[2015] UKFTT 448 (TC)

TC04621

Appeal number: TC/2013/01387

INCOME TAX – tax avoidance scheme – Isle of Man double taxation arrangements – application of section 858 ITTOIA 2005 – whether appellant was entitled to the income of an Isle of Man partnership – application to amend grounds of appeal to rely on further grounds – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT HUITSON **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JONATHAN CANNAN
MR ALBAN HOLDEN

Sitting in public in Manchester on 3-5 February 2015

Miss Alison Graham-Wells of counsel instructed by Montpelier Group (Tax Consultants) Limited for the Appellant

Mr Kieron Beal QC and Mr James Rivett of counsel instructed by the General Counsel and Solicitor of HM Revenue & Customs for the Respondents

DECISION

Introduction

1. The Appellant ("Mr Huitson") is an electrical engineering consultant resident in the UK. In April 2001 he entered into a tax avoidance scheme ("the Scheme") marketed by a firm of tax consultants called Montpelier Tax Consultants (Isle of Man) Limited ("Montepelier"). The Scheme involved setting up an Isle of Man trust of which Mr Huitson was the settlor and in which he had an interest in possession, or a right to income. The trust became a partner in an Isle of Man partnership which in turn entered into a contract with Mr Huitson to provide his services. Under his contract with the partnership Mr Huitson was entitled to an annual fee of £15,000. He was also entitled to a share of the partnership profits as a beneficiary under the trust.

2. If the Scheme operates as Montpelier intended, Mr Huitson would pay income tax and national insurance on his annual fee of £15,000. However he would pay no income tax or national insurance on sums paid to him as beneficiary of the trust. The scheme purports to exploit the terms of the UK - Isle of Man Double Taxation Arrangements ("the DTA").

3. Similar schemes operated prior to 2001. In *Padmore v Commissioners of Inland Revenue [1987] STC 36* the taxpayer was resident and employed in London. He became a partner in a Jersey resident partnership and claimed relief from income tax on his share of partnership profits under the UK - Jersey Double Taxation Arrangements. The High Court and the Court of Appeal held that the taxpayer was entitled to relief on the basis that the partnership's profits were exempt from tax in the UK and the taxpayer's share of those profits was similarly exempt. Those decisions turned on the meaning of the term 'person' used in the double taxation arrangements which it was held included a partnership. The Inland Revenue had previously taken the view that the term did not include a partnership.

4. Before the appeal in Padmore had been finally determined by the courts, Parliament passed legislation in *Finance (No 2) Act 1987* to counteract the taxpayer's arguments. What is now *section 858(1) and (2) Income Tax (Trading and Other Income) Act 2005* ("ITTOIA 2005") was enacted, which provided that a partner in the relevant circumstances would be liable to income tax despite the existence of double taxation arrangements. The legislation had retrospective effect, save in respect of decided or pending litigation.

5. The Scheme being promoted by Montpelier involved the use of an Isle of Man resident trust. The intended effect of the trust structure was that Mr Huitson's income from the trust would be treated as being of the same nature as the underlying trust income, namely a share in the partnership profits. However Mr Huitson would not be a member of the partnership and therefore, so the argument goes, section 858 would not operate to prevent reliance on the DTA.

6. In Finance Act 2008 Parliament legislated to amend s 858 by the addition of s 858(4), again with retrospective effect. Section 858(4) reads as follows:

> "*(4) For the purposes of this section the members of a firm include any person entitled to a share of income of the firm.* "

7. The Respondents contend that the purpose of that amendment was to counteract arguments by taxpayers such as Mr Huitson that relief under the DTA was available. The Appellant contends that section 858(4) is not effective to counteract the Scheme.

8. Before the present appeal was notified to the tribunal, Mr Huitson commenced judicial review proceedings. He challenged the retrospective effect of s858(4) on the basis of infringement of rights under Article 1 First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ("A1P1"). The claim was dismissed by Kenneth Parker J in the Administrative Court – *R (Huitson) v Revenue and Customs Commissioners [2010] EWHC 97 (Admin).* An appeal was dismissed by the Court of Appeal - *R (Huitson) v Revenue and Customs Commissioners [2011] EWCA Civ 893*.

9. The Court of Appeal also heard and dismissed another challenge by way of judicial review relating to s 858(4) at the same time as Mr Huitson's appeal – *R (Shiner & Sheinman) v Revenue and Customs Commissioners [2011] EWCA Civ 892.* The claimants alleged that s 858(4) infringed Article 56 of the European Community Treaty (free movement of capital) now Article 63 of the Treaty of the Functioning of the European Union. The claimants also alleged as Mr Huitson was doing that there was an infringement of their rights under A1P1.

10. Mr Huitson's Notice of Appeal to the Tribunal dated 14 February 2013 contends that section 858(4) does not apply to his circumstances. The basis of that contention is that Mr Huitson was not a member of the partnership by virtue of section 858(4) because he was not entitled to a share of the *income* of the firm. His entitlement under the trust was to a share of the *profits* of the firm.

