Neutral Citation Number: [2024] EWCA Civ 797

Case No: CA-2023-001974

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MR JUSTICE RICHARD SMITH AND JUDGE ANDREW SCOTT
[2023] UKUT 00146 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2024

Before:

LORD JUSTICE ARNOLD
LADY JUSTICE WHIPPLE
and
LADY JUSTICE FALK

- -

Between:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and –	
GE FINANCIAL INVESTMENTS	**Respondent**

- -
- -

Hui Ling McCarthy KC and Barbara Belgrano (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Appellants**
Philip Baker KC and John Brinsmead-Stockham KC (instructed by **Slaughter and May**) for the **Respondent**

Hearing dates: 2 and 3 July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 17 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Lady Justice Falk:

Introduction

1. This is an appeal by HMRC against a decision of the Upper Tribunal ("UT") that the Respondent GE Financial Investments ("GEFI"), a UK incorporated company, was a resident of the United States for the purposes of the US/UK double tax convention (the "Convention"). The effect of the UT's decision, reversing the conclusion of the First-tier Tribunal ("FTT") on that issue, is that the United Kingdom is required to confer double tax relief in respect of US tax paid on GEFI's interest income for the accounting periods ended 31 December 2003 to 31 December 2008 inclusive.

2. GEFI defends the UT's conclusion as to residence but seeks to maintain in the alternative that the UT was wrong to conclude that the FTT was entitled to hold that GEFI was not carrying on "business" in the United States. A conclusion that it was doing so would have been an alternative route to securing double tax relief. I will refer to the residence issue as "Issue 1" and the question whether GEFI was carrying on business as "Issue 2".

3. The numbers, at least as far as the UK Exchequer is concerned, are substantial. After HMRC succeeded in the FTT GEFI paid around £124m of UK corporation tax in respect of the relevant period, plus interest of around £64m. It had previously also paid US tax of around US$303m (at a rate of 35%) on the same income. GEFI's position before us is that if HMRC succeeds on both issues then it is likely, but not certain, that GEFI will obtain relief under US domestic law (known as unilateral relief) for the UK tax, but no relief for the interest element. If unilateral relief is available then GEFI would have a net irrecoverable cost representing the difference between the interest paid to HMRC and the interest recovered on tax overpaid in the United States.

4. The court is grateful for the assistance provided by the submissions of Hui Ling McCarthy KC, leading Barbara Belgrano, for HMRC and Philip Baker KC and John Brinsmead-Stockham KC for GEFI. In oral submissions Mr Baker addressed Issue 1 for GEFI and Mr Brinsmead-Stockham addressed Issue 2.

Relevant factual background

5. GEFI is part of the well-known General Electric group, the ultimate parent company of which is the General Electric Company ("GE"), a US corporation. GEFI was incorporated in 1997 as a private limited company under the Companies Act 1985 and was a direct subsidiary of a further UK incorporated company, an unlimited company called GE Capital Investments ("GECI"). GECI also had another subsidiary, GEFI Inc, a US corporation established in Delaware. GECI was in turn a direct subsidiary of General Electric Capital Corporation ("GECC"), a US incorporated entity and an indirect subsidiary of GE. GE also owned another relevant US corporation, GELCO Corporation ("GELCO").

6. GEFI was dormant until June 2003. On 27 June 2003 it adopted a new memorandum and articles of association. As the UT explained:

> "[19] … The objects included:
> (1) the objects, at (A), "to carry on business as a general commercial company and to carry on any trade or business whatsoever";

> (2) the object, at (B), to hold "directly or indirectly financial receivables and other assets including (but not limited to) shares or stock in any company carrying on a financial trade";
> (3) the objects, at (D), "to advance, deposit or lend money";
> (4) the object, at (E), "to carry on any other trade or business whatever"; and
> (5) the objects, at (L), to "lend and advance money or give credit … and to receive money on deposit or loan …".
>
> [20] The articles of association also provided at Article 8.3A that:
> "no Ordinary Dollar Shares in the capital of the Company shall be transferred unless there are transferred to the transferee at the same time all of such Ordinary Dollar Shares for the time being in issue and all of the Common Stock in [GEFI Inc] for the time being outstanding"."

Although GEFI had sterling as well as dollar shares, the dollar shares represented the vast majority of its issued share capital. For present purposes the sterling shares can be ignored.

7. On the previous day GEFI Inc had been incorporated and immediately amended its constitution to provide for a mirror restriction to that referred to in new Article 8.3A, namely:

> "No shares of common stock of [GEFI Inc] may be transferred to any person unless the transferee of such shares of common stock simultaneously receives (i) all shares of common stock of [GEFI Inc.] then outstanding and (ii) all of the then outstanding ordinary dollar shares…in [GEFI Ltd]".

8. The effect was to "staple" the shares of the two entities together. This had the consequence that GEFI was treated for US federal income tax purposes as a domestic (that is US) corporation, under section 269B of the US Internal Revenue Code ("s.269B"). However, GEFI was also UK tax resident by virtue of its incorporation in this jurisdiction. The effect in both States was to subject GEFI to tax on its income on a worldwide basis, rather than only on income connected with that State.

9. Also on 27 June 2003, GEFI and GEFI Inc agreed to form a limited partnership under Delaware law, with GEFI as the limited partner with a 99% interest and GEFI Inc as the general partner with the remaining 1% (the "LP"). The limited partnership agreement recorded the purposes of the LP as being:

> "… to (i) hold directly or indirectly financial receivables and other assets, and companies carrying on a financial trade, and engage in activities related or incidental thereto, and (ii) engage in any and all lawful activities to which the General Partner and the Limited Partner agree."

As with a UK limited partnership, management of the partnership's activities was in the hands of the general partner alone.

10. The initial capital contributions to the LP comprised existing debt which had originally been created in 1995 by the issue of a promissory note by GELCO to GECC. That debt was restructured into two promissory notes owed by GELCO which were transferred

down the group to enable the partners to contribute them to the LP in their 99:1 proportions. The total debt contributed on 27 June 2003 was around $1.5bn.

11. During 2003 GEFI also acquired two UK resident GE subsidiaries.

12. Further debt was created in 2004 and 2006. GEFI and GEFI Inc made partnership contributions of around $1.1bn in July 2004, funded by a sale of one of GEFI's subsidiaries to another GE entity for cash and a loan by GEFI to GEFI Inc of the amount needed to provide the latter's 1% share. The LP used the funds to make a loan to GELCO. Further contributions of around $206m were made in July 2006 (following the receipt by GEFI of further sale proceeds) which were advanced to GECC under a revolving credit facility. There was also a term loan from the LP to GELCO of around $210m in December 2006, but this reflected a restructuring of existing debt rather than any fresh advance.

13. There were therefore a total of five debts held by the LP over the relevant period, referred to in the FTT's decision as Loans 1 to 5, namely the two initial promissory notes, the loan made in 2004 and the two loans in 2006. Only two of these, Loans 3 and 4 (made in July 2004 and July 2006 respectively), could be described as fresh advances.

14. It is common ground that the LP is to be treated as "transparent" both for UK and US tax purposes, such that its activities are treated as carried on by its partners and therefore that the interest arising to the LP on the various loans is taxable directly in the partners' hands. Further, it is uncontroversial that the interest on each of the loans had a US source.

15. As the UT recorded at [31] and [32] (and as GEFI had explained to it) the structure just described was originally set up with a view to obtaining a US tax advantage. That advantage did not materialise due to a change in US tax law shortly after the structure was implemented. However, the structure was retained because it also gave rise to a potential UK tax advantage in the form of a greater capacity to incur deductible interest costs in the UK, although in fact the extra capacity turned out not to be needed. The details of that do not matter for present purposes, other than the fact that it was assumed that the structure would not give rise to additional UK tax. It is on that point that HMRC disagree.

The issues

16. In a little more detail, the two issues are as follows:

    Issue 1: whether the share staple between GEFI and GEFI Inc had the effect that GEFI was a resident of the United States for the purposes of the Convention during the relevant period.

    Issue 2: if GEFI was not so resident, whether it carried on business in the United States through a permanent establishment for the purposes of the Convention during the relevant period.

17. Originally there were two components to Issue 2 in dispute, namely (a) whether GEFI carried on business in the United States through a permanent establishment and (b) whether it mattered that US tax was levied on the basis of residence rather than carrying on business. The FTT concluded against HMRC on component (b), the UT found it

unnecessary to consider it and it is not pursued before this court. Further, HMRC did not seek to rely on the absence of a US "permanent establishment" independently of their argument that GEFI did not carry on business. So the sole point in dispute under Issue 2 is whether GEFI carried on business.

The Convention

18. The relevant version of the Convention is that signed on 24 July 2001, as amended by a protocol signed on 19 July 2002. It has effect for the purposes of relieving double taxation by virtue of The Double Taxation Relief (Taxes on Income) (The United States of America) Order 2002 (SI 2002/2848), made by an Order in Council pursuant to what is now Chapter 1 of Part 2 of the Taxation (International and Other Provisions) Act 2010. As is common, large parts of the Convention reflect the OECD Model Tax Convention ("MTC"), but there are also some material differences.

Residence: Issue 1

19. Article 4 deals with residence and relevantly provides:

> "1. … the term "resident of a Contracting State" means, for the purposes of this Convention, any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State.
> …
> 5. Where by reason of the provisions of paragraph 1 of this Article a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the mode of application of this Convention to that person. If the competent authorities do not reach such an agreement, that person shall not be entitled to claim any benefit provided by this Convention, except those provided by paragraph 4 of Article 24 (Relief from Double Taxation), Article 25 (Non-discrimination) and Article 26 (Mutual Agreement Procedure)."

20. If GEFI was solely UK tax resident for Convention purposes then treaty benefits would be generally available to it. This would include, pursuant to Article 11(1) (set out below), that interest arising to it would be taxable only in the United Kingdom, notwithstanding that the interest has a US source. In effect, the Convention would confer taxing rights exclusively on the United Kingdom and it would not be required to give credit for US tax. This is subject to the point raised by Issue 2.

21. If on the other hand GEFI was to be treated as both UK and US resident for Convention purposes, then treaty benefits would not generally be available. This is subject to any agreement being reached under Article 4(5), but none has been.

22. In principle it would follow that the Convention would permit both States to tax GEFI's income in full (leaving to one side any more generous relief conferred by domestic law). However, the general denial of treaty benefits under Article 4(5) is subject to the crucial

exception of Article 24(4). So far as relevant, that provision requires the United Kingdom to allow a credit for US tax paid on US source income against UK tax on the same income. The net effect of this is that GEFI would not owe any UK tax on the interest, because the US tax already paid more than covers the UK tax.

