

Client Update

Uncertainty Over UK Taxation of Delaware LLCs: UK Tax Authority's Finesse

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When confronting one of the many horrendous (and often creative) disasters befalling South Park, the cartoon's lazy police officer, Officer Barbrady, always responds "move along, nothing to see here." The UK's tax authority ("HMRC") has responded to the recent UK Supreme Court decision regarding the UK tax treatment of Delaware LLCs in the same vein. Given the frequency with which Delaware LLCs crop up in private equity fund and other structures, HMRC's response to the Court's decision has been eagerly awaited by funds that have both a UK nexus and a Delaware LLC.

RECAP OF THE COURT DECISION

In July this year, the Supreme Court determined that, in contrast to HMRC's established practice, a Delaware LLC should be treated as transparent for UK income tax purposes. This was an excellent decision for Mr. Anson, the taxpayer in the case, because he was able to claim double tax relief for US state and federal tax against his UK income tax liability. A more extensive account of the decision is contained in our attached Client Update "The Delaware LLC: Now We See It, Now We Don't...or Do We?".

The decision created a great deal of uncertainty not only about how HMRC would treat Delaware LLCs in the future but also whether it would change its treatment of existing structures.

WHAT HAS HMRC SAID?

In a briefing note published on 25 September, HMRC has said very little. Under the heading "Practice Announcement," HMRC states:

"HMRC has after careful consideration concluded that the decision is specific to the facts found in the [Anson] case. This means that where US LLCs have been treated as companies within a group structure HMRC will continue to treat 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.

... Individuals claiming double tax relief and relying on the Anson v HMRC decision will be considered on a case by case basis.”

So, you would be excused for wanting to cry out, like one South Park character in response, “every time there is something in this town you just say ‘move along, nothing to see here,’ we want some --- ---- answers!”

WHAT DOES THIS MEAN FOR ME?

Any fund that has a Delaware LLC in its structure and which also has a UK nexus should review its current UK tax approach and consider whether its facts are analogous to those of Mr. Anson. We would be very happy to assist in undertaking this analysis and discussing with you the pros and cons of making an argument that the Delaware LLC in your structure should be treated as UK tax-transparent.

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Please do not hesitate to contact us with any questions.