11. Very shortly before the hearing of the appeal Miss Graham-Wells, who appears for Mr Huitson, applied to amend the grounds of appeal as follows:

(1) To allege that the legislative amendment enacting section 858(4) was unlawful in EU law because it was an unlawful restriction on the movement of capital between Member States and infringed Article 56.

(2) To clarify the existing grounds of appeal.

(3) To dispute the amount of statutory interest payable.

12. We refused permission for Mr Huitson to amend his grounds of appeal to rely on Article 56 on the basis that it amounted to an abuse of process and also because the application was made so late in the day. We set out our reasons for doing so in more detail below. The sole ground of appeal remains that set out in Mr Huitson's Notice of Appeal which is essentially a matter of statutory construction. The issue is whether

Mr Huitson was entitled to a share of the income of the firm for the purposes of s 858(4).

13. We understand that the sum in dispute in Mr Huitson's appeal is approximately £195,000 comprising tax, national insurance contributions and statutory interest. Both parties agreed that the position in relation to national insurance contributions would follow the position in relation to income tax. We deal below with the point in relation to statutory interest. This is not a lead case, but there are other taxpayers who are in the same position as Mr Huitson, including clients of Montpelier and clients of other advisers.

14. The structure of this decision is as follows:

(1) Findings of Fact

(2) The Judicial Review Proceedings

(3) The Application to Amend

(4) Decision on the Appeal

(5) Conclusion

(1) Findings of Fact

15. We heard evidence from Mr Huitson and from Mr David MacDougall, an Inspector of Taxes who since May 2006 has been responsible for enquiries into Mr Huitson's tax returns. Both made witness statements and gave oral evidence.

16. From August 1985 onwards Mr Huitson supplied his services as an electrical engineering consultant through a UK limited company. His work involved the management of electrical engineering projects for businesses such as Network Rail and Alstom Power.

17. *Schedule 12 Finance Act 2000* provided that workers supplying services through an intermediary should be treated as if they were employees rather than self-employed persons for income tax and National Insurance purposes. The legislation is known as the IR35 legislation and was thought to have substantially reduced, if not eliminated, the tax advantages to self-employed persons of operating through intermediaries.

18. In or about early 2001 Mr Huitson became a client of Montpelier. Montpelier provided advice to Mr Huitson and others with respect to the Scheme. The Scheme sought to take advantage of the DTA and comprised three elements:

(1) On 20 June 2001 Mr Huitson established the Robert Huitson Family Settlement ("the Trust"). The trustee was an Isle of Man company called Crackington Limited ("Crackington"). Mr Huitson paid £1,000 to Crackington to establish the Trust. He was a beneficiary of the Trust and was entitled to the

income of the Trust as it arose during his lifetime. The trust deed permitted Crackington to carry on any trade or business with such other persons as it should think fit.

(2) On 20 December 2001 Crackington entered into partnership with four other Isle of Man companies which were each trustees of Isle of Man trusts set up by other persons who had entered into the Scheme. The five trust companies were known as "Ordinary Partners". Montpelier was also a partner and was known as the "Managing Partner". The Partnership was known as "the Allenby Partnership".

(3) On 20 August 2001 the Allenby Partnership entered into a contract for services with Mr Huitson under which he agreed to provide electrical engineering consultancy services and advice, and to develop electrical engineering IT. Mr Huitson contracted to work at least 1,200 hours per year. Under that contract Mr Huitson received a fixed fee of £15,000 per annum, or such lesser sum as might be generated by his work for the Partnership. The services were to be performed in any country in the world, excluding the Isle of Man. Mr Huitson did not work for anyone other than the Allenby Partnership. The evidence as to how Mr Huitson's work was invoiced was not clear.

19. We note the anomaly between the date the Allenby Partnership was constituted and the earlier date when it entered into the contract for services with Mr Huitson. Nothing turns on that for present purposes. HMRC do not suggest that the documents did not establish the legal relationships they purport to establish.

20. Clause 8 of the Allenby Partnership provided that the Managing Partner may engage any independent contractor as an adviser or consultant and may enter into any arrangements for the payment of any fees or other sums to such person. Pursuant to that power it entered into the contract for services with Mr Huitson and also we understand separate contracts with each of the other Ordinary Partners

21. Schedule 6 of the Allenby Partnership provided that the Managing Partner would determine the distribution of partnership profits as follows:

> "*The amount and frequency of distributions of partnership profits and the division of profits among the Partners shall be determined solely by the Managing Partner from time to time. In the absence of any decision by the Managing Partner on the distribution of partnership profits within three months of any year-end of the partnership, the profit distribution shall be as to 10% to the Managing Partner and equally among the Ordinary Partners. Losses shall at all times be shared and borne by the Partners as to 10% by the Managing Partner and equally among the Ordinary Partners.* "

22. Montpelier had obtained counsel's advice in relation to the Scheme. It was intended that under the rule in *Baker v Archer-Shee (1926) 11 TC 749* the income arising from the Allenby Partnership would be treated as Mr Huitson's income for tax purposes.