Carrying on business: Issue 2

23. Article 11 relevantly provides:

> "1. Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.
> …
> 3. The provisions of paragraph 1 of this Article shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State, in which the interest arises, through a permanent establishment situated therein, and the interest is attributable to such permanent establishment. In such case, the provisions of Article 7 (Business Profits) of this Convention shall apply."

24. Article 7(1) provides:

> "The business profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the business profits of the enterprise may be taxed in the other State but only so much of them as are attributable to that permanent establishment."

25. The term "business" is partially defined in Article 3(1)(d) as including "the performance of professional services and of other activities of an independent character". More relevantly, Article 3(2) provides:

> "2. As regards the application of this Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires … have the meaning which it has at that time under the law of that State for the purposes of the taxes to which this Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State."

26. Although this most obviously covers terms not defined at all, the OECD Commentary on the equivalent provision in the MTC states, at para. 10.2 of the 2000 version:

> "The Convention does not contain an exhaustive definition of the term "business", which, under paragraph 2, should generally have the meaning which it has under the domestic law of the State that applies the Convention."

It goes on to explain that the provision of the MTC that is reflected in Article 3(1)(d) of the Convention was included in the MTC in 2000 to address a specific issue which is not relevant to this case.

27. As discussed further below, it is common ground that the effect in this case is to require the term "business" to be taken to have the meaning it has for the purposes of UK taxes

to which the Convention applies, namely "taxes on income and on capital gains", the existing UK taxes as at the date of the Convention being listed as income tax, capital gains tax, corporation tax and petroleum revenue tax (Article 2(1) and (3)(b)).

28. The basic definition of a permanent establishment in Article 5(1) is "a fixed place of business through which the business of an enterprise is wholly or partly carried on".

29. The combined effect of Articles 11 and 7 is that, where interest income is attributable to a permanent establishment through which a resident of a Contracting State "carries on business" in the other Contracting State, that other State has the primary taxing rights over the income. Applied to these facts, therefore, if GEFI was solely UK tax resident for Convention purposes but the interest income was attributable to a permanent establishment through which it carried on business in the United States, then under Article 24(4) GEFI would be entitled to a credit for the US tax it has borne on the interest, reflecting the allocation of taxing rights under the Convention. Alternatively, if GEFI was not treated as carrying on business (and was solely UK tax resident for Convention purposes) then the effect of Article 11(1) would be to allow UK taxation, with no obligation to confer a credit for US tax.

30. As already indicated, it is also common ground that the question whether GEFI was carrying on business should be determined by reference to the activities of the LP, due to its "tax transparency". In practice this means GEFI Inc's activities as the general partner.

31. It is worth noting that any decision that GEFI was carrying on business in the United States would be a decision in principle only, because there would be a separate question of attribution under Article 7(1). Subject to that point, however, a conclusion in GEFI's favour under Issue 2 would lead to the same result as under Issue 1, namely that no UK tax would be due.

Relevant US tax law

32. The judge found as follows as regards US tax, based on the expert evidence:

> "[24] On the basis of this expert evidence it is clear that US federal income tax law distinguishes between "domestic" and "foreign" corporations. Under s 7701(a)(4) of the US Internal Revenue Code of 1986, as amended (the "Code"), a "domestic" corporation is a corporation "created or organized under the laws of the United States" or in any one of the fifty states or the District of Columbia. A "foreign" corporation is defined by s 7701(a)(5) of the Code as any corporation that is not a domestic corporation.
>
> [25] Unlike a domestic corporation, which is liable to tax on its worldwide income under s 11 of the Code, a foreign corporation is generally subject to US federal income tax on two classes of income, first in the case of a foreign corporation that is engaged in the conduct of a trade or business within the US at some point during the taxable year, income that is considered to be "effectively connected" with such US trade or business; and secondly interest, dividends, rents, salaries, wages, premiums, annuities and various other types of income from US sources that are considered to be "fixed or determinable annual or periodical" and that are not effectively connected income.

[26] However, s 269B of the Code (“s 269B”) provides:

> “(a) **General rule.**— Except as otherwise provided by regulations, for purposes of this title—
>
> (1) if a domestic corporation and a foreign corporation are stapled entities, the foreign corporation shall be treated as a domestic corporation.
>
> …
>
> (c) **Definitions.**— For purposes of this section—
>
> (1) **Entity.**— The term “entity” means any corporation, partnership, trust, association, estate, or other form of carrying on a business or activity.
>
> (2) **Stapled entities.**— The term “stapled entities” means any group of 2 or more entities if more than 50 percent in value of the beneficial ownership in each of such entities consists of stapled interests.
>
> (3) **Stapled interests.**—Two or more interests are stapled interests if, by reason of form of ownership, restrictions on transfer, or other terms or conditions, in connection with the transfer of 1 of such interests the other such interests are also transferred or required to be transferred.
>
> (d) **Special rule for treaties.**— Nothing in section 894 or 7852(d) or in any other provision of law shall be construed as permitting an exemption, by reason of any treaty obligation of the United States heretofore or hereafter entered into, from the provisions of this section.
>
> (e) **Subsection (a)(1) not to apply in certain cases.**—
>
> (1) **In general.**— Subsection (a)(1) shall not apply if it is established to the satisfaction of the Secretary that the domestic corporation and the foreign corporation referred to in such subsection are foreign owned.
>
> (2) **Foreign owned.**—For purposes of paragraph (1), a corporation is foreign owned if less than 50 percent of—
>
> (A) the total combined voting power of all classes of stock of such corporation entitled to vote, and
>
> (B) the total value of the stock of the corporation,
>
> is held directly (or indirectly through applying paragraphs (2) and (3) of section 958(a) and paragraph (4) of section 318(a)) by United States persons (as defined in section 7701(a)(30)).”

[27] As a result of the amendment by GEFI Inc to its Certificate of Incorporation … and the adoption by GEFI of Article 8.3A to its amended Articles of Association…, the shares of GEFI were “stapled” to the stock of GEFI Inc. As such, GEFI and GEFI Inc were stapled entities throughout the relevant period and, as the exceptions in s 269B(e) do not apply, GEFI was treated by s 269B(a)(1) as a domestic corporation for the purposes of US federal income tax law and therefore liable to US federal income tax on its worldwide income.

[28] In his report Mr Shashy [GEFI’s expert] stated that:

> > "… there is no material difference between a corporation that is actually domestic (and viewed as a resident in the US, that is, subject to taxation on worldwide income) and one that is deemed to be domestic for purposes of US tax law (and similarly viewed as a resident of the US, in the sense that it is subject to taxation on worldwide income)."
>
> Mr Miller [HMRC's expert], in his report, confirmed that, for US tax purposes, the share staple had an analogous effect to incorporation in the US."

The FTT then went on at [29] to identify some differences in the US tax treatment of domestic and stapled corporations, before saying:

> "[30] Additionally, although he was not asked to do so, Mr Miller considered it "appropriate" for him, "to point out" that the US Treasury Department "appears to take the view" that a stapled Dutch corporation is a resident of the US within the meaning of Article 4(1) of the income tax treaty in effect between the US and the Netherlands that was signed on 18 December 1992."

An extract from Mr Miller's report is then set out which refers to a Memorandum of Understanding between the United Sates and the Netherlands which Mr Miller said "appears to presuppose that a stapled Dutch corporation is a resident of the United States" under Article 4(1) of the US/Netherlands treaty.

33. The judge also recorded that, as to whether GEFI carried on business from a US tax perspective for the purposes of Article 7 of the Convention, the experts agreed that it was extremely fact dependent but neither considered it likely that GEFI would be so regarded given a general rule that "there would need to be some regular and continuous activity" ([32]).

34. Particular points which are worth noting from these findings are as follows:

    a) US tax law distinguishes between domestic and foreign corporations. Pausing there, GEFI would undoubtedly be regarded as a foreign corporation since it is incorporated in the UK.

    b) Foreign corporations are not ordinarily subject to US tax on income unless it is effectively connected with a US business or otherwise derives from US sources.

    c) However, s.269B has the effect that a foreign corporation "shall be treated as a domestic corporation" if its shares are "stapled" to those of a domestic corporation, unless they are majority owned by foreign persons (s.269B(a) and (e)).

    d) If s.269B applies it overrides treaty provisions that would otherwise affect its operation (s.269B(d)).

35. Further, it is worth noting that there was no finding that stapling has any US legal consequences apart from the tax consequences discussed by the FTT (leaving to one side the restriction on share transfers inherent in the act of stapling). The FTT referred to this in its decision at [65] in terms of a submission that was unsupported by evidence, but as

Ms McCarthy pointed out the burden of proof was on GEFI and it did not assert that there were any additional consequences.

Approach to treaty interpretation

36. There was no dispute as to the general approach to the interpretation of double tax conventions so, for convenience, I will repeat the summary I gave in *Royal Bank of Canada v HMRC* [2023] EWCA Civ 695, [2023] STC 1205:

> "[23] … Article 31(1) of the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention") requires a treaty to be:
>
> > "… interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
>
> [24] Article 31 also provides that the context extends beyond the treaty itself to certain other sources, including subsequent agreements between the parties in respect of the interpretation of the treaty, subsequent practice that establishes such an agreement and any relevant rules of international law.
>
> [25] Article 32 permits recourse to further supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31, or to determine that meaning when it would otherwise be ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.
>
> [26] As Lord Reed explained in *Anson v HMRC* [2015] UKSC 44, [2015] STC 1777:
>
> > "[56] Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Subsequent agreement as to the interpretation of the treaty, and subsequent practice which establishes agreement between the parties, are also to be taken into account, together with any relevant rules of international law which apply in the relations between the parties. Recourse may also be had to a broader range of references in order to confirm the meaning arrived at on that approach, or if that approach leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable."
>
> [27] Later in his judgment Lord Reed commented on the fact that the process of interpretation must take account of the fact that what is being interpreted is an international convention, not a UK statute. He said this:
>
> > "[110] Article 31(1) of the Vienna Convention requires a treaty to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It is accordingly the ordinary (contextual) meaning which is

> relevant. As Robert Walker J observed at first instance in *Memec* [1996] STC 1336 at 1349, 71 TC 77 at 93, a treaty should be construed in a manner which is "international, not exclusively English".
> [111] That approach reflects the fact that a treaty is a text agreed upon by negotiation between the contracting governments…"

He went on to emphasise in the same paragraph the courts' predisposition, when faced with "narrow and technical constructions", to favour an interpretation which reflects the "ordinary meaning of the words used and the object" of the treaty.

[28] This echoes the well known passage of Lord Diplock's speech in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, at pp.281-282:

> "The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.* [1978] AC 141, 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation'."

