

UK Tax Alert

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UK tax treatment of US LLCs: HMRC responds to the Supreme Court's decision in *Anson v HMRC*

Executive Summary

Her Majesty's Revenue & Customs (HMRC) has now published **its response** to the U.K. Supreme Court's recent judgment in *Anson v HMRC*. The response confirms that HMRC will continue its existing practice of treating U.S. limited liability companies (LLCs) as companies for U.K. tax purposes.

Background

The dispute in *Anson v HMRC* related to whether Mr Anson, a member of a U.S. LLC, was entitled to double tax relief for U.S. tax against his U.K. tax liability on his share of the LLC's profits.

It has been HMRC's long-standing practice that U.S. LLCs are "opaque" entities for U.K. tax purposes (similar to companies or corporations), notwithstanding their "transparent" treatment under U.S. tax law. HMRC therefore had denied Mr Anson double tax relief on the basis that the income on which U.S. tax had been suffered was his share of the LLC's profit and that it was not the "same income" as the subsequent distribution of the profit by the LLC which was subject to tax in the United Kingdom. In other words, the income which had been taxed in the U.S. was not his income but was that of the LLC.

However, the Supreme Court, restoring the First-Tier Tribunal's decision in 2010, found in favour of Mr Anson and held that, on the facts of the case and, in particular, the terms of the LLC agreement and the relevant provisions of the Delaware LLC Act, he "... was entitled to the share of the [LLC's] profits allocated to him, rather than receiving a transfer of profits previously vested (in some sense) in the LLC." The income that was liable to U.K. tax was therefore his share of the profits, which was the "same income" that was subject to U.S. tax. Double tax relief was therefore available.

HMRC's Response

There has been some concern since the judgment as to whether it could have wider consequences for the U.K. tax treatment of U.S. LLCs, which have generally been treated by HMRC and taxpayers as companies for various U.K. tax purposes.

HMRC's published Brief states that it considers the decision in *Anson* to be confined to the facts of the case. As such, its general tax treatment of U.S. LLCs will remain in accordance with its current practice. Specifically:

- Where U.S. LLCs have been treated as companies within a group structure, HMRC will continue to treat the U.S. LLCs as companies for U.K. tax purposes

- Where a U.S. LLC itself has been treated as carrying on a trade or business, HMRC will continue to treat the U.S. LLC as carrying on a trade or business
- HMRC will continue with its existing approach to determining whether a U.S. LLC should be regarded as having “issued share capital” for U.K. tax purposes.

Double tax relief claims by U.K. individuals with income arising through a U.S. LLC will be considered by HMRC on a case-by-case basis.

Comment

The case did not specifically deal with the wider question of whether a U.S. LLC is a company for U.K. tax purposes, but was focused on whether Mr Anson was subject to U.S. tax and U.K. tax on the same income within the meaning of the U.K.-U.S. double tax treaty. HMRC’s response is therefore a practical one. It is also consistent with its reaction to the First-Tier Tribunal’s decision in favour of Mr Anson in 2010, so it is not surprising.

LLCs formed in jurisdictions outside the United States are not specifically mentioned in the Brief; however, we would expect the same principles to apply to non-U.S. LLCs whose laws of formation are based on the U.S. LLC statutes.

Care should still be taken in drafting the terms of LLC operating agreements to ensure that the LLC in question achieves the expected U.K. tax treatment.

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