23. At all material times article 3(2) of the DTA has provided:

" *The industrial or commercial profits of an Isle of Man enterprise shall not be subject to United Kingdom tax unless the enterprise is engaged in trade or business in the United Kingdom through a permanent establishment situated therein. If it is so engaged, tax may be imposed on those profits by the United Kingdom, but only on so much of them as is attributable to that permanent establishment.*"

24. We should record that for the purposes of this appeal only, HMRC accepted that the Allenby Partnership was a Manx enterprise for the purposes of the DTA and that it had no permanent establishment in the UK.

25. The intended effect of the Scheme was that Mr Huitson would be treated as being entitled to the partnership profits as if he were a partner in the Allenby Partnership. They were the commercial profits of an Isle of Man enterprise and as such were not subject to UK tax. At the same time, the Isle of Man would not tax Mr Huitson on income from the trust because he is not resident in the Isle of Man. In the words of Kenneth Parker J, the Scheme would "*appear to realise every taxpayer's dream of lawfully avoiding, or at least greatly reducing, income tax in any jurisdiction*". In the case of Mr Huitson the effective rate of tax he would suffer on his income would be approximately 3.5%.

26. Financial statements for the Allenby Partnership show the following income of the partnership, the profits available for distribution and the profits distributed to Crackington as follows:

Period Ended	**Income** **£**	**Profit available for Distribution** **£**	**Profit distributed to Crackington** **£**
31 March 2002	228,145	174,259	19,802
5 April 2003	408,204	311,914	27,900
5 April 2004	404,335	304,327	31,829
5 April 2005	310,760	242,890	38,250
5 April 2006	327,053	268,593	39,200
5 April 2007	329,570	280,816	37,900

27. On 6 May 2005 one of the other Ordinary Partners of the Allenby Partnership resigned. Crackington resigned on 15 May 2007. By 29 May 2007 all the Ordinary Partners had resigned.

28. Mr Huitson has claimed relief in relation to trust income for the following years of assessment:

Tax Year	Amount £
2001-02	20,350
2002-03	27,350
2003-04	32,406
2004-05	38,250
2005-06	39,200
2006-07	37,900

29. The Inland Revenue (as it then was) had become aware of the Scheme by July 2002 when it issued a Technical Exchange to staff. Enquiries into Mr Huitson's tax returns for the above periods were opened together with enquiries into the returns of other clients of Montpelier who had used the Scheme. The enquiry into the 2001-02 return was commenced on 4 December 2003. On 16 May 2007 HMRC wrote to Mr Huitson and the other clients stating that they did not accept the claims to relief and that representative cases were being taken to the Special Commissioners. In February 2008 HMRC wrote to Montpelier stating that the Scheme was caught by section 858 ITTOIA 2005. At all material times until then section 858 and its predecessors had effect as follows:

> " *(1) This section applies if –*
>
> *(a) a UK resident ("the partner") is a member of a firm which –*
>
> *(i) resides outside the United Kingdom, or*
> *(ii) carries on a trade the control and management of which is outside the United Kingdom, and*
>
> *(b) by virtue of any arrangements having effect under section 788 of ICTA ("the arrangements") any of the income of the firm is relieved from income tax in the United Kingdom.*
>
> *(2) The partner is liable to income tax on the partner's share of the income of the firm despite the arrangements.*"

30. On 12 March 2008 a budget statement announced legislation to amend section 858. In the event section 58 Finance Act 2008 was enacted which provided as follows:

> "*(3) In section 858 of ITTOIA 2005 (resident partners and double taxation agreements), insert at the end - "(4) For the purposes of this section the members of the firm include any person entitled to a share of income of the firm"*

(4) The amendments made by subsections (1) to (3) are treated as always having had effect.

(5) For the purposes of the predecessor provisions, the members of a partnership are to be treated as having included, at all times to which those provisions applied, a person entitled to a share of income or capital gains of the partnership."

31. Following the retrospective amendment of s 858, HMRC refused Mr Huitson's claims to relief and issued closure notices on 21 August 2008 and 8 October 2008.

32. On 21 October 2008 Mr Huitson applied for permission to proceed with a claim for judicial review. As indicated above, he challenged the retrospective effect of s858(4) on the basis of infringement of his rights under A1P1. The principal remedy being sought was a quashing of the closure notices and a declaration that they were invalid. The claim was eventually dismissed by Kenneth Parker J in his judgment handed down on 28 January 2010. That judgment was upheld by the Court of Appeal in a judgment dated 25 July 2011.

33. On 7 February 2012 the Supreme Court refused permission to appeal. On 6 August 2012 Mr Huitson made an application to the European Court of Human Rights alleging infringement of his A1P1 rights.

34. In subsequent correspondence Montpelier has contended that Crackington and therefore Mr Huitson was not entitled to a share of the income of the partnership. He was entitled to a share of the profits. In those circumstances it was contended that section 858(4) did not in any event apply to the Scheme.

35. On 4 December 2012 Mr MacDougall gave his view of the matter for the purposes of the statutory review provisions in Taxes Management Act 1970 ("TMA 1970"). Essentially he contended that the Scheme was caught by section 858 as amended by section 58. Mr Huitson was entitled to a share of the income of the Allenby Partnership. He did not distinguish between a share of income and a share of profits for these purposes but it is clear to us that he considered the two terms to be interchangeable as far as Mr Huitson's entitlement under the Trust was concerned.

