[2021] UKUT 104 (TCC)

PROCEDURE – application for preliminary hearing of issues refused by First-tier Tribunal – application of principles in Wrottesley v HMRC – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Appeal number: UT/2020/0058

BETWEEN

CHRIS HOYLE
TREVOR JARMAN
ALISTAIR FORSYTH **Appellants**

-and-

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

TRIBUNAL **JUDGE THOMAS SCOTT**
JUDGE ASHLEY GREENBANK

Sitting in public by way of remote video hearing treated as taking place in London on 21 December 2020

Andrew Thornhill QC and Ms Laura Ruxandu, instructed by Scotts Atlantic LLP, for the Appellants

Elizabeth Wilson QC and Mr Quinlan Windle, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

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DECISION

INTRODUCTION

1. This appeal relates to an application (the "Application") by the appellants, Mr Chris Hoyle, Mr Trevor Jarman and Mr Alistair Forsyth, for certain issues in their underlying appeals to be dealt with as preliminary issues. The Application was opposed by the respondents, the Commissioners for Her Majesty's Revenue and Customs ("HMRC").

2. The First-tier Tribunal ("FTT") (Judge Philip Gillett) refused the application in a decision released on 12 March 2020, with full reasons released on 7 April 2020. The appellants appeal to this tribunal, with the permission of the FTT.

BACKGROUND

3. The underlying appeals concern arrangements implemented by the appellants and others on the advice of Scotts Atlantic London LLP ("Scotts"), which were intended to enable the appellants to exit from a film partnership scheme without incurring material tax liabilities. The issue in those appeals is whether payments made to the appellants as part of those arrangements are subject to income tax under Chapter 5 of Part 13 of the Income Tax Act 2007 ("ITA") or, in the alternative, are subject to capital gains tax.

4. We have out in this section a brief summary of the factual background to the film partnership scheme and the exit arrangements, and the procedural history of the underlying appeals.

The film partnership scheme

5. The appellants were members (with others) of limited liability partnerships (the "LLPs"), which were set up with the assistance of Scotts. The appellants made capital contributions to the LLPs funded primarily by bank borrowings and partly from their own resources. The LLPs purchased the rights to various films and immediately leased them back.

6. In their partnership returns for the first tax year following their formation (which was either 2004-05, 2005-06 or 2006-07), the LLPs claimed trading losses amounting to almost the entire amount of the capital contributions. Relief was claimed under s48 Finance (No. 2) Act 1997 and under s42 Finance (No. 2) Act 1992.

7. The appellants' tax returns for the same tax years claimed sideways loss relief on the basis that the LLPs were carrying on a trade. The relief was carried back and set off against taxable income arising in earlier years and/or set off against taxable income arising in the year of the return.

8. HMRC opened enquiries into the partnership returns of the LLPs for the years in which the losses were claimed. The LLPs maintained, and HMRC at that stage accepted, that the LLPs were trading. Closure notices under s28B of the Taxes Management Act 1970 ("TMA") were issued to designated members of the LLPs concluding that "the trade loss… should be restricted". The amendments made by the closure notices reduced the quantum of the losses by relatively small amounts. The appellants' losses in the film trades were correspondingly reduced.

The exit arrangements

9. In early 2011, Scotts made a proposal to the members of each of the LLPs designed to allow them to dispose of their interests in the LLPs, and eliminate their liabilities to the banks, without incurring a material liability under Chapter 5 Part 13 ITA. The appellants all agreed to implement the exit arrangements.

10. Under the exit arrangements, inter alia:

(1) during the tax year 2012-13, the appellants assigned all their rights to distributable profits arising from their interests in the LLPs to a company incorporated in the British Virgin Islands and resident for tax purposes in Jersey for a sum which was used to repay the borrowings they had incurred to make their initial capital contributions to the LLPs;

(2) in the tax year 2013-14, the appellants transferred their residual interests in the LLPs to a company incorporated and tax resident in Ireland for a nominal sum;

(3) steps were taken to emigrate the trades and the LLPs to Ireland;

(4) two non-UK resident companies became designated members of the LLPs.

