[2015] UKUT 0130 (TCC)
Appeal number: FTC/94/2014

INCOME TAX /CORPORATION TAX - Losses – interpretation of s118ZC ICTA 1988 limit on loss relief for members of LLPs - whether appellant's third share in capital of LLP was "contributed" as capital (s118ZC(3) ICTA) on basis that this was the amount appellant had exposed to risk– no - whether appellant's third share was included in amount the appellant was "liable to contribute" to the assets of the LLP in the event LLP was wound up (s118Z(4)(a) ICTA) – no - appeal from Tax Chamber allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and -	
(1) HAMILTON & KINNEIL (ARCHERFIELD) LIMITED **(2) ARCHERFIELD ESTATES LIMITED** **(3) H&K ENTERPRISES LIMITED**	**Respondents**

TRIBUNAL: MR JUSTICE WARREN CP

Sitting in public at George House, Edinburgh on 17 February 2015

Graham Maciver for the Appellants

Julian Ghosh QC and Thomas Chacko for the Respondents

DECISION

Introduction

1. The appellants ("**HMRC**") appeal from the decision of the Tax Chamber released on 10 April 2014 ("**the Decision**") allowing the appeals by the respondents against amendments to their respective corporation tax returns. The appeal of the first respondent ("**HKAL**") was for the period ending 28 February 2009 and the appeals of the second respondent ("**Estates**") and the third respondent ("**Enterprises**") were for the periods ending 31 October 2007,31 October 2008 and 31 October 2009. The amendment to HKAL's return reflected the non-availability of the loss which it had claimed and the returns of Estates and Enterprises reflected the knock-on effect of part of the loss claimed being unavailable for surrender to them.
2. The tribunal comprised Judge Raghavan and Mr Richard Law (together "**the Tribunal**"). The Tribunal were split on their ultimate decision although there was common ground on one issue. By the casting vote of Judge Raghavan, it was held that the loss claimed by HKAL was available and its appeal allowed. The surrender of part of the loss to Estates and Enterprises was therefore effective and their appeals were also allowed.
3. I will refer to paragraphs of the Decision in this format: Decision [x]. The facts agreed are set out in Decision [5] to [24]. I do not need to repeat them. The material points are these:
    a. HKAL was at all relevant times a member of the limited liability partnership called The Renaissance Club at Archerfield LLP ("**RCA**"). The other member was at all material times a Delaware limited liability corporation called Invest Archerfield LLC ("**IALLC**").
    b. IALLC represented the interests of a group of American investors. HKAL and IALLC were at all material times dealing at arm's length.
    c. The purpose of RCA was to develop and run a golf course and associated hospitality business on the Archerfield Estate in East Lothian. RCA was governed by an agreement ("**the LLP Agreement**") dated 1 April 2005.
    d. RCA made substantial trading losses during the years in issue. For its accounting period ending 29 February 2008, HKAL claimed trading losses relating to RCA of £806,058 and for its accounting period ending 28 February 2009 it claimed trading losses of £835,351

e. The accounts and abbreviated accounts submitted with HKAL's corporation tax return for the periods ending 29 February 2008 and 28 February 2009 stated that they were prepared on the historical cost basis and recorded that HKAL was a member of and held a one-third share in the LLP and that "there was no cost to the investment".

f. On 19 May 2010 HMRC opened an enquiry into HKAL's corporation tax return for the period ending 28 February 2009; and on 26 October 2011 HMRC issued notices amending HKAL's return for the period ending 28 February 2009 so as to disallow the claimed trading losses.

The LLP Agreement

4. The material terms of the LLP Agreement were as follows:

a. Clause 1.1 contained definitions including these:

"Capital"	means the net capital of the LLP as shown in any balance sheet prepared in accordance with the provisions hereof as belonging to the Members and being the excess of the assets of the LLP over its liabilities;
"Contribution"	means any money or assets paid into the accounts of the LLP by a Member…less any liabilities attaching thereto which shall be assumed by the LLP in substitution for it;
"Members"	means [HKAL] and IALLC;
"Member's Share"	means a Member's share and interest of and in [the net capital of the LLP];
"Relevant Proportion"	means: (a) in respect of IALLC, 66.66%; and (b) in respect of [HKAL], 33.34%."

b. Clause 3.8 provided that on the Completion Date [in the event, 3 March 2006]

> "3.8.1 IALLC shall remit to the bank account of the LLP…the sum of US$8 million by way of an initial cash Contribution to the LLP"

c. Clause 9.1 provided that:

> Notwithstanding the amount or value of any Contributions made by each Member as at the Commencement Date or the Completion Date or any other provision of this Agreement, each of the Members shall

acquire as at the Completion Date a Member's Share equal to the Relevant Proportion for that Member. The Members agree that at the Completion Date all necessary adjustments shall be made to the capital accounts of the Members so as to reflect the holding by each Member of the relevant Member's Shares according to the Relevant Proportion for that Member.

d. Clause 10 provided that:

> Notwithstanding the amount or value of any Contribution made by each Member as at the Commencement Date or the Completion Date or any other provision of this Agreement, the profits or losses of the LLP shall, in the case of profits, be payable or, in the case of losses, be allocated, by the LLP to the Members or by the Members to the LLP (as the case may be) in or on the basis of the Relevant Proportions.

e. Clause 21, dealing with winding up, contained the following:

> 21.1 For the avoidance of doubt, no Member has agreed with the other Members or with the LLP that it shall in the event of the winding up of the LLP contribute in any way to the assets of the LLP in accordance with section 74 of the Insolvency Act [ie Insolvency Act 1986 as amended].
>
> 21.2 In the event of the winding up of the LLP then any surplus of assets of the LLP over its liabilities remaining at the conclusion of the winding up…shall, notwithstanding the amount or value of any Contributions made by each Member or any other provision of this Agreement…be payable by the liquidator to the Members in the Relevant Proportions.

Limited Liability Partnerships

5. A Limited Liability Partnerships (an "**LLP**"), unlike a traditional partnership, is a body corporate with legal personality separate from that of its members. It is formed by being incorporated under the Limited Liability Partnerships Act 2000 ("**the LLP Act"**): see section 1(2). The nomenclature is, perhaps, liable to lead to some confusion because the corporate body has "members" not "partners" even though the body is called a Limited Liability Partnership.

