US-UK ARTICLE SERIES

# Anson Revisited:

## What does HMRC's updated guidance mean for UK resident members of US LLCs?

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### UK TAX TREATMENT FOR MEMBERS OF US LLCS

**In this instalment, we explore the impact of HMRC's recently updated guidance on the UK tax treatment of US LLCs and why planning ahead is more important than ever to avoid double taxation.**


### INTRODUCTION

On 12 December 2023 HMRC published updated guidance (issued in International Manual 180050, see also 161040) on the UK tax treatment of profits arising within a limited liability company (an "LLC") incorporated in the US. The guidance indicates that taxpayers will face an uphill struggle if they now wish to claim double tax relief on the basis of the decision of the United Kingdom's Supreme Court in Anson v HMRC [2015] UKSC 44 ("Anson").

### BACKGROUND

In Anson, the taxpayer (Mr Anson), who was UK resident, was a member of a Delaware incorporated LLC. The profits of the LLC were apportioned between and distributed each quarter to its members. The LLC was classified as a partnership for US tax purposes and was, therefore, transparent for US federal and state tax purposes: Mr Anson (and not the LLC) was liable to US tax on his share of the profits as they arose.

HMRC sought to charge Mr Anson to UK income tax on the profits he received from the LLC (i.e. on the distributions) and argued that the profits that had been taxed in the US were the profits of the LLC and not of Mr Anson. On that basis, they argued that Mr Anson was not entitled to the benefit of the US/UK double tax treaty because the US tax and the UK tax were not payable on the same profits.

The First-tier tribunal ("the FTT") found in Mr Anson's favour, finding as fact that under Delaware law the profits of the LLC belonged to the members and not to the LLC. The case ultimately reached the Supreme Court, which also found in favour of Mr Anson by virtue of the FTT's finding of fact: if Mr Anson's share of the profits belonged to him under Delaware law, the distribution of his profits to him represented the mechanics by which he received the profits to which he was entitled and did not represent a separate profit source. As both US and UK tax arose on the same profits, Mr Anson was able to benefit from relief under the US/UK double tax treaty.

ANSON REVISITED

## HMRC'S INITIAL GUIDANCE RELATING TO ANSON PUBLISHED ON 25 SEPTEMBER 2015

Shortly after the Supreme Court's decision in Anson, HMRC published guidance in which they stated that "HMRC has after careful consideration concluded that the decision is specific to the facts found in the case...Individuals claiming double tax relief and relying on the Anson v HMRC decision will be considered on a case by case basis."

Perhaps tellingly HMRC also said that "where US LLCs have been treated as companies within a group structure HMRC will continue to treat the US LLCs as companies, and where a US LLC has itself been treated as carrying on a trade or business, HMRC will continue to treat the US LLC as carrying on a trade or business". HMRC's guidance reassured the corporate community that group relief would continue to be available where US LLCs were part of the group structure.

Although not particularly helpful, this guidance suggested that HMRC conceded that where the facts of a case and those found in Anson were alike, the profits of an LLC should be treated as belonging to its members such that double taxation relief would be available.

## HMRC'S GUIDANCE PUBLISHED IN DECEMBER 2023

However, it appears from the latest guidance that HMRC has decided to take a more robust approach. In INTM180050 HMRC now state: "Based on HMRC's understanding of Delaware LLC law (as at 06 December 2023), and contrary to the conclusion reached by the FTT in HMRC v Anson...HMRC continue to believe that the profits of an LLC will generally belong to the LLC in the first instance and that members will generally not be treated as "receiving or entitled to the profits"of an LLC."

HMRC go on to say that it understands that the LLC law of the other US states is largely the same as that of Delaware so that it would generally not regard the profits of other US LLCs as belonging as they arise to the members.

From HMRC's perspective it follows that individual members will only be chargeable to UK tax on any dividends or other distributions that they receive from the LLC (a consequence of HMRC continuing to regard LLCs as being 'opaque' for UK tax purposes), and that such receipts will be taxed at the dividend rate of income tax (currently up to 39.35%). If the LLC is taxed as a partnership in the US, HMRC warns that in its view no relief is available under the treaty because it believes the same income is not being taxed in both jurisdictions.

Based on HMRC's 2015 guidance taxpayers with similar facts to Anson were claiming treaty relief but in its new guidance HMRC say that where a taxpayer has claimed such relief, "HMRC will consider opening an enquiry or making a discovery assessment in accordance with its normal risk-based approach."

## IMPLICATIONS OF HMRC'S UPDATED GUIDANCE

For UK resident individuals who are members of US LLCs, the significance of the latest guidance is that HMRC is putting the taxpayer on notice that it disagrees with the FTT's finding of fact in respect of Delaware law; as this finding underpinned the Supreme Court's decision that Mr Anson could claim double tax relief, HMRC are now asserting that taxpayers with similar facts to Anson cannot rely on that decision to claim such relief.

Whilst the FTT's finding in relation to Delaware law is treated as a finding of fact and therefore does not set a binding precedent for future cases, the Supreme Court considered that the FTT was entitled to make its findings about the interaction between Delaware legislation and the LLC's operating agreement (it is generally understood that the LLC in Anson was not unusual). Further, as HMRC's revised position is not based on new law but merely disagreement with the decision in Anson, it remains open for taxpayers to continue to file on the basis of Anson (with appropriate disclosure in the tax return).

## WHAT PLANNING OPTIONS ARE THERE BEYOND RELYING ON ANSON?

The latest guidance indicates that HMRC are likely to push back on any attempt by a taxpayer simply to rely on Anson and may intend to re-litigate the point (albeit largely running the same arguments). HMRC may or may not win on any re-run of the Anson litigation. However, unless a taxpayer is determined to fight the point, if possible, we would suggest that it would be more time and cost effective for a taxpayer to structure their affairs so as to avoid the risk of double taxation. For example, to the extent possible, taxpayers could:

- structure their investments/ business interests through an entity that is treated as being either transparent or opaque in both the US and the UK; or
- if they are able to do so, claim the remittance basis of taxation and not remit any income from the LLC.

## CONCLUSION

There is a certain policy logic for HMRC's revised guidance which doubles down on its view that US LLCs should generally be treated as 'opaque' (often the desired treatment from a UK corporation tax perspective); HMRC's position enables it to adopt a more uniform approach that, in practice, does not require it to review the relevant state legislation and an LLC's operating agreement in every case.

However, it is an unsatisfactory outcome for individual taxpayers, particularly for those who want to receive their distributions in the UK and who justifiably wish to rely on the Supreme Court decision to benefit from treaty relief but do not want to incur the expense of challenging HMRC's updated view. Taxpayers who want certainty of treatment may have to either accept an unpalatable double tax cost or see if they can structure or restructure their affairs accordingly.

*Disclaimer*

*The members of our US/UK team are admitted to practise in England and Wales and cannot advise on foreign law. Comments made in this article relating to US tax and legal matters reflect the authors' understanding of the US position, based on experience of advising on US-connected matters. The circumstances of each case vary, and this article should not be relied upon in place of specific legal advice.*

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