11. The appellants made their tax returns on the basis that the provisions of Chapter 5 Part 13 ITA applied to the nominal sum received for the disposal of their residual interests in the LLPs in the tax year 2013-14, but not to the purchase price paid for the sale of their rights to distributable profits arising from their interests in the LLPs in the tax year 2012-13.

The underlying appeals

12. HMRC opened enquiries into the tax returns of the appellants for the tax years 2012-13 and 2013-14. In December 2016, the enquiries were closed on the basis that Chapter 5 Part 13 ITA applied to bring into charge the proceeds of the sale of appellants' rights to the distributable profits arising from their interests in the LLPs either in the tax year 2012-13 or, alternatively, in the tax year 2013-14.

13. Following appeals to HMRC and statutory reviews, the appellants appealed to the FTT in 2017. The appellants' grounds of appeal assumed that the LLPs were trading at all relevant times. The arrangements for the hearing of the appeals and the parties' pleadings proceeded on that basis.

14. The appellants' appeals were listed for a five-day hearing commencing on 22 July 2019. On 1 July 2019, the appellants served their skeleton argument in accordance with the directions given by the FTT. The skeleton argument included an argument based on an assumption that the LLPs were not trading and referred to the decisions of the Court of Appeal in *Eclipse Film Partners (No 35) LLP v HMRC* [2015] STC 1429 and *Samarkand Film Partnerships No 3 v HMRC* [2017] STC 226.

15. On 2 July 2019, the appellants applied to amend their grounds of appeal to include the argument that the LLPs were not carrying on a trade during the tax years 2012-13 and 2013-14.

16. On 12 July 2019, the appellants made a further application to amend their grounds of appeal. In this application, the appellants sought to add two new grounds: (i) first, that the LLPs' activities did not amount to trading at any time; and (ii) second that, if the LLPs were trading when the loss relief was claimed, they were not trading in tax years 2012-13 and 2013-14. In both cases, the appellants asserted that the amounts received by them as proceeds of their disposals of their rights to distributable profits of the LLPs in the tax year 2012-13 were not subject to income tax under Chapter 5 Part 13 ITA.

17. The FTT considered the appellants' application at the start of the hearing of the appeal on 22 July 2019. The FTT decided to admit the new grounds of appeal and to adjourn the hearing to allow the parties to consider the new arguments. The FTT gave written reasons for its decision on 26 July 2019 and, at the same time, gave directions for the continuation of the appeal.

18. On 2 December 2019, HMRC delivered revised Statements of Case in respect of each appellant. In their Statements of Case, HMRC argued that:

(1) on the correct interpretation, Chapter 5 Part 13 ITA applied even if the LLPs were not carrying on a trade in the years covered by the appeal and/or the years in which they made loss relief claims;

(2) given the background to the appeals, and, in particular, the parties' long-held common understanding, the appellants were estopped from arguing that the LLPs had not been carrying on a trade.

19. On 9 December 2019, the FTT directed that the appellants should provide their representations to the revised Statements of Case within 60 days. On 6 February 2020, the appellants provided representations to HMRC's Statements of Case.

THE APPLICATION

20. Also on 6 February 2020, the appellants applied to the FTT for a direction for certain issues to be dealt with at a hearing of preliminary issues. The Application states:

> "The issue which the Appellants ask the Tribunal to hear as a preliminary issue is whether the anti-avoidance provisions in Chapter 5 Part 13 ITA 2007 apply in circumstances where the partnerships in which the Appellants participated were not trading in in the early years being 2004/5 in the case of Mr Jarman, 2005/6 in the case of Mr Forsyth or 2006/7 in the case of Mr Hoyle or in later years."