6. Except as otherwise provided by the LLP Act or any other enactment, the law relating to traditional partnerships (whether English or Scottish) does not apply to an LLP: see Section 1(5).

7. The mutual rights and duties of the members of an LLP and the LLP itself are, subject as provided in the LLP Act or any other enactment, governed:

    a. by agreement between the members, or between the LLP and its members: see section 5(1)(a), or

    b. in the absence of agreement as to any matter, by any provision made in relation to that matter by regulations under section 15(c) of the LLP Act: see section 5(1)(b).

8. Although regulations have been made under that section (the Limited Liability Partnerships Regulations 2001 (SI 2001/1090)) nothing turns on their detail for the purposes of the present case save for Regulation 5 which applies, subject to certain modifications, the provisions of the Insolvency Act 1986 to LLPs. Those include modifications to section 74 as set out in Schedule 3 to the Regulations. The modified section reads as follows:

> 74. When a limited liability partnership is wound up every present and past member of the limited liability partnership who has agreed with the other members or with the limited liability partnership that he will, in circumstances which have arisen, be liable to contribute to the assets of the limited liability partnership in the event that the limited liability partnership goes into liquidation is liable, to the extent that he has so agreed, to contribute to its assets to any amount sufficient for payment of its debts and liabilities, and the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves.

Clause 21.1 of the LLP agreement makes clear beyond argument that HKAL did not enter into any agreement for the purposes of this modified section 74; and it is equally clear that no such agreement can be implied.

9. Section 10 of the LLP Act inserted new sections after section 118 Income and Corporation Taxes Act 1988 ("**ICTA**"). I will refer to those in more detail in a moment.

10. One consequence of the corporate nature of an LLP is that it owns its assets beneficially. Unlike a traditional partnership under English law, the members of the LLP do not own its assets. In that respect, an LLP is like a company incorporated under the Companies Acts. Instead, a member owns a membership interest or share which creates a bundle of rights and duties. The rights will ordinarily include the right to a share of profits and a right to share in surplus on a winding-up. The member may also have the right to take part in management. The LLP agreement may impose duties on the member: the member may commit to working full-time for the LLP and may be obliged to make an additional contribution in the event of a winding-up.

Limited Partnerships

11. LLPs are not to be confused with limited partnerships under the Limited Partnership Act 1907. These partnerships are traditional partnerships but subject to the special provisions laid down in that Act. Under section 4(2), a limited partnership must consist of one or more general partners who shall be liable for all the debts and obligations of the firm and one or more limited partners who shall at the time of entering into such partnership contribute a sum or sums as capital and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed. A limited partner is not, during the continuance of the partnership, to draw out or receive back any part of his contribution; and if he does so, he is liable for the debts and obligations of the firm up to the amount drawn. By

section 6(1), it is provided that a limited partner shall not take part in the management of the partnership business.

Tax legislation

12. The provisions in force at the relevant time were to be found in ICTA. The sections referred to below are those of ICTA unless otherwise indicated.

13. Section 114 made provision for the computation under Schedule D of the profits and losses of a trade carried on in partnership where one of the partners was a company. Those profits and losses were to be calculated for the purposes of corporation tax as if the partnership were a company, subject to a number of exceptions (not relevant for present purposes) set out in section 114(1). The company's share in the profits or loss ascertained in that way were assessable and chargeable to corporation tax as if that share derived from a trade carried on by the company alone.

14. Sections 117 and 118 provided restrictions on certain types of loss relief in the case of limited partners who were, respectively, individuals and companies. Section 118 which is relevant in the present case, restricted the total loss relief which could be claimed by corporate limited partners to "the relevant sum". This was defined as

> "the amount of the partner company's contribution to the trade as at the appropriate time"

where "the appropriate time" was

> "the end of the relevant accounting period in which the loss is incurred…."

15. Section 118(3) completed the picture, providing as follows:

> "(3) A partner company's contribution to the trade at any time is the aggregate of –
>
> (a) the amount which the partner company has contributed to the trade as capital and has not, directly or indirectly, drawn out or received

back (other than anything which it is or may be entitled so to draw out or receive back at any time when it carries on the trade as a limited partner or which it is or may be entitled to require another person to reimburse to it), and

(b) the amount of any profits of the trade to which the partner company is entitled but which it has not received in money or money's worth."

16. Sections 118ZA to 118ZD dealt with the position of LLPs. Section 118ZA provided:

> "(1) For corporation tax purposes, where a limited liability partnership carries on a trade, profession or other business with a view to profit—
>
> (a) all the activities of the partnership are treated as carried on in partnership by its members (and not by the partnership as such),
> (b) anything done by, to or in relation to the partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and
> (c) the property of the partnership is treated as held by the members as partnership property……"

17. Section 118ZB provided that section 118 was to apply in relation to a member of an LLP as in relation to a limited partner but subject to sections 118ZC and 118ZD. Section 118ZD is not relevant to the present case. Section 118ZC, however, is the critical provision. It provided as follows:

> "(1) Subsection (3) of section 118 does not have effect in relation to a member of a limited liability partnership.
>
> (2) But, for the purposes of ...section 118, such a member's contribution to a trade at any time ("the relevant time") is the greater of–
>
> (a) the amount subscribed by it, and
> (b) the amount of its liability on a winding up.
>
> (3) The amount subscribed by a member of a limited liability partnership is the amount which it has contributed to the limited liability partnership as capital, less so much of that amount (if any) as–
>
> (a) it has previously, directly or indirectly, drawn out or received back,
> (b) it so draws out or receives back during the period of five years beginning with the relevant time,
> (c) it is or may be entitled so to draw out or receive back at any time when it is a member of the limited liability partnership, or

(d) it is or may be entitled to require another person to reimburse to it.

(4) The amount of the liability of a member of a limited liability partnership on a winding up is the amount which–

(a) it is liable to contribute to the assets of the limited liability partnership in the event of the partnership's being wound up, and
(b) it remains liable so to contribute for the period of at least five years beginning with the relevant time (or until the partnership is wound up, if that happens before the end of that period)."