36. A review of the decision was carried out on 1 February 2013. It was common ground that the approach in the review letter was superficial and incorrect. However nothing turns on that for present purposes.

(2) The Judicial Review Proceedings

37. Mr Huitson's judicial review claim was brought on the basis that the retrospective element of the amendment in FA 2008 was incompatible with his right to peaceful enjoyment of his possessions guaranteed by A1P1.

38. In summary, Kenneth Parker J held that:

(1) Parliament was entitled to legislate with retrospective effect to prevent taxpayers from exploiting the DTA using what he described as "wholly artificial arrangements". In doing so it achieved a fair balance between Mr Huitson's A1P1 rights and the public interest in preventing tax avoidance – See [79] to [83].

(2) The respondents were not obliged to test the matter in the courts before legislation with retrospective effect was enacted. Failure to follow that route as had been done in Padmore was not disproportionate.

(3) The failure to make an impact assessment prior to legislating did not render the legislative amendment disproportionate.

39. The Court of Appeal recorded the ground of challenge at [21] of the judgment of Mummery LJ as follows:

"21 … *The ground of challenge is that the retrospective changes made by the amendments are disproportionate and are incompatible with Article 1. The claimed interference is retrospective deprivation of "possessions": that is, interference with proprietary interests in claims to relief from payment of income tax in the UK in respect of income received by the claimant in his capacity as owner of an interest in possession under his Manx trust. The case rests on legal objections to retrospective legislation, which violate the principle of legal certainty. The retrospective amendments are said to impose an unreasonable burden on the claimant. Issues of fiscal policy and proportionality are also raised. Reliance is placed on the claimed legitimate expectation of the taxpayer that the tax benefits of the scheme would not be removed with retrospective effect.*"

40. The basis of the appeal to the Court of Appeal was summarised at [45] as follows:

"45. *All of the submissions go to an over-arching general thesis that the retrospective provisions of the 2008 Act failed to achieve a fair balance between the interests of the general body of taxpayers and the rights of the claimant as an individual and that they are disproportionate and incompatible with Article 1.*"

41. It is clear that Mr Huitson's appeal was limited to a challenge based on his Convention rights under A1P1. The Court of Appeal dismissed Mr Huitson's appeal, essentially for the same reasons given by Kenneth Parker J.

42. The Court of Appeal heard Mr Huitson's appeal over the period 2-4 November 2010 and judgments were handed down on 25 July 2011. At the same time the same court heard an application for judicial review by Mr Ian Shiner and Mr David Sheinman who were separately represented from Mr Huitson. In hearing that application the Court of Appeal was acting as a court of first instance. We shall describe that application as "Mr Shiner's case".

43. The Court of Appeal in Mr Shiner's case summarised Mr Shiner's arguments and their relationship with Mr Huitson's case as follows:

> " *5. The application is for judicial review of the retrospective application of s.58 of the Finance Act 2008 (the 2008 Act). That made amendments to the legislation on UK tax affecting the income of foreign partnerships, UK residents and DTAs with the UK. The claimants' case is that the retrospective provisions of s.58 are contrary to and incompatible with the paramount provisions of Article 56 of the European Community Treaty (prohibition of restrictions on free movement of capital between Member States). That prohibition is now incorporated in the same terms in Article 63 of the Treaty on the Functioning of the European Union (TFEU). As Article 56 was the relevant provision in force at the material time, I will continue to refer to it rather than to its replacement.*
>
> *6. The claim is for a declaration that the amendments in s.58 are incompatible with Article 56 and that, as such, they cannot be applied lawfully by HMRC. Orders are also sought quashing the policy decisions of HMRC to enforce the retrospective aspects of s.58, as set out in a letter of 18 August 2008 sent by HMRC to the claimants. The claim for judicial review focuses on the terms of that letter.*
>
> *7. Article 56 is not the only arrow in the claimants' judicial review quiver. In common with Mr Huitson, who has brought an appeal with which this judicial review application was directed to be listed, the claimants say that the retrospective operation of s.58 on claims to relief from UK income tax on income received in the UK from trusts in the Isle of Man is incompatible with the fundamental human right to enjoyment of one's possessions. Protection from unjustified interference with that right is derived from the Human Rights Act 1998 which incorporates the provisions of Article 1 of the First Protocol to the Convention.*
>
> *8. In a sentence, this court has to decide whether it would be contrary to EU law and incompatible with Convention rights for HMRC to apply to the claimants and, in the case of Convention rights, to apply to Mr Huitson, amendments to primary fiscal legislation aimed at retrospectively nullifying the benefits of the tax avoidance scheme used by them.*"

44. It can be seen therefore that Mr Shiner was relying on EU law and in particular Article 56 as well as Convention rights under A1P1. Mr Huitson in contrast had only relied on Convention rights under A1P1. At [16] it was recorded as follows:

> " *16. The order [for permission to bring a judicial review claim] directed that the application should be listed at the same time as the appeal in the case of R (Huitson) v. HMRC [2011] QB 174 in which s.58 is alleged to be incompatible with Article 1 of the First Protocol to the Convention as set out in Schedule 1 Part II to the 1998 Act. Although the judicial review application and the Huitson appeal were heard sequentially at the same hearing and they overlap to*

some extent, it is more convenient to hand down separate judgments than a composite judgment. They can be read together for a fuller picture of the dispute about s.58 of the 2008 Act, Article 56 of the EU Treaty and Article 1 of the First Protocol to the Convention."

