the extended "related party" exception because the same company, TM Dairy, was directly or indirectly participating in the management control or capital of the relevant Corporate Member and LLP. That acceptance is subject however to HMRC succeeding, as the FTT held it did, on two prior issues of interpretation.

Application to assets acquired prior to effective date of amendments?

72. The commencement provisions for s52 were as follows:

> "(5) The amendments made by this section have effect in relation to accounting periods beginning on or after 25 November 2015.
>
> (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."

73. The first disputed issue concerns the scope of the wider FA 2016 definition of "related party" and whether it could apply, as HMRC argued, to assets acquired prior to the effective date of the amendments (25 November 2015). In the appellants' submission it was the previous narrower definition of "related party" which applied as at the date of acquisition on 1 July 2013 because that preceded the taking effect of the change in law.

74. The FTT ultimately agreed with HMRC's view on scope on the basis that CT is an annual tax and that therefore the conditions for a debit to qualify needed to be tested in the accounting period in which the debit arises. In considering whether the disponor was a "related party" at the time of acquisition it was necessary to apply the law as it stood in the later accounting period not the law as it stood at the time of "acquisition" ([142]). The FTT also found the commencement provisions in s52(5) to (7) supported that construction. Those split an accounting period which straddled the effective date, and the FTT agreed with HMRC that the only reason for that split was so that debits accruing on or after the effective date were intended to be affected by the new provisions. The FTT was however less persuaded by HMRC's reliance on the explanatory notes for the clauses which became s52, which stated (at [10]) that "[the] rules apply to debits and credits irrespective of when the relevant transfers of intangible fixed assets took place".

75. Mr Trevett did not dispute that CT was an annual tax and that the question of whether a debit qualifies for relief is to be tested in respect of the accounting period in which the debit arises. However he submitted that this did not support a conclusion that the "related party" test, which only has effect for accounting periods which postdate the date of the acquisition, is to be applied.

76. In our view, the FTT reached the correct interpretation in holding as it did and for broadly the right reasons. The point that CT is an annual tax correctly retained focus on application of the law as amended. The FTT correctly identified that s52 was concerned with the conditions for eligibility of debits sought to be made in a given period. The question of acquisitions only arose once a debit in respect of which relief was sought was in contention. It did not make sense for the effective date to be the date of acquisition when acquisitions only became relevant when a debit was sought in the relevant accounting period. When the relief came to be applied, there would be no justification for applying the related party definition which applied at the time of acquisition, because CT was interested in the date of the debit sought to be given effect in order to determine the applicable law; it was not interested in the date of acquisition. In short, the framework of rules applicable to the relevant debits sought in any given year is to be assessed by reference to the law applicable in that year.

77. In our view, this analysis is correct and would be a sufficient basis to justify the interpretation adopted by the FTT. While both parties took us to the drafting of the commencements of other sections in support of their respective cases we are not persuaded these assist.

78. In conclusion, were it necessary to decide this point, we would agree with the FTT that the new provisions did apply in the relevant accounting periods and were not inapplicable because the date of the transfer preceded 25 November 2015.

Drafting defect and whether can be remedied by Inco Europe approach

79. The other issue of interpretation concerns the fact, accepted by both parties and identified by the FTT, that on a literal reading of s882(5B) it has no effect. The provision is stated to apply "where, for section 1259 purposes, references in this section to a company are read as references to the firm". The problem with this form of words is that s1259 does not make any provision that references to a company are to be read as references to a firm. The condition thus has nothing to bite on because of a misunderstanding of the way s1259 operates.

80. Nevertheless, in agreement with HMRC, the FTT considered the drafting defect could be remedied under the principles set out in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 ("***Inco Europe****")* and *Pollen Estate Trustee Co Ltd v HMRC* [2013] EWCA Civ 753 *("**Pollen**").* In *Inco Europe* the House of Lords explained that before exercising the court's power to correct obvious drafting errors the court should "exercise considerable caution before adding or omitting or substituting words" and should be "abundantly sure of three matters":

> (1) The intended purpose of the statute or provision in question
>
> (2) That by inadvertence the drafter and Parliament failed to give effect to that purpose in the provision
>
> (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.

81. The FTT considered the three conditions mentioned in those principles were satisfied: the intended purpose of the provision was clear both from the provisions and the explanatory notes, the failure to achieve the intended purpose inadvertent, and the substance of the provisions which Parliament would have made in the absence of that error was readily apparent ([148]). The appellants submit the FTT erred in its reliance on the explanatory notes and wrongly applied the principles explained in *Inco Europe.* The FTT should instead have accepted that the FA 2016 amendments had a result contrary to that which the executive had hoped for and the defect could only be corrected by Parliament.