The Decision

18. The Tribunal was unanimous (although the reasoning of Judge Raghavan and Mr Law differed) in deciding that the amount of HKAL's contribution to capital was zero. Judge Raghavan decided that the amount which HKAL was liable to contribute on a winding-up of RCA was one third of the $8 million (I shall round the figure and call it $2.7 million) in fact contributed by IALLC. Mr Law's view was that HKAL was not liable to contribute anything on a winding-up. The decision of the Tribunal was that of Judge Raghavan as the presiding judge of the panel.

A summary of the parties' arguments

(1) HMRC

19. HMRC submit that this is a straightforward case. The Tribunal were right to conclude that the contribution of HKAL to RCA was zero. The word "contribution" should be given its ordinary and straightforward meaning of a payment or transfer of assets made by HKAL to RCA (a separate corporate entity which owns, beneficially, its assets). As a matter of fact, HKAL made no such contributions: the entire $8 million was contributed by IALLC. It is not argued on this appeal that $2.7 million was in fact contributed by IALLC on behalf of HKAL. It follows that HKAL did not make a contribution.

20. HMRC submit that Mr Law was right to conclude that HKAL had no liability to contribute on a winding-up and Judge Raghavan was wrong to reach the opposite conclusion. Far from there being any liability to make a contribution to RCA in the event of its winding-up, the LLP Agreement makes it clear that HKAL will have no such liability. The fact that HKAL had a one third membership interest in RCA is neither here nor there: that one third share did not arise as the result of any contribution by HKAL and the fact that, on a winding-up, there may be no surplus assets and thus no payment to HKAL, does not mean that it has a liability, on winding-up, to contribute an amount equal to the $2.7 million return of capital which it would have received if RCA had been profitable.

(2) HKAL

21. HKAL submits that the Tribunal was wrong to conclude that HKAL did not make a contribution at the initial stage. Although not asserting that $2.7 million was contributed by IALLC on HKAL's behalf, it is submitted that "contributed to capital" is apposite to capture that amount as an effective or constructive contribution to RCA because the LLP Agreement treats it as contributed to capital.

22. HKAL submits that Judge Raghavan was right to conclude that HKAL had a liability to contribute to the assets of RCA on a winding-up and that Mr Law was wrong to reach the opposite conclusion. A one third share of the $8 million which was contributed by IALLC was credited to HKAL's capital account and was at risk. The risk having materialised in the sense that RCA made losses so that HKAL would receive no return of that which was at risk, it can be said to be liable to contribute to the assets of the partnership. If there had been an LLP agreement

that allowed HKAL to protect its investment, then it would not have risked losing its investment on a winding-up.

The genesis of sections 117 and 118

23. Sections 117 and 118 and their predecessor provisions in Finance Act 1985 are anti-avoidance provisions introduced to counter the decision of the Court of Appeal in *Reed (HMIT) v Young* [1985] STC 25, upheld by the House of Lords (see [1986] STC 285), both decisions being reported at 59 TC 196. The case concerned a tax avoidance scheme in which the limited partner in a limited partnership claimed relief from income tax in respect of losses of £41,000 attributable to her share under the partnership agreement notwithstanding that she had contributed less than that. In the Court of Appeal it was held that section 4(2) of the Limited Partnership Act 1907 did not put a ceiling on the share of losses to be borne by a limited partner. Since, as was conceded by the Crown, the loss could be carried forward, it could also be set off against the income for the year in which the loss arose notwithstanding that the taxpayer was not liable for the losses in excess of her contribution. In similar vein, the House of Lords held that trading losses of a partnership were conceptually distinct from its debts and liabilities; the protection afforded by section 4 was immaterial to the question when the limited partners had "sustained a loss". The assessment to tax was concerned with trading losses which were allocated by reference to the share of the partner under the partnership agreement and bore no necessary relation to what might ultimately turn out to be the contribution which the partner might be called on to make towards the firm's debts.

24. The response of the Crown to the decision of the Court of Appeal was to limit the amount of loss relief available to a limited partner to the amount "contributed to the trade as capital…".

25. At Decision [41] and [42], the Tribunal referred to the competing mischiefs at which HKAL and HMRC say sections 117 and 118 were directed at. HKAL said that the mischief was a limited partner claiming more by way of loss relief than it is possible as a matter of economic reality for the partner to lose in participating in the business of the partnership. The same aim is to be found in relation to both an LLP and also its members. HMRC saw the mischief as an amount of loss being capable of set-off that is entirely unrelated to the taxpayer's own capital at risk. I do not gain assistance from these competing positions. The way in which each party identifies the mischief is really no more than an assertion of a factor which supports their respective ultimate conclusions.

"contributed…..as capital"

26. Section 118 is aimed at limited partners: this can be seen from the definition of "relevant accounting period" namely one during which the partner company carried on the trade as a limited partner. The partner company will, or should, have made a contribution to the limited partnership in accordance with section 4(2) Limited Partnerships Act 1907, the contribution being of "a sum or sums as capital or property valued at a stated amount". This will be reflected in the capital account of the limited partner. Mr Ghosh submits that capital is therefore fundamental to the concept of a limited partnership. It is this sort of capital to which section 118(3) was referring.

27. In contrast, he says that capital and capital contributions are not fundamental to the concept of an LLP. The LLP Act does not require partners to make capital

contributions, it does not define an LLP's capital and it does not place any capital (or capital maintenance) requirements on an LLP. He contends that this feature of the LLP regime is extremely relevant to the interpretation of section 118ZC.

28. I do not agree. It may be the case that there is no statutory obligation for capital contributions to be made to an LLP. But where contributions are in fact made and are credited to the capital accounts of members, there is capital of the LLP just as much as there is capital in the case of a limited partnership. The asserted differences between an LLP and a limited partnership in relation to capital do not require, in my view, fundamentally different approaches to be taken to the concept of "contribution" under section 118 and under section 118ZC.

29. It is clear, that section 118ZC must be construed as part and parcel of Chapter 7 Part IV ICTA. In particular, it must be construed consistently with section 118 and with the fasciculus of sections starting at section 118ZA. I agree, up to a point, with Mr Ghosh that it must have been intended to apply to LLPs the same restrictions as are found in sections 117 and 118. However, that would be subject to making the necessary adjustments (or to use forbidden language, *mutatis mutandis*) to reflect the different circumstances. Further, it may not be obvious how the restrictions in relation to a limited partnership should translate into a restriction in relation to an LLP. Moreover, effect must be given to the wording of section 118ZC where it cannot, on any view, be taken merely as a reflection of something similar in relation to limited partnerships, for example the reference to the "amount of its liability on a winding up". Ultimately, it is the language of section 118ZC which must be construed and section 118 can be only a tool in that exercise of construction.