21. The Application therefore identified two issues to be dealt with at a preliminary hearing:

(1) whether the provisions in Chapter 5 Part 13 ITA 2007 can apply in circumstances where an individual never carried on a trade (even though he or she made a successful claim for loss relief); and

(2) whether it makes a difference if the individual carried on a trade, made a successful claim for loss relief, and then ceased to trade before the chargeable event occurred.

The appellants refer to these issues together as "the Trade Issue".

22. On 21 February 2020, HMRC submitted a notice of objection opposing the Application. On 9 March 2020, the appellants made representations in response to HMRC's notice of objection.

THE FTT DECISION

23. On 12 March 2020, the FTT determined the Application without a hearing. The FTT rejected the Application. It released a summary decision on 16 March 2020, and, following a request by the appellants, a full written statement of findings of fact and reasons for the decision on 7 April 2020. We refer to the FTT's full written statement of findings of fact and reasons for the decision as the "FTT Decision".

24. The FTT Decision can be summarized as follows:

(1) The FTT reminded itself (at FTT [14]) of its broad case management powers as set out in rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTRs"), and, in particular, its power in FTR rule 5(3)(e) to deal with a point as a preliminary issue.

(2) The FTT noted its obligation when exercising its powers to seek to give effect to the overriding objective to deal with cases fairly and justly (FTR rule 2).

(3) The FTT referred (at FTT [15]) to the decision of the Upper Tribunal in *Wrottesley v HMRC* [2015] UKUT 637 ("*Wrottesley*"), in which the Upper Tribunal set out the principles to be considered when deciding whether or not to order a preliminary hearing in the following terms (*Wrottesley* [28]):

28. We think that the key principles to consider can be summarised as follows:

(1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.

(2) The power should only be exercised where there is a "succinct, knockout point" which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a "knockout" one.

(3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.

(4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way- (3)(a) above.

(5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.

(6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.

(7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.

(8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly.

(4) The FTT then set out its reasons for rejecting the Application (at FTT [27] to [33]) in the following terms:

27. The Upper Tribunal also said in *Wrottesley* that a preliminary hearing should only be held where there is a ""succinct, knockout point" which will dispose of the case or an aspect of the case". In this case, it appears that the Appellants are suggesting that the determination of the Trade Issue will in effect dispose of the case in its entirety. I do not agree with this assessment.

28. In my view, the Trade Issue is not determinative of the case as a whole because HMRC have put forward additional arguments, as well as the question of the charge to capital gains tax on the disposal of the Appellants' interests in the partnerships. If a Tribunal were to find in favour of the Appellants on the Trade Issue then it would still be necessary to hold a subsequent hearing to consider the other arguments, including the somewhat complex issue of whether or not the Appellants are estopped from claiming that the partnerships in question never traded, because they initially claimed loss relief on the basis that the partnerships were trading.

> 29. If, on the other hand, a Tribunal were to find in favour of HMRC on the Trade Issue, then it would still be necessary to hold a subsequent hearing in order to determine the other issues because they might become relevant in the event of the, almost certain, appeal.
>
> 30. In addition, the various arguments in issue are not standalone arguments. They are intertwined and difficult to separate easily.
>
> 31. The Trade Issue would not therefore in my opinion be a "knockout point" nor would it be particularly "succinct". It is not a preliminary issue. It is at the very heart of this case.
>
> 32. In addition, I understand that there are a number of similar appeals standing behind this appeal. Given the issues and the amounts at stake, it is highly likely that any decision on the proposed preliminary issue would be appealed, leading to a very long drawn out appeals process before the other issues in the case could be considered. This would be a most unsatisfactory outcome.
>
> 33. I therefore consider that the best way to deal with this appeal fairly and justly is to have all issues heard together in light of all the relevant facts.

THE GROUNDS OF APPEAL

25. The appellants appeal to this Tribunal against the FTT Decision. In summary, their grounds of appeal are that, although the FTT correctly identified the relevant test, it failed properly to apply it to the facts before it. In particular, the appellants say that the FTT erred in law:

(1) in concluding that the Trade Issue was not a "succinct, knockout point"; and

(2) in concluding that that the overall delay in proceedings would be long and prevent the consideration of additional issues which could affect a number of similar appeals standing behind the current proceedings.