[29] The Treaty we are concerned with here, like most bilateral double tax treaties, is based on the OECD Model Tax Convention ("MTC"). As explained by Lord Briggs in *Fowler v HMRC* [2020] UKSC 22, [2021] 1 All ER 97, guidance as to how such a treaty is to be interpreted can also be found in OECD Commentaries on the MTC, which (even where they post-date the treaty in question) should be "given such persuasive force as aids to interpretation as the cogency of their reasoning deserves" (see at [16] and [18], citing Patten LJ's judgment in *Smallwood v HMRC* [2010] EWCA Civ 778, [2010] STC 2045 at [26(5)]; see also *Irish Bank*, where the 2008 version of the Commentary was considered in interpreting a treaty entered into in 1976)."

37. I would add four points at this stage.

38. First, the unilateral opinion or practice of a tax authority is not a relevant aid to interpretation: see *Irish Bank Resolution Corporation Ltd v HMRC* [2020] EWCA Civ 1128, [2020] STC 1946 ("*Irish Bank*") at [18]-[23].

39. Secondly, academic commentaries and judgments from foreign courts are at most of persuasive value. In *Fothergill v Monarch Airlines Ltd* [1981] AC 251 Lord Diplock said this at pp.283-284 about academic commentaries published after a treaty had been concluded and decisions of foreign courts:

> "To a court interpreting the Convention subsequent commentaries can have persuasive value only ... The persuasive effect of learned commentaries, like the arguments of counsel in an English court, will depend upon the cogency of their reasoning…

> As respects decisions of foreign courts, the persuasive value of a particular court's decision must depend upon its reputation and its status, the extent to which its decisions are binding upon courts of co-ordinate and inferior jurisdiction in its own country and the coverage of the national law reporting system…"

40. Lord Scarman made similar comments at pp.294-295. After referring to the legislative history, *travaux préparatoires*, international case law and the writings of jurists as aids to construction of a convention which are not a substitute for its terms and the use of which is in the court's discretion, Lord Scarman compared the usefulness of an agreed conference minute of the meaning of draft text with other documents such as working papers of delegates which would "seldom be helpful", and then said at p.295:

> "The same considerations apply to the international case law and the writings of jurists. The decision of a supreme court, or the opinion of a court of cassation, will carry great weight: the decision of an inferior court will not ordinarily do so. The eminence, the experience and the reputation of a jurist will be of importance in determining whether, and, if so, to what extent, the court should rely on his opinion.
>
> Nevertheless the decision whether to resort to these aids, and the weight to be attached to them, is for the court. However, the court's discretion has an unusual feature. It is applied not to a factual situation but to a choice of sources for help in interpreting an enactment. It operates in a purely legal field. An appellate court is not, therefore, bound by the lower court's selection of aids, but must make its own choice, if it thinks recourse to aids is necessary. This legal process is not unlike the use made by our courts of antecedent case law, though it lacks the inhibitions of any doctrine of precedent."

41. Thirdly, the primary means of ascertaining the object and purpose of a treaty will generally be its text, read in the context of relevant surrounding circumstances. At the very least the text will be the place to start. This point was made by Mummery J in *IRC v Commerzbank AG, IRC v Banco Do Brasil SA* [1990] STC 285 ("*Commerzbank*"), p.298 at para. (3), in a passage cited by Patten LJ in *Irish Bank* at [16] and also referred to with approval by this court in the earlier cases of *Memec plc v HMRC* [1998] STC 754, 766 and *Re the Trevor Smallwood Trust, Smallwood v Revenue and Customs Comrs* [2010] EWCA Civ 778, [2010] STC 2045 ("*Smallwood*") at [26]. This part of *Smallwood* was also referred to with approval by Lord Briggs in *Fowler* at [19]. Mummery J said this:

> "Among those principles is the general principle of international law, now embodied in art 31(1) of the Vienna Convention on the Law of Treaties, that 'a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. A similar principle is expressed in slightly different terms in McNair's *The Law of Treaties* (1961) p 365, where it is stated that the task of applying or construing or interpreting a treaty is 'the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the

> surrounding circumstances'. It is also stated in that work (p 366) that references to the primary necessity of giving effect to 'the plain terms' of a treaty or construing words according to their 'general and ordinary meaning' or their 'natural signification' are to be a starting point or prima facie guide and 'cannot be allowed to obstruct the essential quest in the application of treaties, namely the search for the real intention of the contracting parties in using the language employed by them'."

42. A similar point was made with some force by the Supreme Court of Canada in one of the cases on which GEFI relies, *Canada v Alta Energy Luxembourg SARL* 2021 SCC 49 ("*Alta Energy*"). In considering an argument that the Canadian general anti-avoidance rule ("GAAR") was engaged in a treaty context, Côté J, giving the judgment of the majority, said this at [58]:

> "It must be remembered that the text also plays an important role in ascertaining the purpose of a provision. The proper approach is one that unifies the text, context, and purpose, not a purposive one in search of a vague policy objective disconnected from the text."

43. Fourthly, there was some discussion at the hearing about how reference to OECD Commentaries (and indeed to the MTC itself) fits in with the terms of Articles 31 and 32 of the Vienna Convention. Given Lord Briggs' guidance in *Fowler* and the fact that there is no controversy that reference is permitted, it is not necessary to determine the extent to which the power to refer to such material is derived from Article 31 or 32, or (at least for versions of the OECD Commentary that post-date the relevant treaty) is akin to academic commentaries. However, I note that in relation to later versions of the OECD Commentary Lord Briggs referred in *Fowler* at [18] to the cogency of their reasoning in a similar way to Lord Diplock's reference to the use of academic commentaries in *Fothergill v Monarch Airlines*, and that the authority that Lord Briggs cited was *Smallwood* at [26], where Lord Diplock's comment is referred to in a citation from *Commerzbank*, p.298 at para. (5). In other words, those later versions were treated in a similar way to academic commentaries.

44. In this case there are no relevant agreements or practices of the kind referred to in *Royal Bank of Canada* at [24] that are specific to the Convention, but considerable reliance has been placed on the MTC and OECD Commentaries on it, views expressed in leading texts and two decisions of the Supreme Court of Canada, *Crown Forest Industries v Canada* [1995] 2 SCR 802 ("*Crown Forest*") and *Alta Energy* (the latter decided after the FTT decision in this case).

The Tribunal decisions in outline

FTT Decision

45. The FTT's decision ([2021] UKFTT 0210 (TC), Judge Brooks) sets out at [3] and [4] a detailed statement of agreed facts. The critical aspects have already been summarised, but the agreed facts also include that the LP was dissolved in 2009 and that the stapling provision was then removed from GEFI's Articles. GEFI was also re-registered as an unlimited company. Further, some details are set out of a failed attempt by the US and UK tax authorities to reach agreement as to GEFI's residence for Convention purposes

and an unsuccessful attempt by GEFI to procure agreement between the two authorities under the mutual agreement procedure in Article 26.

46. The FTT's decision also sets out at [8] more detail of the LP's activities, taken from a chronology that had been sent to HMRC. This included additional detail about Loans 1 to 5 and also payment instructions under which cash was moved, in particular partnership distributions to enable tax liabilities to be met, and details of resolutions passed by GEFI Inc to ratify past activity. The judge then went on to describe, with extensive quotations, contemporaneous exchanges which in the judge's view indicated the "extent of the participation in the loan transactions by the various entities and the individuals involved" ([9]).

47. The judge then considered expert evidence on US tax law and Delaware law. Each party engaged an expert on the former and GEFI also put forward expert evidence on the latter. No oral evidence was provided by the experts. As far as tax is concerned a joint memorandum confirmed that there were no material points of disagreement between the two experts. The findings made about US tax are set out above.

48. The expert evidence on Delaware law confirmed among other things that the LP was a separate legal entity, that its general partner was its agent and liable for its obligations, and that a limited partner was not so liable unless it was also a general partner or participated in the control of the partnership business. As the UT noted, however, there is no indication that there is a legal requirement for a Delaware limited partnership to conduct business.

49. On Issue 1, the judge concluded at [61]-[66] that GEFI was not US resident for the purposes of Article 4(1) of the Convention. The judge accepted HMRC's submissions that, for residence to be established, Article 4(1) of the Convention required both liability to worldwide taxation and a "connection" or "attachment" to the country concerned. Worldwide taxation was a necessary but not a sufficient condition. Further, the share staple did not represent a connection with the United States, as opposed to a connection to GEFI Inc. In reaching this conclusion the FTT took account of the differences of treatment it had identified between US domestic corporations and stapled foreign entities for federal income tax purposes.

50. The judge also decided that GEFI was not carrying on business. In reaching that conclusion the judge referred to a number of cases that had considered the meaning of "business" in various contexts, including *Ramsay v HMRC* [2013] UKUT 226 (TCC), [2013] STC 1764 ("*Ramsay*" – not to be confused with the much more famous House of Lords decision with that name). He agreed that GEFI's objects should be taken into account (contrary to HMRC's submission that the sole focus was the LP) but considered that they were not determinative. The judge went on:

> "[83] Although there can be little doubt that the activities of the LP fit the description of a "serious undertaking" it remains necessary to consider the other factors identified by Judge Berner at [64] in *Ramsay*, namely whether these were actively pursued with reasonable or recognisable continuity, whether they had a certain amount of substance in terms of turnover, whether they were was conducted in a regular manner and on sound and recognised business principles, and whether the activities were of a kind which, subject

> to differences of detail, are commonly made by those who seek to profit by them.
>
> [84] While the loans were conducted on sound and recognised business principles and the sums involved clearly substantial, holding five affiliate loans over the course of approximately six years, especially as only three of these originated with the LP is, in my judgment, more of a passive, sporadic or isolated activity than a regular and continuous series of activities. In this I agree with Ms McCarthy [for HMRC] who submits that there is nothing to suggest that personnel or agents acting on behalf of the LP made or conducted continuous and regular commercial activities in the US. All that appears to have happened was that monies were directed straight to GELCO without negotiating terms or the consideration at a director level as would have been expected from a company carrying on commercial activities on sound business principles."