30. Mr Ghosh submits that there is an "essential ambiguity" in section 118ZC because the LLP Act did not make provision for subscription to an LLP or for members to make contributions as capital. As he puts it, this was a consequence of the decision to make LLPs extremely flexible structures, under which the members would have considerable freedom to define their mutual rights and obligations. I do not agree that there is an essential ambiguity.

31. The structure of section 118ZC read with section 118 is this. Loss relief in the case of an LLP remains restricted by the amount of the relevant sum, that is to say the company partner's "contribution to the trade". That phrase is given a special meaning as the greater of the two amounts specified in section 118ZC(2). The first amount of the amount "subscribed by it [the member]" and the second is the amount of the member's "liability on a winding-up".

32. Section 118ZC(3) explains what "the amount subscribed" by a member is. It is the amount "contributed to the [LLP] as capital" less so much of that amount as falls within paragraphs (a) to (d) of that sub-section. Those paragraphs are all concerned with amounts which the member has drawn out or received back (whether directly or indirectly) or might draw out or receive back, or which another person might be obliged to reimburse. Section 118ZC(4) explains what the amount of the liability on winding up is.

33. All of these provisions must be construed together and the particular words used inform the meaning of each other. Thus the word "subscribed" is informed by the words "contributed… as capital"; and what is to be seen as contributed by way of capital is informed by the items which are to be deducted from the amount contributed.

34. The concept of "subscribing" to (whether viewed as subscription to the trade or to an LLP) is not, to my mind, a difficult one to grasp. It is the transfer of assets, usually money but sometimes assets valued at a stated amount, to the LLP in return for an interest in the LLP. An initial subscription will confer membership (if the person concerned is not already a member) which will carry the rights and duties agreed between the members among themselves and between the members and the LLP itself. Those rights and obligations can include a share in profits and losses, a right to a share in surplus on winding-up and a right (in contrast with a limited partner in a limited partnership) to be involved in the management of the business of the LLP.

35. In the present case, the $8 million paid to RCA by IALLC was clearly "subscribed". This is precisely described by the words "contributed to the [LLP] as capital" in section 118ZC(3), especially when that phrase is read together with the sub-paragraphs describing the reduction in the amount allowable. As the Tribunal put it at [47] of the Decision, both section 118 and section 118ZC necessarily assume that the "amount" of what has been "contributed…as capital" is straightforwardly quantifiable and that other amounts can be straightforwardly deducted from it.

36. Equally clearly, it was, I consider, subscribed by IALLC. I do not understand Mr Ghosh to dispute that. But what he says is that the same payment can give rise to a subscription by both IALLC and HKAL. HMRC say that this would amount to double-counting. IALLC could claim loss relief capped at $8 million and HKAL could claim loss relief capped at $2.7 million. This would allow the total amount of relief to exceed 100% of the capital contribution. Mr Ghosh points out, however, that section 118ZC is only a limitation on what may be claimed: there

has to be an actual loss accruing to the member so there is no double counting of any loss. I do not think that that is an answer to the point. If none of the members of the LLP has a liability to contribute to the assets of the LLP over and above their initial contributions (whether while the LLP is a going concern or on its winding-up) the result, if Mr Ghosh is correct, is to allow a loss greater than the total amount which has been contributed. I do not consider that this can have been the intention behind the legislation which was to restrict the relevant loss relief claims to the amounts contributed. Subject to one caveat, I would reject a construction which allows the same amount to be counted twice.

37. The caveat relates to the impact of Mr Ghosh's submissions in relation to section 118ZC(4). His argument is that that the contribution made by a member is the amount of that which he has put at risk in the enterprise. If, on a winding-up, there is no surplus, he has lost what he put at risk: it can be said that on a winding-up he is liable to contribute to the assets to that extent. Just as the amount which he has put at risk is to be seen as a liability to contribute at the stage of the winding-up, so too, it can be seen as a contribution at the initial stage as the amount the member has contributed within section 118ZC(3).

38. I will return to this caveat when I have considered the argument about section 118ZC(4). But I would add, at this stage, that even if Mr Ghosh's submissions on that aspect are correct, then it seems to me that in principle the total amount of the relevant loss relief available to the members collectively should be restricted by what they collectively have contributed. If Mr Ghosh is right to say that HKAL has put at risk $2.7 million, then it ought to follow that IALLC has not itself put that sum at risk; rather, it has simply transferred that sum to HKAL as part of a commercial arrangement. In that way, the total amount available would not

exceed $8 million. However, since Mr Ghosh does not pursue the argument that the contribution made by IALLC was made, as to one third, on behalf of HKAL, it is not easy to see how IALLC is to be deprived of its ability to rely on the full amount of $8 million as the relevant restriction on its own loss relief claim.

39. My provisional conclusion (provisional only because it is subject to the caveat) is therefore that HKAL did not make any contribution at the initial stage; it cannot claim one third of the $8 million contributed by IALLC as available under sections 118 and 118ZC as a contribution to HKAL's trade.

"liable to contribute to the assets"

40. HMRC submit that the meaning of section 118ZC(4)(a) is clear. The subsection requires it to be assumed that a winding-up is to occur and then for it to be considered whether a member must make a contribution and if so to what extent. In the present case, the LLP Agreement provides that no contribution is to be made. Thus HKAL was not liable to, and did not, pay any sum to the LLP and was not liable to, and did not make any contribution to its assets. I have already discussed the concept of a contribution in the context of section 118ZC. If the same concept is to be applied in relation to section 118ZC(4), then HMRC's submission would, I have no doubt, be correct provided that it is made clear how the quantum of that obligation is to be ascertained.

41. The restriction of loss relief under section 118ZC depends on the contribution to the trade at the "appropriate time" as defined in section 118, that is to say, the end of the accounting period in which the loss is incurred; and so the amount which the member is liable to contribute falls to be assessed at that time. Consider an example where an LLP agreement obliges a member (i) to contribute £1 million at the inception and (ii) to contribute (if needed) a further £500,000 on winding-up

whenever that winding-up occurs. The straightforward interpretation of section 118ZC(4) is that at any time before the LLP is in fact wound up, the "amount which the member is liable to contribute to the assets" in the event of a winding-up is £500,000. It makes no difference to that result that, if the LLP were in fact wound up no additional contribution would then be required because the LLP is solvent. Section 118ZC(4) is clearly, in my view, not concerned with an assessment of the actual solvency position of the LLP.