45. It was common ground in Mr Shiner's case that Article 56 has direct effect and that it is capable of conferring rights on individuals enforceable in the domestic legal order. It provides as follows:

"*1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.* "

46. The competing arguments in Mr Shiner's case were summarised at [17] and [18]:

"*17. In a tiny nutshell the main point forcefully advanced by Mr David Goldberg QC on the claimants' behalf is that the retrospective effect of s.58 is contrary to, and incompatible with, Article 56. The reason for incompatibility is that the amendments made by s.58 are capable of preventing, restricting or discouraging commercial investment of capital in foreign partnerships by means of unjustified discrimination between an investment of capital in a foreign partnership and an investment of capital in a UK partnership. It is argued that s.58 favours investment in a UK partnership by imposing an incremental domestic tax charge on income, which may already have borne tax in another jurisdiction. Its retrospectivity is an infringement of the EU principles of legal certainty and legitimate expectation. There is no justification for its retrospective and discriminatory effects. If this court has any doubt on this matter contrary to the claimants' contentions, then it ought to refer the questions of interpretation raised for rulings by the Court of Justice.*

18. The substance of HMRC's comprehensive response, also shrunk to nutshell size, is that, on the particular facts as they appear in this case, the claimants' main argument has no possible foundation in EU law. The claimants' case on EU law is described as so hypothetical that the court should not entertain it. In so far as the claimants may be affected by EU law on the actual facts of their case, they have failed entirely to address their effects, or the particular steps needed to establish that s.58 falls within the scope of application of Article 56 and other provisions and principles of EC law; or that s.58 amounts to a restriction on the free movement of capital; or that its provisions are discriminatory, or are incapable of justification, or are disproportionate, or offend the principle of legal certainty."

47. The facts as described by the Court of Appeal show that Mr Shiner had relied on what was essentially the same tax avoidance scheme as Mr Huitson, albeit with different advisers. Mr Shiner paid £10 to his Isle of Man trust which had been set up

for the purposes of the scheme and which entered into a partnership agreement with a similar trust set up by Mr Sheinman. The partnership then traded in the UK.

48. The Court of Appeal in Mr Shiner's case identified the following specific issues which were canvassed before it:

> " *(1) Was there a relevant "movement of capital" or a payment within the meaning of Article 56?*
>
> *(2) If so, was the transfer or payment made between a Member State and a third country? That would involve deciding whether, within the meaning of Article 56, the Isle of Man is a "third country" to which there has been a movement of capital from the UK.*
>
> *(3) If so, how wide can the inquiry then range beyond the particular facts of this case into the realm of hypothetical situations to which s. 58 and Article 56 might relate?*
>
> *(4) Does s.58 restrict transfers of capital to a foreign partnership, but not those to a UK partnership? If so, is that precluded by Article 56 (subject to the defence of justification)?*
>
> *(5) If s.58 is precluded by Article 56, can it be justified in whole or in part, so that the retrospective aspect of s.58 is valid, despite the breach of the Article?*
>
> *(6) Is there a doubt whether s.58 is precluded by Article 56 or whether it can be justified?*
>
> *(7) If so, should there be a reference of questions of interpretation of Article 56 to the Court of Justice?*
>
> *(8) Are the claimants' proceedings an abuse of rights under EU law?*"

49. The Court of Appeal expressed its reluctance to decide issues in the abstract which were not strictly necessary for adjudication in the context of its judicial review function. It decided that the transfer of £10 by Mr Shiner was not a movement of capital for the purposes of Article 56. At [53] Mummery LJ set out his reasons for that conclusion:

> " *53. The payment of £10 had nothing to do with the funding of the Manx partnership structure: it was put into a trust for the claimant and not into the Manx partnership, which was a distinct and separate entity from the Manx trust established by each claimant. Putting £10 each into Manx trusts, which the claimants have created and under which they are also entitled to a life interest, is not in itself a "movement of capital" within the meaning of Article 56. It does not become so, because the Manx trustee of the Manx trust is a member of a Manx partnership that uses the services of the settlor/ beneficiary, or chooses to*

pay the profits of the partnership into the trust for onward transmission to the principal beneficiary."

50. In the circumstances it was not necessary for the Court of Appeal to deal with the other issues on which it had heard argument.

51. Subsequent to the dismissal by the Court of Appeal of Mr Huitson's appeal he submitted an application to the European Court of Human Rights. We were provided with a copy of the decision of the Court which was released on 5 February 2015. Neither party sought to make any further submissions in the light of that decision. The Court declared the application inadmissible on the basis that even if there was interference with a possession, that interference struck a fair balance between the rights of Mr Huitson and the public interest in securing the payment of taxes.