THE PARTIES' SUBMISSIONS

The appellants' submissions

26. Mr Thornhill acknowledges that this is an appeal against a case management decision and that, on an appeal from a case management decision, where the FTT has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, the Upper Tribunal should not interfere unless the decision is so plainly wrong that it is outside the generous ambit of discretion afforded to the FTT (*HMRC v Ingenious Games LLP and others* [2014] STC 1416 ("*Ingenious Games*") per Sales J at [56]). However, he says, in this case, although the FTT identified the correct legal test, it failed to apply that test correctly. This is not a case therefore where the Upper Tribunal needs to be cautious in interfering with an FTT decision. The FTT's decision was simply wrong.

27. Mr Thornhill points to three errors which he says the FTT made in its application of the principles set out by the Upper Tribunal in *Wrottesley*.

(1) First, in deciding whether or not the Trade Issue was a "succinct, knockout point", the FTT failed to appreciate that a difference of view between the parties on the facts did not prevent a point being a "succinct, knockout point". The FTT could and should have directed a preliminary hearing on assumed facts – taking HMRC's view of the facts as the basis for the assumed facts.

If it had done so, it should have been apparent to the FTT that the Trade Issue was a "succinct, knockout point". The point is one of pure statutory construction as to

whether the requirements of s797(1) ITA can be met where the LLP (and so the individual) did not, in fact, carry on a trade when the loss relief was claimed. No factual evidence is required to determine that point.

(2) Second, the FTT failed to deal properly with HMRC's estoppel argument. The estoppel argument is, in reality, simply an aspect of the Trade Issue i.e. on the assumption that no trade was carried on by the LLPs, can the provisions of Chapter 5 Part 13 ITA apply where the taxpayer has claimed a loss (which was allowed by HMRC) on the basis that the LLPs were trading?

In any event, Mr Thornhill says that the concept of *res judicata* (and therefore issue estoppel) does not apply in tax cases. He refers to the High Court decisions in *King v Walden* [2001] STC 822 ("*King v Walden*") and *Carvill v Inland Revenue Commissioners (No. 2)* [2002] EWHC 1148 (Ch), [2002] STC 1167 ("*Carvill (No. 2)*") in support of this submission.

(3) Third, when applying the principles in *Wrottesley*, the FTT overlooked the following advantages of a preliminary hearing.

(a) The capital gains tax issue is a pure question of law which could also be decided as part of the preliminary hearing. It involves a determination of whether or not the appellants obtain base cost in their interests in their capital accounts in the LLPs as a result of their capital contributions and/or whether or not any base cost is reduced if the capital contributions are used to purchase film rights for which relief is given for income tax purposes.

(b) There is a realistic prospect that a determination of the Trade Issue and the capital gains tax issue would dispense with a large number of similar cases which are standing behind this case.

(c) Given the delays in hearing cases in the tribunals as a result of the Covid-19 pandemic, there would be material advantages in a short remote hearing without witnesses. A preliminary hearing offers the prospect of reducing delay in this case and similar cases, thus furthering the overriding objective.

HMRC's submissions

28. Ms Wilson, for HMRC, made the following submissions:

(1) HMRC agree that the Upper Tribunal should exercise extreme caution before interfering in a case management decision of the FTT. That is particularly so in this case. Judge Gillett was fully prepared to hear the case. He had read all the papers and was acquainted with its complexity. He was uniquely placed to determine whether or not the Trade Issue should be heard as a preliminary issue.

(2) It is common ground that the correct principles that should be applied to determine whether or not an issue should be heard as a preliminary matter are those set out in the decision of the Upper Tribunal in *Wrottesley*.