42. However, the relevant LLP agreement might be more complex. Suppose, for instance, that the obligation to contribute to capital in the example reduced by £100,000 each year so that, after the end of the 5th year of the business, there would no obligation to contribute at all. At the end of year 1, the obligation would reduce to £400,000 and if it were asked what the member was liable to contribute immediately after the end of the year, the answer would be £400,000, not £500,000. However, the actual restriction of loss relief would not be to £500,000 at the beginning or to £400,000 after year 1. Sub-section (4)(b) requires that the member remains liable to contribute the relevant amount for at least the next 5 years; in other words, assuming a winding-up within the next 5 years, the amount of his contribution on a winding-up would not decrease. In the example, by the end of year 5 there would be no obligation to contribute and thus the amount of the liability as defined under sub-section (4) would be nil, even at the beginning of the 5-year period.

43. Were it not for the surprising, arbitrary or absurd (depending on one's point of view) consequences of HMRC's approach which I come to in a moment, I would have no doubt at all that this straightforward construction of sub-section (4) is correct. However, Mr Ghosh submits, in the light of those consequences, that a

different approach should be taken to section 118ZC, an approach which eliminates such a result. He also relies on (i) the explanatory notes to section 118ZC (set out in Decision [73]) (ii) extracts from *Hansard*, submitting that the conditions for admissibility laid down in *Pepper v Hart* [1993] AC 593 are satisfied and (iii) the provisions of section 60 Corporation Tax Act 2010. HMRC's position is that neither (ii) nor (iii) is admissible or relevant. Before coming to those materials, I should explain his approach.

44. That approach is that a member's contribution and his liability to contribute on a winding-up are concerned with what it is that the member has put at risk in the enterprise. Thus the actual contribution of the member at the inception of the LLP (which on any view is a contribution for the purposes of section 118ZC(3)) is put at risk. Further, what is also put at risk, according to MrGhosh, is what the member has been credited with in the capital of the LLP. Thus, if the LLP were to be wound up, he would be entitled to a share of the capital; in the present case, HKAL would be entitled to $2.7 million (and, of course, a share of any ultimate surplus). By agreeing that its share of capital should be available to meet the liabilities of the LLP on a winding-up, HKAL "is liable to contribute to the assets….in the event of the partnership's being wound up" within the meaning of section 118ZC(4).

45. Since the issue before me is one of statutory interpretation – I have no power to rewrite the statute, of course – I asked Mr Ghosh to explain how he would have me read section 118ZC textually. He submits as follows:

    a. the word "contributed" in sub-section (3) is to be read as meaning "paid into or chosen to leave in";

b. the words "the amount which ….it is liable to contribute to" in subsection (4) are to be read as meaning "the amount which it has committed as forming part of, or will potentially add to" and the "assets" referred to means "assets available to creditors".

46. As to sub-section (3), he explains that the amount "which [a member] has contributed to the LLP as capital" includes both sums that the member has paid to the LLP on the basis that they are to form part of capital, and sums that the member has chosen (which includes choosing the terms of the LLP agreement as well as making choices under that agreement) to leave in the LLP as capital rather than withdrawing (by way of winding up or otherwise). This includes capitalised profits. While the member does not pay them into the LLP and in fact they originate in the LLP, the member has allowed them to be added to capital rather than taking them out: this is also "contribution".

47. This amount also covers capital sums allocated or assigned to a member, to the extent that they could have been returned to that member if the LLP had been wound up at the time of allocation or assignment.

48. Where shares in the capital are assigned then, if on assignment the partnership still has sufficient assets to return the capital assigned to a new partner (or to a partner whose share has increased by way of assignment), then, it is said, that partner has chosen to leave that capital in the partnership, which is a form of contribution. This would apply whether the new partner pays the old partner more or less than the capital transferred. I comment here that the submission made is premised on the assumption that the LLP has sufficient assets to return the capital assigned. This would require an enquiry into the level of solvency of the LLP before knowing what the contribution was. That cannot be right.

49. As to sub-section (4), he explains that an "amount" which a member is "liable to contribute to the assets of the LLP" on its winding up includes an amount already committed to the LLP which would form part of the assets available to creditors if the LLP were wound up, but which would otherwise be returned to the member on a winding up. In this context, "assets" means "assets available to creditors".

50. Mr Ghosh goes on to explain that, in a simple case, where a member's rights to capital are equal to the sums that that member paid in, this would mean that the same amount would be a contribution under 118ZC(3) and a liability to contribute under 118ZC(4). The amount committed to the LLP would include capitalised profits (which, though they do not originate from outside the LLP, are committed to it and put at risk of dissipation to creditors). It would also include sums standing as partnership capital (which represent sums committed to the partnership) which have been allocated to a member (as in the present case) or have been assigned to a member indeed.

51. This, in my view, represents a significant rewriting of what the words of the statute actually appear to mean. I have a number of observations to make on Mr Ghosh's approach as just explained before turning to the allegedly absurd results of HMRC's approach which Mr Ghosh says leads to what is, in my view, a very strained construction.

52. First, in relation to sub-section (3), Mr Ghosh includes within a member's contributions sums which "he has chosen (including choosing the terms of the LLP agreement as well as making choices under that agreement) to leave in the LLP as capital rather than withdrawing it". There is no need to adopt that formulation in relation to an actual contribution by the member concerned. The formulation is adopted so that HKAL can claim the $2.7 million in fact

contributed by IALLC as contributed by HKAL itself. I can see the argument that, where a member has left in the LLP a sum of money which it could have taken out, it can be said to have made a contribution of that amount. The basis of the argument is that the same result could have been achieved by the member withdrawing the money and then paying it back in. Leaving aside the question whether the withdrawal would fall within section 118ZC(3)(a) (which arguably it would: there is no reason why the withdrawal could not be matched with the payment-in even though it preceded the payment-in), the argument does not run if the member could not in fact withdraw the sum concerned. In the present case, HKAL could not, the day after the $8 million contribution had been made to RCA by IALLC, have withdrawn $2.7 million (at least, not unless IALLC agreed to that course, no doubt on an undertaking to pay the money back into RCA). Clause 11 of the LLP Agreement would not have allowed for this, as a matter of fact, it is simply inconceivable that IALLC would have allowed HKAL to withdraw $2.7 million unless it was an immediate "out/in" arrangement. In any case, if HKAL could have withdrawn this sum, then it would also have been entitled to withdraw it again having paid it in by way of contribution. In that situation, section 118ZC(3)(c) would apply and the amount of the contribution would be reduced to nil.