51. The judge then gave an example that a director of GEFI Inc had been content to sign a loan agreement for a substantial sum, only asking for the reason "seemingly as an afterthought and 'out of curiosity'". The judge also referred to the contemporaneous emails indicating that it was members of GE's tax department rather than directors of GEFI Inc that had been concerned with the loan arrangements and their terms, a comment by one member of the tax team, a Mr Tomasetti, indicative of a lack of business purpose in relation to steps taken in 2004 and a query raised within the tax team about replacing a director of GEFI Inc. The judge then went on:

> "[88] Turning then to the chronology of the LP's activities summarised at paragraph 8, above, it would seem that the only "activities" of the LP in 2003 were its formation and the capital contributions of the partners which fall within Lord Sumner's "domestic operations" [*South Behar Railway Company Ltd v Inland Revenue Comrs* [1925] AC 476, 487] rather than business activities.
>
> [89] In subsequent years the "activities" described in the chronology includes "payment instructions" which occur throughout the relevant period. It explains that these were "typically" signed by management personnel from GE's Treasury, Finance and/or tax departments who were responsible for the transaction concerned. Although subsequently approved by the directors of GEFI Inc who gave their unanimous written consent these payment instructions do not appear represent any management involvement or decision taken by the general partner at the time of the transactions and, as such, cannot be regarded as business activities.
>
> [90] Similarly it would seem that the purpose of the board meetings of GEFI Inc was, as can be seen from the minutes of the short meeting held on 25 June 2008 … to review, approve and ratify the company's past activity rather than make strategic decisions in relation to its current and subsequent dealings. It would appear from those minutes, in the light of the "background information" provided by Mr Tomasetti to the board and his answer to [a GEFI board member's] question that the board had a very limited involvement in the activities of the company, the role of which as lender

> under the Loan Agreements was not properly recorded until the 'Memorandum of Acknowledgement' of 29 December 2009.
>
> [The 'Memorandum of Acknowledgement' confirmed that the LP was to be regarded as the lender to GELCO, rather than GECC which was listed as the lending party: see the FTT's decision at [20]. This document in fact related to Loans 1 and 2, the two promissory notes.]
>
> [91] Therefore, notwithstanding its objects, and having regard to the degree of activity as a whole, particularly the lack of participation in the strategic direction of the LP by the directors of GEFI Inc, I have come to the conclusion that GEFI was not carrying on a business in the US through its participation in the LP."

52. As already indicated the judge went on to consider what was then Issue 2(b) and concluded it in GEFI's favour.

UT Decision

53. The UT reversed the FTT's decision on Issue 1, making it strictly unnecessary to consider Issue 2. However, taking account of the possibility of a further appeal the UT helpfully did consider what was then Issue 2(a), and concluded that the FTT was entitled to reach the conclusion that GEFI was not carrying on business.

54. After considering the facts and the FTT's decision, the UT discussed UK and US domestic law, in the latter case by reference to the expert reports rather than the FTT's findings, concluding at [76(5)] that:

> "…there is no material difference in tax treatment between a 'real' domestic corporation and a stapled foreign one and, in particular, stapled foreign corporations are treated, despite what the FTT thought, in the same way as 'real' domestic corporations for treaty purposes."

55. The UT went on to consider the MTC and OECD Commentary on it in detail (including the historical development of the residence article), before turning to the Convention. It concluded at [113] that there was no support for the view that only particular types of attachment were sufficient for a person to be regarded as resident in a Contracting State for MTC purposes.

56. As to the Convention, the UT rejected HMRC's argument that, unlike incorporation, share stapling did not provide the requisite connection to establish US residence. It took account of the Memorandum of Understanding accompanying the US/Netherlands Treaty referred to in the FTT's findings (see [32] above) as "contextual background", although it said at [123] that it placed little weight on it.

57. The UT also considered *Crown Forest* and *Alta Energy* in some detail. It concluded at [130] that *Crown Forest* was authority for the proposition that "full" taxation was the only connecting factor to establish residence under the US/Canada treaty. It considered that *Alta Energy* was to a similar effect, establishing that the OECD test rested solely on domestic law tests of residence, such that if a person was liable to full taxation under domestic law then they were resident for treaty purposes, formal criteria such as

incorporation being commonly used in addition to factual criteria such as place of management ([136], [137] and [151]).

58. Having determined that persons deemed to be resident for domestic law are treated for MTC purposes as resident for treaty purposes, that incorporation is commonly treated as establishing residence despite being a "formal" rather than a factual or territorial criterion, that the stapling provisions had a similar effect to a provision deeming a stapled entity to be US incorporated, or alternatively share stapling was a "criterion of a similar nature" without the need for an additional legal connection, and that the United Kingdom was to be presumed to be aware of the share stapling rule when it entered into the Convention, the UT concluded that GEFI was a resident of the United States for Convention purposes ([138]-[152]).

59. As to whether GEFI carried on business in the United States, the UT considered the authorities in some detail. It concluded at [232] that, on a fair reading of the FTT's decision, the FTT had considered the principles to be derived from them. It noted that the FTT took account of GEFI's objects but commented that it would have been entitled to disregard them because of the role of the LP, and decided at [238] that what critically weighed in the balance for the FTT was what GEFI (or more accurately the LP on its behalf) had actually done. Read as a whole, the FTT also did not wrongly apply the US test of carrying on business ([240]). The FTT had been entitled to accept HMRC's submission that GEFI acted as a conduit ([243]). Any errors made were not material ([245]).

Issue 1: Residence

60. Before going on I should make one point about nomenclature. I have, like the tribunals below, used the term "worldwide" as a convenient way to refer to the taxation imposed by the United Kingdom and the United States on their residents. It should be understood to mean a form of tax that is unrestricted by the source of the income, as opposed to taxes imposed on the income of non-residents, which are generally linked to a source in the relevant State. The distinction could be seen as being between tax by reference to the attributes of the person and tax by reference to the location of the source. The use of the term "worldwide" gives rise to no issue on the facts of this case, because it reflects the tax systems of both parties to the Convention. But as the OECD Commentary recognises some States adopt a more territorial approach even as regards their own residents, and in such cases a different label such as "residence-basis taxation" may be more appropriate.

The words used

61. The correct starting point in determining Issue 1 is to consider the words used in the Convention to define "resident of a Contracting State". By way of recap, Article 4(1) provides:

> "1. … the term "resident of a Contracting State" means, for the purposes of this Convention, any person who, under the laws of that State, is <u>liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature</u>. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State." (Emphasis supplied.)

62. It is incontrovertible that GEFI cannot in fact be regarded as falling within any of the enumerated criteria of domicile, residence, citizenship, place of management or place of incorporation as far as the United States is concerned. This is irrespective of whether those concepts are interpreted in accordance with a) UK law, as Ms McCarthy submitted was the effect of Article 3(2), set out at [25] above, since we are concerned with the application of the Convention for UK tax purposes, b) US law on the basis that Article 3(2) is subject to the proviso "unless the context otherwise requires" and Article 4(1) expressly refers to the "laws of that State", or c) as Mr Baker submitted, in accordance with a combination of UK law, US law and the OECD Commentary.

63. If US law was relevant in applying Article 4(1) to the facts of this case then, in the absence of any evidence of US legal consequences of stapling beyond the effect of s.269B, we must assume that the relevant legal principles are the same as those applying in this jurisdiction. The critical point is that GEFI is in fact UK incorporated. It is liable to tax in the United States "by reason of" the application of s.269B, which provides that what it explicitly recognises to be a foreign corporation (that is, one not created or organised under US law) "shall be treated" as if it were a domestic corporation. It is not liable to tax by reason of actual incorporation in the United States or by virtue of any of the other enumerated criteria listed in Article 4(1). Although at one point the UT appeared to suggest that GEFI should effectively be assumed to be incorporated in the United States by virtue of s.269B, I did not understand Mr Baker to rely on such an analysis and I cannot see that it would have any evidential support.

64. Even if s.269B provided in terms that, where it applied, the stapled foreign corporation was to be deemed to be a domestic corporation, and (contrary to Ms McCarthy's submission) US tax principles were to be applied in interpreting the concept of "place of incorporation", I cannot see that it would assist GEFI. In *Fowler*, the Supreme Court considered whether UK tax legislation which "treated" Mr Fowler as self-employed for income tax purposes when working as a deep-sea diver in the UK continental shelf applied for the purposes of the UK/South Africa double tax convention in circumstances where he was in fact in employment. Arguably *Fowler* was a stronger case for applying the statutory fiction because it was clear in that case that Article 3(2) required UK tax principles to be applied when interpreting terms such as "employment": see Lord Briggs' judgment at [9]. Nevertheless the Supreme Court held that the fiction of self-employment did not apply for treaty purposes. Rather, the relevant articles had to be "applied to the real world" and this was unaffected by Article 3(2), which instead required the relevant terms to have their "settled meaning…viewed from the perspective of UK tax law" ([30]-[32]).

65. As Ms McCarthy submitted, both the provision considered in *Fowler* (s.15 Income Tax (Trading and Other Income) Act 2005) and s.269B are the type of deeming provisions that deem something to be what it clearly is not (akin to deeming black to be white). Neither s.15 nor s.269B is the sort of provision that might deal with uncertainty at the margins, where there would be much more scope for saying that the treatment or characterisation provided by the provision should apply when interpreting the treaty. This point was picked up by Lord Briggs at [25] where he said:

> "It is clear that it was not a purpose of the deeming provision in s15(2) to resolve some legal or factual uncertainty about whether such divers were genuinely employed or self-employed. On the contrary, s15 applies only to employed divers."

66. On the face of it, therefore, GEFI can be regarded as US tax resident for Convention purposes only if the requirements of s.269B amount to a criterion of a similar nature. That is indeed GEFI's fallback argument (which I address at [121]-[123] below), but its primary argument is that all that the underlined words do is to establish that taxation on a worldwide basis, rather than a source basis, is required.

67. In my view that is not the natural meaning of the words used. Article 4(1) defines a resident of a Contracting State as a person "liable to tax… by reason of" having a particular status (domicile, residence etc.). The words "by reason of" make clear that liability to tax is the consequence of having the requisite status. It does not say that residence status is the result of, or equates to, being liable to tax. Further, the status in question comprises a list of specific connecting factors following by an express *ejusdem generis* provision. The fact that a list is included suggests that the individual items referred to in it were regarded as having significance. The choice of the words "of a similar nature", meaning (broadly) of the same kind or genus, is also relevant. Each of the listed factors is a type of substantive factual or legal connection between the person concerned and the State in question, strongly indicating that for another factor to be something of a similar nature it would also need to be a connection that has a similar character or quality.

68. I agree with Ms McCarthy that if all that was intended to be covered was anything that resulted in worldwide taxation under domestic law then there would be no need for any specific list. The underlined text would much more straightforwardly have referred simply to unrestricted or worldwide taxation. If a list was nonetheless included then the words "of a similar nature" would have read something like "to the same effect" or "having the same consequence".

69. It is also relevant that the Convention includes place of incorporation and citizenship in the list of connecting factors. This is a departure from the MTC, which refers to "…domicile, residence, place of management or any other criterion of a similar nature…". The additional reference to place of incorporation reflects a reservation by the United States which is set out in the OECD Commentary. Neither the addition nor the reservation would be required if the list was no more than a proxy for worldwide taxation.

