

AN ALERT FROM THE BDO INTERNATIONAL TAX PRACTICE

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## INTERNATIONAL TAXATION



### SUBJECT

## U.K. SUPREME COURT RULES THAT PROFITS OF A LIMITED LIABILITY COMPANY ACCRUE TO MEMBERS AS THEY ARISE

### SUMMARY

On July 1, 2015, the Supreme Court of the United Kingdom issued its long awaited judgment in the case of Anson (Appellant) v. Commissioners for Her Majesty's Revenue & Customs (Respondent), [2015] UKSC 44, overturning the Court of Appeal's decision, to find for the taxpayer.

### DETAILS

The issue at stake was whether an individual, Mr. Anson, a non-domiciled U.K. tax resident, was entitled to double tax relief under the United States - United Kingdom Double Income Tax Treaty (the "Treaty") for income he received from his United States interest in a Delaware limited liability company ("LLC"). That is, whether the income taxed in the U.K. could be said to be the same income on which United States tax had been paid. If the income was the same, then double tax relief would be available. However, if it was determined to be different income, (e.g., some type of dividend from the LLC), no credit relief for the United States tax would be allowed.

Specifically, Mr. Anson was subject to taxation in the United States on his share of the LLC's profits as they arose. He had a U.K. tax liability on any after-tax LLC profits that were distributed from the LLC and remitted to the U.K. The issue presented to the Supreme Court was whether he was entitled to double tax relief in the U.K. for the United States taxes suffered on the profits of the LLC. The Treaty generally provides credit relief for United States federal tax if the U.K. tax could be said to be computed by reference to "the same profits or income" by reference to which the United States federal tax was computed. U.K. domestic law also provides for unilateral double taxation relief by reference to the same test, and Mr. Anson claimed double tax relief for the

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Massachusetts state taxes he suffered on the LLC profits on this basis.

The Supreme Court confirmed that what income arises to an LLC member is governed by United States law and is therefore a question of fact. U.K. tax law is then applied to those facts, as found. In this case, the United States legal analysis, with respect to both the relevant Delaware statute governing the LLC, and the rights created by the LLC agreement itself, concluded that Mr. Anson was entitled to the profits of the LLC as they arose, rather than on distribution, even though he did not have a proprietary interest in the assets of the LLC. As such, the profits taxed in the U.K. were the same profits being taxed in the United States, and double tax relief under the Treaty and domestic law was available.

The court made it clear that the U.K. tax treatment of the LLC would depend on the application of both the local governing statute and the rights created under local law by the relevant LLC agreement. Not all LLCs will, therefore, necessarily be regarded in the same way as the one in this case; indeed many may continue to be regarded as opaque (as is HMRC's long-standing view), depending on their constitutions and the law under which they are formed.

## BDO INSIGHTS

- ▶ Although the case is directly on point for United Kingdom resident individuals claiming double tax relief for United States taxes on their limited liability company interests treated as a partnership for United States tax purposes, the case may impact how certain LLCs are regarded for all U.K. tax purposes.

## HOW BDO CAN HELP

Individuals with interests in LLCs should review their particular circumstances to determine whether they could be entitled to double tax relief that was previously denied.

Corporate groups with LLCs in their structure should also consider the impact of the case, in particular, whether any LLCs in the group that were previously considered to be wholly opaque could now be regarded as being transparent from an income ownership perspective. Areas where this may have an impact include: groupings for U.K. tax purposes, (i.e., whether an LLC breaks the tax group; the application of the dividend exemption to distributions received from an LLC; and any other U.K. tax analysis that relies on income being received by the LLC itself rather than the members).

BDO can help you review your LLC agreements in the light of this tax case to determine whether there is any potential change to the current U.K. tax treatment that might present an opportunity or risk to you.

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