(3) HMRC's case is that the issues which the appellants wish to be heard as a preliminary issue cannot be divorced from the evidence and the submissions relating to the remainder of the case. The issues in this case all relate to the same sum of money, derived from the same set of transactions. Whether the Tribunal is considering the liability of the sums received by the appellants to income tax under Chapter 5 Part 13 ITA or to capital gains tax, it will be necessary to have regard to all of the facts and circumstances of the transactions as a whole.

(4) HMRC's arguments on the application of Chapter 5 are indeed questions of statutory interpretation. But they are not succinct points. They require proper enquiry into the facts of the case to determine how the legislation construed purposively should apply to them. For example, the tribunal would need to determine whether "an individual makes a film-related loss in a trade" within the meaning of s797(1)(a) ITA where a loss has been computed and allowed as a loss in a trade. The question involves consideration of the film scheme as implemented by the appellants and the procedural matters relating to it. The tribunal will also have to consider the facts surrounding the exit arrangements in order to determine whether the transactions involve a "disposal of a right of the individual to profits arising from the trade" within the meaning of s797(1)(b) ITA. This legislation needs to be applied purposively and that requires a full understanding of the facts and circumstances in the case. It would be an error to determine the Trade Issue without reference to the underlying facts and the application of the remainder of the Chapter.

(5) Chapter 5 Part 13 ITA is not the whole of HMRC's case. If Chapter 5 cannot apply, HMRC has the estoppel argument. HMRC will say that the appellants are estopped from arguing that the LLPs were not trading in the earlier tax years. The FTT appreciated the argument and rightly did not seek to resolve it, but took it into account in weighing all of the factors to determine whether or not it was appropriate to direct that a preliminary issue should be heard.

(6) HMRC also has the capital gains tax argument. This argument turns on the same facts and the same transactions. It would be an error to allow certain aspects of the treatment of those transactions to be determined independently of the submissions on the capital gains tax issue.

(7) The FTT took account all of the relevant factors and weighed them in the balance. Its decision was within the generous ambit of discretion allowed to the FTT in case management matters. It should be respected by the Upper Tribunal.

DISCUSSION

29. This appeal relates to a case management decision made by the FTT. Under the FTRs, the FTT has broad powers of case management, which are set out in FTR rule 5. These powers include, in FTR rule 5(3)(e), the power to deal with an issue in the proceedings as a preliminary issue. When it exercises this power, the FTT must seek to give effect to the overriding objective to deal with cases "fairly and justly" (FTR rule 2(1)).

30. Since the decision engaged the case management powers of the FTT, we have borne in mind the summary provided by Sales J, as he then was, in *Ingenious Games*, at [56], as follows:

> The proper approach for the Upper Tribunal on an appeal regarding a case management decision of the FTT is familiar and is common ground. The Upper Tribunal should not interfere with case management decisions of the FTT when it has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Upper Tribunal is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT: *Fattal v Walbrook Trustee (Jersey) Ltd* [2008] EWCA Civ 427 at [33], [2008] All ER (D) 109 (May) at [33]; *Revenue and Customs Comrs v Atlantic Electronics Ltd* [2013] EWCA Civ 651 at [18], [2013] STC 1632 at [18]. The Upper Tribunal should exercise extreme caution before allowing appeals from the FTT on case management decisions: *Goldman Sachs International v Revenue and Customs Comrs; Goldman Sachs*

Services Ltd v Revenue and Customs Comrs [2009] UKUT 290 (TCC) at [23]–[24], [2010] STC 763 at [23]–[24].

31. Mr Thornhill submitted that this was not a case of the FTT exercising its discretion, because the FTT erred in law in applying the relevant principles to the facts. However, that assumes too much; this was, like any decision of the FTT in relation to an application to hear a matter as a preliminary issue, an exercise of discretion, to be tested by reference to the criteria referred to by Sales J.

32. The Upper Tribunal in *Wrottesley* at [28] (see [24(3)] above) set out the principles which the FTT should consider when deciding whether or not to deal with an issue as a preliminary issue. There is no dispute between the parties that the principles in *Wrottesley* should be applied in this case. The FTT correctly identified those principles.