Article 4 more generally

70. Turning to the context, the primary context is of course the other terms of the Convention, starting with Article 4 itself. I agree with Ms McCarthy's submission that they tend to support HMRC's case that the focus is on determining residence by reference to factual connecting factors, or what she termed for ease of reference a "relevant local connection". Article 4(2) provides that US citizenship or a "green card" is not enough to establish US residence in the absence of another connection such as a permanent home. The "tie-breaker" for dual-resident individuals in Article 4(4) also operates by reference to the relative strength of connections. Article 4(6) effectively switches off the domicile of dependency that US nationals obtained by marrying UK domiciled men before 1974, so allowing their domicile to be determined by reference to their actual circumstances.

71. At first sight the second sentence of Article 4(1) also supports HMRC's interpretation, but in fact Ms McCarthy did not seek to rely on it. The reason that it seems to assist is that it expressly provides that persons subject only to source taxation are not to be treated as resident. That appears to lead to a strong inference that the first sentence is doing more

than simply saying that residence covers anyone who is subject to worldwide taxation, because if it was just saying that then the second sentence would be redundant.

72. However, the history of the MTC equivalent of Article 4(1) is that the second sentence was not initially included. When it was included it was in the following terms:

> "This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein."

73. The OECD Commentary explains (para. 8 of the 2000 version) that its inclusion was intended to apply to persons such as foreign diplomats who are considered to be resident in a Contracting State but are subject to tax only from sources within the State.

74. I would make two observations on this. First, the introduction of the second sentence is suggestive of Ms McCarthy's approach: if the first sentence is longhand for worldwide taxation rather than requiring a real local connection such as residence, why was the second sentence needed? Secondly, and more importantly, we must interpret the Convention. The MTC, its history and the OECD Commentary cannot be more than guides. The second sentence in Article 4(1) of the Convention is materially different from its MTC equivalent. While it might indeed apply to foreign diplomats it is unarguably wider because it also applies to profits of a permanent establishment. The only rational reason for that is that the parties considered that it was necessary to depart from the MTC by spelling out that taxation of profits of a permanent establishment in a State is not a sufficient local connection to amount to residence for Convention purposes. If they intended that worldwide taxation was the test of residence then the carve out for permanent establishments would be otiose.

Object and purpose

75. As already explained, the words of the Convention must be interpreted not only in their context but in the light of the Convention's object and purpose. However, the object and purpose are primarily gleaned from its text, read in the light of the surrounding circumstances: see [41] and [42] above.

76. It is trite that the general object of a double tax convention is to relieve double taxation, whether by restricting taxing rights and/or by requiring one State to give credit for tax paid in the other. Article 4 of the Convention is an important provision because the State in which a person is resident for Convention purposes may be granted the primary or sole taxing right, with the taxing right of the other State in respect of income and gains arising in its territory either being restricted or removed entirely.

77. The function of double tax conventions in apportioning taxing rights between the State of residence and the State of source, and a distinction that is generally drawn between "active" and "passive" income in making that apportionment, was considered in an illuminating passage in *Alta Energy* in the context of the Canada/Luxembourg treaty (from the judgment of Côté J with whom the majority agreed):

> "[73] Broadly speaking, the apportionment of taxing rights between the residence and source states under the OECD Model Treaty, which serves as a model for the Treaty, is centred on the distinction between active and

> passive income (Li and Cockfield, at p. 12; Avi-Yonah, Sartori and Marian, at p. 155). The source state has the primary right to tax active income (e.g. business profits and employment income), and the residence state has only residual rights. Pursuant to the theory of economic allegiance, the source state has a greater claim to tax active income because its economic environment has the closest connection with the origin of wealth (Malherbe, at p. 56; Li and Cockfield, at pp. 66 and 151). Non-residents owe allegiance to the source state as a result, and they are expected to pay tax for the public services from which they benefit in carrying on their active economic activities in the source state.
>
> [74] Conversely, the residence state has the primary right to tax passive income (e.g. interest, dividends, and capital gains), and the source state has only residual rights. The source state's claim to tax passive income is considered weaker in comparison to that of the residence state because generating such income is assumed to require few public services from the source state. Moreover, the economic environment of the source state is considered less material to the earning prospect of passive investments, as such passive activities may be conducted in various jurisdictions without either improving or negatively affecting their earning prospect. Therefore, non-residents earning passive income owe little allegiance to the source state."

78. The provisions of the Convention illustrate both the significance of residence and the distinction noted in *Alta Energy* between active and passive income.

79. The starting point is Article 1(1), which makes clear that (unless specifically provided otherwise) the Convention applies to residents of one or both States. That is important. The Convention confers material benefits on taxpayers to whom it applies, and the Contracting States have agreed that those benefits should be available only to their respective residents. I pause here to note that, if GEFI's argument were right, an entity based anywhere in the world the shares in which were stapled to a US entity would have to be granted the benefits of the Convention.

80. Turning to the specific provisions, and most pertinently on the facts of this case, Article 11 of the Convention entirely removes the source State's right to tax interest income arising to a resident of the other State unless it is attributable to a business carried on through a permanent establishment in the source State (the classic example of "active" rather than passive income). If a business is carried on through a permanent establishment, then the source State has the primary taxing right under Article 7. Other examples are the dividend provisions (Article 10), where the taxing rights of the source State in respect of residents of the other State are restricted by limiting the rate of any withholding tax, royalties (Article 12) where a similar approach is taken to Article 11, capital gains (Article 13) where again the source State's taxing rights in respect of residents of the other State are removed except in specified circumstances, and employment (Article 14) which also restricts the ability of the Contracting States to tax each other's residents.

81. The importance of the residence concept means that both States have a clear interest in delineating the scope of the other State's ability to determine who falls within the concept of Treaty residence, because where a person is resident in that other State the source State

may well have to cede or at least restrict domestic taxing rights. (Indeed, in the particular context of the Convention the United Kingdom's interest is arguably heightened for corporate entities because of the fact that the tie-breaker in Article 4(5) depends on mutual agreement, and if agreement cannot be reached it must allow a credit for US tax paid on US source income against UK tax on the same income: [22] above.)

82. Ms McCarthy submitted that if GEFI's primary argument was right then there would be nothing to prevent a US law being introduced to the effect that all companies with blue logos should be taxed as domestic corporations, which cannot have been intended. While Mr Baker derided this as a ridiculous example, it is not without force and it could readily be replaced by a more realistic example, such as a rule that subsidiaries of US corporations should be taxed as if they were domestic corporations.

83. Mr Baker's answer to this was essentially that s.269B was an existing provision of the Internal Revenue Code when the Convention was agreed, and both Contracting States are taken to be aware of each other's tax systems. Further, future changes would potentially breach the requirement in Article 26 of the Vienna Convention that the parties perform a treaty in good faith and/or would lead to the Convention being terminated or renegotiated.

84. These arguments do not really answer Ms McCarthy's point. The first assumes that GEFI is right in its interpretation of Article 4(1), namely that s.269B has the effect of treating it as US resident for Convention purposes. As to the second, it is far from clear to me that a change in the US tax system – which would doubtless be prompted by much broader policy considerations than the impact on a particular double tax convention – would engage Article 26. And a treaty cannot sensibly be interpreted on an assumption that any difficulties would lead to its termination. Rather, it seems to me that a much more sensible interpretation is that reflected in the words used in Article 4(1), namely that it is necessary to identify certain connecting factors between the person and the State in question that justify that State in imposing tax.

85. A further point that it is convenient to address at this point is GEFI's argument that a conclusion that s.269B did not make a stapled entity US tax resident for Convention purposes would create much greater uncertainty for the taxpayer since the tie-breaker in Article 4(5) would not be engaged and it would be left without any treaty protection. It would be a "second class resident". In contrast Ms McCarthy submitted that if all that mattered was worldwide taxation then substantial uncertainty would be created as to the application of the Convention by forcing more taxpayers into having to try to seek agreement under Article 4(5).

86. I did not find this debate to be of material assistance. If HMRC is right then GEFI is solely UK tax resident for Convention purposes and, subject to Issue 2, should not be liable to US tax on its US source interest income at all, due to the effect of Article 11(1). This is because it would have a full entitlement to the benefits of the Convention. This is despite the "savings clause" in Article 1(4) which permits each State to tax its own residents as if the Convention had not come into effect. That only applies to persons who are resident "as determined under Article 4", whereas in this scenario GEFI would not be US resident under that Article. In contrast, and absent agreement under Article 4(5), a company that is dual resident for Convention purposes is able to claim only limited benefits under the Convention, albeit that the particular benefit that GEFI seeks happens to be one that would be available.

87. The position in which GEFI may find itself if HMRC's appeal is upheld, namely that it is still liable to US tax and must attempt to obtain unilateral relief in the United States for the UK tax, would have nothing to do with the operation of the Convention as interpreted by this court. Rather, it would be the result of the operation of US domestic law, namely the treaty override in s.269B(d) (see above) and/or any different view that the United States may adopt about the correct interpretation of the Convention.

88. The tie-breaker in Article 4(5) does not assist GEFI. Unlike the 2000 version of the MTC, where the corporate residence tie-breaker turned on the place of effective management of the company, Article 4(5) depends on agreement and, in default of agreement, requires the United Kingdom to allow a credit for US tax paid on US source income against UK tax on the same income ([22] above). This rather reinforces the United Kingdom's interest in the circumstances in which companies can be treated as US tax resident for Convention purposes. Further, it is hard to see how agreement would be likely to be reached other than by a determination of the relative strength of (real) connecting factors. A pure clash of domestic regimes imposing worldwide tax – which is what GEFI says is the only relevant factor – is unlikely to be a promising starting point for a negotiation.

MTC and OECD Commentary

89. Turning to the MTC more generally, the UT found significant support for its approach in the MTC and OECD Commentary: indeed that was its starting point. I accept that the MTC provides important context and helps explain why, for example, some terminology may be included even if it is not of direct relevance to the tax systems of the two Contracting States in question, so as to minimise departures from the MTC. However, I would reiterate that what must be interpreted is the treaty in issue, not the MTC. For example – and as discussed above in the context of the second sentence of Article 4(1) – it might be that variations to the MTC that are reflected in the treaty could affect its interpretation more generally. Further, the Commentary is just that. It should not be read as if it were a statute and it is important to read comments in it in their context.

90. Both parties relied on aspects of the 2000 version of the Commentary on Article 4. Read as a whole, I do not consider that it supports GEFI's interpretation. For example, it refers at para. 3 to the fact that domestic laws "generally" impose comprehensive taxation based on "personal attachment" to the State, possibly extending for example to seafarers on ships with their home harbour in the State (which I would regard as a proxy for a personal attachment). Paragraph 8.2 reflects Article 4(1) in referring to liability to tax "by reason of various criteria". Paragraph 10 explains how the position of dual-resident individuals is resolved under Article 4(2) by giving the "attachment" to one State a preference over the attachment to the other. Paragraphs 21 to 24 comment on the corporate residence tie-breaker, which under the 2000 version of the MTC was as already mentioned determined by the place of effective management of the company, emphasising the importance of the place where key management and control decisions are taken.