53. Secondly, it may well be correct that capitalised profits are to be treated as contributions. The act of capitalisation precludes the profits being withdrawn as profit. Economically, it is just as if the member had made a contribution of the undrawn capitalised profits. It is appropriate to see the act of capitalisation as equivalent to the making of a contribution. In contrast, the $2.7 million which Mr Ghosh would say has been contributed by HKAL was already capital, having been

contributed by IALLC; there is no equivalent to the capitalisation of profits which would constitute the $2.7 million a capital contribution made by HKAL.

54. Thirdly, I can see no argument, apart from the arguments based on the allegedly absurd and arbitrary results of HMRC's construction, why contributions should include capital sums allocated or assigned to a member. I am afraid I simply do not understand why this is said to be so.

55. Fourthly, I am troubled by the description of the amount which a member is liable to contribute on its winding up as including "an amount already committed to the LLP which would form part of the assets available to creditors if the LLP were wound up, but which would otherwise be returned to the member on a winding up". Mr Ghosh is well aware, as his skeleton argument makes clear, that an LLP has a corporate personality of its own and that its assets are in its beneficial ownership, not that of the members. Money which has already been contributed, to state the obvious, has been contributed. It was committed by being contributed. In the present case, $8 million was contributed, or committed if you will, by IALLC; HKAL contributed nothing nor did it commit anything of its own. What it owned, as a result of the arrangement with IALLC, was a membership interest in RCA: but that item of property was not and never became an asset of RCA. It is that asset which was at risk but that has never been contributed to RCA itself.

56. At this stage, I would like to say something about risk. Standing back, what has been risked in the enterprise of RCA was the investment in that enterprise. In capital contribution terms, the risk related to the $8 million all of which was provided by IALLC. IALLC risked losing that sum. HKAL having provided nothing in terms of capital contribution, took no risk at all of losing any capital. HKAL's membership interest was, I readily acknowledge, at risk. That interest,

however, was not an asset of RCA any more than an ordinary share in a limited liability company is an asset of the company. It cannot be said that HKAL's investment of $2.7 million was at risk because it made no such investment.

57. I will come later to the admissibility of Parliamentary statements. It is from them that Mr Ghosh derives the concept of risk as relevant to the construction of section 118ZC. My conclusion, as will be seen, is that the statements on which Mr Ghosh relies are not admissible for reasons which I will explain. But even if they were admissible I do not consider that, in relation to "risk", the statements get Mr Ghosh anywhere. What he relies on is a statement by Lord McIntosh, the Treasury spokesman in the House of Lords, when explaining what became section 118ZC. He explained that the limit in section 117 and 118 would not have worked because of the different structure of LLPs. The new section, he said,

> "defines the limit which reflected our policy of allowing claims by members in LLPs up to the amount of money that they stood to lose if the LLP was wound up because it was insolvent. The effect of this provision is to set a limit on claims based on any capital that the member has subscribed to become a member, plus any undrawn share of profit and any further amounts that he or she has undertaken to contribute in the event that the LLP is wound up.'

58. Leaving aside for the moment the reference to any undrawn share of profits, the policy mentioned was to allow claims up to the amount which the members stood to lose if the LLP was wound up because it was insolvent. Lord McIntosh's statement is far from the clear unequivocal statement which is required by *Pepper v Hart* if it is to be relied on. First of all, Lord McIntosh refers to members, not a member, and quite possibly meant that the members (together) would on a winding-up be limited to claims up to the amount which they, collectively, stood to lose. But even if he was focusing on an individual member, it is hardly likely that he had in mind a member such as HKAL which has had a sum credited to

capital account but which has contributed nothing. If asked whether such a member was contemplated, he might well have said that it was not because it did not stand to lose anything which it had invested.

59. I turn now to the allegedly absurd and arbitrary results of HMRC's approach on which Mr Ghosh relies. I take them substantially from Mr Ghosh's written submissions:

    a. The "greater of" test in section 118ZC(2) would mean that a member who contributed nothing when joining the partnership but agreed to contribute £400,000 on a winding up would have the same entitlement to loss relief as a member who had contributed £400,000 on joining and agreed to contribute a further £400,000 on winding up.

    b. Secondly, if someone purchased another partner's share, one would expect them to stand in the shoes of that partner for loss relief purposes: for example, if Partner A pays £1,000,000 into an LLP on foundation but three years later Partner B (who is not previously a partner) pays Partner A £1,000,000 in return for Partner A's share in the partnership, it seems correct that Partner B should become entitled to the possibility of £1,000,000 of loss relief. However, Partner B has not paid anything into the partnership. On HMRC's interpretation, Partner B is not entitled to any loss relief. In contrast, Mr Ghosh's approach, as applying to the risk of a member losing their stake in the LLP on winding up, deals with this. Where shares in the capital are assigned then, if on assignment the partnership still has sufficient assets to return the capital assigned to a new partner (or to a partner whose share has increased by way of assignment), then that partner has chosen to leave that capital in the partnership, which

is a form of contribution. This would apply whether the new partner pays the old partner more or less than the capital transferred.

c. Thirdly, reliance is placed on section 60 Corporation Tax Act 2010 ("section 60"). Mr Ghosh contends that it was assumed in Parliament and by the draftsman of the Corporation Tax Act 2010 that where a member's share of profit was not drawn but was added to capital, that could found an entitlement to loss relief. Such amounts, he says, are not "contributed" to the LLP: they originate in the LLP. Mr Ghosh's approach follows that of Judge Raghavan whose "interpretation of section 118ZC(4) allows for relief because they represent sums committed to the LLP that the member would risk losing on a winding up".