Is the Trade Issue a "succinct, knockout point"?

33. The Upper Tribunal in *Wrottesley* expressed the view that the power to deal with an issue as a preliminary issue should be exercised sparingly and only where the issue represents a "succinct, knockout point". Mr Thornhill says that the Trade Issue is a "succinct, knockout point" and the FTT erred in failing to recognize this.

The Trade Issue

34. Mr Thornhill acknowledged that there was a significant body of evidence that has been compiled by the parties in this case, but said that a direction could be made for the Trade Issue to be heard as a preliminary issue on the basis of assumed facts. He suggests that the facts as asserted by HMRC could be assumed for this purpose. This suggestion, he says, would overcome the need for a tribunal hearing the preliminary issue to engage in a lengthy fact-finding exercise. It also seeks to address the requirement in the principles set out by the Upper Tribunal in *Wrottesley* for the issue to be one which can be dealt with at a relatively short hearing (*Wrottesley* [28(3)]) by seeking to ensure that the issue can be divorced from the evidence relevant to the rest of the case and heard without reference to the substantial body of evidence that would otherwise be required to be considered.

35. The FTT took the view that the Trade Issue did not produce a succinct, knockout point (FTT [31]). The FTT does not appear to have considered the possibility that the Trade Issue might be heard as a preliminary issue on the basis of assumed facts as a means to address some of its reservations.

36. It is not apparent that this possibility was proposed by the parties to the FTT. However, even if the FTT had considered this possibility, in our view, it would have arrived at the same conclusion.

37. If the Trade Issue were to be heard as a preliminary issue on the basis of assumed facts as the appellants suggest, and if HMRC were to be successful at that hearing, the decision would not necessarily dispose of the case or any material aspect of it. The appellants would remain in a position to advance their appeals on the basis that the facts as assumed for the preliminary issue (i.e. the facts as advanced by HMRC) were not on all fours with their facts. The Tribunal would have to continue with full hearings on the evidence for all of the appeals. The appeals (and the appeals in the cases which are standing behind these appeals) would not have been advanced materially and potentially significant delay and expense would have been incurred.

38. If, on the other hand, the appellants were to be successful on the preliminary issue, the decision would not dispose of the case or any material aspect of it. As the FTT recognized (FTT [28]), HMRC have other arguments which the Tribunal would have to address before it could disposal of these appeals - principally the estoppel issue and the capital gains tax issue.

As Ms Wilson pointed out, these arguments would require the FTT to consider much of the same evidence that it would need to consider in dealing with the Trade Issue. Mr Thornhill argued that these arguments were either subsumed in the Trade Issue or could be addressed through the hearing of a further preliminary issue or issues. We do not agree, and we have set out our reasons below.

The estoppel argument

39. One of HMRC's arguments as set out in its Statement of Case is that the appellants are estopped from arguing that the LLPs were not carrying on a trade as a result of the parties' previous long-standing common understanding.

40. In the context of the Application, Mr Thornhill makes two points:

(1) First, he says that the estoppel argument is an inherent part of the Trade Issue and so can be addressed as part of the preliminary issue.

(2) Second, he says that the weight of authority suggests that the concept of estoppel is not applicable in tax cases and accordingly the FTT should not have afforded the availability of the estoppel argument any material significance when weighing the factors for and against dealing with the Trade Issue as a preliminary issue in accordance with the guidance in *Wrottesley*.

41. We will first address Mr Thornhill's argument on the question of whether an estoppel can apply in tax cases. Mr Thornhill referred us to two cases. The first was *King v Walden* in which Jacob J (at [14] to [27]) reviewed the various authorities (including the decision of the Privy Council in *Caffoor (Trustees of Abdul Caffoor Trust) v Income Tax Commissioner, Colombo* [1961] AC 584 at page 598 as approved by Lord Hope in *MacNiven v Westmoreland Investments Limited* [2001] UKHL 6 at [89]) for the rule that *res judicata* cannot apply to a decision in relation to an amount of tax due in one year so as to preclude the taxpayer from contesting the same issue of fact or law in another year. Applying these authorities, the court held that the Inland Revenue had erred in concluding that it was bound by the findings of wilful neglect in a previous year. The second case to which Mr Thornhill referred was *Carvill (No. 2)* in which, based on similar authority, the High Court (Hart J) acknowledged that it was possible for the same transaction to be treated as carried out for tax avoidance purposes in determining an assessment for one tax year and for commercial purposes in determining an assessment under the same legislative provisions for a subsequent tax year.

