Ingenious Games LLP and others v Revenue and Customs Commissioners **[2021] EWCA Civ 1180**

The appellant LLPs were part of a group which was used for tax avoidance schemes operating in the film industry, allowing losses generated from the films to be set against the LLP members' income from other sources.

Section 64 of the Income Tax Act 2007 provides that trade loss relief could be set against other income if the person carried on a trade in a tax year and made a loss in that year, while s863 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA) provides that if an LLP carried on a trade, profession or business with a view to profit, its activities were to be treated for income tax purposes as done by the members. The First Tier Tax Tribunal (FTT) found that two of the three LLPs had conducted a trade, and had done so with a view to profit, although it found against the LLPs on other grounds and largely disallowed the LLP members' losses claims. HMRC appealed on the trading and profit issues, and the Upper Tribunal decided both issues in HMRC's favour. The appellants appealed to the Court of Appeal.

The court held that these statutory provisions meant, that in order for the LLP members to claim loss relief from the LLPs' trading losses, it was necessary for the LLP to carry on a trade from which the loss was incurred, and to carry on that trade with a view to profit. The court also held that these two requirements should not be given an unduly narrow meaning because this would have wider repercussions outside tax law, since the need for a business to be carried on with a view to (or of) profit was a precondition to the formation of a general or limited partnership under s2 of the Partnership Act 1890, and to the incorporation of an LLP under the Limited Liability Partnerships Act 2000. The court held that the phase 'with a view to [*or* of] profit' must have the same meaning in each of the statutes.

The court held that the FTT had been right to conclude that the LLPs were trading. The LLPs had entered into complex transactions which were not analogous to merely buying an investment. The transactions objectively had a genuine commercial purpose and could fairly be described as trading transactions. As the court had held in *Ensign Tankers* [1989] 1 WLR 1222, a transaction which was of a commercial nature was not deprived of that nature merely because there was a collateral or ulterior purpose to obtain a tax advantage, although if that was the sole purpose then it would be impossible to find that it had a commercial purpose.

The court further held that the test of intention to make a profit was purely subjective, although the objective likelihood of profits and the timescales in which they might be achieved would often be relevant to testing whether there was a genuine subjective intention. On the facts, the controlling minds of the LLPs had a subjective view to profit in relation to the transactions undertaken by the LLPs, and it was irrelevant whether the correct legal analysis of the transactions' nature and effect was that of HMRC or the appellants.

Wilson v Revenue and Customs Commissioners **[2021] UKUT 239 (TCC)**

Wilson was engaged to work for an LLP. HMRC assessed him as self-employed for national insurance purposes but he contended that he was employed, and thus not liable to Class 4 National Insurance Contributions.

Section 4(4) of the Limited Liability Partnerships Act 2000 provides that an LLP member shall not be regarded as employed by the LLP unless, if he and the other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership. The tribunal held that the First Tier Tax Tribunal (FTT) had been entitled to find that, had the LLP been a partnership, Wilson would have been a partner in the sense that he was carrying on a business in common with a view of profit as required by the definition of partnership in s1 of the Partnership Act 1890. The FTT had correctly looked at the substance of the relationship rather than the labels given to it by the parties. Wilson was remunerated by a share of profits; had significant and substantial voting rights which would not be expected of an employee, in particular on the appointment of managing member, authorisations for bank signatories and borrowings, where the business would be carried on, and the suspension of member; had significant rights under the LLP agreement, including to consultation and information about the LLP and an indemnity from it; and significant obligations under it, including restrictive covenants and possible suspension. The provisions in a side letter to the agreement, calculating a purchase price for his interest in the LLP, were also consistent with his being a member rather than an employee, since they effectively gave him an interest in the capital of the LLPs. It was true that the other members could amend the LLP agreement without Wilson's consent, but his rights and obligations were not varied during the relevant period.

The tribunal explicitly declined to address the issue of whether Lady Hale's comments when giving the Supreme Court's judgment in *Clyde & Co v Bates van Winkelfhof* [2014] UKSC 32, that an LLP member could not also be an employee, were obiter and therefore did not overrule the decision of the Court of Appeal in *Tiffin v Lester Aldridge* [2012] EWCA Civ 35 that a member could also be an employee.

The tribunal also declined to rule on whether s863 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA), which provides that if an LLP carries on a trade, profession or business with a view to profit, its activities are to be treated for income tax purposes as done by the members, operated as a deeming provision so that the income of an LLP member was deemed to be a share of profits.

Arora and Arora v Moshiri **[2021] EWHC 2230 (Ch)**

The claimants entered into an agreement with the defendant, an estate agent, that he would introduce them to suitable properties which they would purchase and resell at a

profit. The defendant would manage the properties pending their resale, and would receive 50% of any net profit on the resale. One aspect of the dispute which arose between them was whether the agreement created a partnership between the parties.

Section 1 of the Partnership Act 1890 provides that "[p]artnership is the relation which subsists between persons carrying on a business in common with a view of profit". The court held that the central question was whether the parties were carrying on "business in common". It noted, first, that s2 provides that "[t]he receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share….does not of itself make him a partner". Thus the fact that the agreement provided for the defendant to receive a payment by reference to "net profits" realised on the sale of a property was prima facie evidence of a partnership but was not determinative. Second, the court considered that the defendant's use of the terms "partner" and "partnership" in some communications with the defendants did not demonstrate that they were partners. Third, the parties' requests to each other for the provision of "accounts" reflected the fact that they were engaged in a venture in which each needed information from the other, including rent and payments for building works, not least in order to determine the level of "net profit", but was not indicative of partnership specifically. Fourth, although the defendant provided some financial support for the renovations, this was not a contribution to capital, since this would have been contrary to the rationale for the relationship, which was for the claimants to provide finance and the defendant to provide his skill and professional services. Rather, it was a short-term loan while the claimants were experiencing cash flow problems. Sixth, the wide authority enjoyed by the defendant in relation to the properties was not indicative of partnership but merely consistent with the claimants as investors choosing to delegate day-to-day management of their investments. Seventh, although the defendant's willingness to occupy and pay rent for one of the properties, even though it was not suitable for him, was a personal sacrifice, it was made to maximise the prospect of the properties being sold at a profit and was consistent with him seeking to secure an overall return for himself, rather than suggesting he was in partnership.

The court concluded that no business was being carried on in common. The claimant's business was that of property dealing, while the defendant was an estate agent and property manager. Although they were to share profits, they did so as the operators of separate businesses, and the inevitable closeness of the relationship and similarity of goals were not evidence of partnership. The court considered that this conclusion was reinforced by a number of asymmetries between the positions of the claimants and the defendant, which it considered to be inconsistent with a single business being carried on. Most significantly, the claimants alone had the power to decide when and at what price the properties were to be sold. In addition, the parties' exposure to loss was very different; the claimants alone bore the loss during void periods in which no rent was received and if a property was sold at a loss; the loss suffered by the defendant by not being paid for his work in the latter situation was a very different type of cost. Further, if a property was sold at a profit, the defendant's share of the profit crystallised and was not affected by losses on other properties, unlike the financial situation of the claimants.

The court also noted that the defendant's conduct in regarding it as proper to receive and retain a commission from the vendor of one of the properties without telling the claimants about it was inconsistent with the existence of a partnership.

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