



1 July 2015

PRESS SUMMARY

Anson (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent)
[2015] UKSC 44
On appeal from [2013] EWCA Civ 63

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Sumption, Lord Reed and Lord Carnwath

BACKGROUND TO THE APPEAL

The question on this appeal was whether the appellant, Mr Anson, was entitled to double taxation relief on income he remitted to the UK from the US. This depends on the interpretation of article 23(2)(a) of the UK/US Double Taxation Convention 1975 and its successor, article 24(4)(a) of the UK/US Double Taxation Convention 2001. The relevant question under both provisions is whether the UK tax is “computed by reference to the same profits or income by reference to which the United States tax is computed.” The relevant period was the seven UK tax years running from 6 April 1997 to 5 April 2004, during which Mr Anson was a member of a Delaware limited liability company (“the LLC”), classified as a partnership for US tax purposes. As such, Mr Anson was liable to US federal and state taxes on his share of the profits. Mr Anson remitted the balance to the UK and was liable to UK income tax on the amounts remitted, as “income arising from possessions outside the UK”, subject to any double taxation relief which might be available. The respondents, the Commissioners, decided that he was not entitled to any double taxation relief on the basis that the income that had been taxed in the US was not Mr Anson’s income, but that of the LLC.

On Mr Anson’s appeal, the First-tier Tribunal (“FTT”) found that the combined effect of the Delaware LLC Act (“the LLC Act”) and the LLC agreement (made between the members) was that profits of the LLC belong to the members as they arise. It concluded that Mr Anson was taxed on the same income in both countries, so he was entitled to double taxation relief. The Upper Tribunal allowed the Commissioners’ appeal. The Court of Appeal dismissed Mr Anson’s appeal.

JUDGMENT

The Supreme Court unanimously allows Mr Anson’s appeal. Lord Reed gives the leading judgment, with which Lord Neuberger, Lord Clarke, Lord Sumption and Lord Carnwath agree.

REASONS FOR THE JUDGMENT

The Upper Tribunal construed the FTT’s finding that the profits “belonged” to the members as they arose as a legally erroneous finding that the profits vested in the members as their property. It was however clear from the FTT’s decision that it based its conclusion that “the profits belong as they arise to the members” not upon a confusion between profits and assets, but upon expert

evidence as to the combined effect under Delaware law of the LLC Act and the LLC agreement. The natural reading of the FTT's decision is that when it described the profits as belonging to the members it was referring to a personal right rather than a proprietary right. This is consistent with Mr Anson's expert evidence and with the comparison that the FTT made between the LLC and a Scottish partnership. [38-40]

The Court of Appeal focused on whether Mr Anson had a proprietary right to the profits of the LLC as they arose, rather than addressing whether the income taxed in one country is the same as the income taxed in another. The Court of Appeal also accepted the Commissioners' submission that the FTT's finding that the profits belonged to the members as they arose was a holding on UK domestic tax law, with which the Upper Tribunal was entitled to interfere. However, questions about whether the members had a right to the profits, and if so, what is the nature of that right, were questions of non-tax law, governed by Delaware law. The FTT's conclusion on them was a finding of fact. Domestic tax law then fell to be applied to the facts as so found. [47-51] The Court of Appeal was also diverted by its consideration of the case of *Memec plc v Commissioners of Inland Revenue* [1998] STC 754, which was concerned with article 23(2)(b) of the 1975 Convention, not article 23(2)(a). [43, 50, 101-109]

If the words used in article 23(2)(a) are given their ordinary meaning, it is necessary to identify the profits or income by reference to which the taxpayer's UK tax liability is computed, primarily a question of UK tax law. Next one must identify the profits or income from sources within the US on which US tax was payable under the laws of the US and in accordance with the Convention. That is primarily a question of US tax law. Then it is necessary to compare the profits or income in each case, and decides whether they are the same. [113]

While Mr Anson maintains that his income arises as profits are earned by the LLC, so that the income liable to tax is his share of the profits regardless of whether they are distributed, the Commissioners' position is that his income arises only when profits are distributed by the LLC, so that the income liable to tax is the distributions. The premise of the Commissioners' submissions is that, because the business of the LLC is carried on by the LLC, it follows that the profits generated by the business belong to the LLC. This argument is contradicted by the FTT's finding that the members of the LLC have an interest in the profits of the LLC as they arise. The FTT was entitled to make that finding. Therefore, Mr Anson was entitled to the share of the profits allocated to him, rather than receiving a transfer of profits previously vested (in some sense) in the LLC. It follows that his "income arising" in the US was his share of the profits. That is the income liable to tax under UK law, to the extent that it is remitted to the UK. Mr Anson's liability to UK tax is therefore computed by reference to the same income as was taxed in the US. Accordingly he qualifies for double taxation relief under article 23(2)(a). [115-121]

The Court dismisses an alternative ground focused on a provision in article 23(2)(a) relating to the treatment of dividends. The history of that provision makes clear that the treatment of dividends reflects changes necessitated by the UK's adoption of corporation tax; nothing in the context suggests they were intended to have any wider implication. [60-96]

References in square brackets are to paragraphs in the judgment

NOTE This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.shtml>