91. Mr Baker placed particular reliance on para. 4, which states:

> "4. Conventions for the avoidance of double taxation do not normally concern themselves with the domestic laws of the Contracting States laying down the conditions under which a person is to be treated fiscally as "resident" and, consequently, is fully liable to tax in that State. They do not lay down standards which the provisions of the domestic laws on "residence"

> have to fulfil in order that claims for full tax liability can be accepted between the Contracting States. In this respect the States take their stand entirely on the domestic laws."

He also relied on a reference to deeming in para. 8, commenting on Article 4(1) in the following terms:

> "…As far as individuals are concerned, the definition aims at covering the various forms of personal attachment to a State which, in the domestic taxation laws, form the basis of a comprehensive taxation (full liability to tax). It also covers cases where a person is deemed, according to the taxation laws of a State, to be a resident of that State and on account thereof is fully liable to tax therein (e.g. diplomats or other persons in government service)…"

(The reference here to diplomats is not to foreign diplomats in the Contracting State, but to diplomats sent abroad by the State in question and who continue to be treated as resident in that State.)

92. I do not consider that these comments bear the weight that Mr Baker sought to place on them. Paragraph 4 is of course accurate as far as it goes but it simply makes the uncontroversial point that whether a person is in fact "resident" in a State is to be determined under that State's domestic law, rather than under the terms of the treaty. It does not say that any rule that imposes worldwide taxation amounts to residence: if anything it indicates the opposite by saying that it is up to States to determine "the conditions under which" a person is to be regarded as tax resident and "consequently" fully liable to tax. This clearly encompasses an ability to deal with cases at the margins, such as the seafarer already alluded to, but there is no indication that it goes beyond that.

93. The reference to deeming in para. 8 must be read in its context. There is an obvious link between diplomats (and others sent abroad on government service) and their sending State. Again, this is effectively a case at the margins where the Commentary makes clear that it is within the power of Contracting States to determine the precise scope of residence. It does not indicate that full tax is enough or that anyone subject to full tax is resident: rather, full liability to tax follows from the relevant "personal attachment". Like para. 4 this reflects the words used in Article 4(1).

94. In summary, I do not consider that the OECD Commentary supports GEFI's case. I would also note that if GEFI were right then it is somewhat surprising that the straightforward proposition that anyone subject to worldwide taxation in a State is a resident of it was not spelled out.

95. One further point to make on the MTC relates to the corporate residence tie-breaker. If Article 4(1) of the Convention is considered from the perspective of the 2000 version of the MTC, then its use of place of effective management as the tie-breaker also rather reinforces HMRC's interpretation. Essentially, it aims to determine the State with the closest real connection.

Crown Forest and Alta Energy

96. Crown Forest concerned whether the US/Canada double tax treaty could apply to limit the rate of Canadian withholding tax on barge rental payments made by the taxpayer to a Bahamian company, Norsk. Norsk had its sole place of business in the United States but was taxed there as a foreign corporation on the profits effectively connected to its US business, not including the rental payments. The Supreme Court of Canada rejected the argument that Norsk was a US "resident" for treaty purposes. While it had a "place of management" in the United States and that was one of the listed factors under Article 4 (as in the MTC and the Convention), that was merely one factor contributing to the determination that it carried on business there rather than being the basis of its tax liability. Further, its US business did not amount to a criterion "of a similar nature", because all the other criteria were grounds for taxation of worldwide income rather than merely source income.

97. Mr Baker placed particular reliance on the following statement by Iacobucci J in considering that further point, giving the judgment of the Court:

> "[40] I agree with the appellant that the most similar element among the enumerated criteria is that, standing alone, they would each constitute a basis on which states generally impose full tax liability on world-wide income… In this respect, the criteria for determining residence in Article IV, paragraph 1 involve more than simply being liable to taxation on some portion of income (source liability); they entail being subject to as comprehensive a tax liability as is imposed by a state. In the United States and Canada, such comprehensive taxation is taxation on world-wide income."

98. As Mr Baker had to accept during oral submissions, the ratio of *Crown Forest* is that the equivalent in the US/Canada treaty of the first sentence of Article 4(1) of the MTC refers to liability to tax on a comprehensive or worldwide basis rather than taxation on a more limited basis. As far as the MTC is concerned that is uncontroversial, and indeed it explains why the introduction of the second sentence into Article 4(1) of the MTC (a sentence which in fact was not included in the treaty considered in *Crown Forest*) was not considered to alter the meaning of the first sentence. As Ms McCarthy submitted, worldwide taxation is necessary, but *Crown Forest* does not decide whether it is sufficient. That issue simply did not arise and the Court did not address it.

99. To the extent that any assistance can be gleaned from *Crown Forest*, it tends to assist HMRC's case. Iacobucci J emphasised at [25] the need to show that liability to tax arose "by reason of" a listed ground, which "connotes the existence of some sort of causal connection or, in the least, some relationship of proximity", whereas Norsk's US place of management was not the basis of its liability. A similar point is made at [33] and [34]. In considering the parties' intentions, Iacobucci J commented at [42] that he did not believe that the designers of the treaty would have envisaged that Norsk "ought to benefit from the preferential tax treatment accorded to residents". At [57] an academic commentary is cited which refers to a person being considered resident in a country that "asserts an unlimited right to tax … that is, a right based upon the taxpayer's personal connection with the country". The conclusions at [68] record at (3) that:

> "The parties to the Convention intended only that persons who were resident in one of the contracting states <u>and</u> liable to tax in one of the contracting

> states on their "world-wide income" be considered "residents" for purposes of the Convention." (Emphasis supplied.)

100. *Alta Energy* was a majority decision of the Supreme Court of Canada that concerned a Luxembourg incorporated company that sought the benefit of the Canada/Luxembourg treaty to exempt gains on sales of property from Canadian tax, on the basis that its legal seat was in Luxembourg and that it was therefore resident there for treaty purposes. Article 4(1) of the treaty materially mirrored the MTC. In the Supreme Court the Minister of National Revenue accepted that Alta Energy was a resident of Luxembourg for the purposes of the treaty (see at [17], [60] and [92]) but, as mentioned at [42] above, argued that the GAAR could be invoked because the transaction abused the treaty, which should be read as requiring that residence in a Contracting State necessitated "sufficient substantive economic connections" to it. The Court held that the treaty could not be interpreted in that manner.

101. Again, this decision has no direct application to this case. It was a case about whether the GAAR applied to an entity that was admittedly treaty-resident. It does not determine the requirements for being treaty-resident in the first place. And as with *Crown Forest*, to the extent that it is relevant it tends to assist HMRC. For example, in discussing Article 4(1) Côté J emphasised at [53] that a person is resident if they are liable to tax by reason of "one of the connecting factors listed", and stated at [54] that:

> "In the context of corporations, the "liable to tax" requirement is met under the Treaty where the domestic law of a contracting state exposes the corporation to full tax liability on its worldwide income because it has its residence in that state (see *Crown Forest*, at paras. 40 and 45). Liability to full taxation is established by the nexus between that State and the corporation's resident status."

102. Further, at [67] Côté J commented as follows:

> "[67] In sum, the object, spirit, and purpose of arts. 1 and 4(1) are to allow all persons who are residents under the laws of one or both of the contracting states to claim benefits under the Treaty so long as their resident status could expose them to full tax liability (regardless of whether there is actual taxation). They are broadly consistent with international norms."

Côté J had referred to international norms earlier, at [59], where, in the context of Contracting States' ability to alter their domestic definitions of residence after a treaty was concluded he had said that such definitions should "broadly correspond to international norms and not have the effect of redefining residence in a way 'that takes the words unmistakably past their accepted usage'" (citing *Couzin*, a commentary discussed below, at p.136).

103. The majority concluded that the definition of residence in Luxembourg law (which granted residence to entities with their legal seat there) did not depart from accepted usage. Rather, it was consistent with international practice, which used a mixture of place of incorporation or legal seat on the one hand and "real seat" aimed at identifying the place of effective management on the other. If the parties had intended to depart from established criteria where an entity had minimal economic connections with a State and

only a "formal, legal attachment", then that would have been made clear ([60]-[62] and [67]).

104. Mr Baker relied on a discussion at [55] which refers to paragraph 4 of the OECD Commentary (see [91] above):

> "Aside from the "liable to tax" requirement, the purpose of art. 4(1) is not to establish specific standards for defining residence. This provision expressly states that residence is to be defined by the laws of the contracting state of which the person claims to be a resident. This provision of the Treaty is modeled almost word for word on art. 4(1) of the 1998 OECD Model Treaty, whose Commentary also made it clear that the intention was to leave the core definition of residence to domestic law, not to bilateral tax treaties…"
> [Para. 4 is then set out.]

105. However, all the Court was saying here is that the *definition* of residence is left to domestic law. Indeed, the first sentence indicates that the Court recognised the two components of a) liability to tax, and b) residence.

Other foreign authorities

106. Ms McCarthy referred to two other foreign authorities, namely a decision of the Indian Income Tax Appellate Tribunal in *Deputy Commissioner of Income-Tax v General Electric Co. Plc. UK*, IT Appeal Nos. 2361 to 2363 (Cal.) of 1996 and Cross Objection No. 62 (Cal.) of 1962 and a decision of the Portuguese Supreme Administrative Court in Case 0882/10 dated 12 January 2011. The reasoning in both is more directly in point than *Crown Forest* and *Alta Energy*, although the Indian decision is of a first instance tribunal and in that respect obviously carries less weight than a decision of a senior court. I do not need to consider these cases and do not rely on them. I simply note that the reasoning in each appears to be more consistent with HMRC's case than with GEFI's.

Academic commentaries

107. The parties relied on three academic commentaries, namely *Klaus Vogel on Double Taxation Conventions*, now in its 5th edition, 2022 ("*Vogel*"), a chapter by Marcel Widrig entitled "The Expression 'by reason of his domicile, residence, place of management…' as applied to companies" in Guglielmo Maisto's *Residence of Companies under Tax Treaties and EC Law*, published in 2009 ("*Widrig*"), and *Corporate Residence and International Taxation* by Robert Couzin, published in 2002 ("*Couzin*").

