

Condition B grounds for appeal and reason for rejection

Appendix

Ground number	HMRC ground of appeal	Reason for rejection of ground of appeal given by Upper Tribunal
1	The FTT failed to consider adequately the legal basis for the distinction between employees and partners.	<p>The Judge was not required to approach the question of which members had significant influence by reference to the difference between an employee and a partner, or by the application of any other rigid test of this kind.</p> <p>Rather, the Judge was required to apply the words of Condition B to the facts of this case, as he found them. The distinction between an employee and a traditional partner may be a useful tool in this exercise, but it does not determine the answer. The exercise of applying the words of Condition B to any particular case is an acutely fact sensitive exercise. It is perfectly possible to have employees of a particular LLP who exercise significant influence over the affairs of the partnership. It is also perfectly possible to have members of the partnership who exercise very little influence over the affairs of the partnership. It all depends upon the facts of the particular case.</p> <p>In our view, the Judge was correct to consider the question of significant influence by considering what the members of BlueCrest did within the partnership. We find the submission that, in doing so, the Judge lost sight of the difference between the role of an employee and the role of a traditional partner is both wrong and misconceived.</p> <p>There was no failure here to consider adequately the distinction between a traditional partner and an employee, let alone a failure adequately to consider the statutory question of significant influence. The Judge, as he was entitled to do, simply found it helpful to his analysis to consider the role of a partner in a traditional partnership.</p>
2	HMRC submit that the FTT erred in its construction of “affairs”. It submits that the test of significant influence applies to the affairs of the LLP generally, looking at the business as a whole as opposed to one or more aspects. The FTT concluded, wrongly say HMRC, that the test is not “restricted to the affairs if the partnership generally but can be over any aspect of the affairs of the partnership”.	We do not accept this submission. In our view, to do so would be to write additional words into Condition B. The legislation requires, if Condition B is to be failed, that the relevant member be given significant influence over the affairs of the partnership. The reference is not to the entirety of the affairs of the partnership. As a matter of construction of the wording of Condition B, and as a matter of the purpose behind this legislation, we consider that the bar is set too high if the significant influence in Condition B is read only to mean significant influence over the entirety of the affairs of the relevant partnership.
3	HMRC submit that the FTT erred in its construction of “influence”. It submits that the influence required by the legislation is influence over the management of the partnership business and not financial influence or impact.	<p>For the same reason as set out above in respect of Ground 2, we reject this argument. In our view, HMRC seek to import words into the statute and there is no warrant for demarcating particular types of activity as giving or not giving significant influence. The inquiry is a fact sensitive one. Responsibility for operational activities may give rise to significant influence. Financial performance and/or financial responsibility may give rise to significant influence. Managerial responsibility may give rise to significant influence. Again, this all depends upon the facts of the particular case.</p> <p>In our view, to say, as HMRC do, that financial impact upon the business of the partnership cannot qualify as a source of significant influence is misconceived.</p>

MACFARLANES

4	HMRC submit that the FTT erred in its construction of “significant” in failing to consider and/or apply the ordinary meaning of the term “significant” as a qualifier to the word “influence”	<p>We consider that it would be a mistake to try to put a gloss on the expression “significant influence”, either by imposing a tripartite distinction between insignificant influence, influence and significant influence or by trying to use the employee/partner distinction as a key to unlock the meaning of significant influence, or by any other means of construction.</p> <p>There is no one size fits all approach to answering the Condition B question. Whether there is significant influence in the case of any individual member of a partnership depends upon the facts of the particular case.</p>
5	HMRC argue that the FTT failed to appreciate that any significant influence must ultimately derive from the LLP Agreement and failed to properly take into account the terms of that Agreement which left little room for the portfolio managers (and all members beyond the Board) to exercise influence over the affairs of the partnership	It is clear that the LLP Agreement was not ignored, but the evidence of what had happened on the ground, in terms of who exercised significant influence, proved decisive in the decision of the Judge in relation to the portfolio managers.
6	HMRC submit that the FTT was wrong to apply the analogy with a traditional professional services firm	We find that this Ground, in common with the remainder of the Appeal, does not respect the terms of the Decision. In considering the question of significant influence, and as part of his analysis of that question, the Judge found it helpful to look at the role of partners in a traditional partnership and, in particular, their “find, mind and grind” role. The question is a multi-factorial one, which requires a careful analysis of all aspects of the workings of the relevant partnership.
7	HMRC submit that the FTT was wrong to conclude that the relevant portfolio managers had “managerial clout”.	For much the same reason as Ground 3, this Ground must fail. There is nothing in the wording of Condition B which restricts the types of activity or sources of influence within a partnership which can be considered for the purposes of deciding whether an individual meets or fails Condition B.
8	HMRC submit that the FTT’s findings in relation to “involvement” in operational decisions were not sufficient to demonstrate significant influence of the type required by Condition B	<p>We consider that this assertion is no more than an attempt to re-argue the evidential case which was before the Judge. The Judge was satisfied, on the evidence before him, that the portfolio managers did have significant influence over the affairs of the Respondent.</p> <p>The activities to be considered, when answering the Condition B question, are not demarcated or ring fenced in this way. The fact that a particular activity may be one normally carried out by an employee may be a factor which assists in determining whether a particular activity constitutes a source of significant influence within a partnership, but all depends upon the facts of the particular case.</p>
9	HMRC assert that the FTT was wrong to conclude that a capital allocation of \$100 million was sufficient evidence to demonstrate significant influence. HMRC contend that financial impact is not, on its own, sufficient to demonstrate “influence” of the type required by Condition B.	This misrepresents the Judge’s reasoning in relation to the influence exercised by portfolio managers, which was based upon all his findings as to the activities of portfolio managers. In the case of those portfolio managers with capital allocations of \$100 million or more, the Judge was satisfied that their activities constituted significant influence upon the affairs of the Partnership. In our view, this was pre-eminently a matter for the Judge.

Macfarlanes LLP | 20 Cursitor Street London EC4A 1LT | T +44 (0)20 7831 9222 | F +44 (0)20 7831 9607 | DX 138 Chancery Lane | macfarlanes.com

This content is intended to provide general information about some recent and anticipated developments which may be of interest. It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained. Macfarlanes LLP is a limited liability partnership registered in England with number OC334406. Its registered office and principal place of business are at 20 Cursitor Street, London EC4A 1LT. The firm is not authorised under the Financial Services and Markets Act 2000, but is able in certain circumstances to offer a limited range of investment services to clients because it is authorised and regulated by the Solicitors Regulation Authority. It can provide these investment services if they are an incidental part of the professional services it has been engaged to provide.