(3) The Application to Amend

52. The draft amended grounds of appeal which Mr Huitson sought permission to rely on, generally criticised the fact that the amendment in FA 2008 was retrospective, was enacted without warning and was not applied consistently to all taxpayers. To some extent those grounds are relevant to the arguments based on Article 56. Otherwise, even if made out they would not establish any ground of appeal over which this tribunal would have jurisdiction. They are matters for judicial review and to a large extent were considered in Mr Huitson's judicial review proceedings.

53. The proposed amendments also included various arguments directed towards the uncertainty of the language used in s858(4). Miss Graham-Wells described them as clarifying the original ground of appeal. As such those arguments are relevant to the point of construction which is the original ground of appeal and we consider them below in that context.

54. The proposed amendments also challenged the Respondent's entitlement to statutory interest on any tax found to be due. In particular the period over which it was chargeable having regard to the retrospective legislative amendment. In the event Miss Graham-Wells accepted that was a matter for enforcement proceedings rather than this tribunal.

55. More significantly the proposed amendments alleged a breach of Article 56 based on the following matters:

(1) Section 858(4) is discriminatory, in that it applies only to UK resident participators in an overseas partnership.

(2) It discourages participation by UK residents in overseas partnerships by reason of the restriction on double taxation relief.

(3) The restrictions cannot be justified by a need to prevent tax avoidance because they are not limited to cases of tax avoidance.

56. In addition to the submission that s 858(4) breached Article 56, the amended grounds of appeal alleged a breach of Convention Rights, in particular Article 14 and

the prohibition of discrimination. In the event Miss Graham-Wells did not pursue that amendment.

57. Miss Graham-Wells submitted that Mr Huitson's right to move his £1,000 capital to invest it in a Manx partnership had been restricted.

58. We were told that Mr Shiner explicitly agreed to be bound by the Court of Appeal's decision in Mr Huitson's case in relation to A1P1. However there was no such concession on the part of Mr Huitson in relation to Mr Shiner's case and the Article 56 argument.

59. Miss Graham-Wells submitted that the decision of the Court of Appeal in Mr Shiner's case was simply that there was no movement of capital which engaged Article 56. She submitted that Mr Huitson's case was materially different because there was a movement of £1,000 to the Trust. We do not accept that there was any material difference. It is clear from the judgment of Mummery LJ in Mr Shiner's case that the £10 was paid by Mr Shiner to his Isle of Man trustees. The point being made at [53] of the judgment was that there was no restriction on a movement of capital to the trustees and there was no movement of capital to the partnership. The investment by the trustees in the partnership did not involve any cross-border element because both were resident in the Isle of Man. In our view Mr Huitson's case on Article 56 is factually indistinguishable from Mr Shiner's case before the Court of Appeal. To that extent we are bound by the judgment of the Court of Appeal.

60. It is not clear to us that the Court of Appeal's findings in relation to the proportionality of the retrospective amendment in relation to A1P1 would necessarily read across into the test of proportionality in relation to Article 56. It seems to us that the Court of Appeal was careful to confine its decision on proportionality in Mr Shiner's case to the A1P1 issue that it had decided in Mr Huitson's case. However it is not necessary for us to say that we would be bound by the Court of Appeal's decision on proportionality in relation to A1P1 in any argument based on Article 56.

61. Mr Beal QC who appeared together with Mr Rivett for the respondents submitted that the amendment to rely on Article 56 was an abuse of process in any event because it ought to have been raised by Mr Huitson in the Court of Appeal. There was no obvious reason why Mr Huitson could not have sought permission to amend his judicial review claim to encompass the Article 56 issue that the Court of Appeal was already dealing with in Mr Shiner's case.

62. We were referred to the decision of the House of Lords in *Johnson v Gore-Wood [2002] 2 AC 1*. The law in relation to abuse of process was summarised by Lord Bingham at 31A-F as follows:

> " *But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on*

efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

63. The crucial question is whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise an issue which could have been raised previously.

64. It seems to us that the most appropriate forum for Mr Huitson to raise the Article 56 issue was in his own judicial review claim. There was no explanation as to why he did not raise the issue either in the Administrative Court or before the Court of Appeal.

65. In all the circumstances and in the absence of any explanation we are satisfied that the application to amend was an abuse of process. That was one reason for which we refused permission to amend to introduce the Article 56 ground.

66. In any event, and taking into account the background to Mr Huitson's judicial review claim, we considered that the application to amend was made far too late in the day. Not only was it late in the day, but we also took into account for these purposes

that it was an issue that could and should have been raised in the judicial review proceedings.

67. In summary, Mr Huitson has been aware of the Article 56 argument since at least November 2010. His then counsel was present at the hearing before the Court of Appeal. Detailed directions were given in this Tribunal following a case management hearing in July 2014. There was no suggestion of any amendment to the grounds of appeal. The parties were notified of the final hearing date on 2 September 2014 after counsel for both parties had given their time estimates for the final hearing.

68. The application to amend the grounds of appeal to include the Article 56 argument was not made until 20 January 2015. That application envisaged the service of a least one further witness statement in support of the amended grounds of appeal. There was no witness statement or draft witness statement available. We were told that was to save expense in case the application was refused. It turned out that Mr Huitson wished to rely on supplementary evidence from himself and from Mr Paul Garrett of Crackington. We were told that the evidence would be short and speak to documents already in the bundle. If that is right it does not explain why no draft witness statements were available.