42. In response, Ms Wilson referred us to the decision of the Court of Appeal in *Tinkler v HMRC* [2019] EWCA Civ 1392 ("*Tinkler*"). In that case, Hamblen LJ set out (at [54]) a summary of the principles governing estoppel by convention, largely based on the summary provided by Briggs J in *HMRC v Benchdollar Limited and others* [2009] EWHC 1310 (Ch). In *Tinkler*, the Court of Appeal dismissed HMRC's cross-appeal against a decision of the Upper Tribunal that the conditions for establishing an estoppel by convention had not been met. However, it was accepted by the parties that an estoppel by convention, as opposed to an issue estoppel, might arise and be applicable in a tax case. Ms Wilson suggested that HMRC would seek to rely on the summary of the relevant principles as set out by Hamblen LJ in *Tinkler* to argue estoppel by convention in this case.

43. The Supreme Court is currently scheduled to hear the appeal from the decision of the Court of Appeal in *Tinkler.* However, notwithstanding the weight of authority concerning the application of issue estoppel in tax cases, we consider that on the basis of current authority the application of estoppel by convention on the facts of the case remains a valid argument for HMRC to deploy. It would not be appropriate for us in the context of this Application to comment further on the merits of that argument. The FTT also acknowledged (at FTT [28])

the availability of the estoppel argument and, quite properly, did not endeavour to decide it in the context of the Application, but took it into account in deciding that the Trade Issue was not a "succinct, knockout point" as it raised other issues that would need to be decided. In our view, it was correct to do so.

44. Mr Thornhill also argued that estoppel was essentially part of the Trade Issue and could be determined as part of the process of dealing with the Trade Issue as a preliminary issue. As we understand it, his suggestion was that the Tribunal could simply take into account the fact that the appellants have previously accepted, in relation to a prior tax year, that the relevant LLP was carrying on a trade in determining as a preliminary issue whether or not Chapter 5 can apply where the appellants are not treated as carrying on a trade.

45. However, the application of estoppel by convention (as argued by HMRC) is inevitably dependent on the facts and circumstances of the case. It raises questions as to whether it would be unconscionable for the appellants to depart from an alleged previous common understanding of the parties in the light of those facts and circumstances. Mr Thornhill's solution to this issue was again that the preliminary issue (or issues) could be determined on the basis of assumed facts, with the facts being assumed in HMRC's favour. However, this would create the same risks of subsequent delay and costs as agreeing facts in relation to the Trade Issue. Further, we agree with Ms Wilson that a hearing to determine the Trade Issue and the estoppel issue would not be preliminary at all, but a partial hearing of the main appeal, falling into the trap identified in *Wrottesley.*

46. We accept Ms Wilson's submission that the various issues in this case – the Trade Issue, the estoppel argument and the capital gains tax issue (to which we refer below) – are interlinked and depend upon the same facts and circumstances. As the Upper Tribunal identified in *Wrottesley*, the power to deal with an issue as a preliminary issue should be used sparingly. The principles set out in *Wrottesley* effectively confine the issues which should be dealt with as a preliminary issue to separate, discrete issues, which hold out the prospect of disposing of the case or a material aspect of it without involving a significant fact-finding exercise. It will nearly always in theory be possible to reduce a case such as this involving mixed questions of fact and law to a series of hypothetical questions which are divorced from the facts by assuming the facts at issue. In our view, considerable caution should be exercised in following such an approach. The appellants' attempts to do so in this case in our view indicate that the Trade Issue does not meet the *Wrottesley* criteria.