82. In *Pollen,* the Court of Appeal (Lewison LJ with whose judgment the other LLJs agreed) applied the *Inco Europe* approach to tax provisions, in that case an SDLT relief provision. On its terms, the relief in respect of SDLT liability on a property purchase, while available if a charity alone was the purchaser, did not apply where a non-charity also had a beneficial interest. No relief was thus available even in respect of the charity's share of the beneficial interest. Applying *Inco Europe* the Court read the provision such that the relief would apply to the extent of the charity's beneficial interest. The Court considered (at [49]) the reading "necessary in order to give effect to what must have been Parliament's intention as regards the taxation of charities". As regards the need to formulate new wording the Court earlier noted it was

sufficient "…to be confident of the gist or substance of the alteration, rather than its precise language".

Discussion

83. Logically, the first question to ask before engaging with the *Inco Europe* principles is whether the language works without amending the wording. For the reasons both parties identified and we have already set out, we do not consider it does. The next step is to identify the intended purpose of the provision. Mr Trevett's submission was that, contrary to the FTT's view, neither the provision nor the explanatory notes make that clear.

84. Paragraph 13 of the explanatory notes for the clause which was enacted as s52 explained that HMRC 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" [*i.e. those applying to assets created on or after April 1 2002*].

85. HMRC submitted that this is relevant as it identifies the mischief sought to be addressed by the legislation and that (per *Westminster City Council v National Asylum Support Service* [2002] UKHL 38 (at [5])) it is admissible as an aid to construction. In our view it is possible to discern the purpose of s882(5B) from its own terms when viewed in the context of the wider provisions themselves (and without recourse to the explanatory notes).

86. It appears from s52(1) itself that Parliament was concerned to amend s882 by changing the definition of a person who is a related party in relation to another person so as to encompass the participation condition (as defined in TIOPA). The drafting of the opening words of the new s882(5B) (viz. "References in subsection 5A to a person include a firm in a case where") demonstrates an intention to specify that firms can be regarded as a person to whom the section applies when considering whether a person is a related party in a specified circumstance. The defective part in the following words relates to specification of that circumstance but the words still reveal something of the intention. They point to a conclusion that the circumstance concerns "s1259 purposes" and in turn s882(5C) makes it apparent that those purposes are "the purposes of determining under section 1259 the amount of profits or losses to be allocated to a partner in a firm". The words "references in this section to a company are read as references to the firm" in regard to the function of s1259 indicate that the drafter appreciated that s1259 is carrying out some kind of deeming; the problem is that they failed accurately to reflect the proper nature of the deeming with which the provision was concerned.

87. Accordingly, standing back Parliament's purpose was to:

(1) amend the concept of "related party"; and

(2) include firms in the analysis of "related party" in situations where s1259 was relevant (i.e. where the profits from which a corporate member's share in a partnership are being calculated).

88. In our view the simple problem is that, when describing the function of s1259, the drafter has misdescribed it and thereby failed to give effect to the intention. As to the second *Inco Europe* principle, the lack of effect ensuing from that misdescription is plainly inadvertent. The drafting fails to give effect to the purpose of applying a participation condition when the issue of the related party exception applied and fails to ensure that a party was not excluded from

falling within the remit of the related party exception because it was a firm rather than a company.

89. In respect of the third *Inco Europe* condition we can accordingly be satisfied as to the provision Parliament would have made. We agree with Mr Tidmarsh, the clear gist of the provision is that, where s1259 applies, the provision is to be taken as requiring references in s882 to a company as if they were references to a firm.

90. Although Mr Tidmarsh reminds us that we only need be satisfied of the gist of the substance, at our invitation he did provide a formulation (added words underlined) which we think it is helpful to expose as it shows how the misdescription of s1259 can be corrected straightforwardly.

> "References in subsection (5A) to a person include a firm, where for s1259 purposes, <u>a company is taken to be carrying on the trade of the firm and in such a case</u> references in this section to a company are read as references to the firm."

91. We acknowledge that other drafting formulations may be possible and note the observation in *Pollen* that judges are not Parliamentary drafters. Ultimately, and adopting the formulation used in *Pollen,* we are satisfied that reading the legislation in the way we have explained above is necessary in order to give effect to what must have been Parliament's intention.

92. While Mr Trevett's submissions emphasised that the facts of this case were a long way from those in *Inco Europe* (where a consequential provision had inadvertently removed a statutory jurisdiction), it is the principles from that case which are relevant. But, in any case we do not see that the misdescription of a statutory provision in circumstances where the surrounding context makes clear what was intended is such a long way from the drafting defect in *Inco Europe*. Moreover the facts of *Pollen* well illustrate the way in which the *Inco Europe* principles might have wider application beyond the particular sort of error with which that case was concerned.

93. We therefore agree that the FTT was correct in its view that the appellants' appeals, in respect of the relevant accounting periods would fall to be dismissed even if the appellants had been successful on the first question. If it had become necessary to do so we too would have dismissed the appellants' appeals in relation to those periods for the reasons we have explained.

Conclusion

94. The appellants' appeals are dismissed.

MR JUSTICE TROWER
JUDGE SWAMI RAGHAVAN

RELEASE DATE: 06 September 2024