69. The position was that the respondents would be in a position where they would have little if any warning as to the evidence to be led in support of the amended grounds of appeal. Mr Beal fairly said that he was prepared to deal with the legal arguments that arise in connection with the amended grounds of appeal, but the respondents would be prejudiced if he was forced to effectively cross examine "blind".

70. It was inevitable that if we gave permission to amend the grounds of appeal then the hearing would have to be postponed, or at least go part heard. In the light of all the circumstances we did not consider that was consistent with the overriding objective of dealing with cases justly and fairly, even if it could be compensated for in costs. As a matter of discretion therefore we would also have refused the application to amend.

71. Mr Beal suggested that the application to amend was part of a cynical attempt to delay the hearing of the appeal. We are satisfied that was the case. Nor did we consider that a number of breaches of previous directions by Mr Huitson in relation to lists of documents for this appeal had any real significance in relation to our discretion to permit a late amendment.

(4) Decision on the Appeal

72. We now turn to the point of statutory construction which forms the grounds of appeal. We must decide whether the Scheme as implemented by Mr Huitson is caught by s 858(4). The short point is whether the reference in s 858(4) to income of the firm is intended to mean the profits of the firm.

73. Kenneth Parker J gave consideration to whether the Scheme would in fact work were it not for the amendment in s 858(4). He did not decide that issue, but he did

express reservations as to whether *Baker v Archer-Shee* would apply in the context of the DTA. At [72] he summarised his analysis:

> "*72. I would summarise the foregoing analysis as follows. The tax efficacy of the arrangements was far from clear cut. There were respectable arguments on both sides of the question. The rule in Archer-Shee has stood for a very substantial time: it was a powerful weapon in the hands of those relying on the arrangements. On the other hand, it appears to me that HMRC would have had strong purposive-based arguments that article 3(2) was not intended to apply to income received by a person behind the shelter of a trust, even if the income had its origins in the profits of a qualifying partnership, especially if the ultimate recipient of the income were not resident in the Isle of Man. Furthermore, the alternative possibility could not be ruled out that the courts would, for the purpose of anti-avoidance fiscal legislation, treat a person in the position of the Claimant as "a member of the firm" under section 858 of the 2005 Act. I do not believe that the outcome of any legal proceedings in respect of the arrangements would have been a foregone conclusion. They would, I believe, have been complex, protracted and costly.*"

74. The Respondents have not taken on this appeal any of the issues as to the efficacy of the Scheme which were considered by Kenneth Parker J. The sole issue for us is whether s 858(4) is engaged on the facts of the case. In that context it is notable that at [73] Kenneth Parker J stated:

> "*73. The whole matter was in any event put beyond dispute by section 58(3) of the 2008 Act …*"

75. It is clear from the judgment of Kenneth Parker J that both parties in Mr Huitson's judicial review claim considered that the amendment to introduce s 858(4) had resolved issues as to the efficacy of the Scheme in favour of the respondents, subject only to the A1P1 challenge. Similarly, in Mr Shiner's case Mummery LJ stated at [4]:

> "*4. Under purely domestic legislation having retrospective, as well as prospective, effect, the claimants are plainly liable to pay UK income tax for the past years of assessment…*"

76. It may be that Mr Huitson's representatives took the view at that stage that the amendment in s 858(4) put the arguments on the merits beyond dispute. That was how Mr Huitson's case was put in his Statement of Facts and Grounds in the judicial review. If that was right then judicial review provided the only remedy. We also observe that to bring a judicial review claim generally requires that other avenues of redress have been exhausted. If Mr Huitson's representatives thought there was an avenue of redress other than judicial review they would no doubt have brought that to the attention of the Administrative Court.

77. Notwithstanding the judicial observations of Kenneth Parker J and the Court of Appeal, the point of construction now raised by Mr Huitson was not argued before either court and we must consider the matter afresh.

78. In the context of A1P1 Kenneth Parker J set out various "incontrovertible" propositions at [76] including the following:

> "*… v) The fundamental purpose of DTAs is to avoid double taxation. It is not a purpose of DTAs to facilitate the complete avoidance of income tax in any jurisdiction, or to allow residents of a particular state to reduce the tax on their income to a level below that which would ordinarily be exacted by the state of residence.*
>
> *vi) It is a legitimate and important aim of UK public policy in fiscal affairs that a DTA should do no more than relieve from double taxation, and that a DTA should not be permitted to become an instrument by which persons residing in the UK avoid, or substantially reduce, the incidence of income tax that they would ordinarily pay on their income, including income earned from the exercise of a trade or profession. That is particularly the case where the means chosen to exploit the DTA in that way comprises artificial arrangements.*"
>
> (emphasis added)

79. It is notable that reference is made to income earned from the exercise of a trade or profession. Indeed Mr Gittins of Montpelier used the same terminology in one of his witness statements in the judicial review where he stated:

> "*… The clear purpose of Section 62 [Finance (No 2) Act 1987] was to amend the overseas partnership provisions in the 1970 Finance Act so as to remove the exemption conferred on persons like Mr Padmore by the UK Jersey Double Tax Treaty that is to say the UK resident partner in a foreign partnership relying on the terms of a Double Tax Treaty to exempt foreign partnership income from UK tax.* "
>
> (emphasis added)

80. Plainly what is subject to income tax is the profits of a trade, which was the term used by Mummery LJ in the appeal against the judgement of Kenneth Parker J at [73]:

> "73. *Finally, in taking legitimate expectation into account in striking a fair balance which justified the retrospective legislation, the judge was fully and plainly entitled to take into account the reasonable expectation that, even if the scheme worked, UK residents should have to pay UK income tax on the profits of their trade or business.*"

81. Miss Graham-Wells submitted that s858(4) was imprecise and vague in making reference to "income". It is not defined in the Taxes Acts and she described it as a nebulous term. Whether that is right or not will depend on the context in which it is

used. We accept that strictly it may have been clearer if Parliament had referred to profits rather than income. However we are satisfied that Parliament used the term income to refer not to a share in the income or gross receipts of a partnership but to a share in the profits of the partnership.

82. In our view it would be extraordinary if Parliament intended s 858(4) to refer to a person having a share in the gross income of a partnership. Section 858 itself was clearly an anti avoidance provision aimed initially at schemes such as those in Padmore involving a share of profits. Mr Gittins accepted as much in his evidence in the judicial review proceedings and Kenneth Parker J described it as such when setting out the legislative history. The same context was also described in the Explanatory Note to the Finance Bill 2008.

83. Both parties agreed that we must give s 858(4) a purposive construction and we were referred to the now well known passage from the judgment of Lewison J as he then was in *Berry v HMRC [2011] STC 1057* which at [31] provides a helpful summary of the purposive approach to statutory construction involved in the *Ramsay* principle. We have had regard to the whole of that summary, but we note in particular the following paragraphs emphasised in submissions:

> " *iv) Although the interpreter should assume that a statutory provision has some purpose, the purpose must be found in the words of the statute itself. The court must not infer a purpose without a proper foundation for doing so (Astall v HMRC (§ 44)).*
>
> *v) In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole (WT Ramsay Ltd v Commissioners of Inland Revenue (1981) 54 TC 101, 184; Barclays Mercantile Business Finance Ltd v Mawson (§ 29)).*
>
> …
>
> *vii) In looking at particular words that Parliament uses what the interpreter is looking for is the relevant fiscal concept: (MacNiven v Westmoreland Investments Ltd [2001] STC 237 (§§ 48, 49)).*"

84. Miss Graham-Wells submitted that HMRC's approach went beyond a purposive construction. They were seeking to re-write s 858(4) to refer to "a share of the income *and/or the profit* of the firm". We do not accept that submission.

85. Mr Beal referred to a number of provisions which he submitted provide a context in which to construe the term income. In particular s 1 ITTOIA 2005 states "*This Act imposes charges to income tax under – (a) Part 2 (trading income)* …". Part 2, s 3(1) then states that a charge to income tax is imposed on "*the profits of a trade*".

86. Clearly the trading profits of a partnership are taxed on the individual partners according to their share of those profits (s 852 ITTOIA 2005). It seems to us that

Section 8(1B) TMA 1970 which deals with the requirement for partners to make a tax return is even more directly in point:

> "*In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under this section shall include each amount which, in any relevant statement, is stated to be his share of any income, loss, tax, credit or charge for the period in respect of which the statement is made.*"
>
> (emphasis added)

87. A partnership statement is a statement under section 12AB TMA 1970 which must include the "*amount of income or loss [which] has accrued to or has been sustained by the partnership* …" together with the amount equal to each partner's "*share of that income [or] loss* …". It seems to us that the reference here to partnership income is plainly intended to refer to a partnership's trading profits and the individual partners' shares of those profits.

88. We are satisfied from all the examples given above that in some contexts the term income can be construed as meaning profits. In the present context we accept Mr Beal's submission that income in section 858(4) means the profits of a partnership. We agree with Mr Beal that the term income was used not to distinguish entitlement to the profits of a partnership but the position in relation to capital gains. There is support for that conclusion in the provisions of section 58 FA 2008. Section 58(2) made an identical amendment to s 59 Taxation of Chargeable Gains Act 1992 which was the equivalent anti-avoidance provision for chargeable gains realised by overseas partnerships. Similarly, for the purposes of retrospective application of the amendments and the predecessor provisions, section 58(5) also distinguishes between a share of income from a partnership and a share of capital gains of a partnership.

89. In our view it is not unnatural in the context of income tax to refer to an entitlement to income from a partnership when meaning an entitlement to a share of the profits of the partnership. In particular when it is in the context of a beneficiary's entitlement to trust income which comprises the trust's share of the profits of a partnership in which it is a partner.

90. In the light of the legislative history, and giving the provision a purposive construction, we are satisfied that the Scheme is caught by s 858. Mr Huitson is to be treated as a member of the Allenby Partnership in all the relevant tax years because he was entitled to a share of the income of the partnership.

Conclusion

91. For the reasons given above we dismiss the appeal.

92. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later

than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 3 SEPTEMBER 2015