60. I consider those points in turn.

61. As to the first, HMRC accept that it is correct and that it appears to be arbitrary. Whether it is an absurd result is a different matter; sometimes, it has to be accepted, statutory provisions do not always precisely hit the target at which they are aimed, or, if they do hit the target, there is unforeseen collateral damage. It may be that that is the position in relation to section 118ZC.

62. As to the second point, Mr Ghosh says that it has never been HMRC's approach to refuse an assignee the benefit of his assignor's contribution when applying the restriction of loss relief under section 117, 118 or 118ZC. That demonstrates that the contribution does not have to be made by the person claiming the relief.

63. Alternatively, it is anomalous or even unprincipled that the assignee should not be able to take advantage of the assignor's contribution. At one point in his written submission, Mr Ghosh's position is that where shares in the capital are assigned, as described in the example in paragraph 54(b) above, then if on assignment the

partnership still has sufficient assets to return the capital assigned to a new partner (or to a partner whose share has increased by way of assignment), then that partner has chosen to leave that capital in the partnership, which is a form of contribution. This would apply whether the new partner pays the old partner more or less than the capital transferred. This deals he says with the anomaly referred to at paragraph 59 above.

64. I cannot accept those arguments:

a. First of all, the arguments rest on an unsubstantiated assertion about HMRC's practice.

b. Secondly, it was always possible for an assignment to be structured in such a way that the assignee did, in fact, make a contribution so that the suggested anomaly could have been avoided.

c. Thirdly, to the extent that the argument relies on the proposition that the member has chosen to leave the capital in the LLP, I repeat what I said at paragraph 53 above.

d. Fourthly, if HMRC's practice is as Mr Ghosh suggests, it may be wrong: it was HMRC's case before me that an assignee cannot take the benefit of an assignor's capital contribution for the purposes of these provisions. I do not propose to decide that point. I can see arguments that an assignee may be entitled to stand in the shoes of the assignor for the purposes of these provisions and be able to say that he has made a contribution; but there are contrary arguments and the point has not been argued. However, even if it is correct that an assignee is entitled to step into the shoes of the assignor of a membership interest in an LLP, it does not follow that a corporate member of an LLP which has itself made no contribution to the

LLP or its trade and which does not derive its interest other than by way of assignment, can claim that any amount has been "subscribed by it" within section 118ZC(2)(a).

e. Fifthly, the argument at paragraph 63 above turns on the LLP having enough assets to return capital to the member and on the proposition that the member has chosen to leave that capital in the partnership. This argument gets Mr Ghosh nowhere if the LLP is insolvent. And it gets him nowhere if, as in the present case, the member has no right to withdraw capital.

f. Sixthly, I repeat the comment at the end of paragraph 48 above.

65. As to the third point, Mr Ghosh puts his point carefully: section 60, he says, shows Parliament's assumption that capitalised profits could found an entitlement to loss relief. That may be so. But as paragraph 59. above shows, his argument was that such amounts are not "contributed" to the LLP; rather they originated in the LLP. On that footing, capitalised profits would not fall within section 118ZC(3) but only within section 118ZC(4). This, in turn, supports (he contends) a wide construction of the latter section and just as it captures the capitalised profits, so too it captures the $2.7 million.

66. It is said by HMRC that section 60 Corporation Tax Act 2010 cannot be relied on by HKAL for the interpretation of section 118ZC, a provision put on the statute book some 10 years earlier by the LLP Act. Lord Hodge referred, in *Scottish Widows plc v Commissioners for HM Revenue and Customs (no.2)* [2012] SC (UKSC) 19, to what Lord Diplock had said in *Inland Revenue Commissioners v Joiner* at pp 1715, 1716 namely that it was a legitimate purpose of legislation by Parliament to clarify the law by making it clear in which of two alternative

meanings the ambiguous language of an earlier statute was to be understood, but that it would only be if the language of a provision in an existing statute was ambiguous that it would be legitimate to infer that a purpose of the subsequent statute was to remove doubts as to what the law had always been. HMRC's position is that section 118ZC is not ambiguous in a relevant sense and that it cannot be relied on.

67. I was, however, referred to section 60 and have looked at it. Having done so, I propose to say something about it because I do not think that it supports Mr Ghosh's case. The Corporation Tax Act 2010 formed part of the tax code re-write: it was an Act "to restate with minor changes…certain enactments". It was not a pure consolidating Act. It should not be interpreted so as to conform precisely with the legislation it supersedes if a difference in meaning is the natural meaning of the words used; nor should earlier legislation necessarily be construed so as to conform with the clear meaning of the superseding legislation.

68. What section 60 provides is that a company's contribution to an LLP at any time is "the sum of amounts A and B". Broadly speaking, amount A corresponds to the contribution in accordance with section 118ZC(3) and amount B corresponds to the contribution in accordance with section 118ZC(4). Section 60(2) contains the definition of amount A; and section 60(3) provides that the company's share of profits (so far as that share has been capitalised) "is to be included in the amount which the company has contributed to the LLP as capital". Quite clearly, capitalised profits are included in amount A, not amount B. It is to be noted that these profits are not "to be treated" as included but are actually included. This indicates that the word "contribution" in this context subsumes capitalised profits, a meaning which I consider to be a perfectly normal interpretation of the word. If

anything, this structure supports an argument that capitalised profits are included as contributions within section 118ZC(3) so that section 60(3) simply makes explicit ("In particular,….) what is only implicit in section 118ZC(3). This is in contrast with Mr Ghosh's submission that such amounts are not "contributed" at all but (only) originate in the LLP.

69. There is a separate point arising out of section 60. Amount B is defined as the amount of the company member's liability of a winding-up of the LLP "so far as that amount is not included in amount A". It follows that the draftsman envisages that there might be an amount which the company member has contributed as capital which includes an amount which it is liable to contribute to the assets in the event of a winding-up. And so, Mr Ghosh submits, it is also the case that an amount may fall within both sections 118ZC(3) and (4). Accordingly, it is said that HMRC's argument that sub-section (4) is concerned only with additional amounts cannot be right.

