

SUPREME COURT JUDGMENT IN ANSON - IMPLICATIONS FOR LLC MEMBERS

BACKGROUND

On 1 July 2015 the UK's Supreme Court released its judgment in the *Anson*¹ case. The case concerns the treatment of a Delaware LLC for UK income tax purposes. The specific question was whether Mr Anson, a member of the LLC, could claim relief against UK tax for US tax paid by him on the profits of the LLC.

The LLC was classified as a partnership for US purposes and so Mr Anson was liable to US tax on his share of the profits of the LLC. Mr Anson had also been taxed in the UK on distributions of profits received from the LLC as if they were distributions from a company. Relief was only available against the UK tax for the US tax payable by Mr Anson if it was computed by reference to the same profits. Reversing the decision of the Court of Appeal, the Supreme Court held that relief was available.

The Court did not reach this decision on the narrow basis of an interpretation of the double tax relief provisions in the UK / US double tax treaty or the UK's unilateral relief code. Rather, its decision is based on a general finding that, for UK domestic law purposes, members of an LLC in the form of that in the *Anson* case are entitled to the profits of the LLC as they arise. This has wider implications for the UK tax treatment of both corporate and individual members of some LLCs.

IMPLICATIONS

- ◆ The Supreme Court decision will not apply to all LLCs. It turns on findings of fact by the First Tier Tribunal which are themselves based on both Delaware law and the LLC agreement. However, a good number of existing LLCs are likely to be affected.
- ◆ The judgment is good news for some individual members of such LLCs, if, like Mr Anson, they have been paying UK tax on distributions from the LLC and US tax on the profits. Although such members may now pay UK tax on their share of profits as they arise, they will be entitled to a credit for US tax they have paid against their UK tax liability and, in some cases, a refund of UK tax they have paid.

¹ *Anson (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent)* [2015] UKSC 44

- ◆ The decision will be less welcome to other members of such LLCs. For example, UK corporate members of an LLC would have expected not to pay UK tax on profits until they were distributed (and so to be able to accumulate profits and reinvest without any shareholder level UK tax). Any distribution may also have been exempt from UK corporation tax. Instead, unless the underlying profits are themselves exempt, corporate members will be subject to UK tax on those profits as they arise and may not benefit from the distribution exemption (although a subsequent distribution of those profits should be ignored).
- ◆ As noted above, the Supreme Court focused on the specific question of whether the UK and US tax was computed by reference to the same income. It did not base its decision on the traditional analysis of whether the LLC was "transparent" or "opaque" for tax purposes. In doing so, the Supreme Court was critical of the Court of Appeal's application of the decision in *Memec*², which has been viewed as the leading authority for deciding the classification of non-UK entities for UK purposes (and forms the basis of HMRC's published guidance). The application of *Memec* may now be more limited and the treatment of other non-UK entities may need to be reconsidered.
- ◆ *Memec* is, however, still good law. Indeed, the judgment in the *Anson* case gives an example of where *Memec* will remain relevant: where an LLC which is a member of a group is in receipt of dividend income from its own subsidiaries. The interaction of the different tests in such circumstances is uncertain. HMRC guidance may be necessary to resolve the position here.
- ◆ As we mentioned above, the decision in the *Anson* case turned on the drafting of the LLC agreement. Members of LLCs – both corporate and individual – should review their LLC agreements to determine if the decision applies and whether any changes should be made.

² *Memec plc v Inland Revenue Commissioners* [1998] STC 754

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This note is intended to provide general information about some recent and anticipated developments which may be of interest.

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