Briefing

Tax

BURGES SALMON

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HMRC response to Anson v HMRC: a Supreme Court decision on Double Tax Treaty Relief in Respect of Profits from US LLC

Background

On 11 August 2015, we published an article on the Supreme Court's decision in Anson v HMRC Commissioners [2015] UKSC 44 where it was held that an individual taxpayer was entitled to double tax treaty relief in respect of his share of profits in a Delaware limited liability company (LLC).

On 25 September 2015, HMRC released a response to this decision in a policy paper entitled: *Revenue and Customs Brief 15 (2015): HMRC response to the Supreme Court decision in George Anson v HMRC (2015) UKSC 44.*

HMRC's published view since before the Anson case is that US LLCs are not fiscally transparent for UK tax purposes. Accordingly, a UK member should be subject to UK tax on their distributions from the LLC rather than by reference to their share of the LLC's profits as the profits arose.

In coming to the conclusion that the taxpayer was entitled to double tax treaty relief, it was held in the Anson case that members of the US LLC became automatically entitled to a share of the LLC's profits as the profits arose prior to any distribution. It was also found that a member's interest in the LLC was not similar to an interest in share capital. This was contrary to the HMRC published view.

HMRC response

HMRC's response reflects a very narrow interpretation of the Anson case. In the response, HMRC simply concludes that the Anson case is specific to its facts; in particular, those regarding the rights of the taxpayer based on the Delaware LLC Act and the LLC agreement.

HMRC says that where US LLCs have been treated as companies within a group structure then this will remain unchanged, and where a US LLC has itself been treated as carrying on a trade or business then this will also remain unchanged.

In addition, HMRC proposes to continue its existing approach to determining whether a US LLC should be regarded as issuing share capital. For individuals claiming double tax relief and relying on the Anson case, HMRC will consider these on a case by case basis.

While the policy paper may offer some relief for those LLC members not wishing to go through the trouble of reviewing their current tax status, the policy paper does not appear to be helpful in making the legal analysis any more certain for others. It contains neither additional guidance nor any clarification of its previously published view.

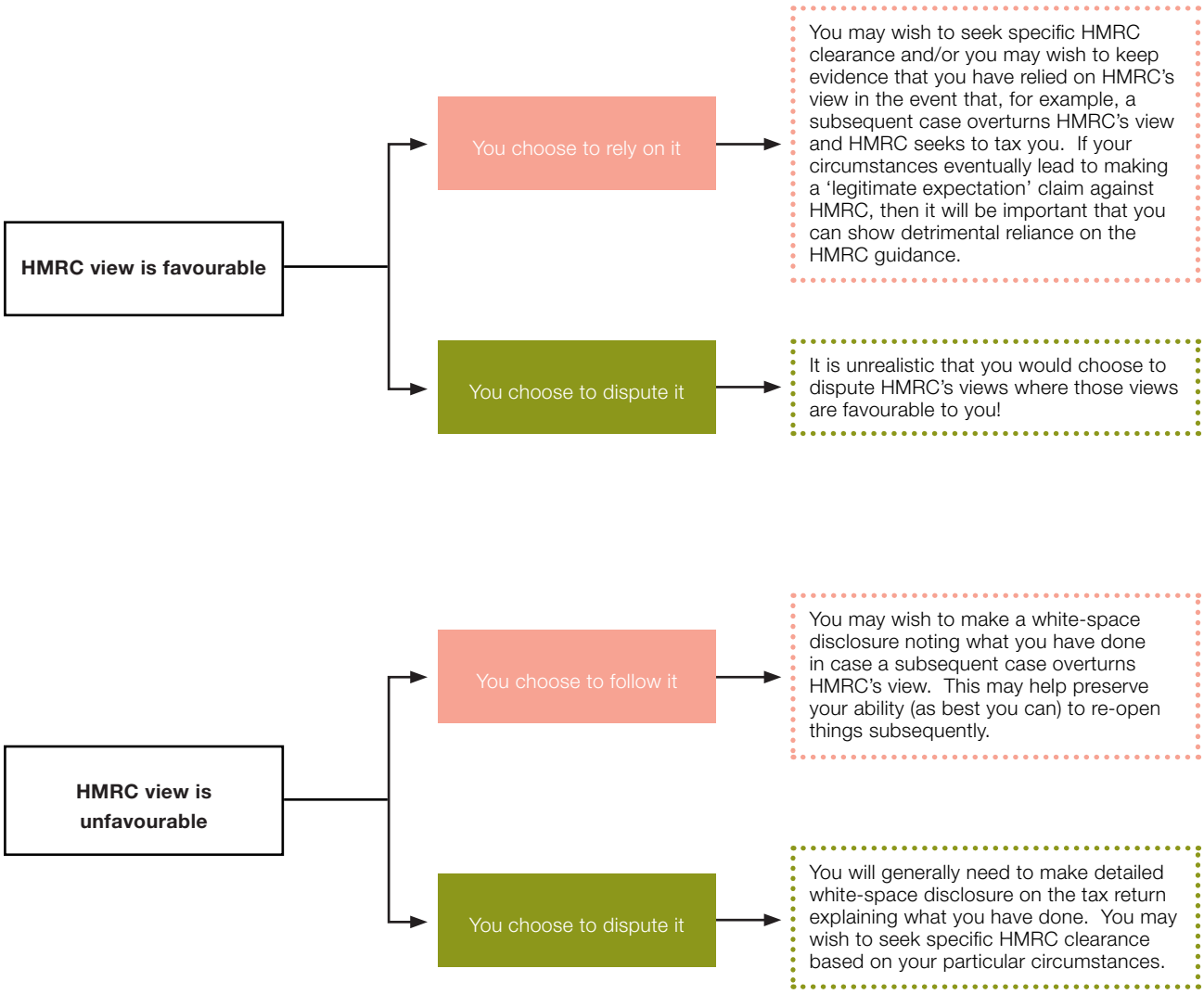
Comments

Going forward, UK members of non-UK LLCs (and other see-through entities) will need to carry out a proper analysis on the basis of their particular LLC arrangements and constitutional documents, taking into account the principles in the Anson case on the one hand, and the HMRC guidance on the other. Determining the correct tax treatment may not be straightforward and could mean considerable differences in tax treatment.

On another point, this case throws up some interesting questions of when HMRC views can be relied on.

In practice, taxpayers could find themselves in one of the following four (practically, three) situations depending on whether HMRC's views are favourable to you or unfavourable to you.

(see diagrams overleaf)



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