108. I do not agree with GEFI's argument that, properly understood, the academic commentaries support its position.

109. The leading, and most up to date, commentary is *Vogel*. In its discussion of the words "any other criterion of a similar nature" in Article 4(1) of the MTC at pp.287-290 (paras. 60-67) it describes references to domestic laws in the MTC (and UN equivalent) as therefore "not unqualified, (i.e., not all connecting factors giving rise to full liability to tax are sufficient)" and then says at p.288:

> "61. There are two possibilities for interpreting the term 'of a similar nature':
> Under a (broader) **functional** interpretation, any domestic feature triggering

> unlimited tax liability is sufficient. In contrast, a (narrower) **territorial** understanding requires both unlimited liability to tax and a territorial connection between the taxpayer and the State concerned. In our view, the **territorial interpretation is preferable**. All other connecting factors listed in Article 4(1)…contain a territorial link between the taxpayer and the State taxing his worldwide income. Furthermore, the functional interpretation would reduce the listed connecting factors to mere examples of 'liable to tax' without any additional merit. Not requiring a territorial connection of any kind between the taxpayer and the State would also blur the line between the source State and the residence State." (Emphasis in original.)

110. This rather speaks for itself, and is supported by a passage at p.289, para. 64, that states:

> "Provisions of domestic law that **deem** a person to be fully liable to tax generally do **not qualify as a similar criterion**."

111. However, what Mr Baker relied on was passages that follow at paras. 65 and 67 which discuss nationality/citizenship and place of incorporation. *Vogel* takes the approach that these do not create territorial links because they are "purely legal". He submitted that the inclusion of those concepts in the Convention therefore made *Vogel's* territorial interpretation inappropriate, leaving the functional interpretation which reflected GEFI's position.

112. With respect, this ignores *Vogel's* rationale, which includes accepting that "not all connecting factors giving rise to full liability to tax are sufficient" and that the list of connecting factors should not be treated as "mere examples". It also fails to take account of the express reference to deeming provisions being insufficient. Further and importantly, *Vogel's* discussion relates to the MTC, where the enumerated factors are domicile, residence and place of management. Unlike the MTC the Convention expressly refers to citizenship and place of incorporation, making clear that such links are sufficient.

113. While *Vogel* presumably has in mind factual links such as a place of management, for what it is worth I have some difficulty in viewing place of incorporation as not being a link of a territorial nature. A company is a legal construct, and the fact that it derives its existence from the laws of a particular State seems to me to be a rather obvious link with that State. In contrast, at least in English law the country where an individual is domiciled might in some circumstances have a tenuous link with the individual. I also note that, from an English law perspective, a company's place of incorporation can be regarded as its domicile: see for example *Gasque v Comms. of Inland Revenue* [1940] 2 KB 80 (a surtax case holding that a company's domicile is its place of registration, meaning the jurisdiction in which it was formed), and in a more general private international law context *Dicey, Morris & Collins on the Conflict of Laws*, 16th ed, Rule 185, 30R-001, which states that the domicile of a corporation is the country under whose law it is incorporated. It is also worth noting in passing that the corporate tie-breaker in Article 4(3) of the 2017 version of the MTC, which has changed to a provision requiring mutual agreement, expressly refers to place of incorporation as one of the relevant factors that the Contracting States should take into account in their discussions, alongside place of effective management. The fact that Article 4(1) was not altered at the same time to include an express reference to place of incorporation seems to suggest that it was not considered necessary. The inclusion of place of incorporation in the revised Article 4(3)

is also a clear indication that the place of incorporation is regarded internationally as an appropriate connecting factor.

114. However, that debate is of no material relevance to the application of the Convention because it expressly refers to place of incorporation in Article 4(1). The important point is that, applied to the Convention, *Vogel's* analysis is consistent with the conclusion that HMRC's interpretation is to be preferred.

115. *Widrig* takes a similar approach to *Vogel*. The author comments at 8.1 that the MTC "lists a number of connecting criteria" typically used to define residence. He explains at 8.2.4 that "other criteria of similar nature" must be "interpreted in the context of the other examples of connection criteria". Any other criterion leading to unlimited tax has to be similar to one of those. He comments that the three listed criteria (domicile, residence and place of management) "have to a certain extent a local connection", such that other criteria had to have "a certain local character of a factual nature". Like *Vogel*, *Widrig* goes on to state that the law of incorporation of a company is not "similar" because it "lacks the effective personal attachment", but the author notes that both the United States and Canada have placed reservations on Article 4 in that respect and on that basis place of incorporation could be considered as being of a similar nature (pp.281-282). The conclusion at 8.5 (with which I agree) states that:

> "The connecting criteria 'domicile, residence, place of management or any criterion of a similar nature' in the OECD MC ensure that only companies that have unlimited liability to tax based on sufficient local connection are entitled to double tax treaty benefits."

116. *Couzin* is similarly supportive of HMRC's position. Commenting on the MTC, the author states at section 3.1.2:

> "Article 4(1) refers not to tax liability in the abstract, but liability "by reason of" one of the listed criteria. On a plain reading of the article, it is not sufficient that a corporation be both resident in a contracting state and liable to tax in that state in order to be a resident of the state for purposes of the convention. There must also be a causal link between the liability to tax and one of the prescribed connecting factors: residence, place of management or any other criterion of a similar nature."

117. In discussing the listed connecting factors, the author observes at 3.1.3 that the *ejusdem generis* qualification "implies some limitation" on the application of national law, irrespective of whether Article 3(2) applies to the enumerated criteria. I would agree with that. Whatever legal system is used to interpret those individual concepts, the words "of a similar nature" can only be interpreted in accordance with the Vienna Convention. *Couzin* also recognises the possibility that domicile may cover place of incorporation at 3.1.3.1 and concludes at 3.1.3.2 that a domestically incorporated company should in any event be regarded as liable to tax by reason of its residence where the domestic law has that effect. In considering the words "any other criterion of a similar nature" *Couzin* states at 3.1.3.5:

> "If every nexus for taxation is a "criterion of a similar nature", i.e. if the requisite similarity is nothing more than the fact that the criterion serves as a basis for taxation, then the full expression "liable to tax by reason of

> domicile, residence, place of management or any other criterion of a similar nature" collapses to "liable to tax"… The test in Article 4(1) becomes a prolix tautology."

118. *Couzin* also considers *Crown Forest* in some detail, and concludes at 3.1.4.1 that:

> "… Article 4(1) residents are meant to be persons whose liability is premised on a personal or locative attachment rather than a connecting factor based on the source of income. To adopt the accepted but regrettably imprecise term, Article 4(1) is meant to refer to those who are subject to "residence taxation". Imprecision is replaced by misdirection where "residence taxation" is replaced by expressions such as "full tax liability" or "comprehensive taxation"."

119. While I agree with Mr Baker that the final sentence may be read as a comment about terminology, recognising that concepts like "full tax liability" do not work well for States that impose tax on a territorial basis (see [60] above), I disagree that *Couzin's* distinction between residence and source taxation in this section supports GEFI's case. Rather, it is clear that *Couzin* does not agree that all that is required is a criterion that serves as a basis for taxation. Instead, the criterion must be based on some level of attachment between the taxpayer and the State.

US/Netherlands treaty

120. The FTT recorded evidence from HMRC's expert that the United States and Netherlands appeared to have agreed in a Memorandum of Understanding that a stapled entity should be treated as US tax resident for the purposes of the US/Netherlands double tax convention (see the final paragraph of [32] above and the FTT's decision at [30]). However, as far as the Convention is concerned I consider that this is best seen as no more than the unilateral opinion of one of the parties, which is not a relevant aid to interpretation: [38] above. The fact that a third party may have agreed to that stance in the context of a different treaty, in circumstances that are unknown, makes no difference. At the most GEFI might argue that the published existence of the Memorandum of Understanding prior to entry into the Convention was part of the surrounding circumstances that could be taken into account under Article 32 of the Vienna Convention, but as a unilateral opinion I consider this doubtful. The UT placed little weight on it. I would not be inclined to place any weight on it.

GEFI's alternative case

121. GEFI's alternative case is that the requirements of s.269B amount to a criterion "of a similar nature".

122. I do not accept this. The US connections required by s.269B are limited to a) stapling of more than 50% by value of the foreign corporation's shares to those of a domestic corporation, and b) direct or indirect ownership as to 50% or more by US persons. Both of these requirements relate to the ownership and control of the relevant company. Neither requires any form of link between the company <u>itself</u> and the United States, whether a formal legal one (such as incorporation, the location of its registered office or similar) or a factual one (such as place of management). The facts that the entity to which the company is stapled is itself US incorporated and that both entities are ultimately US

owned cannot suffice. In contrast, the criteria specified in Article 4(1) all describe legal or factual connections between the entity itself and the relevant Contracting State of a kind that may justify worldwide taxation.

123. The UT referred at [148] to GEFI's "substantive economic ties" to the United States, but any such ties it had are irrelevant to the application of s.269B and, as *Crown Forest* illustrates, economic or other links not falling within the criteria in Article 4(1) cannot provide a different route to treating an entity as US resident for Convention purposes.

Conclusions on residence

124. In conclusion on Issue 1, HMRC's interpretation is to be preferred based on the ordinary meaning of the words used in their context and in the light of the object and purpose of the Convention. In summary, the first sentence of Article 4(1) requires both the existence of a local connection falling within the enumerated criteria or which is of a similar nature to those criteria, and that that connection attracts worldwide taxation. Further, GEFI's status as a stapled entity under s.269B does not amount to a criterion of a similar nature.

125. Accordingly, the FTT reached the correct conclusion on Issue 1. As to its somewhat compressed reasoning, there is some validity in Mr Baker's criticism of the FTT's reliance on the second sentence of Article 4(1), albeit that the explicit reference to profits of a permanent establishment in the version in the Convention weakens that criticism: see above. Mr Baker also fairly criticised the FTT's reliance on its findings that US tax differences exist between domestic and stapled corporations in concluding that there was no relevant connection with the United States. The conclusion is correct but the existence of differences is not relevant to it.

126. It also follows that the UT made an error of law in reaching the conclusion that GEFI was US resident for Convention purposes. I will not comment further on its detailed reasoning, other than to note that using the MTC and OECD Commentary as its starting point, rather than the words of the Convention itself in the light of its object and purpose, may have increased the risk of error. I should also observe, however, that although it makes no difference in light of the decision of this court, I have some concern that the UT exceeded its jurisdiction in purporting to take a different view of some aspects of the expert evidence to that of the FTT (see [54] above). The UT (and this court) is fixed with the lower tribunal's findings on the evidence unless its decision is set aside due to an error of law. It is only at that point that the UT or this court has power to make its own findings on the evidence: ss.12 and 14 Tribunals, Courts and Enforcement Act 2007.

Issue 2: carrying on business

127. On this issue, I agree with the UT that the FTT made no material error of law. Ultimately the question was an evaluative one for the FTT to determine, and it was entitled to conclude as it did. Indeed, based on my much more limited understanding of the evidence I see nothing surprising about its conclusion that GEFI was not carrying on business.