70. It is right that the draftsman wished to cover the possibility that an amount falling within amount A might also fall within amount B and thus inserted a provision precluding double-counting. The fact that he wished to do so does not, however, demonstrate that he had in mind actual circumstances in which this might occur. He may well have included the exclusion out of caution. In any case, I do not think that it can be safely said that he considered that the whole of a member's actual contribution within amount A would ever also be within amount B were it not for the exclusion. I think the drafting would have been rather different if he had contemplated such a possibility. I make no decision about the meaning of section 60 since it has not been argued. The fact that its meaning is unclear means

that it is of no assistance in the exercise of interpretation of section 118ZC even if it is technically admissible for that purpose.

71. As to the question of the admissibility of section 60 as an aid to construction, the Tribunal dealt with this in Decision [81] to [85]. I agree with their conclusion that there is no relevant ambiguity in section 118ZC and that section 60 cannot be relied on. But if that is wrong, section 60 does not, as I have explained, assist HKAL.

72. As to the explanatory notes to section 118ZC (set out in Decision [73]), these are admissible as an aid to construction: *R (oao Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 at [1] – [6]. But care must be taken. Thus Lord Steyn said at [5] and [6]

> "5. Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see *Cross, Statutory Interpretation,* 3rd ed (1995), pp 160-161……..
>
> If exceptionally there is found in Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court. This reflects the actual decision in *Pepper v Hart* [1993] AC 593. What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."

73. So, what is it in the Explanatory Notes explaining section 118ZC on which HKAL relies? It is the sentence

> "The limit for relief claimed by members of LLPs would be the amount they have subscribed to the LLP together with any further amount that they have undertaken to contribute in the event that the LLP is wound up."

74. These words seem to me to reflect precisely what is found in section 118ZC(2)(a) and (3) (leaving aside the deductions under the lettered paragraphs of sub-section (3) which are referred to later in the same paragraph of the Explanatory Notes) and in section 118ZC(4)(a). Judge Raghavan was of the view that that was not so because the amount subscribed "together with any further amount…" did not match up with the "greater of" test found in the section itself.

75. It is true that there was no such match. But it would be wrong on the basis of that mismatch to search for a meaning of the statute which reflected the Explanatory Notes unless there was a choice between two equally simple and straightforward interpretations of the statute, one of which did, and one of which did not, reflect the Explanatory Notes. The explanation for the mismatch, surely, is that either the wording of the statute fails to reflect what the draftsman meant to say or that the Explanatory Notes are inaccurate. It seems to me that the latter explanation is far more likely. If the construction for which Mr Ghosh contends is correct, I find it astonishing that the Explanatory Notes are drafted in the way that they are. I would expect at least a passing reference to the proposition that the amount subscribed was included in the liability to contribute on winding-up.

76. In any case, if the mismatch is to be resolved, rather than left as an acknowledged error, it should surely be the Explanatory Notes, rather than the statute which should be given the strained construction. Thus, "any further amount" could be interpreted as meaning "the amount of any excess over the amount subscribed". I do not suggest that that should be done; but it seems to me to do no more damage

to the wording of the Explanatory Notes than HKAL's construction of section 118Z Cdoes to that section.

77. There are three other points which I wish to add ;

a. First, it is, it seems to me, a necessary part of Mr Ghosh's argument that any amount which is subscribed will automatically feature as part of the member's liability on a winding-up in an ordinary case. For example, suppose a case where the member has subscribed £100,000. He has received no return of capital and remains entitled to his capital share on winding-up. If the draftsman had really thought that the amount subscribed was already included in the liability on a winding up, he would hardly have drafted sub-section (2) in the way that he did. It may be that there are cases where the amount subscribed would not feature as an element of the liability on a winding-up with the result that section 118ZC(3) is not entirely redundant. Mr Ghosh has suggested a case in which that may be so. But that does not meet the point that, had the sub-section been intended to cover the ordinary case, it would have been drafted differently.

b. Secondly, in relation to an actual contribution, section 118ZC(3)(b) and (c) defined two circumstances in which the amount of the actual contribution was reduced for the purposes of the cap on loss relief. There is no corresponding provision in section 118ZC(4). There could, therefore, be circumstances under which loss relief would be capped, if it were only section 118ZC(3) which applied, at a lower figure than that which would apply if section 118ZC(4) also applied (as it would on Mr Ghosh's approach) in relation to the same actual contribution. That would be a

surprising result and, I suggest, one which is as equally an absurd result as the result of HMRC's approach.

c. Thirdly, section 118ZG (which applied to individual, rather than corporate members) provided that an individual member's contribution to the trade was the sum of (a) the amount subscribed (b) the amount of any undrawn profits and (c) where there is a winding-up the amount contributed to the assets of the LLP. This is not, of course, an identical provision to section 118ZC but both provisions refer to an amount subscribed (albeit differently defined) and both provisions refer to the amount contributed to the assets of the LLP. There is no provision (similar to that found in relation to amount B in section 60) preventing an amount contributed to the assets on winding-up which had already been included in the amount actually contributed at an earlier stage from being counted twice. It cannot be right, therefore, to apply to this section Mr Ghosh's approach to section 118ZC(4). Rather, the meaning of section 118ZG is clear, in my view, in drawing a distinction between amounts (a) and (c) above.

d. Other things being equal, the same construction should be given to the same or similar words and phrases in different sections within the same fasciculus of sections unless the context requires otherwise. This is a pointer against the construction of section 118ZC for which Mr Ghosh contends.

78. Mr Ghosh submits that this is a case where recourse should be had to *Hansard* and that, if that is done, the meaning of section 118ZC becomes clear. The Tribunal dealt with the admissibility of *Hansard* at Decision [77]. I agree with their conclusion and reasoning. The first requirement in *Pepper v Hart* is that the

legislation in question is ambiguous or obscure, or its literal meaning would lead to absurdity. I do not consider that section 118ZC is ambiguous or obscure. I do not consider that the factors which Mr Ghosh has identified mean that there is absurdity. Even if there were an absurdity, and even if the *Hansard* material demonstrated a clear intention that the amount contributed should include the amount subscribed together with any additional contribution on a winding-up, I do not consider that it is possible, by way of an exercise of construction, to give effect to such an intention.

79. Taking account of all the arguments and considerations addressed above, I reject HKAL's case. In my view, the decision of Judge Raghavan was in error and that of Mr Law is to be preferred. The caveat explained in paragraph 37 above can be ignored as being without substance.

Conclusion

80. HMRC's appeal is allowed.

Mr Justice Warren

Chamber President

Release Date: 20 March 2015