The capital gains tax issue

47. Mr Thornhill says that the capital gains tax issue is again a pure question of law, which could either be disposed of at the hearing of the preliminary issue(s) or at a short separate hearing. Ms Wilson says that the capital gains tax issue is more complex. It is interlinked with the Trade Issue and the estoppel argument because it arises from the same transactions.

48. The FTT had regard to the capital gains tax argument as one of the other issues which would need to be resolved even if the Trade Issue was dealt with as a preliminary issue (FTT [28]). For the reasons that we have given above, in our view, the FTT was correct to take it into account in deciding that the Trade Issue was not a "succinct, knockout point" as there were other issues that would need to be decided.

49. Furthermore, for the reasons that we have given above (at [44]) in the context of the estoppel argument, we agree with HMRC's submission that these issues (the Trade Issue, the estoppel argument, and the capital gains tax issue) are interlinked and relate to the same set of facts. They are apposite to be heard at a single hearing which addresses all of the arguments in the context of the evidence as to all the surrounding facts and circumstances.

Conclusion: "succinct, knockout point"

50. While the FTT did not consider whether it might be possible to deal with the Trade Issue as a preliminary issue on the basis of assumed facts, in our view, it reached the correct conclusion, namely that the Trade Issue was not a "succinct, knockout point" because it was not divorced from the evidence and submissions that were relevant to the rest of the case.

The benefits of hearing the Trade Issue as a preliminary issue

51. Mr Thornhill says that the FTT also failed to take into account other relevant issues in the balancing exercise which is required to be considered in deciding whether an issue should be heard as a preliminary issue. In particular, in his submission, the FTT failed to give appropriate weight to the benefits that might be achieved if the Trade Issue was decided as a preliminary issue – principally in terms of reduction in delay and expense if the appeals (and any appeals standing behind them) could be determined at a short preliminary hearing. It also failed to consider the benefits that the hearing of a preliminary issue might offer in allowing the appeals to progress notwithstanding the current restrictions applying as a result of the Covid-19 pandemic, because a preliminary issue could be heard remotely and without the need for witnesses to attend.

52. While the FTT did not refer to the first point in the reasons for its decision, it did set out (at FTT [15]) the guidance in *Wrottesley*, which refers at (7) to consideration of whether determination of the preliminary issue "would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall". That is the only reference in the *Wrottesley* guidance to the potential advantages identified by Mr Thornhill. It would have been preferable for the FTT to have addressed this issue specifically in its decision, but in our view it is implicit in its conclusions that the Trade Issue was neither a knockout point nor particularly succinct (FTT [31]) that in the FTT's estimation a preliminary hearing issue would not necessarily be helpful in relation to time or costs, and might indeed be detrimental.

53. As regards the question of the avoidance of delay which might otherwise result from the procedures that have had to be adopted by the courts and tribunals in response to the Covid-19 pandemic, we note that the FTT's decision on the papers was taken on 12 March 2020, before any lockdown in the UK was announced. In any event, we do not regard this issue as one which requires particular reference in the FTT's decision. The courts and tribunals have had to adapt their procedures and practices in response to the pandemic, for example, by the introduction of remote video and hybrid hearings. In the vast majority of cases, those procedures have proved themselves adequate to permit cases to proceed fairly and justly and we have no doubt that, even if those procedures and practices remain in place at the time of the hearing of these appeals, they would prove more than adequate for dealing with the issues in the substantive appeals.

DECISION

54. We consider that the FTT correctly directed itself as to the applicable principles, and that its decision was comfortably within the generous ambit of its case management discretion. This is not a case where it would be appropriate for this Tribunal to interfere with that exercise of discretion.

55. We dismiss this appeal.

Signed on original

THOMAS SCOTT **ASHLEY GREENBANK**

UPPER TRIBUNAL JUDGES

Release date: 26 April 2021