128. It is common ground that Article 3(2) requires the concept of "carrying on business" to be applied to GEFI by adopting the meaning of that concept for the purposes of UK taxes to which the Convention applies: see [27] above. It is also common ground that "business" is wider than "trade" for UK tax purposes.

129. However, it is worth noting two points. First, it is not obvious to me that UK tax law principles should be applied without any reference to the broader principles that apply in interpreting the Convention, and in particular the need to consider the meaning of words in their context. The context here includes a clear distinction between interest attributable to a business carried on in a Contracting State and interest derived in other circumstances: essentially the difference between active and passive income discussed in *Alta Energy* (see [77] above). However, I will not develop this point further given the common ground between the parties in this case.

130. Secondly, there is relatively limited modern case law authority on the meaning of business in UK tax law because the concept is not generally of central relevance to the imposition of tax on income. For example, non-UK resident companies conducting business in the United Kingdom are subject to corporation tax if they carry on a trade (rather than a business) here (s.19 Corporation Tax Act 2009), and a company falls within the charge to tax as soon as a chargeable source of income is acquired: s.1167 Corporation Tax Act 2010. In contrast there are numerous cases that consider whether a particular activity amounts to a trade.

131. The leading modern case on the meaning of "business" for tax purposes is *American Leaf Blending Co v Director-General of Inland Revenue* [1979] AC 676 (PC) ("*American Leaf*"), an appeal from the Federal Court of Malaysia. GEFI also placed reliance on the much earlier Court of Appeal decisions in *Inland Revenue Comrs v Korean Syndicate Ltd* [1921] 3 KB 258 ("*Korean Syndicate*") and *Inland Revenue Comrs v Westleigh Estates Company Limited* [1924] 1 KB 390 ("*Westleigh*"), and on the House of Lords decision in *South Behar Railway Company Ltd v Inland Revenue Comrs* [1925] AC 476 ("*South Behar*").

132. *American Leaf* concerned a Malaysian entity that abandoned a loss-making tobacco business and made five successive lettings of various parts of its premises, including a warehouse and factory. It sought to set its prior losses against the rental income, which depended on the source of the rents being a business. Lord Diplock gave the judgment of the court. He rejected the view of the special commissioners that the fact that letting property was included in the company's objects was conclusive in favour of there being a business, noting that a comment of Pollock MR in *Westleigh* that apparently supported that proposition was made in the context of a company carrying out one of its principal objects, and adding (at p.683):

> "Their Lordships would not endorse the view that every isolated act of a kind that is authorised by its memorandum if done by a company necessarily constitutes the carrying on of a business."

133. Lord Diplock went on to distinguish private individuals where there was "no presumption" that the receipt of rents from property amounts to carrying on business, and a company incorporated for the purpose of making profits for its shareholders, where "any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business", adding that it was not easy to envisage circumstances that would displace that prima facie inference where a company's property is let out for rent (p.684). He then said:

> "The carrying on of "business", no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the

> business, the activity may be intermittent with long intervals of quiescence in between. In the instant case, however, there was evidence before the special commissioners of activity in and about the letting of its premises by the company during each of the five years that had elapsed since it closed down its former tobacco business. There were three successive lettings of the warehouse negotiated with different tenants; there was the removal of the machinery from the factory area which made it available for use for storage and a separate letting of that area to a fresh tenant; and as recently as October 1968 there was the negotiation of a letting to a single tenant of both the factory area and the warehouse."

134. While the question was one of fact, the Privy Council concluded that the only reasonable conclusion was that the company carried on business, nothing in the evidence rebutting the prima facie inference.

135. Mr Brinsmead-Stockham submitted that the FTT had made fundamental errors of law. First, it failed to apply the "strong presumption" or inference that a company in GEFI's position was carrying on business (the epithet "strong" is derived from *Westleigh* at p.415 and was not disputed by HMRC). Instead, he submitted that the FTT simply applied a list of factors derived from the VAT case of *C&E Comrs v Lord Fisher* [1981] STC 238, which were applied in the Upper Tribunal decision in *Ramsay*, without recognising that those cases related to individuals (albeit that Mr Brinsmead-Stockham recognised that the factors are relevant). Secondly, the FTT reached its conclusion based on a lack of activity without recognising that no significant (or any) activity was required. Thirdly, it did not engage with three of the four higher court decisions on which GEFI relied. More specific errors were a misunderstanding of Lord Sumner's reference to "domestic operations" in *South Behar*, an incorrect application of the US tax law test of business and a misunderstanding at [90] about which loan agreements were covered by the Memorandum of Acknowledgement.

136. I do not consider that any of these alleged errors involves a material error of law, and this is also not a case that gets anywhere near succeeding in an *Edwards v Bairstow* challenge on the basis that no reasonable tribunal could have reached the conclusion that it did on the evidence.

137. Arnold LJ rightly reminded Mr Brinsmead-Stockham of what Lady Hale said in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at [30] (in relation to the Asylum and Immigration Tribunal):

> "This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts."

This principle has been applied in a tax context: see for example *HMRC v Procter & Gamble UK* [2009] EWCA Civ 407, [2009] STC 1990 at [48], per Toulson LJ.

138. The FTT received detailed submissions from GEFI about the correct legal test to apply, by reference to *American Leaf* and the other cases on which GEFI relies. A tribunal does not make an error of law by not naming or citing from particular cases, particularly when it is clear that it has focused on more recent authorities that consider them. Further, the FTT's decision expressly refers to the "strong" inference that a company is carrying on business when it puts its property to gainful use in citing another case at [75], and other citations at [76] and [78] capture the same point. It cannot be assumed that when it reached its conclusions the FTT somehow forgot a point that it had repeatedly made.

139. More fundamentally, a strong presumption or inference that a company is carrying on business does not mean that it necessarily is. Ultimately, GEFI's position is that because the LP held some very large loans GEFI must therefore be taken to have been carrying on business. That does not follow. A multi-factorial evaluation is required: it all depends on the particular facts. For example, in *American Leaf* Lord Diplock laid stress not only on the lettings themselves but on related activities such as negotiations with different tenants and the removal of machinery. As these additional activities rather illustrate, there may well be a qualitative difference between what is involved in letting property to tenants and simply receiving an income stream from loans. In *South Behar* the company in question had at its risk funded the construction of a railway by agreement with the Secretary of State, and the income in question arose from a later agreement under which the Secretary of State took over the operation of the railway in exchange for an annuity rather than the previously agreed share of earnings. The decision was that the company still carried on its railway-related business. That is important. It was not a decision that it had a new business of earning annuities. In *Korean Syndicate* the company was formed to acquire, work and turn to account mining concessions. It acquired a large concession in Korea but, after considering working it itself, ultimately contracted with another entity to exploit it in return for a percentage of profits. Lord Sterndale MR expressly distinguished the company's objects from the case of "a person who holds certain investments and merely draws the interest from them, or of an owner of mines who simply leases them in consideration of the payment to him of royalties" (p.272).

140. Expanding on that last point, GEFI placed reliance on the focus in *American Leaf* and the earlier cases on whether the activity was pursuant to the objects of the company. Mr Brinsmead-Stockham suggested that Lord Diplock's comment on what Pollock MR said in *Westleigh* (see [132] above) amounted to saying that a company undertaking its principal object must be carrying on business. I would not read Lord Diplock's judgment as intending to establish any such rule, but in any event it is of limited relevance here. The issue for decision is whether GEFI carried on business through a US permanent establishment. Its only US activity was its interest in the LP, in which as the limited partner GEFI had no active participation. The appropriate focus is therefore on the LP, and whether it was carrying on business through the activities of its general partner (see [30] above). The main purpose for which the LP was formed was to "hold directly or indirectly financial receivables and other assets…" (see [9] above), and there was no indication of any legal requirement for it to carry on business ([48] above). The LP's constitution was equally consistent with acting as a pure passive holding vehicle and with something that amounts to a business.

141. As to whether the FTT applied a US tax law test, it explicitly recognised at [73] that it was required to consider the meaning of business as understood in UK law, and proceeded to refer at [73] to [80] (the remainder of its section under the heading of "law"

in relation to this issue) only to UK case law. The FTT's reference at [84] to "passive, sporadic or isolated activity" does reflect a comment by GEFI's expert Mr Shashy to that effect, but that represented Mr Shashy's own characterisation of the LP's activities rather than a reiteration of the test under US tax law. The FTT evidently agreed with the description. The other alleged errors, relating to *South Behar* and the Memorandum of Acknowledgement, are clearly not material. As to the former, what the FTT was saying at [88] (see [51] above) was that the initial formation of the LP and capital contributions were the kind of "domestic operations" referred to by Lord Sumner in *South Behar* at p.487, where he referred to the domestic operations of declaring and paying dividends, remunerating directors and presenting reports. The FTT was however entitled to conclude that subsequent payment instructions did not convert the LP's activities into a business, in contrast to *South Behar* where the receipt of annuities was found to be sufficient to continue an existing business.

142. Turning to the FTT's overall evaluation, the critical factual conclusions are at [84], which bears repeating:

> "[84] While the loans were conducted on sound and recognised business principles and the sums involved clearly substantial, holding five affiliate loans over the course of approximately six years, especially as only three of these originated with the LP is, in my judgment, more of a passive, sporadic or isolated activity than a regular and continuous series of activities. In this I agree with Ms McCarthy who submits that there is nothing to suggest that personnel or agents acting on behalf of the LP made or conducted continuous and regular commercial activities in the US. All that appears to have happened was that monies were directed straight to GELCO without negotiating terms or the consideration at a director level as would have been expected from a company carrying on commercial activities on sound business principles."

143. The FTT then expanded on this with some examples from the documentary evidence and more factual detail about what the LP actually did, before concluding at [91] that GEFI was not carrying on business through the LP, referring again there to the lack of strategic direction by GEFI Inc's directors.

144. This conclusion does not involve any material error of law. In essence, the LP acted merely as a passive holding vehicle for some loan receivables. Their size makes no difference: the test is a qualitative one. The board of GEFI Inc, as the LP's general partner, did not make strategic decisions and in fact had "very little involvement" ([90]). While the involvement of GE's tax department was neither surprising nor a reason to treat the LP's activities as somehow being "denatured" from being a business as a result of any tax motivation (which would be an incorrect approach), the FTT made no such error. It was fully entitled to focus on the lack of activity by the general partner in reaching its evaluative conclusion.

Conclusions

145. In conclusion I would allow HMRC's appeal on Issue 1 and dismiss GEFI's appeal on Issue 2, with the result that the UT's decision is set aside on Issue 1 and upheld on Issue 2. The effect is to reinstate the FTT's conclusion that the United Kingdom is not required

to confer double tax relief in respect of US tax paid on GEFI's interest income for the periods in dispute.

Lady Justice Whipple:

146. I agree.

Lord Justice Arnold:

147. I also agree.